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2013 IL App (3d) 120525-U

Order filed March 27, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

RANDY G. FONTENOY,)	Appeal from the Circuit Court
)	of the 14th Judicial Circuit,
Plaintiff-Appellee,)	Mercer County, Illinois,
)	
v.)	Appeal No. 3-12-0525
)	Circuit No. 11-CH-6
KEN PARK,)	
)	Honorable Jeffrey W. O'Connor,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justices Carter and Holdridge concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's finding that defendant intentionally interfered with plaintiff's enjoyment of plaintiff's land is not against the manifest weight of the evidence. The trial court's award of damages in the amount of \$24,870.06 is also not against the manifest weight of the evidence. Affirmed.

¶ 2 Plaintiff, Randy Fontenoy, brought this action, claiming that defendant, Ken Park, improperly interfered with plaintiff's enjoyment of a tract of land. The circuit court of Mercer County entered an order in plaintiff's favor, finding that defendant "intentionally destroyed"

plaintiff's method of ingress and egress from plaintiff's property and awarded plaintiff a judgment in the amount it would cost to restore the property "to satisfactory utility; *** \$24,870.06."

Defendant appeals claiming, *inter alia*, that certain findings of fact were against the manifest weight of the evidence and the amount of damages awarded is also against the manifest weight of the evidence.

¶ 3

BACKGROUND

¶ 4 This dispute involves an express easement that runs over Randy's land. Randy owns the servient estate and Ken owns the dominant estate. The complaint alleges that a prior owner of Randy's property granted the express easement of ingress and egress to defendant so that defendant could get to his own property. A driveway existed which allowed this ingress and egress. The complaint continues that when Randy bought his property, he had the lot surveyed and discovered that the driveway was not located within the bounds of the easement. Randy tore down a vacant house on the property, built a new house and, at his own expense, created a new driveway which both properties used at the correct location of the easement. The complaint claims that Ken had "dug up" the new driveway which "significantly interfered with" Randy's enjoyment of his property. This, Randy claimed, violated Ken's duty as the dominant estate owner to maintain the easement in good repair while not interfering with the servient estate owner's enjoyment of his property.

¶ 5 Ken filed an affirmative defense, alleging that his "actions were justified because he has a duty to maintain the easement, and to make it safe." The matter proceeded to a bench trial.

¶ 6 Randy testified that he resides at 1321 263rd Street, Sherrard, which is the property at issue in this dispute. He purchased the property in August of 2009 and was aware of the

easement when he did so. Upon purchasing the property, Randy talked to Ken and explained that the driveway used by both properties did not sit within the bounds of the easement. Randy told Ken that he planned to move the driveway so it sat on the easement. Ken responded that Randy would have to pay for the change. Randy moved the driveway so that it sat on the easement, noting it cost him "every bit of thirty-five hundred dollars" to do so.

¶ 7 Randy continued, noting that he laid stone on the driveway and then used "sealer which seals your driveway up." He had experience doing this type of work for Verplaetse Excavating before retiring from his job as a union laborer. He heard no complaints from Ken at the time and was never asked by Ken to use a different type of stone. Randy completed the driveway in "the first part of April" of 2010.

¶ 8 Randy stated that on April 10, 2010, Ken "cored it all out." He explained that by coring it out, he meant to indicate that Ken used a mini-excavator and a John Deere tractor to take "all the dirt and all the rock and everything" on the driveway down "a good thirty inches."

¶ 9 Randy stated that after he completed his work on the driveway, Randy could get "turned around right in the driveway" and drive "back out again" from his house. He is unable to do so after Ken's changes to the driveway.

¶ 10 Randy discussed estimates that were entered into evidence, explaining that they included charges for a retaining wall to hold all the excess rock Ken brought into the site. Randy acquired three estimates from three different contractors to "fix the entire easement to make it safe" in his opinion. The estimates all varied in amounts from \$19,000 to \$31,000. Randy opined that since Ken stripped the dirt away near Randy's house, it is not possible to "raise the driveway back up" without a retaining wall.

¶ 11 Randy noted he tried to stop Ken from tearing up the driveway. He called the Mercer County sheriff's department, who replied that they could not intervene as this is a civil matter. Randy requested that Ken stop tearing up the driveway when Ken told him to "talk to your lawyer." For the year and a half since Ken completed his modifications, Randy has had to use three-point turns to back out of his property.

¶ 12 Ken Park testified he is 36 years old and a laborer at John Deere. He worked for Joe Sedlock in the landscaping business for about four years. He has owned his property since 2003.

¶ 13 Ken noted he had concerns with Randy's construction of the driveway as he "didn't notice any base being put down." He was not sure if an ambulance or fire truck could get to his property if needed. He witnessed a "tandem" slip off the driveway during Randy's construction, which led him to worry. Ken acknowledged that he did not "convey any concerns" to Randy directly about the construction of the driveway. Instead, he "conveyed that through my attorney."

¶ 14 Ken noted he did all the excavation work himself. He did not see any base or the proper stone on the driveway when doing the excavation work. Ken concluded his direct testimony, noting that he also had concerns regarding the slope of the driveway Randy created. Finally, Ken noted he has seen Randy pull in and out of his property many times and has never seen him need to make a three-point turn to do so.

¶ 15 On cross-examination, Ken noted he never traveled across the driveway Randy built. He acknowledged seeing a large pile of rock on Randy's property, but never saw any of that rock in the driveway when doing his excavation. Ken further acknowledged that he was aware Randy's work was not complete when the tandem slipped off the driveway.

¶ 16 Ken noted that he believed two-inch stone was the proper kind of rock to use as the base

for the driveway. He then reviewed a receipt from Collinson Stone Company, showing that 30,200 pounds of "2in. Stone" was purchased for the "Randy Font." job on March 1, 2010. A second receipt dated the same day appears in the record for an additional 30,400 pounds of "2in. Stone" for the "Randy Font." job. Ken explained that these receipts do not mean Randy put two-inch stone in the base of the driveway, only that he has "a receipt for two-inch stone, that does not mean that he used that laying out the new" driveway.

¶ 17 In response to questions from the trial judge, Ken indicated he "dropped" the driveway down 18 inches near Randy's property on advice of his counsel and a man named Don Duncan, who had expertise in the area of excavating. Ken noted he paid Duncan to haul away the excavated material and, as such, assumed Duncan made some money on the project.

¶ 18 The trial court found Ken's behavior "outrageous." The judge drew attention to Ken's own testimony regarding the two-inch stones, noting that "the fact you could blindly excavate that entire lane and not see one paving stone, you lack credibility in that regard."

¶ 19 Ultimately, on January 5, 2012, the trial court entered judgment in favor of Randy in the amount of \$24,870.06. Ken filed a timely posttrial motion to reconsider, which the trial court denied on May 29, 2012. This appeal followed.

¶ 20 ANALYSIS

¶ 21 Defendant attempts to raise three issues on appeal. Initially, defendant mentions that the trial court "should balance the landowners' competing rights." Defendant then claims that "the trial court's liability findings, particularly that defendant committed an 'act of revenge,' were against the manifest weight of the evidence." Finally, defendant asserts that the amount of the judgment is contrary to the manifest weight of the evidence.

¶ 22

A. Competing Rights

¶ 23 We note above that defendant attempts to raise three issues on appeal and that he mentioned competing rights of landowners as we find no actual argument or claim of error in this section of defendant's argument to this court. While defendant cites numerous cases, which discuss the relationship between dominant and servient estates, he makes no argument as to how these cases relate to any error in this case.

¶ 24 This court is entitled to have issues clearly defined with pertinent authority cited and cohesive arguments presented. *Stenstrom Petroleum Services Group, Inc. v. Mesch*, 375 Ill. App. 3d 1077, 1098 (2007) (quoting *Obert v. Saville*, 253 Ill. App. 3d 677, 682 (1993)). Accordingly, a party forfeits an argument by failing to develop it. *Velocity Investments, LLC, v. Alston*, 397 Ill. App. 3d 296, 298 (2010); Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013).

¶ 25

B. Findings of the Trial Court

¶ 26 Defendant argues that certain trial court's findings are against the manifest weight of the evidence. Specifically, defendant argues that the evidence failed to show: (1) that his construction of the driveway burdened plaintiff's use of his property; (2) that he acted out of malice or out of revenge; or (3) that his work destroyed plaintiff's property.

¶ 27 "A finding is against the manifest weight of the evidence only if the opposite conclusion is clearly evident or if the finding itself is unreasonable, arbitrary, or not based on the evidence presented. [Citation.] Under the manifest weight standard, we give deference to the trial court as the finder of fact because it is in the best position to observe the conduct and demeanor of the parties and witnesses. [Citation.] A reviewing court will not substitute its judgment for that of the trial court regarding the credibility of witnesses, the weight to be given to the evidence, or the

inferences to be drawn." *Best v. Best*, 223 Ill. 2d 342, 350-51 (2006).

¶ 28 Sufficient evidence exists in the record to support the trial court's findings. As such, we cannot say they are against the manifest weight of the evidence.

¶ 29 Plaintiff testified that he obtained defendant's permission to relocate the driveway to its proper geographic area as identified by the survey conducted when defendant purchased his property. After doing so, plaintiff was able to pull into his garage and back out without engaging in any "point" turns. Once defendant modified the driveway, plaintiff had to use three or four-point turns when leaving his property. While defendant testified that he has never seen plaintiff have to use such turns, the trial court specifically found defendant to be less than a credible witness. Plaintiff noted that the series of turns were necessary as defendant's excavation caused an 18 to 22-inch drop-off directly outside plaintiff's garage. Plaintiff further noted that defendant laid a large pipe under the new driveway. To install the pipe, defendant built up an area three feet by dumping rock on plaintiff's property. Undoubtedly plaintiff's testimony is sufficient to support the trial court's finding that defendant materially changed the nature of the easement and burdened plaintiff's enjoyment of his property. Defendant argues that the approximate two-foot change in grade to plaintiff's property was not a material change to the easement. Like the trial judge, we disagree.

¶ 30 Moreover, sufficient evidence exists to support the trial court's finding that defendant acted out of malice. Defendant acknowledged never actually driving on the newly constructed driveway before deciding to tear it up. While he claimed to engage in the excavating due to concerns associated with a tandem truck slipping off the driveway, he further acknowledged that incident occurred before plaintiff completed construction and he was aware of no incidents

following plaintiff's completion of the driveway. Defendant also claimed to obtain advice from his lawyer and Don Duncan regarding altering plaintiff's improvements. Part of that advice included the belief that 2-inch stone was the proper material to be used as a foundation.

Evidence supports the trial court's finding that plaintiff used more than 60,000 pounds of 2-inch stone to complete his improvements to the driveway, yet defendant claims to have seen none of it.

¶ 31 Furthermore, plaintiff sought and received defendant's permission to move the driveway within the bounds of the recorded easement. Defendant admits that he monitored plaintiff's work, yet voiced no concerns to plaintiff, whatsoever, regarding the quality of construction nor the progress of the project. Defendant further admits that he never sought plaintiff's permission to tear up plaintiff's recently-completed project, and refused to talk to plaintiff about the matter when plaintiff inquired as to why defendant was tearing up the driveway. These facts make it impossible for us to say the trial court's finding, that defendant acted out of malice or as an act of revenge on plaintiff, is against the manifest weight of the evidence.

¶ 32 It has long been held that "the owner of an easement cannot make material alterations in the character of the easement if the alteration would place a greater burden on the servient estate or interferes with the use and enjoyment of the servient estate." *Professional Executive Center v. LaSalle National Bank*, 211 Ill. App. 3d 368, 380-81 (1991). The nature of the easement "cannot be changed by either party without the consent of the other." *Sullivan v. Bagby*, 335 Ill. 192, 195-96 (1929). Defendant acknowledges plaintiff sought defendant's permission before beginning work on the driveway. Defendant further acknowledges he never sought plaintiff's permission before destroying plaintiff's work.

¶ 33

C. Amount of Damages

¶ 34 Finally, defendant argues that the trial court's award of \$24,870.06 is "contrary to the manifest weight of the evidence." We find ample evidence in the record to support the award and, therefore, hold it is not against the manifest weight of the evidence.

¶ 35 Plaintiff testified that he had experience doing excavation work for Verplaetse Excavating before retiring as a laborer in Local 309. He built walls, poured concrete, set pipes, built roads and graded roads while working as a laborer for 20 years. He had experience with the materials used for his construction of the driveway from his days as a laborer.

¶ 36 Plaintiff further testified that he obtained estimates to repair damage done by defendant to the driveway. In his opinion, a wall needed "to be built to actually hold the rock in place" that defendant dumped at the site. A retaining wall was necessary, according to plaintiff, as defendant "cut down so low he took all the dirt out of there which if you would have cut it out a foot or so deep then dumped rock in that crevice, you wouldn't have lost your rock because you would have something holding it." Given defendant's alteration of the area, plaintiff opined it is necessary to build a retaining wall. Failing to do so would result in rock "sliding down the hill," encumbering his ability to enjoy his property.

¶ 37 Plaintiff obtained three estimates to complete the work he believed necessary to repair the driveway. One estimate totaled \$19,500 from Outdoor Innovations, a second totaled \$24,870.06 from Landmark Landscaping, and a third totaled \$31,000 from Meyer Landscaping. All of the estimates contained retaining walls. Plaintiff specifically testified that these walls were necessary to restore the driveway to a condition in which he could enjoy it.

¶ 38 Defendant acknowledges that \$24,870.06 "precisely coincides with an estimate from

Landmark Landscaping" but takes issue with the trial court's award for numerous reasons. First, defendant argues that the trial court's order imposes "no requirement that Randy use the judgment for such construction." Bootstrapping that argument, defendant claims that the award provides "sums for speculative future work to improve Randy's property to a condition that did not exist prior to Ken's construction of a new drive."

¶ 39 While defendant complains that no evidence exists indicating that construction of the walls "were necessary to allow Randy the use and enjoyment of his property," plaintiff's testimony belies that assertion. Defendant characterizes plaintiff's testimony as "his own personal opinion" and claims no "competent evidence (as opposed to Randy's non-professional unsupported opinion) was presented to the trial court to show the necessity of having retaining walls."

¶ 40 However, defendant has cited no authority to support his allegation that plaintiff's testimony is somehow insufficient to prove it is necessary to build retaining walls to return the property to a state where plaintiff can again enjoy it. As noted above, this court is entitled to have issues clearly defined with pertinent authority cited and cohesive argument and research. *Stenstrom Petroleum Services Group, Inc.*, 375 Ill. App. 3d at 1098 (quoting *Obert*, 253 Ill. App. 3d at 682). By failing to cite to any authority to support his assertions, defendant has forfeited the argument that plaintiff's testimony alone is insufficient to support the amount of damages awarded by the trial court. *Velocity Investments, LLC*, 397 Ill. App. 3d at 298; Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). Forfeited or not, defendant's argument lacks the slightest scintilla of merit. The evidence established that defendant, without even consulting with plaintiff, made significant changes to the grade of the servient estate. Plaintiff also proved that retaining walls

were necessary to correct the problem created by defendant. Plaintiff provided three different estimates from landscapers. The trial court picked the middle one. The trial court awarded no damages above the estimated cost of repairs, such as damages for plaintiff's loss of quiet enjoyment. Looking at the totality of the evidence, the judgment is relatively modest.

¶ 41 Moreover, defendant cites no authority (undoubtedly because there is none) to support his assertions that failure to include in the judgment a "requirement that Randy use the judgment for such construction" renders the judgment improper. As such, defendant has forfeited that argument. Defendant also has provided no citation to authority to support his argument that the judgment is improper as it effectively allows plaintiff to improve the "property to a condition that did not exist prior to Ken's construction of a new drive." That argument is also forfeited.

¶ 42 **CONCLUSION**

¶ 43 For the foregoing reasons, the judgment of the circuit court of Mercer County is affirmed.

¶ 44 Affirmed.