IN THE COURT OF APPEALS OF IOWA

No. 2-379 / 91-07

FILED
FEB 23 1993
CLERK SUPREME COURT

ELMER D. KEMP and **CLAUDIA L. KEMP,**

Appellants,

vs.

CITY OF CAMANCHE, A Municipal Corporation; **JOSEPH L. McKENRICK,** and **LILLIAN McKENRICK; LEROY LEWIS McKENRICK; DONALD J. McMANUS** and **NANCY J. McMANUS, et al.,**

Appellees.

Appeal from the Iowa District Court for Clinton County, L. D. Carstensen and James E. Kelley, Judges.

Kemps appeal the district court's ruling on their declaratory judgment action. **AFFIRMED.**

John O. Moeller, Davenport, until his withdrawal and then Elmer Kemp, Camanche, pro se., for appellants.

Thomas R. Mayer and Gary J. Rolfes of Mayer, Mayer, Lonergan & Rolfes, Clinton, for appellee City of Camanche.

Simon W. Rasche, Jr., Camanche, for appellees McKenrick and McManus.

Considered by Oxberger, C.J., and Schlegel and Habhab, JJ.

HABHAB, J.

Elmer and Claudia Kemp purchased a triangular piece of property in 1966 located within the City of Camanche, Iowa. Their property compromises Block 5 in W.V. Lum's First Addition and is bounded on the westerly side by Second Avenue, on the southeasterly side by Seventh Street, and on the north by the disputed tract, formerly known as Tenth Place. Between 1970 and 1984, Kemp made inquiries to the City officials regarding the status of Tenth place north of his property and truly thought that Tenth Place was an open street. There is a street sign that says Tenth Place and a gravel path approximately the width of a car.

On September 12, 1986, the Kemps filed a petition for declaratory judgment seeking a ruling as to the rightful owners of Tenth Place, Eleventh Place, and Pearl Avenue located within Camanche. These streets comprise three of the four streets surrounding Block 8 which lies immediately to the north of the Kemps' block. Defendants McKenricks and McManus live on Block 8. Defendants McKenricks filed a counterclaim maintaining that they owned by adverse possession Tenth Place, Eleventh Place, and Pearl Avenue which had previously been vacated by the City. The City disclaimed any ownership or interest in Pearl Street and did not contest either the Kemps' or McKenricks' positions regarding Tenth Place.

The issues in this protracted litigation were bifurcated for trial. On March 31, 1988, Judge Cartensen

held that the City of Camanche adopted an ordinance in 1905 which vacated Tenth Place north of the Kemps property and south of the McKenrick and McManus properties. The court found the ordinance to be valid even though it had remained in the home of a city clerk for years prior to being filed in City Hall. The ordinance was valid in the court's opinion even though no formal deed ever dedicated the property back to its prior owner.

In the second phase of trial, Judge Kelley ruled on November 2, 1989, that in addition to the 1905 ordinance, Thomas U. Voorhees, the sole proprietor of the blocks in question, filed a document entitled "vacation of plat" stating that the streets between the blocks have been closed for more than twenty years. Citing section 918 of the 1897 Iowa Code, Judge Kelley believed that the streets reverted to the ownership of the proprietors. The Defendants McKenrick obtained their root of title from Thomas U. Voorhees. The court held that the McKenricks are the rightful owners of the disputed portion of Tenth Place and Pearl Street. Because the City has failed to maintain Eleventh Place, the court held that the City is estopped from claiming that Eleventh Place is an open city street, and that Eleventh Place is vacated in favor of Joseph L. McKenrick.

The Kemps have appealed raising fifteen allegations of error in their pro se brief. To summarize, they challenge the validity of the 1905 ordinance which effected a

vacation of the streets in question. They dispute Judge Kelley's finding of fact and law regarding adverse possession.

Although this is a declaratory judgment action, under Iowa Rule of Civil Procedure 267 we review it as any other judgment. Our scope of review is governed by how the case was tried in district court. Grinnell Mut. Reins. Co. v. Voeltz, 431 N.W.2d 783, 785 (Iowa 1988). This case was tried in equity, so our review is de novo. 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).

In order to facilitate the clarity of this decision, some issues will be combined and considered in a differing order than set forth by Kemp in his brief. We will first look at what effect the 1905 ordinance had on the three disputed streets, Tenth Place, Eleventh Place and Pearl Street.

I. Validity of the 1905 Ordinance

Iowa Code section 1001 (1897), which provides for conveyance of land by cities under special charter, states:

> They shall have power, by a three-fourths vote of all members of the council, to dispose of and convey lands unsuitable, insufficient or unnecessary for the purposes for which they were

> originally acquired; but when such lands are disposed of, enough shall be reserved for streets to accommodate adjacent property owners; and to dispose of the title or interest of such city in any real estate, or any lien thereon, or share or certificate therefor, owned or held by it, including any street or portion thereof vacated or discontinued, however acquired or held, upon such terms as the council shall direct. Conveyance executed in accordance with this section shall extinguish all the rights and claims of the city existing prior thereto.

The minutes from the 1905 meetings of the Camanche City Council show the city passed an ordinance vacating the disputed portion of Tenth Place and Pearl Street and releasing them to Thos. U. Voorhees. Eleventh Place was declared an open street.

Kemp claims that the 1905 ordinance was invalid because it violated the city of Camanche's charter passed in 1857. Section 35 of the charter provides:

> Ordinances passed by the city council shall be signed by the mayor, and attested by the city recorder, and before they take effect be published in one or more newspapers printed in the city, at least ten days; they shall also be recorded in a book kept for that purpose and signed by the mayor and attested by the recorder.

Kemp contends there is no proof the ordinance was signed by the mayor, published or recorded in a book kept for that purpose. There is a presumption that the legal requirements essential to the validity of a statute were complied with in its enactment. Miller v. City of Oelwein, 155 Iowa 706, 710, 136 N.W. 1045, 1047 (1912). There is evidence in the record that for many years Camanche had no city hall. City clerks kept city records in their homes.

The ordinance of 1905 found its way home sometime during the 1970s. It appears that the mayor did not sign the minutes. We refrain from deciding whether the ordinance was properly enacted because we find the city is prohibited from claiming title in the streets Tenth Place, Eleventh Place and Pearl Street by the doctrine of title by estoppel.

II. Title by Estoppel

Title by estoppel can exist when there is a long continued non-use of a street or alley by the municipality; maintenance of possession by claimant under claim of right in good faith; erection of valuable improvements thereon with the knowledge and assent of the public and the city; and to open the street would result in great damage. Clinton Nat'l Bank v. City of Camanche, 251 N.W.2d 248, (Iowa 1977). We find McKenrick has proved title by estoppel.

There is sufficient credible evidence in the record to show that Pearl Street, Tenth Place and Eleventh Place have been maintained and occupied by Joseph L. McKenrick and his predecessors in title, his father and grandfather since approximately April of 1928. Joseph McKenrick testified that for a long time prior to 1953, a farming, a bee keeping, and orchard operation was run by Willis McKenrick and his predecessors on the property known as Pearl Street. The trial court also found that there was credible

testimony that Eleventh Place and Tenth Place were never improved by the city of Camanche, but that gravel was placed upon those tracts by the McKenrick family to allow access to the property and that the McKenricks contracted for plowing of the lane on 10th place. There is no evidence that the city of Camanche has put sewers in Tenth or Eleventh Place. The trial court, however, found there was credible evidence that Joseph McKenrick and his father Willis McKenrick, installed a sewer line in the area denominated as Tenth Place in order to hook into a sanitary sewer in Second Avenue. The city of Camanche has never treated Tenth Place as an open city street. The city has never maintained it, and has done nothing more than possess maps showing that at one time it may have been a city street.

Further, Mr. Voorhees, the McKenrick's predecessor, attempted to vacate the plat privately. Voorhees filed on February 25, 1905, a document entitled "vacation of plat" which was recorded in book 56 of Town Lot Deeds at page 138 in the Office of the Clinton County Recorder. Iowa Code section 919 (1897) requires the recorder of the county where vacated plats are recorded to "write across that part of the plat so vacated, the word "vacated", and make a reference on the same to the volume and page in which the instrument is recorded." Both the disputed portions of Pearl Street and Tenth Place are marked accordingly. We therefore find that Kemp and the city had notice that the

Voorhees and the McKenricks believed the streets were vacated.

The fact that Joseph L. McKenrick and his predecessors in title may never have paid taxes on Eleventh Place, Tenth Place and Pearl Street in the intervening years is not determinative of their ownership by continuous possession since no later than 1953. Clinton Nat'l Bank, 251 N.W.2d at 251.

We therefore hold that Kemp's claim to Tenth Place is denied. We determine the disputed portions of Pearl Street, Tenth Place and Eleventh Place are not public streets and we affirm Joseph L. McKenrick's claim to this property.

Defendant also claims that he was not granted a fair trial because he was entitled to a jury trial and did not get one. It appears from the record Kemp never made a timely application for a jury trial. We have repeatedly held that ordinarily, matters not raised in the trial court, including constitutional questions, cannot be effectively asserted for the first time on appeal. State v. Lyon, 223 N.W.2d 193, 194 (Iowa 1974)

We determine any other issues the parties may have advanced, including issues raised by appellant in Division VII, VIII, and X, are either covered by this opinion or are without merit. We note that appellant has failed to argue issues under Divisions VII, VIII, and X and direct to his attention Iowa Rule of Appellate Procedure 14(a)(3). In

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addition, we call to appellant's attention his failure to cite us to the page referred to in the appendix.

AFFIRMED