2018 IL App (4th) 170335-U

NO. 4-17-0335

FILED
May 2, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

KEY OUTDOOR, INC., Plaintiff-Appellant, v. CITY OF SPRINGFIELD, Defendant-Appellee.	))))))))	Appeal from the Circuit Court of Sangamon County No. 14L65 Honorable John P. Schmidt, Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Holder White and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in granting defendant's motion for summary judgment.

¶ 2 On August 11, 2014, plaintiff, Key Outdoor, Inc. (Key), filed an amended complaint against defendant, City of Springfield (City), for ejectment and trespass after the City removed Key's sign from a small parcel of land between Fifth Street and Sixth Street in Springfield and then erected its own sign on the property. The land in question is immediately south of a railroad underpass that is south of Stanford Avenue. For ease of reference, we will refer to the disputed property as "the median." Key alleged the City could not remove Key's sign and erect its own sign on the median because Key had a prescriptive easement for its sign on the property. On April 18, 2017, the trial court granted the City's motion for summary judgment. Key appeals, arguing the court erred in granting the City's motion. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Sometime around April 2012, Illinois Central Railroad Company (Illinois Central) notified Key it was the owner of the median on which Key's sign was located. Illinois Central asked Key to remove its sign. Key refused. In November 2012, Illinois Central contacted Key again. Key still refused to remove its sign.

¶ 5 In May 2013, the City notified Key it intended to remove the sign. The City had a lease with Illinois Central to erect its own sign on the median. In June 2013, Key told the City it did not consent to the removal of its sign. Regardless, the City removed Key's sign and erected its own sign.

¶ 6 According to Key's amended complaint, the only practical use for the median is displaying signs for passing traffic on Sixth Street. Key's sign had been at this location since 1977, when its predecessor in interest, Imperial Outdoor Advertising (Imperial), erected the sign. Key purchased Imperial and all of its assets on December 31, 1997. Beginning sometime in January 1992, Imperial stopped paying any kind of fee or rent to have the sign on the median and did not make any kind of agreement to keep the sign on the median. The same was true for Key after it purchased Imperial. The sign was continuously present on the median from January 1992 until the City removed the sign.

¶ 7 Key alleged it had a prescriptive easement as a result of it and Imperial having the sign on the median without paying rent since January 1992. According to Key, it and Imperial possessed the sign on the median "in a manner which was visible, notorious, and exclusive, in opposition to the claims of any titleholder."

> "11. Upon completion of its purchase of Imperial, [Key] immediately assumed possession of the prescriptive easement of the Subject Property through maintaining the signboard upon that property, and continued to do so in the same

visible, notorious, and exclusive manner, in opposition to the claims of any titleholder, under claim of said prescriptive easement.

12. As a result of the foregoing, [Key] became, through adverse possession, the true and lawful owner of the prescriptive easement of the Subject Property in or around January 1997."

¶ 8 On November 23, 2016, Key filed a motion for summary judgment, arguing it was entitled to keep its sign on the median because of its prescriptive easement. Key attached the deposition testimony and an affidavit of its president/chief executive officer, Robert Dahl, to its motion. Key's motion did not address whether Imperial had permission to initially build the sign on the median.

¶ 9 At the time Key purchased Imperial, Key was provided three letters regarding the sign on the median. The first letter dated September 24, 1991, which was from Southern Pacific Transportation Company (Southern Pacific) to Imperial, concerned three licenses (Nos. 476, 694, and 153) which were administered through Transportation Displays, Inc. (TDI). The letter stated:

"Effective October 1, 1991, SPCSL Corporation will be taking over the management of Sign License agreements on SPCSL property. All former agreements will be replaced with new agreements as soon as possible. Please complete the attached application forms for *each location* and return by October 31, 1991. After we review your applications, we will then submit to our management for approval.

Please do not construe this as a commitment to license any location to you as all such matters require management approval." (Emphasis in original.)

¶ 10 On October 9, 1991, TDI sent Imperial a letter with regard to TDI License Numbers SPT-476 and SPT-694. Dahl testified TDI performs the duties of an agent for the property owners where signs are located, working with outdoor advertising companies who want to have signs on railroad property. The letter stated:

> "This is to advise that effective the next anniversary date of the above licenses, all billing and correspondence will be handled directly by [Southern Pacific].
>
> Enclosed for your reference[] is a schedule indicating the effective cancellation date of each license with TDI.
>
> For additional information, please contact [Southern Pacific] ***."

The letter then provides an address for Southern Pacific.

¶ 11 On December 11, 1991, Southern Pacific sent Imperial another letter regarding the proposed replacement of TDI Nos. SPT 694 and SPT 476. The letter stated:

> "Thank you for the information your [*sic*] provided. It has come to my attention that SPT 476 is located on property that was not conveyed to CM&W Railway, nor SPCSL Corporation.
>
> It is described in the deed from Illinois Central Gulf as follows:
>
> '*Excepted* from the conveyance of the line of railroad described at Springfield, Illinois … that part of the "New Connection" trackage and right-of-way situated in Section 9, 10, and 11, T15N, R5W, and that lies East of a parallel and/or concentric with and 50 feet normally distant Easterly from the center of the main track of the ["]Chicago, Illinois to Godfrey, Illinois line.[" ']

You should contact TDI to find out who this location belongs to.

Concerning SPT 694, I need additional information concerning the *exact* location. Please provide the following:

1. The exact number of feet from the center of the Easterly most track; and

2. The exact distance from the Sangamon underpass.

I have attached a Railroad map to help you pinpoint this location. This information is vital to having our Operating Department approve this location. Please provide this information as soon as possible.

I have also attached a copy of the spotted map you sent. The pink line represents the areas of SPCSL ownership as far as I can determine at this time." (Emphasis in original.)

¶ 12 Dahl testified he believed either SPT 476 or 694 was for Imperial's sign on the median. However, he did not know which one. Dahl assumed the other number was for a "side by side" billboard for southbound traffic on Fifth Street in Springfield. He did not know if anyone from Imperial ever responded to the last letter from Southern Pacific or contacted TDI.

¶ 13 When asked whether Imperial paid rent for the sign on the median, Dahl responded: "They did at one time but memory serves me it was on railroad property and they received the letter from the railroad saying we don't own this property anymore." Imperial did not pay rent after receiving this letter. Dahl also testified if anyone had a lease for the sign it would have been Imperial Outdoor. Dahl did not recall any specific conversation he had with anyone from Imperial about this sign. He testified it is not uncommon in the billboard industry to have a sign on property with an unknown owner. According to Dahl, Key had never paid rent to have the sign on the property.

¶ 14 On February 15, 2017, the City filed a motion for summary judgment, arguing Key did not have a prescriptive easement because the sign was built on the median with permission pursuant to a license. The City argued the permissive use of property can never turn into a prescriptive easement claim. According to the City's motion, plaintiff's predecessor in interest, Imperial, built the sign on the parcel of land after negotiating an agreement with the railroad. Imperial lost any documentation with regard to this agreement. Regardless of the missing documentation, the City stated "the evidence is overwhelming and uncontroverted that the arrangement was begun as a permissive license or leasehold." The City points to the fact most of the evidence showing Imperial was given permission to build the sign was produced by Key.

¶ 15 During his deposition, Dahl offered testimony regarding Key's purchase of Imperial. He stated Key received copies of leases Imperial had negotiated. However, to the best of his knowledge, Key did not receive a written lease for the sign at issue in this case, and Key did not pay rent for keeping the sign on the median.

¶ 16 According to the City's motion, because Imperial began using the median with permission, Imperial or Key had to unequivocally communicate to the median's owner it was claiming the right to keep its sign on the median in opposition to the landowner's right to control his property and then keep the sign on the property for the requisite 20-year period to acquire a prescriptive easement. The City argued Imperial's and Key's failure to pay rent was not an assertion of its right to keep the sign on the parcel irrespective of the lawful property owner's rights.

¶ 17 Further, the City argued Key did not provide admissible evidence to establish Imperial stopped paying rent in 1991. Instead, "[t]he only admissible testimony for summary

judgment purposes is Mr. Dahl's statement that the Plaintiff did not pay rent for just over 15 years, from its acquisition of the sign in December, 1997[,] until it was removed in early 2013."

¶ 18 The City also argued Key could not encumber Illinois Central's title to the median with a prescriptive easement without naming Illinois Central as a party in the case.

¶ 19 On March 13, 2017, Key filed a response to the City's motion for summary judgment. Key argued the current ownership of the property at issue is unknown and had not been proved. Further, Key pointed out no evidence, like a deed, exists to establish who owned the property in question when plaintiff began its "adverse possession" in 1991 or 1992. Key noted the record is unclear who owned the subject parcel since 1991.

¶ 20 Key also argued no evidence exists either it or Imperial ever received a license or lease for the property from Illinois Central Railroad, the company who claims to now own the property. According to Key, the City needed to produce a document titled "lease" or "license" to prove Imperial ever had permission to put the sign on the subject property. Regardless, even if Imperial was given permission to put the sign on the property, its permissive use became hostile when Imperial stopped paying rent for the sign being on the property. Key argued the failure of both it and its predecessor in interest, Imperial, to pay rent for the sign for 23 years established its right to keep its sign on the property via a prescriptive easement.

¶ 21 On April 18, 2017, the trial court granted the City's motion for summary judgment. If a hearing was held on the summary judgment motions, a transcript is not included in the record. According to the court's docket entry: "It is clear from all the documents submitted the original agreement for the erection of a sign was a license granted to Imperial Sign by the railroad. The fact that at some point Imperial Sign or its predecessor stopped paying for that license is immaterial. The plaintiff never had a tenancy interest in the land."

¶ 22 This appeal followed.

¶ 23 II. ANALYSIS

¶ 24 Key argues the trial court erred in granting the City's motion for summary judgment. The court essentially found Key could not establish a prescriptive easement because Imperial was given permission to build the sign on the median. "To establish an easement by prescription, the claimant must prove that the use of the land was adverse, exclusive, continuous, and under a claim or title inconsistent with that of the true owner." *Sparling v. Fon du Lac Township*, 319 Ill. App. 3d 560, 563, 745 N.E.2d 660, 663 (2001). As for the adversity element, "the claimant must show that the use of the property was with the knowledge and acquiescence of the owner but without her permission." *Sparling*, 319 Ill. App. 3d at 563, 745 N.E.2d at 663.

¶ 25 Summary judgment is appropriate when the pleadings, depositions, and admissions on file, together with any affidavits, show no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Abrams v. City of Chicago*, 211 Ill. 2d 251, 257, 811 N.E.2d 670, 674 (2004). We apply a *de novo* standard when reviewing a summary judgment ruling. *Abrams*, 211 Ill. 2d at 258, 811 N.E.2d at 674. However, this only means we do not give the trial court's ruling any deference. *Buerkett v. Illinois Power Co.*, 384 Ill. App. 3d 418, 421, 893 N.E.2d 702, 709 (2008). It does not mean we will search the record for reasons to overturn trial court's ruling. *Bauer v. City of Chicago*, 137 Ill. App. 3d 228, 237, 484 N.E.2d 422, 428 (1985).

¶ 26 We note Key alleges it is entitled to a prescriptive easement to keep its sign on the property in question because neither it nor Imperial paid rent for its sign on the property after receiving Southern Pacific's December 11, 1991, letter. That letter stated Southern Pacific did not own the property to which license SPT-476 applied and directed Imperial to contact TDI to

determine who owned the property. Dahl testified at a deposition either license SPT-476 or SPT 694 applied to the sign at issue in this appeal. In addition, Dahl stated in an affidavit this letter from Southern Pacific related to the subject property. According to his affidavit, "On the subject property, Imperial got a letter from the railroad that was believed to own the property. Southern Pacific said they did not own the subject property. It is dated December 11, 1991, and attached as Exhibit A. Once it got the letter, Imperial did not pay rent on the subject property. Key has never paid rent to anyone on the subject property."

¶ 27 Under Key's theory of the case, the clock for its adverse claim started when Imperial stopped paying rent to have its sign on the median after receiving the letter from Southern Pacific stating it did not own the property for which TDI License SPT-476 applied. Key relied on Dahl's deposition testimony, his affidavit, and the letters from Southern Pacific and TDI to establish this point. Based on Key's theory of the case, this same evidence established Imperial had permission through a TDI license to have the sign on the property in question. In *Leesch v. Krause*, 393 Ill. 124, 128, 65 N.E.2d 370, 372 (1946), a case involving a claim for a private easement or an easement by prescription, our supreme court stated "[i]t is the rule that in cases where the original use is permissive, such permissive use can never ripen into a prescriptive right, as such permissive use is presumed to continue until the contrary is shown." "Mere permission to use the land can never ripen into a prescriptive right, regardless of the length of time such permissive use is enjoyed. [Citations.] Permissive use negates not only the adversity element of a prescriptive easement claim but also that the usage took place under a claim of right." *Deboe v. Flick*, 172 Ill. App. 3d 673, 675-76, 526 N.E.2d 913, 915 (1988).

¶ 28 Key argues the permissive use of property can become adverse allowing the party who originally used the license to acquire an easement by prescription. Key asserts the

permissive use here became adverse when Imperial stopped making the rent payments to keep the sign on the property. Key argues it and Imperial's failure to pay rent shows the adversity of their claim to the property. The only case Key cites as support for its argument is *Walter v. Jones*, 15 Ill. 2d 220, 154 N.E.2d 250 (1958), which we find inapposite.

¶ 29 *Walter* did not involve a situation like the one in the case *sub judice*. *Walter* concerned neither a license nor an easement. It also did not involve a situation where a party or his immediate predecessor was initially permitted to use the property in question. *Walter*, 15 Ill. 2d at 222-24, 154 N.E.2d at 251-52. As a result, it provides no support for Key's assertion that Imperial's permitted use of the land turned adverse once it stopped making rent payments. Because this court is not a depository upon which an appellant can simply dump the burden of argument and research (*Elder v. Bryant*, 324 Ill. App. 3d 526, 533, 755 N.E.2d 515, 521-22 (2001)), we find Key forfeited its argument it and Imperial's failure to make rent payments made their possession adverse.

¶ 30 In an attempt to avoid the legal ramifications of the sign originally being built with the permission of whoever owned the property at that time, Key argues to this court "[i]t is possible that neither, SPT 476 or SPT 694, is the subject property." We think Key meant it is possible neither of these licenses applied to the property at issue. We find defendant forfeited this argument as it was never made to the trial court. An appellant seeking review of a trial court's summary judgment ruling "may only refer to the record as it existed at the time the trial court ruled, outline the arguments made at that time, and explain why the trial court erred in granting summary judgment." *Rayner Covering Systems, Inc. v. Danvers Farmers Elevator Co.*, 226 Ill. App. 3d 507, 509-10, 589 N.E.2d 1034, 1036 (1992). In addition, this argument contradicts Dahl's deposition testimony and affidavit and the theory of the case he presented to

the trial court.

¶ 31 III. CONCLUSION

¶ 32 For the reasons stated, we affirm the trial court's summary judgment order.

¶ 33 Affirmed.