IN THE COURT OF APPEALS OF IOWA

No. 8-063 / 96-1740

HOME ELEVATOR COMPANY, INC.,

Plaintiff-Appellee,

vs.

LOUIS SCHABLE AND JOAN SCHABLE,

Defendants-Appellants.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Ida County, Gary E. Wenell and Robert C. Clem, Judges.

Defendants appeal from a district court order ruling plaintiff has a prescriptive easement over a parcel of defendants' land and permanently enjoining defendants from interfering with plaintiff's use of the easement. **AFFIRMED.**

Craig H. Lane of Craig H. Lane, P.C., Sioux City, for appellant.

E. A. Jacobson of Jacobson Law Firm, P.C., Ida Grove, for appellee.

Heard by Sackett, P.J., and Vogel and Mahan, JJ.

MAHAN, J.

Louis and Joan Schable appeal the district court's decision establishing a prescriptive easement and granting the request of Home Elevator Company, Inc. (HEC) for a permanent injunction restraining the Schables from interfering with the use of the easement. The Schables contend the district court erred when it: (1) denied the Schables' motion to dismiss for failure to state a claim upon which relief can be granted due to being barred by the statute of limitations; and (2) sustained HEC's motion for summary judgment. We affirm.

In 1946, HEC and Farmer's Lumber Company (Farmer's), the Schables' predecessor, entered into an easement agreement. The agreement granted HEC an easement over Farmer's driveway in return for HEC allowing Farmer's to use HEC's scales located on Lots 5 and 6. The easement was to run for ninety-nine years, with a limitation:

> With this further condition that at such times as the scales of the grantee is not in condition to be used that in that event this easement is to be null and void.

The Schables purchased the property, including the driveway, in 1972. The parties agree HEC's scales were not in existence when the Schables bought the property, twenty-three years before the time of this action.

The Schables claim HEC paid them $500 in September 1993 for rental of the driveway. The Schables presented a check stub with HEC's name, labeled "Past Land Rent," as evidence. According to the Schables, the parties then attempted to enter

into a lease, but never finalized it. HEC continued to use the driveway until January 1, 1995, when the Schables erected a barricade. On January 3, HEC served the Schables with a temporary restraining order requiring the Schables to take down the barricade and allowing HEC to use the driveway. The district court ultimately determined HEC had a prescriptive easement across the west ten feet of Lot 7 and entered a permanent restraining order against the Schables.

I. STANDARD OF REVIEW. Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. 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).

II. MOTION TO DISMISS. The Schables filed a motion to dismiss for failure to state a claim upon which relief can be granted. In the motion they claimed the injunction requested by HEC could not be granted because no legal action had been filed proving ownership, and if HEC had filed such an action, it would be barred by Iowa Code sections 614.17 and 614.17A (1995). We find sections 614.17 and 614.17A do not apply to this action.

The Schables next contend there is nothing in HEC's petition nor motion for summary judgment which even hints or suggests HEC is asking the district court to

establish a prescriptive easement. The Schables argue HEC cannot get an injunction if they do not first request such a determination.

The supreme court has stated its general lack of support for granting motions to dismiss: "[W]e certainly do not recommend the filing of motions to dismiss in litigation, *the viability of which is in any way debatable*." *Cutler v. Klass, Whicher & Mishne*, 473 N.W.2d 178, 181 (Iowa 1991) (emphasis added).

HEC's petition alleged it had been in open, notorious, and continuous possession of the property for more than fifty years, including for more than the twenty-two years since the Schables acquired the property. The petition went on to allege HEC has a prescriptive easement and the blockade erected by the Schables interfered with the use of the easement and violates HEC's rights.

Under notice pleading a suit will survive a motion to dismiss whenever a valid recovery can be gleaned from the pleadings. *Cutler*, 473 N.W.2d at 181. Further, we have liberal amendment rules. *See Grace Hodgson Trust v. McClannahan*, 569 N.W.2d 397, 398-99 (Iowa App. 1997) (Leave to amend shall be freely given when justice so requires. Amendments are the rule and denials the exception. Allowing amendments is encouraged and denying permission to amend is discouraged.). Thus, the trial court correctly denied the motion to dismiss. We think the Schables were on notice regarding the claim establishing a prescriptive easement.

For these reasons, we affirm the decision of the district court to deny the motion to dismiss.

III. SUMMARY JUDGMENT. The Schables contend the trial court erred when it granted HEC's motion for summary judgment.

> We will uphold a grant of summary judgment when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. An issue of fact is "material" only when the dispute is over facts that might affect the outcome of the litigation, given the applicable governing law.
>
> When we review the propriety of a grant of summary judgment, the moving party is required to show that no genuine issue of material fact exists and that he or she is entitled to judgment as a matter of law. In determining whether the movant has met this burden, we review the record in a light most favorable to the party opposing summary judgment, in this case the [defendant].
>
> In this sense, we review the record as we would on a motion for directed verdict, with the nonmoving party entitled to every legitimate inference that reasonably can be deduced from the evidence and summary judgment is inappropriate if reasonable minds can differ on how the issue should be resolved.

Smith v. CRST Int'l, Inc., 553 N.W.2d 890, 893 (Iowa 1996). Even when the facts are not in dispute, summary judgment is not appropriate where reasonable minds could draw different inferences from the facts. *Grace Hodgson Trust*, 569 N.W.2d at 400.

When determining the existence of a prescriptive easement, it should first be noted:

> [T]he doctrine of adverse possession upon which plaintiff relies is to be taken strictly. There are usually no equities in favor of one who claims property of another by adverse possession and his acts are to be strictly construed. The facts relied upon to establish adverse possession must be strictly proved. They cannot be presumed. The law presumes the possession of land is under the regular title and will not permit such presumption to be overcome by another presumption.

Simonsen v. Todd, 154 N.W.2d 730, 736 (Iowa 1967).

There are two ways to establish a prescriptive easement. First, a party may establish the easement by adverse possession, under claim or right or color of title, openly, notoriously, continuously, and hostilely asserted against the defendants for ten years or more. *Heald v. Glentzer*, 491 N.W.2d 191, 193 (Iowa App. 1992). To prove the use is adverse, the party claiming the existence of the easement must prove, independent of use, that an easement was claimed as a matter of right, and the land owner had notice of the claim of right. *Id.*

> Continuance in a use and possession of land which were permissive in their origin constitutes no evidence of gift, nor will such possession by mere lapse of time become hostile or adverse to the person under whom it was taken.

Simonsen, 154 N.W.2d at 736. However, such a permissive use becomes adverse upon transfer of the servient property in the absence of evidence the continued use was permitted as a mere favor. *Id.* at 736-37.

Second, a prescriptive easement may also be created:

> [W]hen original entry upon the lands of another is under oral agreement or express consent of the servient owner and the party claiming the easement expends substantial money or labor to promote the claimed use in reliance upon consent or as a consideration for the agreement.

Id. at 736. The use of the easement must also continue for ten years for it to vest. *Maisel v. Gelhaus*, 416 N.W.2d 81, 87 (Iowa App. 1987).

Once the period of prescription has passed, the prescriptive easement can only be lost by at least ten years of continued nonuse accompanied by facts and

circumstances clearly indicating an intentional relinquishment. *National Properties Corp. v. Polk County*, 386 N.W.2d 98, 105 (Iowa 1986).

In its motion for summary judgment, HEC admits the initial use of the driveway was permissive, but contends, according to *Simonsen*, its use of the driveway became adverse in 1972 when the Schables purchased the property. HEC contends the Schables' purchase of the property started the statute of limitations running. The Schables filed a general resistance. In an affidavit by Joan Schable, she admits the Schables purchased the land in 1972. Joan contends she reluctantly allowed HEC to use the portion of the land mentioned in the easement agreement, but HEC's usage "was not under any demand made upon me or by their assertion of a right to use the same as can be seen by their payment of [the $500] as recently as 1993."

In *Simonsen*, the supreme court stated:

> Here there is no evidence the nature of the use, admittedly permissive in its inception, changed while the servient property was owned by Mrs. Ritchie. There is no evidence upon which it could be determined plaintiff used the right of way as a matter of right rather than with permission. *The statutory period had not run after the transfer to this defendant.* Most of the cases referred to as controlling present a stronger factual situation than presented by plaintiff here. We therefore hold plaintiff failed to establish an easement for right of way purposes over defendant's land by prescription.

Simonsen, 154 N.W.2d at 737 (emphasis added). In this instance, even if HEC's use of the driveway was permissive up to the time the Schables purchased the property

in 1972, under *Simonsen* the use has been adverse for approximately twenty-three years unless there is evidence the use was permitted as a favor. We find no evidence the use was permitted as a favor. Further, the payment of $500, while possibly showing an intent to relinquish the prescriptive easement, does not begin to undo the prescription without at least ten years of nonuse of the easement and other circumstances showing an intentional relinquishment. *National Properties Corp.*, 386 N.W.2d at 105.

We find the uninterrupted continued daily use of the easement by HEC and its customers for twenty-three years from the date of the Schables' purchase created a prescriptive easement and the right to an injunction. The Schables had ten years from 1972 until 1982 to stop the use of the driveway or to change the nature of the use, but did nothing.

For these reasons, we affirm the decision of the trial court.

AFFIRMED.