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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

MARIE B. THOMAS,

Plaintiff-Appellant-Cross-Appellee,

vs.

FLORENCE HOYT,

Defendant-Appellee-Cross-Appellant.

Filed February 24, 1981

0-333
2-64549

Appeal from Greene District Court - Paul Hellwege, Judge.

Plaintiff appeals from trial court's judgment that set aside an earlier order granting a temporary injunction requiring defendant to remove obstructions in a tile culvert blocking the flow of water from plaintiff's land to defendant's land and that overruled plaintiff's petition for a permanent injunction requiring defendant to remove obstructions from the tile culvert and to maintain an opening to allow waters to flow from plaintiff's land to defendant's land. Defendant cross-appeals from trial court's ruling allowing plaintiff to clean the original watercourse on defendant's land down to the level of the pond on plaintiff's land. Affirmed on plaintiff's appeal; affirmed with modification on defendant's cross-appeal.

Richard N. Winders of Herrick, Langdon & Langdon, Des Moines, for appellant-cross appellee.

Raymond Snook and John A. Beltz of Snook Law Office, Glidden, for appellee-cross appellant.

Considered by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

JOHNSON, J.

Plaintiff, Marie B. Thomas, appeals from trial court's judgment that set aside an earlier order granting a temporary injunction requiring defendant, Florence Hoyt, to remove obstructions in a tile culvert blocking the flow of water from plaintiff's land to defendant's land and that overruled plaintiff's petition for a permanent injunction requiring defendant to remove obstructions from the tile culvert and to maintain an opening allowing waters to flow from plaintiff's land to defendant's land. Plaintiff claims trial court erred in determining that defendant's artificially-constructed ditch was not the established watercourse for taking water from most of plaintiff's land and that plaintiff had no right to connect into it. Defendant cross-appeals from trial court's ruling allowing plaintiff to clean the original watercourse on defendant's land down to the level of the pond on plaintiff's land. Defendant claims that the main natural watercourse never drained the pond. We affirm trial court's judgment on plaintiff's appeal and affirm with modification on defendant's cross-appeal.

I. Procedural Overview. On October 27, 1978, plaintiff filed a petition for temporary and permanent injunctive relief requesting the court to order defendant to remove obstructions in a tile culvert that was blocking the flow of water from plaintiff's land and to maintain an opening to allow water to flow from plaintiff's land to defendant's land. Plaintiff also requested monetary damages. Trial court issued a temporary injunction on November 30, 1978, ordering defendant to remove obstructions in the drainage ditches and outlets. Defendant filed her answer and counterclaimed seeking damages for plaintiff's alleged trespass on her property. Thereafter, the parties amended their pleadings, each seeking punitive damages for the intentional and malicious acts of the other. Following a hearing, trial court entered a decree on December 20, 1979, denying plaintiff's request for a permanent injunction and setting aside the previously-granted temporary injunction. Plaintiff's appeal and defendant's cross-appeal followed.

II. Facts. Plaintiff's land lies to the south of defendant's. Both properties are relatively flat, with small elevations; plaintiff's property is higher than defendant's. The natural flow of water on plaintiff's land is from the southeast corner in a north-northwesterly direction where it meanders to a pond near the dividing line of the two properties. From the pond it flows northwesterly through defendant's property, eventually reaching the Dunbar Slough west of defendant's property. Defendant also owns land to the southeast of plaintiff's property; this land eventually drains onto plaintiff's property.

In the early 1950's, defendant constructed a drainage system on her land which includes a long east-west ditch near defendant's north boundary that empties into the Dunbar Slough. Extending from the east-west ditch is a north-south ditch that terminates near the boundary line between the defendant's and plaintiff's property. An east-west farm lane runs along the boundary line on defendant's property extending west to a point a short distance from the south terminus of the north-south ditch and east to a north-south highway. A spade ditch on the south side of the farm lane extends east from the south terminus for approximately 130 feet and west for a distance which is disputed by the parties. Defendant claims the distance to be 30 feet while plaintiff claims the distance to be over 300 feet. An eighteen-inch tile under the farm lane drains the water from the spade ditches into the north-south ditch. Defendant's son testified that the purpose of the spade ditches was to keep the farm lane dry.

Plaintiff inherited her land from her mother in 1974 and moved onto the property in 1975. During 1975 and 1976, plaintiff's husband did extensive drainage work on the farm in the drainage area south of the pond by deepening the natural watercourse and creating grass waterways. At that time he intended to centralize the water from the deepened ditches by flowing it into the pond. The drainage work also increased the flow of water. Prior to this work, there appears to have been four outlets for water from plaintiff's land onto defendant's land; after the drainage work, only one primary outlet remained, that being to the north of the pond.

The evidence shows that the land on the boundary line between the parties' properties rose in elevation approximately eighteen inches to two feet over the years, primarily due to defendant's normal methods of farming. Silting also contributed to the buildup of soil. This buildup was evidenced by the tops of the fenceposts which were exposed only about two feet. This buildup on defendant's land acted as a barrier to the natural flow of water from plaintiff's land. Evidence showed that under these circumstances the water from plaintiff's land did not flow naturally over defendant's land until the water level was deep enough to overflow the north rim of the shallow pond.

In 1978, plaintiff's son, by using a backhoe, constructed a ditch, twelve feet wide and three and one-half to four feet deep, connecting the parties' drainage systems. The connecting ditch began at the south end of the pond on plaintiff's land, ran north to the boundary line and then east for approximately 130 feet where it connected with the terminus of the north-south drainage ditch on defendant's land. Plaintiff neither asked

for nor was given permission to construct this ditch, most of which was on defendant's land. Plaintiff's son claimed to be cleaning out defendant's ditch, although in doing so he obliterated defendant's hand-dug spade ditch. Defendant blocked the west side of this ditch after discovering plaintiff's construction activities. Plaintiff then initiated her action seeking a temporary and permanent injunction.

III. Scope of Review. In this action where the parties sought equitable redress as well as compensatory relief, our review is de novo. Braverman v. Eicher, 238 N.W.2d 331, 334 (Iowa 1976).

IV. Injunctive Relief. Plaintiff contends that trial court erred in setting aside the temporary injunction and in not granting a permanent injunction. She claims the natural waterway has been replaced with defendant's artificially-constructed ditches that she was entitled to repair and maintain. She further argues that defendant has failed to prove any damages resulting from her use of the waterway.

Defendant argues that plaintiff's surface water always has flowed over the natural watercourse northwesterly across defendant's land and has never flowed through defendant's artificially-constructed north-south ditch which lies at a higher elevation than plaintiff's pond. She cites trial court's findings that the inceptional trespass was plaintiff's, further arguing that she was permitted by law to block the connecting ditch to force the surface water back into the natural watercourse. We agree with defendant.

We begin our analysis with the general principle that the law entitles the dominant landowner (here plaintiff) to drain the surface water from his or her land over the servient owner's (here defendant's) land and that the servient owner is without remedy unless the volume of water is substantially increased or the manner or method of drainage is substantially changed and actual damages result. Rosendahl Levy v. Iowa State Highway Commission, 171 N.W.2d 530, 536 (Iowa 1969). The law also entitles a party to injunctive relief "only under extraordinary circumstances. . . . It is designed primarily to avoid irreparable damage and to afford relief when there is no adequate remedy at law." Myers v. Caple, 258 N.W.2d 301, 304 (Iowa 1977). Injunctive relief is appropriate only where "it appears there is an invasion or threatened invasion of a right, and that substantial injury will result to the party whose rights are so invaded, or such injury is reasonably to be apprehended." Rosendahl Levy, 171 N.W.2d at 537 (quoting Schmitt v. Kirkpatrick, 245 Iowa 971, 977, 63 N.W.2d 228, 231 (Iowa 1954)). The burden is on plaintiff as the party seeking such relief to prove the elements of her case. Id.

Trial court found the existence of two watercourses. The first, and greatest, is the natural, northwesterly watercourse which carried water from plaintiff's pond; the second, and smaller, is in the northeast corner of plaintiff's land and flows initially into the east spade ditch and then into the north-south ditch. Trial court also found that defendant could block the machine-dug ditch created by plaintiff's son extending west of the north-south terminus but could not block the tile culvert since it also carried water from the east spade ditch which drained the small northwest corner of plaintiff's land.

After reviewing the evidence, we agree with trial court that injunctive relief for plaintiff on the grounds specified was not warranted. We find trial court correctly determined that two watercourses existed and that plaintiff's main watercourse did not drain naturally into defendant's artificially-constructed, north-south ditch through the west spade ditch. Plaintiff, therefore, was without right to connect her drainage system through the pond to defendant's artificially-constructed system. It naturally follows then that plaintiff's son had no right to enter onto or reach over onto defendant's land to clean out or alter defendant's spade ditches. Likewise, no burden of proof shifted to defendant to establish damages. See Rosendahl Levy, 171 N.W.2d at 536. We conclude that trial court did not err on this issue.

V. Cleaning Out the Natural Watercourse. On cross-appeal defendant alleges error occurred in trial court's ruling that granted plaintiff the right to clean out the original watercourse down to the level of the bottom of the pond. Defendant contends trial court's order would have the effect of lowering the northwesterly watercourse below its natural level and would enable plaintiff to drain the pond that has never previously been drained, thereby impermissibly increasing the flow of water across defendant's land.

Trial court found that the testimony indicated the bottom of the pond was approximately seven inches lower than the north rim of the pond and accorded plaintiff the right to enter defendant's property during April, 1980

> . . . to clean out the watercourse originally existing, the same to start at the bottom of the pond previously referred to and to flow in a generally northwesterly direction. The rim of the pond shall be cut at the north or northwest edge thereof. The construction of the same shall be under the supervision of the Greene County Soil Conservation Service. The same shall be constructed as a grass waterway, with the cost thereof to be borne by the Plaintiff.

While our review of the law leads us to conclude that trial court was correct in its ruling that plaintiff has the right to reestablish the original watercourse, see DeWitt v. DeWitt, 259 Iowa 1037, 1041, 147 N.W.2d 32, 34 (1966), our de novo review discloses trial court's finding that lowering the original watercourse to the level of the bottom of the pond would restore the natural watercourse is not supported by the record.

The evidence shows that, since at least 1939, the natural northwesterly watercourse has not drained the ponded area on plaintiff's land, although the watercourse has drained the overflow from the pond until the buildup of soil along the fenceline rendered the natural watercourse unavailable for draining even the bulk of the overflow. Due to defendant's drainage alterations during the 1950's enabling her to direct her surface water through the artificially-constructed ditches and to farm the natural watercourse, however, we find that the natural watercourse has filled in primarily due to the farming operations, rather than solely from natural causes.

We thus conclude trial court erred in assessing the total cost of cleaning out the natural watercourse against plaintiff. Although Nixon v. Welch, 238 Iowa 34, 124 N.W.2d 476 (1947), may suggest that trial court was correct, we note that the court in Nixon found the watercourse filled in due to natural silting (rather than primarily due to the actions of the defendant landowner) and consequently required plaintiff to assume the cost burden of cleaning out the ditch even though, as here, both parties would receive benefits from the drainage. 238 Iowa at 40, 44, 24 N.W.2d at 479, 481. Under the authority of DeWitt, we conclude that defendant is required to assume the expense of restoring the natural watercourse on her land. 259 Iowa at 1041, 147 N.W.2d at 34. Following restoration of the natural watercourse, plaintiff also has the right to maintain the watercourse, if necessary. Nixon, 238 Iowa at 42-43, 24 N.W.2d at 480.

As a final point, we conclude that plaintiff cannot establish her right to lower the original watercourse to the level of the bottom of the pond through these proceedings seeking injunctive relief. Her remedy lies instead in the provisions set forth in chapter 465, The Code 1979. See Myers, 258 N.W.2d at 304. Rosendahl Levy, 171 N.W.2d at 536. Because we modify that part of trial court's order allowing plaintiff to cut the pond to the bottom, the issue of injury or potential injury to defendant is not before us and is left for another day.

In summary, we agree with defendant that trial court erred in ordering the original waterway cut down to the level of the bottom of the pond. We conclude plaintiff is entitled only to restoration of the natural watercourse as a grass waterway. Restoration shall be completed under the supervision of the Greene County Soil Conservation Service. Costs are to be borne by each party for the work done on that party's land. Trial court's order therefore is modified accordingly. All other provisions of trial court's decree not expressly addressed are affirmed.

AFFIRMED IN PART; MODIFIED IN PART.