2015 IL App (5th) 140511-U

NO. 5-14-0511

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

REBECCA KOLAR and CLAY KOLAR,	)	Appeal from the
	)	Circuit Court of
Plaintiffs-Appellees and Separate Appellants,	)	Jackson County.
	)	
v.	)	No. 13-CH-60
	)	
MAKANDA TOWNSHIP ROAD DISTRICT and DANNY WILLIAMS, Highway Commissioner of Makanda Township,	)	Honorable
	)	W. Charles Grace,
Defendants-Appellants and Separate Appellees.	)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Justices Goldenhersh and Cates concurred in the judgment.

ORDER

¶ 1 *Held*: Court abused its discretion in denying a preliminary injunction to enjoin defendant road district and its commissioner from cutting trees on the plaintiffs' property where (1) the court did not consider the potential for irreparable harm to the plaintiffs if their old growth trees were cut down prior to a final ruling; and (2) the court found that the defendants' evidence was sufficient to establish a prescriptive highway easement, but did not determine the width of that easement.

¶ 2 The plaintiffs, Rebecca and Clay Kolar, sought a preliminary injunction enjoining the defendants, the Makanda Township Road District (Road District) and Makanda Township Highway Commissioner Danny Williams, from cutting trees on their property

as part of a road improvement project. In response, the defendants alleged that the township had a prescriptive easement for a public road. They alleged that the easement was 40 feet wide, including the road bed and an area of land extending 20 feet from the center of the road on each side. The court denied the plaintiffs' petition, finding that the defendants presented evidence sufficient to establish a prescriptive easement. However, the court also found that the easement covered only the road bed itself and an area of up to three to five feet on either side of the road. The defendants appeal, arguing that the court erred in limiting the scope of the prescriptive easement. The plaintiffs filed a separate appeal, arguing that (1) the court's finding of a prescriptive easement was against the manifest weight of the evidence; and (2) the court erred in expanding the easement beyond the width of the road. We reverse.

¶ 3 In 1992, the plaintiffs purchased a 69-acre piece of land in Jackson County. In 1993, they built a home on this property. The property abuts a gravel road called Sheppard Lane. Sheppard Lane is a small rural road that begins in the Village of Makanda, runs through rural Jackson County, and ends just across the county line in Union County. The portion of Sheppard Lane that lies within the Village of Makanda is paved with an oil-and-chip surface. The remainder of the road is gravel. The defendants maintain the portion of Sheppard Lane that lies outside the Village of Makanda and within Jackson County. Sheppard Lane varies in width from 10 feet to 20 feet. The portion abutting the plaintiffs' property ranges in width from 14 feet to 18 feet. Sheppard Lane was never formally dedicated as a public highway. At issue is whether it became a public highway by prescription.

¶ 4 When the plaintiffs purchased their property, there were three homes on Sheppard Lane. At the time of these proceedings, there were 10 homes. One of the 10 property owners also rented out a cabin as a bed and breakfast. In addition, there was some testimony that Blue Sky Vineyard was interested in purchasing property on Sheppard Lane and may have already done so.

¶ 5 In 2013, the defendants decided to upgrade Sheppard Lane. The proposed project included widening the road to a uniform width of 20 feet, paving the road with an oil-and-chip surface, and providing drainage ditches along the side of the road. The project required the defendants to remove brush and trees−including old growth trees−along the edge of the plaintiffs' property.

¶ 6 On August 22, 2013, the plaintiffs filed a petition for an emergency temporary restraining order (TRO) and a petition for a preliminary injunction. In both petitions, the plaintiffs alleged that Sheppard Lane was a "residential access way" and that no prescriptive easement had been established. They further alleged that the defendants began cutting down trees on adjacent properties. They alleged that in some places, the defendants were cutting trees 30 feet from the edge of the existing road bed. Both petitions requested that the defendants be enjoined from cutting trees on their property.

¶ 7 On August 26, after a brief *ex parte* hearing, the court granted the plaintiffs' request for a TRO. The court set the matter for a hearing on the plaintiffs' petition for a preliminary injunction on September 5.

¶ 8 The defendants were served with notice on August 27, 2013. They filed an answer to the plaintiffs' petition on September 4, the day before the preliminary injunction

hearing was set to begin. The defendants alleged that Sheppard Lane is a public road. They further alleged that Makanda Township receives allocations of state fuel tax revenue to maintain 33 miles of township roads, including Sheppard Lane.

¶ 9 The hearing took place over two days on September 5 and September 11, 2013. The record contains no transcript from the September 5 hearing, at which the plaintiffs presented most of their evidence. We note that it is the responsibility of appellants to provide this court with a record sufficient to resolve their claims of error. See *Todd W. Musburger, Ltd. v. Meier*, 394 Ill. App. 3d 781, 795 (2009). We further note, however, that we do not believe the incomplete record in this case will hinder our ability to render a decision.

¶ 10 At the September 11 hearing, Highway Commissioner Danny Williams testified that he became the highway commissioner in 1986. He testified that the Road District maintained Sheppard Lane the entire period he served in that capacity. Williams explained that the ongoing maintenance provided by his department included clearing brush from the sides of the road and removing fallen tree branches from the road. He further testified that the Road District occasionally upgraded and repaired the road by raising it and adding gravel. Williams testified that the township Road District maintained 40-foot rights-of-way for nearly all of the township roads. On cross-examination, he acknowledged that there were some roads with narrower rights-of-way, but stated that there were "not many."

¶ 11 Williams testified about the need for the improvement project. He explained that at the time of the hearing, Sheppard Lane ranged in width from 10 to 20 feet. As traffic

on Sheppard Lane increased, requests to the Road District for maintenance also increased. Increased traffic made it difficult for vehicles traveling in opposite directions on Sheppard Lane to pass. He stated that a uniform road width of 20 feet would be necessary to allow vehicles to pass each other. In addition, Williams testified that the drainage was very poor, and Sheppard Lane "washed out" after any significant rainfall. The intended project included widening the entire road to a uniform width of 20 feet, paving it with an oil-and-chip surface, and creating drainage ditches along the sides of the road. Williams testified that with the exception of the plaintiffs, all of the Sheppard Lane property owners were happy about the upgrades.

¶ 12 Finally, Williams testified about the use of Sheppard Lane by the public. He testified that the road was used by property owners and their visitors, including guests at a bed and breakfast owned and run by one of the property owners. He also testified that "you just have people that sightsee and go down a dead end road and turn around."

¶ 13 Norris Hagler, who previously served as highway commissioner for Makanda Township, also testified for the defendants. Hagler served as highway commissioner from 1977 to 1979. He testified that the Road District was responsible for maintaining Sheppard Lane during his tenure as well. This maintenance consisted of grading the road, clearing leaves and debris from the road, adding gravel, and cutting brush from the sides of the road. Hagler testified that the Road District always maintained a 40-foot right-of-way on Sheppard Lane. He acknowledged that some of the trees within this asserted right-of-way were at least 30 or 40 years old.

¶ 14 Two Sheppard Lane property owners testified for the defendants. Michael Huskey has owned the property at the end of Sheppard Lane since 1987. He testified that when he bought his property, there were only 3 homes on the road, but that number had increased to 10 or 11 by the time of the hearing. He testified that one property owner operated a cabin rental business on his property, and that Blue Sky Vineyard was purchasing property near the end of Sheppard Lane. He stated that he heard that the vineyard purchased the property that morning, but acknowledged that he could not confirm this. Huskey further testified that he saw Road District employees mowing grass and removing trees along the sides of the road.

¶ 15 Jim Lacy has lived on Sheppard Lane for 15 years. He, too, testified that traffic increased during this time. Lacy testified that he has called the Road District to request clean-up of debris in the road after a storm. He further testified that he believed that the Road District has gradually expanded the area of land it maintained along the sides of the road. Finally, Lacy testified to seeing old barbed wire fencing along portions of the sides of the road. He estimated that this fencing was approximately 15 to 20 feet from the center of Sheppard Lane.

¶ 16 Clay Kolar testified in rebuttal. He testified that before it was removed by the defendants, there was a fence approximately two feet from the edge of the road on the property across the street from his property. Kolar acknowledged that the Road District cut tree branches to maintain the land along the sides of the road. However, he stated that this only occurred right along the edge of the road. In addition, Kolar denied that the Road District mowed grass along the sides of the road, stating that there really was not

any grass to cut. Asked about the increased traffic on Sheppard Lane, Kolar replied, "other than people just wanting to see what's down the road, the increased traffic is due to the [increasing number of] people who live there."

¶ 17 At the end of the hearing, the court informed the parties that it would "take the matter under advisement briefly." The court further stated that it "would hope that in ten days to two weeks, at the most, the Court will make a determination." The court did not do so, however. Instead, over one year later, the court entered an order on September 24, 2014. The record does not contain any explanation for the court's delay in ruling.

¶ 18 The court expressly found that there were no recorded easements, rights-of-way, or dedications making Sheppard Lane a public road. In addition, the court found that the proposed 40-foot right-of-way contained old growth trees that were valuable to the plaintiffs because the trees prevented erosion and provided privacy. However, the court found that the township Road District had been maintaining Sheppard Lane at least since 1977. The court noted that such maintenance included periodic grading of the road; replacement of gravel; mowing, bush-hogging, and cutting brush and small trees along the side of the road; and plowing snow. The court found that this maintenance was not performed as a favor to land owners. See *People ex rel. Carson v. Mateyka*, 57 Ill. App. 3d 991, 999 (1978) (finding that evidence of public maintenance of a road did not support a finding of a prescriptive easement where evidence showed that the "public maintenance was initiated as a political favor" and continued due to a mistake).

¶ 19 In addition, the court found that there was evidence of increasing public use of Sheppard Lane. In particular, the court pointed to the evidence that one property owner

had a cabin rental business on his property and the testimony that Blue Sky Vineyard was at least looking at property on Sheppard Lane. The court further found that the public was not prohibited from using the road, and noted that the plaintiffs acknowledged as much. The court found that the township's maintenance of the road and the public's use of the road were "open and obvious, continuous and uninterrupted, and with the knowledge of all" for a period of at least 20 to 30 years. See 605 ILCS 5/2-202 (West 2012).

¶ 20 The court framed the issues before it as follows: "Has Plaintiff established a basic right involved in this process such that injunctive relief should be extended? On the other hand, are the elements present in the evidence for a highway by prescription and, if so, what would constitute such a highway ***, and if not, should a permanent injunction issue?" The court concluded that the defendants had established a prescriptive easement.

¶ 21 In addressing the width of the prescriptive easement, the court first noted that the extent of a prescriptive easement is defined by its historic prescriptive use. See *In re Onarga, Douglas & Danforth Drainage District of Iroquois County*, 179 Ill. App. 3d 493, 494-95 (1989). The court went on to state that "[i]t is rudimentary that easements are limited to what is strictly necessary." The court then stated as follows:

> "The court finds that the Township's highway easement by prescription is limited to no more than a twenty feet wide road surface, that is, 10 feet [on] either side of center, and that reasonable drainage should be determined according to the scientific issues involved if financially possible, and the Court believes that

reasonable might be 3 [to] 5 feet on either side of [the] surface, again, where necessary." (Emphasis in original.)

¶ 22 On October 14, the defendants filed a notice of interlocutory appeal, challenging the court's decision to limit the easement to three to five feet of land in addition to the road bed. On October 23, the plaintiffs filed a motion to reconsider and for clarification. In addition to asking the court to reconsider its determination that a prescriptive easement existed, the plaintiffs asked the court to clarify whether the September 24 order was a final order or an interlocutory order. The plaintiffs asserted that the order should be deemed to be final, contending that there were "no other issues pending before this court at the time of the September 24 order," and there were no issues remaining to be resolved.

¶ 23 On October 24, the court entered an order denying the plaintiffs' motion to reconsider and clarifying its earlier order. The court noted that the plaintiffs sought clarification as to whether the September 24 order constituted a preliminary ruling or a final judgment; however, it did not answer this question. Instead, the court stated that, "while the findings of fact and law were made, the Court did not rule specifically on Plaintiff's original request for injunctive relief. That request is hereby specifically denied." The plaintiffs filed their separate notice of appeal on November 6, 2014.

¶ 24 Before addressing the merits of the parties' contentions, we must consider whether the court's order constitutes an interlocutory order denying a request for a preliminary injunction or a final order disposing of all issues before the court. The standard of review to be applied depends upon how the order is characterized. *Electronic Design &*

Manufacturing, Inc. v. Konopka, 272 Ill. App. 3d 410, 415 (1995). The plaintiffs argue that the court's order should be deemed to be a final judgment on the merits. This is so, they contend, because the court entered the order after "full hearings on the merits of the plaintiffs' complaint." The defendants, by contrast, argue that the order was a preliminary ruling because it does not fully resolve all the issues before the court, and because the defendants had no notice that what was noticed as a preliminary injunction hearing would instead serve as a final hearing on the merits of the case. For the reasons that follow, we conclude that the order was interlocutory in nature.

¶ 25 The confusion regarding the nature of the order entered in this case is not unique. As our supreme court has explained, "In far too many cases, the distinction between a temporary restraining order, a preliminary injunction, and a permanent injunction becomes blurred during the proceedings. What *** starts as a proceeding to obtain a preliminary injunction results in an order that is in fact a permanent injunction." *Buzz Barton & Associates, Inc. v. Giannone*, 108 Ill. 2d 373, 385 (1985). The court went on to note that "it is quite easy and tempting to expand the [preliminary injunction] hearing into the merits of the ultimate question as to whether a permanent injunction should issue." *Id*. at 385-86. The court cautioned, however, that "[s]uch a temptation should be resisted." *Id*. at 386.

¶ 26 The court explained that the purposes of preliminary and permanent injunctions are different. The level of proof needed to support each type of injunction is likewise different. *Id*. A preliminary injunction is meant to preserve the status quo until a final hearing can be held and the matter can be resolved. *Id*. (quoting *Nestor Johnson*

Manufacturing Co. v. Goldblatt, 371 Ill. 570 (1939)). An order granting or denying a preliminary injunction is not meant "to determine controverted rights or to decide controverted facts or the merits of the case." *Id.* (citing *Lonergan v. Crucible Steel Co. of America*, 37 Ill. 2d 599, 611 (1967)). Thus, a party seeking a preliminary injunction "need not carry the same burden of proof that is required to support the ultimate issue." *Id.*

¶ 27 Furthermore, a proceeding on a preliminary injunction typically involves "an abbreviated evidentiary hearing on an emergency basis." *Konopka*, 272 Ill. App. 3d at 415. Thus, "[t]he 'findings' of a court under these circumstances do not carry with them the preclusive effect of *res judicata*," and the parties have the opportunity to present additional, more conclusive evidence when the matter proceeds to a full trial on the merits. *Id*.

¶ 28 Here, it is difficult to glean the court's intent from the September 24 order, and the October 24 order does not clarify the matter. However, the procedural history of the case indicates that the order must be treated as a preliminary ruling. The two-day hearing began a mere two weeks after the plaintiffs filed their initial complaint, nine days after the defendants received notice, and only one day after the defendants filed a responsive pleading. There is no indication that either party conducted any discovery in the matter. Moreover, the plaintiffs did not file any pleading requesting permanent relief before the hearing. Clearly, further proceedings were contemplated when the hearing took place. Under these circumstances, it would not have been appropriate for the court to enter a permanent injunction or a final judgment denying injunctive relief.

¶ 29 In addition, the order does not fully and finally resolve all issues on the merits. As discussed earlier, the court stated that the width of the easement "*should be determined*" by scientific evidence related to drainage needs, and opined that a reasonable width "*might* be 3 [to] 5 feet on either side" of the road. (Emphases added.) This is not a definitive finding that can be enforced without further proceedings and more specific findings. See *Dolan v. O'Callaghan*, 2012 IL App (1st) 111505, ¶ 34. We find that the order entered in this case constitutes an interlocutory ruling on a request for a preliminary injunction.

¶ 30 A party seeking a preliminary injunction must demonstrate (1) a clearly ascertainable right in need of protection; (2) irreparable harm that will occur if the injunction is not granted; (3) the lack of an adequate remedy at law; and (4) a likelihood of success on the merits. *Hartlein v. Illinois Power Co.*, 151 Ill. 2d 142, 156 (1992). On appeal, this court considers only whether the party that requested the preliminary injunction "has demonstrated a *prima facie* case that there is a fair question as to the existence of the rights claimed." *Callis, Papa, Jackstadt & Halloran, P.C. v. Norfolk & Western Ry. Co.*, 195 Ill. 2d 356, 366 (2001). We will not overturn the trial court's decision absent an abuse of discretion. *Id.* A trial court abuses its discretion if it enters an order that alters the status quo or awards the ultimate relief sought in the case. *Konopka*, 272 Ill. App. 3d at 415.

¶ 31 One of the factors necessary to establish the right to a preliminary injunction is the likelihood of success on the merits. As the supreme court noted in *Buzz Barton*, "if the proof shows that the plaintiff has no protectable interest, *** then a preliminary

injunction should not issue." *Buzz Barton*, 108 Ill. 2d at 386. Here, the likelihood of success on the merits turns on an assessment of the evidence related to both the existence and extent of the prescriptive highway easement asserted by the defendants.

¶ 32 The plaintiffs contend that the court's finding of a prescriptive easement was contrary to the manifest weight of the evidence. Because this matter involves a ruling on a preliminary injunction, we decline to apply that standard. See *Limestone Development Corp. v. Village of Lemont*, 284 Ill. App. 3d 848, 854 (1996). The question before us is not whether the hearing evidence established a right to a prescriptive easement. The question is whether the plaintiffs demonstrated a fair question that the right they assert exists.

¶ 33 The right asserted by the plaintiffs is the right to prevent the defendants from cutting trees on their property. They can demonstrate that this right exists if (1) they can prevail on their claim that the defendants do not have any prescriptive highway easement for Sheppard Lane; or (2) they can show that the prescriptive easement does not encompass the entire strip of land claimed by the defendants for that purpose.

¶ 34 The elements necessary to establish a highway by prescription are identical to the elements necessary to establish a private easement. *Mateyka*, 57 Ill. App. 3d at 997. To establish a prescriptive highway easement, public use of the road must be adverse, open and obvious, continuous and uninterrupted, under a claim of right, and with the knowledge of the owner but without the owner's consent for a period of at least 15 years. *Limestone Development*, 284 Ill. App. 3d at 854 (citing 605 ILCS 5/2-202 (West 1994)).

Evidence that a road has been publicly maintained for the requisite period is strong evidence that the road is, in fact, a public road. *Mateyka*, 57 Ill. App. 3d at 999.

¶ 35 The extent of a prescriptive easement is limited by the use that led to the establishment of the easement. *Limestone Development*, 284 Ill. App. 3d at 855. However, the easement for a public road is not strictly limited to the area the public actually uses. Such easements may include additional land that is "essential to make the easement effective." *Semmerling v. Hajek*, 258 Ill. App. 3d 180, 186 (1994); see also *City of Highland Park v. Driscoll*, 24 Ill. 2d 281, 283 (1962) (explaining that a trial court was correct in finding drainage ditches along the sides of a road to be part of an easement for that road where the road district had maintained those ditches and the ditches "were essential to make the easement effective").

¶ 36 Here, there was little evidence to contradict the defendants' claim that Sheppard Lane was a public highway by prescription. The plaintiffs emphasize the fact that nearly all of the traffic on Sheppard Lane consisted of property owners and their invitees. However, it is the character of the public use, not its volume, that establishes a prescriptive easement. See *Limestone Development*, 284 Ill. App. 3d at 855. The evidence presented indicates that property owners and visitors used Sheppard Lane to reach their destinations because they believed it was a public road. This constitutes public use under a claim of right. See *Mateyka*, 57 Ill. App. 3d at 999 (explaining that where residents and their guests used a private road pursuant to a private easement recorded in their deeds, their use of the road was "permissive, and not under a claim of right on behalf of the public"). In addition, the evidence showed that the defendants

provided all necessary road maintenance for a period in excess of 15 years. Thus, we agree with the defendants that the plaintiffs have not established a likelihood of success on the merits with respect to their claim that there is *no* public easement for Sheppard Lane. This does not end our inquiry, however. The plaintiffs also assert that they are entitled to injunctive relief because the width of the easement is limited to the existing road bed.

¶ 37 There was some evidence in the record to support the defendants' claim that they historically performed maintenance in the entire area they claim as an easement. One witness testified that the defendants used a mower with a 20-foot boom when cutting grass along the sides of the road. Former highway commissioner Norris Hagler testified that he always maintained a 40-foot easement for Sheppard Lane during his tenure. Other evidence suggested prescriptive use of a much narrower easement. Clay Kolar testified that the only maintenance he observed was cutting of tree branches right next to the side of the road. Jim Lacy testified that fences had been erected as little as 15 feet from the center of Sheppard Lane, which is 5 feet less than the asserted width of 20 feet on each side of the center.

¶ 38 The court's findings regarding the existence of an easement were preliminary in nature and did not have a preclusive effect (see *Konopka*, 272 Ill. App. 3d at 415), and the court left open the question of the width of the easement. In addition, the court stated that a reasonable easement would consist of the road surface and an additional three to five feet along each side. This statement indicates that the court was likely to find that the defendants had a prescriptive easement that was considerably narrower than the 40-

foot easement they asserted. Thus, we find that the plaintiffs raised a fair question as to their right to prevent the defendants from cutting the trees on at least a portion of the claimed easement.

¶ 39 We turn now to the other factors involved in determining whether a preliminary injunction should be granted. Those factors are: (1) that they have a clearly ascertainable right in need of protection; (2) that they will suffer irreparable harm that will occur if the injunction is not granted; and (3) that they have no adequate remedy at law. *Hartlein*, 151 Ill. 2d at 156. The plaintiffs own their property. Thus, they have a clearly ascertainable right to stop the defendants from cutting any trees on their property that do not fall within the area covered by any easement the court might ultimately determine exists. As the trial court pointed out in its order, some of the trees at issue are old growth trees. Once these trees are cut, they cannot be replaced if the court ultimately determines that they are not within the bounds of an easement. As such, the plaintiffs could face irreparable harm for which there is no adequate remedy at law if the defendants are permitted to cut their trees in error. For these reasons, we find that the court abused its discretion in denying the motion for a preliminary injunction.

¶ 40 Finally, we note that both parties have raised arguments regarding the width of the easement. The plaintiffs contend that the evidence showed that any easement is limited to the existing road bed, while the defendants claim the court erred and usurped the authority of the road commissioner by limiting the easement to three to five feet beyond the road bed. However, as we have stated, we do not construe the court's statements regarding the width of the easement as "findings." Moreover, there has been no final

determination on the merits declaring an easement. The parties will each have the opportunity to present additional, more conclusive evidence related to both the existence and width of the asserted easement when this matter comes for a full trial on the merits. As such, we need not consider the parties' arguments related to the width of the easement.

¶ 41 For the foregoing reasons, we reverse the order of the trial court denying the plaintiffs' request for a preliminary injunction.

¶ 42 Reversed.