IN THE COURT OF APPEALS OF IOWA

No. 9-030 / 08-1058
Filed April 8, 2009

JAMES D. TOWNSEND and
TOWNSEND CRANE SERVICE, L.C.,
Plaintiffs-Appellees/Cross-Appellants,

vs.

WILLIAM D. NICKELL and LAVERNA L. NICKELL; NANCY LOU NICKELL a/k/a NANCY LOU SCOTT and RICHARD EUGENE SCOTT; LINDA LEA NICKELL a/k/a LINDA LEA CAPPER a/k/a LINDA LEA WINTERBURN and TIME WINTERBURN; BERNICE C. NICKELL a/k/a BERNICE C. COMMERS; and JAMES NICKELL,
Defendants-Appellants/Cross-Appellees.

Appeal from the Iowa District Court for Washington County, Joel D. Yates, Judge.

Defendant claims that the district court erred in not awarding him attorney fees in an action in which he successfully defended a claim to a parcel of land. Plaintiff cross-appeals, contending that the district court erred in denying his adverse possession and prescriptive easement claims to the property. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Steven Ballard of Leff Law Firm, L.L.P., Iowa City, for appellant.

Richard Bordwell, Washington, for appellee.

Considered by Vogel, P.J., and Vaitheswaran and Eisenhauer, JJ.

VAITHESWARAN, J.

This appeal and cross-appeal arise from a boundary dispute. Bill Nickell, who successfully defended a claim to a parcel of land, contends the district court should have awarded him attorney fees. James Townsend asserts that he is entitled to the disputed property through adverse possession or, in the alternative, that he is entitled to a prescriptive easement to use the property. We affirm in part, reverse in part, and remand. On Nickell's petition for rehearing, we grant his request for rehearing on his claim for appellate attorney fees and substitute this opinion for the opinion filed on March 11, 2009.

I. Background Facts and Proceedings

James Townsend and his wife purchased a piece of real estate. Later, Bill Nickell, who owned adjacent property, agreed to sell a portion of his land to Townsend. Townsend claimed that he and Nickell agreed to have a sheep fence serve as the northern boundary to the property. Nickell claimed that the two agreed to a boundary line that made the parcel "square."

Nickell had the land surveyed, with Townsend declining to be present. That survey described a northern boundary that was consistent with Nickell's understanding. The parcel with this boundary was designated "Parcel A." The disputed land between the sheep fence and the boundary line that Nickell claimed the parties agreed upon came to be known as "Parcel C."

A real estate contract signed by Townsend and Nickell referred only to Parcel A. Townsend received a warranty deed that only made mention of Parcel A.

Townsend installed a septic tank on a portion of Parcel A. He later installed a septic leach field that extended onto Parcel C. He also began storing equipment on the north edge of Parcel C in an attempt to mark the boundary he ascribed to. Nickell moved these items back to Parcel A. Townsend placed heavier equipment there that was not moved.

Two years after the real estate contract was signed, Nickell set posts to mark the Parcel A boundaries and prepared to farm Parcel C. After Nickell's tenant farmer attempted to farm the land, Townsend approached the farmer and told him not to drive over Parcel C because it would destroy his leach field. Nickell told the farmer to farm it anyway, because he owned the land up to the posts. The tenant farmer declined to do so.

Over the years, Townsend offered to pay Nickell for Parcel C. Nickell declined the offer.

Townsend filed a petition to quiet title and an application for injunction, claiming that he was the owner of Parcel C. He subsequently added claims of adverse possession and prescriptive easement. The district court ruled in favor of Nickell on all claims. Nickell sought the payment of attorney fees under a provision in the real estate contract that authorized a successful party to recover attorney fees and costs "[i]n any action or proceeding relating to this contract." The district court denied the request. A second motion was also denied on the ground that "[t]he defendants offered no evidence at trial as to the issue of attorney fees." Nickell appealed and Townsend cross-appealed. We will address the cross-appeal first.

II. Adverse Possession

On cross-appeal, Townsend argues that "the evidence submitted to the district court was sufficient to establish [his] ownership of Parcel C by adverse possession." Our review of this issue is de novo. *Mitchell v. Daniels*, 509 N.W.2d 497, 499 (Iowa Ct. App. 1993).

A party seeking to gain title by adverse possession "must establish hostile, actual, open, exclusive and continuous possession, under claim of right or color of title for at least ten years." *C.H. Moore Trust Estate v. City of Storm Lake*, 423 N.W.2d 13, 15 (Iowa 1988). Proof of each of these elements must be "clear and positive." *Id.* The doctrine of adverse possession is strictly construed because the law presumes possession is under a regular title. *Id.*

Our analysis begins and ends with the exclusivity requirement. "[A] claimant's possession need not be absolutely exclusive; it need only be of a type of possession which would characterize an owner's use." *Huebner v. Kuberski*, 387 N.W.2d 144, 146 (Iowa Ct. App. 1986) (quoting 2 C.J.S. *Adverse Possession* § 54 (1972)). A "mere casual intrusion by others on property occupied by the adverse claimant does not deprive his possession of its exclusive character." *Id.* (quoting 2 C.J.S. *Adverse Possession* § 56 (1972)).

We conclude Townsend's possession of Parcel C was not exclusive. Nickell asked Townsend to move the equipment stored on Parcel C. He also moved Townsend's lighter equipment off Parcel C. He put in posts along the boundary designated in his survey and told his tenant farmer to farm the land. *Cf. Council Bluffs v. Simmons*, 243 N.W.2d 634, 636–37 (Iowa 1976) (noting "defendant registered no protest against plaintiff's use of the land which

defendant now claims"). While Townsend objected to the farming and it never proceeded, we conclude Nickell's actions defeated Townsend's claim that his possession of Parcel C was exclusive.

Because Townsend could not prove that his possession of Parcel C was exclusive, we agree with the district court that he did not prove his claim of adverse possession. We find it unnecessary to address the remaining elements of adverse possession.

III. Prescriptive Easement

Townsend argues in the alternative that the district court should have granted him a prescriptive easement for the septic leach field as well as an easement for the storage of equipment on Parcel C. 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." *Johnson v. Kaster*, 637 N.W.2d 174, 178 (Iowa 2001). The doctrine differs from adverse possession in that "easement by prescription concerns the use of property and adverse possession determines acquisition of title to property by possession." *Id.*

For a claim of prescriptive easement to be successful, the claimant must show more than merely use for a statutory period; claimants "must also show they claimed an easement as of right, and this must be established by evidence distinct from and independent of their use." *Id.* Additionally, the claimant must show that the owners of the land to which the easement is claimed had express notice of the plaintiff's claim of right to use the disputed property. *Id.*

Townsend sought two different prescriptive easements—one to use the septic leach field and the other to store equipment. We will focus only on the leach field because we believe Townsend placed the equipment on Parcel C simply to mark what he believed to be the boundary. There was no evidence distinct from his use of the land that established his claim of an easement for storage of the equipment.

With respect to the septic leach field, we begin with the elements of hostile possession and claim of right. These elements are similar in nature. *Id.* The septic leach field was installed as part of the approved septic system that was purchased in June 1995. Made of perforated pipe, rock, and sand, it extended onto Parcel C. The pipes were hooked together in the ground and covered with layers of the sand and rock. After it was installed, there was a mound of dirt about "a foot or two" above the ground which was, according to Townsend, "very noticeable." There was also a well on Parcel C that was filled up in 1995 to comply with sanitation regulations. Approximately one or two years after the mound was created, Townsend and his wife seeded it. We conclude these actions evinced hostile use of Parcel C with a claim of right. *See Anderson v. Yearous*, 249 N.W.2d 855, 861 (Iowa 1977) (finding that party who built and maintained ditch for fourteen years established adverse use and claim of right to drain water onto defendants' land).

Based on this evidence, we are also persuaded that Townsend's possession was open and notorious. *See id.* Although Townsend and Nickell dispute whether Nickell was aware of the septic leach field, the activity to install

the septic system and the mound of dirt created over the leach field satisfied this requirement.

There is also no question that the leach field was in place continuously for ten years, as it was installed along with the septic tank in 1995 and was still there when Townsend filed his lawsuit twelve years later.

As noted, Townsend also had to prove that Nickell had "express notice" of the prescriptive easement claim. *Johnson*, 637 N.W.2d at 180. This requirement ensures

> the landowner knows another's use of the property is claimed as a right hostile to the landowner's interest in the land. Otherwise, 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). The express notice must 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 (quoting *Collins Trust v. Allamakee County Bd. of Supervisors*, 599 N.W.2d 460, 465 (Iowa 1999)). Based on the facts described above, we conclude there was sufficient evidence of Townsend's claim to Parcel C to place Nickell on inquiry notice of the existence of the easement. Accordingly, we reverse the district court's denial of the claim for a prescriptive easement to use Parcel C for a septic leach field.

IV. Attorney Fees

Nickell contends the district court should have awarded him reasonable attorney fees. Our review of this issue is for errors of law. Iowa R. App. P. 6.4.

The right to recover attorney fees is purely statutory. *Hockenberg Equip. Co. v. Hockenberg's Equip. & Supply Co. of Des Moines, Inc.*, 510 N.W.2d 153, 158 (Iowa 1993) ("A party generally has no claim for attorney fees as damages in the absence of a statutory or written contractual provision allowing such an award."). The pertinent statute here is Iowa Code section 625.22 (2007), which provides in relevant part, "When judgment is recovered upon a written contract containing an agreement to pay an attorney's fee, the court shall allow and tax as a part of the costs a reasonable attorney's fee to be determined by the court."

It is undisputed that the real estate contract signed by Townsend and Nickell authorized the prevailing party in a contract action to receive attorney fees. The key question is whether Nickell's answer to the amended petition contained a specific request for attorney fees. If it did, we must then decide whether Townsend's claims were based on the real estate contract and whether the attorney fees should be apportioned among the contractual claims and the remaining claims.

In *Nelson Cabinets, Inc. v. Peiffer*, 542 N.W.2d 570, 573 (Iowa Ct. App. 1995), this court was asked to resolve an attorney fee issue under Iowa Code section 535.11(8), which authorizes the recovery of "attorney's fees and court costs." The court held that "attorney fees must be specifically pleaded before they may be awarded." *Id.* Here, Nickell did not specifically seek attorney fees; he requested "that the court dismiss plaintiffs' petition at plaintiffs' cost." Despite the absence of a specific attorney fee request, we believe the language Nickell used encompasses a request for attorney fees. We reach this conclusion on the basis of Iowa Code section 625.22. Unlike the code provision at issue in *Nelson*,

section 625.22 states that attorney fees will be taxed as part of the costs rather than as a separate item. Additionally, section 625.22 imposes an obligation on the district court to award reasonable attorney's fees as costs. *See $99 Down Payment, Inc. v. Garard*, 592 N.W.2d 691, 694 (Iowa 1999) (stating that the use of the word "shall" in a statute is mandatory language). While section 535.11(8) also uses the word "shall," the entire phrase simply affords the debtor an opportunity to request attorney fees rather than a right to receive attorney's fees. *See Nelson*, 542 N.W.2d at 573. Finally, a party is not entitled to costs until the termination of the proceedings and Nickell itemized his attorney fee request at that time. *See Bankers Trust Co. v. Woltz*, 326 N.W.2d 274, 278 (Iowa 1982) (stating that the right to costs "accrues at the termination of the proceedings and this right exists solely by virtue of the statute"). For these reasons, we conclude Nickell's failure to specifically mention attorney fees in his answer does not preclude his right to recover fees.

We turn to Townsend's responsive argument that Iowa Code section 625.22, authorizing fees in actions based on written contracts, does not apply because his action was "a boundary and title dispute based on an oral agreement" rather than an action based on the written real estate agreement. Townsend's amended petition and the district court's ruling belie this argument. In his petition, Townsend sought to "reform the written contract and deed to conform to the original [oral] agreement." The district court ruled on this issue, stating "the plaintiff has failed to meet his burden of proof as to his claim for quiet title and reformation of contract." We conclude Townsend's action was at least partially grounded in contract and, accordingly, section 625.22 applies.

Townsend finally argues that "[s]ince the attorney fees incurred by the Nickells do not relate solely to the contractual issues between the parties, Iowa law requires that said fees be apportioned between the contractual issues . . . and the adverse possession and easement by prescription issues." We agree with this argument. As noted, the action was only partially grounded in contract. Therefore, Townsend should not have to pay Nickell's trial attorney fees that were incurred in defending the adverse possession and prescriptive easement claims. We reverse the district court rulings denying Nickell's request for trial attorney fees and remand for a determination of the appropriate amount of attorney fees.

Nickell also seeks appellate attorney fees. Appellate fees are authorized to the extent that they involve claims related to the real estate contract, but are not authorized as they relate to Townsend's claims of adverse possession and prescriptive easement. *See Banker's Trust*, 326 N.W.2d at 278. In this case, Nickell has not challenged the underlying ruling on the reformation of contract but he has challenged the district court's denial of his request for trial attorney fees arising from that contract. As he prevailed on that issue, we conclude he is entitled to appellate attorney fees. We remand "for the limited purpose of an evidentiary hearing on and the fixing of appellate attorney fees." *Id.* at 279. Costs are taxed equally to each party.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.