Etter v. Marone

Court of Chancery of Delaware, Kent

February 28, 1978, Submitted ; April 11, 1978, Decided

C.A. No. 492

Reporter
1978 Del. Ch. LEXIS 526 *; 1978 WL 22028

Opinion

GROVER C. BROWN, VICE-CHANCELLOR

UNREPORTED OPINION

This case involves one of those unfortunate situations wherein neighbors apparently find it impossible to live next door to each other in peace and harmony. It is equally unfortunate that this Court lacks the magical power that would be required to resolve the situation without having to resort to the tenets of the law. Be that as it may, this is a decision after trial in an action brought by the plaintiffs Etter to have the defendants Marone remove a hedge.

The parties own adjoining lots having dimensions of 90 feet by 216 feet. The rear portion of the Etter lot is enclosed by a chain link fence situated 3 inches inside the property line. The rear portion of the Marone lot is likewise enclosed on sides and rear by a large California privet hedge. This hedge was planted around 1968 and its original root line was fixed 18 inches inside the Marone property line. The Marones have never ***trimmed*** **[*2]** this hedge, but have deliberately permitted it to grow to its present height of some 12 feet. The hedge has also sprawled out in width and now extends through and well over the fence so as to encroach into the yard of the Etters along the common boundary line. The hedge in this expanded condition also runs the full 216 foot length of the property line.

When the hedge was planted in 1968, the Etter property was owned by a Mr. and Mrs. Lins, the Etter's immediate predecessors in title. It was during this same year that the Lins put up the chain link fence. The Lins and the Marones got along very well as neighbors. In fact the Lins sought to have the Marones share the cost of the fence so as to mark their common boundary, but at the time the Marones were not in a financial position to contribute. They had no objection to the fence, however, nor did the Lins have any objection to the hedge. All was well. In fact, they cannot even recall which came first. In any event, the hedge was planted 18 inches or so from where the fence posts were implanted.

It was the intention of the Marones from the outset to permit the hedge to grow. They desired the privacy it would afford **[*3]** them. It also acted as a windbreak in the winter (since the rear of their property faces north) and as a deterrent to the sound emanating from aircraft operations at the nearby Dover Air Force Base.

The Etters purchased the Lins property in 1971, at which time the young hedge apparently caused no problem. As it proceeded to grow, however, so did the dissatisfaction of the Etters. By 1974 the hedge hung over the Etters' fence by several feet. While the Marones were away, and apparently without first saying anything about it, Etter cut the top out of that portion of the hedge encroaching over the fence, leaving the resultant state of the vegetation somewhat unsightly. Marone sued him. Etter found some basis for having Marone arrested. The location of corner markers became a judicial issue. And away matters went.

Etter charges that the hedge constitutes a continuing nuisance. The thickness of the branches now protruding through the fence make it a danger to children. Grass either does not grow or cannot be mowed by Etter because of these branches. Leaves from the hedge find their way into the Etter swimming pool, allegedly calling for additional daily attention **[*4]** and work on the pool. The previous litigation at the Justice of the Peace level confirmed Etter's lawful right to engage in self-help so as to remove the encroaching branches. By now, however, the Etters want no part of what has become a mammoth task. During his last effort, Mr. Etter spent two evenings after work cutting and hauling several pickup loads of branches, but did not get even a third of the way down the 200 foot length

of the hedge.

Marone is willing to ***trim*** the hedge, but since it is now growing against and through the fence, he cannot do so without entering the Etter yard. And since the Etters refuse to talk to him, Marone cannot get permission. The Etters had their counsel draft a written agreement to permit the ***trimming*** of the hedge. Marone was willing to sign it if the Etters would remove a release of all liability clause from it. They would not. Thus, finally, the present action and trial.

The Etters ask the Court to direct the Marones to relocate the hedge to a position four feet back from the fence so as to allow room for maintenance between the hedge and the fence, and to thereafter require the Marones to keep that portion of it ***trimmed*** and under control. **[*5]** This, of course, is impossible. It could only be accomplished by taking out the entire hedge and planting another one four feet from the fence. Moreover, to require the hedge to be maintained at a four foot level on one side of the Marone yard while it retains its twelve foot height to the rear and along the other side (the neighbors on the other side have no objection to the hedge) would throw the beautification of the Marone property out of kilter and deny them their privacy in the direction of neighbors with whom they are not even on speaking terms. I do not view this to be an acceptable result, and I deny the application.

In sum, the Marones have just as much right to border their property with a hedge located within their property line as the Etters have a right to do likewise with a chain link fence. Nor do the Etters have a right to dictate that the Marone hedge shall be kept at a height which suits the Etters, particularly where the Marones have justifiable reason for letting it grow, where it is not being done for spite or harassment, and where there is no objection from other neighbors.

At the same time, certain generally accepted principles obtain with regard **[*6]** to encroaching ***trees*** or hedges. Regardless of whether encroaching branches or roots constitute a nuisance, a landowner has an absolute right to remove them so long as he does not exceed or go beyond his boundary line in the process. 2 *C.J.S.* 51, Adjoining Landowners § 52; 1 *Am.Jur.2d* 775, Adjoining Landowners § 127. He may not go beyond the line and cut or destroy the whole or parts of the plant entirely on another's land even though the growth may cause him personal inconvenience or discomfort. 2 *C.J.S.* 51, *supra.*

Normally, this right of removal is considered a sufficient remedy, and an action for damages or for a mandatory injunction to compel the owner of the growth to remove the ***encroachment*** will not lie. It is only where some actual and substantial damage has been sustained that an injured landowner may compel the removal of the offending branches. 2 *C.J.S.* 51, Adjoining landowners § 53. And even here, in accordance with the maxim that he who seeks equity must do equity, a landowner may be refused such relief unless he permits the defendant, or his agents, to go upon his premises so as to remove the ***encroachments***. 1 *Am.Jur.2d* 784, Adjoining **[*7]** Landowners § 136.

Applying these basic principles I reach the following conclusions based upon the evidence presented in addition to a cursory view of the premises made on my own subsequent to trial (the hedge and fence can be easily seen from public streets both front and rear -- and on February 28 there were no leaves).

The current state of growth of the hedge, and the size and extent of its protrusion and ***encroachment*** into the Etter yard, when coupled with its considerable length, convince me that there is at present sufficient injury to the enjoyment of the Etter property as to warrant an order requiring the Marones to bear the responsibility and/or expense of ***trimming*** the portion of the hedge on the Etter property back to the property line and removing the debris resulting therefrom. I will sign an order requiring them to do so on this one occasion, which directive, however, shall be conditional upon the Etters, upon reasonable notice, permitting the Marones, or their duly authorized and responsible agents, to enter upon the Etter property for this purpose. Failure or refusal of the Etters to grant such permission, upon reasonable notice, shall relieve the Marones **[*8]** of any further obligation to take such action.

Once the hedge and all protrusions are ***trimmed*** back to the property line (which is 3 inches outside the fence) the above legal principles shall thereafter apply and the Etters shall be free to keep any new growth ***trimmed*** back as it appears, or to let it grow, whichever they prefer. Costs of this proceeding shall be assessed against the Marones.

Counsel are directed to agree upon and submit a form of order embodying the result set forth herein.

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