IN THE COURT OF APPEALS OF IOWA

No. 0-646 / 90-376

CLARENCE WEISS,

Appellant,

vs.

BUFORD MARTIN,

Appellee.

FILED
JUN 25 1991
CLERK SUPREME COURT

Appeal from the Iowa District Court for Johnson County, L. Vern Robinson, Judge.

Weiss appeals a district court order denying his motion for enforcement of a prior court order. **AFFIRMED.**

John Fishburn of Fishburn & Fishburn, Muscatine, for appellant.

Philip A. Leff of Leff, Leff, Leff, Haupert & Traw, Iowa City, for appellee.

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

OXBERGER, C.J.

Clarence Weiss and Buford Martin own adjoining farms in Johnson County. A north-south boundary fence divides the farms. Weiss's farm lies east of Martin's farm. A drainage ditch flows southeasterly across Martin's farm, crosses under the fence between the farms, and flows into a ditch flowing southwesterly across Weiss's property. After the Martin ditch flows into the Weiss ditch, the Weiss ditch flows south and empties into a main ditch flowing westerly and slightly to the south. This main ditch eventually flows into Richey Creek which flows essentially due south immediately above and below the area where the main ditch flows into it.

In 1970, Martin sued Weiss for altering the flow of water from the Weiss drainage ditch onto the Martin farm. The alteration consisted of a corn cob dike which was stopping the flow of water from the Martin drainage ditch into the Weiss drainage ditch. In 1973, prior to trial, the parties entered into a stipulation agreement requiring each party to perform certain obligations concerning the drainage of water on, or across, his farm.

In 1976, Weiss sued Martin claiming Martin had breached the parties' stipulation by altering the course of water so that the water caused erosion on the Weiss property. In 1981, the district court entered an order which generally denied Weiss's claim but ordered Martin to carry out the

terms of the stipulation by lowering the elevation of a remnant east-west fence on his property so there would be no additional pooling and runoff from the Martin property into the Weiss ditch. We affirmed the district court order in an unpublished opinion. Weiss v. Martin, No. 2-384 2-67887 (Apr. 8, 1983).

Following our 1983 opinion, Martin leveled off certain land, including the area of the remnant east-west fence, and cleared out his drainage ditch. In September 1985, Weiss filed this action seeking a motion for enforcement of the prior court order and stipulation. Weiss alleged that Martin had failed to comply with certain requirements of the 1973 stipulation and the 1981 court order. Additionally, Weiss claimed Martin's actions following our decision diverted increased water into his ditch which in turn caused erosion of his property.

On November 19, 1985, the district court appointed Jack D. Riessen, an expert witness "to make an inquiry into the facts and circumstances surrounding the parties' dispute so as to assist the Court in fashioning whatever relief or remedy it deems appropriate . . . ." Riessen filed his report on March 14, 1986.

The case was tried on January 24 and 25, 1990. On February 6, 1990, the trial court filed its ruling denying Weiss's motion. Weiss has appealed.

Weiss sets out four areas in which he claims the trial court erred. Weiss claims the trial court erred by: (1) finding Martin had complied with the 1981 court order and the 1973 stipulation which required him to lower the elevation of his land at the site of a remnant east-west fence, (2) finding Martin had complied with various paragraphs of the 1973 stipulation signed by the parties, (3) finding the erosion on the Weiss property was primarily a result of headcutting,[1] not additional water draining from Martin's property, and (4) not following the court appointed expert's recommendations regarding construction of permanent erosion control structures.

We review this equity case de novo. Iowa R. App. P. 4. 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).

At trial, both parties presented experts who gave conflicting testimony about whether Martin had complied with the prior court order and stipulation and the cause of the erosion of the Weiss ditch. The court appointed expert, Riessen, also testified about his findings with respect to these issues.

Riessen's report concluded that while Martin's

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1. Tributary drainageways are prone to progressive deepening through a process known as headcutting. Progressing upstream from the deepened main stem, the tributary streams will, by natural forces, deepen themselves. As they deepen, unstable banks slough or slide in, creating a wider channel.

compliance with the order to lower the elevation of the land along his remnant east-west fence could not be definitively determined, Martin "has done nothing to his ditch or the adjacent area which has substantially contributed to erosion on the Weiss North-South ditch."

The record clearly shows that following our prior decision, Martin bulldozed and leveled off the land in the area of the remnant east-west fence on his property. Weiss claims Martin's actions fail to comply with the 1973 stipulation incorporated into the 1981 court order because the land remains elevated. The order directed Martin "to carry out the terms of the Stipulation to the extent that the elevation along the remnant of the east-west fence on the north side of said fence shall be lowered to its elevation of the area at the time of the Stipulation on March 3, 1973."

Stipulations are to be construed so as to effectuate the intent of the parties. Hawkins Korshoj v. State Board of Regents, 255 N.W.2d 124, 126 (Iowa 1977). We interpret a stipulation "with reference to its subject matter and in light of the surrounding circumstances . . . ." Id.

Riessen reported that Martin's compliance could not be definitively determined due to an absence of accurate survey information regarding the exact elevation of the area in 1973. The problem was not the lack of prior

surveys, but that the original survey did not have a recognizable bench mark such that subsequent surveys could "tie that same data in" and verify that the current elevation was the same as the previous elevation. Additionally, Riessen testified he found the order perplexing because the erosional process started on Martin's farm in approximately 1969, the order would appear to require Martin to return the area to the erosional state that existed in 1973 when the stipulation and agreement was reached.

The evidence in the record shows that irrespective of the exact elevation of the land in the area of the former remnant fence, the work performed on the area has successfully stopped the additional pooling and runoff of water from the Martin property into the Weiss ditch. Because Martin's actions have essentially squelched the additional runoff Weiss originally complained of, we find Martin has complied with the spirit of the stipulation incorporated into the 1981 court order.

The 1973 stipulation also required Martin to maintain the fence line south of the area where his ditch joins the Weiss ditch. Weiss agreed to maintain the drainage ditch in the area so it would not erode under the boundary fence. The trial court found Weiss has not done any work to avoid the erosion under the boundary fence, and as a

result of this inaction, Martin has been unable to place a fence in the area due to the erosion. We agree.

Weiss cannot ask us to enforce an obligation on Martin where his own inaction makes Martin unable to carry out the obligation. Individuals seeking equity must be willing to do equity. Koch v. Wasson, 161 N.W.2d 173, 179 (Iowa 1968). Therefore, we also affirm the trial court with respect to this aspect of Weiss's petition.

The last complaint Weiss makes about Martin's noncompliance with the stipulation is that Martin has impermissibly altered the land surface so as to increase the flow and velocity of the water entering the Weiss ditch. Weiss asserts this impermissible alteration is a substantial factor in the current erosional process occurring on his property.

In order for conduct to be a proximate cause of injury to another, the conduct must be a substantial factor in bringing about the harm. Oak Leaf Country Club, Inc. V. Wilson, 257 N.W.2d 739, 746 (Iowa 1977)(citations omitted). The trial court found the actions undertaken by Martin "to clear his drainage ditch merely demonstrates good conservation techniques and results only in an insignificant increase in the flow of water to Weiss's ditch." Additionally, the trial court found the primary cause of the erosion to Weiss's ditch to be headcutting, which results because the streams below Weiss's ditch have

been widened and deepened. We agree with the trial court's determinations regarding Martin's actions and the primary cause of the erosion of Weiss's ditch. Martin's expert as well as the court appointed expert both presented testimony supporting these determinations. While Weiss's expert testified differently, we defer to the trial court's apparent credibility assessment.

Next we address Weiss's contention the trial court erred by not following the suggestions made by Riessen in his report to the court. In his report, Riessen suggested a possible engineering solution to the erosion problems plaguing the parties. The trial court refused to provide such relief. The trial court based its refusal on (1) its concern that it lacked jurisdiction to make orders unrelated to the matter already adjudicated, and (2) the lack of evidence presented as to what exactly is necessary to stem the erosive process, the expense involved in stemming the erosion and the actual amount of damages caused by the erosion.

Weiss asserts the trial court had the authority to devise a plan to deal with the problems of erosion faced by the parties. Weiss cites Moody v. Van Wechel, 402 N.W.2d 752 (Iowa 1987), in support of his assertion. Moody does not support Weiss's position. In Moody, after applying the law concerning surface water drainage to the facts of the case, the trial court directed the parties to agree to an

acceptable drainage plan. Id. at 756. The trial court retained jurisdiction, so it could appoint a special master to devise a plan if the parties were unable to agree on an acceptable plan. When the parties were unable to agree, a hearing was held on the matter of devising a plan and then the court ordered implementation of a plan. Id.

In the case at bar, Weiss only asked the court to enforce the prior court order and stipulation. No evidence was admitted, nor any hearing held with respect to creation of an additional erosion control plan which would place new obligations on the parties. We conclude the trial court properly refused to order relief based on Riessen's suggested solution. The parties came to the court in response to Weiss's motion for enforcement of the prior court order and stipulation. The parties only litigated the issue placed before the court. The issue of new and different relief was neither pleaded nor adjudicated. The parties are free to implement the suggested solution, and we join the trial court in urging them to consider seeking an engineering solution to their problems, but the trial court lacked authority to order such a remedy in this litigation.

Lastly, Martin has requested appellate attorney fees. Generally, attorney fees are not recoverable absent specific contractual or statutory provisions allowing for their recovery. Corporate East Assoc. v. Meester, 442

N.W.2d 105, 109 (Iowa 1989). Because no such basis exists in this case for the award of attorney fees, we deny Martin's request. The costs of this appeal are taxed to Weiss.

AFFIRMED.