2017 IL App (5th) 160223-U

NOS. 5-16-0223, 5-16-0332 cons.

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT



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| CHARLENE BURRELL, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Williamson County. |
| | ) | |
| v. | ) | No. 15-CH-124 |
| | ) | |
| TERRY BISCHING, | ) | Honorable |
| | ) | Jeffrey A. Goffinet, |
| Defendant-Appellant. | ) | Judge, presiding. |

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Cates and Barberis concurred in the judgment.

**ORDER**

¶ 1 *Held*: The trial court's finding that an easement by implication was created based on preexisting use is affirmed.

¶ 2 The crux of this appeal is whether an easement exists which grants the tenants of a building the right to park on a driveway and concrete slab located on an adjacent property. The trial court concluded there was an easement by implication based on preexisting use. We affirm.

¶ 3 FACTS

¶ 4 The relevant facts necessary for the disposition of this case are as follows. Defendant, Terry Bisching, and his brother, Robert Bisching, purchased property located at 311 Texas Avenue (311) and 313 Texas Avenue (313) in Carterville, Illinois, on or about December 30, 1988. At the time of purchase, 311 consisted of a single large house, and 313 consisted of a house and shop. Between 1988 and 1991, defendant and his brother subdivided 311 into three apartments and rented the apartments to tenants.

¶ 5 311 and 313 are neighboring parcels, and a driveway is located between the two properties which runs north to south. The driveway next to 311 contains a concrete curb, and there is a concrete slab located near the apartment building. 311 has a backyard and front yard, which consists of grass, brush, and sidewalk. There is a culvert or ditch located at one end of 311; Texas Avenue is located at the other end. Garages are also located on the 311 property.

¶ 6 Defendant maintained both properties until he sold 311 to Donald, Judy, and Amanda Sims (Sims) in June 2001. At the same time, title to 313 was conveyed solely to defendant. Pursuant to the sale of 311, defendant and Sims entered a joint roadway agreement (agreement), which provides in relevant part:

> "[B]oth parties jointly agree to use for the benefit of both parties, their heirs and assigns for ingress and egress and utility purposes, a now existing gravel road partially located across the west property line of the parties of the first part and

also partially located on the east part of the property owned by the party of the second part."

The dimensions of the driveway contemplated in the agreement are 220 feet long by 50 feet wide. The agreement is silent regarding parking on the driveway.

¶ 7 Sims maintained 311 for several years and rented the apartments to tenants until they sold the property to Richard Davis in 2005. Thereafter, Davis maintained 311 and continued to rent the apartments to tenants until he sold 311 to plaintiff, Charlene Burrell, in 2008. Similar to all prior owners, plaintiff continued to rent the apartments to tenants. In the fall of 2015, a survey conducted at the request of defendant indicated the property line between 311 and 313 was within two feet of the building at 311, and that the driveway located between 311 and 313 was completely on the property of 313. Thus, the agreement contained a significant error, as it contemplated part of the driveway would be located on each side of the property line. Thereafter, defendant took steps to prevent the tenants of 311 from parking on the driveway.

¶ 8 Plaintiff filed a two-count complaint on November 23, 2015. The first count alleged there was an express easement between the parties. Plaintiff requested the trial court enter an order enforcing the easement and prohibiting defendant from interfering with use of the easement. The second count alleged an easement by implication developed between the parties based on prior use. Plaintiff requested that the trial court enter judgment stating an easement by implication exists, thereby granting plaintiff and her tenants continued use of the easement for parking.

¶ 9 In response to plaintiff's complaint, defendant filed a motion for injunctive relief on December 23, 2015, requesting that the court enter preliminary and permanent injunctions against plaintiff as follows: (1) that plaintiff be ordered to inform her tenants of their assigned parking outside defendant's boundaries; (2) that plaintiff give notice to her tenants of defendant's boundaries; (3) that plaintiff be enjoined from authorizing and, trespass or parking upon defendant's property; and (4) that plaintiff be ordered to remove her mailboxes from defendant's property. Defendant further requested that he be awarded damages for repairs to his land, sign repair, survey expenses, other proven damages, and such further relief as the court deemed just and appropriate. Defendant also filed a motion to dismiss plaintiff's complaint on the same date.

¶ 10 Plaintiff filed an answer to defendant's motion for injunctive relief on January 8, 2016, asserting her tenants have the right to park on the easement because it is implied in the parties' agreement. Plaintiff requested that the court deny defendant's motion. On the same date, plaintiff filed a motion for temporary injunctive relief requesting that the court enter an order: (1) allowing the tenants to park and use the easement while the matter is ongoing; (2) prohibiting defendant from interfering with plaintiff's tenants parking on the easement in any fashion; (3) prohibiting defendant from interacting or otherwise provoking plaintiff's tenants; and (4) any other remedy the court deemed necessary. Plaintiff subsequently filed an amended complaint, which essentially mirrored the original complaint but included allegations of necessity.

¶ 11 The matter proceeded to a bench trial on March 30-31, 2016, at which time the court heard the parties' arguments regarding the motions for injunctive relief. By

agreement of the parties, the court considered this hearing as a hearing on permanent injunctions to resolve all pending matters. The following relevant testimony was presented. Defendant acknowledged that prior to conveying 311 to Sims, he could not say people did not park along the driveway for access to 311. Moreover, Judy Sims' testimony indicated the tenants of 311 were already parking on the driveway and concrete slab when she purchased the property in 2001. According to Judy Sims, it was her understanding that tenants were permitted to parallel park along the side of the driveway at the time she purchased 311. While Judy Sims owned 311, she testified her tenants were never prevented from parking parallel along the driveway or on the concrete slab. Davis testified that prior to purchasing 311, he inspected the property and saw cars parked parallel along the driveway and concrete slab. Davis further testified that when he owned 311, his tenants parked on the driveway and concrete slab. Plaintiff testified that prior to the fall of 2015, defendant never told her that tenants could not park on the driveway or concrete slab. There was no testimony presented which indicated the tenants never parked on the driveway after defendant converted 311 to apartments.

¶ 12 After hearing the sworn testimony of the parties, Judy Sims and Davis, among other witnesses, and after considering the parties' written closing arguments, the court entered its judgment on April 28, 2016. Specifically, the court ordered as follows: (1) the dimensions and location of the driveway are established at its current location, 200 feet long and 50 feet wide; (2) parking is allowed along the driveway in a parallel fashion that does not interfere with ingress or egress for either lot; (3) the mailbox at 311 shall be moved to the property at 311, provided it complies with United States Postal regulations;

and (4) both sides shall bear their own costs. The court denied all other relief sought by either party.

¶ 13 Plaintiff filed a motion to reconsider on May 17, 2016, seeking to expand the scope of the court ordered easement to include the adjoining concrete slab. The court entered an amended judgment on July 21, 2016, wherein it expanded the scope of the easement to include the concrete slab. Specifically, the court stated: "Parking is allowed along the driveway in a parallel fashion and on the concrete slab that does not interfere with ingress or egress for either lot." The court also amended its dimensions of the driveway from 200 feet long and 50 feet wide to 220 feet long and 50 feet wide.

¶ 14 This appeal followed.

¶ 15 ANALYSIS

¶ 16 Before we address the primary concern on appeal regarding whether an implied easement has been established, we first respond to defendant's contention that plaintiff lacked standing to bring this suit because she failed to prove she received any conveyance from a party in the chain of title of the easement.

¶ 17 The standing doctrine is designed to preclude persons who have no interest in a controversy from bringing suit. *Deutsche Bank National Trust Co. v. Gilbert*, 2012 IL App (2d) 120164, ¶ 15. It is well settled that a party lacking an interest in the controversy has no standing to sue. *Scachitti v. UBS Financial Services*, 215 Ill. 2d 484, 493 (2005). Our supreme court has observed that "lack of standing in a civil case is an affirmative

defense, which will be waived if not raised in a timely fashion in the trial court." *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 508 (1988).

¶ 18 After careful review, we find defendant's contention is without merit. The record shows defendant has raised its assertion that plaintiff lacked standing to bring this suit for the first time on appeal, thereby forfeiting review of that claim by this court. *Countrywide Home Loans Servicing, LP v. Clark*, 2015 IL App (1st) 133149, ¶ 38. For this reason, we decline to address defendant's argument.

¶ 19 We now turn to the gravamen of this appeal, which is defendant's contention that the trial court erred in finding an easement by implication from a preexisting use exists which grants the tenants of 311 the right to park on the driveway and concrete slab located on the property of 313. Since the focus of this appeal concerns whether the trial court erred in finding an easement implied based on a preexisting use, we limit our inquiry accordingly.

¶ 20 An easement is an individual's right or privilege to either pass over or use the land of another. *Katsoyannis v. Findlay*, 2016 IL App (1st) 150036, ¶ 28. A grant of an easement is construed using the same rules applied to deeds and other written instruments or agreements. *Duresa v. Commonwealth Edison Co.*, 348 Ill. App. 3d 90, 101 (2004). Further, an instrument creating an easement is construed in accordance with the intention of the parties, which is ascertained from the words of the instrument and the circumstances contemporaneous to the transaction, including the state of the matter conveyed and the objective to be obtained. *River's Edge Homeowners' Ass'n v. City of*

*Naperville*, 353 Ill. App. 3d 874, 878 (2004). Courts tend to strictly construe easement agreements in order to permit the greatest possible use of the property by its owner. *Duresa*, 348 Ill. App. 3d at 101.

¶ 21 Illinois courts recognize two types of implied easements: the easement by necessity and the easement implied from a preexisting use. *Granite Properties Ltd. Partnership v. Manns*, 117 Ill. 2d 425, 435 (1987). Regarding an easement by implication based on a preexisting use, our supreme court has observed:

> "The easement implied from a prior existing use, often characterized as a 'quasi-easement,' arises when an owner of an entire tract of land or of two or more adjoining parcels, after employing a part thereof so that one part of the tract or one parcel derives from another a benefit or advantage of an apparent, continuous, and permanent nature, conveys or transfers part of the property without mention being made of these incidental uses. In the absence of an expressed agreement to the contrary, the conveyance or transfer imparts a grant of property with all the benefits and burdens which existed at the time of the conveyance of the transfer, even though such grant is not reserved or specified in the deed." *Manns*, 117 Ill. 2d at 436.

¶ 22 Generally, three conditions must be present in order for a court to find an easement implied from a preexisting use: (1) common ownership of the claimed dominant and servient parcels and a subsequent conveyance separating that ownership; (2) before the conveyance, the common owner used part of the united parcel for the benefit of another part, and this use was apparent, obvious, continuous, and permanent;

and (3) the claimed easement is necessary and beneficial to the enjoyment of the parcel conveyed by the grantor. *Manns*, 117 Ill. 2d at 437.

¶ 23 It is important to recognize that easements by implication arise as an inference of the intention of the parties to a conveyance of land. *Manns*, 117 Ill. 2d at 437. This inference, which is drawn from the circumstances of the conveyance alone, represents an attempt to ascribe an intention to parties who failed to express their intentions at the time of conveyance. *Manns*, 117 Ill. 2d at 437; *Katsoyannis*, 2016 IL App (1st) 150036, ¶ 28. To fill these gaps resulting in incomplete thought, courts find certain facts suggestive of intent on the part of the parties to a conveyance. *Manns*, 117 Ill. 2d at 438. In the case of an easement implied from a preexisting use, proof of the prior use is evidence that the parties likely intended an easement, on the presumption that the grantor and the grantee would have intended to continue an important or necessary use of the land known to them that was apparently continuous and permanent in its nature. *Manns*, 117 Ill. 2d at 438.

¶ 24 The party claiming an easement bears the burden of proof to demonstrate facts necessary to create an implied easement, and such proof must be made by clear and convincing evidence. *Katsoyannis*, 2016 IL App (1st) 150036, ¶ 28. A reviewing court will not disturb the findings of a trial court regarding proof of the elements unless they are against the manifest weight of the evidence. *Martin v. See*, 232 Ill. App. 3d 968, 978 (1992). In reviewing the judgment entered below, a reviewing court is not limited to the reasoning employed by the trial court, and may affirm the judgment based on any reason supported by the record. *Schaumburg State Bank v. Bank of Wheaton*, 197 Ill. App. 3d 713, 719 (1990).

¶ 25 After careful review of the record, we find the facts in this case meet the requirements for an implied easement based on preexisting use. Regarding the first element, there is no controversy concerning initial common ownership. It is undisputed that defendant owned both 311 and 313 prior to conveying 311 to Sims.

¶ 26 Regarding the second element, we find the common owner, namely defendant, used the driveway for the benefit of 311. At trial, defendant could not say that people did not park along the driveway for access to 311 prior to his conveyance of 311 to Sims. Moreover, Judy Sims' testimony indicates tenants of 311 were parking on the driveway and concrete slab at the time defendant conveyed 311 to her in 2001. The testimony presented at trial indicated tenants continued to park on the driveway until near the time defendant conducted a survey of the properties in 2015. Further, there was no testimony presented that the driveway was never used by tenants for parking. For these reasons, we conclude defendant used the driveway for the benefit of 311 prior to his conveyance, and this use was apparent, obvious, continuous, and intended to be permanent.

¶ 27 Finally, with regard to the third element, we find the easement is necessary and beneficial to the enjoyment of 311. Illinois courts recognize "[i]t is not required that the easement claimed by the grantee be necessary for the enjoyment of the estate granted, but it is merely sufficient if it is highly convenient and beneficial to the estate granted." *Roketa v. Hoyer*, 327 Ill. App. 3d 374, 378 (2002). Here, the testimony clearly shows that use of the driveway is highly convenient and beneficial to the tenants of 311 for access to the apartments and garages located on the property. For these reasons, we find plaintiff has satisfied the three elements required to support a finding of an implied

easement from a preexisting use. Accordingly, the trial court's judgment was not against the manifest weight of the evidence.

¶ 28 Citing to *Manns*, defendant argues it is not possible for the trial court to find an easement by implication because there is an "expressed agreement to the contrary." *Manns*, 117 Ill. 2d at 436. Defendant contends that where there is an express easement, the document granting the easement itself should be the "exclusive vehicle for determining the intent of the parties." We disagree.

¶ 29 Defendant's argument ignores the fact that the agreement is silent as to parking. Here, the agreement provides the "now existing gravel road" may be used for the benefit of both parties for "ingress and egress and utility purposes." However, for the reasons provided herein, we find the actions of defendant prior to his conveyance of 311 and our finding that the easement is highly convenient and beneficial to the tenants of 311 support our conclusion that an easement by implication based on preexisting use was created. Accordingly, we reject defendant's argument.

¶ 30 CONCLUSION

¶ 31 For the foregoing reasons, the judgment of the circuit court of Williamson County is hereby affirmed.

¶ 32 Affirmed.