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IN THE COURT OF APPEALS OF IOWA

DONALD J. McKINLEY, MARJEAN M.)
McKINLEY and ACORN PARK FARMS,)
INC., an Iowa Corporation,)

Appellees,)

Filed November 22, 1978

vs.)

LEON THOME,)

Appellant,)

597
2-61127

vs.)

WILLIAM A. FOX,)

Intervenor.)

Appeal from Mitchell District Court - C. H. Wild, Judge.

Defendant landowner appeals trial court order directing him to remove obstructions to the natural drainage of surface water onto his farm. - Affirmed.

Erwin Larson, Charles City, and Judith M. O'Conohoe, of McCartney & Erb, Charles City, for Appellant.

Jerry H. Folkers, of Dunkelberg, McKinley & Folkers, Osage, for Appellees and Intervenor Appellee.

Heard by Oxberger, C.J., and Danielson, Snell and Carter, JJ.

PER CURIAM

Defendant Leon Thome appeals issuance of an injunction ordering him to remove fill which obstructs the flow of surface water from the property of plaintiffs, Donald and Marjean McKinley, and intervenor, William Fox. We affirm.

Our review is de novo. Rule 4, Rules of Appellate Procedure. We do, however, give weight to the trial court's findings. *Witthauer v. City of Council Bluffs*, 257 Iowa 493, 133 N.W.2d 71 (1965).

Thome owns a tract of land north of the McKinley farm and northwest of the Fox property. Evidence showed that an intermittent waterway runs from the northern part of the Fox land, across the northeast corner of the McKinley property and then westward through the southern portion of Thome's farm. Even the expert witness for Thome agreed that the area slopes from east to west and that there is a natural waterway running across Thome's property. Fox and the McKinleys, as owners of the dominant estates, are entitled to drain surface water into the natural watercourse; Thome's servient estate must accept that water. *Braverman v. Eicher*, 238 N.W.2d 331, 334 (Iowa 1976). They are not permitted, however, to alter the natural drainage system so as to increase substantially the burden on the servient estate.

Thome contends that the tiling system installed by Fox, the McKinleys and adjacent land owners has altered the natural course of draining and has caused the quantity of water draining onto his land to increase so greatly that he has been substantially injured. We find the first contention is without merit. Evidence established that the tiling system in the northeast corner of the McKinley farm and in the northern portion of Fox's land was laid along the natural water course and that the tile outlets were level with the water course. Neither can it be said that the tiling system itself was an alteration of the natural course of draining. In *Miller v. Hester*, 167 Iowa 180, 149 N.W. 93 (1914), the following was noted at page 185:

The very purpose of drainage is to gather the water from the surface of the ground into a channel and discharge it at some particular point. Drainage would be wholly ineffectual in the accomplishment of its purpose if this were not permitted. . . . From this it would appear that the owner of the dominant estate has the right to hasten and thereby incidentally

increase, the drainage through natural depressions or drainways, by the use of tiling where this is done in a proper manner for the improvement of his own land for agricultural purposes...

Next, Thome argues that an agent of the McKinleys and Fox entered his property without permission and excavated the waterway, thereby changing its natural course. Additionally, he claims that if the agent did have permission to enter, this would constitute an oral easement contrary to the statute of frauds, § 622.63, The Code. The excavation consisted only of clearing bog and grass out of the waterway on Thome's property so that the water in the McKinley and Fox tile could flow more freely. The purpose of the excavation was not to create a new drainage system. There was no material alteration of the existing natural flow through the Thome property. Thus no oral easement is necessary to entitle the McKinleys and Fox to drain their property into the "excavated" waterway.

Thome also attempted to show an alteration of the natural drainage system by evidence that a landowner, not a party to the action, had connected his tiling system to that of the McKinleys and Fox thereby changing the natural draining of his land from west to south. Assuming that Thome can prove such an alteration, his remedy lies not in obstructing the natural flow from the Fox and McKinley farms but in seeking relief against the offending neighbor. See Halsrud v. Brodale, 247 Iowa 273, 72 N.W.2d 94 (1955). We note that Thome's answer to plaintiffs' petition requests that plaintiffs be required to bring in all interested parties, yet Thome does not assert on appeal that trial court failed to add indispensable parties.

Alternatively, Thome asserts that the tiling system of the McKinleys, Fox and others has greatly increased the quantity of water draining onto his property to his substantial injury. We think the evidence is insufficient to determine whether there is more water passing through the natural waterway on Thome's property as a result of the various tiling projects. Regardless of that fact, however, Thome has failed to show that he has suffered substantial injury because of the drainage practices of the McKinleys and Fox. Thome himself admitted that he did not expect to get much of a crop out of the waterway area. In fact, the evidence suggests that Thome is able to till more of his farm now than was possible before the tiling took place.

Thome alleges trial court erred in finding that the McKinleys and Fox would suffer irreparable harm as a result of his obstructing the waterway. An expert witness for the McKinleys and Fox testified that the obstruction could back up water into the system causing tile to crack in winter or become blocked with silt. The McKinleys established that three or four acres of their farm will be taken out of production in the absence of an effective tiling system. We think the requisite irreparable harm entitling plaintiffs and intervenor to injunctive relief has been shown. See Schlader v. Strewer, 158 Iowa 61, 66, 138 N.W. 1105 (1912). Thome further raises the "clean hands" doctrine as a bar to the injunctive relief sought by the McKinleys and Fox. There is no evidence in the record to sustain this defense.

AFFIRMED.