IN THE COURT OF APPEALS OF IOWA

No. 1-087 / 10-0949
Filed February 23, 2011

MARGARET ELLIOTT,
Plaintiff-Appellant,

vs.

WAYNE JASPER,
Defendant-Appellee.

Appeal from the Iowa District Court for Wapello County, Michael R. Mullins, Judge.

Margaret Elliott appeals from grant of summary judgment dismissing her petition for injunctive relief. **AFFIRMED.**

Margaret Elliott, Ottumwa, pro se.

Richard Gaumer of Webber, Gaumer & Emanuel, P.C., Ottumwa, for appellee.

Considered by Vogel, P.J., and Doyle and Tabor, JJ.

DOYLE, J.

Margaret Elliott appeals from grant of summary judgment dismissing her petition for injunctive relief. She contends genuine issues of material fact existed concerning whether an easement over the land of her neighbor, Wayne Jasper, had been created. We affirm.

***I. Background Facts and Proceedings*.**

In April 1998, Margaret Elliott purchased a home on North Graves Street in Ottumwa, described as Lots 2 and 3 of E. A. Langford's Addition. The home had no driveway accessing the street. Instead, the home's driveway was accessible by what Elliott believed to be a public alley extending from Earl Street to the back her property. The alley, paralleling Graves Street, was adjacent to the rear property lines of Lots 8 to 2 and located on property owned by Leo and Phyllis Tee.

Wayne Jasper purchased the Tee's property in July 2005. Four years later, Jasper placed a locked gate across the alley, thus blocking Elliott's access to her property's driveway. Jasper also gave Elliott a note informing her she was no longer permitted to drive or walk on Jasper's land and that the gate would be replaced by a fence.

Elliott filed a petition for injunctive relief seeking an injunction to permanently prohibit the placement of a fence, gate, or other obstruction across the alley. Jasper answered the petition, and he later filed a motion for summary judgment requesting an order dismissing Elliott's petition. Elliott resisted, claiming resolution of the matter was not amenable to summary judgment

because of factual disputes. She also asserted she had an implied easement or an easement by prescription to the alley.

The parties disputed whether or not Leo Tee gave Elliott permission to use the alley. Jasper claims Tee, now deceased, agreed and consented to permit Elliott to cross his property. In his affidavit in support of his motion for summary judgment, Jasper states, in relevant part:

> When I bought the [Tee] property I was told that Leo Tee had been permitting persons to drive across his property to get access to the back of their property. I was further told that Leo Tee told the folks, namely Margaret Elliott, that he would no longer be maintaining the alleyway as he called it. After I purchased the property, I discovered that an alley only went partially up along the back of the Graves Street lots. In fact the plat showed that the alley then turned left and ran parallel with Earl Street. Leo Tee had the City vacate the alley to him.
>
> I consented to the use of the property by Mrs. Elliott and her family members for a period of time.

In her affidavit, Elliott states Tee did not expressly grant permission for her use of the alley across his property; rather, she believed the alley to be public. She states that in her over eleven-year use of the alley, no property owner ever challenged her use of the alley. The fact that Tee mentioned in the summer of 1998 that he would not maintain the alley did not concern Elliott as, to her knowledge, he did not maintain it anyway. Elliott asserted the City of Ottumwa maintained the alley from the time she moved in until sometime in 2007.

An aerial photograph shows the existence of the alley extending from Earl Street to the back of Elliott's property. However, the plat map does not show any alley access to the back of Elliott's property, Lots 2 and 3. The plat map does depict an alley paralleling Graves Street behind Lots 14 through 6. This alley does not extend beyond Lot 6. At Lot 6 the alley turns north and parallels Earl

Street. No alley depicted on the plat map behind Lots 5, 4, 3, 2 and 1. That there is no written easement benefitting Elliott's property is not in dispute.

After hearing, the district court found that, without proof of substantial maintenance and improvement of the land as evidence of a claim of hostility or claim of right, Elliott's use of the alley was insufficient to establish a prescriptive easement. Further, the court also found Elliott could not prove an easement by implication. The court concluded: "Although the parties do not agree as to all the facts, there are no genuine issues as to the facts which are material for deciding as a matter of law that [Jasper] is entitled to judgment."

Elliott now appeals.

II. Scope and Standards of Review.

This case was brought in equity. Generally, in equity cases our review is de novo. Iowa R. App. P. 6.907. However, when an equity case is resolved on summary judgment, our review is for the correction of errors at law. *Kragnes v. City of Des Moines*, 714 N.W.2d 632, 637 (Iowa 2006).

Summary judgment should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3). We view the record in the light most favorable to the resisting party. *Smith v. Shagnasty's Inc.*, 688 N.W.2d 67, 71 (Iowa 2004).

III. Discussion.

On appeal, Elliott contends the district court erred in granting summary judgment in favor of Jasper, asserting genuine issues of material fact existed concerning whether an easement over Jasper's land had been created. Upon

our review, we find the district court committed no error in dismissing Elliott's petition.

Easements may be created by: (1) express written grant, (2) prescription, or (3) implication. *Wymer v. Dagnillo*, 162 N.W.2d 514, 516 (Iowa 1968). Elliott has not claimed an easement by express written grant. The issue, therefore, is whether she has an easement by either prescription or implication.

***A. Easement by Prescription*.**

> Under Iowa law, an easement by prescription is created when a person uses another's land under a claim of right or color of title, openly, notoriously, continuously, and hostilely for ten years or more. It is based on the principle of estoppel and is similar to the concept of adverse possession. We consider principles of adverse possession when determining whether an easement by prescription has been created. However, the concepts of adverse possession and easement by prescription are not one and the same. Rather, easement by prescription concerns the use of property and adverse possession determines acquisition of title to property by possession. For [a party] to claim a right to continued use of the disputed property, they must show something more than use for the statutory period. They must also show they claimed an easement as of right, and this must be established by evidence distinct from and independent of their use.

Johnson v. Kaster, 637 N.W.2d 174, 178 (Iowa 2001) (internal citations omitted).

The requirements of hostility and claim of right are similar. *Brede v. Koop*, 706 N.W.2d 824, 828 (Iowa 2005).

> Hostility refers to declarations or acts that show the declarant or actor claims a right to use the land. "Similarly, a claim of right requires evidence showing an easement is claimed as a right." It must also be established that the servient owner had express notice of the claim of right, not just the use of the land. This notice may be actual or established by "known facts of such [a] nature as to impose a duty to make inquiry which would reveal [the] existence of an easement."
>
> A claim of right must be shown by evidence independent of the use of the easement. That is because permissive use of land is not considered to be hostile or under a claim of right. Moreover,

> "[c]ontinued use does not, by mere lapse of time, become hostile or adverse."

Id. (internal citations omitted).

"The facts relied upon to establish a prescriptive easement "must be strictly proved. They cannot be presumed." *Id*. "Ultimately, we must determine on a case-by-case basis whether there is evidence to support the requirements of a prescriptive easement." *Johnson*, 637 N.W.2d at 179.

Although "mere use" is insufficient to establish hostility or claim of right, certain acts, including substantial maintenance and improvement of the land, can support a claim of ownership and hostility to the true owner. *Id. at* 179; *Simonsen v. Todd*, 261 Iowa 485, 489, 154 N.W.2d 730, 733 (1967)). An easement by prescription may arise under this exception to the strict rules governing prescriptive easements

> in those instances in which the original entry upon the lands of another is under an oral agreement or express consent of the servient owner and the party claiming the easement expends substantial money or labor to promote the claimed use in reliance upon the consent or as consideration for the agreement.

Brede, 706 N.W.2d at 828 (quoting *Simonsen*, 261 Iowa at 495, 154 N.W.2d at 736).

Although Elliott used the alley continuously and openly for over ten years, nothing in the record shows her use of the alleged easement was hostile or by claim of right. There was no express notice given to Jasper or Tee that Elliott had a right to use the land. Moreover, there is no showing in the record that Elliott expended substantial money or labor to maintain the alleged easement. Elliott spent no money maintaining the alley. At most, after Tee told Elliott he

would no longer maintain the alley, Elliott asked someone to rake some of the gravel back into the low spots. The trial court was correct in finding that Elliott did not have an easement by prescription.

***B. Easement by Implication*.**

"'[A]n easement by implication exists when the owner of two parcels employs one so as to create a servitude on the other and then transfers one parcel without a specific grant or reservation of easement in the conveyance.'" *Nichols v. City of Evansdale*, 687 N.W.2d 562, 569 (Iowa 2004) (citation omitted). We determine whether the requisite intent to create an easement by implication existed "as of the time of the severance of the unity of ownership." *Bray v. Hardy*, 248 Iowa 794, 801, 82 N.W.2d 671, 675 (1957). When an easement is not expressly conveyed, as was the case here, we analyze the following four factors to determine whether an easement by implication has arisen: (1) separation of title; (2) a showing that, before the separation took place, the use giving rise to the easement was so long, continued, and obvious, it was manifest the use was intended to be permanent; (3) it appears the easement is continuous rather than temporary; and (4) the easement is essential to the beneficial enjoyment of the land granted or retained. *See Brede*, 706 N.W.2d at 830; *Nichols*, 687 N.W.2d at 569.

The first and second requirements make clear that an easement by implication arises only where the now separate estates were previously owned as one property, and where the owner of the then unified property used one portion, prior to the separation of title, in a way that continuously benefitted the now-claimed dominant estate. *See Wymer* 162 N.W.2d at 517 ("That is where

the owner of an entire tract uses it so a part [of the property] derives from the other a benefit or advantage of a continuous, permanent and apparent nature, and [then the owner of the unified parcel] sells the part in favor of which such benefit or advantage exists, an easement, being necessary to the reasonable enjoyment of the property granted, will pass to the grantee by implication."). The undisputed facts of this case make clear that an easement by implication has no applicability here.

The original plat of E. A. Langford's Addition to the City of Ottumwa was filed in 1891. Elliott asserts that when the addition was dedicated, the city accepted a public alley which ran "for some ways into Lot 5." The plat map provided in the record before us depicts an alley adjacent to the rear lot lines of Lots 8, 7, and 6. It does not extend *into* any of the Langford Addition lots, and it does not extend beyond Lot 6. In other words, the alley depicted on the plat map, whether or not ever dedicated to the city, does not provide access to Lots 5, 4, 3, 2, and 1.

Elliott argues Lots 2, 3, 4, and 5 were at one time owned by the same person, "until various . . . lots were sold or otherwise transferred." She concludes she

> has an implied easement pursuant to the facts set forth that the single owner of Lots 2, 3, 4, and 5 created servitude over Lots 4, 5 and 3 for the use of Lots 3 and 2 and later sold the Lots without a specific reservation in the conveyances.

The fatal flaw in Elliott's argument is that the alley, for which she now seeks an implied easement, does not cross over any of the mentioned Lots. The original owner of the Lots did not own the land upon which the alley lay. The

alley is *adjacent* to, not within the Lots. Under the facts presented, the alley does not fit within the definition of easement by implication. We conclude the district court was correct in finding Elliot did not have an easement by implication.

***IV. Conclusion*.**

Although Elliott used the alley continuously and openly for over ten years, nothing in the record shows that her use of the alleged easement was hostile or by claim of right, and thus there were no genuine issues of material fact concerning her claim for an easement by prescription. Additionally, there were no genuine issues of material fact concerning her claim for an easement by implication because, under the facts presented, the alley does not fit within the definition of easement by implication. Accordingly, we find the district court committed no error in granting Jasper's motion for summary judgment and dismissing Elliott's petition.

AFFIRMED.