IN THE COURT OF APPEALS OF IOWA

No. 9-071 / 97-2046
Filed March 31, 1999

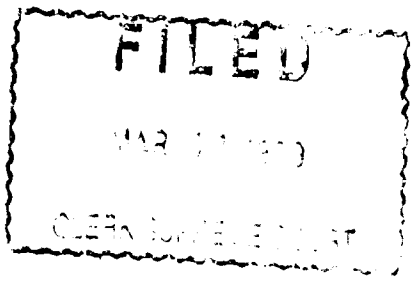
NINTH AVENUE COMPANY, L.C.,

Plaintiff-Appellee,

vs.

ROBERT DARRAH, SAUNDRA DARRAH, and DARRAH'S APCO, INC.,

Defendants-Appellants.



Appeal from the Iowa District Court for Pottawattamie County, Timothy O'Grady, Judge.

Defendants appeal from a district court ruling that plaintiff established a modified easement by prescription over a portion of defendants' property. **AFFIRMED.**

Robert V. Rodenburg, Council Bluffs, for appellants.

Robert S. Lannin of Croker, Huck, Kasher, DeWitt, Anderson & Gonderinger, Omaha, Nebraska, and John M. McHale of Peters Law Firm, Council Bluffs, Iowa, for appellee.

Heard by Sackett, C.J., and Huitink and Mahan, JJ.

SACKETT, C.J.

Defendants-appellants Robert Darrah, Saundra Darrah, and Darrah's APCO, Inc., appeal from an order establishing a modified easement by prescription over a thirty-foot portion of a lot in Council Bluffs, Iowa,[1] used as a driveway between a convenience store located on defendant Saundra Darrah's property and a restaurant and motel owned by plaintiff on adjoining property.[2] We affirm.

The action began when plaintiff Ninth Avenue Company, L.C., sought to establish a permanent easement over Lot 4 in Block 45 in Brown's Subdivision in Council Bluffs, Pottawattamie County, Iowa. The area was used as a driveway along a restaurant that leads into a motel owned by plaintiff. The driveway area where plaintiff sought the easement is owned by defendant Saundra Darrah and also provides access to a convenience store she owns on Lots 1, 2, 3, and 4 in the same block of the same addition.

The district court established a modified easement by prescription. Defendants contend plaintiff did not prove a modified easement by prescription because there was no express consent or oral agreement by the owners of the servient estate. They argue

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[1] Defendant Saundra Darrah is the owner of Lot 4 in Block 45 of Brown's Subdivision in Council Bluffs, Iowa, over which plaintiff seeks the easement. Saundra also owns Lots 1, 2, and 3 in the same block.

[2] Plaintiff is the owner of a restaurant, motel, and parking lot on Lots 5, 6, 25, 26, 27, and 28 in Block 45 of Brown's Subdivision in Council Bluffs, Iowa. Plaintiff sought a permanent easement over a thirty-foot portion of Lot 4 in the same subdivision. Lot 4 abuts Lot 5. The questioned property is used as a driveway along the restaurant that leads into the motel.

there was no evidence sums were expended in reliance on an agreement or consent. They further contend there is no evidence the restaurant and motel would not have been built without access to the Lot 4 driveway. They also contend the action was barred by the settlement agreement.

Plaintiff asserts the district court's decision may also be affirmed as an easement by implication or on an estoppel theory. Plaintiff further advances defendants' contention the settlement agreement barred the action was not raised in the district court and therefore the argument is waived.

The case was tried before the district court in equity. The parties agree that we review de novo. Iowa R. App. P. 4.

In 1982, Donald Sorensen owned Lots 1, 2, 3, 4, 5, and 6, which he leased to Darrah, Schroer & Kress, P.C., with an option to purchase. Defendant Robert Darrah owned sixty percent of the corporation. The convenience store is located on Lots 1 through 4. Defendant Saundra Darrah began to operate the convenience store and continued to operate it at all material times.

On June 27, 1984, the option to purchase was exercised with Sorensen contracting to sell Lots 1, 2, 3, and 4 to Darrah, Schroer & Kress, P.C. In the contract, Sorensen reserved an easement for a driveway over Lot 4. Sorensen also gave Darrah, Schroer & Kress, P.C., the right of first refusal on Lots 5 and 6. The contract gave Robert and Saundra, as individuals, the right to form a partnership for the purpose of constructing a restaurant and/or motel on part of the same lots. If that

happened, Sorensen would transfer Lots 5 and 6 to the partnership for a $25,000 interest in it.

In late 1984, Robert exercised the option. A site plan was developed and an architect hired. A restaurant was to be built on Lots 5 and 6. A motel was to be built on Lots 25, 26, 27, and 28. The site plan showed the entrance drive to the motel as crossing Lots 4 and 6. Construction of the restaurant began. On August 29, 1985, Sorensen transferred the land to a partnership called Finish Line Partnership.

Prior to construction of the restaurant, a portion of Lot 4 was an unimproved weedy drainage area. Throughout construction, Robert represented he owned Lots 1 through 6. During construction, Lots 5 and 6 and a portion of Lot 4 were filled and graded. A portion of Lot 4 was also paved. The restaurant and subsequent motel, built in 1986, were designed in such a way as to use the questioned piece of Lot 4 for ingress and egress.

Robert was the managing partner of Finish Line Partnership and had the exclusive right to manage the partnership, conduct its business, and be responsible for its decisions. Robert was to assume all responsibilities for the partnership during the construction period. Finish Line Partnership was incorporated as Finish Line, Inc., in December of 1988 with Robert as the registered agent, incorporator, and sole member of its board of directors. The corporation owned the restaurant and motel until 1993. At that time, the other shareholders filed a suit against Robert charging he breached fiduciary duties and misappropriated funds. The suit was resolved by an

agreement and Robert released his control of the corporation in exchange for a release and indemnification.

The remaining shareholders then became incorporated as Ninth Avenue Company, L.C. On June 24, 1993, Finish Line, Inc., conveyed Lots 5, 6, 25, 26, 27, and 28 to plaintiff Ninth Avenue Company, L.C.

A survey was done on July 28, 1993. It showed the west line of Lot 4 and the east line of Lot 5 ran along the end of the parking stalls to the east of the restaurant and a car must cross Lot 4 to get to these parking stalls. Plaintiff continued to use the west thirty feet of Lot 4 for ingress and egress until June of 1995 when defendants permanently blocked the restaurant's parking spaces and the delivery area to the motel's main entrance.

The district court found plaintiff had proven a modified version of an easement by prescription. The district court found the site plans for the restaurant and motel relied on Lot 4 for access to the east parking stalls for the restaurant and to the motel. The district court further found the architect considered all the property to be owned by the Darrah family. The district court specifically found when the architect's plans incorporated those assumptions, neither Robert nor Saundra objected and the architect was authorized to implement those plans.

The district court also found before the site plans for the restaurant and motel were developed Robert had personally exercised the option on those lots. The district court held the approval of the site plans for the restaurant and the motel were evidence

of Robert's agreement on behalf of Darrah, Schroer & Kress, P.C., that Lot 4 would be used by the restaurant and motel for access to parking and the motel office. The district court also found plaintiff or its predecessor in interest expended funds to promote the use of a portion of Lot 4 in reliance on the agreement to make Lot 4 a servient estate, and Lot 4 was filled, graded, and paved when the restaurant land was developed. The district court determined the cost of those improvements were paid by Finish Line Partnership, a predecessor in interest to plaintiff. The district court noted neither Robert nor Saundra objected to the improvements and expenditures on their property. Specifically, the district court found Robert, as managing partner of Finish Line Partnership, approved the expenditures and paid the bills. Additionally, the district court found the design and construction of the restaurant and motel relied on access across Lot 4. The district court found the easement by prescription was established by clear and convincing evidence, and Lot 4 had been used by and was available for access to the east parking stalls of the restaurant from the time the restaurant was built until June 1995 when it was blocked.

Prescription is one of the three or four methods by which an easement may be created. *Simonsen v. Todd*, 261 Iowa 485, 489, 154 N.W.2d 730, 732 (1967); *Phillips v. Griffin*, 250 Iowa 1350, 1354, 98 N.W.2d 822, 824 (1959); *Webb v. Arterburn*, 246 Iowa 363, 378, 67 N.W.2d 504, 513 (1954); *Loughman v. Couchman*, 242 Iowa 885, 888, 47 N.W.2d 152, 153-54 (1951). An easement by prescription is created by adverse possession, under claim of right or color of title, openly, notoriously,

continuously, and hostilely asserted against defendants for ten years or more. *Phillips*, 250 Iowa at 1354, 98 N.W.2d at 825. Under some circumstances there may be an easement by prescription where the original use was with the consent of the servient owner and use as of right has continued for more than ten years. *Loughman*, 242 Iowa at 888, 47 N.W.2d at 154. This has been applied only in those situations in which the party claiming the easement has expended substantial amounts of labor or money in reliance upon the servient owner's consent or his oral agreement to the use. *See Simonsen*, 261 Iowa at 489, 154 N.W.2d at 733; *Loughman*, 242 Iowa at 888-89, 47 N.W.2d at 154; *McKeon v. Brammer*, 238 Iowa 1113, 1117, 29 N.W.2d 518, 521 (1947); *Morse v. Rhinehart*, 195 Iowa 419, 420-21, 192 N.W. 142, 142 (1923).

In *Cook v. C., B. & Q. R.R. Co.*, 40 Iowa 451 (1875), the court recognized a mere parol license is revocable at common law. The court went on to recognize in some states, when the licensee has acted under the authority conferred and incurred expense in the execution of it, equity regards it as an executed contract and will not permit it to be revoked, and held that this seems to be the law in this state, finding the rule fully in accord with the principles of an enlightened jurisprudence. *Id.* at 455.

Defendant contends there is no evidence of any express consent or oral agreement by the owners of the servient estate. We disagree. There is substantial evidence Robert, acting for plaintiff's predecessor partnership and corporation, singularly was responsible for development of the lot and construction of the restaurant and motel. Saundra, while not as actively involved, operated the adjoining

property at all times and was fully aware of the existence of the easement. The result reached by the district court is clearly equitable and is affirmed.

Defendants next contend the issue was resolved by a settlement agreement. Plaintiff contends error was not preserved on this issue. Defendants' brief fails to show where it was preserved. Saundra testified she was not aware of the property lines until the settlement was formalized.

For reasons advanced by the district court, we also concur with its decision on this issue.

AFFIRMED.