2018 IL App (5th) 170292-U

NO. 5-17-0292

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

DORIS WALLS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Monroe County.
	)	
v.	)	No. 17-SC-29
	)	
BRUCE MUDD,	)	Honorable
	)	Dennis B. Doyle,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE OVERSTREET delivered the judgment of the court.
Justices Chapman and Cates concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court properly entered judgment in favor of the defendant on the plaintiff's suit to recover easement repair charges because repair charges were outside parties' expectation considering previous upkeep and the plaintiff failed to sufficiently notify the defendant or allow the defendant a reasonable opportunity to participate in repair decisions.

¶ 2 The plaintiff, Doris Walls, filed a small-claims complaint for breach of contract against the defendant, Bruce Mudd, for work completed on a driveway utilized by the plaintiff, the defendant, and others, pursuant to an easement. The plaintiff sought payment of $2650, the defendant's respective share of the driveway repairs. The circuit

court entered judgment in favor of the defendant. We hereby affirm the circuit court's judgment.

¶ 3 BACKGROUND

¶ 4 The parties live on Wildlife Drive in Red Bud, Illinois. They share an easement in the form of a driveway, utilizing the easement to reach their respective residences. On April 10, 1997, David Walls and the plaintiff, the defendant and Tonya Mudd, Thomas and Penny Dietz, and Don Schult signed an agreement providing that "[t]he upkeep of the road from [a public roadway known as] VV Road to the mailboxes shall be divided equally among the properties involved" and that "[a]s the ownership of the property changes, this responsibility will default to the new owner." The agreement was recorded with Monroe County on April 25, 1997. Thereafter, Harold Hooten purchased the Schult property.

¶ 5 Through the years, the driveway's condition deteriorated, so the plaintiff contacted Moore Asphalt to work on the road. Pursuant to its November 8, 2016, invoice, Moore Asphalt charged $10,680 to level the road, lay and roll three inches of rotomill (recycled asphalt) on the road, and install ditches on the side of the road. Moore Asphalt submitted its invoice to the plaintiff, and after the plaintiff paid the invoice, she sought reimbursement from the defendant and the remaining easement holders. The defendant and Harold Hooten declined to pay.

¶ 6 On February 15, 2017, the plaintiff filed a small-claims complaint, seeking a judgment against the defendant for $2650, which, she alleged, was his portion of the road

repairs she authorized, plus court fees. The circuit court held a bench trial on May 3, 2017.

¶ 7 At the bench trial, the plaintiff testified that the four property owners shared the easement to the driveway and that 10 or 15 years ago, these neighbors had paid $100 to Moore Asphalt to rock the driveway. The plaintiff testified, however, that the roadway had since deteriorated and was in terrible condition and that the mail carrier had refused to use it.

¶ 8 The plaintiff testified that she and Penny Dietz had paid their share of expenses for the Moore Asphalt roadwork. The plaintiff testified that she spoke to Dietz prior to the completion of the roadwork so that Dietz could notify the defendant and Hooten. The plaintiff testified that she received payment from Dietz in November 2016 and sent a note to the defendant and Hooten in December 2016, notifying them of the invoice and their share. The plaintiff testified that the defendant and Hooten had not paid their share of expenses.

¶ 9 David Walls, the plaintiff's husband, testified that many years ago, he hired Roger's Ready Mix to build the road to his house, installing large rocks and then smaller and smaller rocks and packing them in. Walls testified that he also installed speed bumps on the road, which "did really well until [he] got neighbors." Walls testified that through the years, the neighbors had used a tractor blade to scrape the speed bumps and rock off the driveway until it became impassable. Walls testified that the post office employees had stopped delivering mail to the mailboxes because of the impassable roadway. Walls further testified that Moore Asphalt's repair work made the road passable and was not

excessive. Walls testified that he planned to solely pay for additional roadwork involving bigger culverts and three inches of oil and chip.

¶ 10 Penny Dietz testified that the plaintiff had notified her that Moore Asphalt would be working on the road. Dietz testified that the plaintiff had requested that she notify the defendant and Harold Hooten that the work would be completed. Dietz testified that the plaintiff had stated, "Well, I doubt they'll pay, but [the work] is being done." Dietz testified that she contacted Moore Asphalt, requesting a written estimate of the work to be completed, but Moore Asphalt refused to provide an estimate to Dietz.

¶ 11 Harold Hooten testified that in 2015, he sought to add rock to the driveway, but the plaintiff and her husband would not agree to it. Harold argued that he did not receive sufficient notice prior to the roadwork and that he did not agree to it. Harold asserted that Dietz had told him that the plaintiff had authorized roadwork and was paying for it. Harold testified that the work completed by Moore Asphalt was excessive.

¶ 12 Barbara Hooten testified that the road was in bad shape, that the road ditches needed to be dug out, and that the road needed to be built higher; however, Barbara testified that she was not notified of the work Moore Asphalt planned to complete. Barbara testified that she did not believe the rotomill improved the roadway because the rain washed it away. Barbara testified that the driveway started developing potholes less than a month after the rotomill was installed.

¶ 13 The defendant testified that he had acquired an estimate for roadwork in 2009, the neighbors had paid $250 each, and Stamm Trucking had added rock to the roadway. The defendant acknowledged that the driveway was in terrible shape and needed roadwork,

including rock and ditch work. The defendant testified, however, that the road did not require asphalt and that Moore Asphalt did not improve the road effectively because it was "still washing out" and contained potholes. The defendant testified that he had insufficient notice of the Moore Asphalt work requested by the plaintiff. Although the defendant acknowledged that a week prior to the roadwork, Dietz notified him that roadwork would be completed, the defendant testified that Dietz had told him that the plaintiff was paying for it.

¶ 14 On May 3, 2017, after hearing evidence, the circuit court found that the parties did not attempt to agree on the roadwork to be completed, that the defendant was not sufficiently notified of the work to be completed, and that the asphalt work completed was a substantial change in the nature of the roadway. Noting that the plaintiff had the burden of proof, the circuit court entered judgment in favor of the defendant.

¶ 15 On June 1, 2017, the plaintiff filed a motion to reconsider. On July 17, 2017, at the hearing on the motion to reconsider, the court clarified that it had found that the plaintiff had failed to give the defendant sufficient notice and that the contractor had refused to notify the other property owners of the costs prior to completion of the work. The court noted that it had further found that the plaintiff had changed the basic nature of the road because instead of adding rock, Moore Asphalt asphalted it. The circuit court denied the plaintiff's motion to reconsider. On July 26, 2017, the plaintiff filed notice of appeal.

¶ 16 ANALYSIS

¶ 17 On appeal, the plaintiff argues that the circuit court's determination that the defendant did not breach the contract was against the manifest weight of the evidence.

¶ 18 The construction and legal effect of an instrument is a question of law. *Briarcliffe Lakeside Townhouse Owners Ass'n v. City of Wheaton*, 170 Ill. App. 3d 244, 249 (1988). "In ascertaining the intention of the parties, the court should look at the words of the instrument and the circumstances contemporaneous to the transaction." *Id.* "Such circumstances may include the state of the thing conveyed, the object to be obtained, and the practical construction given by the parties through their conduct." *Id.* Moreover, each contract imposes upon each party a duty of good faith and fair dealing. *JPMorgan Chase Bank, N.A. v. East-West Logistics, L.L.C.*, 2014 IL App (1st) 121111, ¶ 48. "The duty of good faith requires 'the party vested with contractual discretion to exercise it reasonably, and he may not do so arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectation of the parties.' " *Id.* (quoting *Bank One, Springfield v. Roscetti*, 309 Ill. App. 3d 1048, 1059-60 (1999)).

¶ 19 In the present case, the written agreement between the parties provided that "upkeep of the road from VV Road to the mailboxes shall be divided equally" among the parties. Merriam-Webster's defines "upkeep" as "the act of maintaining in good condition: the state of being maintained in good condition" and "the cost of maintaining in good condition." http://www.merriam-webster.com/dictionary/upkeep (last visited Aug. 30, 2018); see *Gallagher v. Lenard*, 226 Ill. 2d 209, 233 (2007) (to determine parties' intent, court must look to the plain language of the agreement). "Upkeep" is not synonymous with "upgrade," a positive act of improvement, but instead involves simple maintenance. See generally *Anderson v. Warren Local School District Board of Education*, 2017-Ohio-436, ¶ 64, 75 N.E.3d 239.

¶ 20 Here, the evidence revealed that the parties' past conduct included blading and adding rock to the common driveway, which had amounted to a cost of hundreds of dollars. However, the plaintiff sought reimbursement for her unilateral authorization of $10,680 of asphalt roadwork, which the evidence showed was inconsistent with the language of the agreement and the reasonable expectation of the parties. See *Payne v. Rutledge*, 391 S.W.3d 875 (Ky. Ct. App. 2013) (where easement holders' agreement shared costs incidental to maintenance, repair, or rebuilding of driveway that had previously been covered with dirt or gravel, agreement did not require shared payment for concrete pavement because concrete improved the driveway and was outside the plain terms of the agreement's sanction of maintenance, repair, or rebuilding).

¶ 21 Moreover, the parties' agreement to divide upkeep equally is consistent with the parties' common law responsibilities as easement holders. See generally *In re Estate of Stewart*, 2016 IL App (2d) 151117, ¶ 80 (to the extent that common-law precedent is consistent, it remains instructive); *Enterprise Leasing Co. of St. Louis v. Hardin*, 2011 IL App (5th) 100201, ¶ 22 (contract must be interpreted to be consistent with the law and public policy of the state). "As a general rule the owner of an easement has not only the right but also the duty to keep the easement in repair." *Briarcliffe Lakeside Townhouse Owners Ass'n*, 170 Ill. App. 3d at 249. "[I]f the easement is owned by more than one person, the duty to maintain it is apportioned between all owners based on the extent of the individual owner's use of the easement." *Quinlan v. Stouffe*, 355 Ill. App. 3d 830, 841 (2005). The easement owners may repair the easement provided one does not unreasonably interfere with the rights of the others to also repair, nor render the easement

less convenient or useful. *Id.* The "duty to contribute, however, is dependent upon the reasonableness of the repair." *Id.*; see also *Beggs v. Ragsdale*, 120 Ill. App. 3d 333, 338 (1983) (reasonableness of means to adapt road to easement holder's use is question of fact). "[T]he repairing party must give the contributing parties adequate notification and a reasonable opportunity to participate in decisions regarding the repairs." *Quinlan*, 355 Ill. App. 3d at 841. "Moreover, the repairs must be performed adequately, properly, and at a reasonable price." *Id.*

¶ 22 In this case, the evidence revealed that the plaintiff did not provide the defendant with "adequate notification and a reasonable opportunity to participate in decisions regarding the repairs." See *id.* Additionally, the evidence revealed that the asphalt work costing $10,680 was much more expensive and extensive than the roadwork the parties had authorized previously. Compare *id.* at 831 (court ordered easement holders to pay *pro rata* share of repairs where repairs involved laying new gravel on gravel driveway for a cost of $1327.51). We cannot conclude that the circuit court's findings that the parties did not attempt to agree on the roadwork to be completed and that the work completed was a substantial change in the nature of the roadway were against the manifest weight of the evidence (see *Kunkel v. P.K. Dependable Construction, LLC*, 387 Ill. App. 3d 1153, 1157 (2009) (standard of review in bench trial is whether judgment is against manifest weight of evidence) or clearly erroneous (see *Quinlan*, 355 Ill. App. 3d at 836 (when issue presented cannot be accurately characterized as either a pure question of fact or a pure question of law, reviewing court should treat issue as a mixed question of law and fact, subject to the clearly erroneous standard of review). Accordingly, the circuit court

properly concluded that the defendant was not required to pay for the roadwork expenses, especially in light of the lack of sufficient notice required to participate in the roadwork decisions. See generally *Koch v. J&J Ranch, L.L.C.*, 2013 WY 51, ¶¶ 24-30, 299 P.3d 689 (Wyo. 2013) (although easement holders who share in use of private roadway must ordinarily share in the costs of repair and maintenance, because plaintiff sought costs for rebuilding the road, instead of merely filling in troublesome low spots, remaining easement holder was not required to pay for rebuild, especially in light of the lack of notice to participate in decision to rebuild).

¶ 23 In sum, the evidence revealed that the parties' past conduct included blading and adding rock to the common driveway, which had amounted to a cost of hundreds of dollars. The plaintiff's unilateral authorization to spend $10,680 in asphalt roadwork was inconsistent with the reasonable expectation of the parties. Instead, the plaintiff was required to give the defendant adequate notification and a reasonable opportunity to participate in the decisions regarding the driveway roadwork before recovering for roadwork expenses. Accordingly, we find that the circuit court properly entered judgment in favor of the defendant.

¶ 24 CONCLUSION

¶ 25 For the foregoing reasons, we affirm the judgment of the circuit court of Monroe County.

¶ 26 Affirmed.