IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

No. 5-384 / 94-1142

URBAN V. LUKAVSKY and **MARY A. LUKAVSKY,**

Appellants,

vs.

BRUCE A. HOFFMEIER and **KAREN M. HOFFMEIER,**

Appellees.

Appeal from the Iowa District Court for Jasper County, J. W. Jordan, Judge.

The plaintiffs appeal a district court judgment entered upon a jury verdict in favor of the defendants on a breach of contract claim, and a district court order granting a directed verdict for defendants on a negligence claim. **AFFIRMED.**

Brad McCall and Lois J. Vroom of Brierly Law Office, Newton, for appellants.

Sharon Soorholtz Greer of Cartwright, Druker & Ryden, Marshalltown, for appellees.

Considered by Donielson, C.J., and Cady and Huitink, JJ.

DONIELSON, C.J.

The plaintiffs, Urban and Mary Lukavsky had sustained flooding on their property in 1990 and 1993. They claimed the flooding was due to the defendants' addition of fill dirt and the erection of a home on their adjacent property. The plaintiffs filed suit claiming the defendants were negligent in failing to provide an adequate outlet for surface water and that the defendants had breached a contractual obligation to maintain an outlet sufficient to drain surface water. The contract claim stems from a 1957 agreement between the prior owners of the plaintiffs and defendants' property. The agreement required the owners of the defendants' property to furnish an outlet for any surface water collected on the plaintiffs' property.

The trial court granted the defendants' motion for directed verdict on the negligence claim and the jury found against the plaintiffs on their contract claim. Upon our review of each of the appellate issues raised by the plaintiffs, we affirm.

I. DIRECTED VERDICT.

The trial court granted the defendants' motion for directed verdict on the negligence claim. The plaintiffs had claimed the defendants were negligent in raising the level of their land and, as a result, had caused flooding upon their property. The trial court granted the motion because it did not believe the record showed a duty

flowing from the defendants to the plaintiffs separate from any easement or contractual obligations their predecessors in ownership may have undertaken.

We review the grant of a directed verdict for the correction of errors at law. *Regan v. Denbar, Inc.*, 514 N.W.2d 751, 752 (Iowa App. 1994). In our review of a trial court's ruling on a motion for directed verdict, the question is whether the evidence, when viewed in the light most favorable to the plaintiffs, was sufficient to generate a jury question. *Holdsworth v. Nissly*, 520 N.W.2d 332, 336 (Iowa App. 1994).

On appeal, the plaintiffs claim the defendants were the owners of an estate which was servient to their dominant estate, and the defendants had a resulting duty not to obstruct or alter the natural flow of water from the dominant estate. The plaintiffs claim the defendants' actions in raising the level of their land breached that duty.

"Water from a dominant estate must be allowed to flow in its natural course onto a servient estate." *Moody v. Van Wechel*, 402 N.W.2d 752, 757 (Iowa 1987). In determining which of adjacent tracts is dominant, relative elevation and not the general movement of floodwaters is controlling. *Id.* The plaintiffs had the burden to prove by a preponderance of the evidence that their land was the dominant estate and the defendants' land was the servient estate. *Maisel v. Gelhaus*, 416 N.W.2d 81, 84 (Iowa App. 1987).

The trial court found the record did not support a finding that plaintiffs' property was the dominant estate. The trial court was correct. The plaintiffs did not introduce evidence to prove their property had the higher elevation, and, in fact, there was considerable evidence indicating the defendants' property was of a higher elevation. The trial court properly denied the plaintiffs' motion to amend to conform to the proof as the evidence did not support the contention that their property was the dominant estate. In addition, there was no evidence the defendants did not exercise ordinary care in the use of their property. The trial court did not err in granting a directed verdict on the plaintiffs' negligence claim.

II. DEFENSE OF IMPOSSIBILITY OF PERFORMANCE.

The plaintiffs argue the trial court erred in instructing the jury on the defense of impossibility of performance. They claim this defense "is at odds with traditional notions of negligence and common law duties." However, it was the plaintiffs' contract, not negligence, claim which was ultimately submitted to the jury, and impossibility of performance is a defense in a contract action.

"The doctrine of impossibility of performance is recognized in Iowa as an excuse for nonperformance generally where that which has been promised becomes objectively impossible to perform due to no fault of the nonperforming party." *Nora Springs Coop. Co. v. Brandau*, 247 N.W.2d 744, 747 (Iowa 1976). Performance of

a contract may be rendered impossible by the intervention of unforeseen, accidental, and uncontrollable superior agencies. *Yost v. City of Council Bluffs*, 471 N.W.2d 836, 839 (Iowa 1991).

The parties to a lawsuit are entitled to have their legal theories submitted to a jury as long as they are supported by substantial evidence. *Reener v. Hill & Williams Bros., Inc.*, 502 N.W.2d 26, 27 (Iowa App. 1993). There was substantial evidence to warrant submission of the instruction on the defense of impossibility of performance, and the trial court did not err in submitting it to the jury.

III. SPECIFIC PERFORMANCE.

In their petition the plaintiffs had requested specific performance of the 1957 agreement. They sought a court order directing the defendants to construct and maintain an adequate outlet for the drainage of surface waters. During the trial, plaintiff Urban Lukavsky testified he had built up his dike since the 1993 flooding and he claimed he knew he had solved the problem of water drainage. The trial court denied the plaintiffs' request for specific performance on the ground that there was no basis to compel the defendants to do something when the plaintiffs' testimony indicated the problem no longer existed.

Our review of a request for specific performance is de novo. *H & W Motor Express v. Christ*, 516 N.W.2d 912, 913 (Iowa App. 1994). Specific performance

of a contract is not a remedy which is available as matter of right. *Id.* at 913-14. Rather, its availability rests in the sound discretion of the court. *Id.* at 914. The object of specific performance is to best effectuate the purpose for which a contract is made. *Lange v. Lange*, 520 N.W.2d 113, 118 (Iowa 1994).

Given the jury's rejection of the defendant's breach of contract claim, and the plaintiffs' testimony indicating the flooding problem had been solved, no basis existed for ordering specific performance of the contract. We affirm the trial court's denial of this request.

AFFIRMED.