

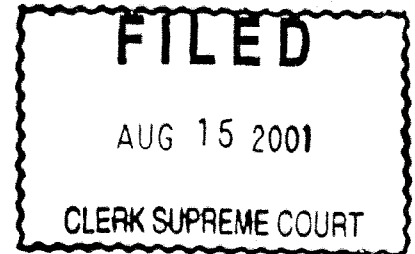
IN THE COURT OF APPEALS OF IOWA

No. 0-717 / 99-1913
Filed August 15, 2001

JORJA MOORE,
Plaintiff-Appellee/Cross-Appellant,

vs.

DUBUQUE COUNTY ABSTRACT & TITLE COMPANY,
A.E. COOPER AND PHYLLIS W. COOPER,
Defendants-Appellants/Cross-Appellees.



Appeal from the Iowa District Court for Dubuque County, R.J. Curnan,
Judge.

The defendants appeal, and plaintiff cross-appeals, from a district court order denying plaintiff's request for injunctive relief to prevent the defendants from completing an office addition and denying both parties' claims for damages.

APPEAL AFFIRMED AS MODIFIED; CROSS-APPEAL AFFIRMED.

William C. Fuerste of Fuerste, Carew, Coyle, Juergens & Sudmeier, P.C.,
Dubuque, for appellants.

Todd L. Stevenson and D. Flint Drake of Kane, Norby & Reddick, P.C.,
Dubuque, for appellee.

Considered by Sackett, C.J., and Zimmer and Miller, JJ.

ZIMMER, J.

The defendants-appellants/cross-appellees, Dubuque County Abstract & Title Company, A.E. Cooper, and Phyllis Cooper,¹ (hereinafter "DCA&T") claim the district court erred in denying their claim for damages and attorney fees resulting from a temporary injunction which stopped construction of an addition to their building. The plaintiff-appellee/cross-appellant, Jorja Moore, claims the court erred in denying her requests for a permanent injunction and for damages resulting from the construction and from the loss of an easement. We affirm as modified on the appeal and affirm on the cross-appeal.

I. Background

Jorja Moore and DCA&T are abutting neighbors on business property lots located on the east side of Iowa Street between 9th and 10th Streets on a city block in downtown Dubuque. Moore's property lies at the north end of the block and DCA&T's property lies at the south end of the block. The two parcels adjoin each other along their rear property lines. Along the east side of both properties is an alley. Iowa Street and a sidewalk run along the west side of both properties. Prior to the construction at issue, both properties had some vacant space at the rear of their buildings -- approximately thirty feet on Moore's property (lot 1) and forty-five feet on DCA&T's property (lot 2).

In 1987 DCA&T entered into an "easement and maintenance agreement" with a predecessor in title to Jorja Moore. The easement agreement language is

¹ A.E. Cooper and Phyllis Cooper are officers and shareholders of the Dubuque County Abstract & Title Company.

a central issue.² The record reveals Moore purchased her property in 1998 and opened a restaurant. She used the common area south of her restaurant for vehicular traffic and parking. In October 1998 DCA&T sent Moore a letter notifying her of its intention to expand its offices northward onto the common area abutting the driveway between the buildings. A short time later, DCA&T started construction of an addition on the rear of its building which would occupy all the vacant land on its lot. Moore complained and threatened to seek an injunction.

On October 26, Moore filed an application for a temporary injunction and obtained an ex parte order³ from Judge Alan Pearson granting the injunction subject to the posting of a bond. On October 30 the bond was posted and the temporary injunction issued, which enjoined and restrained defendants as

² The 1987 agreement provides in pertinent part:

The parties agree as follows:

1. There is a common driveway entrance from Iowa Street centered approximately on the boundary line between Lot 1 and Lot 2, and a common area for vehicular and pedestrian traffic between the buildings located on Lot 1 and Lot 2.

2. Each party grants to the other an easement over and across that portion of the common driveway entrance located on its lot for vehicular and pedestrian traffic related to the businesses conducted or to be conducted by the parties on their respective lots.

3. Each party grants to the other an easement over and across the common area located on its lot for vehicles and pedestrian traffic related to the businesses conducted or to be conducted by the parties on their respective lots. Nothing herein shall prevent either party from expanding its building onto its portion of the common area to the extent allowed by then existing City of Dubuque Zoning Ordinances and Codes. In that event, the size of the common area easement shall be reduced accordingly.

...

5. The easements granted herein shall be perpetual and binding on the heirs, successors, assigns and personal representatives of the parties hereto.

³ DCA&T admits, "Plaintiff, notified Defendants of Plaintiff's intent to pursue an injunction, by facsimile, delivered at approximately 3:00 p.m." October 26, 1998.

follows:

proceeding with construction upon Defendants' property, to cease and desist from preventing access to Plaintiff's property by Plaintiff and, Plaintiff's suppliers and customers, and is further temporarily enjoined from blocking the driveway easement which straddles the boundary between the Plaintiff's property and the Defendants' property.

DCA&T responded on November 3 with an answer and request for immediate hearing on dissolving the injunction. The issue of damages was severed for later determination and the court held hearings on the injunction on November 16 and 18. The district court vacated the injunction on November 19, permitting construction to resume. The court also specifically reserved all claims for damages by either party "for pleading and determination at a later time."

At trial Moore sought a permanent injunction and damages based on alleged violation of the easement agreement. DCA&T sought damages based upon the construction delay caused by the temporary injunction. Following trial the court issued its judgment and decree in September 1999. The court "found and determined . . . that the easement agreement is vague and that each of the parties' interpretations is reasonable under the language of the document and the facts and circumstances shown at trial" It denied Moore's request for a permanent injunction. The court also concluded "that neither party, under the findings and circumstances set forth . . . is entitled to damages from the other and that neither party is entitled to attorney fees." The court denied DCA & T's motion pursuant to Iowa Rule of Civil Procedure 179(b). DCA&T has appealed and Moore has cross-appealed.

II. Appellate claims:

A. *Defendants/appellants.* The title company and its owners claim the court erred in not awarding any damages resulting from the temporary injunction. They argue it was obtained improperly without notice and a hearing and was vacated when challenged. They claim entitlement to \$11,544.10 in damages for (1) attorney fees and expenses incurred in vacating the injunction, (2) lost rental income caused by the delay in construction, (3) damages for increased construction costs, and (4) damages for additional charges from the architect incurred in fighting the injunction.

B. *Plaintiff/appellee.* Moore claims the court erred in denying a permanent injunction and in not awarding her damages resulting from trespass on her property by the construction crews.

III. Discussion:

This is an equitable action and we review de novo. Iowa R. App. P. 4.

A. *The easement agreement.* The parties disagree regarding what the language of the easement agreement means. Moore argues there are two easements – a driveway and a common area. She contends the driveway easement extends along both sides of the property line from the public street to the alley. The common area includes the remainder of the property between the parties' buildings. The language allowing each party to build in their portion of the common area, in Moore's view, does not allow either party to build in the driveway easement along the lot line.

DCA&T argues there are two easements – a driveway *entrance* and a common area. The driveway entrance straddles the property line coinciding with

the curb cut on the public street. The common area encompasses the vacant area between the parties' buildings. In DCA&T's view, the language allowing building in the common area permits either party to build on the vacant portion of their own lot to the extent allowed by local zoning ordinances.

At the hearing on whether the temporary injunction should be dissolved, Moore introduced testimony from the attorney who drafted the easement agreement. He testified the "common driveway entrance" easement was intended to extend from the street to the alley, straddling the lot line. In analyzing this testimony, the court stated:

And I understand that Mr. McKay, when he drafted this agreement, offered his opinion yesterday as to what each of these easements covered I will simply tell you all, I don't accept it.

Mr. McKay is a very capable lawyer and honest gentleman but he has to be wrong in his interpretation, and the reason is paragraph 3 clearly says that for the common area Dubuque Abstract can build a building right out to the property line, and Mr. McKay wrote that in the agreement.

Having done that, it is proof positive that whatever easement exists under paragraph 2 for entrance, it does not extend all the way back to the alley centered on the property line. I mean that is just a mutually exclusive interpretation from paragraph 3. They cannot possibly both be true.

. . . [I] assume that everything that's in here was there for a purpose and is consistent with the rest of it, and since it says very clearly a building can be there and can run out to the property line, that must mean that the entrance easement in paragraph 2 did not run all the way back to the alley. It stopped, generally speaking, at the common area, and part of the problem is we don't really know where the limit of, quote, the common area, end quote, is, but for my purposes, the common area is essentially the rectangular area of the two lots.

The court vacated the temporary injunction and allowed construction to resume. In its order, it addressed the "entrance" easement. "In light of the entire record, the Court concludes that an access of 14 feet or a *de minimis* deviation

therefrom is sufficient to satisfy the terms of the contract." The court specifically did not address any damages.

After additional pleadings concerning damages and trial on the claims, the trial court issued its final judgment and decree. Before discussing the interpretation of the easement agreement, the trial court referred back to the November 1998 proceedings on the temporary injunction, noting:

On November 16th and 18th, hearings were held before Judge Pearson and his Decree and Supplemental Order were subsequently filed. These being part of the file, the Court does not set forth or review their findings here. They are self-explanatory. Suffice it to say that as of November 19th, 1998, the temporary injunction was vacated.

The court then reviewed the easement language and the conflicting interpretations of the parties. The court was unable to resolve the issue, noting only that it appeared from the language "that there are two separate easements but that one overlays the other. . . . To the extent one overlays the other, both easements exist on the same land." It determined the language was vague and that the varied interpretations were "reasonable," concluding "the Court's own interpretation thereof is moot." Applying a "balancing of the equities" approach, the court determined "the extreme hardship of any decree granting a mandatory injunction in this case means that the Defendant must prevail regardless of which of the two reasonable interpretations the court would apply." See Restatement (Second) of Torts § 941 (1977) (discussing balancing of equities). The court then declined to award damages and permanent injunctive relief.

Upon de novo review of the record, we agree with the reasons expressed by the district court when it vacated the temporary injunction and allowed

construction to resume in November of 1998. For those same reasons, we agree with DCA&T's contention that the trial court properly denied Moore's application for a permanent injunction. We affirm the district court's denial of temporary and permanent injunctive relief.

B. DCA&T's Damage Claims. DCA&T claims the trial court erred in not awarding damages. Moore's original petition was an application for an injunction restraining DCA&T "from the construction of a building and appurtenant structures." Nothing else was sought. No claim for damages was made. The prayer of the petition does not include a generic equitable relief request. It appears from the record the district court granted a temporary injunction upon posting of a bond, without other notice to DCA&T or opportunity to be heard. See Iowa R. Civ. P. 326. The district court's actions appear to violate the requirement in rule 326 for notice if the injunction would stop construction of a building. *Id.*

The district court vacated the temporary injunction about three weeks later, after DCA&T responded and a hearing was held. In its response, DCA&T also requested that the court "pronounce the rights" of the parties to use the common area defined in the easement and that the court award damages for the plaintiff's interference. Our supreme court has held:

The law is well settled in this state that, when an injunction is the only relief sought and the temporary writ issued therein is dissolved on final hearing, recovery by the defendant may be had for the reasonable and necessary costs, expenses, and attorney fees expended in procuring such dissolution.

Chrisman v. Schmickle, 209 Iowa 1311, 1313, 230 N.W. 550, 551 (1930). Moore argues this principle does not apply if the injunction was "merely auxiliary" to the

main action and the plaintiff prevails in the main case. *Western Fruit & Candy Co. v. McFarland*, 188 Iowa 204, 210, 174 N.W. 57, 59 (1919). In her brief, Moore claims the “most significan[t]” purpose for the request for the temporary injunction was to stop the defendants’ trespass and excavation upon the plaintiff’s real estate. The record does not support this conclusion. No allegations of trespass appear in the application for the injunction. The petition was amended six months after the temporary injunction was vacated to add two counts, one of which was trespass.

The test to determine whether or not the request for the injunction was auxiliary to the main case is to remove the request from the prayer of the petition to determine what case remains. *Chrisman*, 209 Iowa at 1313, 230 N.W. at 552; *Colby v. Meservey*, 85 Iowa 555, 52 N. W. 499 (1892). In the instant case, in contrast to *Chrisman*, not even a general equitable prayer would remain in the original petition. Moore’s additional claims were not added until after DCA&T completed construction and sought to recover damages from the third-party defendant bonding surety. Moore certainly did not prevail in the proceedings to vacate the temporary injunction. She did not prevail in the final proceedings on the permanent injunction or the amended claims for damages. We conclude the district court should have awarded some damages to DCA&T.

1. *Attorney fees and expenses.* Because the original temporary injunction was improperly obtained, was the main object of the suit, and was vacated, DCA&T is entitled to the “reasonable and necessary costs, expenses, and attorney fees expended in procuring” the vacation. *Chrisman*, 209 Iowa at 1313, 230 N.W. at 551; *accord Western Fruit*, 188 Iowa at 209, 174 N.W. at 59. They

claim they should receive \$4,578. We agree and award DCA&T \$4,578 in attorney fees and expenses.

2. *Loss of use.* The temporary injunction slightly delayed the completion of the building from its projected completion. Some evidence exists that construction crews continued some site preparation and work on forms for the footings, so the delay was not so great as it might have been. Damages caused by a delay in construction may be calculated by lost rental value or loss of use. *City of Corning v. Iowa-Nebraska Light & Power Co.*, 225 Iowa 1380, 1386-87, 282 N.W. 791, 794-95 (1938). DCA&T presented evidence commercial office space rents for \$10 per square foot per year in Dubuque. The building addition included 1564 square feet. Daily prorated rental, therefore, would be \$42.85 for the entire addition. We award damages under this theory of recovery in the amount of \$857.

3. *Increased construction costs.* The appellants claim the construction delay increased contractor costs by \$4,266 for cold-weather additives to the concrete and mortar and for necessary insulated enclosures to allow construction to continue once the weather turned cold. Their claim is based on equitable principles allowing compensation for actual losses "suffered by reason of the wrongful issuance of the injunction" 43A C.J.S. Injunctions § 331 at 740. That section, however, continues in pertinent part, ". . . that is, such damages as are the actual, necessary, and proximate result of the injunction during the time it was operative." *Id.* "The period for which damages are recoverable under an injunction bond is ordinarily limited to the time the injunction was in force." 42

Am. Jur. 2d Injunctions, § 366 at 1181. We decline to award damages under this theory of recovery.

4. *Charges by architect.* DCA&T claims it should receive an award of damages which includes the additional charges made by their architect for preparing for and appearing in court. It submitted evidence the architect charged \$900 for services related to challenging the temporary injunction. Such damages may fall under the “reasonable and necessary costs, expenses” language of *Chrisman*, 209 Iowa at 1313, 230 N.W. at 551, once we determined the temporary injunction was improperly issued. We award DCA&T \$900.

C. *Moore's damage claim.* Moore claims damages for trespass on her property by the construction crews. She also claims damages as a result of losing parking spaces and delivery access at the rear of her restaurant. Her brief alleges, contrary to the facts, that the defendants excavated on property to which they had no title nor claims of ownership interest, encroaching as much as six feet on her property. She claims the injunction was merely auxiliary to the main proceeding, when in fact, the injunction was the only remedy sought until the pleadings were amended six months after the temporary injunction was vacated.

During the initial excavation, sand fill from under the edge of Moore's paved “common area” collapsed into the excavation on DCA&T's lot. The contractor erected a temporary barrier on Moore's land to prevent pedestrians and vehicles from traversing the pavement along the edge which no longer had any support. The contractor also parked trucks in the alley and on the driveway entrance to the common area. These actions did temporarily prevent Moore, her employees, customers, and vendors from using the driveway access easement

and the common area behind her building. She argues, without supporting authority, that the contractor was the defendants' agent. Part of the orders vacating the temporary injunction addressed these issues and directed the contractor to remove its trucks and to eliminate the need for the temporary barrier as quickly as prudent. Once the footings were in, the fill was replaced and the trespass by the contractor on Moore's lot stopped.

DCA&T's building addition did reduce the width of the driveway access easement to about ten feet. Only one vehicle can pass at a time now, instead of two at the same time. Moore alleges deliveries must now be made through the front door and pass through the dining room, damaging the carpet. She also claims there is no room behind her building now for a handicapped parking place.

75 Am. Jur. 2d Trespass § 117 (1999) provides in part, "One injured by the trespass of another is entitled to recover damages from the other for all harm, past, present, and prospective, legally caused by the trespass." "Where a trespass is of a permanent nature, all damages, past and prospective, are recoverable in one action." *Id.* at § 119.

Moore cannot recover from DCA&T for the actions of the contractor. Even if such recovery were proper, the actions were temporary, so the damage would be minimal. The only arguable continuing trespass is the building itself and the restricted width of the driveway entrance easement. The easement agreement does not specify any width for the entrance or that the width cannot change. Moore offers no evidence from which the court could quantify appropriate damages. We affirm the court's decision not to award damages to Moore.

On the appeal, we affirm the judgment of the district court as modified. We award DCA&T damages for attorney fees and expenses in the amount of \$4,578.40, damages for loss of use in the amount of \$857, and additional architect expenses of \$900 resulting from contesting the initial temporary injunction. We affirm on the cross appeal.

APPEAL AFFIRMED AS MODIFIED; CROSS-APPEAL AFFIRMED.