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STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1416

Gregory K. Kjellberg,
Appellant,

vs.

Franklin Outdoor Advertising Company, Inc.,
Respondent.

Filed August 19, 2008
Affirmed
Hudson, Judge

Sherburne County District Court
File No. C0-05-753

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Considered and decided by Schellhas, Presiding Judge; Shumaker, Judge; and Hudson, Judge.

U N P U B L I S H E D O P I N I O N

HUDSON, Judge

On appeal from the district court's resolution of this boundary dispute, appellant argues that (a) the record does not support a number of the findings of fact regarding

adverse possession and an easement by estoppel; and (b) the district court misapplied the law regarding the creation of an easement. We affirm.

FACTS

Anton and Cecilia Banyai owned certain land on which Anton Banyai ran an automobile shop. West of that parcel of land was a .17 acre parcel (the west parcel), that is the subject of this proceeding. At various times, the Banyais gave leases to respondent Franklin Outdoor Advertising Company (Franklin) allowing Franklin to put billboards on their property and purporting to allow Franklin to put billboards on the west parcel. Franklin was originally run by James Franklin, and later by his son, Keith. In 1986, more than 15 years after Anton Banyai started running his auto shop, James Franklin acquired a quitclaim deed to the west parcel from a local church.

In 1992, Anton Banyai died. In 1996, appellant Gregory Kjellberg bought the Banyai land from Cecilia Banyai and in 2005, he sued Franklin seeking to have Franklin remove from the west parcel what was the fourth billboard Franklin had put on the Banyais' land or the west parcel. After a trial to the court, the district court ruled that Anton and Cecilia Banyai had adversely possessed the west parcel and that Franklin had an easement by estoppel over that adversely possessed land for the billboard. The district court denied Kjellberg's motion for amended findings or a new trial, and he appeals.

D E C I S I O N

I

Kjellberg's notice of appeal states that the appeal is taken from the May 29, 2007 order denying his posttrial motion, but does not mention the underlying judgment. The

only part of the May 29, 2007 order that is appealable is the portion denying the motion for a new trial. *See Mingen v. Mingen*, 679 N.W.2d 724, 726 n.1 (Minn. 2004) (noting that an order denying the motion for amended findings is not appealable). Kjellberg's brief, however, challenges the judgment, not any aspect of the May 29, 2007 order. We may review a ruling affecting the one from which an appeal is taken. Minn. R. Civ. App. P. 103.04. It is undisputed that the judgment affected the May 29, 2007 order. And because Franklin had Kjellberg's brief before filing its own brief, Franklin will not be prejudiced if we extend review to the December 11, 2007 judgment. Therefore, in this case, we will do so. *Cf. Kelly v. Kelly*, 371 N.W.2d 193, 195–96 (Minn. 1985) (stating that notices of appeal are liberally construed in favor of their sufficiency, and are not insufficient due to defects which could not have been misleading).

II

Kjellberg challenges certain findings of fact. On appeal, findings of fact are not set aside unless clearly erroneous. Minn. R. Civ. P. 52.01. In reviewing findings of fact, an appellate court views the record in the light most favorable to the findings, and will not set a finding aside just because it views the evidence differently. *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999). "[F]indings of fact are clearly erroneous only if the reviewing court is left with the definite and firm conviction that a mistake has been made, [and] [i]f there is reasonable evidence to support the district court's findings, [an appellate court] will not disturb them." *Id.* (quotation omitted).

To show adverse possession of land, a party must show "that the property has been used in an actual, open, continuous, exclusive, and hostile manner for 15 years," and the

findings supporting adverse possession must be supported by "clear and convincing evidence." *Rogers*, 603 N.W.2d at 657. The clear-and-convincing-evidence standard is lower than the beyond-a-reasonable-doubt standard, and is satisfied if the truth of the fact to be proven is "highly probable." *Id.* In addressing whether evidence is clear and convincing, "circumstantial evidence is entitled to as much weight as any other evidence[,]" and, "if there is reasonable evidence to support the district court's findings of fact, [appellate courts] will not disturb those findings." *Id.* at 657–58.[1]

Finding C3

Finding C3 states that Anton Banyai used the west parcel "as if it were his property[,]" that he mowed the parcel, used a shed on the parcel, stored cars there, and drove across it often enough to create a driveway. Kjellberg challenges each aspect of this finding, including an assertion that the district court misidentified the location of the shed. As detailed below, we conclude that clear and convincing evidence supports the essential aspects of finding C3 and shows that the Banyais exercised control over the west parcel. Therefore, determining the exact location and use of the shed is not necessary, and we decline to address the parties' disputes on those questions.

[1] *Village of Newport v. Taylor*, 225 Minn. 299, 303, 30 N.W.2d 588, 591 (1948), states that "adverse possession may be established only by clear and positive proof based on a strict construction of the evidence, without resort to any inference or presumption in favor of the disseizor, but with the indulgence of every presumption against him." Our review of whether the record supports the district court's findings regarding adverse possession need not satisfy *Village of Newport* and its progeny. The applicability of that analysis is restricted, and not applicable here. *See Rogers*, 603 N.W.2d at 657 (addressing restriction); *Alstad v. Boyer*, 228 Minn. 307, 311, 37 N.W.2d 372, 375 (1949) (same).

Citing the testimony of Cecilia Banyai that Anton Banyai parked cars on the east, but not the west, side of the shop, Kjellberg argues that the record lacks clear and convincing evidence that Anton Banyai parked cars on the west parcel. We reject this argument. Keith Franklin, Franklin's current principal, testified that when he graduated from high school in 1972 he was a "motor head," that he often visited a friend via a route requiring him to pass Anton Banyai's auto shop, and that (a) he sporadically stopped at Anton Banyai's shop between 1973 and 1979 to view and discuss cars and car parts; (b) during that period, the west parcel was used as "[a] parking lot for old cars, cars being worked on, parts being waited for, stuff like that"; and (c) in 1979, Anton Banyai said that he owed the west parcel. Thus, the record contains substantial evidence that, before the Banayis' 1979 lease of the west parcel to Franklin for its first billboard, Anton Banyai parked cars on the west parcel. We defer to the district court's resolution of the credibility question created by the conflicting testimony on this point. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). Further, an auto shop with cars parked around it in various states of disassembly is circumstantial evidence that the cars parked near the shop are related to the shop. Therefore, *Rogers* allows the inference that the cars parked on the west side of the shop that were described by Keith Franklin were shop-related.

The district court found that Anton Banyai "drove across the [west] parcel with sufficient frequency to create a driveway." Kjellberg argues that exhibit 32, a photograph, shows no driveway. But the photo does show a path of some type, and exhibit 32A, an enlargement of exhibit 32, shows that the path visible on exhibit 32 appears to be wheel ruts on the land, meaning that somebody drove across the grass north

and slightly west of the shop often enough to create those ruts. Further, Keith Franklin testified that, between 1973 and 1979, there was an unpaved dirt driveway between the back of the shop and County Road 11. This testimony is consistent with Keith Franklin's testimony that, in 1979, Anton Banyai said that he owned the land behind his shop. Keith Franklin also testified that he used the driveway in question. We reject Kjellberg's argument that there is no evidence to show the frequency with which the driveway was used; it was used with sufficient frequency to be visible in exhibits 32 and 32A. And because those exhibits show no other destination near the shop, whoever used the driveway must have had Anton Banyai's auto shop as a destination.[2]

Kjellberg argues that Anton Banyai did not cut the grass on the west parcel often enough for the mowing to support adverse possession. We reject this argument for two reasons. First, Anton Banyai told Keith Franklin to put Franklin's first billboard as close to the County Road 11 right-of-way as possible to minimize interference with Anton Banyai's mowing. That Anton Banyai was concerned that the billboard's placement would complicate his mowing suggests that he mowed the west parcel with reasonable frequency. Further, *Stanard v. Urban*, 453 N.W.2d 733, 735 (Minn. App. 1990), *review*

[2] Citing testimony by Keith Franklin, Kjellberg asserts that Keith Franklin, and "presumably" others, drove across the west parcel "for safety reasons" and argues that this shows that Banyais did not exclusively possess the west parcel. The exclusive-possession element of the adverse-possession analysis requires that the disseizor use the land as its owner, not as a member of the public. *Merrick v. Schleuder*, 179 Minn. 228, 232, 228 N.W. 755, 756 (1930). Here, while the testimony Kjellberg cites shows that Keith Franklin drove across the west parcel for safety reasons, it also shows that Keith Franklin drove across the west parcel to gain access to Anton Banyai's auto shop. Thus, the use of the west parcel to access the Banyais' business is consistent with that parcel being owned by the Banyais and used for purposes of their business.

denied (Minn. June 15, 1990), which Kjellberg cites to support his argument, is distinguishable. *Stanard* cites *Romans v. Nadler*, 217 Minn. 174, 180–81, 14 N.W.2d 482, 486 (1944), for the proposition that occasional mowing is insufficient to show adverse possession. 453 N.W.2d at 736. The crux of both *Stanard* and *Romans*, however, is the extent to which mowing along with "additional acts" by the disseizor can satisfy the requirements of adverse possession. *Romans*, 217 Minn. at 180–81, 14 N.W.2d at 486; *Stanard* 453 N.W.2d at 736. In addition to mowing, this record shows that Anton Banyai parked cars on the west parcel, that Anton Banyai or those traveling to or from his auto shop drove across the west parcel, and that Anton Banyai leased and granted easements over the west parcel. In *Stanard*, "the only 'additional acts' were the storing of lake equipment in the winter and the playing of children on the property." 453 N.W.2d at 736.

Noting that caselaw allows adverse possession of only the land actually possessed by the disseizor, Kjellberg argues that the award of adverse possession of the entire west parcel to Banyais is unsupported because the evidence shows that only part of the west parcel was actually used by Banyais. This record creates doubts about the accuracy of this assertion. But even if the assertion is accurate, Kjellberg's argument is entitled to limited weight. Consistent with Keith Franklin's testimony, the district court found that Franklin's first billboard, installed in 1979 by Keith Franklin, was "placed . . . on the westerly edge of the Westerly Parcel," west of the current billboard and associated easement. Further, other prior Franklin billboards were east of the current billboard. Thus, even if Banyais did not adversely possess the *entire* west parcel, the portion of that

parcel where Franklin's current billboard and easement are located is land over which Banyais *did* exercise control, and Kjellberg's argument would not require reversal.

Finding C7

Finding C7 states that a church that quitclaimed any interest it had in the west parcel to Keith Franklin's parents "reported that they completed the land sale with [Keith Franklin's parents]." Noting that there is a 1988 entry in the church's records indicating that "no deed had been obtained for the sale" and that the matter would be investigated by the church, Kjellberg challenges this finding, arguing that it incorrectly "implies" that, in 1986, Keith Franklin's father, then the principal of Franklin, gained an interest in the west parcel. Because this finding does not go to Banyais' adverse possession of the west parcel, it need not be supported by clear and convincing evidence to be affirmed.

The entry in the church records that Kjellberg cites to support his argument states: "[Franklin] has not been able to get a deed on the land purchased from the church. Since sale is in the abstract, there should be no problem. It was agreed to look into it further." This entry shows that (a) the sale is in the abstract for the property; (b) the church concedes that it conveyed whatever interest it may have had; and (c) the church did not expect a problem in correcting a technical defect in memorializing the transfer. We decline to use this entry in the church records to rule that the district court clearly erred in finding that the church conveyed whatever interest it had in the west parcel.

Findings C16 & C17

Findings C16 and C17 state that the Banyais and Franklin agreed that Franklin would get an easement over the west parcel for its current billboard, and that they jointly

retained an attorney to draft the appropriate documents, but that "[t]he agreement was never fully signed because Anton Banyai passed away." Kjellberg challenges these findings, arguing that letters in the file show a "bitter dispute" between Franklin and Banyai about the billboard and easement. These findings do not go to adverse possession and need not be supported by clear-and-convincing evidence to be affirmed.

Because the letters and trial testimony both mention an agreement between Franklin and Banyai, the record supports the finding of an agreement. On this record, especially given the evidence that Anton Banyai, in the presence of a Franklin employee, personally approved the proposed location that Franklin staked out for what is the location of its current (fourth) billboard, we cannot conclude that the district court clearly erred by refusing to rule that the letters precluded the existence of a Franklin-Banyai agreement regarding the billboard and easement.

III

Kjellberg argues that the adverse-possession determination is defective because the Banyais did not pay real-estate taxes for at least five years on the west parcel. The district court did not address taxes in its order, and Kjellberg did not raise that omission in his new-trial motion. Therefore, the question is not properly before this court and we do not address it. *Peters v. Bodin*, 242 Minn. 489, 492, 65 N.W.2d 917, 919 (1954) (holding that an alleged error that is not made the basis for a motion for a new trial cannot be considered on appeal).

IV

The district court ruled that Franklin had an easement by equitable estoppel over the adversely-possessed west parcel. Kjellberg argues that this ruling is defective because it is unsupported by a finding that Franklin, in constructing its current sign, reasonably relied on its purported agreement with the Banyais. *See McNattin v. McNattin*, 450 N.W.2d 169, 172 (Minn. App. 1990) (noting that the essential elements of equitable estoppel are reasonable reliance resulting in harm). He also argues that equitable estoppel cannot be invoked against him because, when he bought the land, he lacked notice of facts that would reasonably suggest an easement on the west parcel.

"The application of equitable estoppel ordinarily presents a question of fact unless only one inference can be drawn from the facts." *Drake v. Reile's Transfer & Delivery, Inc.*, 613 N.W.2d 428, 434 (Minn. App. 2000). Findings of fact are reviewed for clear error. Minn. R. Civ. P. 52.01.

Reasonable Reliance

There is no explicit finding that Franklin reasonably relied on its agreement with Banyai, but by the time of Franklin's 1992 construction of its current billboard, (a) Franklin had been dealing with Banyai for business purposes since 1979; (b) Keith Franklin had been periodically stopping at the auto shop for personal or business purposes since 1973; (c) the parties had reached an agreement regarding the location of this billboard and an easement, which had been staked out by Franklin; and (d) that staked location was accepted by Anton Banyai in the presence of a Franklin employee. The long prior relationship and the agreement of Anton Banyai to the placement of the

billboard suggests that Franklin's August 1992 construction of the billboard without a written agreement was reasonable, especially in light of the fact that, at the time, Anton Banyai was in the later stages of a terminal illness. Indeed, after the billboard was constructed, Franklin and the Banyais jointly retained counsel to draft the documents necessary to memorialize their agreement and Cecilia Banyai apparently signed that agreement.

Kjellberg also argues that there could not be an easement by estoppel because there was no evidence of consideration for the Banyais' grant of the billboard easement on the west parcel. Even if Kjellberg is correct, consideration is not an element of equitable estoppel. *See, e.g.*, *Brekke v. THM Biomedical, Inc.*, 683 N.W.2d 771, 777 (Minn. 2004) (reciting elements of equitable estoppel). Therefore, a lack of consideration would not be fatal to invoking equitable estoppel.

Notice

The district court ruled that, under *Levine v. Twin City Red Barn No. 2, Inc.*, 296 Minn. 260, 264, 207 N.W.2d 739, 742 (1973), because Kjellberg bought the property knowing of the sign and the easement, he is estopped from rejecting those encumbrances on his land. Kjellberg asserts that this cannot be the case because he "bought the property knowing that two title opinions referenced the same sign easement on the [east parcel]" and that he did not know of an unrecorded, but recordable, written easement for the west parcel. The basis for Kjellberg's assertions are that there was no easement recorded on the west parcel and that Cecilia Banyai told him that the current billboard is in the wrong place and there was no written easement for its current location. *Levine*

makes clear that "[i]t has long been recognized in Minnesota that a person who purchases land with knowledge or with actual, constructive, or implied notice that it is burdened with an easement in favor of other property ordinarily takes the estate subject to the easement." 296 Minn. at 264, 207 N.W.2d at 742. Here, Kjellberg was aware of the billboard when he bought the property. Also, before he closed the sale, he was presented with title opinions for the east and west parcels, each showing the existence of an easement, and he was also presented with a survey showing the existence and location of the billboard and an easement on the west parcel. Thus, Cecilia Banyai's statements were inconsistent with a title opinion, a survey, and the presence of the billboard. Kjellberg does not explain why these facts are insufficient to create at least constructive or implied notice that permission for the billboard's placement might exist.

Finally, Kjellberg supports his argument that he lacked adequate notice of the easement by citing purportedly confusing language on "[t]he survey." But "[t]he survey" to which Kjellberg refers is a December 2001 survey, and it did not exist when he bought the property in 1996. Further the December 2001 survey noted that the document creating the easement shown on the west parcel "MAY NOT BE RECORDED AS OF 2-21-05." Thus, even if the December 2001 survey is considered, it would seem to suggest the existence of an unrecorded easement, giving Kjellberg at least implied or constructive notice of the possibility of the document he seems to assume did not exist.

Affirmed.