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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 19-563

Filed: 4 February 2020

Mecklenburg County, No. 17 CVS 23389

B.V. BELK, JR., Plaintiff,

v.

VRS MAGNOLIA PLAZA, LLC, Defendant.

Appeal by plaintiff from judgment entered 31 December 2018 by Judge Karen Eady-Williams in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 January 2020.

*James W. Surane and Leslie Rawls, for Plaintiff-Appellant.*

*Martineau King, PLLC, and Wong Fleming, by L. Kristin King and Daniel C. Fleming, for Defendant-Appellee.*

YOUNG, Judge.

This appeal arises out of Defendant's use of a water drainage system, which caused runoff onto Plaintiff's property. The trial court correctly determined that Defendant is entitled to an easement implied by prior use in the pond, and the trial court did not err in granting summary judgment in favor of Defendant. Therefore, we affirm.

I. Factual and Procedural History

In December 1986, B. V. Belk (“Plaintiff”) acquired 107 acres of undeveloped property located in Mecklenburg County (“the property”). Conbraco Industries, Inc. (“Conbraco”) was a grantee in this purchase, but Plaintiff always managed the property. In May 1987, Plaintiff and Conbraco conveyed the property to Magnolia Estates, a joint venture composed of Plaintiff and Conbraco. Plaintiff was the managing member and controlling partner of the joint venture.

In 1987, Plaintiff subdivided the property, constructed a roadway and began building residential homes. The subdivision created two adjacent parcels separated by the road. The northern parcel (“Magnolia Parcel”) is now owned by VRS Magnolia Plaza, LCC (“Defendant”), and the southern parcel (“Belk Parcel”) is now owned by Plaintiff. In December 1987, Plaintiff dedicated the road to the town, and it was accepted as a public road.

In 1988, the town and the county approved Plaintiff’s construction plans to develop a shopping center called “Magnolia Plaza” on the Magnolia Parcel. In accordance with Plaintiff’s plans, commercial structures and underground stormwater drainage systems were built on the Magnolia Parcel. This included a drainage pond (“the pond”), constructed on the Belk Parcel, designed to address water runoff from land north and south of the road. Plaintiff had a pipe constructed

underneath the road to carry the water that drained from Magnolia Parcel to the pond.

In 2012, HEPMAG, LLC (“HEPMAG”) purchased Magnolia Parcel from Plaintiff. HEPMAG acted with due diligence by completing surveying and mapping of the property. There did not appear to be any “existing or identified easements or reservations of ownership in the right-of-way, or any of the stormwater piping,” nor “any record of a private ownership interest in the storm water system underneath [the road] into which the surface stormwater from the Magnolia [Parcel] drains.” The plans were approved by the town and county. The redevelopment did not impact the existing stormwater system outfall which received runoff from the Magnolia Parcel, rather it “maintained the same inlets and the same pipes receiving the stormwater as it had existed in the original development[.]” It is undisputed that the surface water from Magnolia Parcel continued to drain to the underground drainage system and into the public right-of-way in the same manner it did during Plaintiff’s ownership of the property.

In August 2015, Defendant acquired Magnolia Parcel from HEPMAG. Defendant did not design or construct any improvements on Magnolia Parcel, did not make any changes to the existing shopping center or parking lot areas, nor did he alter the surface water management systems.

*Opinion of the Court*

On 22 December 2017, Plaintiff filed a complaint against Defendant for trespass, nuisance, and negligence, based on water runoff onto Plaintiff's property from Defendant's shopping center. Plaintiff sought injunctive and compensatory relief. Both parties moved for summary judgment. The trial court granted Defendant's motion for summary judgment and ordered easement by prior use. Plaintiff's motion for summary judgment was denied, and Plaintiff filed timely written notice of appeal.

II. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.'" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576(2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)).

III. Implied Easement

Plaintiff contends that the trial court erred by declaring an implied easement by prior use in favor of Defendant. We disagree.

To establish an easement implied by prior use, plaintiffs must prove that: (1) there was a common ownership of the dominant and servient parcels of land and a subsequent transfer separated that ownership; (2) before the transfer, the owner used part of the tract for the benefit of the other part, and that this use was apparent, continuous and permanent; and (3) the claimed easement is necessary to the use and enjoyment of plaintiffs' land.

*Metts v. Turner*, 149 N.C. App. 844, 849, 561 S.E.2d 345, 348 (2002).

The Belk Parcel and Magnolia Parcel were under Plaintiff's common ownership since his purchase of the property in 1986 until he conveyed the Magnolia Parcel to HEPMAG in 2013. Plaintiff testified that from the purchase of the Property in 1986 until the sale of the Magnolia Parcel to HEPMAG, he had "always been in charge" of managing and developing the property, and has been in control of the property "since [he and Conbraco] bought it." Although Plaintiff, Conbraco, Magnolia Estates, Plaintiff's wife, and BVB-NC were record owners of the Belk Parcel, Magnolia Parcel, or both parcels at different times during this twenty-seven-year period, both parcels always remained under Plaintiff's complete management and control. Contrary to Plaintiff's argument on appeal, "common ownership" does not strictly mean that different parcels were owned by the same exact individuals or entities at the same exact time. *See* Restatement (Third) of Property: Servitudes § 2.12 cmt. c (2000) ("If the prior use is made while two or more parcels have some, but not all, owners in common, implication of a servitude depends on the circumstances.") Therefore, there was a common ownership of the dominant and servient parcels of land and a subsequent transfer separated that ownership.

Before the transfer, Plaintiff used the Magnolia Parcel for the benefit of the Belk Parcel, and that use was apparent, continuous, and permanent. Plaintiff constructed the pond on the Belk Parcel in 1988 to drain the surface water from the

Magnolia Parcel. The drainage on the property is still used in the same manner today. This use was apparent because it was Plaintiff who had the pond constructed for the purpose of draining the surface water. The use was continuous because the pond has been in use for twenty-five years, and the use was permanent because it was specifically designed to address water runoff from the Magnolia Property. Plaintiff testified that when he originally built the shopping center, it required the use of the pond, this was a part of Plaintiff's planned development, and he contemplated that all the subdivided parcels would use the pond for storm water drainage.

Lastly, the easement is necessary for the use and enjoyment of the land. The easement "is necessary if it is reasonably necessary to the full and fair use of the property." *McGee v. McGee*, 32 N.C. App. 726, 728, 233 S.E.2d 675, 676 (1977). Defendant's expert engineer stated in an affidavit that the pond is a "critical infrastructure component of the stormwater system for Magnolia Plaza and has been for thirty (30) years," and "[i]f the pond was not in place . . . , there would be a much higher risk of flooding of the residences adjacent to the creek channel downstream." In addition, it would be unreasonable to require Defendant to reconstruct a new drainage system where the current system is fully functional and has existed for nearly three decades.

The evidence shows the pond was under common ownership from 1986 to 2013;

*Opinion of the Court*

Plaintiff began utilizing the pond for the benefit of the Magnolia Parcel in 1988, intended for this use to be permanent, and continued to use the pond in the same manner until he sold the property to HEPMAG; and the continued use of the pond by Defendant is reasonably necessary. Therefore, the trial court correctly determined that Defendant is entitled to an easement implied by prior use in the pond.

IV. Summary Judgment

Plaintiff contends that the trial court erred in granting Defendant's motion for summary judgment. We disagree.

There are no genuine issues of material fact that precludes summary judgment in favor of Defendant. Plaintiff has made no viable claim against Defendant, because Plaintiff has not shown that he owns the property at issue. The water drains directly into the public system via the pipe, and the pipe belongs to the town. Since there is no evidence that Plaintiff has any ownership in the pipe, there are no genuine issues of material fact. Accordingly, the trial court did not err in granting summary judgment in favor of Defendant.

AFFIRMED.

Judges MCGEE and DIETZ concur.

Report per Rule 30(e).