IN THE COURT OF APPEALS OF IOWA

No. 0-618 / 89-1739

FILED
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CLERK SUPREME COURT

HAWKEYE LAND CO.,

Plaintiff-Appellant,

vs.

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LAURENS STATE BANK,

Defendant-Appellee.

Appeal from the Iowa District Court for Pocahontas County, Dale E. Ruigh, Judge.

Hawkeye Land appeals from a district court order requiring the Laurens Bank to execute the necessary documents to transfer the bank's interest in certain property and improvements thereto, but denying Hawkeye's request for a mandatory injunction and for money damages. **REVERSED AND REMANDED.**

Joe H. Harris, Cedar Rapids, for appellant.

Donald A. Beneke, Pocahontas, for appellee.

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

PER CURIAM

This case involves the current responsibility for removal of petroleum tanks that are a detriment to the real estate on which they are located. The tanks, in Laurens, Iowa, are on real estate owned by plaintiff-appellant Hawkeye Land Co. Defendant-appellee, the Laurens State Bank, acquired an interest in the storage tanks from a lessee of the parcel, a Mr. Koenig.

The lease that forms the basis of this controversy was made in 1953. In 1953 the storage tanks were not in place. Plaintiff did not acquire the premises until the storage tanks were in place. In 1973, after the storage tanks were in place, Koenig was assigned the interest of a prior lessee, and subsequently gave defendant bank a security interest in the tanks. On April 15, 1987, plaintiff terminated Koenig for nonpayment of rent. In September 1987 Koenig transferred his interest in the property to defendant bank.

Plaintiff brought this suit claiming it had requested the defendant bank to move the tanks or lease the premises, and defendant bank had failed to do so. Plaintiff claimed it was damaged and sought an injunction requiring the defendant bank to remove the tanks. The trial court found the tanks were a part of the real estate, and the defendant bank and Koenig had waived or abandoned their right to possession and removal.

On appeal, the plaintiff claims the trial court should have issued an injunction directing the defendant to remove the tanks or should have assessed damages against the defendant bank for its failure to do so.

After Koenig was removed from the picture, the plaintiff attempted to have the tanks removed and attempted to sell the property. The defendant succeeded in thwarting the attempted removal and sale. The trial court found, in part:

> Although the bank did enforce its rights against Mr. Koenig by acquiring his ownership interest in the improvements on or about September 22, 1987, the bank has not made any effort to remove the improvements from the leased premises. In fact, the bank has steadfastly refused Hawkeye's demands that they remove the storage tanks and other improvements. . . . The evidence is abundantly clear that the bank has absolutely no intention of paying any sum of money to remove the improvements or repair any damages to the real estate caused by such removal.

The trial court also found:

> While agreeing with the Court that it has no duty of removal, the bank has continued to claim an ownership interest in the leasehold improvements.

The trial court went on to determine by not removing the improvements, the bank had no claim to the tanks.

This was a suit filed in equity. Therefore, we review de novo. Iowa R. App. P. 4. We look at the entire record, giving weight to the fact-findings of the trial court, especially when considering the credibility of witnesses,

but are not bound by them. See In re Marriage of Steenhoek, 305 N.W.,2d 448, 452 (Iowa 1981).

We agree with the factual findings made by the trial court, but we do not agree that these factual findings support a finding of abandonment. Abandonment is defined in 1 Am. Jur. 2d Abandoned, Lost and Unclaimed Property § 1 (1962):

> In its general sense, abandonment means the act of intentionally relinquishing a known right absolutely . . . .
>
> Abandoned property is that to which the owner has voluntarily relinquished all right, title, claim and possession, with the intention of terminating his ownership, but without vesting it in any other person and with the intention of not reclaiming future possession or resuming its ownership, possession or enjoyment.

The defendant bank has never relinquished claim to the property, rather the defendant bank continues to assert ownership. In asserting ownership, the defendant bank prevented a sale and prevented the plaintiff from having the tanks removed at no cost. Equity would not be served by allowing the defendant bank, after asserting ownership to the plaintiff's detriment, to be relieved of the responsibilities of ownership.

We remand the case to district court. We order the district court to enter an injunction directing the defendant to remove the tanks, or to enter a judgment in plaintiff's favor for the cost of removal.

We do not retain jurisdiction.

REVERSED AND REMANDED.

Oxberger, C.J., concurs; Habhab, J., specially concurs.

HABHAB, J. (specially concurring)

I concur in the result only.