FILED
AUG 29 1985
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

136

GETHMANN CONSTRUCTION CO., INC. and KENNETH W. GETHMANN,

Plaintiffs-Appellants,

vs.

GENERAL GROWTH PROPERTIES and AETNA LIFE INSURANCE COMPANY,

Defendants-Appellees.

Filed August 29, 1985

5-297
84-1415

Appeal from the Iowa District Court for Marshall County - Carl E. Peterson, Judge

Plaintiffs appeal from the order denying their claims for injunctive relief and damages in an action for nuisance. AFFIRMED.

Charles King of Haupert, Robertson & King, Marshalltown, for plaintiffs-appellants.

John B. Grier and James T. Peters of Cartwright, Druker & Ryden, Marshalltown, for defendants-appellees.

Heard by Donielson, P.J., and Snell and Hayden, JJ.

In 1966, the plaintiff, Kenneth Gethmann, purchased a tract of land for commercial development. General Growth Properties, the defendant, leased a tract adjacent to the Gethmann property in 1970. Both tracts were located on a flood plain and were crossed by a creek.

General Growth Properties subsequently constructed a shopping mall on its property. The construction included filling the tract and installing a storm sewer to carry the creek waters under and across the mall. The sewer pipe was designed to handle a "5-year flood" in accordance with city requirements at the time.

In 1974, the city enacted an ordinance requiring that buildings constructed on flood plains be protected against a "100-year flood."

The plaintiffs filed this action for nuisance alleging that the mall construction caused water from the creek to flood plaintiffs' property and that the sewer system installed by the mall developer made it necessary for plaintiffs to take additional steps in order to develop their property in compliance with the "100-year flood." There was also testimony that one day in 1977 the creek had gone out of its banks onto plaintiffs' property. Gethmann testified that because the mall's storm pipe could not handle a 100-year flood, he would be required to use an additional 65,000 to 55,000 cubic yards of fill to develop his property. Other remedies included cutting an open channel along the property line or installing a larger pipe under the mall.

At the close of the plaintiffs' evidence, the defendants moved to require the plaintiffs to elect a remedy. The trial court sustained the motion and the plaintiffs chose to seek injunctive relief on the basis of a continuing nuisance. The trial court ruled that the plaintiffs had failed to establish a continuing nuisance and dismissed the plaintiffs' petition.

Plaintiffs have appealed alleging that: (1) the trial court erred in requiring them to elect between injunctive relief and damages; and (2) that there was substantial evidence to show the existence of a nuisance, entitling them to both injunctive relief and damages.

At the close of the evidence, counsel for the defendant made a motion that plaintiffs elect a remedy. The court interpreted the petition as seeking injunctive relief on the theory that the defendants had created a continuing nuisance and alternatively seeking damages on the basis that the nuisance was permanent. On the basis of the record, we cannot say that the relief sought in the petition necessarily created two inconsistent positions. See, Bolinger v. Kiburz, 270 N.W.2d 603, 606 (Iowa 1978):

> Ordinarily the inconsistency depends on whether the facts relied on as the basis of one remedy are repugnant and contradictory to the facts relied on as the basis of another remedy. When the theories of recovery are factually consistent, an inconsistency does not arise until one of the remedies may be pursued concurrently even to final adjudication, but the satisfaction of one claim bars the other one.

After reviewing the record, we cannot say that the theories of recovery sought were factually inconsistent. However, we find it unnecessary to further discuss the propriety of the order requiring plaintiffs to elect a remedy because of finding that no substantial evidence of a nuisance was produced.

Our review is de novo. Iowa R. App. P. 4. We give weight to the findings of the trial court but are not bound by them. Iowa R. App. P. 14(f)(7).

Iowa Code sections 657.1 and 657.2(4) define the term nuisance in a manner applicable to this case. Section 657.1 provides:

> Whatever is injurious to health, indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance. . . .

Iowa Code § 657.1.

Section 657.2(4) includes the following as a specific definition of a nuisance:

> 4. The corrupting or rendering unwholesome or impure the water of any river, stream, or pond, or unlawfully diverting the same from its natural course or state, to the injury or prejudice of others.

Iowa Code § 657.2(4) (1985).

The question of whether a nuisance has been created and maintained is ordinarily one of fact, not of law, and depends on all the attending or surrounding circumstances. Each case of this nature must depend on its own facts. Patz v. Farmegg Products, Inc., 196 N.W.2d 557, 560-61 (Iowa 1972).

Under the facts of this case, we cannot find that the defendant has created a nuisance, either permanent or continuing. The plaintiffs' case stems from the fact that the Marshalltown City Council changed the ordinance regulating building construction on flood plains from a requirement that there be a protection against a 5-year flood to one requiring that there be protection against a 100-year flood. A 5-year flood is a flood of such magnitude that there is a 20 percent probability that that flood will be equalled or exceeded in that year; a 100-year flood is one of such magnitude that there is a one percent probability that it will be equalled or exceeded in any one year.

When the defendant, General Growth Properties, developed the land adjacent to the plaintiffs' property, the ordinance required protection against a 5-year flood. The storm sewer installed by the defendant was in compliance with this 5-year flood requirement.

In 1974, the city council changed the ordinance to require protection against a 100-year flood. This change substantially increases the cost that the plaintiffs will incur if they develop the property. The plaintiffs argue that because of the construction of the shopping center and the increased flooding caused by the drainage system installed by the defendant at the time the shopping center was constructed, it will now cost them substantially more to develop their property in accordance with the 100-year flood requirement.

After reviewing the record, we cannot say that the construction of the shopping center and the flooding resulting from it constitutes a nuisance. When the shopping center was constructed, the defendants installed a drainage system in complete compliance with the 5-year flood ordinance in effect at that time. There has only been one documented instance of flooding since the construction of the shopping center in 1972. In 1977, there was a 100-year flood which resulted in flooding of the plaintiffs' property. We cannot say that this one instance of flooding establishes a nuisance.

Similarly, we do not believe that the testimony of Leonard Neugebauer, plaintiffs' expert witness, that there was a theoretical nuisance, constitutes substantial evidence of a nuisance. The defendants offered expert testimony rebutting Neugebauer's findings. In light of the conflicting evidence, we look to the actual instance of flooding in reaching our determination that the defendants' drainage system does not constitute a nuisance.

The system built by the defendants was in complete compliance with the 5-year flood protection ordinance in effect at the time of the construction of the mall. The defendants cannot be expected to anticipate and provide for changes the city council might make, such as the requirement of the 100-year flood protection ordinance. The plaintiffs have only offered one documented instance of actual flooding which occurred after a 100-year flood. We reject the plaintiffs' claim that the construction of the shopping center and the resulting flooding constitute a nuisance because of the increased cost they would incur in developing the land to meet the 100-year flood requirement. The findings of the trial court dismissing the petition are affirmed.

AFFIRMED.