

Commonwealth of Kentucky Court of Justice	<u>ORDER</u>	No. 23-CI-00182 Circuit Court Henry County
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ANDREW WEINGARTEN, ET AL.

PLAINTIFF

Vs.

L'ESPIRIT PROPERTY OWNERS ASSOCIATION, ET
AL.

DEFENDANT

** ** ** ** **

This matter came before the court on several motions for temporary injunctions brought by the various parties in this action. The court conducted a hearing on the motions on March 22, 2024. After the hearing additional briefs were filed by the parties, including a subsequent motion for a temporary injunction brought by the Defendants, L'Espirit Property Owners Association (LPOA) and the L'Espirit Property Owners Association Board of Directors (Board). The court, having heard the arguments of the parties and being sufficiently advised, hereby enters the following findings of fact and conclusions of law.

**MOTIONS OF PLAINTIFF WEINGARTEN, LPOA, AND THE BOARD FOR
TEMPORARY INJUNCTION RELATED TO BRIDAL PATH**

Plaintiff Andrew Weingarten originally brought his motion for a temporary injunction as part of a package of motions for temporary injunctive relief along with Plaintiffs Robert Vessels, Mark Suna, and David Poff. In the portion of the

motion specific to Weingarten, the motion alleges the Board “improperly levied and continues to improperly levy those fines, as they lack the authority to do so pursuant to the Articles, Bylaws, and Declaration.” Weingarten renewed this motion separately from the other plaintiffs on January 28, 2024. Following oral arguments related to the Weingarten motion and the other motions for temporary injunction, Defendants filed their own motion for temporary injunction on May 28, 2024. In their motion for temporary injunction, Defendants request the Court to permit LPOA, at its own expense, to temporarily relocate an approximately thirty (30) foot portion of Mr. Weingarten’s fence line by fifteen (15) feet so that, until this litigation is resolved, the Bridle Path that has been used for decades may once again be accessible to L’Esprit members.

1. ESSENTIAL FACTS FOR THIS MOTION

Weingarten owns a tract of land and residence located in the L’Esprit Development. Weingarten’s tract is servient to a recorded Bridle Path easement. He has owned this tract for approximately 14 years. Some portions of the recorded Bridle Path on Weingarten’s lot are impassable by horses and difficult for humans to navigate due to sharp drop-offs, cliffs, dense vegetation and trees, a creek, and a steep hill. Perhaps due to these difficulties the original Perimeter/Bridle Path fencing was placed approximately sixty (60) feet South of the recorded Bridle Path easement and outer boundary of the L’Esprit property on the property now owned by Weingarten creating an encroachment on the

North side of the Weingarten tract between the Bridle Path that has been regularly used since the 1980's and the path that was recorded.

As the creek washed out over the years, the Bridle Path was relocated again to its current route to allow easier passage. The Bridle Path now further encroaches on to the lot now owned by Weingarten. During this move of the Bridle Path, an approximately 30-foot portion of the original fence was taken down. Although the exact date of the fence removal is unknown, this portion of the fence was removed well before Weingarten purchased his tract and remained disassembled, until Weingarten took action to rebuild it. Defendants claim an easement by prescription across the portions of the Weingarten tract that are used as a Bridle Path but are not on the recorded plats. By rebuilding the fence, Weingarten has effectively blocked use of the Bridle Path¹.

The Declarations of the Defendant LPOA at Article 2, Section 2.03(ii) prohibit the construction of any fences, structures, or obstructions within or across any area designated as a Bridle Path "by the recorded plats." There is no question that the route of Bridle Path claimed by the Defendants is not on Weingarten's or any other recorded plat.² Yet, in August of 2023, Defendant Board began to levee fines against Weingarten for rebuilding the fence to block the area of his property which had been used as part of the Bridle Path. In

¹ There is evidence in the record that Weingarten rebuilt the fence to block the Bridle Path in retaliation for the denial of his request to place wire fencing on the inside of the board fence around his property to prevent his dogs from escaping and to prevent stray dogs from entering his property. Whether the fence was rebuilt for this purpose is immaterial for the purposes of resolution of the motions for temporary injunctions.

² Article 2, Section 2.03 contains a provision allowing the recorded Bridle Paths to be relocated by the owner of tracts upon which they are located provided that a plan for such relocation is submitted to and approved by the LPOA. This provision requires the recording of a new perpetual easement. There is no evidence in the record to indicate prior owners of Weingarten's tract relocated the Bridle Path in accordance with this provision.

addition, the Board has threatened to impose a lien on his tract and to potentially seek foreclosure for any unpaid fines.

At the hearing held on March 22, 2024, Weingarten testified that the fines and the threat of liens encumbering his residence act as an immediate detriment to the market value of his home and potentially makes his home unmarketable if he were to attempt to sell his home. The Defendants contend the lack of access to the Bridle Path they have used for decades has caused irreparable harm to the property owners and businesses who desire to use the Bridle Path across Weingarten's tract.

2. FINDINGS AND CONCLUSIONS OF LAW

CR 65.04(1) states, "A temporary injunction may be granted during the pendency of an action on motion if it is clearly shown by verified complaint, affidavit, or other evidence that the movant's rights are being or will be violated by an adverse party and the movant will suffer immediate and irreparable injury, loss, or damage pending a final judgment in the action, or the acts of the adverse party will tend to render such final judgment ineffectual."

Interpreting CR 65.04, the Kentucky Court of Appeals found in *Maupin v. Stansbury*, 575 S.W.2d 695, 698 (Ky. App. 1978):

CR 65.04 sets out the substantive elements for temporary injunctive relief by providing that the remedy is warranted only where it is clearly shown that one's rights will suffer immediate and irreparable injury pending trial. The purpose of these requirements is to insure that the injunction issues only where absolutely necessary to preserve a party's rights pending the trial of the merits. Although the injunction is not to be substituted for a full trial on the merits, *Oscar Ewing Inc. v. Melton*, supra, it is clear that the party must show, either by verified complaint,

affidavit, or other proof, that such harm is likely to occur unless the injunction issues.

In order to show harm to his rights, a party must first allege possible abrogation of a concrete personal right. *Morrow v. City of Louisville, Ky.*, 249 S.W.2d 721 (1952). While the nature of this right may be, and usually is, disputed, it is clear that some substantial claim to a personal right must be alleged. Because a temporary injunction often has the effect of enforcing a mere claim of the right, doubtful cases should await trial of the merits. *Oscar Ewing, Inc. v. Melton*, supra. In addition to showing that personal rights are at stake, CR 65.04 further requires a clear showing that these rights will be immediately impaired. Thus, the remote possibility of some feared wrong in the future is insufficient to support a trial court's award of a temporary injunction. *Chapman v. Beaver Dam Coal Co., Ky.*, 327 S.W.2d 397 (1959). Rather, the element of "immediacy" contemplates that the parties show an urgent necessity for relief. *McCloud v. City of Cadiz, Ky.App.*, 548 S.W.2d 158 (1977). This means that "(a)n injunction will not be granted on the ground merely of an anticipated danger or an apprehension of it, but there must be a reasonable probability that injury will be done if no injunction is granted." *Hamlin v. Durham*, 235 Ky. 842, 32 S.W.2d 413, 414 (1930).

In addition to the above substantive aspects of CR 65.04, various equitable considerations must also be evaluated. For example, in any temporary injunctive relief situation the relative benefits and detriments should be weighed. *Kentucky High School Athletic Association v. Hopkins, Ky.App.*, 552 S.W.2d 685 (1977). Obviously, this entails a consideration of whether the public interest will be harmed by the issuance of the injunction or whether its effect will merely be to maintain the status quo.

A prescriptive easement can only be acquired by actual, hostile, open and notorious, exclusive, and continuous possession of the property for the uninterrupted statutory period of fifteen years. In *Ellington v Becraft*, 534 S.W.3d 785, 795 (Ky. 2017), the Kentucky Supreme Court held that acquiring a private easement by prescription must meet all the elements of adverse possession.³ The Kentucky Supreme's Court position stands in contrast to the more lenient requirements that prevail in the other modern interpretations of prescriptive easements. Where the existence of a prescriptive easement is contested, the trial

³ Citing, *Columbia Gas Transmission Corp. v. Consol of Kentucky, Inc.*, 15 S.W.3d 727, 730 (Ky. 2000) (internal citations omitted).

court is to make its determination and findings based upon the evidence and testimony presented to it at trial. *Id.* at 799.

This court, having given due consideration to the position of each party and the evidence presented, finds that each party has met their burden and the motions for injunctive relief are granted. There is a substantial question of whether Defendants can claim ownership to a prescriptive easement over that portion of Weingarten's tract used as part of the Bridle Path. Whether Defendants have established a prescriptive easement is a question for a fact-finder after a trial over the merits.

Should a fact-finder later determine the Defendants have not established a prescriptive easement for that portion of Weingarten's tract, then the imposition of fines, assessments, or liens for blocking or obstructing the Bridle Path is a violation of Weingarten's substantial rights and has unnecessarily caused an immediate and irreparable injury. Accordingly, Defendants shall not impose any fines or liens upon Weingarten or the tract owned by him until it is determined at a trial whether Defendant LPOA holds a prescriptive easement for this portion of his property. Any existing fines or liens held against Weingarten or the Weingarten's tract shall be removed pending the outcome of this matter. This court has not determined whether the imposition of fines, assessments, or liens for violation of the Declarations or Bylaws are within the scope of the Board's authority. Such a determination was unnecessary for the purpose of evaluating the merits of Weingarten's motion.

The Defendants, likewise, have met their burden under CR 65.04. Because there is a substantial question of whether Defendants have an easement by prescription across a portion of Weingarten's tract, there is also a question created of whether the re-construction of a previously removed fence constitutes a violation of the prohibition in the Declarations for blocking the Bridle Path. Given that the Bridle Path has been used for decades, including the unrecorded route through Weingarten's tract, and the re-constructed fence prevents the unrestricted use of the Bridle Path, Defendants have shown their rights have been violated and there exists an immediate and irreparable injury. Defendants, at their own expense, may remove the re-constructed fence to allow access through the Bridle Path. Weingarten shall not take any measures to prevent access to the Bridle Path, including the unrecorded portion that encroaches upon his tract until the conclusion of a trial on the merits to determine whether there exists an easement by prescription for the Bridle Path across the portions of his property subject to this suit.

In other words, both parties are returned to the status quo immediately prior to the initiation of their dispute concerning the installation of wire fencing.

It is ordered that both parties motions for a temporary injunction on the terms set forth above shall be and the same are hereby GRANTED.

CR 65.05(1) states, "No restraining order or temporary injunction shall be granted except upon the giving of a bond by the applicant, with surety, in such sum as the court or the officer to whom application is made deems proper, for the payment of such costs and damages as may be incurred or suffered by any

person who is found to have been wrongfully restrained or enjoined. The address of the surety shall be shown on the bond.” Accordingly, each party shall post a \$3,000.00 full cash bond to be deposited with the Oldham Circuit Clerk. Each party shall be their own surety. These injunctions do not take effect until the applicable bonds are posted.

**PLAINTIFFS’ MOTION FOR TEMPORARY INJUNCTION ON THE
“RESIDENT MEMBERS” AMENDMENT TO THE BYLAWS FOR BOARD OF
DIRECTORS ELECTIONS**

3. ESSENTIAL FACTS FOR THIS MOTION

Plaintiffs, Andrew Weingarten, Robert Vessels, Mark Suna, and David Poff, collectively seek an injunction to prevent the Board from amending the Bylaws to strip a member of their membership rights to seek a position on and be elected to the L’Esprit Property Owners Association’s Board of Directors for not living within the L’Esprit Property. The Board Defendants allowed members to vote on an amendment to the Bylaws at an annual member meeting on November 16, 2022. Plaintiffs charge that the Board Defendants, arbitrarily and capriciously, affirmed the amendment at their August 7, 2023 Board of Directors meeting. The amendment amended Article VII(3) of the Bylaws to (i) require members of the L’Esprit Property Owners Association to have a residence on the L’Esprit Property to be a “Resident Member” and (ii) declare that only “Resident Members” can be nominated to be on the L’Esprit Property Owners Association’s Board of Directors. However, the Articles, Bylaws, and/or Declaration do not contemplate

“Resident Members,” and the Bylaws previously stated, at Article VII(3), that even nonmembers could be solicited to be Directors on the Board of Directors.

It is the Plaintiffs’ argument that because Plaintiff Suna does not live within the L’Esprit Property, the LPOA and/or the Board Defendants arbitrarily stripped him, and another non-resident, property owner who sought nomination for the Board, of their rights to seek a position on and be elected to the L’Esprit Property Owners Association’s Board of Directors.

Defendants acknowledge Article VII of the Bylaws governs the election process for the Board but deny that the amendment of the Board election process was a change pertaining to the membership that is covered by the Declaration or the Articles. Defendants state that the amendment only contemplates who may be nominated for a Board of Director position and the procedure for elections and suggests the amendment does not determine who may be a member more generally. Moreover, Article VII as amended only requires one to have a residence in L’Esprit to be considered a Resident Member; it does not require one to live in that residence. Because this amendment is only a change to Board of Directors elections and does not regulate membership generally, it is a Bylaws issue that may be amended at a regular or special meeting of the Members, by a vote of the majority of a quorum of the members present in person or by proxy as provided for in Article VI of the Bylaws.

Defendants question whether the Plaintiffs have presented a substantial question upon which they would be likely to prevail, as set forth above, and as required for the issuance of a temporary injunction. Additionally, Defendants

challenge whether the Plaintiffs have presented proof of an immediate and irreparable injury as would be required for injunctive relief. The only Plaintiff which complains of an infringement on a right to seek election to the Board is Plaintiff Suna. Defendants point out that at the time of the last Board of Directors election in November of 2022, the amendment was not in effect and did not prevent Plaintiff Suna from seeking election. Plaintiff Suna would only be affected by the amendment if he sought a seat on the Board at a future election. Defendants point out that Plaintiff Suna has made no indication of an intention to seek a future election to the Board.

The L'Esprit Development was incorporated by Articles of Incorporation in 1986. These Articles state that each owner of a tract of the L'Esprit Property shall be a member of the corporation and that members have voting rights based upon the amount of acreage of the L'Esprit Property owned by each. In Article VIII, the Articles dictate that the affairs of the corporation shall be managed by a Board of Directors of not less than five (5), nor more than nine (9) members, which number shall be fixed by the by-laws of the corporation. The Articles require "by-laws" and rules to "regulate the business and affairs of the corporation so long as the same are not inconsistent with the provisions of these articles, and the recorded Declaration or the laws of the Commonwealth of Kentucky."⁴ An amendment to the Articles requires an affirmative vote of three quarters of authorized voters at a meeting duly called for that purpose.

⁴ Articles of Incorporation, Article XIII.

The L'Esprit Development is subject to the current Declaration of Easements, Covenants, and Restrictions passed in 1995. The Declaration, in Article 5, defines membership and voting rights in the same manner as the Articles. There is no mention in either the Articles or the Declaration of the procedures for the election of members to the Board.

The Bylaws of the L'Esprit Development, immediately prior to the amendments complained of herein, were last amended in 2018. The election of members of the Board are governed by Article VII of the Bylaws. Under Article VII(1) "Ballots", the election of Directors shall be by written ballot at each Annual Meeting or any special meeting called for the purpose of electing Directors. Each member may cast as many votes as they are entitled to cast under the Articles. The nominees receiving the most votes are elected. Under Article VIII(3) "Nominees" of the 2018 Bylaws, the Nominating Committee could solicit applications from among the members or nonmembers.

The "Nominees" provision was amended by the members at their annual meeting in November of 2022 where the minutes reflect the majority of a quorum of the members present in person or by proxy voted in favor of the amendment. The "Nominees" provisions was later adopted by the Board at a meeting held in August of 2023. Article VIII(3) now reads "The Nominating Committee may solicit applications for nomination from among Resident Members. A member shall be considered a Resident Member if they have a residence with the association." It is this provision that Plaintiffs contend was passed in violation of Plaintiff Suna's rights.

Article XI of the Bylaws allow for their amendment, at a regular meeting or a special meeting of the members, by a vote of the majority of a quorum of the members present in person or by proxy. The Bylaws amendment process is subject to a limitation on the amendment of any provision which is covered by the Articles, subjecting those amendments to the requirements as provided in the Articles.

4. FINDINGS AND CONCLUSIONS OF LAW

As quoted above, *Maupin v. Stansbury*, 575 S.W.2d at 698, holds in order to show harm to his rights, a party must first allege possible abrogation of a concrete personal right. While the nature of this right may be, and usually is, disputed, it is clear that some substantial claim to a personal right must be alleged. In addition, an injunction will not be granted on the ground merely of an anticipated danger or an apprehension of it, but there must be a reasonable probability that injury will be done if no injunction is granted.

Maupin summarized how a court should view applications for temporary injunctive relief: “Applications for temporary injunctive relief should be viewed on three levels. First, the trial court should determine whether plaintiff has complied with CR 65.04 by showing irreparable injury. This is a mandatory prerequisite to the issuance of any injunction. Secondly, the trial court should weigh the various equities involved. Although not an exclusive list, the court should consider such things as possible detriment to the public interest, harm to the defendant, and whether the injunction will merely preserve the status quo.

Finally, ***the complaint should be evaluated to see whether a substantial question has been presented.*** If the party requesting relief has shown a probability of irreparable injury, presented a substantial question as to the merits, and the equities are in favor of issuance, the temporary injunction should be awarded. However, the actual overall merits of the case are not to be addressed in CR 65.04 motions.” [Emphasis added].

In general, the standard for a preliminary injunction is essentially the plaintiff must show a likelihood of success on the merits. In order for a preliminary injunction to issue, it is of prime importance that the petitioner demonstrate a likelihood of success on the merits. This factor is usually given particularly heavy weight in deciding a motion for preliminary injunction. Indeed, if a party seeking a preliminary injunction is unable to show a substantial likelihood of success on the merits, the court need not consider the other requirements for obtaining an injunction. CJS § 55 Injunction.

It is this courts’ determination that Plaintiffs have not presented a substantial question or the likelihood of success at trial on the merits. While Plaintiffs complain the passage of the amendment of the Bylaws⁵ arbitrarily and capriciously infringes upon the voting rights of Plaintiff Suna and others, this court disagrees. The Articles and the Declaration both mention voting rights of members, not any right to be nominated or serve on the Board. The court agrees with the Defendants and finds, in this initial evaluation, that the amendment

⁵ The amendment to limit nominations to the Board of Directors to members who have a residence within the L’Esprit Development.

only contemplates who may be nominated for a Board of Director position and the procedure for elections and suggests the amendment does not determine who may be a member more generally.

The Articles specifically anticipate bylaws to govern the election of a Board⁶ and definitively requires bylaws and rules to be adopted to regulate the business and affairs of the L'Esprit POA corporation.⁷

Moreover, the Bylaws are specifically amendable under Article XI of the Bylaws at a regular meeting or a special meeting of the members, by a vote of the majority of a quorum of the members present in person or by proxy. The minutes and the record reflect the vote to amend the Bylaws was done in accordance with the proper procedure as required by the Bylaws.

Plaintiff Suna's voting rights under the Articles are not affected by the amendment- only his opportunity to seek a position on the Board because he does not own residence in the L'Esprit Development. A motion on behalf of Plaintiffs that a temporary injunction be issued in this matter in accordance with the prayer of the complaint, was heard by the court. The court has considered the arguments of counsel. For the reasons set forth above, it is ordered that said motion is DENIED.

**PLAINTIFFS' MOTION FOR TEMPORARY INJUNCTION TO ALLOW THEM
ACCESS INSPECT ALL BOOKS, RECORDS, AND PAPERS OF THE LPOA,
THE BOARD, INCLUDING DETAILED AND ITEMIZED BILLS FOR LEGAL
SERVICES AND SOCIAL MEDIA ACCOUNTS.**

⁶ Articles of Incorporation, Article VIII.

⁷ Articles of Incorporation, Article XIII.

Finally, Plaintiffs seek a temporary injunction to allow them to have access to all books, records, and papers of the LPOA. Defendants acknowledge the Plaintiffs are entitled to inspect the books, papers, and records of the LPOA under Article X of the Bylaws and have established a procedure for Plaintiffs to take advantage of this right. No substantial question has been raised by the complaint and there is no proof in the record Defendants have denied them access to inspect, books, papers, and records of the LPOA.

Plaintiffs also seek access to detailed and itemized bills for legal services incurred by the LPOA. It should be noted that Plaintiff Mark Suna is involved in four or more lawsuits involving the L'Esprit Property Owner's Association and/or its Board, including this complaint and other complaints for the denial of approval for a subdivision development for property he owns in the L'Esprit development. There exists an attorney client privilege between the LPOA and/or the Board and their attorneys to which Plaintiffs are attempting to circumvent under the guise of seeking information related to "determining how the L'Esprit Property Owners Association and/or the Board Defendants are managing without regard to the Articles, Bylaws, and Declaration." Plaintiffs make the same demand to review detailed billing records to ascertain "whether the Board Defendants are inappropriately using L'Esprit Property Owners Association funds to target them with the law." The Defendants advance the similar argument with regard to communications with the social media director.

It is the court's opinion Plaintiffs misunderstand CR 65.04 and the fundamental nature of injunctive relief. Temporary injunctions are an extraordinary equitable remedy and are not to be used except for great and irreparable mischief. *Commonwealth of Kentucky v. Mountain Truckers Association, Inc.*, 683 S.W. 260, 263 (Ky. App. 1984). The information the Plaintiffs seek to inspect amount to discovery and evidentiary issues under the Civil Rules and the Rules of Evidence- not substantial questions requiring the balancing of equities in order to prevent an immediate or irreparable harm.

As stated, Plaintiffs are entitled to inspect the records, papers, and documents of the LPOA and the Board. The Court has heard no persuasive evidence that Defendants have prevented Plaintiffs' access to their records, papers, and documents and a temporary injunction is unnecessary. The court will not allow a motion for injunctive relief to be used as a "strong arm of equity" to circumvent the normal procedures to investigate claims and acquire evidence under the Civil Rules or the Rules of Evidence.

A motion on behalf of Plaintiffs that a temporary injunction be issued in this matter in accordance with the prayer of the complaint, was heard by the court. The court has considered the arguments of counsel. For the reasons set forth above, it is order that said motion is DENIED.

DATE: _____



Judge, Henry Circuit Court