

No. 1-10-0774

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JOHANNA RACHEL,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County, Illinois
)	County Department,
)	Chancery Division
)	
)	No. 04 CH 21023
v.)	
)	
JOHN SERSHEN,)	Honorable
)	Martin Agran,
Defendant-Appellee.)	Judge Presiding.

JUSTICE JOSEPH GORDON delivered the judgment of the court.
Justices Howse and Epstein concurred in the judgment.

ORDER

HELD: The trial court did not err when it denied plaintiff's request for injunctive relief because her claim was time barred by the statute of limitations.

In December 2004, Plaintiff Johanna Rachel brought this suit in chancery against Defendant John Sershen, seeking an abatement of trespass and a finding that defendant lacked an

adverse right to trespass on a portion of her property that defendant's garage encroached upon. Following an August 2009 bench trial, the trial court found that while defendant held no adverse right to maintain an encroaching structure on plaintiff's property, he had sustained his burden on the affirmative defense of statute of limitations and denied plaintiff's request for an injunction. For the reasons that follow, we affirm.

I. BACKGROUND

In December 2004, plaintiff Johanna Rachel filed the instant action against her next-door neighbor, defendant John Sershen, in the chancery division of the Circuit Court of Cook County, seeking a court order forcing defendant to remove a portion of his garage encroaching approximately ten inches onto her property. In her third amended complaint, plaintiff alleged that she lacked an adequate remedy at law, and sought equitable relief in the form of an abatement to trespass. She further sought a finding that defendant had no adverse right to trespass on her property. A bench trial was conducted in August 2009. The relevant facts adduced at that trial follow.

Plaintiff and defendant are adjacent landowners. In 1995, defendant demolished the then existing garage on his property and constructed a new garage in its place. He also built a new deck on top of the garage. The City of Chicago issued two stop work orders for the construction of the garage and deck for lack of a permit and for being contrary to permit, respectively, but defendant subsequently came into ostensible compliance with the building code. When completed, the roof of the garage encroached approximately ten inches across defendant's property line onto what is now plaintiff's property. Defendant testified that he received oral permission from the previous owner of plaintiff's property, an individual identified by the name Stan, to extend the roof of the garage so long as he installed lights on that portion of the roof,

which he did. The building plans defendant submitted to the city did not indicate that the roof extended onto plaintiff's property, nor was the permission which he received from Stan allowing him to do so reduced to writing.

Plaintiff conceded that she was aware of the encroachment upon her property when she purchased it in 1999. She further testified that she had no issue with the encroachment until she and defendant had a falling out once defendant began "being so negative" in the summer of 2003. Plaintiff alleged that the overhang blocked light, caused rain water to fall onto her property, and resulted in ice forming during the winter. She further complained defendant's dog would, at times, relieve itself on top of the deck and its waste would fall onto her property when it rained, attracting flies.

Defendant testified that he took steps to prevent water from falling onto plaintiff's property by designing the roof in such a way that ninety percent of the water landing on the deck drained into the adjacent alley rather than plaintiff's property. He further stated that his dog no longer was allowed upon the deck.

Defendant further testified, and it was undisputed, that he spent hundreds of hours and much money constructing the garage and the deck, and that removing the portion extending onto plaintiff's property would render the entire building structurally unsound. He further averred that he can no longer personally undertake to repair or modify the structure due to an injury he sustained after constructing it, but acknowledged that he did not obtain any estimates to have the encroachment removed.

During closing arguments, plaintiff argued against the application of the any statute of limitations, urging that her claim was one sounding in equity, not law. She contended that, if anything, her claims were subject to the doctrine of laches which, in a court of equity, "cannot be interposed and will not be interposed to protect an act of wrongdoing." She argued that because

defendant acted wrongfully, he was not entitled to rely on the equitable defense of laches. Nor did defendant attempt to invoke a defense of laches. Instead, he urged that a five year state of limitations should govern this case, and since it is undisputed that he built the garage in 1995 but plaintiff did not complain about it until December 2004, that period had run by the time plaintiff brought her suit.

The trial court agreed with defendant and found in an October 2009 order that while defendant had no right to maintain the encroaching structure on plaintiff's property through the doctrine of adverse possession, he had sustained his burden to raise the affirmative defense of statute of limitations. Plaintiff filed a post trial motion in which she urged the trial court supplement its earlier order wherein the court held defendant had no right to adversely possess her property and urged the court to require defendant to remove his encroaching structure. Plaintiff orally argued at the hearing on that motion that the trial court "must undertake to consider laches before invoking the statute of limitations" when considering whether to grant an injunction abating trespass.

On February 17, 2010, the trial court refused plaintiff's request to modify its previous order. Instead, it amended its October 2009 order by prohibiting defendant from further changing or enlarging the encroachment, except to remove it back to the property line, stating that "neither defendant or any heir or assignee or subsequent purchaser shall alter the structure except to remove it back to the property line dividing the properties of plaintiff and defendant." This appeal followed.

On appeal, plaintiff argues (1) that the trial court erred when it refused to consider the applicability of laches which she contends was tantamount to giving defendant a perpetual easement to maintain his garage which encroaches on her property; and (2) that the trial court further erred when it applied an inapplicable five year statute of limitations period to this action

instead of a twenty year period. For the reasons that follow, we affirm.

II. ANALYSIS

A. Inapplicability of Laches

Plaintiff first contends that the trial court erred by considering defendant's affirmative defense of statute of limitations rather than laches. We disagree by reason of the fact that plaintiff's claim is not one that would warrant equitable relief. While the trial court did not give a reason for its conclusion that the statutes of limitation applicable at law apply, we are not precluded from doing so even if we would draw upon matters in the record not articulated by the trial court. See *Devoney v. Ret. Bd. of the Policemen's Annuity & Benefit Fund for Chi.*, 199 Ill. 2d 414, 422 (2002) ("The reasons given by a lower court for its decision or the findings on which a decision is based are not material if the judgment is correct. [citation]. A judgment may be sustained upon any ground warranted by the record.").

Plaintiff contends that because her complaint sought equitable relief, the statute of limitations for trespass did not apply to her claim, and that, if anything, the trial court should have invoked the doctrine of laches. See *Meyers v. Kissner*, 149 Ill. 2d 1, 12 (1992) ("Statutes of limitation, applicable in legal actions, are not directly controlling in suits seeking equitable relief."). Plaintiff's contention would more than likely be correct if she could have established her entitlement to equitable relief, which she cannot under the facts of this case. It has been long established in Illinois that generally, "[a] mandatory injunction will ordinarily issue against the maintenance by a land owner of an encroachment on the land of an adjoining owner to compel the removal of such encroachment." *Pradelt v. Lewis*, 297 Ill. 374, 377 (1921). But "where the

encroachment is slight and the cost of removing it will be great and the corresponding benefit to the adjoining owner small, *** the court will ordinarily decline to compel a removal and will leave the complaining party to his remedy at law." *Pradelt*, 297 Ill. 374, 377 (1921).

The holding in *Pradelt* has been upheld in numerous subsequent decisions. See, e.g. *Whitlock v. Hilander Foods, Inc.*, 308 Ill. App. 3d 456, 462 (1999) ("in deciding whether to order a defendant to remove an offending structure, the trial court must balance the hardship to the defendant against the benefit to the plaintiff; if the former is great and the latter slight, the court will ordinary leave the plaintiff to his remedy at law."), *Malchow v. Tiarks*, 122 Ill. App. 2d 304, 311 (1970) ("where an encroachment is slight and unintentional and the cost of removing it is great, and the corresponding benefit to the adjoining owner is small, and damages can be had, the courts will ordinarily refuse to grant injunctive relief, and will leave the complaining party to his remedy at law"). See also *Nitterauer v. Pulley*, 401 Ill. 494, 505 (1948), *Crain Enterprises v. City of Mound City*, 189 Ill. App. 3d 130, 144 (1989).

Here, it appears from the record that plaintiff is not entitled to equitable relief in this case. The decision of whether to grant or deny equitable relief turns on "such factors as the expense and difficulty of removing an encroachment in relation to the damage resulting therefrom, or the benefit that would accrue from its removal." *Ariola*, 16 Ill. 2d at 51. In the instant case, the undisputed testimony indicated that defendant spent hundreds of hours and considerable amounts of money on the construction of his garage and deck. That garage overhang extended across defendant's property line by less than a foot near the back of plaintiff's property, close to an alley and far from her home. The evidence also shows that simply removing the encroaching portion of defendant's garage without rendering the entire building structurally unstable would be impossible. On the other hand, plaintiff knew of the encroachment when she purchased the property in 1999 and did file suit for over 5 years, until her and defendant's social relationship

deteriorated. Her argument that the lack of gutters on the garage causes rain water to fall on her property, water which would naturally fall there anyways, is insufficient to compel its removal, as is her contention that defendant's dog formerly relieved itself upon the deck.

Plaintiff, however, contends that defendant's conduct was intentional, and therefore she was automatically entitled to injunctive relief. We do not agree. Our courts have held that "where the encroachment was intentional, in that [the] defendant proceeded despite notice or warning, or where he failed to take proper precautions to ascertain the boundary, the courts *** have refused to balance the equities, and have issued the mandatory injunction without regard to the relative convenience or hardship involved. *Ariola v. Nigro*, 16 Ill. 2d 46, 51-52 (1959). "For an encroachment to be intentional, it must either be deliberate or in willful disregard of the rights of the adjoining property owner. Such an encroachment will be regarded as deliberate when made after due warning. *Malchow v. Tiarks*, 122 Ill. App. 2d 304, 312 (1970), citing *Ariola*, 16 Ill. 2d at 53 and *Nitterauer v. Pulley*, 401 Ill. 494, 505 (1948).

Our courts have also suggested, however, that a defendant who obtains permission from a neighboring land owner does not intentionally violate his neighbor's rights when he encroaches upon that neighbor's property. See *General American Realty Co. v. Greene*, 107 Ill. App. 3d 1001, 1016 (1982) (holding that because defendant did not seek prior approval for an encroachment, injunctive relief was properly granted). Other states as well have adhered to the rule that a mandatory injunction to compel the removal of an encroachment by adjoining landowner will be denied where the plaintiff has consented to the encroachment. See *Weis v. Cox*, 205 Ind. 43, 50 (1933) (the evidence supported a finding that appellants acquiesced in the pouring of encroaching concrete, and were thus estopped from obtaining equitable relief). See also *Ferrone v. Rossi*, 311 Mass. 591 (1942), *Youse v. McCarthy*, 51 Pa. Super. 306, 312 (1912), *McGee v. Randolph*, 90 N.E.2d 599 (Ohio. App. 1949).

In the instant case, there is no dispute that defendant built the encroaching structure only after receiving permission to do so from a prior owner of plaintiff's land. The fact that the permission was oral, rather than written was immaterial since, as the trial court properly held, the permission was not admitted to evidence a right in the estate, but only to show that the encroachment was made with the previous owner's consent. Moreover, the record indicates that plaintiff knew of and assented to the encroachment when she purchased the property and in 1999 and did not object to it for over five years. Accordingly, it is manifestly apparent that equitable relief requiring defendant to remove the encroaching structure would impose a far greater hardship upon him than the correlative benefit that would accrue to plaintiff, and further that the consent received from the former owner would negate any claim of an intentional violation of plaintiff's right to enjoy her property by defendant. Consequently, statutes of limitation rather than laches, are applicable and we must therefore next consider whether the trial court correctly applied a five year statute of limitations.

B. Incorrect Statute of Limitations

The Illinois Code of Civil Procedure provides for a five year statute of limitations for claims seeking monetary damages from trespasses. 735 ILCS 5/13-205 (West 2004). Plaintiff, however, contends that even if statutes of limitation rather than laches were appropriate, the twenty year statute should have been applied here. Plaintiff bases this claim on *Meyers v. Kissner*, where our supreme held that while the plaintiff's claim for monetary damages stemming from defendant's continuing trespasses was limited by a five year statute of limitations, his claims for equitable relief were barred by a twenty year laches period. *Meyers v. Kissner*, 149 Ill. 2d 1, 11-12 (1992). Under *Kissner*, equity will intervene and laches will not bar the filing of a suit prior to the running of a twenty year time period in cases of continuing violations. *Kissner*, 149 Ill. 2d at

11-12 (“For continuing violations such as the one at hand, the five-year statute of limitations merely specifies the window in time for which monetary damages may be recovered prior to the filing of the complaint. ***[I]n actions seeking equitable relief from the flooding of one's property, *** laches will not act as a bar prior to the running of the 20-year time period.”). Plaintiff therefore claims that under *Kissner*, because defendant did not maintain the encroaching structure for a period of 20 years, the court erred in denying her claim for relief.

Arguably, even where the trespass is continuous, the test for whether equitable intervention is warranted will still depend on the relative hardships between the parties, namely whether the hardship on the defendant to remove the encroachment outweighs the benefit accruing to the plaintiff from its removal. As stated above, this balancing test clearly favors defendant in this case.

However, even if equitable intervention were otherwise appropriate in this case, the five year statute of limitations period would still apply because, unlike *Kissner*, the encroachment in this case does not come under the umbrella of a continuing violation. A continuing violation extends to situations where new encroachments occur on a continuing basis, such as the repeated flooding or erosion of another's land like that in *Kissner*. It does not encompass situations where there is a single encroachment with effects that endure over an extended period of time, such as the encroachment in the instant case.

This rule was clearly articulated in *Bank of Ravenswood*, where the appellate court held that:

"[a] continuing violation *** is occasioned by continuing unlawful acts and conduct, not by continual ill effects from an initial violation [citation]. Moreover, 'where there is but one overt act from which subsequent damages may flow, it is held that the statute begins to run on the date the defendant invaded the plaintiff's

interest and inflicted injury, and this is so despite the continuing nature' of the injury." *Bank of Ravenswood v. City of Chicago*, 307 Ill. App. 3d 161, 167-168 (1999), quoting *Austin v. House of Vision, Inc.*, 101 Ill. App. 2d 251, 255 (1968).

In this case, the initial trespass to plaintiff's land occurred in 1995 when defendant constructed the garage and deck. Under *Bank of Ravenswood*, plaintiff's cause of action for trespass accrued at the time of construction, and any ill effects stemming from that construction "would be a continual effect from the initial violation but not a continual violation." *Bank of Ravenswood*, 307 Ill. App. 3d at 168. Because, the twenty year period is inapplicable here and, as discussed extensively above, the balancing of hardships under *Pradelt* prohibits plaintiff from seeking equitable relief, we cannot say that the trial court erred in applying a five year statute of limitations in this case.

III. CONCLUSION

For the foregoing reasons, we affirm.

AFFIRMED.