2017 IL App (2d) 160348-U
No. 2-16-0348
Order filed May 4, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE CITY OF DIXON, as Successor in Interest to James E. Dixon and Judith A Dixon, Plaintiff-Appellee, v. SCOTT C. BURKITT and LINDA K. BURKITT; and THE FIRST NATIONAL BANK IN AMBOY, Defendants (Scott C. Burkitt and Linda K. Burkitt,. Defendants- Appellants).	)	Appeal from the Circuit Court of Lee County. No. 10-CH-86 Honorable Ronald M. Jacobson, Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Jorgensen and Schostok concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's judgment that the original plaintiffs proved a prescriptive easement, specifically that the use of the land at issue had been adverse, was not against the manifest weight of the evidence: by a written agreement, permission to use the land expired in 1954, and there was no evidence that such permission had been requested or granted at any point during the 20 years that followed.

¶ 2 James E. Dixon and Judith A. Dixon (the Dixons), who owned the commercial property at 87 South Hennepin Street in Dixon, filed an action against Scott C. Burkitt and Linda K. Burkitt (defendants), the owners of the adjacent commercial property at 71-79 South Hennepin, claiming a prescriptive easement over a concrete driveway on the southwest part of defendants' property. The trial court found for the Dixons. After they conveyed all their interest in their property to the City of Dixon (City), the court substituted the City as plaintiff and denied defendants' motion to reconsider. Defendants appeal, contending that the judgment was against the manifest weight of the evidence because the Dixons did not prove that, for the requisite 20-year period, the use of the driveway had been adverse and not permissive. We affirm.

¶ 3 Formerly, both properties were owned by a partnership between Barnett Wienman and Jacob Sinow. On February 23, 1945, Sinow died. His wife, Mollie, continued the partnership. However, by a 1946 agreement filed with the recorder of deeds, she and Wienman settled a lawsuit over the partnership and its properties, ending the former and disposing of the latter. Wienman transferred his share of the partnership's interest in 87 South Hennepin to Mollie, and she transferred her share of its interest in 71-79 South Hennepin to him. Paragraph 6 of the agreement stated:

> "[Wienman] does *** grant unto *** Mollie Sinow, a right-of-way for driveway purposes over the Westerly fifteen (15) feet of the Northerly fifty (50) feet of the Westerly one-half of Lot Two (2) *** and that said right-of-way shall continue only for so long as the said Barnett Wienman shall be the owner of said property over which such right-of-way is granted, and shall cease and be terminated upon the said Barnett Wienman making a bona fide sale of said property, for a valuable consideration, or upon his death, whichever event takes place first."

¶ 4 On June 18, 2010, the Dixons filed their *pro se* complaint against defendants and First National Bank in Amboy (which held a lien on defendants' property). On June 21, 2012, they filed an amended complaint. The Dixons claimed a prescriptive easement over the area described in paragraph 6 of the 1946 agreement. They alleged that the concrete driveway provided pedestrian and vehicular access from River Street (on the northern boundary of defendants' property) to the garage door of the basement of the building at 87 South Hennepin; that the driveway was the only exterior means of access to and from the basement garage; that the Dixons and their predecessors in title had used the driveway openly, hostilely, and continuously for more than 20 years; and that defendants had refused to recognize the Dixons' right to the easement and had prevented them from using the driveway.

¶ 5 Defendants answered the complaint, and the parties stipulated to the following facts. Wienman died December 10, 1954. The Dixons owned the building at 87 South Hennepin. It was leased to the Lee County Title Company, James Dixon's title insurance firm, or its successor, for a term dating from January 1, 2006, and lasting no less than 5 and no more than 10 years. The lease did not provide access to the building other than by Hennepin Avenue and the south-side alleyway. It did not include the basement and did not mention the disputed property.

¶ 6 On October 31, 2012, the court held a bench trial. The Dixons' first witness, David Sinow, testified on direct examination as follows. He was 64 years old, had been born in Dixon, and had resided there until 1966, when he left for college. He eventually obtained a law degree and started practicing law. Mollie was his grandmother and had owned the building at 87 South Hennepin, with which he had been familiar since the 1950s.

¶ 7 David testified further as follows. From the early 1950s through the early 1960s, the building was occupied by Campbell Motors, which used the first floor for retail sales and the

basement for a body shop. Vehicles used the concrete driveway to enter the basement from River Street. Almost immediately after Campbell Motors left, Budget Bakery moved in, remaining into the late 1970s. Budget Bakery sold goods on site and also delivered extensively. Its trucks used the concrete driveway for daily access to and from River Street and routinely parked in the basement. Budget Bakery was followed by Baskets & More, then, in the mid-1980s or somewhat later, by a fireplace store, and in the 1990s by a card shop. All these businesses used the basement for storage, and the last two also parked vehicles there. After he obtained his law license in 1974, David helped to negotiate the leases for the building.

¶ 8 David testified that no neighbor to the north ever interfered with any of the foregoing tenants' access to the building or demanded that they stop using the driveway. To his knowledge, no tenant ever requested permission from any neighbor to use the driveway. David never requested such permission, as it "[w]asn't necessary." He added, "We had used it for years and years and years and it had always been used that way. There was never even a thought about it." In 1999, David's family sold the property to the Dixons.

¶ 9 In the remainder of his testimony, David stated as follows. When he lived in Dixon, the building immediately north of 87 South Hennepin contained the Dixon Hatchery, which Wienman owned at the time. Trucks delivered chickens from the hatchery. There was an entrance from the driveway. David also walked up and down the driveway when he entered or exited the building at 87 South Hennepin. The leases that David drafted for the various tenants included ingress and egress but did not specifically mention the driveway. To David's knowledge, his family never claimed the driveway by adverse possession. Because there had been no interference with the free use of the driveway, there had been no reason to file suit to

claim it by adverse possession. However, David could not know for certain whether any of the tenants had ever asked permission to use the driveway.

¶ 10 James Dixon testified on direct examination as follows. He had been acquainted with the properties in the area since his boyhood; the driveway had existed since 1948 or 1949. The Dixons purchased 87 South Hennepin in fall 1999. Shortly before, James inspected the basement and saw three vehicles parked there. He knew that there was no recorded easement for the driveway. Shortly after the purchase, James told Scott Burkitt that he had bought the building. Scott responded in part that James did not have the right to go across the driveway; James replied that he disagreed. Afterward, he used the driveway often.

¶ 11 James testified that, in spring 2000, a holdover tenant moved out of the first floor, and he renovated the building, including the basement. Several community and municipal organizations used the basement for storage, unloading materials from trucks in the driveway. Defendants did not confront him over these uses. However, they eventually placed a chain-link fence across the entrance to the driveway, so that the Dixons could not use it.

¶ 12 James testified on cross-examination as follows. He had not personally used the driveway more than twice and had not made repairs or paid taxes on it. He did not know whether any of the organizations that stored things in his basement had asked defendants' permission to use the driveway. James purchased the property at 87 South Hennepin in September 1999 from Cory Bryson, who had signed a contract with the Sinows. He never attempted to record an easement, because he never deemed it necessary. On April 10, 2010, James's son Lucas told him that Scott had stopped him from driving an old car on the driveway, which Lucas had done previously in order to store the car in the basement. James knew nothing about the business dealings of the building's tenants before 1999.

¶ 13 In his remaining testimony, James stated that, before buying the property, he looked at the driveway and saw that it served both 87 South Hennepin and defendants' buildings, providing the only means for vehicles to exit and enter the basement of the former. In 1999, he also knew that the driveway had been there for 50 years.

¶ 14 The Dixons next called Gary Campbell, who testified as follows. He was 73 years old and had worked in his father's shop at 87 South Hennepin from 1953 through 1962, when the business moved. He worked in the basement body shop; there were usually three to five vehicles there at a time. The Campbells used the driveway to get vehicles to and from the shop; it was the only way in or out. He had driven vehicles there many times and had never been blocked or denied access. He had never had to get permission from anyone to drive up or down the driveway. The Campbells never repaired the driveway. The hatchery also used the driveway.

¶ 15 The trial court admitted a copy of the 1946 agreement. The Dixons rested.

¶ 16 Lorena Bock testified for defendants as follows. She worked for Baskets & More at 87 South Hennepin from 1995 "through the 2000s." Store policy required anyone who wanted to drive a vehicle in or out of the garage basement to request permission from defendants. She asked such permission several times, and they always granted it. Some other people rented the basement to store vehicles. Bock was not familiar with the property until 1995.

¶ 17 Scott Burkitt testified as follows. Before July 1993, he had had no involvement with the properties at issue. When defendants bought 71-79 South Hennepin in July 1993, there were no recorded easements. Since then, many people had asked their permission to use the driveway. Scott had not seen James use the driveway. In 1999, he told James that there was no recorded easement for the driveway. Lucas drove a car on it twice, probably in spring 2010, causing some

damage. In 2012, Scott placed the fence across the entrance to the driveway, partly because there had been vandalism and fires.

¶ 18 Linda Burkitt testified as follows. The people at Baskets & More had regularly asked their permission to use the driveway. None of the community organizations that James had mentioned had asked for her permission to use the driveway. She had always had pleasant interactions with the businesses in the area but had had no interaction with James.

¶ 19 After hearing arguments, the trial judge held that the Dixons had established a prescriptive easement and that it had not been abandoned at any point. The judge explained that the evidence showed clearly that, from 1954 through the late 1970s, more than the required 20-year period, the use of the driveway by Campbell Moors and Budget Bakery had been open, continuous, under a claim of right, and exclusive, the last of these meaning only that their use of the driveway had not depended on the permission of the driveway's owner.

¶ 20 The judge noted the remaining issue: whether the use had been adverse or by permission. The 1946 agreement was crucial. Paragraph 6 had given Mollie (and her successors) permission to use the driveway, but it plainly stated that the permission would terminate on the death of Wienman. Wienman died December 10, 1954. The agreement had been recorded, providing constructive notice that the license that Wienman had granted Mollie had been extinguished. Thus, at that point, the use of the driveway by nonowners became adverse. There was no evidence that, between December 10, 1954, and the late 1970s, any owner of the driveway ever granted a nonowner permission to use it. Although defendants had shown that such permission had been requested and granted after they bought 71-79 South Hennepin, that occurred beyond the applicable 20-year period.

¶ 21 Defendants moved to reconsider and to reopen the proofs. The court denied the motions. After the City was substituted as plaintiff, the court determined the geographical scope of the easement and entered a judgment. Defendants timely appealed.

¶ 22 On appeal, defendants contend that the trial court's finding of a prescriptive easement was against the manifest weight of the evidence. As they did in the trial court, defendants focus their argument on the element of adversity for the 20-year period that started on December 10, 1954. (They do not contend that the trial court erred in holding that the easement, if created, had not been abandoned.) They note that, until Wienman died, Mollie and her tenants used the driveway with his permission. They then assert that no evidence proved that Mollie "was doing anything other than continuing to have her tenants use the driveway on the same basis they had while Wienman was alive, with the acquiescence of his heirs." For the following reasons, we hold that the trial court's determination that the Dixons proved continuous adverse use for the requisite 20 years was not against the manifest weight of the evidence.

¶ 23 To prove an easement by prescription, a claimant must show that the use of the land was adverse, exclusive, continuous, uninterrupted, and under a claim of right for at least 20 years. *Petersen v. Corrubia*, 21 Ill. 2d 525, 531 (1961); *Light v. Steward*, 128 Ill. App. 3d 587, 593-94 (1984). Here, the sole issue on review is whether the Dixons proved the element of adversity. This was a question of fact, and the trial court's finding that the use of the driveway by the tenants of 87 South Hennepin was adverse and not merely permissive may not be disturbed unless it was against the manifest weight of the evidence. See *Light*, 128 Ill. App. 3d at 594-95.

¶ 24 We agree with the City that the trial court's finding of adverse use, starting December 10, 1954, and continuing for more than 20 years, was not against the manifest weight of the

evidence. As the City argues, the key to this finding was the 1946 agreement, combined with the behavior of the parties concerned thereafter.

¶ 25 The 1946 agreement unambiguously stated that the permission granted to use the driveway would terminate immediately upon the death of Wienman. Therefore, as of December 10, 1954, any use of the driveway by the owners or tenants of 87 South Hennepin was without the permission of the owners, at least absent any evidence to the contrary.

¶ 26 And there was literally *no* evidence that, between December 10, 1954, and December 10, 1974, anyone associated with 87 South Hennepin ever requested permission to use the driveway, much less that the owners ever granted such permission. Moreover, David Sinow and Gary Campbell provided evidence that Campbell Motors, followed by Budget Bakery, used the driveway without requesting (or having their landlord, the Sinows, request) permission. David testified that he never asked permission to use the driveway and that, to his knowledge, no tenant ever did. Campbell testified that he had never had to request permission to use the driveway. Neither witness could say that nobody had ever requested permission, but the absence of evidence of any such requests, combined with the affirmative testimony that regular users of the driveway had never sought permission or found it necessary to do so, establishes that the finding of adversity was not against the manifest weight of the evidence.

¶ 27 Defendants contend that "[n]obody in 1954 wrote or said anything indicating [that] continued use of the driveway after Wienman's death was being considered adverse or hostile." They argue that continued permission could be inferred from the "neighborly relationship" between the property owners and users after December 10, 1954. But, as the City points out, nobody had to say or write anything to indicate that the continued use of the driveway was not permissive; the 1946 agreement already said so. Wienman's death transformed the character of

the use. The agreement told everyone that permission was ended. Moreover, the temporary permission that Mollie received was the product of a lawsuit between her and Wienman. Under these circumstances, and given the lack of evidence otherwise, the trial court reasonably found that the continued use of the driveway did not result from "a mere extension of neighborly courtesy" (*Piper v. Warren*, 61 Ill. App. 2d 460, 465-66 (1965)).

¶ 28 *Top of the Town, LLC v. Somers Sportsmen's Ass'n, Inc.*, 797 A.2d 18 (Conn. App. Ct. 2002)), an adverse-possession case on which defendants rely, is distinguishable. In 1957, Galbraith, a member of the defendant gun club, had orally permitted it to use part of his property for its activities. In 1967, he died. His will did not refer to the defendant's use of the area. *Id.* at 20. Eventually, the property descended to Galbraith's nephews. In 1997, the defendant offered to purchase the entire property, including the area that it had used, but the nephews instead sold the property to the plaintiff. That year, the plaintiff ordered the defendant to vacate the property; the defendant refused; the plaintiff brought an action and the defendant brought a counterclaim; and the trial court found that the defendant was entitled to part of the property, 23 acres that it had fenced off and posted "no trespassing" signs on. *Id.* at 21.

¶ 29 The appellate court reversed. The court explained that, to establish adversity (*i.e.*, a "claim of right"), the defendant had the burden to prove its "intent to disregard the true owner's right to possession." *Id.* at 22. The court then held that, although the original license had expired with Galbraith's death in 1967, the trial court had erred in requiring the plaintiff to prove that, after that event, the defendant no longer had permission to occupy the property. There might still have been implied permission and, with either adverse possession or a prescriptive easement, implied permission is not adverse. *Id.* at 23. However, the trial court had shifted the burden to the plaintiff to prove that it had permitted the use at issue. *Id.*

¶ 30 Aside from centering on adverse possession (under Connecticut law), which necessarily involved different issues from a prescriptive easement, *Top of The Town* is distinguishable on its facts. There, the original owner's permission lapsed with his death, but nothing that followed affirmatively told the defendant that it could no longer use the property. Thus, there was a basis to infer the continuation of the neighborly relations, and therefore the continuation by the owner's successor of his permission to use the property. Here, by contrast, the trial court could find that the 1946 agreement negated any continued "neighborliness." The court could (and did) recognize the explicit change in the relationship, one that was not present in *Top of the Town*. The recognition was particularly reasonable given that the disputed area was on property used by for-profit businesses, not an informal recreational organization in which the owner had taken a personal interest. Thus, we do not find defendants' reliance on *Top of the Town* persuasive.

¶ 31 For the foregoing reasons, the judgment of the circuit court of Lee County is affirmed.

¶ 32 Affirmed.