

IN THE COURT OF APPEALS OF IOWA

No. 8-163 / 07-1282
Filed July 16, 2008

**GEORGE P. LYSENKO and
REBECCA LYSENKO,**
Plaintiffs-Appellants,

vs.

**CARROLL JENSEN and
JOYCE JENSEN,**
Defendants-Appellees.

Appeal from the Iowa District Court for Black Hawk County, Bruce E. Zager, Judge.

The Lysenkos appeal the district court's denial of their request for injunctive relief. **REVERSED AND REMANDED.**

Timothy Luce of Anfinson & Luce, Waterloo, for appellant.

Henry J. Bevel III and Gene Yagla of Yagla, McCoy and Riley, Waterloo, for appellee.

Heard by Vogel, P.J., and Zimmer, J. and Nelson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

VOGEL, P.J.

George and Rebecca Lysenko appeal from the district court's denial of their request for injunctive relief to require neighboring landowners, Carroll and Joyce Jensen, to stop their blockage of the natural flow of surface water. On appeal, they contend the district court's ruling was inequitable as it was their only available remedy. We agree and reverse and remand.

I. Background Facts and Proceedings

The Lysenkos and the Jensens are neighboring property owners. In 2002, Jim Sands Construction [Sands] began developing a twenty-six lot subdivision named Elk Run Heights. That same year, the Lysenkos purchased one of these lots and utilizing Sands, were the first to build a home on Gray Street. Shortly after the Lysenkos moved into their new home, other homes on Gray Street were completed. In July 2005, the Jensens purchased the property directly east of the Lysenkos' property, upon which Sands built their home. In September 2005, the Jensens added significant landscaping, including bringing in approximately thirteen to sixteen truckloads of dirt and constructing a four-inch to eight-inch berm located between the Lysenko and Jensen properties. After this landscaping was completed, the Lysenkos began having water problems on their property.

In June 2006, the Lysenkos filed a petition requesting the Jensens be enjoined from obstructing the natural water flow between the properties. The Lysenkos alleged that the raised elevation of the Jensen property and the building of the berm substantially increased the volume of water on their property. In June 2007, after a trial, the district court denied the Lysenkos'

request for injunctive relief. The district court found that the natural water flow was “across the Lysenko property onto the Jensen property” and this natural water flow “was present even before the construction of the Jensen property.” Additionally, the raised elevation of the Jensens’ property and the berm the Jensens constructed between the properties “may result in some additional pooling of water in the Lysenko back yard.” However, the district court concluded this was not such a significant alteration to the natural water flow such that the extraordinary remedy of injunctive relief should be granted. The Lysenkos appeal from this ruling.

II. Scope of Review

An action for injunctive relief is in equity. Therefore, our review is de novo. Iowa R. App. P. 6.4.

III. Analysis

The common law rule “recognizes a servitude of natural drainage as between adjoining lands. Under this concept a servient estate must accept surface waters which drain thereon from a dominant estate.” *Braverman v. Eicher*, 238 N.W.2d 331, 334 (Iowa 1976). A party may petition for injunctive relief if the natural flow of water is wrongfully altered. *Blink v. McNabb*, 287 N.W.2d 596, 601 (Iowa 1980). However,

the grant or denial of injunctive relief, of any nature, unquestionably rests in the sound judicial discretion of the court In determining whether to exercise its discretion to grant or refuse an injunction, the court should balance all of the equities, which include not only the relative hardships to the parties, but their conduct with reference to the transaction, the nature of the interests affected, and the relative proportion of the interests of each that will be lost by whichever course of action is taken.

Braverman, 238 N.W.2d at 335. “Equity usually invokes its extraordinary injunctive power only when necessary to prevent irreparable harm or when the complaining party is otherwise without an effective remedy.” *Johnson v. Pattison*, 185 N.W.2d 790, 797 (Iowa 1971).

The Lysenkos argue that the district court erred in not granting their request for injunctive relief as the Jensens have obstructed the water flow between their properties and an injunction is the only remedy available to them. The evidence introduced at trial clearly demonstrated, and neither party disputed, that their properties were originally graded so that the surface water would flow from the Lysenkos’ property across the Jensens’ property. James Sands, the developer of the subdivision, described the natural water flow of the subdivision and individual lots. Sands testified that he graded the lots on Gray Street so that water flowed from the west to the east, with each lot designed to drain to the front and rear of the lot and downhill. Several properties drain onto the Lysenkos’ property, which then drains onto the Jensens’ property and then towards the Jensen’s back easement. Sands also testified that while completing the grading of the Jensens’ property, the Jensens accused him of taking an extra two feet of dirt out of the backyard. He then brought in another foot of dirt and graded the backyard, but would not bring in any additional dirt.

After Sands’ final grading of the Jensens’ property, the Jensens undertook significant landscaping to their property. They added thirteen to sixteen truckloads of dirt to their yard, which undisputedly raised the surface of their property. They also built a berm that ran along the fence line between their property and the Lysenko property, which stopped approximately twenty feet

before the drainage easement in the back of the property. George Lysenko testified that they had no water problems prior to the Jensens' landscaping, but began having water pool in their back yard after the landscaping was completed. George also testified their sump pump began to run much more frequently.¹ Additionally, after even a light rain, water pools in the backyard and the Lysenkos are unable to mow or walk in certain areas. George described how the Jensens' landscaping had altered the water flow and stated: "water flows in the backyard like it always has, but when it reaches the Jensen property there's a barricade there. It slows down, and it's a swampy area." Supporting these observations, Sands testified that the Jensen berm acted as a dam and prevented the natural water flow and drainage.

Contrary to George's testimony, Steve Wirtz, the contractor who completed the landscaping on the Jensens' property, testified that although the landscaping did alter the natural flow of water between the properties, it should not have caused water to pool on the Lysenko property.² However, he also testified that the berm prevented water from flowing onto the Jensens' property and directed water down the fence line of the Lysenkos' property. Although

¹ There was evidence that prior to the Jensens purchasing their property, the Lysenkos' sump pump drained onto it. See *Braverman*, 238 N.W.2d at 335 ("[N]o right exists to alter the natural system of drainage from a dominant estate in such manner as to substantially increase the servient estate burden."). However, it did not appear that this was an ongoing problem. The sump pump is currently located on the northeast corner of the home. George's testimony indicated that the front of the home is graded to the northeast, which is toward the street and not the back yard. Contrary to this, Wertz testified that when he began landscaping the Jensens' property, there were some muddy areas in their yard. He claimed that this was caused by the Lysenkos' sump pump water and the increased watering of their yard in an attempt to grow grass. He then testified that after the Lysenkos stopped watering their lawn as much, the muddy spots dried up.

² Part of Wirtz's testimony is obscured by apparent references to an exhibit 17, which would have been clear visually but was not well verbalized for the written record.

Sands testified there was no pooling of water on the Lysenkos' property before the Jensens' landscaping was completed, Wirtz claimed there was. When asked about the current water flow, he stated: "Before the berm, was coming on the Jensens'; after the berm, it was going down [the Lysenkos]." From the evidence and testimony presented,³ we conclude that the Lysenkos have demonstrated that the Jensens altered the natural flow of water as originally graded and caused pooling of water in the Lysenkos' backyard.

However, we must also balance the equities to determine whether injunctive relief should have been granted in the present case. *Braverman*, 238 N.W.2d at 335. We compare the Lysenkos' harm with the "hardship or loss" to the Jensens from the issuance of an injunction. See *Johnson*, 185 N.W.2d at 797-98 (discussing the comparative injury doctrine). As discussed above, the damage to the Lysenkos' property is an increase in volume and pooling of water in their backyard, causing increased demand on their sump pump and decreased use of their back yard. However, to remedy the situation, the Jensens would only be required to alter their landscaping by removing some fill dirt from their property and eliminating the berm. Additionally, the record did not contain any testimony indicating that if the Jensens were required to regrade and remove the berm, their property would be harmed in any manner. Returning the back yard to the intended grade and allowing proper water drainage is the only effective remedy available to the Lysenkos. Therefore, we conclude that the Lysenkos are entitled to injunctive relief.

³ The record on appeal does not contain most of the exhibits entered into evidence. Moreover, the few photographs that are included are not the original photographs, but are black and white copies.

We reverse the district court's order and remand for entry of an order granting the injunctive relief requested.

REVERSED AND REMANDED.