IN THE COURT OF APPEALS OF IOWA

No. 0-032 / 99-0424
Filed March 15, 2000

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CLERK SUPREME COURT

C. ALLEN RICE,
Plaintiff-Appellee/Cross-Appellant,

vs.

SEVENTEEN TWENTY ASSOCIATES and ROBERT E. ANDREWS,
Defendants-Appellants/Cross-Appellees.

Appeal from the Iowa District Court for Polk County, Jack D. Levin, Judge.

Defendants appeal from the district court ruling granting the plaintiff's motion for summary judgment in plaintiff's action seeking a declaratory judgment of the existence of a parking easement on the defendants' property. **REVERSED AND REMANDED.**

Dick L. Jensen, Des Moines, for appellants.

Edward N. McConnell of Dickinson, Mackaman, Tyhler & Hagen, P.C., Des Moines, for appellee.

Heard by Sackett, C.J., and Hecht, J., and Schlegel, S.J.*, but decided by Sackett, C.J., and Vogel and Hecht, JJ.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (1999).

HECHT, J.

Seventeen Twenty Associates and Robert E. Andrews (referred to jointly herein as "Associates") appeal from the district court's entry of summary judgment in favor of C. Allen Rice in Rice's action for declaratory judgment. We reverse and remand because the district court did not have indispensable parties before it.

I. Factual Background and Proceedings. University Square Ltd., an Iowa limited partnership ("University,") developed the commercial property known as Clocktower Square in West Des Moines. In 1983, University recorded a restrictive covenant disclosing the subject real estate was part of a two-phase development master plan approved by West Des Moines. The first phase included a shopping center plaza and two office buildings. The second phase included two commercial buildings in a commercial plaza. The restrictive covenant, executed by University's general partner, Timothy J. Urban, disclosed the developer's intent with respect to an easement for sidewalks, roadways, streets, and parking within the contemplated Professional Services Park (a/k/a "Clocktower Square"):

> The Restrictive Covenant shall create over and across all portions of the above-described real estate, an easement for ingress and egress from adjacent public streets, an easement for access over and across all sidewalks, roadways, streets and parking areas located upon said legally described real estate which said easements shall be for the benefit of the owners or their successors or assigns in interest including invitees of all or any portions of the above-described real estate.
>
> The Restrictive Covenant is a restriction on the entire property legally described above and shall run with the land unless or until modified or revoked by a recorded document executed by

> all of the owners of all portions of the above-described parcel and the written consent of the City of West Des Moines . . . .

The real estate in question was thereafter divided into lots known in this litigation as Lots 3, 4, and 5. University sold lots 3 and 5 to Dr. Michael Stein and Dr. David Friedgood. On February 28, 1985, University and the doctors executed an easement agreement acknowledging the existence of a permanent nonexclusive easement over the three lots:

> WHEREAS, University and Stein and Friedgood wish to acquire and grant certain permanent nonexclusive easements for the purpose of operation and maintenance of a roadway and parking areas and for ingress and egress access benefiting all property described in Exhibit "A" attached hereto;
>
> . . . .
>
> 1. Stein and Friedgood hereby grant severally to University and University hereby reserves unto itself a permanent nonexclusive easement . . . for the purpose of construction, operation and maintenance of a roadway and parking area and for ingress to and egress from all property adjoining said easement . . . .

The parties recorded the easement agreement in Polk County on May 3, 1985. They amended it in September of 1985 by deleting the original Exhibit A and substituting a new Exhibit A. The first page of the new exhibit consisted of a copy of the Clocktower Square final plat, and the second page was a drawing of the development delineating private building areas and common maintenance facilities. The only references to easements on the second page of the new exhibit refer to "ingress-egress."

On October 22, 1985, Associates took title, subject to easements of record, to Lot 4 from University. On July 21, 1995, Rice purchased Lot 5 from Stein and Friedgood. However, Rice did not occupy the structure on Lot 5 until

March of 1997. Conflict developed between Rice and Associates when Associates took the position neither Rice nor his invitees could use parking spaces located on Lot 4. Associates erected "no parking" signs near the boundary between Lots 4 and 5. The signs provided notice of Associates position parking spaces on Lot 4 were solely for the use and enjoyment of Associates and their invitees. In response, Rice notified Associates of his belief the nonexclusive parking easement permitted him and his invitees to park in any parking spaces on Lots 3, 4, and 5.

Both Rice and Associates commissioned surveys that documented the boundary between Lots 4 and 5 bisected certain marked parking spaces located between the buildings on the two lots. The surveys also disclosed Associates placed the "no parking" signs on Lot 5 rather than on their own lot. When the parties were unable to resolve their differences with regard to the nature and extent of the parking easement, Rice filed the present action against Associates for declaratory judgment. He did not join Stein and Friedgood, the owners of Lot 3, as parties. Rice sought an adjudication of the rights and duties of the parties under the easement and claimed actual and punitive damages for Associates' trespass. Associates denied the material allegations of the petition and, in a counterclaim, sought actual and punitive damages for Rice's breach of the easement agreement and trespass. Rice filed a motion for summary judgment that Associates subsequently resisted.

The district court concluded the parties' predecessors in title had unambiguously created a parking easement by written agreement. In a ruling

sustaining Rice's motion for summary judgment, the district court reasoned the language employed by the parties to the easement agreement demonstrated their intent to create a permanent nonexclusive easement for unrestricted use of all parking areas by all property owners within the development. The district court's ruling further determined the "no parking" signs placed by Associates constituted a violation of the easement agreement and restrictive covenants, and ordered their removal. The district court awarded no damages.

On appeal, Associates claim the district court erred: (1) in granting summary judgment against them despite the existence of genuine issues of material fact in the record; (2) in holding the conveyance was subject to an easement not shown on the Clocktower Square final plat; (3) in expanding an easement for ingress and egress to permit blanket cross-parking; (4) in giving undue weight to an affidavit purporting to set forth the intent of the developer on the subject of cross-parking; (5) in failing to rule an easement for ingress and egress does not include the right or privilege of cross-parking; (6) in failing to hold owners of Lot 3 are indispensable parties in this case. Rice cross-appeals, asserting the district court erred in failing to award him attorney fees and costs.

II. Indispensable Parties. Associates claim for the first time on appeal Stein and Friedgood, the owners of Lot 3, are indispensable parties. They argue the easement agreement that is the subject of this case affects the parking rights of the owners of Lot 3 equally as much as it does the rights of parties to this appeal. Rice contends: (1) Associates could have joined Stein and Friedgood as parties in the district court, but "waited in the weeds" to raise the issue on appeal;

and (2) Stein and Friedgood will not be prejudiced in any event if we affirm the district court's determination cross mutual easements for parking exist on all three lots.

The failure to join an indispensable party may be raised for the first time on appeal. *Ditch v. Hess*, 212 N.W.2d 442, 450 (Iowa 1973). Though it is unfortunate this was not done earlier in the district court, we are constrained by existing authority to address the issue. Rule 25(b) of the Iowa Rules of Civil Procedure provides:

> (b) Definition of Indispensable Party. A party is indispensable if his interest is not severable, and his absence will prevent the court from rendering any judgment between the parties before it; or if notwithstanding his absence his interest would necessarily be inequitably affected by a judgment rendered between those before the court.

We believe Stein and Friedgood, parties to the easement agreement and owners of Lot 3, are indispensable parties in this litigation. If the court interprets the easement agreement to permit cross-parking, the rights of the owners of Lots 4 and 5 and their invitees to park on Lot 3 will be confirmed. We leave room for the possibility the owners of Lot 3 may not be any more enthralled with such a prospect than Associates are. Conversely, if the court interprets the easement agreement to preclude cross-parking, the rights of the owners of Lot 3 and their invitees to cross-park on Lots 4 and 5 will be foreclosed. We must also leave room for the possibility the owners of Lot 3 may assert, as Rice does, they and their invitees have every right under the easement agreement to park on Lots 4 and 5 if they choose. Thus, each of these potential outcomes might be viewed as adverse to the interests of Stein and Friedgood, and it would be inequitable to

adjudicate the interpretation of the easement agreement without giving them an opportunity to be heard. Accordingly, we reverse the ruling on the summary judgment and remand this case to the district court for want of indispensable parties, with leave to bring them in. All costs of this appeal are taxed to Associates.

REVERSED AND REMANDED.