IN THE COURT OF APPEALS OF IOWA

No. 5-555 / 94-1652

FILED
DEC 22 1995
CLERK SUPREME COURT

LeROY L. GRAY, CAROLYN GRAY, and GRAY TRANSPORTATION, INC.,
Plaintiffs-Appellants/Cross-Appellees.

vs.

SAMGENE TERMINALS, INC., and GENE ZUZICH,
Defendants-Appellees/Cross-Appellants,

and

MILLER FENCE CO.,
Appellee.

Appeal from the Iowa District Court for Black Hawk County, John J. Bauercamper and Jon C. Fister, Judges.

The plaintiffs appeal the district court's ruling denying them injunctive relief and damages regarding enforcement of their unrecorded easement rights on the defendants' property. **AFFIRMED.**

Larry L. Anfinson of Randall, Anfinson & Luce, P.L.C., Waterloo, for appellants.

Joe Nutting and Kimberly A. Pieters of Martin, Nutting, Miller, Pedersen, Kelsen & Pieters, Waterloo, for appellees.

Considered by Hayden, P.J., and Sackett and Huitink, JJ.

HAYDEN, P.J.

The plaintiffs, LeRoy and Carolyn Gray, are the contract purchasers of commercial property in Waterloo. Their property adjoins property owned by Samgene Terminals, Inc., which is owned by the defendant, Gene Zuzich. The parties operate competing trucking businesses on the properties. As part of the Grays' contract purchase, they arranged to obtain an access easement over the adjoining property then owned by Kroblin Refrigerated Xpress, Inc., which subsequently went bankrupt. The easement was never recorded until August 1993. After Kroblin failed to pay taxes on the adjoining real estate, the real estate was sold at a tax sale with Samgene Terminals, Inc. ultimately purchasing the tax certificate on April 8, 1993. Samgene subsequently prepared and served a notice of expiration of right of redemption and taking of tax deed. Samgene did not serve the plaintiffs with this notice. Samgene received a tax deed in July 1993.

In October 1993, defendant Miller Fence Co., at the direction of Samgene and Zuzich, started construction on a fence which cut off the plaintiffs' access through the easement area. The plaintiffs then filed a petition seeking injunctive relief against the defendants to prevent the fence from blocking their access to the easement area. Plaintiffs obtained a temporary injunction against Samgene, Zuzich, and Miller Fence Co. enjoining the fence construction.

Plaintiffs filed a petition claiming, first, the easement was enforceable against defendants because defendants had actual knowledge of the easement. The plaintiffs argued defendants had actual knowledge of the easement because plaintiffs performed various maintenance of the easement property and used the easement land to access their own property and store trucks. The plaintiffs also believe defendants had actual knowledge of the easement through the knowledge of one of his employees. Secondly, plaintiffs claimed they were entitled to notice of expiration of right of redemption under Iowa Code section 447.9 because they were persons in possession of the parcel. Plaintiffs subsequently amended their petition to include a request for declaratory judgment and damages.

The defendants filed an answer challenging the plaintiffs' easement rights and requesting dismissal of the petition and expenses including attorney fees. Defendants argued they were subsequent bona fide purchasers for value without actual notice. Defendants further argued they properly served all parties in possession with notice of expiration of right of redemption.

After trial, the district court entered a ruling on September 7, 1994, denying the plaintiffs' petition for injunctive relief. The court determined the defendants had no actual knowledge of the unrecorded easement and Samgene's tax deed was valid. The court also determined the plaintiffs were not parties in possession and, therefore, not entitled to "Notice of Expiration of Right of Redemption and Taking of Tax Deed"

under Iowa Code section 447.9 because the plaintiffs' use of the easement area was transitory, nothing was permanently erected on the real estate, and the plaintiffs did not inform defendants of the existence of the easement when they had an opportunity to do so. The court also determined the defendants were not entitled to attorney fees because plaintiffs requested more than injunctive relief. In addition to denying the petition, the court directed the temporary injunction be dissolved, certain costs be taxed to the plaintiffs, and all parties pay their own attorney fees. The court indicated the balance of the bond after the payment of costs be held by the clerk until further order by the court.

On October 5, 1994, the plaintiffs filed a notice of appeal. On October 7, 1994, plaintiffs filed an application for release of bond. On October 13, 1994, defendants filed a resistance seeking to have judgment entered in their favor for damages covering their defense costs. On October 19, 1994, the district court entered an order releasing bond. On October 24, 1994, the defendants filed a notice of cross-appeal. On November 4, 1994, plaintiffs filed a motion to dismiss the cross-appeal as untimely. The defendants resisted the motion. On November 17, 1994, this court entered an order denying the motion to dismiss the cross-appeal but ordering the parties to address the issue in the appellate briefs.

I. Standard of Review.

In this equity action, our review is de novo Iowa R. App P 4 We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

II. Actual Knowledge/Bona Fide Purchaser for Value.

In the case at bar, the plaintiffs did not record their easement until August 1993. All unrecorded written grants are rendered invalid against a bona fide subsequent purchaser of the land for value without notice. Iowa Code § 558.41 (1993). Absent the possession of actual or constructive notice by a bona fide purchaser for value, the easement is extinguished. *Id.* Actual notice of an easement depends upon the purchaser having either actual knowledge of the easement or knowledge of sufficient facts to charge him or her with a duty to make an inquiry which would reveal the existence of the easement. *National Properties Corp. v. Polk County*, 351 N.W.2d 509, 511 (Iowa 1984). One who purchases land with knowledge of such facts as would put a prudent person upon inquiry which, if prosecuted with ordinary diligence, would lead to actual notice of rights claimed adversely by another, is chargeable with the actual notice he or she would have received. *Id.*

A land purchaser generally has three sources of information to which he should turn for ascertainment of existing rights in any property he proposes to buy. These include: (1) records in the county recorder's office; (2) other public records; and, (3) an inspection of the land itself, to determine by observation any rights which may exist apart from our recording system by virtue of occupancy, use or otherwise *National Properties Corp.*, 351 N.W.2d at 511.

In this case, there are facts sufficient to charge defendants with a duty to make inquiry which would reveal the existence of the easement. Samgene Terminals, Inc., owned by defendant Zuzich, is adjacent to plaintiffs' business. Plaintiffs estimated its use of the easement at approximately 300 times per week. Between 1988 and 1993, Plaintiffs hauled in gravel and graded the disputed area. The only access from the front of plaintiffs' property to the rear was through the disputed area. Defendant, Zuzich, admitted he knew the approximate location of the boundary and also knew the plaintiffs' trucks had been using the disputed area for access. Defendants were also aware plaintiffs stored their trucks overnight and on weekends on the Kroblin real estate.

The issue in this case, therefore, is: What would an investigation into plaintiffs' use of the land have revealed? Would diligent inquiry by the defendants have lead to the discovery of an express written easement? Plaintiffs argue the defendants should have asked Gray questions as to whether or not he had an easement over the disputed

area. Plaintiffs argue defendants should be charged with actual knowledge of the easement because, if defendants would have questioned plaintiffs about the easement, defendants would have been informed the easement existed. Defendants, on the other hand, argue no further action could have reasonably been undertaken which would have lead to the discovery of the unrecorded easement. Defendants contend plaintiffs would not have revealed the existence of the easement even if directly asked.

We determine Zuzich did make an adequate inquiry into plaintiffs' interest in the land. Defendant sent an order to Black Hawk County Abstract Company requesting the title company issue a report concerning any encumbrances on the real estate. The request specifically contained a request for an inquiry into the existence of any easements. No easements were noted, and a lien report was issued.

Additionally, Zuzich asked plaintiffs several question about the disputed land to which plaintiff made no mention of the easement. Zuzich directly asked Gray why he was still running his trucks on Samgene land. Gray merely stated he would continue to do so. There were several opportunities for plaintiffs to inform defendants of the easement when the two met on the property, negotiated over purchase alternatives, and argued. The plaintiffs, however, did not mention the existence of the unrecorded express written easement nor did they mention the easement after recording it. Gray never told Zuzich about the easement until after Zuzich purchased the property and obtained a tax deed and attempted to build a fence. In fact, Gray testified at trial he did

not intend to provide Zuzich with the easement until Gray could no longer use the disputed property.

We affirm the trial court's conclusion defendants did not have actual knowledge of the easement. Defendants made adequate inquiry into the existence of any easements and, as the trial court noted, the equities of the case favor the defendants since the plaintiffs were in the best position to have avoided this situation.

III. Notice of Expiration of Right of Redemption.

A tax deed is both prima facie evidence of a proper sale and conclusive evidence of the manner of the sale. Iowa Code § 448.4, 448.5 (1993); *See also Butler v. Hoover Nature Trail, Inc.*, 530 N.W.2d 85, 89 (Iowa App. 1994). A tax deed can be defeated, however, among other things, by the failure to give notice of the sale. Iowa Code § 448.6(4); *See also Butler*, 530 N.W.2d at 89. A tax deed is void where the redemption notice was not properly given. *Butler*, 530 N.W.2d at 89. As such, when statutory notice of right of redemption is not given to a person in possession, the right of redemption does not expire. *Pendergast v. Davenport*, 375 N.W.2d 684, 689 (Iowa 1985).

Rather than define the term "possession," when determining whether a party is in possession, our case law refers to conduct which gives notice to the holder of the certificate of purchase. *Id.* at 690. "Where possession is such as to put the tax purchaser on inquiry as to why or under what right the possession is claimed it is

deemed sufficient in a case of this kind." *Id.* (quoting *Burks v. Hedinger*, 167 N.W.2d 650, 655 (Iowa 1969).

Plaintiffs argued they were persons in possession by virtue of their use and occupancy of the real estate. The trial court, however, held the plaintiffs were not entitled to notice under section 447.9 as parties in possession because their use of the land was transitory, and nothing was permanently erected on the property. The court further stated the plaintiffs had every opportunity to inform the defendants of the existence of the easement when they met on the property, negotiated over purchase alternatives, and argued. Plaintiffs, however, chose not to reveal the existence of the easement. As such, the trial court found the equities favored defendants because plaintiffs were in the best position to avoid the problem.

Given these facts, we agree with the trial court and conclude plaintiffs were not in sufficient possession of the property to import notice on defendants that plaintiffs were exercising possession over the disputed area. Defendants had no reason to believe plaintiffs had any legal right to occupy the disputed property. Plaintiffs did not indicate they had a legal right despite inquiry by the defendants, and no records revealed plaintiffs had legal right to possess the land. Plaintiffs appeared to be mere trespassers. We affirm.

IV. Defendants' Cross-Appeal.

Defendants cross-appealed demanding plaintiffs pay their attorney's fees and other costs and damages allegedly arising in this case. Plaintiffs argue the cross-appeal should be dismissed as untimely and, alternatively, damages should not be allowed because they sought relief other than an injunction. The trial court denied the request for attorney's fees because an injunction was not the sole relief requested by plaintiffs. We agree.

"'The law is well settled in this state that, when an injunction is the only relief sought, and the temporary writ issued therein is dissolved on final hearing, recovery by the defendant may be had for the reasonable and necessary costs, expenses, and attorney fees expended in procuring such dissolution.'" *Milwaukee West. Bank v. Cedars of Cedar Rapids, Inc.*, 170 N.W.2d 670, 673-74 (Iowa 1969) (quoting *Chrisman v. Schmickle*, 209 Iowa 1311, 1313, 230 N.W. 550, 551 (1930)). Count II of the amended petition requested alternative relief, including declaratory judgment, construction of the easement, establishment of an easement by prescription, and damages. As such, defendants are not entitled to damages or attorneys fees. We affirm.

AFFIRMED.