FILED
AUG 25 1981
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

SARAH PILDIS, AND SARAH PILDIS AND ESAHR PILDIS AS TRUSTEES OF THE SARAH PILDIS MARITAL TRUST, AND AS TRUSTEES OF THE RESIDUARY TRUST ESTABLISHED BY LAST WILL & TESTAMENT OF ABE PILDIS, DECEASED)

Plaintiffs-Appellants, Cross-Appellees,)

vs.)

TAMM, INC.

Defendant-Appellee, Cross-Appellant.)

Filed August 25, 1981

1-141
2-64726

Appeal from Polk District Court. Ray Hanrahan, Judge.

Plaintiff appeals from trial court's refusal to either enjoin or forfeit defendant's use of the easement on plaintiffs' property. REVERSED IN PART, AFFIRMED IN PART, AND REMANDED WITH INSTRUCTIONS.

Thomas Clark, of Buck, Isaacson & Clarke, Des Moines, Ia., for defendant-appellant.

R. Jeffery Lewis and Arthur E. Gamble, of Gamble, Riepe, Burt, Webster & Davis, Des Moines, Ia., for plaintiff-appellee.

Submitted to Oxberger, C. J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Plaintiffs appeal from the trial court's refusal to either enjoin or forfeit defendant's use of the easement on plaintiffs' property. We affirm in part, reverse in part, and remand with instructions.

Defendant-appellee owns property which adjoins plaintiffs-appellants' property near downtown Des Moines. On June 29, 1973, a decree was entered establishing a driveway easement restriction over plaintiffs' property which specifically prohibited defendant from using the driveway for parking.

When plaintiffs saw that defendant was continually violating the express prohibition against parking on the easement, they brought this action for an injunction and forfeiture of the easement, claiming that the retaining wall was being damaged by the parked vehicles. Plaintiffs were also concerned because their access to the driveway was blocked by the parked vehicles, and because they believed that the easement could be enlarged through the constant abuse of the easement agreement by defendant, his tenants, and visitors.

The trial court denied plaintiffs' requests for an injunction, damages, and a forfeiture of defendant's easements. Plaintiffs appeal.

I. Scope of Review

Our review of this equity matter is de novo. Iowa R. App. P. 4. We may give weight to the findings of the trial court, but we are not bound by them. Iowa R. App. P. 14(f)(7). We are to give weight to the trial court's findings, but we are not to abdicate our function as triers de novo on appeal. Tamm Inc. v. Pildis, 249 N.W.2d 823, 828 (Iowa 1976) (citations omitted).

II. Injunction

Plaintiffs' claim is that the court is justified in granting injunctive relief. We agree. The equitable power to enjoin is exercised in extraordinary circumstances only. Injunctive relief is designed primarily to avoid irreparable damage and to afford relief when there is no adequate remedy at law. Myers v. Caple, 258 N.W.2d 301, 304 (Iowa 1977).

An injunction is a preventive remedy which examines future and threatened injury, rather than punishes wrongful acts already committed. Jenkins v. Pedersen, 212 N.W.2d 415, 420 (Iowa 1973).

One seeking an injunction must show both that his rights have been violated and that he will suffer substantial damages unless an injunction is granted. Myers v. Caple, 258 N.W.2d at 305.

Plaintiffs meet the first part of the test, in showing that their rights are being violated. They proved by substantial evidence that defendant and his tenants park regularly on the easement property. When defendant parks on the driveway and allows others to do so, he is violating the 1973 court decree establishing only a driveway easement on plaintiffs' property, not a parking easement.

If plaintiffs can show "substantial damage," they have met both requirements for an injunction. Often a "comparative injury," or a "relative hardship" test is used to help determine whether an injunction is appropriate. "If the injury is slight and an injunction would result in serious hardship or loss to the defendant, courts have refused to enjoin, leaving the plaintiff to his claim for damages." Johnson v. Pattison, 185 N.W.2d 790, 797 (Iowa 1971).

The evidence fails to show that defendant would suffer any hardship if he would be enjoined from parking in an easement area where he is already prohibited from parking. Defendant would merely be required to park in his own parking lot rather than in the driveway.

Plaintiffs claim they would be injured in several ways if parking is not prohibited on the driveway. The retaining wall which supports the driveway was not designed to support parked vehicles, and plaintiffs assert the structure will be damaged unless parking on the driveway is stopped. Plaintiffs are prevented from using the driveway when cars and trucks are parked there. Furthermore, the defendant may gain additional easement rights by prescription if he is not prohibited from parking in the easement area.

Defendant asserts that plaintiffs' claims are trivial and that they fail to prove any irreparable injury. After our review of the record, we think that the evidence shows such injury. Through the passage of time the driveway will be damaged because it was not structurally designed to support parked vehicles. Also, since an easement established for limited uses may be expanded in Iowa by prescription, each day increases the threat that the defendant will obtain rights in plaintiffs' land that are in direct contravention to the 1973 court decree. Schwenker v. Sagers, 230 N.W.2d 525, 527 (Iowa

1975).

An easement holder cannot use an easement in a way which imposes additional burdens on the owner of the servient estate. Once rights are acquired by prescription, however, that principle would be of little comfort to the plaintiffs. Therefore, to prevent the inevitable situation where defendant will claim that through prescription he has acquired the right to park on the driveway, we will enjoin defendant from parking, or allowing others to do so, on the easement area. If defendant were allowed to continue using the drive as a parking lot, plaintiffs would suffer irreparable damage because a property right that is theirs would forever be altered, and damages at law would be inadequate.

We direct the trial court to issue an injunction which prohibits defendant, his visitors, his tenant and his tenant's visitors, from parking in the driveway for any period of time other than for use as a service entrance. This direction merely enforces the terms of the 1973 court decree establishing the easement rights.

III. Forfeiture

Our granting a prohibitory injunction against defendant is a sufficient remedy that precludes the necessity of a forfeiture. Equity abhors a forfeiture. Chicago, Rock Island and Pacific Railroad Co. v. City of Iowa City, 288 N.W.2d 536, 541 (Iowa 1980).

IV. Waiver of Defendant's Counterclaim

Under Iowa R. App. P. 14(a)(3), if a party fails to argue an issue in his brief, that issue may be deemed waived. When defendant elected not to brief the denial of his counterclaim, that point was waived.

The costs of this appeal are assessed against the defendant.

REVERSED IN PART, AFFIRMED IN PART, AND REMANDED WITH INSTRUCTIONS.