2015 IL App (3d) 140785-U

Order filed August 21, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

BRIAN C. HOFBAUER,	)	Appeal from the Circuit Court
	)	of the 21st Judicial Circuit,
Plaintiff-Appellant,	)	Iroquois County, Illinois,
	)	
v.	)	Appeal No. 3-14-0785
	)	Circuit No. 12-CH-44
MARSHA S. HOFBAUER,	)	
	)	Honorable Adrienne W. Albrecht,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Presiding Justice McDade and Justice O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the trial court's grant of summary judgment in favor of defendant. Based on the record before this court, the plaintiff has no license or easement to defendant's property. We further find this appeal frivolous and therefore grant defendant's motion for sanctions.

¶ 2 Plaintiff, Brian C. Hofbauer, and defendant, Marsha S. Hofbauer, own neighboring properties. For approximately 20 years, plaintiff leased defendant's land as a tenant farmer. Plaintiff also used defendant's land during the term of his lease to access a portion of his own

land, which was on the north side of a drainage ditch running through his property. In 2010, defendant terminated plaintiff's lease. In May 2012, plaintiff filed a complaint for declaratory judgment and injunction, seeking a permanent right to use defendant's land to access his own. Plaintiff claimed the termination of the lease landlocked a portion of his land, which entitled him to an easement by implication or, in the alternative, an irrevocable license to use defendant's land. In April 2014, defendant filed a motion for summary judgment, which the trial court granted. Plaintiff promptly filed a motion to reconsider, which the trial court denied.

¶ 3 Plaintiff appeals, arguing: (1) the defendant caused plaintiff's land to be landlocked by terminating his lease; (2) he had an irrevocable license to use defendant's land and therefore the trial court erred by granting summary judgment in defendant's favor; (3) the trial court's refusal to follow *Martin v. See*, 232 Ill. App. 3d 968 (1992), and *Wilder v. Finnegan*, 267 Ill. App. 3d 422 (1994), when denying his motion to reconsider violates *stare decisis*; (4) the defendant granted plaintiff a license to use her land by giving him permission to use it; (5) his property is landlocked in spite of the fact that there are other means of access to it; and (6) revocation of plaintiff's license to use defendant's land constitutes a fraud upon him.

¶ 4 Defendant counters these arguments and further argues that sanctions should be imposed on plaintiff for filing a frivolous appeal. We affirm the trial court's judgment and grant defendant's request for sanctions.

¶ 5 BACKGROUND

¶ 6 Plaintiff purchased his property in 1999. A drainage ditch runs roughly east to west through his land, separating the property into two portions. A bridge 15 feet wide traverses the ditch. Plaintiff can utilize the bridge to access the northern portion of his parcel. Plaintiff crosses the bridge with tractors, mowers, and his pickup truck, but cannot get some of his larger

farm machinery over the bridge—namely a 12-row planter, which he possessed when he purchased the property.

¶ 7 Defendant owns land immediately north of plaintiff's property. Defendant has owned the land since 1984 when her husband, plaintiff's brother, died. Plaintiff leased defendant's land for farming from approximately 1988 to 2008, after which defendant leased the land to a third party. The parties never committed the lease to writing. During the lease, plaintiff unilaterally decided to use defendant's land to gain access to the northern portion of his property with his larger farm machinery. After the termination of the lease, plaintiff continued to make use of defendant's property for the same purpose.

¶ 8 Defendant threatened to pursue criminal sanctions if plaintiff continued trespassing on her property and informed plaintiff that he was forbidden from accessing her property. Plaintiff continued to utilize defendant's property. The Iroquois County circuit court records Web site indicates that plaintiff was subsequently issued a notice to appear for criminal trespass to land in April 2012. (An appellate court may take judicial notice of government records published on a Web site. *People v. Mitchell*, 403 Ill. App. 3d 707,709 (2010).)

¶ 9 In May 2012, plaintiff filed a complaint seeking a declaratory judgment to use defendant's property to access the northern segment of his land with large farm equipment. Simultaneously, plaintiff sought—and was subsequently granted—a preliminary injunction preserving his ability to do so.

¶ 10 At his May 2013 discovery deposition, plaintiff admitted he has access to the northern half of his property over his bridge, but stated that access is not suitable to him. Plaintiff claimed he contacted a contractor approximately five years before the present legal proceedings in an attempt to have his bridge reinforced. This would have rendered it capable of sustaining the

weight of all types of farming equipment he owns. He said the contractor never started the work; however, plaintiff does not know why the work was not completed. Plaintiff did not contact anyone else in an attempt to get the bridge work done—before or since the commencement of this lawsuit against defendant. His original plan to rebuild the bridge was eventually abandoned when his insurance provider would not insure it. He has not contacted any other insurance company about the matter. Plaintiff has never contacted the drainage district about working on the bridge for him or had an expert assess the bridge's current capability.

¶ 11 Plaintiff testified that he did not purchase his property contingent upon accessing the northern tract via defendant's property. At the time of purchase, plaintiff claims he could not get his larger farm equipment—specifically his 12-row planter—over the bridge, and that he never farmed his current property prior to purchasing it.

¶ 12 In September 2013, plaintiff filed an amended complaint. Plaintiff alleged in the altered complaint that he was entitled to: (1) an easement by necessity to use defendant's land; or (2) alternatively, an irrevocable license to use defendant's land in order to access his own. Plaintiff sought to permanently enjoin defendant from interfering with his use of defendant's land for the purpose of bringing large farm machinery onto the northern portion of his land.

¶ 13 At a second deposition, plaintiff admitted he made the decision to access the northern half of his land by way of the defendant's property without consulting defendant or obtaining her permission. The property that he utilizes for this purpose is not a roadway and he never made any improvements to the stretch of land. Plaintiff conceded that defendant received no benefit for his use of her land. Plaintiff further declared there are two paths across defendant's property he used to access the northern segment of his land. He used one path while he leased

defendant's land, and the second path—the property at issue in the current proceedings—only since termination of the lease.

¶ 14 In April 2014, defendant filed a motion for summary judgment, arguing that: (1) no license existed for plaintiff to use defendant's land; and (2) even if a license had existed, it was revocable. In response, plaintiff withdrew his argument that an easement by necessity existed over defendant's land, conceding that the parties' two tracts were never one parcel. Instead, plaintiff argued that summary judgment was improper because genuine issues of material fact existed as to whether plaintiff: (1) had an irrevocable license to use defendant's land based upon the existence of a verbal lease; or (2) was entitled to an easement by implication due to the absence of potential alternative methods to get large farm machinery onto the northern portion of plaintiff's land. We note that in this pleading, plaintiff considered the license "verbal" because plaintiff used defendant's land during the course of his lease and defendant had yet to produce any evidence she was unaware he was using her land for this purpose. Plaintiff cited no legal authority for this argument.

¶ 15 In May 2014, the trial court granted defendant's motion for summary judgment in a written order, finding that nothing in the record supported plaintiff's claim that he had an irrevocable license to use defendant's land. In so doing, the court noted a lack of detrimental reliance on the part of the plaintiff. The court further noted plaintiff's counsel's own admission under direct inquiry by the court that plaintiff took no actions or spent additional money in reliance on representations by defendant.

¶ 16 Plaintiff filed a motion to reconsider. Plaintiff argued in the motion that: (1) the trial court erred by failing to follow *Martin v. See*, 232 Ill. App. 3d 968; (2) the license issued to plaintiff by defendant was irrevocable; (3) the plaintiff made improvements to defendant's

property (plaintiff supported this claim with an affidavit that contained new information contradicting his prior testimony); and (4) revocation of plaintiff's license to use defendant's land deprived him of the use of his own land. Following a hearing, the trial court denied plaintiff's motion to reconsider.

¶ 17 Plaintiff appeals.

¶ 18 ANALYSIS

¶ 19 I. The Trial Court's Grant of Summary Judgment

¶ 20 A. Standard of Review

¶ 21 "Summary judgment is appropriate where the pleadings, affidavits, depositions, and admissions on file, when viewed in the light most favorable to the nonmoving party, demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *West Bend Mutual Insurance v. Norton*, 406 Ill. App. 3d 741, 744 (2010) (citing *Smithberg v. Illinois Municipal Retirement Fund*, 192 Ill. 2d 291 (2000)); 735 ILCS 5/2-1005(c) (West 2014). We review *de novo* a trial court's ruling on a motion for summary judgment. *Benson v. Stafford*, 407 Ill. App. 3d 902, 911 (2010). In determining whether the trial court reached the proper result, we need not confine ourselves to the court's rationale, but may instead affirm the grant of summary judgment on any basis supported by the record. *Berglind v. Paintball Business Ass'n*, 402 Ill. App. 3d 76, 85 (2010).

¶ 22 B. Plaintiff's Irrevocable License Claim

¶ 23 Plaintiff insists he has an irrevocable license to use defendant's land after the expiration of his lease. A license, as it relates to real property, is defined as "permission to do an act upon the land of another without possessing any estate or interest in such land. [Citation.] A parol license is revocable, although a consideration has been paid or expenditures have been made on

the faith of the agreement, except when revocation would operate as a fraud upon the licensee." *Wilder v. Finnegan*, 267 Ill. App. 3d 422, 427 (1994). "[P]ermission to use land cannot ripen into a prescriptive right, regardless of the time such permissive use is enjoyed." *Keck v. Scharf*, 80 Ill. App. 3d 832, 835 (1980). Furthermore, "[a] parol license may be revoked by express notice, by acts which are entirely inconsistent with enjoyment of the use, or by appropriating the land in question to any use contrary to its enjoyment by the licensee." *O'Hara v. Chicago Title & Trust Co.*, 115 Ill. App. 3d 309, 320 (1983).

¶ 24 Defendant denies the existence of a license. At oral arguments, plaintiff's counsel conceded there is no direct evidence that defendant gave plaintiff a license to use her land to access his own, but insists she "must have known." For purposes of our analysis, we will presume a license existed during the course of the lease.

¶ 25 Without citing to the record, plaintiff asserts in his reply brief that defendant gave him permission to use her land to access his own property through hers. This court has looked for such evidence in the record and found none. Plaintiff's next assumption is that since defendant did not object to his use of her land for this purpose, there was permission. Plaintiff further claims in his appellate brief there was nothing in the record or pleadings that disputes he had permission from defendant to use defendant's land, implying the onus is on her to prove otherwise. These assertions were put forth by plaintiff's counsel despite plaintiff's deposition testimony explicitly stating he did not have permission from defendant to use defendant's land for this purpose.

¶ 26 To view the file in a light most favorable to the nonmoving party (in this case, the plaintiff), we suspend logic and proceed as if there was permission for plaintiff to use the land or something equivalent to a license. The requirements of the fraud exception to the general rule

that a license is revocable are: (1) the licensee has spent substantial sums of money, which was induced by the affirmative efforts of the licensor; (2) improvements that the licensee made were at least partly for the benefit of the licensor; and (3) revocation would result in an injury that would amount to great wrong and oppression. *Grigoleit, Inc. v. Board of Trustees of the Sanitary District of Decatur*, 233 Ill. App. 3d 606, 614 (1992).

¶ 27 In applying these requirements to the facts in this case, it is apparent that the fraud exception has no application. Plaintiff has not even claimed expenditures made or improvements initiated at the behest of the defendant or anything that would result in a great wrong to him. Plaintiff further claims his irrevocable license is attached to a portion of defendant's property, which he only began using after the termination of his lease. The fraud exception does not apply.

¶ 28 Summary judgment requires the opposing party to come forward with some facts to support its cause of action. *North Community Bank v. 17011 S. Park Ave., LLC*, 2015 IL App (1st) 133672, ¶ 15. Plaintiff failed to come forward with any evidence to indicate that his license to use defendant's land—to the extent a license ever existed—is irrevocable. Defendant's termination of plaintiff's lease in 2010 served as a valid revocation of plaintiff's permission to use defendant's land for any reason. Defendant's subsequent lease of the land to a third party was an act further consistent with this revocation. Absent evidence to the contrary, any license to use defendant's land to access plaintiff's was revoked by the termination of the lease in 2010. Since the record contains no evidence creating a genuine issue of material fact as to the revocability of the purported license at issue, the trial court properly granted summary judgment for defendant.

¶ 29 C. Plaintiff's Easement by Implication Argument

¶ 30 Plaintiff argues that defendant landlocked his property by revoking his lease of her property, thereby implying he is entitled to an easement by necessity. No.

¶ 31 There are two types of implied easements—an easement by necessity and an easement implied from a preexisting use (*i.e.*, an easement by implication). *Dudley v. Neteler*, 392 Ill. App. 3d 140, 144 (2009). Plaintiff argued on appeal that he was entitled to an easement by implication. At oral argument, plaintiff conceded no easement existed, but continues to advance his landlocked claim as if he were supporting such a claim. An easement by implication can exist only if each of the following conditions are met: "(1) ownership of the dominant and servient estates by a common grantor, followed by separation of title; (2) use of the easement, before separation, in an apparent, obvious, continuous, and manifestly permanent manner; and (3) necessity of the easement to the beneficial enjoyment of the dominant estate." *Gacki v. Bartels*, 369 Ill. App. 3d 284, 290 (2006) (citing *Deem v. Cheeseman*, 113 Ill. App. 3d 876, 882 (1983)).

¶ 32 Here, plaintiff concedes that ownership of the alleged dominant and servient estates were never held by a common grantor. Ownership by a common grantor is, of course, a prerequisite to the separation of title into two tracts. Ergo, no easement by implication exists across defendant's property.

¶ 33 To the extent the plaintiff is landlocked, he landlocked himself. Plaintiff acknowledges that the local drainage district is liable for maintenance of a bridge over the drainage ditch.

¶ 34 Section 12-5 of the Illinois Drainage Code (Code) provides:

> "[T]he districts shall continue to be liable for the construction, reconstruction and maintenance of at least one bridge or proper

> passageway over each open ditch constructed or ordered constructed." 70 ILCS 605/12-5 (West 2012).

Plaintiff acknowledged that this court has already ruled accordingly in facts strikingly similar to the case at bar. In *People ex rel. Peters v. O'Connor*, this court held that under section 12-5 of the Code (70 ILCS 605/12-5 (West 2014)), " 'proper passageway' " is interpreted to mean capable of sustaining modern farm equipment. *People ex rel. Peters v. O'Connor*, 311 Ill. App. 3d 753, 757-58 (2000). As such, clear statutory language and binding precedent from this court speak directly to this issue: when a drainage district has landlocked a portion of a farmer's land by way of a drainage ditch, the district is responsible for providing a bridge over that ditch, including for the purpose of accommodating modern farm equipment. *Id*.

¶ 35 Plaintiff could have avoided any adverse effects resulting from the termination of his lease of defendant's land by consulting the local drainage district and demanding that the bridge be modified to accommodate his equipment. Plaintiff opines, however, that this remedy is not preferred because it could require further litigation costs on his part and place an additional burden on taxpayers should his efforts prove successful. That is, while there is a clear statutory remedy for plaintiff's problem, he knowingly chose to disregard it and sue the defendant. This course of action fails to offer a rationale for placing the burden upon the defendant (presumably a taxpayer herself) instead of the taxpayers as a whole. It also assumes that the drainage district would refuse to do that which it is required to do.

¶ 36 II. Motion for Sanctions

¶ 37 A. Standard of Review

¶ 38 On appeal, defendant asks this court to impose sanctions on plaintiff under Illinois Supreme Court Rule 375(b) (eff. Feb. 1, 1994). Plaintiff makes no counterargument other than

to insist at oral argument that his appeal is in good faith. Under Rule 375(b), this court can impose sanctions on a party or a party's attorney when an appeal is frivolous or not taken in good faith. Ill. S. Ct. R. 375(b) (eff. Feb. 1, 1994)); *Klose v. Mende*, 329 Ill. App. 3d 543, 550 (2001). Frivolous appeals are those brought "without merit and [with] no chance of success." Ill. S. Ct. R. 375(b), Committee Comments (adopted June 19, 1989). For the purpose of awarding sanctions, an appeal is deemed frivolous based on an objective standard of conduct. *Wittekind v. Rusk*, 253 Ill. App. 3d 577, 580 (1993). The imposition of sanctions is warranted, if a reasonable, prudent attorney acting in good faith would not have brought an appeal. *Edwards v. City of Henry*, 385 Ill. App. 3d 1026, 1039 (2008).

¶ 39 Plaintiff's arguments on appeal are numerous. As noted above, plaintiff argued: (1) the defendant caused plaintiff's land to be landlocked by terminating his lease; (2) he had an irrevocable license to use defendant's land and therefore the trial court erred by granting summary judgment in defendant's favor; (3) the trial court's refusal to follow *Martin v. See*, 232 Ill. App. 3d 968, and *Wilder v. Finnegan*, 267 Ill. App. 3d 422, violates *stare decisis*; (4) the defendant granted plaintiff a license to use her land by giving him permission to use it; (5) his property is landlocked in spite of the fact that there are other means of access to it; and (6) revocation of plaintiff's license to use defendant's land constitutes a fraud upon the defendant. A reasonable and prudent attorney would not have brought these arguments before this court under the facts presented.

¶ 40 The law regarding easements and licenses across real property is virtually ancient. The law of easements in Illinois, like most, if not all states, is derived directly from English common law and is thus, older than the United States itself. *Gerber v. Grabel*, 16 Ill. 217, 221-22 (1854). The law regarding each, steeped in tradition, is simple and straightforward. Plaintiff's arguments

in this case for the existence of an easement or an irrevocable license on defendant's property lack the basic foundation required to proceed with such claims. Plaintiff makes no cogent argument his property is legally landlocked, he has a license, or that case law supports his position.

¶ 41 Licenses are not created to solve problems related to landlocked property; that is the realm of an easement. Thus, plaintiff's arguments are a series of legal nonsequiturs. Even if the properties in the instant case were previously owned by a common grantor, there is still no discernible theory under which plaintiff would be entitled to an easement. In order for plaintiff's landlocked argument to succeed, he must further present evidence that his parcel became landlocked *at the time of severance* in order to succeed in an easement by necessity claim. *Gacki v. Bartels*, 369 Ill. App. 3d at 291-92.

¶ 42 Here, plaintiff persisted with his easement claim after admitting the conditions that render him "landlocked" existed at the time he purchased the property. Basic legal research by a prudent attorney acting in good faith would have revealed the frivolous nature of an easement claim under such facts.

¶ 43 Plaintiff considers *Martin v. See* as dispositive precedent in this matter. *Martin v. See*, 232 Ill. App. 3d 968. The *Martin* court granted an easement to one party (the Martins) and an irrevocable license to another party (the Wilsons). Given that a few hundred years of precedent make it clear that plaintiff had no implied easement or easement by necessity, this claim should never have been initiated against the defendant.

¶ 44 C. Plaintiff's Irrevocable License Claim

¶ 45 *Martin* clearly is inapposite to the case at bar. In *Martin*, one of the plaintiffs purchased land, a portion of which was only accessible by the use of what clearly appeared to be a public

road. As far as any witness knew, access has always been via that road. Appearances can be deceiving; as it turned out, the road was private and owned by defendant. When defendant and plaintiffs got crossways, defendant barred plaintiffs from using the road. Plaintiff Martin originally purchased his property assuming that the road in question was what it appeared to be: public. The only other entry possible to access the property without access via the road, would be to place a culvert across a creek on the property of a stranger.

¶ 46 The *Martin* court did not note the requirements of the exception to the general rule that a license is revocable. *Grigoleit, Inc. v. Board of Trustees of the Sanitary District of Decatur*, 233 Ill. App. 3d at 614. Nothing in *Martin*, however, contradicts *Grigoliet* or suggests that the requirements are somehow optional. Plaintiff asserts they are not requirements but merely mitigating factors. Semantics aside, plaintiff has none of them present in this case, whatever their label.

¶ 47 In spite of this, plaintiff continues to assert—without providing basic supporting evidence—that he is entitled to an irrevocable license. The basis of his claim is that the facts in this case are similar to the facts in *Martin*. The similarities between the two cases are superficial at most. No reasonable attorney could argue *Martin* is controlling on the facts of this case. Here, plaintiff could have solved his problem simply by asking the drainage district to do what it was legally required to do.

¶ 48 We see no legitimate reason why plaintiff's counsel persisted with the arguments he presented to this court. Making unsupported legal arguments is, in fact, the hallmark of frivolous argument and further suggests plaintiff has frivolous motives.

¶ 49 Accordingly, this court hereby grants defendant's motion for sanctions against plaintiff and his counsel, Ronald E. Boyer. We order plaintiff and Boyer to pay to defendant both the

reasonable costs of this appeal and any other expenses reasonably incurred by defendant in defending this appeal. These expenses shall include reasonable attorney fees. The precise amount of attorney fees will be determined once counsel for defendant submits to this court, within 14 days after the filing of this judgment, an affidavit setting forth such expenses and fees. Plaintiff will have seven days to file a response. This court will then file a supplemental order determining the amount of sanctions that will be imposed. See *Dreisilker Electric Motors, Inc. v. Rainbow Electric Co.*, 203 Ill. App. 3d 304, 312-13 (1990).

¶ 50 CONCLUSION

¶ 51 For the foregoing reasons, the judgment of the circuit court of Iroquois County is affirmed.

¶ 52 Affirmed, with sanctions.