IN THE COURT OF APPEALS OF IOWA

No. 1-130 / 90-1269

FILED
MAY 29 1991
CLERK SUPREME COURT

200

GARY PEGGS, PAUL BROGDEN, and ROYAL PEGGS,

Appellants,

vs.

LOUVA VOUMARD and PETER L. RICELLI

Appellees.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison, Judge.

Plaintiffs appeal district court's refusal to enjoin defendants from using a sanitary sewer system installed by plaintiffs. **AFFIRMED.**

Paul E. Huscher, Des Moines, for appellants.

Lee H. Gaudineer, of Austin, Gaudineer, Austin, Salmons & Swanson, Des Moines, for appellee Voumard.

F. Richard Lyford and Barbara G. Barrett of Dickinson, Throckmorton, Parker, Mannheimer & Raife, P.C., Des Moines, for appellee Ricelli.

Heard by Donielson, P.J., and Schlegel and Sackett, JJ. Oxberger, C.J., takes no part.

SCHLEGEL, J.

Plaintiffs Royal and Gary Peggs and Paul Brogden appeal a judgment entered by the district court, sitting without a jury, in favor of defendants Louva Voumard and Peter L. Riccelli. Plaintiffs sought to enjoin defendants from using a sanitary sewer system installed by plaintiffs. The district court dismissed the petition after finding that the sewer had been dedicated to the public and that defendants had an irrevocable license to use certain real property in which defendants' connecting sewer line was laid. We affirm.

I.

Willie Voumard and a man named Andrews owned Westview Heights Trailer Court and Andrews Mobile Home Park, respectively, both of which are located in the southeast corner of the City of Urbandale. The trailer parks are comprised of 126 family units that were serviced by a north-south sewer which, by means of two mechanical pumping stations, raised waste up a hill and emptied south into a public sewer under Hickman Road. In 1966 or 1967 Royal Peggs, Gary Peggs, and Paul Brogden, doing business as Royal Development, developed and platted three additions, including eighteen single- and multiple-family lots in Rocklyn Estates Plat No. 2. (A simplified representation of this plat is attached as "Exhibit A.")

Rocklyn Estates No. 2 lies downhill from and is contiguous on the north and west of the trailer parks. Holcomb Avenue, which was dedicated by plaintiffs to the city, runs generally east-west through the northern end of the inverted "L"-shaped plat. Plaintiffs constructed a sanitary sewer under Holcomb Avenue which empties into public sewer under Rocklynn Drive. (Although Holcomb Avenue was dedicated for street purposes only, no one disputes that the sewer under Holcomb Avenue is a public sewer.) Based on projected use, the city required plaintiffs to use an eight-inch sewer pipe. Plaintiffs paid another developer $5,000 to tap into the Rocklynn Drive sewer.

The original plat specified an easement, twenty feet in width, for a "private sanitary sewer" running along the boundary of lots 10 and 11. (This boundary is on the irregular north and northeast end of lot 10.) The plat does not specify the party in whose interest the easement was preserved; however, Royal Peggs testified that the city engineer required a sewer on the boundary of lots 10 and 11 for the future use of the trailer parks. Plaintiffs constructed the sanitary sewer, again at the behest of the Urbandale city engineer, using eight-inch pipe. This sewer line runs from Holcomb Avenue southeast for about 105 feet and then less than fifty feet east to its terminus.

Plaintiffs constructed two buildings with twenty-eight dwelling units on lots 9 and 10. They planned to build a

so-called "feeder" line over 330 feet south from the sewer along the northern boundary of lot 10 and approximately fifty feet inside the east boundary of lot 10. They approached the trailer park owners, Andrews and Voumard, with a plan for the trailer parks to contribute to the cost of constructing the feeder line. The trailer park owners declined. Plaintiffs proceeded to build the feeder line, and the city engineer again ordered plaintiffs to use an eight-inch pipe, which was larger than necessary to service the twenty-eight units. Plaintiffs seem to have believed that they would be entitled one day to recover part of the sewer line construction costs from the trailer park owners in spite of building the feeder line for their own use. Plaintiffs and the city knew that the city would be responsible for maintaining the various sewer lines.

Over the following twenty years, the various properties changed hands. The ownership of lots 9 and 10 remained with Royal Development and its successor corporation for several years. In June 1970 the Peggs sold their shares back to Royal Development, thus transferring control to Paul Brogden. As partial consideration for sale, the corporation agreed to allow the Peggs a say in and one-half of the fee charged for selling the right to tap into the sewer line on the north side of lot 10. In 1979 defendant Peter Riccelli acquired the Andrews Trailer Park. In 1981, under the new name of Rocklyn Development, the corporation sold lots 9 and 10 to Brogden without restriction.

Brogden, in a sale in which the corporation joined, immediately sold lots 9 and 10 to Steven B. Bassman. In the unrecorded contract, Brogden reserved to himself (and the corporation) two "sewer hook-up rights." The only recorded document pertaining to the Bassman sale, a memorandum of agreement, made no mention of the sewer line. In 1982 Willie Voumard died, and defendant Louva Voumard, who lives in Florida, succeeded in ownership of the West View Heights Mobile Home Park.

Sometime in 1983 or 1984, the trailer park managers decided it would be prudent to tap into a gravity-based system rather than to rely on the pump system, and they approached the city. The city engineer informed them that they would have to make a connection to the sewer under Rocklyn Estates No. 2 at the parks' expense. The trailer park managers then talked to Edward Spuzello, who managed Bassman's apartment buildings on lots 9 and 10. The extent of Bassman's knowledge about the proposed tap is unclear.

Spuzello testified that he believed the city to be involved in the project and that he had received a letter, perhaps by way of Bassman, from the city which indicated that the tap would be made. Although he knew that the trailer park owners were paying for the new sewer line, the manager of West View Park, Walter Barnes, testified that he believed the city to be in charge. The city engineer, who supervised the project daily, stated that he had believed the system to have been dedicated to the public.

The city and the company that laid the sewer had indicated to the trailer park managers that the parks needed to acquire an easement. (Such an easement would have been from the terminus of the feeder line approximately fifty feet inside the east boundary of lot 10, running east to the Andrews trailer park.) It is clear, however, that the trailer park managers and owners believed they had permission to make the tap on lot 10. It is also clear that Bassman's manager, Spuzello, was satisfied with the arrangement as long as the grounds were returned to normal. Defendants never acquired an easement or paid a fee for tapping into the sewer, but they expended over $6,000 installing the connecting sewer.

In October 1986, approximately two years later, plaintiffs discovered the tap. They filed this action in 1987. Their petition alleged that they had retained "the right to grant or deny hook-ups to a private sewer line in Rocklyn Estates, Plat No. 2." Plaintiffs further alleged that they were injured by defendants' use of plaintiffs' "unique" real estate interest. Plaintiffs requested that defendants be enjoined from using the sewer and be required to pay damages "by reason of their trespass and unauthorized use of the Plaintiffs' property."

Before this case was submitted to the district court, Brogden instituted real estate forfeiture proceedings against Bassman. Bassman failed to cure the default, and in early 1990, the contract was forfeited. As of trial, Brogden again owned lots 9 and 10.

In its July 1990 decision, the district court held that the eight-inch sewer lines had been dedicated to the public. The court further held that, based upon permission granted by a person who had apparent authority and upon independent consideration, defendants had obtained an irrevocable license. The court found that the plaintiffs had "at all times desired to retain their ability to collect a connection fee," but it "conclude[d] that plaintiffs (and the City of Urbandale) have failed to take the necessary steps to protect such a right." Finally, noting that plaintiffs did not seek an award for the cost of installing the original sewer lines, the court awarded no damages and dismissed the petition. Plaintiffs appeal.

II.

The first issue which we need to resolve is our proper scope of review. Our standard of review is controlled by the nature of the case before us. Roeder v. Nolan, 321 N.W.2d 1, 3 (Iowa 1982). The legal or equitable nature of the proceedings may be determined by the pleadings, the relief sought, and the conduct of the case before the district court. Sanborn v. Maryland Cas. Co., 255 Iowa 1319, 1321, 125 N.W.2d 758, 759 (1964). Plaintiffs contend that the matter was heard in equity, but defendants contend that the matter was heard in law.

The petition filed in equity requested injunctive relief, and the court found that it could not award the

type of damages sought. Both defendants proceeded as though the matter was in equity, alleging as an affirmative defense that plaintiffs had an adequate remedy at law. The district court likewise proceeded as if in equity. The court received evidence subject to objections. From the whole record--the pleadings, the relief sought, the conduct of the case--we believe the matter was heard in equity. When a case has been tried in equity, we review the record de novo. Iowa R. App. P. 4. While we give weight to the trial court's findings of fact, we are not bound by them. Iowa R. App. P. 14(f)(7).

III.

The issue which plaintiffs frame for review is whether the trial court erred in concluding that an easement over plaintiffs' property existed. The question is rather misleading in several respects. First, the trial court held that the sewer line had been dedicated to the public and that an irrevocable license, as opposed to an easement, had arisen. Second, the question assumes that plaintiffs have a property interest either in the sewer or in the real property in which the sewer lies. Third, it blurs together the issues of dedication and license.

A. We agree with the trial court that the first issue to be addressed is ownership. The first question that arises concerns the nature of the interests in the sanitary sewer lying on lot 10 and lot 10 itself.

When the tap was made in 1984, Bassman had possession of lots 9 and 10 pursuant to an executory contract with Brogden. Under the doctrine of equitable conversion, Bassman "became the equitable owner of the premises, and [Brogden] continue[d] to hold legal title merely as security for payment of the purchase price." Rector v. Alcorn, 241 N.W.2d 196, 200 (Iowa 1976); see also Beaver v. Ross, 140 Iowa 154, 158-59, 118 N.W. 287, 289 (1908). Upon an equitable conversion, the whole property passes to the vendee, who may sell, incumber, and devise the property and upon whom, in the absence of contractual provisions to the contrary, a diminishment in the value of the property must fall. O'Brien v. Paulsen, 192 Iowa 1351, 1353, 186 N.W. 440, 441 (1922); see Rector, 241 N.W.2d at 200.

The unrecorded Brogden-Bassman contract, in which Rocklyn Development also joined, stated: "Two additional sanitary sewer hook-up rights are hereby reserved to Sellers and shall remain the property of the Sellers. Buyer shall recognize said rights and permit Sellers to sell or convey to any adjacent property owner a 'hook-up' to said sanitary sewer." We find nothing in this language which creates a cognizable real property interest or security interest enforceable against third parties in the sewer system itself or in the real property to which it had been affixed. There was no evidence that any such interests had been recorded under Iowa Code sections 558.11 (instruments affecting real property) or 554.9313

(fixtures). Rather, the provision obligated Bassman, who otherwise owned the sewer on lot 10, to permit Brogden to collect the fee for tapping into the sewer system. There is nothing in the record to indicate privity between plaintiffs and defendants or that would give rise to a duty owed by defendants to plaintiffs. Based upon these facts, we conclude that neither Brogden nor the corporation can maintain an action against these defendants for any alleged wrong against the real property or in tapping into the sewer line in 1984.

Royal and Gary Peggs had owned lot 10 and the sewer through the development corporation until 1970. Their agreement with the corporation merely restricted the corporation's right to enter contracts pertaining to the sewer system. The agreement required the corporation to obtain consent from the Peggs before allowing a tap and required it to pay them half of any fee received. The record shows that the corporation fulfilled this obligation. Moreover, like the Brogden-Bassman contract, this obligation did not purport to give any legal or equitable interest in the real property or the sewer to the Peggs, and no such interests were recorded. Consequently, we think they can bring no action against these defendants for any alleged wrong against the real property or in using the sewer line.

To summarize, we find nothing to show that the real property ad coelum et ad infernos, that is, to the sky and

to the center of the earth, as that concept is now understood, see United States v. Causby, 328 U.S. 256, 260-61 (1946), did not pass to Bassman. See Rector, 241 N.W.2d at 200; O'Brien, 192 Iowa at 1353, 186 N.W. at 441; Beaver, 140 Iowa at 158-59, 118 N.W. at 289. The various developers, with each successive contract, retained only the right against his purchaser to approve taps into the sanitary sewer system and the right to share in the fee. In fact, the corporation appears to have fulfilled its contractual obligation to the Peggs by not entering into any agreements for use of the sanitary sewer in question. Bassman, on the other hand, appears to have failed in his obligation to Brogden. Plaintiffs now seek to recover from defendants the fees denied to them by Bassman's apparent breach of contract, but we know of no rule of law or equity which would allow such a result. With the benefit of hindsight, it is easy to see that, had any of the developers felt themselves entitled to additional compensation for the sewer line laid, they could have set a price and left it to the party in possession to recover the fee.

B. We turn our attention next to the question of whether defendants had obtained a license. It is important to note that any license obtained would pertain to the real property in which the defendants constructed the sewer in 1984, that is, the approximately fifty feet from the tap to the east boundary of lot 10. It is also important to note

that only Bassman, or his agent, had the power to grant a license to use this real property, irrespective of the right to tap into the sanitary sewer.

"A license in respect of real property is a personal, revocable, and unassignable privilege, authority, or permission conferred either by writing or parol to do a particular act or series of acts upon the land of another without possessing any interest or estate in such land." 53 C.J.S., Licenses § 88, at 437 (1987) (footnote omitted). The Iowa Supreme Court has stated: "[I]t is said that an easement is assignable, but not revocable; while the opposite of each is true of a license; and that an easement implies an interest in land, while a license does not." Paul v. Blakely, 243 Iowa 355, 358, 51 N.W.2d 405, 407 (1952). A license may be created by parole agreement. Id. (citation omitted). "An executed license, for which a consideration has been paid or money has been expended in reliance thereon, may be assigned and is not revocable for that reason." Id. at 359, 51 N.W.2d at 407-08 (citations omitted); Sisters of Mercy v. Lightner, 223 Iowa 1049, 1063, 274 N.W. 86, 94 (1937); 53 C.J.S., Licenses, § 96(a), at 445-46 (1987). In such a case, there is no practical difference between a license and an easement. Paul, 243 Iowa at 359, 51 N.W.2d at 408 (quoting Robbins v. Archer, 147 Iowa 743, 745, 126 N.W. 936, 937 (1910)).

Our de novo review of the record leads us, like the district court, to conclude that there was an agreement with Spuzello, who had apparent authority, see Mayrath Co. v. Helgeson, 258 Iowa 543, 548, 139 N.W.2d 303, 306 (1966); accord State v. Sellers, 258 N.W.2d 292, 297 (Iowa 1977), to grant a license to use the land for a sewer pipe. See Abodeely v. Cavras, 221 N.W.2d 494, 503 (Iowa 1974) (failure to repudiate agent action deemed ratification). Plaintiffs contend that neither Spuzello nor Bassman granted any property rights, but the evidence to which plaintiffs point shows only that Spuzello did not fully comprehend the consequences of assenting to the laying of a sewer line across Bassman's property. Although Spuzello may have misconstrued the city's involvement in the project, we are not persuaded that Bassman or he were coerced or otherwise forced to give consent that they were not otherwise prepared to give. Furthermore, because defendants relied on the license given by Spuzello, we conclude that Bassman and Bassman's successors are estopped to revoke the license. We emphasize again that plaintiffs have no cause for complaint about the granting of a license in real property in which they had no interest.

C. Because of our finding above, it is doubtful that we need to continue the analysis. Nevertheless, we turn finally to the issue of rights in the sewer system on and adjacent to lot 10. As we noted above, plaintiffs retained no ownership interest in the sewer system, and in 1984,

Bassman owned the sewer on lot 10, provided it had not already been dedicated to the public.

In Marksbury v. State, the supreme court noted:

> The elements necessary to establish an express dedication are (1) an appropriation of the land by the owner for a public use, evidenced by a positive act or declaration manifesting an intent to surrender the land to the public; (2) an actual parting with the use of the property to the public; and (3) an actual acceptance of the property by the public.

322 N.W.2d 281, 284 (Iowa 1982) (citing Schmidt v. Town of Battle Creek, 188 Iowa 869, 874-75, 175 N.W. 517, 519-20 (1919)). Long ago, the supreme court also established:

> No particular formality is required in order to make [a] dedication [to the public]. Any act of the owner of the soil clearly indicating an intention to dedicate, is sufficient. The intention to dedicate--the animus dedicandi may be manifested by writing, sealed or unsealed, by parol, or by acts inconsistent with any inference except such intention. Proof of the animus dedicandi may be by circumstances, and may rest in pais. One of such circumstances [sic] which will be considered evidence of dedication is the use of [that which purportedly has been dedicated] by the public, with the knowledge and assent of the owner of the soil; and when such use extends through a long series of years, the animus dedicandi is presumed. The reason of this rule is, that when the owner of the soil so long acquiesces in the using of [that which purportedly has been dedicated], having knowledge thereof, he is estopped to deny his prior dedication.

Wilson v. Sexon, 27 Iowa 15, 16 (1869) (citations omitted). The supreme court also held that a conveyance of the real property "does not operate to defeat the dedication of either plaintiff or defendant, as against the public." Id. at 17.

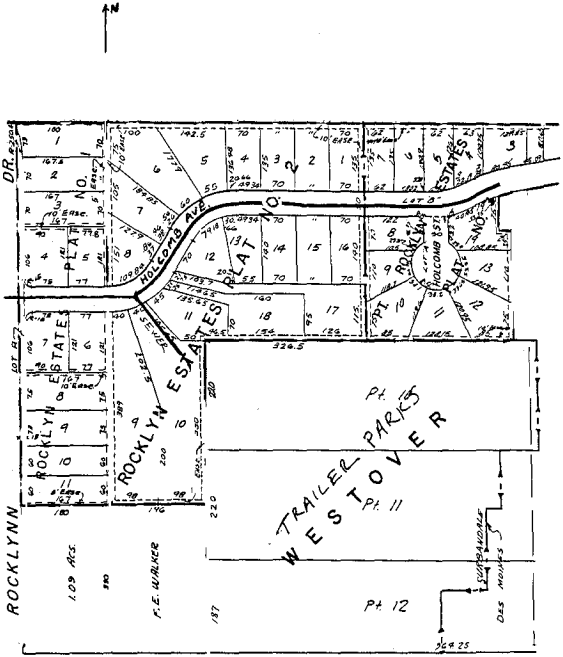
Our de novo review of the record leads us to the conclusion that all of the elements of a public dedication of the sewer lines are present in this case. Irrespective of his contractual obligations to Brodgen and Rocklyn Development, Bassman, as owner of the property, allowed defendants to tap into the sewer line on lot 10 and allowed defendants to use the system for five years before he lost his interest. This is sufficient to show the intent to dedicate. Bassman and his successors in interest are estopped to deny the dedication. Finally, there can be no doubt that the use went to the public and that it was accepted by the public.

IV.

Having considered de novo all of the issues presented for review, we hold that the sewer line on lot 10 had been dedicated to the public and that defendants had a license to lay a connecting sewer line across lot 10. Bassman and his successors in interest are estopped to deny the existence of the license and dedication.

AFFIRMED.

Exhibit A


N
HALCOMB AVE
ROCKLYN ESTATES
ROCKLYN ESTATES NO 2
ROCKLYN ESTATES NO 3
ROCKLYN ESTATES NO 4
ROCKLYN ESTATES NO 5
ROCKLYN
Pt. 15
TRAILER PARKS
WESTOVER
Pt. 11
Pt. 12
1.09 ACS.
F.E. WALKER
DES MOINES
326.5