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2014 IL App (3d) 120932-U

Order filed March 27, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

JOHN SZYMANSKI, LISA SZYMANSKI,)	Appeal from the Circuit Court
and MIKE KLUGA,)	of the 12th Judicial Circuit,
)	Will County, Illinois,
Plaintiffs-Appellees,)	
)	
v.)	
)	
RICHARD REITER and MIKE VENZIANO,)	
)	
Defendants-Appellants.)	Appeal No. 3-12-0932
)	Circuit No. 09-MR-1248
)	
MIKE VENZIANO,)	
)	
Counter-Plaintiff-Appellant,)	
)	
v.)	
)	
JOHN SZYMANSKI, LISA SZYMANSKI,)	
and MIKE KLUGA,)	Honorable
)	Barbara Petrunaro,
Counter-Defendants-Appellees.)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justice McDade concurred in the judgment.
Justice Wright dissented.

ORDER

¶ 1 *Held:* In a boundary dispute that turned on the accuracy of conflicting property surveys, the record was unclear as to whether either survey followed surveying procedures prescribed by Illinois law. The case was therefore remanded for additional factual findings.

¶ 2 In this boundary dispute, plaintiffs/counter-defendants John and Lisa Szymanski (the Szymanskis) sued defendant Richard Reiter, the owner of property that is adjacent to the Szymanskis' property, and defendant/counter-plaintiff Mike Venziano, the contract purchaser of the Reiter property, for trespass when Venziano built a driveway that the Szymanskis claimed encroached upon their property. Plaintiff Mike Kluga, who owned another adjacent property, also sued the defendants for trespass. The plaintiffs sought damages, injunctive relief, and a declaration that: (1) a property survey performed by Claassen White & Associates on March 13, 2008 (the Claassen survey) was accurate; and (2) a property survey performed by Ruettiger Tonelli & Associates (Ruettiger survey) was not accurate. Venziano filed counterclaims seeking monetary damages for trespass and nuisance and a declaration that the Ruettiger survey was accurate and that the Claassen survey was not accurate.

¶ 3 After conducting a bench trial, the circuit court held that the Claassen survey was accurate and that the Ruettiger survey was not accurate. Relying upon the boundary lines established by the Claassen survey, the circuit court ruled that the driveway constructed by Venziano crossed onto the Szymanskis' property and constituted a trespass. The circuit court denied Kluga's and the defendants' claims for trespass. In this appeal, the defendants claim that the circuit court erred in finding the Claassen survey accurate and the Ruettiger survey inaccurate.

¶ 4

FACTS

¶ 5 Reiter is the owner of Lot 19 in County Clerk's Subdivision in Will County (Lot 19), and Venziano is the contract purchaser of Lot 19. The Szymanskis and Kluga each own lots abutting Lot 19. Venziano constructed a gravel driveway on Lot 19 which is now paved. The Szymanskis claim that the driveway built by Venziano crosses a portion of their property. Venziano disagrees. The Szymanskis obtained the Claassen survey, which shows that part of Venziano's driveway is on the Szymanski's property. Venziano obtained the Ruettiger survey, which concludes that no portion of the driveway strayed onto the Szymanskis' property.

¶ 6 The Szymanskis and Kluga sued the defendants for trespass in the circuit court of Will County.¹ The plaintiffs sought damages, injunctive relief, and a declaration that the Claassen survey was accurate and the Ruettiger survey was not accurate. Venziano filed counterclaims seeking monetary damages for trespass and nuisance and a declaration that the Ruettiger survey

¹ The Szymanskis alleged that Venziano committed a trespass by constructing a driveway across their property. Kluga alleged that "[o]n or about May 9, 2010, Defendants, without consent or authority and against the will of *** [Kluga], entered onto [Kluga's property] in that, they put weed killer and rebar stakes on [Kluga's] property." Kluga further claimed that, despite his demands that the defendants refrain from such conduct, the defendants "continue to assert that they will continue to trespass and, therefore, continue to deprive [Kluga] of [his] right to exclusive possession of the property."

was accurate and that the Claassen survey was not accurate.²

¶ 7 The case proceeded to trial before the circuit court. During the trial, David Claassen, the surveyor who prepared the Claassen survey, testified as to how the Claassen survey was conducted and offered his opinions on the accuracy of the Claassen survey and on various alleged errors and inaccuracies in the Ruettiger survey. Eric Cox, a surveyor employed by Ruettiger, Tonelli & Associates (the firm that prepared the Ruettiger survey), testified as to how the Ruettiger survey was conducted and offered his opinions regarding the accuracy of the Ruettiger survey and regarding various alleged errors and inaccuracies in the Claassen survey. John Szymanski, Kluga, and Venziano also testified.

¶ 8 The circuit court found that "it appears that the more credible testimony and survey comes from the *** Claassen *** survey." In support of this finding, the court noted that the Claassen survey concurred with right-of-way work that Ruettiger, Tonelli, & Associates previously did for the Plat of Highways for a nearby tollway. Accordingly, the circuit court held that the Claassen survey was accurate and that the Ruettiger survey was not accurate. The court provided no further analysis in support of its decision. Relying upon the boundary lines established by the Claassen survey, the circuit court ruled that the driveway constructed on the defendants' property crossed onto the Szymanskis' property and constituted trespass. The circuit court denied Kluga's and the defendants' claims for trespass.

² Venziano also filed a counterclaim for battery against Kluga which is not at issue in this appeal.

¶ 9

ANALYSIS

¶ 10 In this appeal, the defendants argue that the circuit court erred in finding the Claassen survey accurate and the Ruettiger survey inaccurate. Among other things, the defendants contend that the Claassen survey did not follow certain surveying procedures that are prescribed by Illinois law. Specifically, the defendants maintain that the Claassen survey did not determine the disputed boundary line by first establishing the exterior lines and corners according to the original United States government survey and corresponding field notes, as required by *Kelch v. Izard*, 227 Ill. App. 3d 180, 189 (1992) and other cases.

¶ 11 After reviewing the trial court's decision, the parties' briefs, and the record on appeal, we are unable to determine whether either the Claassen survey or the Ruettiger survey followed this prescribed methodology. Apparently, the Claassen survey used a "Government Land Offices township plat" as "additional evidence" to confirm that Claassen's calculations of the angle of one of the corners "were a better fit with County Clerk Subdivision" than were the calculations made by the Ruettiger survey. However, it is not clear whether either the Claassen survey or the Ruettiger survey applied the procedure ordained in *Kelch* (*i.e.*, establishing the original U.S. government corners first and then locating the disputed boundary line in accordance with those corners). Moreover, it is not clear whether either survey was fully consistent with the lines and corners described in the original U.S. government survey.

¶ 12 As a matter of law, we need to know the answers to these questions before we can decide this appeal. Accordingly, we reverse the circuit court's judgment and remand this matter so that the circuit court may make additional factual findings on these issues.

¶ 24

CONCLUSION

¶ 25 For the foregoing reasons, we reverse the judgment of the circuit court of Will County and remand the matter to the circuit court. On remand, the circuit court shall make factual findings as to whether: (1) the Claassen survey first established the exterior lines and corners according to the original United States government survey and corresponding field notes and then located the disputed boundary line in accordance with those corners; (2) the Ruettiger survey first established the exterior lines and corners according to the original United States government survey and corresponding field notes and then located the disputed boundary line in accordance with those corners; (3) the Claassen survey is consistent with the lines and corners described in the original U.S. government survey and corresponding field notes; and (4) the Ruettiger survey is consistent with the lines and corners described in the original U.S. government survey and corresponding field notes. Based upon these findings as well as its original findings, the circuit court shall then decide which of these surveys, if any, is accurate, and which is inaccurate.

¶ 26 Reversed; cause remanded.

¶ 27 Justice Wright, dissenting.

¶ 28 I respectfully dissent.

¶ 29 At issue in this appeal is the trial court's decision to allow declaratory relief, count III, in favor of the Szymanskis. Based on the divergent approaches described by the surveyors testifying on behalf of each party, I cannot agree with the majority's view that the trial court's findings were incomplete. Importantly, after considering the conflicting testimony of each surveyor, the trial court found plaintiffs' surveyor credible and concluded plaintiffs met their

burden of proof, for purposes of the declaratory action, by showing the 2008 survey completed by Claassen, White and Associates, P.C., was accurate by a preponderance of the evidence.¹

¶ 30 I respectfully submit that the role of this court is to give deference to the trial court's decision in this case, which was exclusively within its province, as it involved the weighing of conflicting evidence and credibility determinations. *Pekin Ins. Co. v. Hallmark Homes, L.L.C.*, 392 Ill. App. 3d 589, 593 (2009), citing *In re Marriage of Rife*, 376 Ill. App. 3d 1050, 1058-59 (2007). The case law provides a reviewing court should not overturn a trial court's factual determinations in a declaratory action unless they are against the manifest weight of the evidence. *Board of Education v. Jackson*, 401 Ill. App. 3d 24, 31 (2010).

¶ 31 Consequently, I respectfully disagree that our review is *de novo* since the trial court did not decide the declaratory issue based on the pleadings. Instead, I consider the court's ruling in light of the manifest weight of the evidence presented to the judge.

¶ 32 A party must prove its proffered boundary line by a preponderance of the evidence. See *Vinyard v. Vaughn*, 138 Ill. App. 3d 641, 645 (1985). To properly establish interior section lines, a surveyor must first establish exterior corners and lines according to the original government survey and field notes. *Irwin v. Rotramel*, 68 Ill. 11, 15 (1873).

¹ The trial court's order indicates Claassen, White and Associates, P.C., performed a survey of plaintiff Szymanski's property, first on March 18, 2008, and an updated survey on October 26, 2009. The body of count III did not delineate which of these surveys plaintiffs wanted the court to declare as accurate, but the prayer for relief requests the court to declare the 2008 Claassen survey as accurate.

¶ 33 According to the trial court’s recitation of evidence, Claassen testified his crew visited each lot in Boula’s Subdivision, and located the original spikes and iron pipes, some 15 to 18 inches deep, according to the original survey of Boula’s Subdivision completed in 1959. In addition, his crew enlarged the scope of their task by seeking and successfully locating the monuments at each corner of County Clerk’s Subdivision, and located all of the points from County Clerk’s Subdivision northwest of Archer and east of Smith Road. This broadened investigation confirmed their field measurements were correct “within a few tenths of a foot.”

¶ 34 According to the court, Claassen stated his crew’s measurements were “consistent with the County Clerk and Boula Subdivisions.” In short, Claassen’s survey concluded defendants’ driveway was not confined to the boundaries of Lot 19 and intruded on plaintiff Szymanskis property. Obviously, the trial court was satisfied that Claassen’s testimony met plaintiffs’ burden of proof, a preponderance of the evidence, and establishing the driveway constructed by defendants was not contained within the boundaries of Lot 19.

¶ 35 The court also received evidence that attempted to convince the court that Claassen’s conclusion was not worthy of belief based on an evaluation of Claassen’s conclusions using an entirely different methodology. To this end, defendant presented the testimony of Eric Cox, a licensed surveyor employed by Ruettiger, Tonelli and Associates.

¶ 36 During his testimony, Cox candidly admitted to the court that his crew “was unable to locate any original County Clerk Subdivision monuments.” Since Cox’s crew did not locate existing monementation, Cox calculated the boundaries of Lot 19 using a proportionate analysis based on the angles measured by his crew on site. Here, Cox’s measurements cannot be

duplicated because his crew did not leave monuments showing the points of origination for their measurements.

¶ 37 I emphasize that according to the trial court's detailed order, Cox testified that "there were no monuments at points for Lot 19, or his surveyors simply did not find any." Cox testified he could not say Claassen and White were "incorrect, nor [were] they correct." In fact, according to the court's recitation of the testimony, Cox acknowledged the Ruettiger survey provided an overlap of "current monumentation[.]" and asserted, based on the measurements of his field crew, the monuments placed in Boula's Subdivision, which *Claassen's* crew actually located, could be "incorrect." Thus, to support Cox's survey, the court had to conclude the existing monumentation Claassen's crew found in Boula's Subdivision was originally inaccurately placed in the soil at some point in history.

¶ 38 The majority is troubled because defendants contend *Claassen's* crew should have created new monumentation to replace the landmark destroyed by the construction of roadways. If the absence of new monumentation at a specific location invalidates Claassen's survey, then the failure of Cox's crew to place any new monumentation at every unmarked location they relied upon should similarly invalidate Cox's conclusions. In my view, Cox's testimony was inconclusive since he noted he could not say whether the Claassen survey was inaccurate or accurate. In short, Cox's testimony did not weaken the conclusion by Claassen.

¶ 39 Based on the credibility determination of the court, finding plaintiffs' witness Claassen more credible, I would affirm the trial court's determination that plaintiffs met their burden of proof by a preponderance of the evidence to establish the Claassen survey was accurate.

¶ 40 Therefore, I respectfully dissent and conclude remand for additional findings is not required.