2018 IL App (4th) 170602-U

NO. 4-17-0602

FILED
March 14, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

H&R PROPERTY SERVICE, LLC, an Indiana Limited Liability Company, Plaintiff-Appellee, v. BRADLEY P. CONINE and KATRINA L. CONINE, Defendants-Appellants.	))))))))	Appeal from Circuit Court of Clark County No. 13CH17 Honorable David W. Lewis, Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Knecht and Turner concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding the prescriptive easement across defendants' property had not been abandoned, nor did the new owners change or increase the use of the easement.

¶ 2 In June 2013, plaintiff, H&R Property Service, LLC, an Indiana limited liability company, filed a complaint for declaratory action against defendants, Bradley P. Conine and Katrina L. Conine, requesting the trial court find a prescriptive easement on a grassy lane running across defendants' property and linking plaintiff's property to the nearby Iron Bridge Road. Following a bench trial, the trial court found the grassy lane was a prescriptive easement.

¶ 3 Defendants appeal, asserting its grassy lane was no longer a prescriptive easement because (1) the use of the easement changed, (2) plaintiff attempted to extend the prescriptive easement beyond its original purpose, and (3) the prescriptive easement was abandoned by plaintiff's predecessor in title. We affirm.

¶ 4 I. BACKGROUND

¶ 5 Defendants' property (Conine property) is located just south of Iron Bridge Road in Clark County, Illinois. Defendants have owned the property since 1998 when they purchased the property from a family member. In 2012, plaintiff purchased the property directly south of defendants' property, which was formerly owned by the Ensor family (H&R property). Plaintiff's owners and employees accessed the H&R property via a grassy lane running down the east side of the Conine property, linking the H&R property with Iron Bridge Road. There was no recorded easement with respect to the grassy lane.

¶ 6 In October 2012, plaintiff's manager, Kenneth Halcomb, attempted to enter the grassy lane on the Conine property, only to find the entrance blocked by a locked gate. Defendants asserted plaintiff had no right to use the grassy lane and should find an alternative access road.

¶ 7 In June 2013, plaintiff filed a complaint for declaratory judgment which, generally, sought a prescriptive easement over the grassy lane running through the Conine property. In August 2014, defendants filed an answer and affirmative defenses asserting, in pertinent part, (1) the grassy lane was not an easement; (2) to the extent any easement existed, the predecessor in title—the Ensor family—abandoned it; and (3) plaintiff improperly sought a completely different or increased use of the alleged easement.

¶ 8 The case proceeded to a bench trial in September 2016. We will outline the evidence necessary to resolve this appeal.

¶ 9 The Ensor family, plaintiff's predecessor in title, owned the H&R property for decades. Stuart Ensor, the family's grandson, frequently visited the property, which he accessed by a Jeep or other vehicle via the grassy lane on the Conine property. However, the grassy lane

was primarily utilized by farmers to regularly access the Conine and H&R properties for farming and for transporting heavy farm machinery. Stuart also occasionally engaged in clay shooting on the H&R property. In 1988, Stuart's grandfather passed away, but Stuart continued to visit the property two or three times per year, accessing the property by motorcycle, Jeep, or all-terrain vehicle via the grassy lane on the Conine property.

¶ 10 In May 2011, the Ensor family conveyed a warranty easement deed in perpetuity to the United States of America to place the H&R property in the Wetlands Reserve Program, at which time all farming operations on the property ceased. Stuart continued to visit the property two to three times per year via the grassy lane, with his last visit occurring just before finalizing the sale of the H&R property to plaintiff.

¶ 11 Plaintiff purchased the H&R property in 2012 for the purpose of creating a private hunting area for plaintiff's owners. Plaintiff's employees accessed the property weekly via the grassy lane until October 18, 2012, when they arrived to find the gate locked. Halcomb testified he encountered Bradley Conine one mid-summer evening in 2012 while leaving the H&R property, but Bradley made no comment about Halcomb's use of the grassy lane that evening. However, shortly before October 18, 2012, Katrina Conine sought out Halcomb to tell him the grassy lane was not a recorded easement. After finding the access gate to the grassy lane locked on October 18, 2012, Halcomb accessed the property by crossing an adjacent creek with that landowner's permission.

¶ 12 Following the trial, the trial court filed a written order granting the prescriptive easement. The court found the use of the grassy lane was exclusive, uninterrupted and continuous for at least 20 years, hostile and adverse to defendants' rights, and under a claim of title inconsistent with that of defendants. The court rejected defendants' argument that the

easement had been abandoned, finding the purpose of the easement had always been to provide access to plaintiff's land, not for the specific purpose of farming. Further, the court determined the plaintiff's use of the easement for private hunting did not increase the burden on the easement.

¶ 13 This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 On appeal, defendants do not contest that a prescriptive easement once existed. Rather, defendants argue the prescriptive easement ceased to exist when (1) the use of the prescriptive easement changed, (2) plaintiff attempted to extend the prescriptive easement beyond its original purpose, and (3) the prescriptive easement was abandoned by plaintiff's predecessor in title.

¶ 16 Whether the plaintiff has proved the establishment of a prescriptive easement is generally a question of fact, and we will not overturn the trial court's findings of fact unless the findings are against the manifest weight of the evidence. *Brandhorst v. Johnson*, 2014 IL App (4th) 130923, ¶ 69, 12 N.E.3d 198.

¶ 17 A. Use and Extension of Easement

¶ 18 Due to their similarity, we address defendants' first two arguments together. Defendants assert, now that the H&R property can no longer be used for farming due to its placement in the Wetlands Reserve Program, plaintiff's attempt to use the easement to access its land for hunting purposes has changed the original use of the easement.

¶ 19 The trial court found the use of the easement was for access to the H&R property. Defendants disagree, arguing the use of the easement was for farming; therefore, when plaintiff began using the lane for hunting rather than farming, it substantially changed the use of the land.

In other words, defendants assert we must look at the changing use of plaintiff's land. Defendants rely on *In re Onarga, Douglas & Danforth Drainage District of Iroquois County*, 179 Ill. App. 3d 493, 495, 534 N.E.2d 226, 228 (1989), for the proposition that "if an easement arises by prescription, the extent of the prescriptive use defines the easement." However, defendants contend, in making its ruling, the trial court failed to distinguish *Onarga* and *Limestone Development Corp. v. Village of Lemont*, 284 Ill. App. 3d 848, 672 N.E.2d 763 (1996), from the present case when rendering its decision.

¶ 20 In *Onarga*, the Third District addressed "whether the petitioner's drainage district can unilaterally and without consent or authorization increase the burden of an easement on the servient tenement" by increasing the size of the drainage tiles from 10 inches to 24 inches. *Onarga*, 179 Ill. App. 3d at 494. The court concluded a prescriptive easement for a 10-inch tile across the servient tenement was restricted to a 10-inch tile because increasing the size of the tile would also improperly increase the size of the easement. *Id*. at 494-95.

¶ 21 In *Limestone Development Corp*., 284 Ill. App. 3d at 855-56, the Limestone Development Corporation (Limestone) sought to use a prescriptive easement—a narrow trail used by the public to access recreational activities such as fishing, camping, and swimming—to pursue its commercial development plans. Thus, Limestone sought to use the trail for its own commercial purposes, which would require it to transport heavy construction machinery and construction materials through the easement. *Id*. at 856. The First District found such a use far exceeded the public's prior use of the trail. *Id*. "Although the owners of an easement are allowed to make repairs so that the easement is reasonably usable, they cannot make material alterations in the easement's character that place a greater burden on the property." *Id*. at 857.

The court therefore concluded Limestone was "limited to the type of use that led to the creation of the prescriptive easement." *Id.*

¶ 22 As defendants note, these cases are distinguishable from the present case. However, the distinguishing characteristics do not support defendants' position. Both *Onarga* and *Limestone* involve situations where the party claiming the easement sought to increase the size of the easement, thus placing a greater burden on the respective properties. Here, there is no indication that plaintiff sought to increase the size of the easement or posed a greater burden on defendants' property. In fact, the record supports that the opposite is likely true. While the prior owners and tenants of plaintiff's land used the easement as an access point for its large farm machinery, plaintiff currently uses the easement as an access point for private hunting and has sought no changes or increases to the easement. The hunting "equipment" consists of Jeeps, all-terrain vehicles, and the like, all of which are far less substantial and burdensome to defendants' property than farm machinery. Moreover, the record contains evidence that the easement was not used only to access farmland. Stuart testified he utilized the easement to engage in clay shooting and to simply visit the property, even after the H&R property was no longer used for farming.

¶ 23 Defendants have provided us with no cases in support of their argument that changing the use of the easement from accessing farmland to hunting grounds changes the use of the easement itself. The trial court found no change or increase in the use of the easement, which is supported by Stuart's testimony that he frequently accessed the H&R property via the easement for non-farming purposes. Accordingly, the trial court's finding regarding the use of the easement was not against the manifest weight of the evidence.

¶ 24 B. Abandonment

¶ 25 Defendants next argue plaintiff's predecessor in title abandoned the easement in May 2011 by conveying a warranty easement deed to the United States for the cultivation of a wetland reserve that prohibited future farming on the property. In support, defendants rely on *Schnabel v. Du Page County*, 101 Ill. App. 3d 553, 428 N.E.2d 671 (1981). In *Schnabel*, a railroad company obtained a right-of-way on the servient estate to build and operate a railway, which it operated until 1960. *Id*. at 555. In July 1961, the railroad company received permission from the Illinois Commerce Commission to abandon the railway and sell its property, equipment, and facilities. *Id*. In 1965, after clearing the property, the railroad company deeded its right-of-way to Du Page County, which in turn leased the right-of-way to Illinois Prairie Path, Inc., for purposes of creating a public nature trail. *Id*.

¶ 26 The reviewing court noted, "Abandonment has been defined as the voluntary relinquishment or giving up with the intention of never again claiming one's rights or interest. [Citation.] Thus, in order to establish that a railroad has abandoned its right-of-way easement, it is necessary to prove actual relinquishment and the intention to abandon the use of the premises." *Id.* at 558. Abandonment occurs where "nonuse is accompanied by acts which manifest an intention to abandon and which destroy either the object for which the easement was established or the means of its enjoyment." *Id*. If the railroad abandons its right-of-way, then the owner of the servient estate is revested with ownership of the right-of-way. *Id*. Due to the railroad company formally abandoning the right-of-way and removing all of its materials from the site, the reviewing court concluded the railroad company abandoned the right-of-way. *Id*. at 563. Thus, the railroad company's subsequent conveyance to Du Page County had no effect, as full ownership of the land revested in the owner of the servient estate. *Id*.

¶ 27 *Schnabel* is distinguishable. In *Schnabel*, the railroad company received permission from the Illinois Commerce Commission to formally abandon the right-of-way, and subsequently removed the railroad ties and other materials from the property. *Id.* Conversely, in this case, although the Ensor family deeded the use of the H&R property to the United States for purposes of creating a wetland reserve, the record provides no evidence of a formal attempt to abandon the easement.

¶ 28 To the contrary, the trial court found the Ensor family did not abandon the easement. Stuart testified he continued to utilize the easement after the H&R property became a wetland reserve, driving a Jeep or all-terrain vehicle through the easement to reach the H&R property. This was consistent with Stuart's use of the easement throughout the years, as he always accessed the H&R property via the easement, even for purposes not related to farming. The court found the testimony regarding Stuart's continued use of the easement sufficient to overcome the defense of abandonment, and such a finding was not against the manifest weight of the evidence.

¶ 29 III. CONCLUSION

¶ 30 Based on the foregoing, we affirm the circuit court's judgment.

¶ 31 Affirmed.