2012 IL App (3d) 110430-U

Order filed May 1, 2012

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

DMGL, LLC,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
Plaintiff-Appellee,	)	Tazewell County, Illinois,
	)	
v.	)	Appeal No. 3–11–0430
	)	Circuit No. 08-L-128
VILLA RIDGE INVESTMENTS, LLC,	)	
	)	Honorable
Defendant-Appellant.	)	Paul Gilfillan,
	)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Carter and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: A judgment in favor of a property owner requiring a neighboring property owner to pay for the costs of removing a temporary parking lot extension and restoring the land was affirmed because the injury was not permanent, the land was not held for strictly business use, and the land could be repaired at a cost that was not disproportionate to its value. Since it was a continuing, nonpermanent trespass, and the plaintiff was seeking the equitable remedy of restoration, the action was not barred by the statute of limitations applicable to actions to recover damages to real property. The award of mesne profits was based on the evidence and was also affirmed.

¶ 2 The plaintiff, DMGL, LLC, brought an action in ejectment and trespass against the

defendant, Villa Ridge Investments, LLC, for a parking lot that extended onto the plaintiff's property. The trial court granted summary judgment in favor of the plaintiff on the ejectment claim and granted the plaintiff possession. After a bench trial, the trial court awarded the plaintiff restoration damages and 27 months of mesne profits. The defendant appealed.

¶ 3 FACTS

¶ 4 The Ghantous family purchased an apartment complex in 1995. After some transfers among themselves, the apartment complex was transferred to the defendant in 2005. Leo Ghantous was the manager of the defendant, and his wife was the sole member of the defendant. When the property was purchased in 1995, there existed an improvised extension of the apartment complex's blacktop parking lot, which consisted of railroad ties and gravel.

¶ 5 On July 18, 2007, the defendant was informed that the lot extension constituted a trespass on the plaintiff's property. The plaintiff's property was a 37-acre tract of land that was located to the east of the apartment complex. The land was vacant, former farmland, that had been in the plaintiff's family for a number of years. A survey was conducted, which showed that the lot extended onto to a 30 foot by 60 foot portion of the plaintiff's property. The defendant received a copy of the survey on September 20, 2007.

¶ 6 The plaintiff filed a two-count complaint against the defendant, alleging encroachment and seeking ejectment pursuant to section 6-101 *et seq.* of the Code of Civil Procedure (735 ILCS 5/6-101 *et seq.* (West 2008) in Count I and alleging trespass in Count II. The complaint sought compensatory and punitive damages. On the defendant's motion, the trial court struck without prejudice the plaintiff's prayer for punitive damages. The defendant filed an answer, asserting the statute of limitations as an affirmative defense and a counterclaim to quiet title on

the theory of adverse possession.

¶ 7 The plaintiff moved for summary judgment, which the trial court granted in part. It granted judgment in favor of the plaintiff on the defendant's affirmative defense and counterclaim, and in favor of the plaintiff on its claim for ejectment. The trial court granted the plaintiff possession of the disputed property. It reserved ruling on the trespass claim; although the plaintiff proved that the defendant's improvements encroached, there were factual questions regarding whether it was a continuing trespass, the wilfulness of the trespass, and any damages.

¶ 8 The defendant amended its answer to add the affirmative defense that any trespass was committed by the prior owner, and the plaintiff was allowed to amend its complaint to reinstate its claim for punitive damages and ask for attorney fees. At the bench trial, a real estate appraiser, James Klopfenstein, testified that the reasonable rental value of the lot extension was $60 per month. An excavator, Richard Miller, testified that it would cost $13,927 to remove the lot extension; $17,262 if they could not access it from the defendant's property. Phillip Blake Lippi, a member and manager of the plaintiff, testified that the plaintiff's property was appraised in 2004 for $380,000 to $420,000. In 2005, he paid $73,000 to acquire an undivided one-third interest in the property from a deceased aunt's estate.

¶ 9 Leo Ghantous testified that the lot extension was already in place when his family acquired the apartment complex in 1995. He testified that he informed his managers to advise the tenants not to use the gravel lot after the defendant lost the ejectment claim on summary judgment.

¶ 10 After the bench trial, the trial court found that the trespass was nonpermanent and continuous. The trial court found that the difference between the fair market value before and

after the injury was not an appropriate measure of damages because the injury was not permanent, did not involve buildings or other improvements, and was susceptible to repair at a moderate expense. Also, there was no credible evidence as to any diminution in value of the land immediately after the trespass, but the land was vacant and not held for strictly personal or business use. It found that the five-year statute of limitations on damages was applicable, so damages were limited to those occurring after October 1, 2003. The trial court found that there was no wilful or wanton behavior, and it denied the plaintiff's request for punitive damages and attorneys fees. The trial court concluded that the appropriate measure of damages was the cost of restoration. It also awarded mesne profits for the rental of the lot extension from the date the defendant received the survey on September 20, 2007, until the summary judgment order was entered granting the plaintiff possession on December 19, 2009. Thus, the trial court entered judgment in favor of the plaintiff and against the defendant in the amount of $15,547. The defendant's motion to vacate or modify the judgment was denied. The defendant appealed.

¶ 11 ANALYSIS

¶ 12 The defendant argues that it did not create the parking lot extension, so it should not be required to pay to return the land to the way it was and that the right of action for damages to land is personal and can not be assigned by deeding the land. Also, the defendant argues that the trial court erred in granting restoration as the measure of damages and that restoration damages were barred by the five year statute of limitations on damages to real property. Lastly, the defendant argues that the award of mesne profits was improper.

¶ 13 The defendant argues that the plaintiff was not the owner of the land when the damage occurred (the lot extension was built), so the cause of action belonged to the plaintiff's

predecessor in title and the plaintiff had no right of action. The plaintiff argues that the trespass was continuing and the trespass was unknown at the prior transfer, so any depreciation had not been taken into account.

¶ 14 It is undisputed that the defendant did not install the parking lot extension that extended onto the plaintiff's property. However, if a trespass is continuing, any person in possession of the property during the continuation of the trespass may maintain and action for ejectment or trespass. *Rosenthal v. Crystal Lake*, 171 Ill. App. 3d 428 (1988). Whether a plaintiff has the right to maintain an action against a defendant is a question of standing that we review *de novo*. *Wexler v. Wirtz Corp.*, 211 Ill. 2d 18 (2004). Since the lot extension continued to protrude onto the plaintiff's land after the plaintiff acquired the property, and the defendant continued to use the lot extension, the plaintiff had a right of action in trespass against the defendant.

¶ 15 On the issue of restoration damages, the defendant argues that it did not change the plaintiff's land, so it should not be required to pay to return it to the way it was. The defendant argues that we should draw a distinction between removal costs and restorative damages, and the defendant should not be responsible for the restorative costs, the topsoil and seeding. The plaintiff contends that the trial court properly carried out its intent to compensate the injured party and place it in nearly the same position as if there had been no trespass.

¶ 16 The law of torts attempts to restore an injured party to the place before the tort. *Myers v. Arnold*, 83 Ill. App. 3d 1 (1980). When a landowner has shown that he has suffered a compensable injury, the court should examine the exact interest harmed and fashion a remedy to address that harm and do substantial justice. *Myers*, 83 Ill. App. 3d at 7. Although, generally, the measure of damages is the depreciation loss, i.e., the difference between the fair market value

before and after the wrong, this rule is only a flexible guide. *First Baptist Church v. Toll Highway Auth.*, 301 Ill. App. 3d 533 (1998). When an injury to land is not permanent, diminution in value may be an inadequate measure of damages, and the better measure of damages may be the cost of restoring the property to its original condition. *Myers*, 83 Ill. App. 3d at 8; *Wujcik v. Gallagher*, 232 Ill. App. 3d 323, 331 (1992). When determining whether cost-of-repair is a more adequate measure of damages, courts consider whether the realty is held for personal or business use, whether the injury is capable of repair, and whether the cost of repair is wholly disproportionate to the value of the land. *First Baptist Church*, 301 Ill. App. 3d at 545. A reviewing court will not disturb a trial court's finding as to damages unless its measure of damages was erroneous as a matter of law or it ignored the evidence. *First Baptist Church*, 301 Ill. App. 3d at 543.

¶ 17 In this case, although the defendant argued that the plaintiff held the property for investment purposes only, the trial court found that it was vacant land that was not held for strictly personal or business use. The trial court also found that the difference in market value before and after the trespass was not an appropriate measure of damages because it was not a permanent injury, and it was susceptible to repair at a moderate expense. The plaintiff had presented reasonably certain cost of restoration evidence that was not sufficiently countered or rebutted by the defendant. The evidence showed that the plaintiff's 37 acres was appraised in 2004 for $380,000 to $420,000. In 2005, Lippi paid family members $73,000 to acquire an undivided one-third interest in the property. The less than $14,000 costs of restoration were not wholly disproportionate to the value of the land. The trial court considered the relevant factors, and its restoration award compensated the plaintiff for the trespass. The trial court did not ignore

the evidence in requiring the defendant to remove the lot extension, and the seeding and topsoil are part of the cost of restoring the property to its original condition. Thus, we affirm the restoration damages award.

¶ 18 Section 13-205 of the Code of Civil Procedure provides that actions to recover damages for an injury done to real property must be commenced within five years of when the cause of action accrued. 735 ILCS 5/13-205 (West 2008). The defendant argues that the gravel parking lot was already in place when the Ghantous family acquired the property in 1995, so the latest date upon which the statute of limitations of section 13-205 would have expired was 2000. The plaintiff argues that the lot was a continuing trespass and restoration damages were not barred by the statute of limitations. The trial court ruled that the statute of limitations did not act as a complete bar to the plaintiff's cause of action or claim for damages, finding that the trespass was non-permanent and continuous, but it limited any claim for damages to those occurring after October 1, 2003 (five years prior to the date the original complaint was filed).

¶ 19 By its terms, Section 13-205 of the Code of Civil Procedure, 735 ILCS 5/13-205 (West 2008), limits damages in legal actions, and is not controlling in suits seeking equitable relief. See *Meyers v. Kissner*, 149 Ill. 2d 1 (1992). A suit seeking restoration is an action in equity. See *Pradelt v. Lewis*, 297 Ill. 374 (1921). The application of a statute of limitation is a question of law that we review *de novo*. *First Baptist Church v. Toll Highway Authority*, 301 Ill. App. 3d 533 (1998). The trial court limited the mesne profits to the five years preceding the filing of the complaint.

¶ 20 The trial court found that the lot extension was a continuing trespass. The defendant cites to a case, *Horner v. Winnebago County*, 332 Ill. App. 217 (1947), that held that a plaintiff's

trespass action against the county for building a street on the plaintiff's land was barred by the five-year statute of limitations. In that case, the plaintiff was seeking legal damages because the street was a permanent structure. Similarly, an action for damages for the trespass of an underground subway was found to barred by the statute of limitations. *Bank of Ravenswood v. City of Chicago*, 307 Ill. App. 3d 161 (1999). That court concluded that there was only one overt act, so there was no continuing trespass. *Bank of Ravenswood*, 307 Ill. App. 3d at 168. However, in both of those cases, the trespassing structure was permanent, so the plaintiff was limited to legal remedies. In this case, the structure is not permanent, and the plaintiff's equitable remedy is not barred by the statute of limitations.

¶ 21 Finally, the defendant argues that the award of mesne profits was improper because it was based upon the value of the plaintiff's land with improvements, rather than vacant land. Mesne profits can be recovered when there is a trespass and a reasonable rental value for the wrongful use of that property can be determined. *Miller v. Simon*, 100 Ill. App. 2d 6 (1968); 735 ILCS 5/6-138 (West 2008). A reviewing court will not disturb a trial court's finding as to damages unless its measure of damages was erroneous as a matter of law or it ignored the evidence. *First Baptist Church v. Toll Highway Authority*, 301 Ill. App. 3d 533 (1998).

¶ 22 In this case, the sole evidence of mesne profits was presented by the plaintiff's expert appraiser. He opined that the monthly rental value attributable to the trespassing parcel was $60 per month. The expert considered the plaintiff's inability to use that property, but also the economic benefit received by the defendant. The trial court found the appraiser's testimony to be credible, and it was a reasonable rental value for the lot extension. Since that finding was in accordance with the evidence, and was not erroneous as a matter of law, we affirm the award of

mesne profits.

¶ 23 CONCLUSION

¶ 24 The judgment of the circuit court of Tazewell County is affirmed.

¶ 25 Affirmed.