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DISTRICT COURT CLERK

1 CASE NO. 00CV0252

2 DEPT. NO. II

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7 IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

8 IN AND FOR THE COUNTY OF DOUGLAS

9
10 JUDY LU SHALLENBERGER, Trustee
11 of the Judy Lu Shallenberger
12 Trust, dated February 29, 1984,

13 Plaintiff/
14 Counterdefendant,

15 vs.

ORDER RE:
PARTIAL SUMMARY JUDGMENT

16 MICHAEL BOGDANOVICH; RUSKA
17 BOGDANOVICH and DOES I-X,

18 Defendants/
19 Counterclaimants,

20 AND RELATED COUNTERCLAIMS

21 AND RELATED THIRD PARTY ACTION

22
23 **THIS MATTER** came on before the Court on the 1st day of May,
24 2002, on the Motion for Partial Summary Judgment ("Motion") filed by
25 Plaintiff, JUDY LU SHALLENBERGER, Trustee of the Judy Lu Shallenberger
26 Trust dated February 29, 1984 ("Plaintiff" or "SHALLENBERGER"). The
27 Motion was filed April 4, 2002.

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1 Present in Court on May 1, 2002, were the Plaintiff, together
2 with her counsel, MICHAEL SMILEY ROWE, ESQ. of ROWE & HALES, LLP;
3 Defendant MICHAEL BOGDANOVICH ("Defendant" or "BOGDANOVICH"), together
4 with his counsel JEFFREY K. RAHBECK, ESQ.; and JAMES W. PUZEY, ESQ. of
5 ALLISON, MACKENZIE, HARTMAN, SOUMBENIOTIS & RUSSELL, LTD., counsel of
6 record for ROCK ISLAND CORPORATION, a Nevada corporation, Third Party
7 Defendant ("Third Party Defendant" or "ROCK ISLAND").

8 Subsequent to the filing of the Motion, ROCK ISLAND filed its
9 joinder to Plaintiff/Counterdefendant's Motion on April 12, 2002.

10 Subsequent to the Motion and the Joinder, Defendant retained
11 counsel. After a conference call with the Court, the time within
12 which to respond to the Motion, and for Plaintiff to thereafter file
13 a reply, was extended. On April 25, 2002, Defendant filed his
14 Opposition to Motion to Dismiss. On April 26, 2002, an Errata to the
15 Opposition to the Motion was filed by the Defendant. Plaintiff
16 replied to the Defendant's Opposition to the Motion on April 30, 2002.

17 The Court set a hearing for oral arguments on the Motion for May
18 1, 2002. At the time of the arguments, all counsel agreed that the
19 Court could, and should, consider all of the Exhibits which were
20 previously introduced into evidence at the time of the hearing on
21 Plaintiff's request for a preliminary injunction. The Court has
22 considered all of the Exhibits heretofore introduced into evidence.

23 During the telephonic conference wherein the Court established
24 a time for oral arguments on the Motion, counsel for Plaintiff orally
25 moved the Court for its order exonerating the \$50,000.00 bond which
26 Plaintiff has placed with the Court as a requirement of the Court's
27 preliminary injunction. Plaintiff's counsel renewed Plaintiff's
28 request for exoneration of the \$50,000.00 bond at the time of the oral

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1 arguments conducted on May 1, 2002. During the hearing on May 1,
2 2002, Defendant's counsel advised the Court that Defendant did not
3 object to the exoneration of Plaintiff's bond. Counsel for ROCK
4 ISLAND also stipulated to the exoneration of Plaintiff's bond.

5 Based upon the entirety of the pleadings filed in this case, and
6 the oral arguments of counsel on May 1, 2002, the Court deems itself
7 well advised in the premises. The Court has specifically focused
8 upon, and carefully considered, all of the points made by counsel in
9 the pleadings filed relating to the Motion, and the Court has
10 carefully considered the Motion, the Opposition to the Motion, the
11 Joinder to the Motion, and the Reply of Plaintiff to the Opposition of
12 the Defendant. The Court does not intend in this Order to delineate
13 all of the points it has considered which are stated in the pleadings.
14 Restated, the Court does not wish it to appear that the contents of
15 this Order are the only matters considered by the Court. All of the
16 parties' points and authorities were given thorough and deliberate
17 consideration by the Court prior to its determination.

18 After such consideration, the Court will incorporate by this
19 reference all of the other written arguments and points submitted by
20 Plaintiff in the Trust's Motion and Reply to Opposition, together with
21 Plaintiff's oral arguments, as the findings and authorities relied
22 upon by the Court. The Court cannot isolate any particular point made
23 by the Plaintiff with which it disagrees, and they all are in accord
24 with the Court's consideration of the Motion.

25 After careful consideration of the Defendant's Opposition and
26 the oral arguments made by counsel for the Defendant, the Court
27 disagrees with the position taken by the Defendant, but observes that
28 it was well presented and argued.

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FINDINGS OF FACT

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2 1. Because this matter is set for a jury's consideration, the
3 Court deems that the Motion has a profound affect on the case, and
4 determines that resolution of the Motion may be the most important
5 issue in the case.

6 2. The Court finds that the easement described and depicted by
7 the evidence in this case, specifically the Parcel Map for Rose
8 Bogdanovich filed for record on February 8, 1989 ("Parcel Map") (the
9 Court's Exhibit "1"), and the Maintenance Agreement entered into by
10 the Plaintiff and the Defendant on May 31, 1989 ("Maintenance
11 Agreement") (the Court's Exhibit "16") are clear and unambiguous. Both
12 the Parcel Map and the Maintenance Agreement were recorded in 1989;
13 the Maintenance Agreement recorded concurrently with Plaintiff's close
14 of escrow wherein the Trust purchased Parcel 6A as depicted on the
15 Parcel Map. The Maintenance Agreement incorporates by reference the
16 Parcel Map.

17 3. The Court finds that the easement as depicted on the Parcel
18 Map, and as specifically defined in the Maintenance Agreement, is very
19 specific as to its width and its length. Accordingly, the Court finds
20 there is no question as to exactly what the parameters were and are of
21 this particular roadway easement.

22 4. The Court finds that the evidence is unequivocal that the
23 intention of the Defendant at the time of the Parcel Map, and the
24 intention of the Plaintiff and the Defendant at the time of the
25 Maintenance Agreement, was to dedicate the easement between Parcels 6A
26 and 6B solely for the use of those two properties, and those two
27 properties alone. There is no factual dispute about what occurred in
28 1989.

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1 5. In reviewing the Motion and related pleadings, including
2 the affidavit of the Defendant, the Court struggled with the issue of
3 the effect of granting partial summary judgment to be sure that the
4 Defendant would not be denied his right to trial by jury on this
5 issue. However, even the Defendant's affidavit does not raise a
6 factual issue relating to his intention in 1989. The affidavit
7 references the Defendant's subjective intention, but the Defendant
8 does not say either in his affidavit or in his deposition testimony
9 that the Plaintiff ever agreed with him. Plaintiff's affidavit makes
10 it clear that the Trustee of the Trust never agreed with Mr.
11 BOGDANOVICH's thoughts. Accordingly, his subjective thoughts are not
12 relevant to determination of the Motion. For some unarticulated
13 reason, the Defendant believed he could be extending the easement
14 later on if he determined it was necessary, but the Court finds that
15 he assumed the risk that he would not be able to extend the easement
16 later on. The Court finds that the Defendant did not extend the
17 easement at the time in question, 1989, when he should have extended
18 it if this easement was to be extended.

19 6. The Court agrees with Plaintiff's assertion, and so finds,
20 that the relevant time period in which the Court must focus is 1989,
21 and not some event that occurred at a later time. At the time of the
22 Maintenance Agreement, it is unequivocal and without any doubt
23 whatsoever that the intention of the parties was to have the "30'
24 private access and public utility easement" designated on the Parcel
25 Map, and as constrained by the Maintenance Agreement, to be located
26 exactly where it is and for purposes stated in the Maintenance
27 Agreement; that is to say, the 30' private access roadway and public

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1 utility easement is, for access purposes, solely for the use of
2 Parcels 6A and 6B as depicted on the Parcel Map.

3 7. The Court finds that the failure of either the Parcel Map
4 or the Maintenance Agreement to use the word "exclusive" as a
5 descriptor of the easement is not pivotal. While the easement was not
6 described as an exclusive easement, the Parcel Map, the Maintenance
7 Agreement, and all of the acts of the Plaintiff and the Defendant are
8 consistent with the finding that the roadway is an exclusive easement.
9 It is to be used exclusively by the owners of Parcels 6A and 6B.

10 The Defendant has asserted that paragraph 4 of the
11 Maintenance Agreement dictates a contrary result.

12 Paragraph 4 of the Maintenance Agreement states:

13 "This agreement and the benefits and burdens thereof
14 shall inure to the grantees, successors, heirs,
15 assigns and representatives of each party."

16 The Court interprets paragraph 4 of the Maintenance
17 Agreement to state that whatever rights to use the 30' private access
18 and public utility easement the Defendant reserved could be assigned
19 to a successor in title to one of the two parcels, Parcel 6A or 6B.
20 Paragraph 4 does not allow him to expand, without Plaintiff's consent,
21 any of the rights to use the easement, nor could Defendant expand the
22 easement itself.

23 8. With regard to the Defendant's equitable arguments that an
24 easement should be implied by the Court, the Court denies the Motion
25 insofar as it might be interpreted to request summary judgment as to
26 other forms of easement. There are certain factual issues to be
27 resolved by the trier of fact as to other forms of easement. The
28 Defendant has raised enough questions of fact, for the purpose of
defeating a Motion for summary judgment, on a claim of an equitable

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1 easement to submit those factual questions to the trier of fact. The
2 Court cannot rule, solely as a matter of law and strictly in the
3 context of summary judgment, that the Defendant does not have a right
4 to use some form of easement arising in equity, such as an easement by
5 necessity or prescriptive easement.

6 The Court does not rule, for example, on the question of
7 whether or not the Defendant could claim, or that the Court could
8 grant, some other separate easement that did not affect the 30'
9 private access and public utility easement.

10 9. The Court finds that the Defendant cannot expand the scope
11 of the roadway within the 30' private access and public utility
12 easement by additional use, or by expansion of the easement's use as
13 access for another parcel, or by expansion of its length or width.

14 CONCLUSIONS OF LAW

15 1. The Court concludes that summary judgment on the
16 interpretation to be given the Parcel Map and the Maintenance
17 Agreement, and the resulting 30' private access and public utility
18 easement, is appropriate. The Court is mindful that summary judgment
19 is only appropriate when, after review of the record in a light most
20 favorable to the non-moving party, there remain no issues of material
21 fact. In determining whether summary judgment is proper, the non-
22 moving party is entitled to have all of the evidence and all
23 reasonable inferences accepted as true. Restated, summary judgment is
24 appropriate when, after a review of the record viewed in a light most
25 favorable to the non-moving party, there remain no genuine issues of
26 material fact and the moving party is entitled to judgment as a matter
27 of law. See, e.g., *Clark County School Dist. v. Riley*, 116 Nev. 1143,

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1 14 P.3d 22; *Coury v. Robison*, 115 Nev. 84, 976 P.2d 518 (1999); *Allyn*
2 *v. MacDonald*, 112 Nev. 68, 71, 910 P.2d 263 (1996);

3 2. The Court concludes, however, that summary judgment is
4 appropriate in certain circumstances such as exist in this case.
5 Particularly this is the case when the Court is called upon to review
6 written instruments that are clear and unambiguous, and are
7 susceptible to only one interpretation. In contract matters, such as
8 the Maintenance Agreement which incorporates the Parcel Map, summary
9 judgment is proper if there are no ambiguities in the instrument.
10 *University of Nevada, Reno v. Stacey*, 116 Nev. 428, 997 P.2d, 812
11 (2000); *Chwialkowski v. Sachs*, 108 Nev. 404, 406, 834 P.2d 405, 406
12 (1992).

13 Where instruments are to be interpreted by the Court, such
14 as contracts, or as in this case the Maintenance Agreement and Parcel
15 Map, the Court is under an obligation to construe the instruments so
16 as to avoid rendering the contract meaningless or portions of it
17 superfluous. *Musser v. Bank of America*, 114 Nev. 945, 964 P.2d 51
18 (1998).

19 3. The Court concludes that there is no ambiguity in the
20 language appearing on the Parcel Map in its depiction of this roadway,
21 to wit: "30' private access and public utility easement".
22 Furthermore, the Maintenance Agreement is likewise unambiguous in its
23 language. The Maintenance Agreement provides at page 2, paragraph 1
24 that both the Plaintiff and the Defendant "shall have equal rights and
25 obligations regarding the 30' private access and public utility
26 easement set forth on the Parcel Map and agree to share equally all
27 costs and expenses thereof". Another example is paragraph 3 of the
28 Maintenance Agreement which provides:

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1 "The funds contributed and accumulated by the parties
2 shall be used for the maintenance, repair and
3 replacement of the road and bridge currently existing.
4 Maintenance shall be undertaken yearly to maintain the
5 roadway and bridge in its existing condition.
6 Expenditures of funds for other than such annual
7 maintenance and repair shall require the joint
8 agreement of the parties."

9 Alteration of the roadway or expansion of its length, width
10 and use cannot be valid unless Plaintiff's consent is first received,
11 which, in this case, it clearly was not.

12 4. The Court concludes that the basic rules for determining
13 the extent of an easement created by deeds, or other recorded
14 instruments such as the Parcel Map and Maintenance Agreement, are set
15 forth in *Cox v. Glenbrook Co.*, 78 Nev. 254, 371 P.2d 647 (1962). The
16 general rule is that the extent of an easement created by conveyance
17 is fixed by the conveyance. *Id.*, at 262. Extrinsic evidence is not
18 admissible for the purposes of determining clear and unambiguous
19 terms. *Id.*

20 Furthermore, the conveying instrument must be construed in
21 light of the facts and circumstances existing at its date and
22 affecting the property, the intention of the parties being the object
23 of the inquiry. *Cox*, at 264.

24 5. As found hereinabove, and as concluded by the Court, there
25 is no question as to the intention of this easement and the parcels
26 benefitted by it. The Court has examined the affidavits of David
27 Winchell, the surveyor of the easement in question, and Daniel
28 Jenkins, the Defendant's planning consultant and environmental planner
who assisted the Defendant in the creation of the Parcel Map, to
ascertain that the intention of the Defendant at the time of the
recordation of the Parcel Map was to create a private road solely for

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1 the owners of Parcels 6A and 6B as depicted on the Parcel Map. As
2 stated in the Jenkins' affidavit, and despite Jenkins' recommendation
3 to the Defendant that he should depict the road completely traversing
4 Lot 6 of the Willow Bend Subdivision, the Defendant chose not to do
5 so. Jenkins' recommendation regarding the length of the roadway and
6 purposes for its use appear to be very similar to that which the
7 Defendant belatedly attempted in 1994 by the "Grant of Easement of
8 Way" and the "Supplement to Maintenance Agreement" (Exhibits 18 and
9 19, respectively).

10 6. The Court concludes that the subsequent "Grant of Easement
11 of Way" executed by the Defendant on September 13, 1994, and the
12 "Supplement to Maintenance Agreement" also executed on September 13,
13 1994, by the Defendant are void *ab initio*, and shall be expunged from
14 the official records of Douglas County, Nevada by recordation of a
15 certified copy of this order.

16 7. The Court concludes that should any of the above-stated
17 conclusions of law be interpreted as a finding of fact, it is so
18 intended by the Court. Similarly, should any of the findings of fact
19 be construed as a conclusion of law, the Court intends such
20 construction.

21 ORDER AND JUDGMENT

22 1. It is the order and judgment of this Court that the 1989
23 Parcel Map and Maintenance Agreement create a private access roadway
24 solely for the use and benefit of the owners of Parcels 6A and 6B of
25 the Parcel Map for Rose Bogdanovich. The roadway shall be governed in
26 its maintenance and use as provided by the 1989 Parcel Map and
27 Maintenance Agreement. In this respect, the Motion is granted.

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1 2. It is the order and judgment of the Court that the 1994
2 "Grant of Easement of Way", recorded as Document No. 347145 and
3 referenced as Book 0994, Pg. 4898, Official Records of Douglas County,
4 Nevada Recorder, and the 1994 "Supplement to Maintenance Agreement",
5 recorded as Document 347145, Book 0994, Pg. 4894 are void, and they
6 shall have no force and effect. By recordation of a certified copy of
7 this Order, the Court determines that the Grant of Easement of Way and
8 Supplement to Maintenance Agreement shall be expunged from the
9 official records of the Douglas County, Nevada Recorder.

10 3. The Motion for Partial Summary Judgment is denied as to any
11 other type of easement that does not affect the easement depicted in
12 the Parcel Map and Maintenance Agreement as there remain questions of
13 fact about whether there is a right to an equitable easement such as
14 an easement by necessity or prescriptive easement.

15 4. It is the order of the Court that the \$50,000.00 bond
16 posted with the Clerk of this Court by the Plaintiff as security for
17 the issuance of the preliminary injunction shall be, and is hereby,
18 exonerated and discharged. The Clerk of the Court shall take such
19 steps as are necessary to release the bond posted by Plaintiff.

20 5. The parties shall continue to be bound by the terms and
21 provisions of this Court's preliminary injunction, except as modified
22 herein, until further order of this Court.

23 6. The Court rules that there is no just reason for delay, and
24 directs entry of Judgment in favor of Plaintiff Judy Lu Shallenberger,
25 and Counter-Claimant Rock Island Corporation, and against Defendants
26 and Counter-Defendants Michael Bogdanovich and Ruza Bogdanovich, and
27 all claims or defenses dealing with the exclusivity or non-exclusivity
28 of the easement in question.

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1 7. The Court further certifies this Partial Summary Judgment
2 as final, pursuant to the provisions of NRCP 54(b).

3 DATED this 16 day of May, 2002.

4
5 Michael P. Gibbons
6 MICHAEL P. GIBBONS
7 DISTRICT COURT JUDGE

8 Submitted by:
9 ROWE & HALES, LLP

10 Michael Smiley Rowe
11 MICHAEL SMILEY ROWE, ESQ.
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16 (775) 782-8141
17 Attorney for Plaintiff

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23 **CERTIFIED COPY**

24 The document to which this certificate is attached is a
25 full, true and correct copy of the original on file and of
26 record in my office.

27 DATE: May 20, 2002
28 B. Reed Clerk of the 9th Judicial District Court
of the State of Nevada, in and for the County of Douglas,

By [Signature] Deputy

REQUESTED BY
Rowe & Hales, LLP
IN OFFICIAL RECORDS OF
DOUGLAS CO. NEVADA

2002 MAY 20 PM 1:43

LINDA SLATER
RECORDER

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