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DIVISION OF RECLAMATION
MINING AND SAFETY

12-19-2017

Dear Mr. Gapla,

It is my understanding that for the Gallegos Corp's harvesting of the Conger Harvest Area, permit M-1998-022, on the USFS lands above County Road 3, Marble, the Div. of Mining & Reclamation and USFS had approved an access route across my property. The Gunnison County District Court in case 2015 CV 30046 held that Gallegos Corp has no right to cross the property owned by Lee & Melissa Bowers or Marble Airfield, LLC which have to be crossed to get to my property. It is my understanding that without that right, they can't use the previously approved route across my property to access the Conger Harvest Area.

Does the Gallegos Corp have

any other access approved by the Div. of Mining + Reclamation or the USFS to the Conger Harvest Area? Is there still a valid permit in place for the Conger Harvest Area?

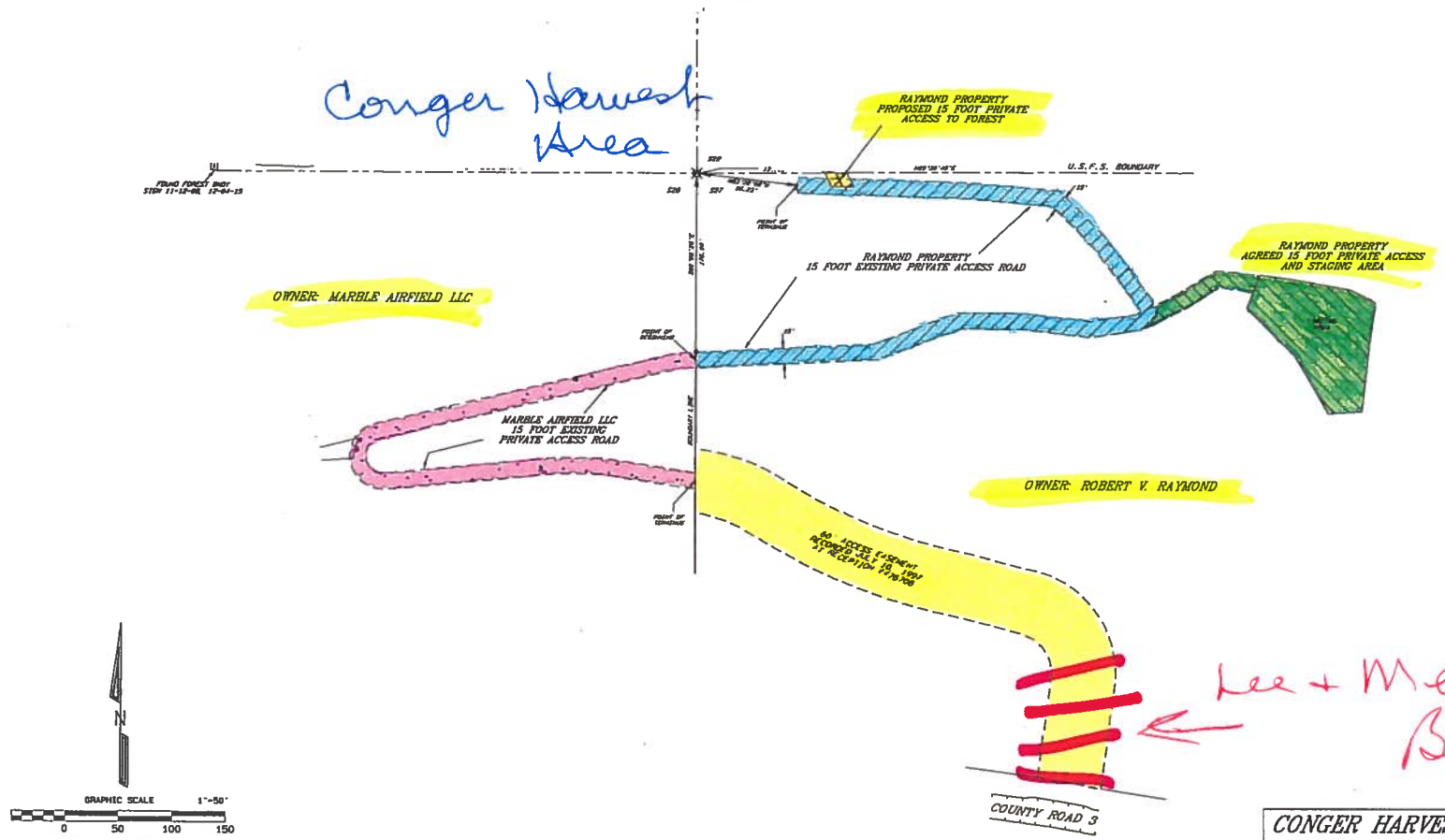
I've enclosed the Court of Appeals order in this case and a copy of the haul route map.

Thanks You for your help

Bob Raymond
4711 CR 3
Marble, Co 81623
970 963-0833

ACCESS EXHIBIT

REDACTED



CONGER HARVESTING AREA
LOCATED IN THE
NW 1/4 NW 1/4, SEC. 27, T11S, R88W, 6th P.M.

D H SURVEYS INC.
118 OURAY AVE. - GRAND JUNCTION, CO.
(970) 245-8749

Drafted By H.W.D.	Checked By E.E.B.	Job No. 693-08-20
Drawn By TWOOD	Date DEC. 2015	Sheet 1 OF 1

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EXHIBIT

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16CA1367 Gallegos Masonry v Raymond 06-15-2017

COLORADO COURT OF APPEALS

DATE FILED: June 15, 2017
CASE NUMBER: 2016CA1367

Court of Appeals No. 16CA1367
Gunnison County District Court No. 15CV30046
Honorable J. Steven Patrick, Judge

Gallegos Masonry, Inc.,

Plaintiff-Appellant,

v.

Marble Airfield LLC, a Delaware limited liability company, H. Lee Bowers II, a/k/a Lee Bowers, and Melissa J. Bowers, a/k/a Melissa Jane Moyer Bowers,

Defendants-Appellees.

JUDGMENT AFFIRMED

Division I
Opinion by JUDGE LICHTENSTEIN
Taubman and Román, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced June 15, 2017

Preeo Silverman Green & Egle, P.C., Jersey M. Green, Centennial, Colorado, for Plaintiff-Appellant

Vaugh & DeMuro, Steven P. Bailey, Colorado Springs, Colorado, for Defendant-Appellee Marble Airfield, LLC

Fox Rothschild LLP, Christopher J. Dawes, Risa B. Brown, Denver, Colorado; Wood Nichols, LLC, Joslyn V. Wood, Kelcey C. Nichols, Carbondale, Colorado, for Defendants-Appellees H. Lee Bowers II and Melissa J. Bowers

¶ 1 This case involves disputed access to land over a private road. Gallegos Masonry, Inc. (GMI), appeals the district court's grant of partial summary judgment in favor of Marble Airfield, LLC, and H. Lee Bowers II and Melissa J. Bowers (the Bowers). We affirm.

I. Background

¶ 2 GMI holds a permit to conduct surface rock harvesting on U.S. Forest Service land in Gunnison County, Colorado. There is no public access to this U.S. Forest Service land. The only access is via a private road that crosses three separate tracts of property owned by the Bowers, Marble Airfield, and ~~Richard~~ Robert V. Raymond. GMI asserts that it could use this private access road over the Bowers' and Marble Airfield's parcels as Raymond's invitee. The following facts are pertinent to this claim.

¶ 3 Raymond's land borders U.S. Forest Service land to the north. It previously bordered the public access road to the south; however, Raymond conveyed 1.25 acres of the southern portion of his land to the Bowers.[1] Marble Airfield's parcel is west of, and adjacent to,

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[1] Prior to this conveyance, Raymond reserved an easement over the private road for himself to cross the Bowers' land. The Bowers do not dispute that Raymond holds this easement.

Raymond's and the Bowers' parcels, with the county road to the south and U.S. Forest Service land to the north.

¶ 4 The private access road winds through these three parcels. As relevant here, the private road begins at the public county road, travels north across the Bowers' property, continues north across Raymond's property, and then turns west across Marble Airfield's property before switching back across Raymond's property. It ends at the U.S. Forest Service land that borders Raymond's property.

¶ 5 As relevant here:

- Raymond holds an express easement to cross the private access road over the Bowers' land.
- Neither Raymond nor GMI holds an express easement to cross Marble Airfield's property.[2]
- GMI holds an express easement, the "Permanent Easement, Staging Area, and Maintenance Agreement" (the PESAMA), on Raymond's land. The PESAMA granted GMI "a non-exclusive easement for ingress and egress

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[2] Gallegos and Associates, Marble Airfield's predecessor, granted GMI an easement to cross the private access road over its land. But this easement expired on December 31, 2014, and Marble Airfield declined to renew or renegotiate the terms of GMI's easement.

> upon, over and across the Raymond Property on the Private Access Road . . . together with an exclusive easement to use certain staging areas." The PESAMA placed restrictions on the location of GMI's rock harvesting as well as tree removal near Raymond's boundary, and required GMI to pay Raymond $13,000 for improvements and maintenance of the private access road.

¶ 6 GMI initiated the present action, seeking a declaratory judgment, quiet title, and mandatory injunction against Marble Airfield, the Bowers, and Raymond, as well as claims for breach of contract and breach of warranty against Raymond.

¶ 7 In its second amended complaint, GMI alleged that based on the PESAMA, GMI is Raymond's invitee, and, as his invitee, it has the right to use Raymond's express easement to cross the Bowers' land. GMI also asserted that it could cross Marble Airfield's parcel as Raymond's invitee because Raymond held what it alternatively

described as a "prescriptive" easement," "easement by necessity," or "easement by estoppel" over Marble Airfield's parcel.[3]

¶ 8 Marble Airfield and the Bowers moved for summary judgment, which the district court granted in part on the basis that GMI is not Raymond's invitee. It also concluded that even if GMI was Raymond's invitee, Raymond had revoked its invitee status.

¶ 9 GMI obtained a certification of final judgment pursuant to C.R.C.P. 54(b) as to Marble Airfield and the Bowers and appealed the partial summary judgment.[4] Raymond is not a party to this appeal.

II. Summary Judgment

A. Standard of Review and Relevant Law

¶ 10 We review de novo the grant of summary judgment. Vigil v. Franklin, 103 P.3d 322, 327 (Colo. 2004). Summary judgment is

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[3] Based on our resolution in Part II.B.2, we need not address whether Raymond has an easement (implied or otherwise) over Marble Airfield's property.

[4] In granting the motion for C.R.C.P. 54(b) certification the district court stated "there is no just reason for delay" without further explanation. However, the parties' motions for Rule 54(b) certification appropriately listed the reasons for the certification, and we assume the court relied on those reasons. See Galindo v. Valley View Ass'n, 2017 COA 78, ¶ 12 n.7.

appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." C.R.C.P. 56(c). We view the allegations in the complaint in the light most favorable to the nonmoving party. Henderson v. Master Klean Janitorial, Inc., 70 P.3d 612, 615 (Colo. App. 2003).

¶ 11 We similarly review de novo the question of whether a party is an invitee. Lakeview Assocs., Ltd. v. Maes, 907 P.2d 580, 584 (Colo. 1995) (reviewing de novo whether a tenant is an invitee or a licensee for purposes of the Premises Liability Act). Under the common law, a business invitee is a visitor who comes onto the property "for a purpose connected with the business in which the occupant in [sic] engaged, or which he permits to be carried on there." Mathias v. Denver Union Terminal Ry. Co., 137 Colo. 224, 228, 323 P.2d 624, 626 (1958).

¶ 12 Finally, we interpret the grant of an easement de novo. Gold Hill Dev. Co. v. TSG Ski & Golf, LLC, 2015 COA 177, ¶ 43. "An easement is a right conferred by grant, prescription or necessity authorizing one to do or maintain something on the land of

another . . . ." Lazy Dog Ranch v. Telluray Ranch Corp., 965 P.2d 1229, 1234 (Colo. 1998); see also Clinger v. Hartshorn, 89 P.3d 462, 466 (Colo. App. 2003) (An easement "confers upon the holder of the easement an enforceable right to use property of another for specific purposes."); Restatement (Third) of Property (Servitudes) § 1.2 (Am. Law Inst. 2000). The rights of the easement holder are limited to those connected with use of the easement. Lazy Dog Ranch, 965 P.2d at 1234.

B. Discussion

1. Bowers

¶ 13 GMI argues that it is Raymond's invitee and therefore can use Raymond's express easement over the Bowers' land.

¶ 14 Raymond's express easement over the Bowers' land is a non-exclusive access easement, reserved for his ingress and egress. The easement reads, in relevant part:

> B. Raymond intends to sell a portion of said property reserving an access easement over the property;
>
> C. The purpose of this Grant of Easement is to grant Raymond a necessary easement for ingress and egress over said property.

(Emphasis added.)

¶ 15 It is undisputed that this express easement does not permit GMI to use the private road over the Bowers' land. See Title Guar. Co. v. Harmer, 163 Colo. 278, 281, 430 P.2d 78, 80 (1967) (a stranger to the instrument creating an easement cannot assert rights to the easement).

¶ 16 GMI asserts, nonetheless, that it may use Raymond's easement over the Bowers' land because, according to the Restatement (Third) of Property, an easement holder may permit his or her invitees to make reasonable use of the easement. See Restatement (Third) of Property (Servitudes) § 4.10 cmt. c, illus. 1 (Am. Law Inst. 2000). As noted in the Restatement comment, such reasonable use may extend to an easement holder's "family, tenants, and invitees." Id.; see also Weeks v. Wolf Creek Indus., Inc., 941 So. 2d 263, 272 (Ala. 2006) ("[U]nless expressly restricted, the use of an easement appurtenant is not limited to the owners of the dominant estate, but also inures to the benefit of their tenants, 'servants, agents, or employees in conducting [their] business,' as well as social and business invitees.") (alteration in original) (citations omitted).

¶ 17 GMI contends that the PESAMA is an "express business agreement" with Raymond that "invites" GMI to conduct business operations on Raymond's land. Therefore, GMI argues, it was Raymond's business invitee and, as such, was entitled to use Raymond's easement over the Bowers' land. We disagree.

¶ 18 Even if we assume, without deciding, that an easement holder's invitee may make reasonable use of the easement, GMI does not meet the legal definition of an invitee. At common law, a business invitee, or business visitor, is one who "is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land." Restatement (Second) of Torts § 332(3) (Am. Law Inst. 1965). To qualify as a business invitee, a business visitor must come "for a purpose connected with the business in which the occupant in [sic] engaged, or which he permits to be carried on there." Mathias, 137 Colo. at 228, 323 P.2d at 626. And there must be some "mutuality of interest" in the subject to which the visitor's business relates. Id.

¶ 19 For example, our supreme court held in Mathias that a photographer who went to the Denver railroad depot to photograph visiting government officials was a business invitee of the depot. Id.

The court held the photographer's presence to photograph the arrival and departure of passengers was directly related to the depot's business, as well as his own, and that the photographer and railway depot shared an interest in the arrival and departure of passengers. Id.

¶ 20 In contrast, here, GMI was not granted the access easement in the PESAMA for the purpose of engaging directly, or indirectly, in any business dealings with Raymond. GMI's use of the private road was to traverse Raymond's property to gain access to its own rock harvesting business on another's land.

¶ 21 Raymond is not in the business of rock harvesting, nor does he share a "mutuality of interest" in rock harvesting. GMI is not in a business related to Raymond's private residence, nor does it share a "mutuality of interest" in Raymond's maintenance of his residence. See, e.g., Restatement (Second) of Torts § 332(3) cmt. e (Am. Law Inst. 1965) ("[A] truck driver from a provision store who enters to deliver goods to a private residence is a business visitor; and so is a workman who comes to make alterations or repairs on land used for residence purposes.").

¶ 22 Further, any business that GMI argues is conducted "on the Raymond property" is actually conducted on GMI's easement. The PESAMA grants a nonexclusive easement to GMI to set up a staging area. Consequently, any of GMI's staging activities for its rock harvesting on U.S. Forest Service land is not permitted on Raymond's servient estate.

¶ 23 Nonetheless, GMI asserts that its "business dealings" with Raymond is the PESAMA itself, and that there is "mutuality of interest" in its terms because GMI benefits from the convenience of accessing and staging near U.S. Forest Service land, while Raymond benefits from the $13,000 payment and rock harvesting restrictions. But whether both parties benefited from Raymond's grant of an easement to GMI is irrelevant to whether the business purpose for GMI's use of the easement over Raymond's property is for their mutual interest.

¶ 24 And we disagree that GMI is otherwise "an invitee" because the PESAMA made GMI's presence "of interest or advantage" to Raymond, in that he was paid consideration for road maintenance and the PESAMA placed limits on its rock harvesting activities on the U.S. Forest Service land. See Atkinson v. Ives, 127 Colo. 243,

249-50, 255 P.2d 749, 752 (1953) (defining an invitee as someone on another's property "by invitation, express or implied, for some purpose of interest or advantage" to the landowner). To be sure, some of the restrictions on GMI's rock harvesting activity in the PESAMA were of interest or advantage to Raymond, but the purpose of granting the easements in the PESAMA was of interest or advantage to GMI, not Raymond: to permit GMI to engage in surface rock harvesting on U.S. Forest Service land.

¶ 25 GMI thus does not meet the legal definition of an invitee. It therefore cannot rely on such status to use Raymond's easement over the Bowers' land. Consequently, the district court did not err in granting summary judgment to the Bowers.

2. Marble Airfield

¶ 26 For the same reason, we affirm the grant of summary judgment as to Marble Airfield. Because GMI is not Raymond's invitee, it cannot rely on such status to use Raymond's easements, express or implied.

III. GMI's Request for Declarations of Law

¶ 27 GMI requests this court to issue two declarations of Colorado property law. First, GMI asks for a declaration that "a holder's

reasonable use of a servitude includes use by his tenants, guests, and invitees." Second, GMI asks for a declaration that "an invitee acquires no interest, estate or privilege in the land of the landowner." We decline GMI's request to issue declarations of law. GMI does not meet the legal definition of an invitee, and thus the requested declarations would amount to a prohibited advisory opinion. Tippett v. Johnson, 742 P.2d 314, 315 (Colo. 1987) ("This court is not empowered to give advisory opinions based on hypothetical fact situations.").

IV. Conclusion

¶ 28 The partial summary judgment in favor of defendants Marble Air and the Bowers is affirmed.

JUDGE TAUBMAN and JUDGE ROMÁN concur.