UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Asheville Division

FILED
Clk, US Bankruptcy Court
NOV 04 2003
THH
WDNC, Asheville, NC

In Re: **JOHN C. CROWELL d/b/a TRAXS REAL ESTATE, d/b/a TRAXS DEVELOPMENT, d/b/a EXCEL REALTY, d/b/a QUESTOR FINANCIAL GROUP, INC., d/b/a SUMMIT PLACE,** Debtor.	Case No. 01-10471 Chapter 7 JUDGMENT ENTERED ON NOV 04 2003
BLUE RIDGE SAVINGS BANK, INC., a North Carolina banking corporation, Plaintiff, v. **LLOYD T. WHITAKER, Chapter 7 Trustee; LEHMAN BROTHERS BANK, FSB, a wholly owned subsidiary of LEHMAN BROTHERS HOLDINGS, INC., a Delaware corporation; H. TERRY HUTCHENS, P.A., Substitute Trustee; GUARANTY HOME EQUITY CORPORATION, d/b/a GB HOME EQUITY CORPORATION, d/b/a GB HOME EQUITY, a Wisconsin corporation; and INVESTORS TITLE INSURANCE COMPANY, Trustee,** Defendants.	Adv. Proc. 03-1009

ORDER

This matter is before the court upon Blue Ridge Saving Bank Inc.'s ("Blue Ridge") Motion for Summary Judgment which seeks the creation of two easements across real property of U.S. Bank National Association ("U.S. Bank"). After consideration of the Motion and the arguments of counsel, the court has concluded that

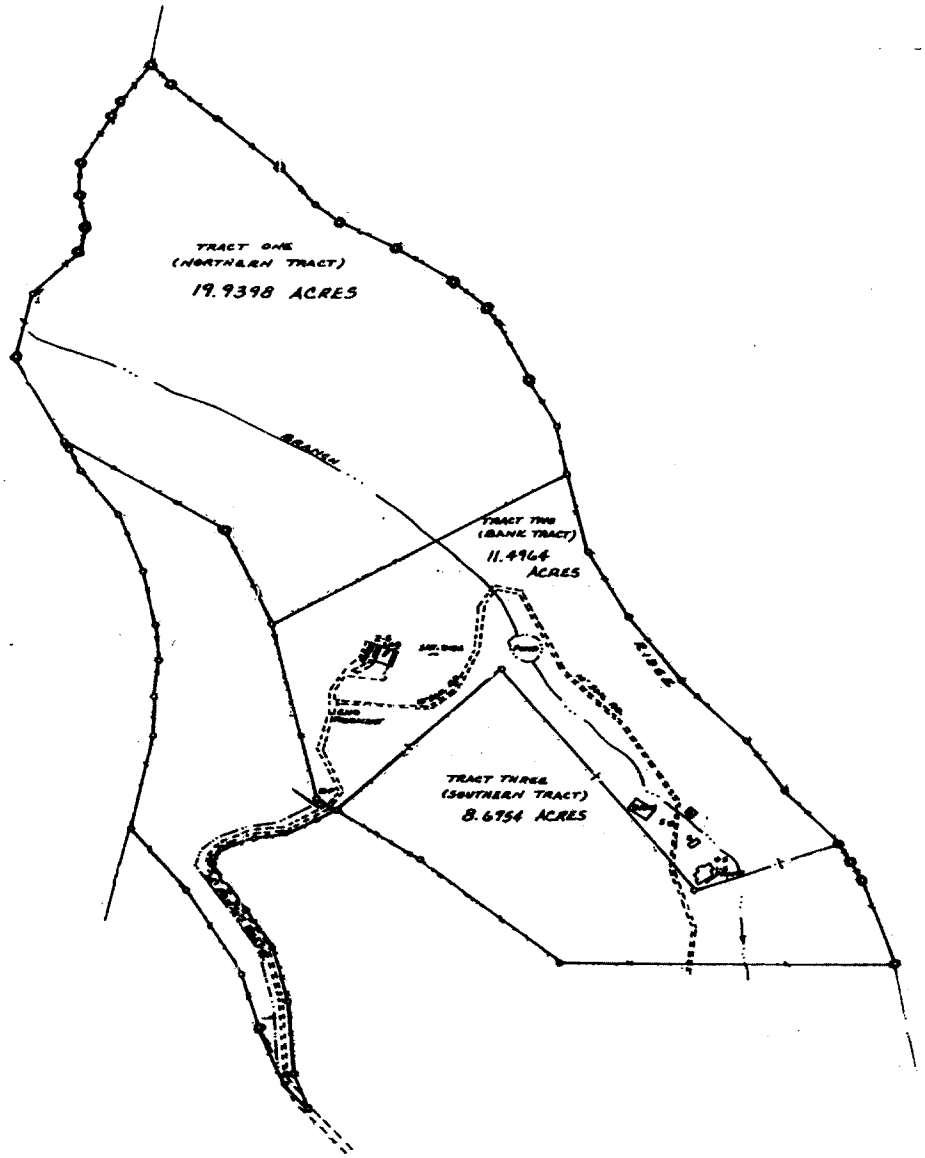
summary judgment should be GRANTED to Blue Ridge with respect to creation of an easement to serve Blue Ridge's "Northern Tract" (count two of the Amended Complaint for Easement) and DENIED with respect to an easement to serve Blue Ridge's "Southern Tract" in addition to the easement already granted by U.S. Bank (count three of the Amended Complaint). The bases for this determination are as follows:

Background

1. The debtor, John Crowell, filed a voluntary Chapter 11 petition, and his case was subsequently converted to one under Chapter 7 of the Bankruptcy Code. One of the debtor's assets was real estate in Haywood County that is now owned by Blue Ridge and U.S. Bank.

2. The property that is the subject of the Amended Complaint is described in Deed Book 473, at Page 2203, at the Haywood County Registry and is comprised of three tracts: the "Northern Tract," the "Bank Tract," and the "Southern Tract." A survey of the property is recorded at Plat Cabinet C, Slide 875, of the Haywood County Registry. All three tracts were owned by Crowell as one unified piece of property. However, during Crowell's ownership, he granted deeds of trust on the three tracts to different lenders. The present ownership of the property, following valid foreclosures and assignments, is that: Blue Ridge owns the "Northern Tract" and the "Southern Tract," and U.S. Bank owns the "Bank Tract."

3. The "Bank Tract" lies between the "Northern Tract" and the "Southern Tract" and contains the only meaningful access to the property. There is no access to the "Northern Tract." The filed survey shows a narrow road that runs through the middle of and the full length of the "Bank Tract" to the "Southern Tract." U.S. Bank granted Blue Ridge an easement across the western corner of its "Bank Tract" to serve Blue Ridge's "Southern Tract." A diagram of how the property lies is as follows:



4. Plaintiff, Blue Ridge, filed this adversary proceeding seeking a declaration that it has an "easement over and across the 'Bank Tract' for the purpose of ingress and egress to the 'Northern Tract' and the 'Southern Tract' and that said easement is superior to all other interests in, and liens on, the [p]roperty."

5. Blue Ridge filed this Motion for Summary Judgment as to counts 2, 3, and 5 of its Amended Complaint, which are its claims for an easement implied by necessity to the "Northern" and "Southern" Tracts and an Easement Implied by Plat to the "Southern Tract."

6. At the hearing on the Motion for Summary Judgment, Blue Ridge abandoned its motion with respect to count 5 of the Amended Complaint. Thus, the court has considered Blue Ridge's Motion with respect to its claims for an easement implied by necessity to the "Northern Tract" and an easement implied by plat to the "Southern Tract."

Easement Implied by Necessity to the "Northern Tract" (Count Two)

7. Blue Ridge argues that it is entitled to an easement implied by necessity to the "Northern Tract" because there is no deeded access to the "Northern Tract" due to the manner in which the property was divided by the debtor in granting deeds of trust to Blue Ridge and U.S. Bank's predecessor in interest.

8. U.S. Bank argues that Blue Ridge's bare allegation that it lacks access to the "Northern Tract" is not sufficient to create an easement. U.S. Bank suggests that Blue Ridge must go one step further and present evidence regarding the scope, size, and location of the proposed easement.

9. It is well settled that "where a tract of land is conveyed which is separated from the highway by other lands of the grantor or surrounded by his lands or by his and those of third persons, there arises, by implication, in favor of the grantee, a way of necessity across the premises of the grantor to the highway." See Pritchard v. Scott, 254 N.C. 277, 282, 118 S.E.2d 890, 894 (1961) (citations omitted).

10. Crowell conveyed the "Northern Tract" to Blue Ridge such that it is surrounded by the land of U.S. Bank and third parties without any means of access. In light of this fact and the well settled law, it is clear that an implied easement by necessity arises in favor of Blue Ridge across the "Bank Tract" to the "Northern Tract."

11. With respect to the size, scope, and location of the easement, "the rule has been established that the right to select the location of a way of necessity belongs to the owner of the servient estate, provided he exercises the right in a reasonable manner, with regard to the convenience and suitability of the way and to the rights and interests of the owner of the dominant

estate." See Oliver v. Ernul, 277 N.C. 591, 600, 178 S.E.2d 393, 398 (1971). Thus, as the owner of the servient estate, U.S. Bank should, in the first instance, choose the size, scope, and location of the easement serving the "Northern Tract" and should do so in a reasonable manner. If a dispute arises over the size, scope, and location of the easement to the "Northern Tract," the court will hold a trial to determine this issue.

12. Finally, U.S. Bank argued that in the event an easement by necessity is created to the "Northern Tract," it would be entitled to compensation for the same. It appears that North Carolina law does not require compensation for an easement by necessity -- at least in the instance of a de minimus "taking." See Pritchard at 285, 118 S.E.2d at 896. Thus, once the location of the easement is determined, U.S. Bank may assert a claim for compensation if there is a significant impact on its property. The court will determine that issue anew if later asserted by U.S. Bank.

Easement by Recorded Plat to the Southern Tract (Count Three)

13. In addition to seeking an implied easement by necessity to the "Northern Tract," Blue Ridge argues that it is entitled to an easement by recorded plat to the "Southern Tract." According to Blue Ridge, an easement by recorded plat is created by the survey that was filed showing an unimproved road across the "Bank Tract" to the "Southern Tract."

14. In support of this argument, Blue Ridge cites Commercial Fin. Corp. v. Langston, 24 N.C. App. 706, 212 S.E.2d 176 (1975) and Realty Co. v. Hobbs, 261 N.C. 414, 135 S.E.2d 30 (1964). These cases generally stand for the proposition that when an owner of land subdivides the land, plats the subdivision into streets and lots, and then sells the lots with reference to the plat, the purchasers of those lots have a right to use the streets shown on the plat for their reasonable use. See Langston, 24 N.C. App. at 710, 212 S.E.2d at 179; Hobbs, 261 N.C. at 421, 135 S.E.2d at 35-36. In effect, the purchasers of the lots have a right in the nature of an easement appurtenant to have the streets shown on the plat kept open for their reasonable use.

15. In addition, these cases emphasize that the right of the lot owners to use the streets shown on the plat cannot be extinguished except by agreement or by estoppel because the existence of the right "was an inducement to and a part of the consideration for the purchase of the lots." See Langston at 711, 212 S.E.2d at 179; Hobbs at 422, 135 S.E.2d at 36. As the court noted in Hobbs, the lot owners "have been induced to buy under the map and plat, and the sale was based not merely on the price paid for the lots, but there was the further consideration that the streets and public grounds designated on the map should be forever open to the purchasers and their assigns." See Hobbs at 422, 135 S.E.2d at 36.

16. This case is distinguishable from both Langston and Hobbs because unlike in those cases, the debtor, Crowell, did not sell property by virtue of a recorded subdivision plan or plat. Rather, Crowell granted deeds of trust on three tracts of a large piece of property as security for his indebtedness. The purported "plat" is in reality merely a boundary and physical survey that was filed in the Haywood County Registry. It does not evidence any development plan, nor does it purport to create any "rights" in the property. It simply shows the layout of the property at a certain time. The "road" that is shown on the survey is an old unimproved pathway that does not appear sufficient to serve as appropriate access to the "Southern Tract"; and if designated as a right-of-way, would seriously devalue the "Bank Tract" by cutting it in two.

17. Moreover, there is no evidence or assertion that Blue Ridge relied on the existence of a particular right-of-way as an inducement to taking its deed of trust on the "Southern Tract." Finally, U.S. Bank's predecessor granted Blue Ridge an easement across the western corner of the "Bank Tract" which provides Blue Ridge adequate access to its "Southern Tract."

18. For these reasons, the court concludes that Blue Ridge's claim for an easement by recorded plat to the "Southern Tract" should be denied.

It is therefore **ORDERED** that:

1. The plaintiff's Motion for Summary Judgment with respect to Count Two of the Amended Complaint is GRANTED;

2. The plaintiff's Motion for Summary Judgment with respect to Count Three of the Amended Complaint is DENIED; and

3. U.S. Bank shall choose the size, scope, and location of the easement across its "Bank Tract" to serve Blue Ridge Bank's "Northern Tract" and do so in a reasonable manner. If a dispute arises over the size, scope, and location of the easement to the "Northern Tract" or if U.S. Bank asserts a further claim for compensation, the court will conduct a trial to determine those issues.

George R. Hodges
Dated as of date entered

George R. Hodges
United States Bankruptcy Judge