2019 IL App (3d) 170523-U

Order filed September 23, 2019

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2019

UPTOWN CHEBANSE, LLC, an Illinois Limited Liability Company,	)	Appeal from the Circuit Court of the 21st Judicial Circuit, Iroquois County, Illinois.
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-17-0523
	)	Circuit No. 15-CH-27
WALTER W. DAMPF,	)	
	)	Honorable James B. Kinzer,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE SCHMIDT delivered the judgment of the court.
Justice Carter concurred in the judgment.
Justice McDade dissented.

ORDER

¶ 1 *Held*: The evidence supports the trial court's finding of a prescriptive easement in favor of plaintiff.

¶ 2 Defendant, Walter W. Dampf, appeals from an order issued by the circuit court of Iroquois County granting plaintiff, Uptown Chebanse, LLC, a prescriptive easement across the rear portion of defendant's property and issuing a permanent injunction against defendant from interfering with plaintiff's access. Defendant challenges the trial court's finding of a prescriptive

easement on three grounds. First, he argues that plaintiff failed to satisfy the continuous use element because "[i]t is not able to locate a definite and specific 'line of travel' across defendant's property." Second, he asserts that plaintiff's use of the property was permissive rather than adverse. Third, he maintains that the beneficial use of his property was interrupted during the required period such that the 20-year continuity requirement reset. We affirm.

¶ 3 I. FACTS

¶ 4 The following facts are from the common law record and the agreed statement of facts filed by the parties in March 2018.

¶ 5 In March 2013, plaintiff purchased a restaurant in Chebanse, Illinois, and immediately took over operation of the business. A loading dock, garbage dumpster, and used grease container are located at the rear of plaintiff's restaurant. Defendant owns the building located to the immediate south of the restaurant, which he uses as a meeting place for a motorcycle club. To the west of defendant's building and on defendant's property is an open graveled area with no obstructions. Large commercial vehicles are unable to access the facilities in the rear of plaintiff's restaurant without traveling over the open area of defendant's property.

¶ 6 On July 8, 2015, defendant obtained a permit to construct a storage shed on the west side of his property. The next day, plaintiff filed a complaint against defendant followed by an amended complaint in September 2016. In pertinent part, plaintiff sought a declaratory judgment that it possessed a prescriptive easement over the westerly portion of defendant's property. Plaintiff asserted that either it or its predecessors in title have used the west portion of defendant's adjoining property in an open, visible, notorious, peaceful and uninterrupted manner, and under a continuous claim of right adverse to defendant for more than 20 years in order to accept deliveries and receive services. Plaintiff maintained that if defendant constructed the

storage shed, it would have no access to the rear of its building and would be forced to close its business.

¶ 7 At the June 2017 hearing, Steve Emme testified that he managed the restaurant and that his wife, Gail, is the sole member of plaintiff's limited liability company. He identified plaintiff's exhibit Nos. 3 and 5 as photographs of the area to the west of defendant's building that depict tire tracks of commercial vehicles, which cross the open graveled area of defendant's property to reach the rear of the restaurant. Emme never received permission to use defendant's property. Since purchasing the restaurant in March 2013, commercial vehicles used defendant's property nearly every day between 8 a.m. and 6 p.m. to access the rear of the restaurant.

¶ 8 Lori Roth testified that she owned and operated the restaurant before plaintiff purchased it. Prior to that, she worked at the restaurant as a waitress. Throughout her ownership and employment, for a period in excess of 20 years, commercial vehicles consistently and openly used defendant's property to access the loading dock and garbage containers. She did not know of any permission given by defendant or his predecessors in title to use the property.

¶ 9 Defendant testified that he intended to construct a storage building in the vacant area behind his property and obtained a building permit for that purpose. The location of the storage building would block commercial vehicles from using his land to access the restaurant. He believed that Roth sold the restaurant to a third party, but repossessed it when that party filed for bankruptcy. Defendant believed the restaurant closed for a period of time after the third party filed bankruptcy, but he did not know how long it remained closed before Roth reopened it. Defendant never gave permission for commercial vehicles to use his property to access the rear area of the restaurant.

¶ 10 Following arguments, the circuit court entered judgment in favor of plaintiff, granting plaintiff a prescriptive easement across the rear portion of defendant's property for access of commercial vehicles and issuing a permanent injunction against defendant, prohibiting him from interfering with plaintiff's access.

¶ 11 Defendant appeals.

¶ 12 II. ANALYSIS

¶ 13 On appeal, defendant challenges the trial court's finding of a prescriptive easement on three grounds. First, he argues that plaintiff failed to satisfy the continuous use element because "[i]t is not able to locate a definite and specific 'line of travel' across defendant's property." Second, he asserts that plaintiff's use of the property was permissive rather than adverse. Third, he maintains that the beneficial use of his property was interrupted during the required period such that the 20-year continuity requirement reset.

¶ 14 A. Prescriptive Easement and the Standard of Review

¶ 15 "To establish an easement by prescription, the claimant must prove the use of the land for at least 20 years was adverse, exclusive, continuous, uninterrupted, and under a claim of right inconsistent with that of the true owner." *Rainbow Council Boy Scouts of America v. Holm*, 2018 IL App (3d) 160715, ¶ 10. The burden of proving a prescriptive right is on the party alleging such right and that party must establish all elements clearly and distinctly. *Bogner v. Villiger*, 343 Ill. App. 3d 264, 269 (2003). Whether a party established a prescriptive easement is a question of fact and the trial court's determination will not be reversed unless it is against the manifest weight of the evidence. *Id.* A finding is against the manifest weight of the evidence only if an opposite conclusion is clearly evident. *Id.*

¶ 16 B. Continuous Use

¶ 17 We begin by considering defendant's contention that plaintiff failed to satisfy the continuous use element of a prescriptive easement. On this issue, defendant argues that plaintiff's claim for a prescriptive easement must fail because "[i]t is not able to locate a definite and specific 'line of travel' across defendant's property."

¶ 18 At the outset, we reject defendant's contention that the claimed easement changed substantially between plaintiff's original and amended complaints. We note that the only fundamental difference between the two is that the amended complaint includes the legal description of the portion of defendant's property used by plaintiff. Second, the cases cited by defendant in support of his "line of travel" claim are either distinguishable from or supportive of plaintiff's position.

¶ 19 In *Thorworth v. Scheets*, 269 Ill. 573, 582-83 (1915), the supreme court granted a prescriptive easement, in part, because the evidence showed "the travel along this alley for nearly a half century has been practically along the same line." *Id.* Defendant attempts to distinguish the facts of this case from those in *Thorworth* by asserting that plaintiff in this case "admit[ted] that there is no continuous line of travel." Contrary to defendant's contention, however, nowhere in the parties' agreed statement of facts does plaintiff admit that there is no continuous line of travel. Thus, *Thorworth* is not distinguishable on the grounds defendant alleges.

¶ 20 In *Bogner*, this court declined to find a prescriptive easement because the location of the challenged easement materially changed during the prescriptive period. *Bogner*, 343 Ill. App. 3d at 270. In that case, the irrigation system at issue only existed since 1996, less than the 20-year prescriptive period. *Id.* Although a prior irrigation system was installed in 1979, the 1996 irrigation system used a separate and distinct path—nine feet east and parallel to the path used by the 1979 system—that encroached upon the property rights of completely different parties. *Id.* at

267, 270. Accordingly, we rejected the defendant's request to find "that moving the path over which you trespass 17 years after the trespass began and then beginning a new trespass over a totally different path which aggrieves totally different parties constitutes continuous use." *Id*. at 270. Unlike in *Bogner*, the evidence here shows that the path traveled by commercial vehicles to access the rear of plaintiff's restaurant did not materially change during the prescriptive period and affected only the property rights of defendant and/or his predecessor(s) in title.

¶ 21 Finally, defendant cites S*chwartz v. Piper*, 4 Ill. 2d 488, 494 (1954), in support of his contention that "although not one of the elements, the plaintiff must prove by clear and convincing evidence the exact location of the line-of-travel which it claims." We note, however, that *Schwartz* concerned a claim of adverse possession rather than a prescriptive easement and is not applicable to the case at bar. Accordingly, we find the record supports the trial court's finding of continuous use.

¶ 22 C. Uninterrupted Use

¶ 23 Defendant next asserts that the beneficial use of his property was interrupted during the required period such that the 20-year continuity requirement reset. He cites *General Iron Industries, Inc. v. A. Finkl & Sons Co.*, 292 Ill. App. 3d 439, 446 (1997), in support of his contention that "interruption, for even one day, in running of 20 year period to gain use of property, ends the period and it must begin anew." We note, however, that *General Iron Industries* involved a claim for adverse possession rather than prescriptive easement. Moreover, the "facts" cited by defendant in support of his claim that the restaurant closed for a period of time during which no commercial vehicles used his property to access the rear of plaintiff's restaurant are not actual undisputed facts. Rather, it is defendant's unsubstantiated belief that the restaurant closed. Defendant argues that the restaurant was closed for "approximately three

months." However, the agreed statement of facts states defendant testified that "[h]e believed the restaurant *** was closed for a period of time *** but was uncertain for how long." Thus, based on the record before us, we find support for the trial court's finding of uninterrupted use.

¶ 24 D. Adverse Use

¶ 25 Finally, we consider defendant's contention that plaintiff's use of his property is permissive rather than adverse because the property at issue is vacant and unoccupied.

¶ 26 To satisfy the adversity element, " '[t]he use must have been enjoyed under such circumstances as will indicate that it has been claimed as a right, and has not been regarded by the parties merely as a privilege or license, revocable at the pleasure of the owners of the soil.' " *Nationwide Financial, LP v. Pobuda*, 2014 IL 116717, ¶ 44 (quoting *Rose v. Farmington*, 196 Ill. 226, 229 (1902)). "Where the property has been used in an open, uninterrupted, continuous and exclusive manner for [a period of 20 years], adversity will be presumed and the burden of proof shifts to the party denying the prescriptive easement to rebut the presumption." *Bogner*, 343 Ill. App. 3d at 270.

¶ 27 Defendant argues that plaintiff's use of the land was permissive because "the land sought for prescriptive easement by [plaintiff] is vacant, unoccupied and unfenced." See *Poulos v. F.H. Hill Co.*, 401 Ill. 204, 214 (1948) (The use of vacant, unoccupied and unenclosed land is presumed to be permissive and not adverse; permissive use can never ripen into prescription no matter how long such permissive use exists.). We disagree. It is disingenuous for defendant to imply that plaintiff's use of a portion of his property, *i.e.*, "the land sought for prescriptive easement," is permissive merely because there are no buildings or other obstructions in the path traveled. Although plaintiff's property is not enclosed by a fence, the property is neither vacant nor unoccupied as defendant uses the building on the property as a meeting place for a

motorcycle club. Here, the record shows that plaintiff or his predecessors in title used defendant's property without permission in an open, uninterrupted, continuous, and exclusive manner in excess of 20 years. The evidence supports the trial court's finding of adversity.

¶ 28 In sum, because we find the evidence supports the trial court's finding that plaintiff's use of defendant's property was continuous, uninterrupted, and adverse—the elements challenged by defendant on appeal—we affirm the trial court's grant of a prescriptive easement in favor of plaintiff and an injunction against defendant.

¶ 29 III. CONCLUSION

¶ 30 For the foregoing reasons, we affirm the judgment of the circuit court of Iroquois County.

¶ 31 Affirmed.

¶ 32 JUSTICE McDADE, dissenting:

¶ 33 The majority finds that plaintiff, Uptown Chebanse, has satisfied the elements entitling it to a prescriptive easement across a portion of the adjoining property owned by defendant, Walter Dampf. Because I would find that Uptown Chebanse has failed to establish at least two, probably three, and, arguably, all five of the elements necessary for the creation of an easement by prescription, I disagree with the majority's conclusion and respectfully dissent.

¶ 34 As recited by the majority, the five elements plaintiff must prove to substantiate its claim to the easement and co-opt the true owner's use and enjoyment of his property are: (1) use of the land for at least 20 years, which use was (2) hostile or adverse, (3) exclusive, (4) continuous and uninterrupted, and (5) under a claim of right inconsistent with that of the true owner. *Rainbow Council Boy Scouts of America v. Holm,* 2018 IL App (3d) 160715, ¶ 10. In my opinion, Uptown

Chebanse has failed to present facts proving its entitlement to a prescriptive easement, and the trial court's contrary finding should be reversed.

¶ 35 I start with the following understanding of fact and law: Dampf was the owner of the property at issue. In order to divest him of his right to hold that property and to use it for his own legitimate purpose and enjoyment, it was solely *plaintiff's* burden to prove it had acquired a superior right by proving each and every one of the five foregoing factors by clear and convincing evidence.

¶ 36 There was an evidentiary hearing in this case, for which there is no report of proceedings. All that we know about the evidence submitted at the hearing is presented in (1) a 4-page "Agreed Statement of Facts," signed by the parties and certified by the trial court, with 11 largely unexplained and inexplicable exhibits attached and (2) the trial court's one-page written order, which makes no findings other than the declaration of the easement and its dimensions. A careful review of those documents reveals no showing of any evidence clearly and convincingly establishing any of the following five elements necessary for the creation of a prescriptive easement.

¶ 37 Use of the Land for at least 20 Years

¶ 38 There was testimony given by Lori Roth stating, apparently in purely conclusory terms, that commercial vehicles had used defendant's property for access to the rear of the restaurant for a period in excess of 20 years, but there are no agreed facts from the parties or findings of fact by the court identifying and documenting the dates allegedly constituting the temporal boundaries at issue. There was also no other evidence proving 20 years of consistent use of a defined right-of-way.

¶ 39 Hostile or Adverse Use

¶ 40 Dampf obviously knew the parameters of his property. When he needed to build a shed for storage, he secured a permit to construct it on property that he identified as his and to which he held title. There was a building on Dampf's property that he used for meetings of his motorcycle group. This was not a remote portion of a vast expanse of land or any other situation where he would have been unaware of what was happening on or about his property. Dampf had an active *presence* on his land and would presumably have known that trucks making deliveries to or picking up garbage from the restaurant were encroaching on his property from time to time. Although he acknowledged he did not actually give affirmative permission for this use of his land, he did *not*, contrary to the assertion of Uptown Chebanse, make any similar acknowledgment in the agreed statement of facts on behalf of his predecessors in title. Nonetheless, anytime he was aware of such encroachment by commercial vehicles and did not raise an objection, he was implicitly acquiescing in that use and the use could not fairly be characterized as hostile. I am unaware of any requirement that "permission" defeating an adverse taking must be overt, oral, or written in order to be effective.

¶ 41 Further, evidence on this element was presented by Lori Roth, whose testimony, according to the agreed statement of facts, was that "she did not know of any permission given by the defendant or any of his predecessors in title." An assertion that one has no knowledge of a fact is vastly different from clear and convincing evidence of either the truth or falsity of the fact. Roth's lack of knowledge about whether permission had been given simply does not equate to clear and convincing proof that permission was not given. This is particularly true when, for much of the relevant time she was an employee, not an owner, and she has not alleged any reason why she *would* know.

¶ 42 Exclusive Use

¶ 43 A careful review of the court's order and the agreed statement of facts reveal no submission of any evidence suggesting or establishing that plaintiff's use of defendant's property was exclusive in any sense. There is no proof that it was never used by Dampf for any purpose of his own or by any of his predecessors in title or by any other person. There is also no evidence that Uptown Chebanse or any of *its* predecessors in title actively prevented others from using the right of way it claims as its own. Accordingly, that required element has not been either addressed or proven.

¶ 44 Continuous and Uninterrupted Use

¶ 45 Defendant testified to his belief that Lori Roth had sold the property to a third party who sought bankruptcy relief. He recalled that for a time after the bankruptcy was filed—he thought about three months—"the restaurant was closed, no commercial vehicles used his property to access the plaintiff's property." Plaintiff implies in its brief that there is no issue raised by defendant's assertion because he presented no supporting evidence. The majority refers to "defendant's unsubstantiated belief" and notes that the agreed statement of facts showed only that defendant "believed the restaurant *** was closed for a period of time *** but was uncertain for how long." *Supra* ¶ 23. The majority concludes, "Thus, based on the record before us, we find support for the trial court's finding of uninterrupted use." *Id.* The problem, of course, is that defendant has no burden of proof; the plaintiff bears that burden. Moreover, plaintiff's witness, Lori Roth, is presumably the best, and perhaps the only, source for confirming or refuting defendant's recollection. Contrary to the conclusion of the majority, there is no evidence—no factual support in the record—that Dampf's recollection was faulty and that the use relied upon by plaintiff was, in fact, uninterrupted and continuous for 20 years.

¶ 46 Use Under a Claim of Right

¶ 47 Uptown Chebanse had purchased the restaurant property in 2013, two years before Dampf's 2015 acquisition of the permit to build a storage facility on his land. Uptown Chebanse *knew or should have known* it had not purchased an easement, nor had the seller, Lori Roth, purported to *convey* the easement, which she now claims to have acquired against the defendant's property and to have held as a matter of right beyond the end of the 20-year period. It is unclear to me how this plaintiff had either an original or a derivative claim of right. There was merely an implicitly permissive use or a new trespass beginning in 2013 that would have been interrupted two years later when Dampf built his proposed shed on his property.

¶ 48 Finally, it must be noted that Uptown Chebanse has failed to prove the use of a reasonably precise and consistent right-of-way for 20 years. If a person is going to deprive another of the use and enjoyment of his own property without compensation pursuant to a prescriptive easement and when that party, appropriately bearing the burden of proof, fails to sustain that burden, the default for the court should be to find the effort to assert a prescriptive easement has failed; it should *not* be to just give the claimant roughly one-third of the property owner's entire holding.

¶ 49 For the foregoing reasons, I would find (1) that plaintiff, Uptown Chebanse, failed to prove the creation of a prescriptive easement against the property of defendant, Walter Dampf; (2) that the permanent injunction barring defendant's construction of a storage building on or otherwise impairing plaintiff's access, not to a precisely-defined and carefully-tailored right-of-way but rather to a 50-foot tract constituting approximately 1/3 of his entire property, was improperly granted; and (3) that the permanent injunction should be dissolved.