JAMES E. AYRER, III, and KAREN LYNNE AYRER, husband and wife, Plaintiffs	:	IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA
vs.	:	NO. 99-00,332
ANTONION A. BERSANI, Defendant	:	PRELIMINARY OBJECTIONS

OPINION AND ORDER

Before the Court for determination are the Preliminary Objections of the Defendant to Plaintiffs' First Amended Complaint, which were filed on July 8, 1999.[1]

Plaintiffs' premises, described in the Complaint, consist of a creek side lot situate in Upper Fairfield Township, Lycoming County, adjoined to the north by a lot owned by Defendant. The basis of the dispute between the parties, based upon the allegations of the initial and First Amended Complaint, is that Defendant entered onto Plaintiffs' land, cut and removed some trees thereon, at a location close to the boundary line between the two parcels. This action was initiated by the filing of an initial complaint filed on February 26, 1999. Preliminary Objections to that Complaint were sustained by Order of Court on June 3, 1999, which did not detail the Court's reasoning, inasmuch as these reasons had been explained to counsel at the time of argument.

This Court finds the present Preliminary Objections to the First Amended Complaint must be denied. As the First Amended Complaint is substantially the same as the

[1] The parties have agreed that these Preliminary Objections should be determined by the Court based upon the briefs filed, without oral argument. Defendant's Brief in Support of the Preliminary Objections was filed July 28, 1999. The responsive brief of Plaintiffs was filed August 11, 1999.

first Complaint and the Preliminary Objections to the First Amended Complaint are essentially similar to those raised to the initial Complaint, this Court will now detail its reasoning for the benefit of the parties.

The notable allegation added by the First Amended Complaint is an allegation that the premises owned by Plaintiffs are described ". . . in said deed as is more particularly described on Exhibit B attached hereto and made a part hereof." The reference is to a 1986 deed by which Plaintiffs acquired title to their lot, recorded in Lycoming County Book 1158, page 79. *See* First Amended Complaint filed July 23, 1999, paragraph 7.

The notable difference between the two sets of Preliminary Objections is that the initial preliminary objections raised the failure of the first Complaint to incorporate and attach a description of the property, as set forth in the deed, under which Plaintiffs claim title to the tract in question. Essentially, the current Preliminary Objections assert two defects in the First Amended Complaint. First, Defendant argues the First Amended Complaint suffers from "insufficient specificity." This is because the subject premises are described in accordance with the deed description and also with a survey done October 21, 1998, which Defendant claims is inconsistent with the deed description. Therefore, Defendant objects on the basis that the First Amended Complaint does not specifically and precisely describe the parcel of land to which title is being claimed by Plaintiffs and also fails to specifically and precisely describe the parcel of ground upon which it is asserted Defendant has trespassed.

Secondly, Defendant objects on the basis that the First Amended Complaint (as did the first Complaint) misjoins an Action to Quiet Title with Actions in Trespass. This Court will first address this second objection.

In seeking relief, both Complaints, under Count 1, seek to Quiet Title to Plaintiffs' premises that are described in the Complaint. Under counts 2, 3 and 4, Plaintiffs seek to recover damages as a result of the alleged trespass upon Plaintiffs' land by Defendant and Defendant's removal of trees therefrom. This Court, in disposing of the initial Preliminary Objections, entered an Order dated June 3, 1999, which denied the Preliminary Objections based upon misjoinder, but did direct that the Action to Quiet Title Count would be severed from the Trespass counts and would be tried first in a non-jury trial; thereafter the trespass counts would be tried, if necessary, as a jury trial. This Court regards that Order as establishing the law of the case in this matter and again will issue an Order directing the appropriate severance of the counts for trial.

The Court's basis for entering the first Order (and this second Order) concerning the denial of the objection of misjoinder, arises from the fact that the occurrence in both the Quiet Title and Trespass actions giving rise to the dispute is Defendant's activity at a specific location on the land — namely, cutting down one or more trees. The separate causes of action are obviously interrelated. Obviously, before the Trespass action can be successfully prosecuted by Plaintiffs, they need to establish they hold title to the property at the location in question. That claim of title is disputed. Plaintiffs allege they possess the area of the property at issue; therefore, an action in ejectment does not exist. Recognizing that Defendant disputes the location of the boundary line between their adjoining properties and ownership of the area of the alleged trespass, Plaintiffs have sought to have the exact location of that boundary line established through the Action to Quiet Title. The procedure of joining the Counts in one

Complaint is an appropriate procedure and in fact one which is required by the applicable rules of civil procedure.

Defendant relies upon the case of ***McDivitt's Pharmacy, Inc. v. Mi-Law of Roosevelt, Inc.***, 43 D&C 2d 456 (Phila. Co. C.P. 1967) for the proposition that an action to quiet title cannot be joined in the same complaint with a trespass action. Granted, such was the holding in ***McDivitt.*** Under the Rules of Civil Procedure then applicable and pertaining to that specific case, no doubt it was a correct decision. However, the Court is not persuaded that such remains the appropriate law and procedure today.[2]

Since 1983, under Pa.R.C.P. Rule 1020(d)(1), 42 Pa.C.S., if a transaction or occurrence gives rise to more than one cause of action against the same person, including causes of action in the alternative, it is mandatory that such causes of action be joined in separate counts in the action. Under the provisions of Rule 1020(d)(4), the failure to so join may be deemed a waiver of the cause of action against the parties. Pa.R.C.P. Rules 1061-1067, 42 Pa.C.S., pertaining to procedures for an Action to Quiet Title, make it clear such action should comply with the rules relating to a civil action and contain no prohibition against joining that cause of action with any other.

[2] The ***McDivitt*** court's holding only referenced a reference to Goodrich-Amram, §1065-3, page 38-39 for the proposition that such joinder was inappropriate. *See* ***McDivitt*** *supra*, 43 D&C 2d at 464. This Court's research has also ascertained that ***McDivitt*** is the only case cited by treatises for this specific proposition of nonjoinder of the action to quiet title with the trespass action. *See*, 22 Standard Pa. Practice 2d, §120-154, page 344, footnote 36 1984).

Obviously, as had been suggested in the treatises dealing with joinder prior to the 1983 rules amendments, causes of action should not be joined together if the issues would be completely unrelated or require different service requirements, or establish different venue and jurisdiction. Such is not the case here. Under Rule 1067, a jury trial is not available to the parties in the Action to Quiet Title case. The parties do have a right to a jury trial in the Trespass case. One available procedure is for one trial to be held, wherein the Court determines the non-jury matters and the jury determines those issues triable to a jury as a finder of fact. It is clear, however, that to try the separate counts together in one trial in the instant case would be not only confusing, but potentially a significant waste of resources, both of judicial time and the time and money of the litigants. Therefore, the non-jury title issues will be resolved first, because if Plaintiffs fail in establishing their title to the land in question, it is clear they cannot pursue the trespass action. If Plaintiffs do establish their title, the trespass action would then be tried before a jury in a subsequent term of court, allowing an appropriate time for additional discovery and trial preparation. This procedure, which was adopted by this Court under its prior Order, will avoid confusion and save expense to the parties.

As to Defendant's objection that the First Amended Complaint is not specific or is confusing with respect to the description of the land to which Plaintiffs assert title, this Court is satisfied that by their amendments Plaintiffs have now cured any defect, for pleading purposes at least, related to sufficiently describing the particular parcel of ground at issue. This Court's prior Order of June 3, 1999, did state that an amended complaint ". . . *at a minimum* shall include the attachment of the appropriate deed upon which Plaintiffs' claim of title is

based" (emphasis supplied). We did not mean to imply that this was to be the only addition or amendment made to the Complaint by Plaintiffs when they prepared the First Amended Complaint. The allegations of the Complaint, as amended, rely solely upon Plaintiffs' claim of title through their deed.[3] Looking at the First Amended Complaint as a whole, it does assert the following: Plaintiffs own the premises (paragraph 3); Plaintiffs acquired title as indicated by Deed Book 1158, page 79 (paragraph 4); the premises owned by Plaintiffs are particularly bounded and described in accordance with an October 21, 1998 survey, as stated fully in the allegation (paragraph 5); a copy of the relevant portion of the survey is incorporated as Exhibit A (paragraph 6); further, "the premises owned by Plaintiffs and above referred to [are] described in said deed and more particularly described on Exhibit B attached hereto and made a part hereof" (paragraph 7). Exhibit B is, in fact, a copy of the deed including the deed description. Thus, Plaintiffs' First Amended Complaint, in total, asserts that they own a particular piece of ground that is described both in accordance with the survey of October 21, 1998 and by the description of Deed Book 1158, page 79.

The Defendant asserts the two descriptions are inconsistent on their face. A comparative reading of the two descriptions does reveal that the courses on the survey appear to be slightly different than the courses in the deed. It is also noted that some of the given distances in the descriptions are different. At the same time, both descriptions refer to the beginning point as being on the low water mark of Loyalsock Creek. Both descriptions also make the low water mark of Loyalsock Creek the western boundary of the premises.

[3] As Defendant points out in its brief, Plaintiffs have not asserted any other theory, such as adverse possession or consentable lines.

Obviously, the low water mark of Loyalsock Creek varies from time to time and presumably would vary between 1986, the date of the deed and 1998, the date of the survey. Whether a change of the low water mark has occurred and whether such change accounts for the other variances in the two descriptions is for the trier of fact to determine. In addition, reading the two descriptions reveals the deed description is not only by metes and bounds; but also refers to adjoining owners. The survey purports to establish three of the boundary lines as being along the line of adjoining owners. It is for the trier of fact to determine whether these, or any other inconsistencies of the two descriptions, mean that the survey does not accurately describe the property conveyed to Plaintiffs by deed. If Defendant is of a belief that the survey does not properly describe the premises acquired by the Plaintiffs through their deed, that issue may be raised by an appropriate pleading through an Answer denying the allegation and/or that after reasonable investigation they are unable to admit or deny the allegation.

This Court does not dispute Defendant's contentions that Plaintiffs must rely upon their own title supremacy to claim ownership of the property, described in their First Amended Complaint, as the premises they own. Plaintiffs cannot rely upon any defect in Defendant's title. More specifically, this Court recognizes that Plaintiffs' claim to the land in question, in order to become superior to the claim of the Defendant, must proceed ". . .only upon the basis of (his) own deed calls reconciled with the monuments on the ground and proceeding from a point of beginning established in (his) own deed." ***Murrer v. American Oil Company***, 241 Pa.Super. 120, 359 A.2d 817 (1976) at 819, quoting ***Walleigh v. Emery***, 193 Pa. Super. 53, 60, 163 A.2d 665, 668 (1960). As recognized by ***Murrer,*** the question of what is the

boundary line is is a matter of law, but where the boundary line is actually located is a question for the trier of fact.

Accordingly, the following Order will be entered.

O R D E R

AND NOW, this 8th day of October 1999, the Preliminary Objections of the Defendant to Plaintiffs' First Amended Complaint, which were filed July 8, 1999, are DENIED. Defendant shall have a period of twenty (20) days from the filing of this Order in which to file a responsive pleading.

The following Scheduling Order shall apply:

1. As to Count 1:
    a. Trial for this case will be for the term of January 10-28 and February 15-18, 2000.
    b. A pretrial will be held before Judge Smith December 9-10, 1999.
    c. Discovery shall be completed not later than November 23, 1999.
    d. Dispositive motions shall be filed not later than December 7, 1999.
    e. Expert reports by Plaintiff should have already been furnished, but to the extent not furnished shall be furnished not later than October 22, 1999; Defendant's responsive expert reports shall be filed not later than November 23, 1999.
2. As to Counts 2, 3 and 4:
    a. The trial term shall be May 1-19, 2000.

b. The pretrial shall be April 3-7, 2000.

c. All discovery shall be completed not later than March 25, 2000.

d. Plaintiffs' expert reports shall be furnished not later than February 25, 2000; responsive expert reports shall be furnished not later than March 24, 2000.

e. Dispositive motions shall be filed not later than March 31, 2000.

3. Count 1 will be tried non-jury; counts 2, 3 and 4 will be tried as a separate jury trial.

BY THE COURT,

William S. Kieser, Judge

cc: Court Administrator
Scott A. Williams, Esquire
Elliott B. Weiss, Esquire
Judges
Nancy M. Snyder, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)

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