IN THE COURT OF APPEALS OF IOWA

No. 1-667 / 10-1828
Filed November 9, 2011

RAVENWOOD, L.L.C.,
Plaintiff-Appellee,

vs.

KEVIN KOETHE, 8450/10, L.L.C., an Iowa Limited Liability Company,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert L. Blink, Judge.

Kevin Koethe, 8450/10, L.L.C., appeals the district court's decision establishing a parking easement to Ravenwood, L.L.C. **REVERSED IN PART AND AFFIRMED IN PART.**

Brett T. Osborn of Wetsch, Abbott & Osborn, P.L.C., Windsor Heights, for appellant.

Douglas A. Fulton of Brick & Gentry, P.C., West Des Moines, for appellee.

Considered by Sackett, C.J., and Vaitheswaran and Tabor, JJ. Doyle, J., takes no part.

SACKETT, C.J.

The question here is whether plaintiff, Ravenwood, L.L.C., has a parking easement over land owned by defendant, Kevin Koethe, 8450/10, L.L.C. The district court found Ravenwood had both an express and a prescriptive parking easement over land owned by Koethe. Koethe contends no such express easement exists, and the district court erred in finding a prescriptive easement. We reverse the district court's finding of an express easement, but affirm its finding of a prescriptive easement.

I. BACKGROUND AND PROCEEDINGS. On July 9, 1993, Richard Krause purchased what is now described as lot 17 in Ravenwood Plat No. 2, in the city of Clive, from Mid-Central Investments, Ltd. Lot 17 contained a commercial office building locally known as 2175 86th Street. On October 25, 1976, Mid-Central had purchased the same lot on contract from G & G Construction Co., an Iowa partnership consisting of John R. Grubb and Gerald D. Grubb, as co-partners. The property description contained in the real estate contract between Mid-Central and G & G Construction set out an easement described as,

> a. A 70.3 foot wide Parking Lot easement over and across a 70.3 feet wide by 97.0 feet long parcel of land that lies directly East of and adjacent to the above described tract of land.

This same easement description was contained in the warranty deed conveying the property to Mid-Central from G & G Construction. The description was slightly altered in the warranty deed conveying the property to Krause from Mid-Central to say "a nonexclusive permanent easement for access and parking

over a parcel of land lying directly East of and adjacent to the above tract which is 70.3 feet wide (East and West) and 97 feet deep (North and South)." Krause later executed a warranty deed conveying this property with the new easement description to his company, Ravenwood, L.L.C.

The lot directly east of and adjacent to lot 17 is what is now known as lot 12 in Ravenwood Plat No. 2, in the city of Clive. This lot is currently owned by Kevin Koethe, 8450/10, L.L.C. who acquired the property on September 29, 2004, from Robert and Christie Boesen. When Koethe was conducting his due diligence inspection of the property prior to purchase, he observed tenants of Ravenwood's building parking in the parking lot located on lot 12. He inquired of Robert Boesen as to whether there was any parking lot easement in favor of lot 17. Boesen responded he was not aware of any easements and provided Koethe the title opinion he obtained prior to purchasing lot 12, which contained no identification of an easement.

Koethe also had his own title opinion done prior to purchasing the lot from Boesen. The title opinion did not contain any transfer documents that contained a parking lot easement. However, in the abstract of title for lot 12, the parking lot easement was noted in a mortgage and an assignment of rents given by G & G Construction Co, a partnership of John R. Grubb and Gerald D. Grubb,[1] to Des

[1] While G & G Construction, a partnership of John R. Grubb and Gerald D. Grubb, mortgaged lot 12 in November of 1976, the record currently before this court contains no transfer document conveying lot 12 to G & G Construction, a partnership of John R. Grubb and Gerald D. Grubb. The abstract of title to lot 12 indicates the following relevant activity:

Moines Savings and Loan Association on November 18, 1976.[2] This mortgage and assignment was recorded as satisfied on April 24, 1984, when the property was conveyed by quit claim deed without reference to the easement from G & G

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1. Paul J. Hackett and Nancy J. Hackett transferred the property to John R. Grubb, Inc. and Jerry's Homes, Inc., d/b/a J & J Construction Co. by warranty deed dated November 1, 1970.
2. John R. Grubb, Inc. and Jerry's Homes, Inc., d/b/a J & J Construction Co. transferred the property to John R. Grubb and Zelda Z. Grubb, husband and wife, Gerald D. Grubb and Nancy A. Grubb, husband and wife, d/b/a G & G Construction by warranty deed dated November 1, 1970.
3. John R. Grubb and Zelda Z. Grubb, husband and wife, Gerald D. Grubb and Nancy A. Grubb, husband and wife, d/b/a G & G Construction mortgaged the property to Des Moines Savings and Loan Association on November 13, 1972, which was satisfied on November 18, 1976.
4. G & G Construction Co., a partnership of John R. Grubb and Gerald D. Grubb, mortgaged the property to Des Moines Savings and Loan Association on November 18, 1976, which was satisfied April 24, 1984.
5. G & G Construction Co., a partnership of John R. Grubb and Gerald D. Grubb, transferred the property to John R. Grubb and Zelda Z. Grubb, husband and wife, and Gerald D. Grubb and Nancy A. Grubb, husband and wife, d/b/a G & G Construction Co., by quit claim deed on April 24, 1984.
6. John R. Grubb and Zelda Z. Grubb, husband and wife, and Gerald D. Grubb and Nancy A. Grubb, husband and wife, d/b/a G & G Construction Co., transferred the property to Hickman Complex Limited by warranty deed dated April 24, 1984.
7. Hickman Complex Limited transferred the property to McNeal Properties, LLC and Paul R. Reed by special warranty deed on February 1, 1999.
8. McNeal Properties, LLC and Paul R. Reed transferred the property to Robert J. Boesen and Christie Boesen by warranty deed on March 27, 2002.
9. Robert J. Boesen and Christie Boesen transferred the property to Kevin Koethe 8450/10 L.L.C. by warranty deed on September 29, 2004.

What is missing from these transfers is a transfer from John R. Grubb and Zelda Z. Grubb, husband and wife, Gerald D. Grubb and Nancy A. Grubb, husband and wife, d/b/a G & G Construction, to G & G Construction Co., a partnership of John R. Grubb and Gerald D. Grubb, sometime between November 1, 1970, and April 24, 1984. It appears the transfer likely took place on November 18, 1976, based on the two mortgages obtained from Des Moines Savings and Loan Association as it is logical only those with an ownership interest in property may pledge property as collateral for a loan. However, no transfer document was contained in the abstract of title provided to this court.

[2] Koethe's title opinion attorney stated he did not include a reference to the easement in his title opinion because the easement was not contained in a transfer document, but was only contained in the mortgage and assignment of rents, which was subsequently released.

Construction, Co., an Iowa partnership, to John R. Grubb and Zelda Z. Grubb, husband and wife, and Gerald D. Grubb and Nancy A. Grubb, husband and wife, d/b/a G & G Construction. The property was then conveyed by warranty deed to Hickman Complex Limited Partnership the same day again without reference to the easement. From Hickman Complex the property was transferred to McNeal Properties and Paul Reed, then to Robert and Christie Boesen, and then to Koethe. All transfers were made without specific reference to the parking easement.

Despite believing no such parking easement existed between his property and Ravenwood, Koethe did not act to prevent Ravenwood's tenants from parking in the lot immediately adjacent to Ravenwood until 2008 when a tenant from Ravenwood allegedly dinged the car door of a tenant from Koethe's building. After the altercation, Koethe contacted Krause, who informed Koethe he had a parking lot easement in the area in question. This incident set off what the district court called "a course of mutual behavior that escalated from juvenile to a costly court conflagration."

In June of 2009, Ravenwood filed suit against Koethe claiming both an express easement and a prescriptive easement over Koethe's property. Koethe filed an answer denying any easement existed and the case proceeded to a bench trial on August 3, 2010. The court issued its "Findings of Fact, Conclusions of Law, and Decree" on September 17, 2010, finding an express easement in favor of Ravenwood and in the alternative a prescriptive easement. It ordered an express easement existed in favor of lot 17 described as

> a nonexclusive permanent easement for access and parking over and across a parcel of land lying directly East of and adjacent to the above tract which is 70.3 feet wide (East and West) by 97 feet deep (North and South) which abuts to the North the tract first above described and which runs 452.5 feet deep (East and West), commencing at the East right-of-way line of N.W. 86th Street, in Clive, Polk County, Iowa.

In addition, the district court ruled Koethe is prohibited and permanently enjoined from interfering with Ravenwood's use of the easement.

Koethe made a motion to enlarge and amend the findings and conclusions asserting the court failed to identify the specific writing that created the express easement. In addition, Koethe asserted the entity in the chain of title for lot 17—G & G Construction, Co., an Iowa partnership consisting of John R. Grubb and Gerald D. Grubb as co-partners—is a separate and distinct entity from the entity in the chain of title for lot 12—John R. Grubb and Zelda Z. Grubb, husband and wife, and Gerald D. Grubb and Nancy A. Grubb, husband and wife, d/b/a G & G Construction Co. As they are two separate legal entities, Koethe contends the owner of lot 17 had no legal right to grant an express easement affecting lot 12, which it did not own. The court declined to amend its ruling on October 11, 2010, and Koethe appeals contending the district court erred in finding both an express easement and a prescriptive easement.

II. SCOPE OF REVIEW. Both parties agree Ravenwood's declaratory judgment action was tried at law. As such, our review is for correction of errors at law. *See Passehl Estate v. Passehl*, 712 N.W.2d 408, 414 (Iowa 2006) (stating our review of declaratory judgment actions depends on how the action was tried to the district court). We are bound by the trial court's findings of fact if

supported by substantial evidence. *Harrington v. Univ. of N. Iowa*, 726 N.W.2d 363, 365 (Iowa 2007). However, we are not bound by the trial court's application of legal principles or conclusions of law. *Collins Trust v. Allamakee Cnty. Bd. of Supervisors*, 599 N.W.2d 460, 463 (Iowa 1999).

III. EASEMENT. An easement is a defined as

> a liberty, privilege, or advantage in land without profit, existing distinct from ownership of the soil, and because it is a permanent interest in another's land, with a right to enter at all time and enjoy it, it must be founded upon a grant by writing or upon prescription.

Maddox v. Katzman, 332 N.W.2d 347, 350 (Iowa Ct. App. 1982). An easement in Iowa can be created in one of four ways: "(1) by express grant or reservation, (2) by prescription, (3) by necessity, and (4) by implication." *Nichols v. City of Evansdale*, 687 N.W.2d 562, 568 (Iowa 2004). In the case at hand, we deal only with the first two.

A. Express Easement. The district court first found an express easement existed in favor of Ravenwood for parking and access over a specific portion of lot 12 owned by Koethe. Koethe asserts this finding is in error. Koethe claims the district court failed to identify the specific writing creating such an easement, and also failed to find the alleged grantor of the easement was not the same entity as the predecessor in interest for Koethe's property. Koethe also claims the only description of the easement contained in the abstract of title was insufficient to identify its location or the servient estate and the district court improperly placed on him the burden to discover this easement when the easement was not properly recorded and indexed in the chain of title to his lot.

An express easement is an interest in land, which falls within the statute of frauds and must be in writing. *Id*. No magic word or terms of art are needed to create an easement. *Gray v. Osborn*, 739 N.W.2d 855, 861 (Iowa 2007). Even a plat map can create a valid easement. *Id*. It is the intention of the parties that is paramount when determining the existence of an express easement. *Id*. However, it almost goes without saying that in order to create an easement, the person or entity granting the easement must own the servient tenement. 28A C.J.S. *Easements* § 67, at 273 (1st ed. 2008). Obviously a person or entity cannot expressly grant to another the right to use land unless that person or entity has authority over that land.

In this case, the easement in question was first identified in a transfer of lot 17, the dominant estate, from G & G Construction, a partnership between John R. Grubb and Gerald D. Grubb, to Mid-Central Investments by way of a real estate contract dated October 25, 1976. So the question is whether G & G Construction, a partnership between John R. Grubb and Gerald D. Grubb, owned the servient estate at the time they granted Mid-Central Investments the easement.

Unfortunately in the record currently before us, we cannot conclude G & G Construction, a partnership between John R. Grubb and Gerald D. Grubb, had any ownership interest or authority over the servient estate, lot 12, at the time when the easement was created. As outlined above in footnote one, the transfer immediately before the easement was granted vested ownership of lot 12 in John R. Grubb and Zelda Z. Grubb, husband and wife, Gerald D. Grubb and Nancy A.

Grubb, husband and wife, d/b/a G & G Construction. This is a separate entity from G & G Construction, a partnership between John R. Grubb and Gerald D. Grubb, who granted the easement. While G & G Construction, a partnership between John R. Grubb and Gerald D. Grubb, likely obtained title to lot 12 sometime between November 1, 1970 and April 24, 1984, as evidenced by the recorded mortgages, on the record currently before us, we cannot conclude it had ownership of lot 12 at the time the easement was created in the transfer of lot 17 to Mid-Central Investments. Unless G & G Construction, a partnership between John R. Grubb and Gerald D. Grubb, owned the servient estate when it created the express easement in favor of lot 17, no such express easement existed.

It is Ravenwood's burden to prove the easement as it is the one seeking to enforce the easement. *Hawkeye Portland Cement Co. v. Williams*, 213 Iowa 482, 486, 239 N.W. 120, 122 (1931). We find Ravenwood has failed to meet its burden to prove an express easement was granted in favor of Ravenwood. Thus, we do not need to address Koethe's other claims of error with respect to the district court finding an express easement. Even though we are unable to find an express easement, the district court also found Ravenwood had a prescriptive easement, which we will now analyze.

B. Prescriptive Easement. A prescriptive easement 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." *Johnson v. Kaster*, 637 N.W.2d 174, 178 (Iowa 2001); *see also* Iowa Code § 564.1 (2009).

An easement by prescription is similar to adverse possession, except an easement concerns the use of the property, and adverse possession concerns the acquisition of title to property. Whenever a party seeks to prove a prescriptive easement, Iowa Code section 564.1[3] requires proof of adverse possession apart from mere use of the property and requires the owner of the servient estate to have express notice of the claim. Unless a landowner knows another has a hostile claim to use its land, "the landowner may incorrectly assume the other's use results merely from the landowner's willingness to accommodate the other's desire or need to use the land." *Larman v. State*, 552 N.W.2d 158, 162 (Iowa 1996). Thus, we must look to see whether Ravenwood had a claim of right to the easement and whether Koethe and his predecessors in interest had express notice.

1. Claim of Right or Color of Title. The hostility and claim of right requirements are closely related in prescriptive covenants. *Collins Trust*, 599 N.W.2d at 464. Hostility does not imply ill-will, but instead refers to declarations made or acts done which reveal a claim of exclusive right to the land. *Id*. As stated above, mere use of the land does not ripen into an easement, but a party claiming an easement must prove its claim through some

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[3] Iowa Code section 564.1 provides,

> In all actions hereafter brought, in which title to any easement in real estate shall be claimed by virtue of adverse possession thereof for the period of ten years, the use of the same shall not be admitted as evidence that the party claimed the easement as the party's right, but the fact of adverse possession shall be established by evidence distinct from and independent of its use, and that the party against whom the claim is made had express notice thereof; and these provisions shall apply to public as well as private claims.

other specific act or conduct. *Id*. Actions such as maintaining or improving the land can support a claim of a prescriptive easement. *Johnson*, 637 N.W.2d at 179. "Color of title is that which in appearance is title, but in reality of is no title." *Grosvenor v. Olson*, 199 N.W.2d 50, 52 (Iowa 1972). In the adverse possession context, a void deed is sufficient color of title to support a claim, so long as the deed is taken in good faith and possession is maintained for the required length of time. *Id*. While claim of right may be based on oral agreement, to constitute color of title, there must be a paper or record title. *Goulding v. Shonquist*, 159 Iowa 647, 650, 141 N.W. 24, 25 (1913).

The evidence produced at trial fails to show that Ravenwood expended any money in improving or maintaining the easement; however, Ravenwood's prescriptive easement claim is supported by color of title by the conveyance of the land with the easement by G & G Construction, a partnership of John R. Grubb and Gerald D. Grubb. While we found above there is insufficient evidence to support a finding of an express easement, this transfer does provide a sufficient basis to support Ravenwood's claim of exclusive right to the land as an easement. *See* 2 Am. Jur. *Proof of Facts* 3d § 125, at 146 (1st ed. 1988) ("Use based on mistake, such as a mistaken belief of ownership, is sufficient to prove adverse intent.").

Koethe challenges that because Ravenwood did not exclude others from using the easement, it was not "exclusive" under the law. Koethe misinterprets the use of the word "exclusive" in the context of prescriptive easements. "Exclusive use in prescriptive easements does not mean that the easement must

be used by the claimant only, as is required in adverse possession; it means that the claimant's right to use the easement does not depend on a similar right in others." *Id.*; *see also Skow v. Goforth*, 618 N.W.2d 275, 278 (Iowa 2000) (stating the servient tenement owner still has the right to use his land which is subject to an easement so long as it does not interfere with the dominant tenement owner's rights).

2. Express Notice. The second element that must be proved to support a claim for a prescriptive easement is that Koethe and his predecessors in interest had express notice of Ravenwood's claim of adverse possession. *Collins Trust*, 599 N.W.2d at 465. "The notice must either be actual or from known facts of such nature as to impose a duty to make inquiry which would reveal the existence of an easement. *Johnson*, 637 N.W.2d at 180. "[W]here the easement is open and visible, the purchaser of the servient tenement will be charged with notice." *Id*.

We agree with the district court that the element of express notice was satisfied in this case. The undisputed evidence is that Ravenwood and its tenants have openly and consistently used the easement area for parking since obtaining title to the property in 1993. Koethe clearly observed the use of the easement as did its predecessors in interest. The fact that neither Koethe nor his predecessors thought to inquire of Krause why his tenants were parking in the easement area until after the fateful door ding does not mean Koethe did not have express notice.

While there was insufficient evidence to find an express parking easement in favor of Ravenwood, we find the district court properly found a prescriptive easement and correctly found the easement runs with the land.

REVERSED IN PART AND AFFIRMED IN PART.