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2011 IL App (3d) 100261-U

Order filed October 28, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT
A.D., 2011

CARL BRYANT, <i>et al.</i> ,)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
Plaintiff-Appellee,)	Will County, Illinois,
)	
v.)	Appeal No. 3-10-0261
)	Circuit No. 09-CH-4764
THE LAKELANDS COMMUNITY)	
HOMEOWNERS ASSOCIATION, CORP.)	
)	Honorable
Defendant-Appellant.)	Barbara Petrungaro,
)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Lytton and McDade concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court's grant of injunctive relief to plaintiff downstream property owners preventing defendant upstream homeowners association from erecting a berm on its property, was not in error. The berm would divert flood waters from their natural path along defendant's property.
- ¶ 2 Plaintiffs, Carl Bryant, Frank Bender, Bette Benders, John Otte, Melvin Rebuehr and Karen Rebuehr (collectively Bryant), brought this complaint for injunctive relief seeking to prohibit defendant Lakelands Community Homeowners Association from constructing a berm to prevent

DuPage River overflow from flooding Lakelands' lake. The trial court granted Bryant a preliminary injunction and enjoined Lakelands from constructing the berm. It brought this interlocutory appeal. We affirm.

¶ 3

FACTS

¶ 4 Lakelands is a residential development that includes private Walloon Lake. The Lakelands area had previously been a quarry. Several Lakelands residents testified that there had been a berm at the site for the proposed berm, that the elevation was later lowered, and a boat ramp was constructed. The DuPage River flows in a southerly direction across the road from Lakelands. In July 1996, the DuPage River flowed over its banks. Flood waters crossed the road and into Walloon Lake. Several Lakelands residents testified that Walloon Lake overflowed and flooded their land, and in some instances, their homes. After the flood, Lakelands looked into protecting itself from flooding. Several options were presented, including constructing the berm at issue and adding culverts under a nearby street to relieve the watershed. It built the culverts and began the berm project. The engineering design for the berm was submitted to the Army Corps of Engineers, the Illinois Department of Natural Resources, and the Illinois Environmental Protection Agency. Lakelands applied for a permit for the berm from the Village of Plainfield, which was granted following a public hearing.

¶ 5 In September 2008, a two-day rain event caused approximately 6 inches of rain in the Plainfield area. Wheaton, which is upriver from Plainfield, received 10.5 inches of rain. The DuPage River set a record for elevation and flooded its banks. Lakelands' residents built a sandbag barrier to prevent the river flood waters from coming into Walloon Lake. Several plaintiffs testified that the flood waters diverted by the sandbags washed back into the river, went downstream and flooded their

properties. Since the 2008 flood, they have noticed erosion on their river banks. The plaintiffs' homes are all built on a flood plain.

¶ 6 Bryant brought the instant action to prevent Lakelands from building the berm. A hearing took place. Both sides presented expert testimony concerning the effect of the berm on the plaintiffs' properties. The expert for Bryant testified that the berm would damage the plaintiffs' properties. Lakelands' expert testified that any change in the amount of water to flow downstream as a result of the berm would be inconsequential. Both experts and several lay witnesses testified that the natural overflow of the DuPage River traveled onto the Lakelands development and into Walloon Lake. The trial court granted Bryant's request for a preliminary injunction preventing Lakelands from building the berm. Lakelands filed this interlocutory appeal.

¶ 7 **ANALYSIS**

¶ 8 The issue on appeal is whether the trial court erred when it granted a preliminary injunction enjoining Lakelands from constructing a berm. Lakelands argues that injunctive relief was improperly granted to Bryant. It submits that Bryant has an adequate remedy at law, did not prove an ascertainable right of protection, or establish a likelihood of success on the merits. It further submits that the benefits of granting the injunction do not outweigh the costs to Lakelands of flooding.

¶ 9 A preliminary injunction maintains the status quo until the merits of a cause have been determined. *Ford Motor Credit Co. v. Cornfield*, 395 Ill. App. 3d 896, 903 (2009). A preliminary injunction is an extraordinary remedy and its issuance is not favored by courts. *Cornfield*, 395 Ill. App. 3d at 903. To obtain a preliminary injunction, a party must establish that: (1) it has a clear right or interest in need of protection; (2) it has no adequate remedy at law; (3) irreparable harm will result

if the preliminary injunction is not granted; and (4) there is a reasonable likelihood of success on the merits. *Stenstrom Petroleum Services Group, Inc. v. Mesch*, 375 Ill. App. 3d 1077, 1089 (2007). To establish the necessary elements, a plaintiff need only demonstrate there is *prima facie* evidence to support its claim. *Weitekamp v. Lane*, 250 Ill. App. 3d 1017, 1022 (1993). The plaintiff's burden of proof in establishing the necessary elements is preponderance of the evidence. *Weitekamp*, 250 Ill. App. 3d at 1022. This court reviews a trial court's grant of a preliminary injunction for an abuse of discretion. *Stenstrom*, 375 Ill. App. 3d at 1089.

¶ 10 As to the element, inadequate remedy, Lakelands maintains that the case law dictates that money damages are an appropriate form of relief for flooding situations like the instant case. Lakelands argues that because adequate money damages were available to Bryant, the issuance of an injunction was improper.

¶ 11 The standard regarding whether a remedy is adequate is whether it is clear, complete and as practical and efficient as a legal remedy. *Tamalunis v. City of Georgetown*, 185 Ill. App. 3d 173, 189-90 (1989). When a party's damages may be adequately compensated with money damages, it has an adequate remedy at law and is not entitled to injunctive relief. *Lumbermen's Mutual Casualty Co. v. Sykes*, 384 Ill. App. 3d 207, 230-31 (2008). Only when money is insufficient to compensate for a party's damages or when an injury cannot be properly quantified in terms of money is injunctive relief appropriate. *Sykes*, 384 Ill. App. 3d at 231. Injunctive relief may be ordered when the injury is of a continuing nature; such injury does not mean it is beyond repair or compensation in money damages. *SSA Foods, Inc. v. Giannotti*, 105 Ill. App. 3d 424, 428 (1982).

¶ 12 We determine that there is no adequate remedy at law for Bryant's damages. Bryant argues that the proposed berm would result in a diversion of the natural path of flood waters from Lakelands

back downstream, and a flood on his property. He further argues that the berm would cause his river bank to erode. Money damages are not appropriate for the continuing nature of the injuries alleged. Enjoining Lakelands from creating the berm is a remedy that is clear, complete and arguably more practical and efficient than requiring Bryant to wait until his property floods again and more erosion occurs to seek money damages. While Lakelands is correct in asserting that case law provides for money damages as compensation for flooded property, those cases do not state that injunctive relief is precluded. *Bradbury v. Vandalia Levee & Draining District*, 236 Ill. 36 (1908) (plaintiffs entitled to money damages as compensation for defendant's taking for a public use plaintiff's land for flooding purposes); *Hurley v. Kincaid*, 285 U.S. 95 (1932) (Court found a taking for public use which entitled the plaintiff to money damages and held that injunctive relief was inappropriate). Moreover, the cases are factually distinguishable. Here, the defendant is not a governmental or quasi-governmental entity subject to the constitution's taking restrictions. In *Alderson v. Fatlan*, 231 Ill. 2d 311 (2008), another case on which Lakelands relies, at issue was whether the plaintiffs were entitled to use of a lake which was partially on their property. This case is about the diversion of flood waters.

¶ 13 The same analysis applies to the next element for a preliminary injunction, that the plaintiff would be irreparably injured if the injunction did not issue. An injury is said to be irreparable where the injured party cannot be adequately compensated in money damages or by some pecuniary standard. *Bally Manufacturing Corp. v. JS&A Group, Inc.*, 88 Ill. App. 3d 87, 94 (1980). The berm would result in flooding at any period of substantial rainfall as established by testimony of flooding after Lakelands was sandbagged. Because repeated flooding will cause continual erosion, damage and loss of property value, we find that Bryant has demonstrated that irreparable harm would result

without the injunction.

¶ 14 As to the next element, Lakelands submits that Bryant did not prove he had an ascertainable right in need of protection. It argues that there was no evidence regarding damage to the Otte property which belongs to one of the plaintiffs and that the omission precludes satisfaction of this element.

¶ 15 In equity, all parties bringing the action must be entitled to recover or none may. *Daniel Boone Woolen Mills v. Laedeke*, 238 Ill. App. 92, 101 (1925). If one or more complainants to an action in equity cannot maintain a case against the defendant, the rest of the parties must seek leave to amend to strike out any co-complainants without a cause of action in order to maintain their action. *Girard v. Lehigh Stone Co.*, 280 Ill. 479, 485-86 (1917).

¶ 16 Contrary to Lakelands' claim, there was evidence presented regarding damage to the properties of all the plaintiffs, including Otte. While Otte himself did not testify, the expert testimony of Jeffrey Allen established that creation of the berm would cause damage to the property of Otte and the other plaintiffs. We consider that the evidence was sufficient to establish an ascertainable right in need of protection of all the plaintiffs.

¶ 17 Lakelands next asserts that the trial court erred as a matter of law in finding that Bryant had a likelihood of success on the merits. It argues that Illinois law provides that a dominant landowner, such as itself, may construct a berm to divert floodgate from its property. It further argues that as the dominant estate, it has a natural easement in the lower, downstream, servient estates owned by the plaintiffs with respect to surface water. It also argues that Bryant's presentation of causation evidence was insufficient to establish his right to relief.

¶ 18 The civil rule sets forth that the owner of a dominant estate has a natural easement in the

servient estate for the natural flow of water. *Peck v. Herrington*, 109 Ill. 611, 619 (1884). A dominant estate may reasonably increase the flow of surface water from its land to the servient estate. *Peck*, 109 Ill. at 620. A dominant owner may drain his property but he cannot divert the natural drainage course. *Templeton v. Huss*, 57 Ill. 2d 134, 141 (1974). A servient estate is not required to aid or improve the natural flow of surface water from the dominant estate. *Bodenschatz v. Parrott*, 153 Ill. App. 3d 1008, 1011 (1987).

¶ 19 “The owners of land along a stream must use them so as not to injure the land of other owners both as regards to surface and overflow water.” *Dickerson v. Goodrich*, 190 Ill. App. 505, 509 (1914). When landowners each have riparian rights to a stream, they must submit to another’s reasonable use of the water, provided it does not inflict substantial injury on the other owners with like rights. *Tetherington v. Donk Brothers Coal & Coke Co.*, 232 Ill. 522, 525 (1908). The right will generally depend on the reasonableness of the use and the extent of the detriment to the servient estate. *Tetherington*, 232 Ill. at 525. The owner of a dominant estate has a duty not to increase the flow of surface waters on a servient estate beyond a reasonable use. *Starceovich v. City of Farmington*, 110 Ill. App. 3d 1074, 1079 (1982). Unreasonableness refers to “the inference with drainage through natural flow and seepage that defendant’s changes cause upon the plaintiff’s servient estate.” *Starceovich*, 110 Ill. App. 3d at 1080. The owner of a servient estate is not required to receive surface water in different quantities or at different times than would occur through the natural waterways. *Bollweg v. Richard Marker Associates, Inc.*, 353 Ill. App. 3d 560, 574 (2004).

¶ 20 We find that there was evidence presented adequate to make Bryant’s success on the merits reasonably likely. Lakelands’ expert projected that creation of the berm would result in minimal amounts of diverted water and be for a reasonable use. Specifically, he stated that in a 100-year

storm event, 2.3%, and in a 500-year storm event, 1.4% of the water that would have naturally flowed into Lake Walloon would instead continue downstream to the plaintiffs' properties. In addition, he testified that all of the diverted water would flow downstream. Bryant's expert opined that any time water is diverted, it has a negative impact downstream. As to the properties of the plaintiffs, he stated that the water diverted from the berm would cause erosion, and a faster flood and longer flood period.

¶ 21 We determine that Lakelands, as a dominant estate, is not entitled to change the course of the natural drainage waterway. The evidence is undisputed that the natural channel for the overflow of the DuPage River waters was across Lakelands' property at the point it seeks to create a berm, and into Walloon Lake. In constructing the berm, Lakelands is doing more than increasing the amount of water flowing downstream to Bryant's properties. It is diverting from the natural waterway some amount of DuPage River flood waters that would otherwise flow onto Lakelands' property. The plaintiffs and their expert testified to the flooding they experienced as a result of Lakelands' sandbagging efforts in the 2008 flood, and that to a reasonable degree of scientific certainty, the flood would reoccur if the berm was constructed. Evidence that an obstruction or diversion of the natural flow caused a prior flood is sufficient to sustain the causation element.

¶ 22 Lakelands submits that the berm is a reasonable development on its property. Its argument is misplaced. It points to *Sparks v. Gray*, 334 Ill. App. 3d 390 (2002), as support for its argument. In *Sparks*, a common ditch between the parties' properties drained into a canal, which was determined to be the servient estate. *Sparks*, 334 Ill. App. 3d at 396. Because the defendants were not changing the natural flow of surface water "or causing it to go back upon the land," but rather displacing water off their property by improving the grade, the reviewing court held that the plaintiffs

did not establish a clear and protectable interest, and that a preliminary injunction in their favor was in error. *Sparks*, 334 Ill. App. 3d at 397. The evidence here demonstrates that the proposed berm would change the natural flow of the surface water, thereby distinguishing *Sparks*.

¶ 23 Lakelands also relies on the good husbandry exception in arguing that the berm is a reasonable development. The good husbandry exception provides that a dominant estate may not “ ‘construct drains or ditches so as to create new channels ’ ” for the servient estate but it “as may be required by good husbandry” divert water on “ ‘his own land’ ” even if it increases water flow “in a regular, well-defined channel[.]” *Templeton*, 57 Ill. 2d at 138-39 (quoting *Peck*, 109 Ill. at 619. Because the evidence suggests a proposed berm would change the course of the water flow, we find that the good husbandry exception is inapplicable.

¶ 24 Lakelands lastly complains that the trial court failed to balance the hardships, and that if it had, it would have found that the balance weighed in favor of Lakelands. Lakelands cites the substantial costs it and its residents incurred as a result of the 1996 flood and argues that they outweigh the benefits to the plaintiffs of granting the injunction.

¶ 25 In determining whether to grant a preliminary injunction, the trial court should decide whether the balance of hardships to the parties supports the grant of injunctive relief. *Bollweg*, 353 Ill. App. 3d at 572. The trial court should consider the potential for economic loss from increased water flow onto the servient estate as well as the potential benefits that would result from development on the dominant estate. *Bollweg*, 353 Ill. App. 3d at 574.

¶ 26 Lakelands presented evidence of the substantial losses suffered by its residents from the 1996 flood. It asserts that in comparison, Bryant suffered little cost from the 2008 flood for which Lakelands erected its sandbag barrier. However, merely because it is susceptible to flooding when

the DuPage River outflows its banks, Lakelands is not permitted to alter the natural course of water to pass the flooding down the river to Bryant. The servient landowners and their expert testified as to the increased flooding on their lands which had not occurred prior to creation of the sandbag barrier. Bryant is not required to wait until his property is damaged to seek relief. The trial court did not err in balancing the hardships in Bryant's favor.

¶ 27 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 28 Affirmed.