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2012 IL App (3d) 110233-U

Order filed March 14, 2012

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2012

LESTER LAIR,	) Appeal from the Circuit Court
	) of the 14th Judicial Circuit,
Plaintiff-Appellant,	) Mercer County, Illinois,
	)
v.	) Appeal No. 3-11-0233
	) Circuit No. 10-MR-11
JEFF FRIEDEN, AMY WINKLER, and THE	)
VILLAGE OF ALEXIS,	) Honorable
	) Gregory G. Chickris,
Defendants-Appellees.	) Judge, Presiding.

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JUSTICE O'BRIEN delivered the judgment of the court.  
Presiding Justice Schmidt and Justice McDade concurred in the judgment.

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**ORDER**

- ¶ 1 *Held:* Judgment in favor of the defendants in a plaintiff's action to quiet title was affirmed on appeal because the trial court's determination of the true property line between the parties' property, based on competing land surveys, was not against the manifest weight of the evidence. Also, the trial court's denial of mandamus relief to the defendant was upheld on appeal because the plaintiff failed to show that the village zoning officer's interpretation of an village fence ordinance as not applying to replacement fences was a clear abuse of discretion involving manifest injustice.
- ¶ 2 Plaintiff, Lester Lair, brought suit against the defendants, Jeff Frieden and Amy Winkler,

now known as Amy Frieden, alleging that the parties were neighboring property owners and part of the Friedens' fence was on Lair property. Lair also brought suit against the defendant, the Village of Alexis, seeking enforcement of a village ordinance pertaining to fences. The trial court ruled in favor of all the defendants, and Lair appealed. We affirm.

¶ 3

### FACTS

¶ 4 The Lairs and the Friedens were neighbors in the Mercer Addition to the Village of Alexis, sharing a common boundary line. Since approximately 1988, there was a chain link fence between the two yards. The Friedens acquired their property in 2003. Lair and his son, David Lair, acquired the property immediately south as joint tenants in 2008. In 2008, the Friedens sought to replace the chain link fence with a plastic panel fence. After removing the chain link fence, the Friedens began to install the plastic posts for the new fence and accidentally severed an underground dog fence that David Lair had installed. The Friedens paid for the repair of the dog fence, but a dispute arose as to whether the new fence was being erected on Lair property.

¶ 5 Prior to installing the plastic panel fence, the Friedens contacted the village clerk regarding the fence, because Village of Alexis Ordinance No. 534 required a construction permit for all new fences. Ordinance No. 534 provides that a permit is required for the erection of all new fences. Village of Alexis Ordinance No. 534(1)(a) (approved Oct. 13, 1997). Don Sperry, the village's zoning officer, informed the Friedens that no permit was required because they were replacing an existing fence, not installing a new fence. The ordinance also required a two-foot setback in side and rear yards, unless the parties agreed to place the fence on the property line (Village of Alexis Ordinance No. 534(1)(e)), but Sperry also opined that the setback provisions

of the ordinance did not apply to the replacement fence.

¶ 6 At this time, each party commissioned a survey. Lair's survey was performed by Martin J. Herman, a licensed land surveyor. Herman had previously noted that if he performed an open end traverse of the Mercer Addition, his result was different depending at which point he began the traverse. Thus, Herman performed a closed loop traverse around the outer boundaries of the Mercer Addition, based upon the original plat. When Herman could not get the traverse to meet up with the starting point, he prorated each lot to allow for an overrun. The Friedens' survey was performed by Brunner, Cooper and Zuck (BCZ), a licensed surveyor firm. Those surveyors utilized an open traverse method using known points. The surveys varied by approximately seven inches, with Herman's survey placing Lair's northern boundary further north than the boundary found by BCZ.

¶ 7 Both surveys indicated that a concrete patio that had been poured by the Friedens in 2009 extended south across the property line between the parties. Thus, the Friedens had approximately 30 inches removed from their patio. Lair approached the village council and requested that Ordinance No. 534 be enforced. The village took no action.

¶ 8 The Friedens hired a builder to complete the vinyl panel fence. Even though they believed that their survey established the correct boundary line, the Friedens had the fence built on the lot line as determined by Lair's survey. Jeff Frieden testified that he showed Lair the proposed fence location and Lair did not object. Jeff testified that he also showed David Lair the proposed location of the fence, and David was only concerned that the fence not be on Lair property.

¶ 9 Lair filed his complaint, seeking to quiet title in Count I, alleging that the fence and

Frieden's concrete patio encroached on his property. In Count II, Lair sought mandamus relief, seeking to order the village to enforce Ordinance No. 534. Prior to trial, the Friedens retained the surveying firm of Kenneth E. Schrader and Associates to review the competing surveys. Both surveyors at the Schrader firm agreed with the methodology utilized by BCZ and criticized the methodology used by Herman. The Schrader surveyors opined that Herman's survey created more problems than it resolved in that it ignored many prior survey markers, ignored historical pins and markers, and used a starting point outside of the Mercer Addition.

¶ 10 The trial court found in favor of the Friedens, concluding that the boundary line was that determined by the BCZ survey, and the vinyl panel fence and concrete patio lay entirely on the Friedens' property and did not encroach onto the Lair property. The trial court also found in favor of the village, finding that the ordinance did not require the issuance of a building permit because the fence was a replacement fence, which was exempted from the ordinance. The trial court also found that the placement of the replacement fence did not violate the two foot setback requirement of the ordinance because it was a reasonable interpretation of the ordinance to find that the setback did not apply to replacement fences. In addition, the trial court found that the Lairs agreed to the placement of the fence. The trial court noted that a mandamus action would not lie against the village absent a showing of a clear abuse of discretion, and the village had immunity for any failure to enforce the provisions of its ordinance. Lair appealed.

¶ 11

#### ANALYSIS

¶ 12 Lair argues that the trial court erred in finding that the BCZ survey established the true property line, contending that his surveyor, Herman, correctly established the true property line. Lair also contends that the replacement fence violated the village ordinance. Lastly, Lair argues

that the Local Governmental and Governmental Employees Tort Immunity Act , 745 ILCS 10/1-101 et seq, did not preclude an action brought pursuant to the Mandamus Act, 735 ILCS 5/14-101 et seq.

¶ 13 Lair disputes the location of the property line between his property and the Friedens' property. Both parties presented surveys, which used different methodologies, to establish the property line. The trial court's determination of the correct property line was a question of fact, and our review is limited to whether that determination was against the manifest weight of the evidence. *Hill v. Meister*, 133 Ill. App. 2d 678 (1971).

¶ 14 Lair argues that the provisions of the Illinois Administrative Code required the surveyors to perform a closed loop traverse, which was the method followed by his surveyor, Herman. The Illinois Administrative Code provides that surveying must be done in accordance with the accepted methods of surveying theory, practice and procedures. 68 Ill. Adm. Code 1270.56(b)(7) (2007). The surveyor must distribute any excess or deficiency, when the survey is of a divisional part of a larger tract, using the surveyor's professional judgment. 68 Ill. Adm. Code 1270.56(b)(7)(D) (2007). Lair argues that accepted practice required Herman to perform a closed loop traverse after he could not resolve discrepancies using the open end traverse survey method. Lair argues that the results reached by BCZ and Schrader were not correct because the minimum standards of surveying practice required them to perform a closed loop traverse. The Friedens argue that BCZ performed its survey in accordance with the standard practice, locating many prior survey markers. In addition, the surveyors from Schrader agreed with the conclusions of BCZ and disagreed with Herman's methodology.

¶ 15 The trial court had before it the testimony of the two original surveyors, Herman and

BCZ, along with the testimony of the two surveyors of the Schrader firm regarding the boundary line and the methodologies they all used to determine the boundary line. The trial court noted the Schrader firm's criticism of Herman's methodology, including the fact that Herman's survey created more problems than it resolved, ignored prior survey markers, ignored historical pins and markers, and used a starting point outside of the Mercer Addition. The trial court concluded that the boundary line established by BCZ, and confirmed by Schrader, was the actual boundary line between the parties' property. We find that the trial court's conclusion was not against the manifest weight of the evidence. Since there was no encroachment, we affirm the trial court's judgment in favor of the Friedens on the quiet title claim.

¶ 16 Lair argues that the Friedens' construction of the vinyl privacy fence violated Village of Alexis Ordinance No. 534. The Friedens point out that the ordinance is silent on the issue of replacement fences. The trial court found that the zoning officer had interpreted the ordinance as exempting replacement fences from the permit requirement, that the Friedens' fence was in fact a replacement fence, and the zoning officer's interpretation and application of the exemption for replacement fences was a reasonable interpretation of the ordinance. The Village argues that the trial court's decision was not a clear abuse of discretion involving manifest injustice by the Village or its officials.

¶ 17 Mandamus is an extraordinary remedy, available to enforce a public officer's official duties when no exercise of discretion is involved. *1350 Lake Shore Assocs. v. Healey*, 223 Ill. 2d 607 (2006). Mandamus is also an appropriate remedy to prevent a discretionary power from being used arbitrarily, resulting in a manifest injustice. *Guzzo v. Snyder*, 326 Ill. App. 3d 1058 (2001). Generally, mandamus cannot be used to compel a public officer's exercise of discretion

for a particular result. *Arthur Weil & Co. v. Board of Education*, 49 Ill. App. 3d 649 (1977).

However, mandamus will lie when the exercise of discretion is inconsistent with the applicable law. *Guzzo*, 326 Ill. App. 3d at 1063. Mandamus also requires a right to relief, a duty to act by the public officer, and authority to comply with the writ. *1350 Lake Shore Assocs.*, 223 Ill. 2d at 614. We will only reverse a trial court's decision to grant or deny mandamus if it is against the manifest weight of the evidence. *1350 Lake Shore Assocs.*, 223 Ill. 2d at 614.

¶ 18 The trial court denied mandamus relief, concluding that the zoning officer's interpretation of Ordinance No. 534 as not applying to replacement fences was a reasonable interpretation of the ordinance and not a clear abuse of discretion involving a manifest injustice. We find that the trial court's conclusion was not against the manifest weight of the evidence. The zoning officer had discretion to interpret the ordinance, and there was no evidence that he used that discretion arbitrarily or inconsistently.

¶ 19 Lair also argues that the Local Governmental and Governmental Employees Tort Immunity Act does not preclude an action brought pursuant to the Mandamus Act. The Friedens argue that the trial court did not make such a ruling. Since we have found that Lair was not entitled to mandamus relief in this action, we will not address the effect of the Local Governmental and Governmental Employees Tort Immunity Act on mandamus actions.

¶ 20 CONCLUSION

¶ 21 The judgment of the circuit court of Mercer County is affirmed.

¶ 22 Affirmed.