IN THE SUPREME COURT OF THE STATE OF NEVADA

FRED KELSEY,
Appellant,
vs.
ROBERT WATSON,
Respondent.

No. 49220

FILED

AUG 07 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from a district court judgment in a real property easement case. Third Judicial District Court, Churchill County; Robert E. Estes, Judge.

In the district court, the parties disputed appellant Fred Kelsey's right to access his property by crossing over the neighboring property of respondent Robert Watson and his wife, Denise Watson. The district court entered a written order on March 2, 2007, granting Watson's motion to dismiss Kelsey's complaint for failure to state a claim, but recognizing that a U.S. government easement existed along the boundary line between the parties' properties. The district court ordered "that neither party shall, in any manner, encroach upon or obstruct the thirty feet right of way reserved to the United State Government, except by placement of gates." Kelsey appeals.

In his proper person appeal statement, Kelsey asserts that the court's order allowing for the placement of gates contradicts its oral ruling at the hearing, which prohibited building a fence on the right of way, and he seeks "clarification" of the order.

When, as in this case, the district court considers materials outside of the pleadings in reviewing a motion to dismiss, the motion is treated as one for summary judgment.[1] Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law.[2] Once the movant has properly supported the summary judgment motion, the non-moving party may not rest upon general allegations and conclusions and must instead set forth, by affidavit or otherwise, specific facts demonstrating the existence of a genuine issue of material fact for trial to avoid summary judgment.[3] This court reviews an order granting summary judgment de novo.[4]

The parties do not dispute that the U.S. government owns a thirty-foot easement along each side of the section line that separates their properties. What they dispute is whether Kelsey obtained a prescriptive easement to use the portion of the U.S. government's easement that is located on the Watsons' property.

To establish a prescriptive easement, the claimant must show adverse, continuous, open, and peaceable use for a five-year period;

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[1]Schneider v. Continental Assurance Co., 110 Nev. 1270, 1271, 885 P.2d 572, 573 (1994) (citing Thompson v. City of North Las Vegas, 108 Nev. 435, 438, 833 P.2d 1132, 1134 (1992)).

[2]Wood v. Safeway, Inc., 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005).

[3]Id. at 731, 121 P.3d at 1030-31; NRCP 56(e).

[4]Wood, 121 Nev. at 729, 121 P.3d at 1029.

exclusivity of use generally is not required.[5] The burden of proving a prescriptive easement rests upon the claimant,[6] who must demonstrate the prescriptive easement's existence by clear and convincing evidence.[7]

Permission to use another's property negates adverse use and "[a] permissive use cannot ripen into an adverse use absent specific notice to the owner of the servient estate that such use is henceforth adverse for purposes of creating a prescriptive easement."[8] The adverse use must be one that "has been claimed as a right, and has not been regarded by the

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[5]Jordan, 113 Nev. at 1044, 944 P.2d at 832 (citing Stix v. La Rue, 78 Nev. 9, 11, 368 P.2d 167, 168 (1962) (explaining that the claimant's exclusive use is not necessary to establish a prescriptive easement, but it may be a relevant factor in evaluating adverse use)); Howard v. Wright, 38 Nev. 25, 143 Pac. 1184 (1914) (noting that easement was not used exclusively by claimant and that the prior owner allowed neighbors to cross his land as a neighborly accommodation); but see Anderson, 96 Nev. at 539-40, 612 P.2d at 218 (stating that for use to be adverse, it must be exclusive and a claimant's private right to use an easement must rest on actual use by the claimant and his predecessors, and not merely on their use as members of the general public).

[6]Anderson v. Felten, 96 Nev. 537, 540, 612 P.2d 216, 218 (1980) (citing Mid-County Cemetery District v. Thomason, 518 P.2d 172, 176 (Or. 1974)).

[7]Jordan v. Bailey, 113 Nev. 1038, 1044, 944 P.2d 828, 832 (1997) (citing Wilfon v. Hampel 1985 Trust, 105 Nev. 607, 608, 781 P.2d 769, 770 (1989)).

[8]Jordan, 113 Nev. at 1046, 944 P.2d at 833 (citing Green v. Stansfield, 886 P.2d 117, 120-21 (Utah Ct. App. 1994)); see Jones v. Bank of Nevada, 96 Nev. 661, 615 P.2d 242 (1980) (concluding that substantial evidence supported the district court's finding that the appellants' use of property was with the permission of the landowner, so no prescriptive easement was created).

parties merely as a privilege revocable at the pleasure of the [servient estate's] owner."[9] While an adverse use may be inferred when a claimant establishes a roadway on another's property,[10] a rebuttable presumption of permissive use arises when a neighbor uses a roadway already established or maintained by the servient estate owner for his own use and the neighbor's use does not interfere with the servient estate owner's use.[11] This permissive use presumption is not rebutted merely by a neighbor's long-time use, maintenance, and improvement of a portion of the servient estate, at least when he has alternative access to the dominant estate.[12] Further, "[c]ourts are reluctant to find prescriptive easements over open and unclosed land since such use tends to be permissive in nature and

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[9]Howard, 38 Nev. 25, 34, 143 Pac. 1184, 1188 (quoting Dexter v. Tree, 6 N.E. 506 (Ill. 1886).

[10]Jordan, 113 Nev. at 1046, 944 P.2d at 833; Chollar-Potosi M. Co. v. Kennedy, 3 Nev. 328, 340 (1867).

[11]Hicks, 95 Nev. at 829, 604 P.2d at 106 (quoting Turrillas v. Quilici, 72 Nev. 289, 291-92, 303 P.2d 1002, 1003 (1956)); Howard, 38 Nev. 25, 143 Pac. 1184.

[12]Hicks, 95 Nev. at 829, 604 P.2d at 106; see Wilfon, 105 Nev. 607, 781 P.2d 769 (1989) (concluding that no prescriptive easement was created when the owner had expressed a general intention to be neighborly and to allow others to enter upon his property until he moved onto it and withdrew permission to cross his land).

does not imply a hostile or adverse use."[13] Whether use is permissive or adverse is a question of fact.[14]

Here, the record contains maps showing various unrelated easements, but Kelsey provided no evidence that, when viewed in the light most favorable to his claims,[15] demonstrated the existence of any factual dispute concerning the U.S. government's easement, or his right to use, or his adverse use of, the easement.[16] At the hearing on Watson's motion to dismiss, Kelsey appeared to argue that he also had the prescriptive right to use a different easement over the Watsons' property—one for accessing his property over the east side of an irrigation canal. Kelsey, however, provided no evidence indicating any adverse use of the alternative easement. Thus, Kelsey failed to set forth specific facts demonstrating the

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[13]Wilfon, 105 Nev. at 609, 781 P.2d at 770; Anderson, 96 Nev. at 540, 612 P.2d at 216, 218.

[14]Groso v. Lyon County, 100 Nev. 522, 523, 688 P.2d 302, 303 (1984); Hicks, 95 Nev. at 829, 604 P.2d at 106.

[15]Wood, 121 Nev. at 731, 121 P.3d at 1031.

[16]The record contains a deed of easement dated December 3, 1986, which concerns an easement over property not pertinent to this case.

Additionally, while Kelsey provided the district court with some photographs, a third party's affidavit and a deed concerning the government's easement, he did not do so until after the district court's order was entered, and thus, they were not part of the evidence considered by the district court. Carson Ready Mix v. First Nat'l Bk., 97 Nev. 474, 476, 635 P.2d 276, 277 (1981) (stating that this court's review is properly confined to the record on appeal and it is appellant's responsibility to make an adequate appellate record).

existence of a genuine issue of material fact as to his adverse use, an essential element of a prescriptive easement.

To the extent that Kelsey attempted to establish an easement by necessity, he would have had to demonstrate prior common ownership and reasonable necessity at the time when the property was divided.[17] Here, nothing in the record shows that the Kelsey and Watson properties were commonly owned at one time. Additionally, such an easement "ought not to be implied merely as a matter of convenience, especially when an acceptable and practical route constituting a lesser burden on the servient estate is available."[18] While it might be more convenient for Kelsey to cross over the Watsons' land, the evidence suggests that Kelsey is able to access his property by another "acceptable and practical" route.[19] Although Kelsey objected to the expense of building his own bridge across the ditch to access a portion of his property, the testimony, photographs and maps in the record clearly show that Kelsey could access his property from Lucas Road. Finally, Kelsey's future desire to subdivide his property does not create an easement.[20]

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[17]Jackson v. Nash, 109 Nev. 1202, 1211, 866 P.2d 262, 268 (1993).

[18]Id. at 1212, 866 P.2d at 269 (quoting Smo v. Black, 761 P.2d 1339 (Or. Ct. App. 1988)).

[19]Id.

[20]See Breliant v. Preferred Equities Corp., 112 Nev. 663, 673, 918 P.2d 314, 320 (1996) (concluding that the potential future need for more parking did not create a necessity for unneeded parking at the time when the property was severed).

In the absence of any evidence in the record demonstrating that a genuine issue of material fact exists as to whether a prescriptive easement was created in Kelsey's favor, and in light of evidence showing that Kelsey had an alternate access route to his property thus negating any easement by necessity claim that Kelsey may have asserted, the district court properly granted summary judgment.

We have considered all of Kelsey's additional arguments on appeal, including that the district court's order is inconsistent with its oral ruling, and we determine that they are without merit.[21] Accordingly, we affirm the district court's summary judgment.

It is so ORDERED.[22]

_____, J.
Gibbons

_____, J.
Douglas

_____, J.
Cherry

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[21]Rust v. Clark Cty. School District, 103 Nev. 686, 689, 747 P.2d 1380, 1382 (1987) (recognizing that an oral pronouncement of judgment is not valid for any purpose and only a written judgment has any effect).

[22]We grant John R. S. McCormick's motion to withdraw as counsel for Watson. NRAP 46(d); SCR 46.

We deny as moot Kelsey's request for injunctive relief pending appeal, provisionally received in this court on May 7, 2007.

cc: Hon. Robert E. Estes, District Judge
Fred Kelsey
Mackedon, McCormick & King
Robert Watson
Churchill County Clerk