2013 IL App (3d) 110790-U

Order filed March 28, 2013

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

JODY KIMBRELL, MICHAEL KIMBRELL and ANNE ISSACS,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
	)	Peoria County, Illinois,
Plaintiffs-Appellants Cross-Appellees,	)	
	)	Appeal No. 3-11-0790
v.	)	Circuit No. 09-L-297
	)	
ILLINOIS-AMERICAN WATER COMPANY, an Illinois Corporation,	)	
	)	Honorable Scott Shore and
Defendant-Appellee Cross-Appellant.	)	Honorable Stephen Kouri,
	)	Judges, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justices Carter and Holdridge concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly found that plaintiffs' initial quiet title action did not bar defendant from asserting its affirmative defense of easement by prescription in this matter. The trial court's finding that defendant sufficiently proved the elements of its prescriptive easement affirmative defense was neither legally erroneous nor against the manifest weight of the evidence. Defendant has

forfeited its argument that the trial court erred in refusing to enter an order in this matter that defendant's prescriptive easement is enforceable against nonparties to this suit.

¶ 2 Plaintiffs, Jody and Michael Kimbrell and Anne Isaacs, brought this trespass and ejectment action in the circuit court of Peoria County. Defendant, Illinois-American Water Company (IAW) owns waterlines running under property owned by plaintiffs. The trial court held, *inter alia*, that IAW established an easement by prescription and set the boundaries of the easement. Plaintiffs appeal, claiming the trial court erred by allowing defendant to impermissibly collaterally attack a final order from a prior quiet title action, that the trial court erred in finding IAW established an easement by prescription and that the trial court misapprehended the remedies available to plaintiffs. Defendant cross-appeals, claiming the trial court erred as a matter of law when concluding it did not have jurisdiction to find defendant's prescriptive easement is enforceable against any party other than plaintiffs.

¶ 3 BACKGROUND

¶ 4 In 1997, plaintiffs purchased an apartment complex located just off of University Street in Peoria, Illinois. The complex is known as the Jeth Court Apartments. The property at issue in this matter, also owned by plaintiffs, consists of three vacant lots immediately to the south of the Jeth Court Apartments. Plaintiffs recognized, shortly after purchase, that their deed to the Jeth Court Apartments did not include deeds to the vacant lots even though they believed they had purchased those lots when obtaining the Jeth Court Apartments. To settle any issues regarding ownership of those lots, plaintiffs obtained quitclaim deeds to them from the original sellers and

also brought a quite title action. In 2000, the plaintiffs herein obtained a judgment quieting title to the property against the named defendants, unknown owners and nonrecord claimants.

¶ 5 In 1948, Exposition Gardens dedicated to the County of Peoria a right-of-way in certain land for the purpose of constructing and maintaining a public highway. The right-of-way for the county highway included the property at issue here. The county constructed a highway known as Old State Aid Route 52 through the right-of-way on this property.

¶ 6 In November of 1958, the County Board of School Trustees of Peoria County, Illinois, sold the property at issue to Robert Silburstein and Harold Geeraerts, who ultimately sold the property to the plaintiffs herein. At the time of the 1958-1959 sale, the property remained subject to the highway right-of-way.

¶ 7 In or around 1960, IAW constructed a 16-inch water main under Old Route 52 within the right-of-way pursuant to a permit issued by the Peoria County Highway Department. IAW never sought, nor obtained, additional permission from any entity beyond that granted by the permit before constructing the water main. The permit provided that if Old Route 52 were reconstructed, the water main needed to be moved. IAW never recorded an easement associated with the main. In 1976, IAW installed a water hydrant on the property at issue here. It connected the hydrant to the water main with a service line. The hydrant lies approximately 8 to 10 feet from the water main and has not moved since its installation.

¶ 8 In the 1970s, Peoria County began moving Old Route 52, now known as University Street, to the west. In 1982, the county completed the move of Old Route 52 to the new

University Street and adopted a “vacation resolution,” which altered the right-of-way. The resolution, which was recorded with the Peoria County Recorder of Deeds office on November 15, 1982, states "that the County Board vacates the part of the Right of Way no longer needed." The resolution included lengthy descriptions of the lands over which the right-of-way was vacated. The parties agree that the description of the lands identified in the vacation resolution includes the property at issue in this matter.

¶ 9 When plaintiffs acquired the subject property in 1997, they obtained title searches and title insurance, which identified several different utilities on the various tracts of land. At the time plaintiffs acquired the property, and to this day, IAW has not recorded any easements for the water main on the property.

¶ 10 Plaintiffs acknowledge that they walked the property prior to purchasing it. They claim the vacant lots were covered with trees, shrubs, grass and garbage, which obstructed their view of the fire hydrant which they did not see until 1998. An appraisal of the property in 1998 noted that the vacant lots were serviceable by various utilities that a commercial property requires. The appraisal further noted that no encroachments existed running on or under the vacant lots.

¶ 11 In 1998, a dispute arose between plaintiffs and the owners of an adjacent apartment complex. During the dispute, plaintiffs cleared shrubs and other foliage from part of the vacant lots at which time they discovered the fire hydrant and sprinklers running east from the hydrant. Plaintiffs assumed the sprinklers were located on a water service line that ran from a main under University Street.

¶ 12 The dispute between plaintiffs and the other complex continued, resulting in the plaintiffs filing an action to quiet title in December of 1999. The principal target of the quiet title action was the owners of the adjacent apartment complex known as Gaslight. Plaintiffs not only named Gaslight as a defendant, but also named all unknown owners and nonrecord claimants as defendants in the quiet title action.

¶ 13 Plaintiffs' quiet title complaint alleged that despite the fact they "sought diligently to learn the identity of such unknown owners and nonrecord claimants, the plaintiffs have no knowledge or information as to the names and addresses of such persons ***." Plaintiffs filed an affidavit for service by publication to terminate the rights of nonrecord claimants. The affidavit noted that "unknown owners cannot be found on diligent inquiry so that process cannot be served upon them." Plaintiffs then served notice on unknown owners and nonrecord claimants by publication.

¶ 14 In the quiet title action, no party answered or asserted a right in the property leading to a default judgment in favor of plaintiffs. The circuit court entered an order of default on March 31, 2000, terminating the rights in the property of the named defendants, all unknown owners and nonrecord claimants.

¶ 15 In or about 2003, plaintiffs commenced an administrative proceeding with the Illinois Commerce Commission against IAW. During the administrative proceedings, plaintiffs informed IAW that they wanted the waterlines removed from the property. IAW did not act on the request.

¶ 16 In February of 2009, plaintiffs entered into a contract for sale of one of the vacant lots

with Casey's Retail Company. Casey's engineers discovered the water main running under the property. Plaintiffs claim this is the first they learned of the water main under the property and allege that it renders the lot unmarketable as it prevents significant construction on the property. Plaintiffs and Casey's asked IAW to move the water main but, again, IAW refused. Casey's then exercised its rights to rescind the contract to purchase the property.

¶ 17 In September of 2009, plaintiffs commenced this action for trespass and ejectment. In September 2010, plaintiffs moved for summary judgment on the issue of liability, arguing they were entitled to judgment on two independent grounds: (1) that defendant was required to move its utility lines upon the reconstruction of University Road to the west of where Old Route 52 used to run through the property; and (2) that the quiet title action defeated the unrecorded interests that defendant is presently asserting in and to the property.

¶ 18 Defendant moved for summary judgment as well. Defendant argued it acquired an easement by virtue of language in the 1982 vacation resolution and, in the alternative, that it had a valid property right pursuant to the 1948 right-of-way deed.

¶ 19 The trial court denied defendant's motion for summary judgment in its entirety. The court granted plaintiffs' motion in part, finding that defendant was presumptively trespassing on the property. The court, however, further found that the quiet title judgment did not bar defendant from defending the trespass claims, as plaintiffs knew or should have known of some utilities on the property and, as such, IAW was not an "unknown owner" at the time of the quiet title action. The trial court found that an issue of fact remained as to whether IAW acquired a

prescriptive easement at some point after Peoria County's 1982 vacation resolution. Finally, the court found that the only remedy available to plaintiffs was money damages and not ejectment.

¶ 20 The matter proceeded to bench trial with the sole issue to be determined whether IAW acquired a prescriptive easement at some point following the 1982 vacation resolution.

¶ 21 Jeffrey Franklin, a surveyor called by plaintiffs as a witness, noted it is generally known that one can tell where a hydrant connects to a water main based upon which direction the hydrant "faces;" that is, connections to a fire hose point toward the direction where the water main lies. Franklin noted the hydrant at issue here faces east.

¶ 22 Plaintiff Kimbrell's testimony indicates that she has extensive real estate experience, having taken real estate classes at Bradley University. She obtained a realtor license in 1989 and worked as a realtor selling residential, commercial and rural properties. She believes it is a good practice to identify utilities on properties prior to purchase and further believes one should perform visual inspections as part of due diligence before purchasing a property. She possesses a real estate appraiser's license in addition to her realtor license.

¶ 23 Kimbrell acknowledged three hydrants were located nearby the Jeth Court Apartments when she purchased them. One was a private hydrant for which IAW sent her a monthly fee. IAW never sent an invoice for the hydrant located on the vacant land at issue in this matter. Prior to November of 2003, she never objected to the presence of the water main as she claims not to have known it existed. She claims the title company "missed" the 1982 resolution during its title search and, as such, she was not given a copy of the 1982 resolution when plaintiffs purchased

the property in 1997. Kimbrell indicated the first she can remember being aware of the vacation resolution was October of 1999. At that time, she read it and understood it.

¶ 24 Despite testifying that October of 1999 is the first she recalls becoming aware of the vacation resolution, Kimbrell acknowledged authoring a document titled "Right to Claim Ownership" in March of 1998. That document identifies the "vacated University St. Right of Way identified by attached Vacation Plat Doc. No. 82-16199 recorded Nov. 15, 1982." The document further states that any "encroachments to the property will be resolved with the offending parties and easement agreements arranged to satisfy the needs of all involved." She attached a copy of the vacation resolution to her "Right to Claim Ownership" document.

¶ 25 Kimbrell testified that it is the duty of appraisers to investigate all utilities available to a piece of property. An appraisal was completed prior to her purchase of the property, but she cannot locate the appraisal. She acknowledged that a May of 1998 title commitment cites, as an exception to coverage, the "rights of public and quasi public utilities in and to [the property], relative to the vacation of [the property] by the 1982 County Resolution." She was aware of the title commitment prior to filing the quiet title action in December 1999.

¶ 26 Kimbrell acknowledged that her brother mowed the property in 1998, making the hydrant visible. At the time, she believed it to be a private hydrant belonging to Gaslight Apartments, the adjacent property.

¶ 27 On October 5, 2011, the trial court issued its judgment finding that IAW did, in fact, prove its defense of prescriptive easement. On October 19, 2011, plaintiffs filed a notice of

appeal attacking the October 5, 2011, order. Thereafter, IAW filed a posttrial motion asking the trial court to identify the specific location of the prescriptive easement. On December 13, 2012, the court entered an amendment to judgment incorporating a plat that identified the parameters of the easement. The court further ruled that it did not have jurisdiction to establish an easement as to third parties since IAW had neither sued nor counterclaimed to establish one, nor served process on any other potential parties in interest. Plaintiffs then filed an amended notice of appeal on December 20, 2011. IAW filed a cross-appeal attacking the court's December 13, 2012, ruling.

¶ 28 ANALYSIS

¶ 29 Plaintiffs essentially raise three claims of error. First, plaintiffs submit that the trial court erred when finding the doctrine of *res judicata* did not bind IAW to the holdings in the quiet title action. Second, plaintiffs submit that the trial court erred in finding IAW established a prescriptive easement for the water main. Finally, plaintiffs claim the trial court erred in finding that they are not entitled to ejectment as a remedy for IAW's trespass.

¶ 30 A. *Res Judicata* and the Quiet Title Action

¶ 31 Plaintiffs argue that the quiet title action, by application of the doctrine of *res judicata*, bars IAW from asserting any interest in the land. The doctrine of *res judicata* provides that a final judgment on the merits rendered by a court of competent jurisdiction is conclusive as to the rights of the parties and their privies to a lawsuit. *Agolf, LLC v. Village of Arlington Heights*, 409 Ill. App. 3d 211 (2011). The doctrine acts as an absolute bar to a subsequent action between

the same parties or their privies involving the same claim, demand or cause of action. *Id.* at 219. *Res judicata* applies when (1) there was a final judgment on the merits rendered by a court of competent jurisdiction; (2) there is an identity of cause of action; and (3) there is an identity of parties and their privies. *Nowak v. St. Rita High School*, 197 Ill. 2d 381, 390 (2001). The parties do not quarrel over the first two elements of the doctrine. At issue is whether IAW was a party to the quiet title action. Plaintiffs claim it was; IAW disagrees.

¶ 32 Plaintiffs submit that it properly perfected service on unknown owners and nonrecord claimants in the title quiet action. IAW agrees, but disputes that it was an unknown owner. IAW notes that the law in Illinois has long held that "persons seeking a judgment against unknown owners must make an honest attempt to see that interested parties have notice of proceedings involving their property rights." *Applegate Apartments Limited Partnership v. Commercial Coin Laundry Systems,* 276 Ill. App. 3d 433, 440 (1995) (citing *Mulvy v. Gibbons*, 87 Ill. 367 (1877)). For service by publication to be binding on parties as "unknown owners," there must be a well-directed effort to ascertain the names and addresses of the unknown owners or parties, and the inquiry must be as full as the circumstances of the situation permit. *Romain v. Lambros*, 7 Ill. 2d 206 (1955).

¶ 33 Plaintiffs do not seem to take issue with IAW's assertion that even the slightest amount of due diligence would have uncovered the fact that utilities ran under the property. Plaintiffs argue, however, that even if that is true, IAW's exclusive method to avoid the effect of the quiet title action was to attack the judgment in that matter by filing a section 2-1401 petition. See 735

ILCS 5/2-1401 (West 2010).

¶ 34 It is clear that we must first determine whether IAW was a party to the quiet title action to properly resolve the issues raised. "A nonparty to a judgment has no standing to seek relief from that judgment by filing a section 2-1401 petition. [Citation.] Section 2-1401 was never intended to permit a person not a party to the action to intervene after final judgment and reopen the suit so as to permit a new claim to be filed." *In re J.D.*, 317 Ill. App. 3d 445, 449-50 (2000); see also *Hurlbert v. Brewer*, 386 Ill. App. 3d 1096 (2008). A few narrow exceptions have been recognized to this rule. A nonparty may seek relief under section 2-1401 if the party is: (1) privy to the record: (2) injured by the judgment and will derive benefit from its reversal; or (3) competent to release error. *Id.* at 1102.

¶ 35 If IAW was neither a party or in privy with a party to the quiet title action, it possessed no standing to bring a 2-1401 petition and plaintiffs' arguments that section 2-1401 provides the exclusive method by which IAW may make its arguments must fail. However, if IAW was, in fact, a party to the quiet title action, then we must address plaintiffs' and IAW's arguments regarding whether section 2-1401 was the exclusive method for IAW to assert its claims.

¶ 36 Section 2-413 of the Code of Civil Procedure states that if "in any action there are persons interested therein whose names are unknown, it shall be lawful to make them parties to the action by the name and description of unknown owners, *** but an affidavit shall be filed by the party desiring to make those persons parties stating that their names are unknown. Process may then issue and publication may be had against those persons by the name and description so given,

and judgments entered in respect to them shall be of the same effect as though they had been designated by their proper names." 735 ILCS 5/2-413 (West 2010).

¶ 37 As noted above, our supreme court noted long ago that in such instances the "statutes contemplate that the party seeking the judgment will make an honest attempt to see that the interested parties have notice of the proceedings involving their property rights." *Romain v. Lambros*, 7 Ill. 2d at 212; see also *Callner v. Greenberg*, 376 Ill. 212, 215 (1941) ("For a service of publication to be binding upon the parties as unknown owners there must be a well directed effort to ascertain the names and addresses of the unknown owners and parties, and inquiry must be as full as the circumstances of the situation will permit. If this is not done the proceeding is not binding upon the parties named as unknown owners.").

¶ 38 In *Graham v. O'Connor*, 350 Ill. 36 (1932), the circuit court entered an order quieting title to 122 acres of farmland. *Id.* The defendant, Kate O'Connor, previously obtained a judgment quieting title in her favor to 15 acres of the 122-acre tract. In O'Connor's quiet title action, she named as defendants, the " 'unknown widow, heirs-at-law, legatees and devisees of Hugh Graham, deceased.' " *Id.* at 37-38. O'Connor also filed an affidavit stating she was unable to ascertain the proper names and places of residence of the defendants after " 'diligent search and due inquiry.' " *Id.* The affidavit specifically indicated " 'that on due inquiry the above named defendants cannot be found and that upon diligent inquiry the place of residence of said above named defendants cannot be ascertained.' " *Id.* at 38. In the Graham's subsequent quiet title action, O'Connor claimed "that, since her suit to quiet the title to the [15 acre] tract was

determined in her favor, the [Grahams] are barred from bringing their action to quiet title to the same land." *Id.* at 39.

¶ 39 The *Graham* court held that the "phrases 'due inquiry' and 'diligent inquiry' in [the statute allowing service on unknown parties] are not intended as useless phrases, but are put there for a purpose. Those two phrases have a well-understood meaning that cannot be reconciled with the taking of a chance of guessing that the names and addresses of unknown parties cannot be ascertained. A perfunctory inquiry does not comply with the provisions of the statute. An honest and well-directed effort must be made to ascertain the names and addresses of unknown parties. The inquiry must be as full as the circumstances of the particular situation will permit." *Id.* at 40-41.

¶ 40 The *Graham* court noted that O'Connor was a "real estate dealer" who the court found "understood the importance and relation of public records to land titles." *Id.* The court then found that she failed to engage in due inquiry when seeking out parties with potential property interests in the tract at issue. *Id*. As such, the court held "all proceedings had in the [original quiet title] action with relation to the land in question *** do not foreclose the complainants from bringing their suit to quiet title." *Id*.

¶ 41 IAW maintains that it was a known, not unknown owner and, as such, the quiet title action had no bearing on its rights or abilities to claim an easement by prescription. We agree.

¶ 42 Just as the party in *Graham* who sought service on unknown owners, plaintiff Kimbrell herein is a real estate professional who understands the importance and relation of public records

to land titles. She acknowledged the existence of the May 1998 title commitment which states:

> "This policy does not insure against loss or damage *** that arise by reason of the following exceptions:
>
> * * *
>
> 12. Relative to the vacation of Parcel 2 by the Resolution recorded November 15, 1982;
>
> * * *
>
> b) Rights of Public and Quasi Public utilities in and to Parcel 2."

Parcel 2 is the land at issue in this appeal. Plaintiff Kimbrell acknowledges that the "Resolution recorded November 15, 1982" states that "the property, right-of-way and easement of any existing public facility shall be reserved for these facilities for the maintenance, renewal and reconstruction of same." Moreover, she authored a document titled "Right to Claim Ownership" on March 27, 1998, to which she attached the vacation resolution. Added to these clues that a utility is likely present on the property is the undeniable existence of a fire hydrant.

¶ 43 The trial court found that defendants herein "were 'known', not 'unknown' owners" at the time plaintiffs filed the quiet title action and, as such, the action "does not preclude prescriptive easement rights from accruing" to IAW. The court referenced the affidavit from the attorney for the plaintiffs who brought the quiet title action, indicating it "suggests plaintiffs were aware of the existence of the lines at the time of the lawsuit and chose not to specifically name defendants

in the quiet title action."

¶ 44 While the trial court focused on the affidavit from the quiet title plaintiffs' attorney, we may affirm on any ground evident in the record. *Fitch v. McDermott, Will & Emery, LLP*, 401 Ill. App. 3d 1006, 1023 (2010). It is evident to us that the record reveals the quiet title plaintiffs did not make a serious attempt to see that the interested parties had notice of the proceedings involving their property rights. There was no "well directed effort to ascertain the names and addresses of the unknown owners and parties." *Callner*, 376 Ill. at 215. Plaintiff Kimbrell herein was as sophisticated as Ms. O'Connor from the *Graham* case. While acknowledging she had seen the title insurance policy, which indicated public and quasi public utilities had rights in and to the land, Kimbrell did nothing with her knowledge of the vacation resolution.

¶ 45 To use the words of our supreme court, we cannot say Kimbrell made "an honest attempt" to locate interested parties prior to filing the quiet title action. *Romain*, 7 Ill. 2d at 212. Again, the "phrases 'due inquiry' and diligent inquiry' *** are not intended as useless phrases ***." *Graham*, 350 Ill. at 40-41. Therefore, we hold the trial court's finding that IAW was not an unknown party and nonrecord claimant when plaintiffs filed their quiet title action is not against the manifest weight of the evidence. As IAW was not a party to the quiet title action, that action has no *res judicata* effect on IAW and, as such, IAW has no standing to attack the judgment in that action by filing a section 2-1401 petition. *In re J.D.*, 317 Ill. App. 3d at 449-50 ("A nonparty to a judgment has no standing to seek relief from that judgment by filing a section 2-1401 petition.").

¶ 46 Moreover, we find unavailing plaintiffs' claim that *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95 (2002), mandates defendant asserts its defense through a 2-1401 petition. Plaintiffs assert that *Sarkissian* dictates "the exclusive manner for obtaining relief from a judgment—even a judgment that may be void or unenforceable as to a particular party—is through a section 2-1401 proceeding." *Sarkissian*, however, involved the named defendant to the original proceeding filing a section 2-1401 petition to vacate a default judgment entered against it. *Id*. We find *Sarkissian* not relevant to the case at bar where the party against whom *res judicata* is being asserted was never a party to the original action.

¶ 47 B. IAW'S Prescriptive Easement

¶ 48 Plaintiffs aver that the trial court erred in finding IAW established a claim for a prescriptive easement. Plaintiffs acknowledge that generally, we would review this matter to determine if the trial court's finding was against the manifest weight of the evidence. See *Chicago Title Land Trust Co. v. JS II, LLC*, 2012 IL App (1st) 063420. However, plaintiffs claim that the trial court employed an improper evidentiary standard: that is, the trial court held that defendant only needed to prove its prescriptive easement by a preponderance of the evidence instead of by clear and convincing evidence.

¶ 49 To establish an easement by prescription, a party must prove that the use of the land was adverse, exclusive, continuous, and under a claim or title inconsistent with that of the true owner. *Bogner v. Villiger,* 343 Ill. App. 3d 264, 269 (2003). Whether a party has established an easement by prescription is a question of fact. *Id*. The burden of proving a prescriptive right is

on the party alleging such right and all elements must be distinctly and clearly proved. *Id*.

¶ 50 Citing to *Catholic Bishop of Chicago v. Chicago Title & Trust Co.,* 2011 IL App (1st) 102389, plaintiffs claim the trial court employed the incorrect evidentiary standard when making its finding that IAW satisfied its burden of proof establishing the easement. Plaintiffs note that *Catholic Bishop* also states, like *Bogner* referenced above, that all elements must be "clearly and unequivocally proved" by the party alleging such right. *Id.* at ¶ 15. As such, plaintiffs submit that the trial court erred when employing a preponderance of the evidence standard.

¶ 51 Before addressing the substance of the plaintiffs' argument, we feel compelled to clarify the evidentiary standard to be employed by a trial court when assessing a prescriptive easement claim. Many courts, including this one, parrot similar language that "elements must be distinctly and clearly proved." *Bogner*, 343 Ill. App. 3d at 269. However, courts have also held that "the trial court's judgment that plaintiffs had proved an easement by prescription by a preponderance of the evidence was correct." *Schultz v. Kant*, 148 Ill. App. 3d 565, 573 (1986). At least two other decisions, *Ritter v. Janson*, 80 Ill. App. 2d 169 (1967), and *Needham v. Village of Winthrop Harbor*, 331 Ill. 523 (1928), seemingly sanction the preponderance of the evidence evidentiary standard in prescriptive easement cases.

¶ 52 In *Needham*, our supreme court analyzed a claim from the Village of Winthrop Harbor that it possessed a prescriptive easement for a public road over the plaintiff's property. *Id.* The *Needham* court stated, "It is only where the preponderance of the evidence shows that the road has been openly and notoriously used as an open and public highway in common by the general

public for the statutory period that such a road will be considered as a public highway by prescription." *Id*. at 534. This signifies to us that our supreme court, at some point, intended one need only prove a prescriptive easement by a preponderance of the evidence. However, three years earlier, our supreme court clearly noted that, "In order to obtain a prescriptive right of way over the lands of another, it is essential that all the elements necessary to establish such right should be clearly and distinctly proven." *Parker v. Rosenberg*, 317 Ill. 511, 518 (1925). Our supreme court repeated this language in *Monroe v. Shrake*, 376 Ill. 253, 257 (1941).

¶ 53 *Parker*, *Monroe* and common sense indicate to us that the evidentiary standard to be satisfied by one seeking an easement by prescription must be greater than by a simple preponderance of the evidence. Obviously, anyone seeking an easement by prescription is attempting to gain a recognizable and enforceable right in land owned by another party on which the party seeking the easement has been trespassing for some period of time. Therefore, we reaffirm our statement from *Bogner* that the party seeking to establish an easement by prescription must prove all elements distinctly and clearly. *Bogner*, 343 Ill. App. 3d at 269.

¶ 54 We disagree with plaintiffs, however, that the trial court employed the incorrect evidentiary standard. The trial court's judgment dated October 5, 2011, very thoroughly discusses the split in authorities regarding which evidentiary standard should be applied to a party seeking to establish an easement by prescription. In doing so, the trial judge voiced a preference for the preponderance of the evidence standard but then clearly stated, "IAW has met its burden of proof establishing its affirmative defense of prescriptive easement, by a

'preponderance' of the evidence and in fact by 'clear and convincing evidence.' " We find plaintiffs' contention that the trial court failed to hold IAW to the higher evidentiary standard to be without merit.

¶ 55 Turning to the substance of plaintiffs' claims, plaintiffs initially contend that the requirements of proving an easement by prescription are the same as proving adverse possession. We disagree. As the First District recently noted in *Chicago Title Land Trust Co v JS II, LLC*, 2012 IL App (1st) 063420, "A prescriptive easement involves a 'lesser interest' than the interest at stake in a claim of adverse possession," and thus the court will not look to adverse possession cases in its review of a successful claim to a prescriptive easement. *Id.* at ¶ 43; see also *Ruck v. Midwest Hunting & Fishing Club*, 104 Ill. App. 2d 185 (1968); *Smith v. Mervis*, 38 Ill. App. 3d 731, 732 (1976).

¶ 56 Again, to establish an easement by prescription, the claimant must prove that the use of the land was adverse, exclusive, continuous, and under a claim or title inconsistent with that of the true owner. *Sparling v. Fon du Lac Township*, 319 Ill. App. 3d 560, 563 (2001). "These elements must have shared a concurrent existence for a period of 20 years." *Catholic Bishop of Chicago v. Chicago Title & Trust Co.*, 2011 IL App (1st) 102389, ¶ 14. While it is the claimant's burden to establish the elements for a prescriptive easement distinctly and clearly, "the law recognizes rebuttable presumptions with regard to the establishment of adversity" when the other elements have been proved and the origin of the alleged easement is unclear. *Light v. Steward*, 128 Ill. App. 3d 587, 596 (1984); *JS II, LLC*, 2012 IL App (1st) at ¶ 32; *Sparling*, 319 Ill. App.

3d at 563. Given this presumption, we will examine the element of adversity last.

¶ 57 Plaintiffs seemingly acknowledge, by failing to argue to the contrary, that defendant has sufficiently proven the elements of continuous use, exclusivity and under a claim of right. The record clearly shows that IAW has continuously used the property under claim of right since constructing the water main in or around 1960 and installing the hydrant in 1976. To establish a claim of right, "it is sufficient if the proof shows that [the claimant] has acted so as to clearly indicate that [the claimant] did claim the right to such use." *Petersen v. Corrubia*, 21 Ill. 2d 525, 533 (1961). Evidence showed that defendant did not hide the fact that its lines ran through the property. Defendant engaged in periodic maintenance of the lines in open view of the public by flushing them and opening the hydrant on the property as necessary.

¶ 58 We also find no argument by plaintiffs that defendant failed to prove exclusivity. "Exclusivity means that the claimant's rights do not depend on the rights of others, not that the claimant alone used the easement." *Healy v. Roberts*, 109 Ill. App. 3d 577, 578 (1982). IAW never moved the water main during the construction of University Street nor can any of IAW's actions indicate that its use of the land depended upon the rights of others. IAW sought no permission from any private landowner to construct its lines or service them.

¶ 59 Plaintiffs initially take issue with the trial court's finding that IAW's use was open and notorious claiming the finding is against the manifest weight of the evidence. While we disagree, we feel compelled to note that the case which plaintiffs cite as requiring defendant to prove the element of "open and notorious" use is an adverse possession case. *Thorman v. Cross*, 185 Ill.

App. 3d 590 (1989). The prescriptive easement cases we have reviewed only discuss open use as it applies to a presumption of adversity. See *Sparling*, 319 Ill. App. 3d at 563 ("However, where the property has been used in an *open*, uninterrupted, continuous and exclusive manner for the required period, adversity will be presumed and the burden of proof shifts to the party denying the prescriptive easement to rebut the presumption." (Emphasis added.)). Nevertheless, we hold the trial court's finding that IAW's use of the land was open is not against the manifest weight of the evidence. "A finding is against the manifest weight of the evidence only if the opposite conclusion is clearly evident or if the finding itself is unreasonable, arbitrary, or not based on the evidence presented." *Best v. Best*, 223 Ill. 2d 342, 351 (2006).

¶ 60 Focusing on Mr. Bessler's testimony, the trial court noted that the company routinely maintained the hydrant, openly flushing it at regular intervals. The trial court found this maintenance necessitated "the presence of water company trucks and uniformed personnel to flush the hydrant and clear brush, and including prior repair of water seepage from the line." The court further noted the hydrant stood three feet tall, was painted yellow and "commonly visible without extraordinary effort." The trial court also noted that evidence indicated it is common knowledge that hydrant's "face" or point towards the water main that provides them water. Moreover, readily available public documents indicate the county granted IAW permission to construct a 16-inch water main within the right-of-way and then vacated the right-of-way which ran over this parcel of land at issue in this matter.

¶ 61 Given the existence of the public documents and IAW's maintenance of the hydrant, we

cannot say the trial court's finding that IAW satisfied its burden of proving it openly used plaintiffs' property is against the manifest weight of the evidence. When reviewing the evidence highlighted by the trial court, the opposite conclusion is not clearly evident to us. In arguing the trial court's conclusion was erroneous, the plaintiffs focus on Ms. Kimbrell's and her brother's testimony that so much debris existed on the lot that one could not see or know of the hydrant. However, it was for the trial court, not us, to weigh that testimony.

¶ 62 Plaintiffs also take issue with the level of proof adduced at trial pertaining to adversity and the knowledge of the owner. Those elements are understandably intertwined. Plaintiffs maintain that IAW failed to call the owners of the property from whom plaintiffs purchased the property in 1997. With no evidence in the record regarding whether IAW's use was adverse or with the permission of the owners prior to 1997, plaintiffs argue as a matter of law that IAW has failed in its burden to adduce sufficient evidence to prove adversity existed for the prescribed 20-year period.

¶ 63 As this court has noted, "With respect to the element of adversity, the claimant must show that the use of the property was with the knowledge and acquiescence of the owner but without his permission." *Sparling v. Fon du Lac Township*, 319 Ill. App. 3d at 563. The *Sparling* court continued, stating, "However, where the property has been used in an open, uninterrupted, continuous and exclusive manner for the required period, adversity will be presumed and the burden of proof shifts to the party denying the prescriptive easement to rebut the presumption." *Id*.

¶ 64 Having shown that the use was open, uninterrupted, continuous and exclusive since 1982, the burden shifts to plaintiffs to rebut the presumption that the use was adverse. By plaintiffs' own admission, there is no evidence in the record regarding the prior owners knowledge, acquiescence or whether they considered IAW's use permissive or hostile. Plaintiffs note that IAW "made no effort to prove, what the Prior Owners knew about the Water Main." The law is clear, however, that once IAW proved the other necessary elements of an easement by prescription, the element of adversity was presumed and it was plaintiffs' burden to rebutt that presumption. *Id*.

¶ 65 Nowhere do plaintiffs argue they rebutted that presumption. Instead, plaintiffs identify a competing presumption in prescriptive easement jurisprudence. Plaintiffs note that Illinois law has long held that the use of vacant and unoccupied land is presumed to be permissive and therefore not adverse, citing *Monroe v. Shrake*, 376 Ill. 253 (1941), and *Light v. Steward*, 128 Ill. App. 3d 587 (1984). Defendant responds that *Monroe* and *Light* involve rural tracts of land. Defendant states that courts of other jurisdictions have explained the rationale behind the rule as follows: “where lands are open, undeveloped and unenclosed they are in a natural state and frequently in large tracts, and owners may not know or care that others use their lands casually.” *Kruvant v. 12-22 Woodland Avenue Corp.*, 350 A.2d 102, 112 (N.J. 1975). Defendant notes that some jurisdictions refuse to apply the “wild lands exception *** where defendant’s land is located in a well settled county and forms no part of an extensive, unimproved, uninhabited area.” *Behen v. Elliott*, 791 S.W. 2d 475 (Mo. 1990).

¶ 66 While this court (*Sierens v. Frankenreider*, 259 Ill. App. 3d 293 (1994)) has acknowledged the doctrine, we have never seen it applied in anything but a rural setting. Therefore, we decline plaintiffs' invitation to apply the presumption in this case. As noted above, however, the presumption that is applicable in this matter is the presumption of adversity. Without proof in the record to rebutt that presumption, we cannot say the trial court erred in finding that IAW adduced sufficient evidence to prove each and every element of its prescriptive easement claim. Accordingly, we hold the trial court did not err in ruling in IAW's favor on its prescriptive easement affirmative defense.

¶ 67 C. Exclusive Remedy

¶ 68 By order dated December 29, 2010, the trial court found that IAW was entitled to defend against the trespass action in a bench trial asserting the affirmative defense of prescriptive easement. The court also ruled that if IAW failed to establish an easement by prescription, the only remedy available to plaintiffs was money damages and that plaintiffs were not entitled to ejectment as a remedy. The last issue raised in plaintiffs' appeal is whether the trial court erred when holding that ejectment is not an available remedy. Having held that the trial court did not err in finding IAW sufficiently proved its easement by prescription, we need not address this issue.

¶ 69 D. Defendant's Cross-Appeal

¶ 70 After finding that defendant established an easement by prescription, the court incorporated a description of the easement into an amended order which effectively set the

specific geographical boundaries of the easement. When doing so, the court, *sua sponte*, announced that it did not have jurisdiction to affirmatively establish such prescriptive easement against any party other than plaintiffs. The court came to this conclusion noting that defendant pled the prescriptive easement as an affirmative defense to plaintiffs' trespass claim and did not bring a counterclaim or third party action against other potential parties.

¶ 71 Citing to *Beverly Trust Co. v. Dekowski*, 216 Ill. App. 3d 732 (1991), and *Smith v. Mervis*, 38 Ill. App. 3d 731 (1976), defendant claims the trial court's ruling is erroneous.

¶ 72 First, we must note that *Beverly Trust* is an adverse possession case. As noted above, a prescriptive easement involves a lesser interest than the interest at stake in a claim of adverse possession and, thus, the court will not look to adverse possession cases in its review of a successful claim to a prescriptive easement. *JS II, LLC*, 2012 IL App (1st) at ¶ 32. Defendant notes that the *Beverly Trust* court stated, "We conclude that the evidence established defendants' open, obvious and exclusive use of the land for the requisite 20 years to support a finding that defendants acquired title to the land by adverse possession." *Beverly Trust*, 216 Ill. App. 3d at 741. Defendant did not plead it is entitled to adverse possession of the land. Defendant simply averred that it acquired an easement by prescription sufficient to defeat plaintiffs' claims of trespass.

¶ 73 While the second case cited to in passing by IAW, *Smith v. Mervis*, 38 Ill. App. 3d 731 (1976), is a prescriptive easement case, *Smith* acknowledges that a prescriptive easement gives someone a "lesser interest" in property than does obtaining "title by adverse possession." *Id.* at

732. The *Smith* court never comments on one's ability to enforce a prescriptive easement against individuals or entities that are nonparties to the litigation. *Id.*

¶ 74 Defendant also claims that one acquires title "when they prove an affirmative defense of adverse possession." Therefore, defendant posits that one who establishes an easement by prescription against one party should be found to have acquired title by adverse possession. Again, we fail to see how. Defendant never pled it acquired title by adverse possession. Defendant has failed to cite any authority which holds that when one establishes an easement by prescription as an affirmative defense in a trespass action then it has also affirmatively established its rights against unknown parties or those never made a party. Without citing authority for that proposition, it is forfeited. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008); *Vancura v. Katris*, 238 Ill. 2d 352, 369 (2010).

¶ 75 CONCLUSION

¶ 76 For the foregoing reason, the judgment of the circuit court of Peoria County is affirmed.

¶ 77 Affirmed