

District Court, Boulder County, State of Colorado 1777 Sixth Street, Boulder, Colorado 80302 (303) 441-1776	FILED Document CO Boulder County District Court 20th JD Filing Date: May 5 2008 9:49AM MDT Filing ID: 19681282 Review Clerk: N/A ▲ COURT USE ONLY ▲
Plaintiffs: RICHARD MCLEAN and EDITH STEVENS v. Defendant: DK TRUST and DON KIRLIN	
<i>Attorney for Plaintiff:</i> Kimberly Hult, Esq. <i>Attorney for Defendant:</i> Andrew M. Low, Esq.	Case Number: 06 CV 982 Division 6 Courtroom Q
ORDER RE: DEFENDANT'S MOTION PURSUANT TO RULE 60(b)(2), C.R.C.P.	

This matter is before the Court on Defendants' Rule 60(b)(2), C.R.C.P. Motion, Plaintiffs' response thereto and Defendants' reply in support thereof.

This Court wants to make it very clear that it has never condoned morally the actions of Plaintiffs in pursuing this matter. Likewise, the Court does not condone the misrepresentation or withholding of evidence. That being said, this Court is bound by its oath to office to apply the law to the facts presented to it despite the fact that its rulings, and the law that it is required to follow, may be controversial and/or unpopular in the community.

Rule 60(b)(2), C.R.C.P., the provision of the Colorado Civil Rules of Procedure pursuant to which Defendants have filed this motion states in pertinent part that:

(b) On motion and upon such terms as are just, the court may relieve a party or his representative from a final judgment, order, or proceeding for the following reasons:
 . . . (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . .

Pursuant to the provisions of this rule, a moving party must prove to the Court by "clear, strong, and satisfactory proof"¹ that: (1) An adverse party gave perjured testimony to the Court in a willful and purposeful manner; (2) the testimony and evidence at issue was material and probably controlled the result of the earlier ruling; and, (3) the moving party could not have discovered the falsity of the testimony "by reasonable diligence in time to offset it" at trial. *Southeastern Colorado Water Conservancy District v. Cache Creek Mining Trust*, 854 P.2d 167, 172 (Colo. 1993).

¹ A movant's burden of proof in a Rule 60(b)(2), C.R.C.P. motion is by "clear, strong, and satisfactory proof." *Sharma v. Vigil*, 967 P.2d 197, 199 (Colo. App. 1998). See also, *Craig v. Rider*, 651 P.2d 397 (Colo. 1982); *Riss v. Air Rental*, 315 P.2d 820 (Colo. 1957); *Domenico v. Southwest properties Venture*, 914 P.2d 390 (Colo. App. 1995). This burden of proof is the equivalent of the more commonly known "clear and convincing" standard of proof. *Borer v. Lewis*, 91 P.3d 375, 379 (Colo. 2004), citing *Craig v. Rider*, id. at 402, footnote 4. The "clear and convincing" burden of proof required of movants here is much higher than the "preponderance of the evidence" standard ("more probably true than not") required of Plaintiffs at the time of trial.

Despite Plaintiffs' insistence that it is not required to do so under the law, this Court has considered all of the additional evidence submitted in support and in opposition to Defendants' Rule 60(b)(2) motion. It has not disregarded any evidence under the theory that it is "cumulative." The Court has reviewed Defendants' Rule 60(b)(2) motion, Plaintiffs' response, Defendants' reply, and the litany of Exhibits attached to both Defendants' and Plaintiff's pleadings. The Court notes that the vast majority of the exhibits relied upon by Plaintiffs in their response to Defendants' motion were in Defendants' possession prior to the commencement of trial in this matter. The Court has also reviewed exhibits in Defendants' submissions at trial that were never offered to the Court for admission, including undated aerial photographs of the subject property.² The Court now understands why this aerial photography was not offered for the Court's consideration by the Defendants. This is explained below.

In addition, the Court has reviewed the four affidavits tendered by Defendants in their motion as well as the eighteen (18) affidavits attached to Plaintiffs' response. The Court has also considered the affidavit attached to Defendants' reply. The Court has compared the submissions attached to the pleadings to the testimony at trial.

Based upon its review of the evidence, the Court can only conclude that Defendants have been disingenuous in their assertions. Defendants have failed to meet their burden of proof.

The sole underlying premise of Defendants motion that is critical for this Court's determination is that Plaintiffs' testimony at the time of trial was false with respect to the time that "Edie's Path" was created. Defendants assert that the path did not exist prior to October 2006, and that Plaintiffs' testimony that they had used the path since 1982 was therefore false. Defendants assert that due to the alleged falsity of the Plaintiffs' proffered testimony, the integrity of the fact finding process was so corrupted that this Court should set aside its Order of October 4, 2007. *See, Aspen Skiing Company v. Peer*, 804 P.2d 166, 174 (Colo. 1991).

Defendants' motion is supported by photographic evidence that was in Defendants' possession at the time of trial, affidavits of witnesses who were either available at the time of trial or who could have been available through reasonable diligence of Defendants, and the affidavit of Mr. William Stone, a survey crew member in the employ of Plaintiffs' expert at the time of trial. Each of the affidavits attached to the Motion, with the exception of Mr. Stone's, asserts essentially the same thing: That to the best of the affiant's recollection, the path designated as "Edie's Path" was created sometime between October 2006 and the summer of 2007. In support of the motion Defendants' reply states:

If someone were wrongfully accused of fabricating evidence of a path next to his property in 2006-07, and the path had actually been there for 24 years, what sort of evidence would one expect that person to produce in response? The single most obvious and dispositive evidence would be an aerial photograph of the property from any time prior to 2007 showing the path. But there is no such photograph in Plaintiffs' response.

² Defendants submitted an exhibit book to the Court at the time of trial that contained all or most of the non-testimonial evidence that Defendants represented they would rely upon to prove their case. Included in Defendants' exhibit notebook at Tab "Z" and designated as "DKT 00333," is an undated aerial photograph of the subject property that clearly shows the path in question. This "Exhibit Z" was not offered by Defendants for admission into evidence at the time of trial. Having not been offered by Defendants, it could not be considered by the Court at that time. For the first time, the Court now knows that "Exhibit Z" is a 2003 aerial photograph of the subject property taken by or for the City of Boulder for Open Space management.

This Court disagrees. The aerial photography from 1993 and 2003 shows the path and Plaintiffs' use of the property. Further, this Court concludes that ground photography from 2002 and eyewitness testimony prove the existence and use of such a path. Defendants' assertions that the path in question did not exist prior to October 2006 are simply contrary to the physical evidence in Defendants' possession as well as the testamentary and physical evidence presented at trial and in response to Defendants' Rule 60(b)(2) motion.

It was the evidence presented by Mr. Stone that gave this Court grave concerns about the veracity of Plaintiffs' trial presentation. Mr. Stone was one of two survey ground crew members who worked for Plaintiffs' expert, Mr. William Wright, on this case. Mr. Stone claims that photographs were taken when he conducted his work on the property, and that the photographs do not indicate the existence of a path on the subject property. The photographs referenced by Mr. Stone were not attached to Defendants' motion although they have been in Defendants' possession for some time preceding the filing of Defendants' Rule 60(b)(2) motion. The Court now understands why the photographs were not included in Defendants' Rule 60(b)(2) submissions. *Attached hereto as Exhibits 1A through 1F.*³

Having reviewed the photographs referenced by Mr. Stone, and having personally viewed the site on two occasions, the Court notes that many of the photographs memorialize what the Court saw: a worn dirt and native grass footpath beginning from a point on Hardscrabble Drive and continuing in a westerly semi-circle direction at least four feet to the southwest of the larger ponderosa pine on lot 50 to an opening onto Plaintiffs' flagstone deck above a large five foot tall rock retaining wall that extends from the west side of Plaintiffs' house into Defendants' property.

The truthfulness of Mr. Stone's affidavit is further called into question by the affidavits of his co-worker, Michael Ekker and Mr. William Wright. Mr. Ekker was on the property on the same date as Mr. Stone in late February 2007. Mr. Ekker recalled the photographs and Mr. Stone's site work. However, Mr. Ekker's recollection of the site work and events transpiring thereafter are remarkably different than those of Mr. Stone. Mr. Ekker states that the "path" in question existed. Both Mr. Ekker and Mr. Wright deny that Mr. Stone was ever asked to place his hand on a Bible or give a recorded statement. Mr. Stone denies in his affidavit that a follow up inspection was conducted and instead claimed that Mr. Wright would not go back to the property because he was in a rush. Yet both Mr. Wright and Mr. Ekker testified that another crew, including Mr. Stone and Ekker, went back to the property on March 9, 2007 to record the location of the paths and to verify the property corner descriptions. Mr. Stone also omits that when he and Mr. Ekker returned to the property on March 9, 2007, they were asked to leave by Don Kirilin.

Also in Defendants' possession from the date of the initial disclosures filed early on in this case, and certainly at the time that the Rule 60(b)(2) motion was filed, is an aerial photograph from 1993. *Attached hereto as Exhibit 2.* This 1993 aerial photograph, along with another aerial photograph from 2003 that is discussed below, were disclosed to Plaintiffs in Defendants' Initial C.R.C.P. 26(a)(1) Disclosures on February 16, 2007, at paragraph B(6), and in Defendants' First Supplemental C.R.C.P. Disclosures on March 29, 2007 at paragraph 20. This 1993 photograph depicts a light area in the location of Edie's Path on the west side of Plaintiffs' property that clearly shows the upper portion of the "path" at issue here, and certainly can be construed as indicating the lower portion of the subject path as well as extensive use of Defendants' property.

³ A seventh photograph was attached by Plaintiffs as a part of Exhibit 12 to their response. It is not included here because it is essentially a duplicate of Exhibit 1F attached hereto.

Defendants have offered the affidavit testimony of Kumar Navulur, Ph.D. as an explanation for the photograph. Rather than contradicting the conclusions of the Court in its observations related to the photograph, Dr. Navulur's conclusions related to the 1993 photograph, which are surprisingly limited, actually support those of the Court: While not conclusive, there is sufficient evidence presented in the photograph to cast doubt on the assertions of Defendants that the path did not exist prior to October 2006. Moreover, Defendants have again offered no explanation why Defendants did not disclose the 1993 photograph to the Court.

Remarkably, for the first time, Defendants disclose in their reply that the 1993 photograph is one of a series of aerial photographs taken for the City of Boulder as part of its Open Space land management. The Court is now advised that the photographs indicated in Defendants' First Supplemental C.R.C.P. Disclosures on March 29, 2007 at paragraph 20, are this series of photos, and that they are photos dated 1982, 1984, 1993, 1999, 2000, 2002, 2003, and 2006. Defendant's state that they: ". . . recently produced to Plaintiffs' counsel high-quality photographic prints of all those photographs." Defendants then state that "out of that whole series, Plaintiffs' counsel suggests that only the 1993 photograph might show the path," and that Plaintiffs' concede that not one of the other photographs shows the path."

This is a remarkable statement for three reasons, especially the third. First, the Court is unable to find any statement in Plaintiffs' response indicating such a concession. Second, Defendants appear to be attempting to shift their burden of proof to Plaintiffs. Had Defendants believed that any of the other photographs in this "series" was dispositive of the issue, Defendants, not Plaintiffs, should have provided these photographs to the Court for its consideration. Again, Defendants did not. And third, and most importantly, the Court, based upon Defendants' representations regarding the dates of these photographs, which the Court now takes judicial notice of, has cross checked this series of photographs with "Exhibit Z" from Defendants' trial submissions. See Footnote 2 herein. The Court concludes that "Exhibit Z" is in fact the 2003 aerial photograph included in Defendants' First Supplemental C.R.C.P. Disclosures on March 29, 2007 at paragraph 20. This photograph is designated as "DKT00291" in Defendants' disclosures referenced above. Incredibly, Exhibit "Z" clearly shows the "path" in question in the same or a very similar condition as it was when the Court inspected the property in 2007. Based upon this finding, this Court can only conclude that Defendants have attempted to purposefully mislead and conceal from this Court what is depicted in "Exhibit Z": A clearly distinguishable dirt and native grass footpath predating by three years the date that Defendants allege the path was created, or as they assert, greatly improved. "Exhibit Z" and "DKT00291" are attached hereto as *Exhibit 3A and 3B*.

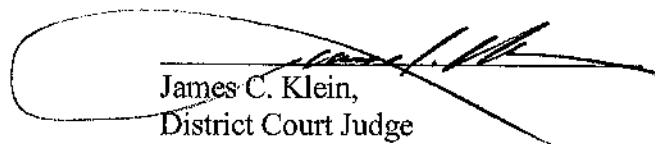
The Plaintiffs have also provided photographs of the path from 2002. See, Trial Exhibit 37, 38, 112 and attachments to Exhibit 11 of the Response (*Exhibits 4A through 4D*, attached hereto). The Defendants did not challenge them at trial, and they apparently do not do so now. Incredibly, Defendants assert that the photos attached to Exhibit 11 actually support their argument. In fact, however, these photographs completely contradict the allegations of the Defendants in their Rule 60(b)(2) motion. These photographs, from different angles, clearly show the existence of the path in question and are consistent with, or are very similar to, what the Court observed in both of its visits to the site during the summer of 2007. These photographs, in conjunction with Defendants' Trial "Exhibit Z", which has now been identified as a 2003 aerial photograph of the area clearly showing the path, lends further proof that the allegations brought by Defendants in the Rule 60(b)(2) motion are false.

Finally, the Defendant's ask this Court to ignore the testimony of numerous witnesses who testified at trial and those who have offered testimony in response to Defendants' Rule 60(b)(2) motion. Many of these witnesses have lived by the Plaintiffs since the 1980's, including Janet Mitchell and Steve Brett, neighbors of Plaintiffs in the same cul-de-sac. Ms. Mitchell's affidavit testimony as well as her contrast of the 2007 Landiscor aerial photograph (*Exhibit 5*, attached hereto) and the earlier 2006 Caps aerial photograph (*Exhibit 6*, attached hereto) is particularly striking and persuasive.⁴ All of these witnesses saw the Plaintiffs using the path and Defendants' property during the time alleged by Plaintiffs. These witnesses distinctly recall the existence of the path prior to the date the Defendants now say it was created in October 2006.

In light of the testimony, the affidavits containing specific recollections of use over twenty (20) years, the photographic evidence that pre-dates October 2006 including the aerial photograph from 1993 and 2003, the photographs from 2002 presented at trial as Exhibits 37, 3 and 112, the 2002 photographs attached to Exhibit 11, and the photographs taken by Mr. Stone and withheld by the Defendants in conjunction with Mr. Ekker's testimony, the Defendants have failed to meet the requisite burden of proof required to set this order aside. Defendants' Motion is therefore DENIED.

BY THE COURT

May 5, 2008
Date


James C. Klein,
District Court Judge

⁴ Again, the aerial photography relied upon by Plaintiffs in response to the Rule 60(b)(2) motion, including those referenced by Ms. Mitchell in her affidavit, has at all times relevant to these proceedings been in the possession of Defendants, yet it has not been disclosed to this Court until now.