IN THE COURT OF APPEALS OF IOWA

No. 2-811 / 12-0497
Filed January 9, 2013

HANDEE, INC., an Iowa Corporation,
Plaintiff-Appellant,

vs.

CITY OF DUBUQUE,
Defendant-Appellee.

Appeal from the Iowa District Court for Dubuque County, Lawrence H. Fautsch, Judge.

A property owner appeals from the district court's denial of injunctive and declaratory relief. **AFFIRMED.**

Chadwyn D. Cox of Reynolds & Kenline, L.L.P., Dubuque, for appellant.

Les V. Reddick of Kane, Norby & Reddick, P.C., Dubuque, for appellee.

Considered by Eisenhauer, C.J., and Doyle and Tabor, JJ.

EISENHAUER, C.J.

Handee, Inc.[1] appeals from the district court's dismissal of its petition for injunction or, alternatively, for declaratory judgment, claiming the court erred (1) in finding Handee failed to demonstrate irreparable injury, (2) in not finding the City of Dubuque (City) violated Handee's rights under Iowa drainage law, and (3) in not granting declaratory relief. We affirm.

I. Background

Handee purchased property on the west side of Southern Avenue in Dubuque in 1997. A thirty-foot-by-eighty-foot commercial building, built in the 1960s, sits on the property parallel to the street. A fenced yard is behind the building. The property slopes toward the west. The western portion of the lot, where fill has not been added, is wooded and slopes steeply down. The property was annexed by the City in the 1970s. In May 2011, in preparation for resurfacing Southern Avenue, the City ordered replacement of a deteriorated, three-foot metal storm water culvert running under the street. At the point in front of Handee's building where the City's right-of-way for the road ended, the workmen found the culvert continued toward Handee's building, but they could see only a few feet into the culvert. It also appeared to be deteriorated. The workmen reconnected the new City culvert to the existing culvert on Handee's property.

Water drains from a hillside across Southern Avenue from the Handee property into the culvert under Southern Avenue. In late July 2011 the City received about eleven inches of rain in less than two days. A two-foot diameter

[1] The corporation is owned by Henry Koester Jr. and Dee Koester.

circular area of the asphalt in Handee's parking lot over the junction of the new and old culverts collapsed. A depression appeared in the yard behind Handee's building near the rear fence line. Portions of the fence and the landscaping in front of the fence shifted and slipped slightly down the steep slope at the rear of the property. In September Handee filed a petition for injunction or, alternatively, for declaratory judgment. The petition sought an order enjoining the City "from directing its drainage culvert onto, under, and across" Handee's property and requiring the City to take all necessary steps to redirect the drainage water at the City's expense. Alternatively, the petition sought a declaration of its right to "block and close the stormwater drainage culvert at issue" permanently.

The matter was tried in February 2012. Concerning the request for an injunction, the court noted no experts testified on the present or future integrity of the building. "The only testimony to support an 'irreparable injury' is Mr. Koester's testimony that the drainage under his building is 'undermining the building.'" The court determined the damage caused by the heavy rain storm was not "irreparable" and Handee had not established "irreparable injury" if the injunction were not granted. *See Wood Bros. Thresher Co. v. Eicher*, 1 N.W.2d 655, 659 (1942) (limiting injunctive relief to cases "where the probabilities reasonably and fairly establish that the petitioner will suffer an irreparable injury if the relief is not granted").

Concerning the request for declaratory judgment, Koester, when asked what would happen if he blocked the culvert, testified, "I imagine there would be a big mess." The court denied the request after concluding granting a declaratory judgment affirming Handee's "right to permanently block and close

the storm water drainage culvert would not 'terminate the uncertainty or controversy giving rise to (these) proceedings.'" *See* Iowa R. Civ. P. 1.1105.

II. Scope and Standards of Review

We review equitable actions de novo. Iowa R. App. P. 6.907; *City of Okoboji v. Okoboji Barz, Inc.*, 717 N.W.2d 310, 313 (Iowa 2006). We give weight to the district court's findings, especially concerning the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.904(3)(g); *Opat v. Ludeking*, 666 N.W.2d 597, 604 (Iowa 2003).

"To obtain an injunction in Iowa, a plaintiff has the burden of proving a legal remedy is inadequate and an injunction is necessary to prevent irreparable injury to the plaintiff." *Fettkether v. City of Readlyn*, 595 N.W.2d 807, 811 (Iowa Ct. App. 1999). The burden of proof is "measured by the test of preponderance of the evidence." Iowa R. App. P. 6.904(3)(f). "The burden of proof in a declaratory judgment action is the same as in an ordinary action at law or equity." *Owens v. Brownlie*, 610 N.W.2d 860, 866 (Iowa 2000) (concluding the burden of proof was by a preponderance of the evidence).

III. Merits

A. Injunction. Handee contends the court erred in denying injunctive relief based on a failure to demonstrate irreparable injury. "Permanent injunctive relief is an extraordinary remedy that is granted only when there is no other way to avoid irreparable harm to the plaintiff." *Lewis Invs., Inc. v. City of Iowa City*, 703 N.W.2d 180, 185 (Iowa 2005). A district court may issue an injunction "when necessary to prevent irreparable injury and when the plaintiff has no adequate remedy at law." *Opat*, 666 N.W.2d at 603.

Handee presented photographic evidence of the circular hole in the paved parking lot in front of the building, a sunken area in the grass near the back fence, and displacement of the fence and the landscaping along the fence. These appeared after the eleven-inch rainfall. Handee had owned the building for about fourteen years at the time. There was no evidence of previous or subsequent damage. As noted above, Koester, owner of Handee, testified he thought it was important to stop the drainage under the building because "it's undermining the building. [E]very time it rains, whatever, there's going to be more erosion, and pretty soon, the building is going to cave in." Other than his bare opinion, there is no evidence the drainage is undermining the building or the building is going to cave in. There is no evidence the culvert actually was located under the building or of any investigation to determine whether the building was sound or whether there was any erosion under the building. We agree with the district court Handee failed to meet its burden to demonstrate irreparable injury. Therefore, the court did not err in refusing to issue a permanent injunction.

B. Iowa Drainage Law. Handee contends "the city has no right to focus and discharge unnatural accumulations of storm water across [its] property in a manner that is harmful to that property." The district court did not address this issue, and Handee did not file a motion to amend or enlarge under Iowa Rule of Civil Procedure 1.904(2) to seek a ruling from the court. "When a district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal." *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002); *see also Johnson v. Kaster*, 637 N.W.2d 174, 182 (Iowa 2001). We do not address this claim.

C. Declaratory Judgment. Handee contends it is entitled to a declaratory ruling it is within its rights to close the culvert at the property line. A "declaratory judgment" is an action in which a court declares rights, duties, status, or other legal relationships of parties. *See Fox v. Polk Cnty. Bd. of Sup'rs.*, 569 N.W.2d 503, 507 (Iowa 1997); *see also* Iowa R. Civ. P. 1.1101. "The court may refuse to render a declaratory judgment or decree where it would not, if rendered, terminate the uncertainty or controversy giving rise to the proceeding." Iowa R. Civ. P. 1.1105.

The court found, "It appears that at one point in time prior to construction of the building at 1655 Southern Avenue, a prior owner or developer of 1655 Southern Avenue connected to the culvert under Southern Avenue." Handee contends property records do not show the existence of any easement for the culvert on his property, so the court should declare its right to close or block the culvert at the property line. Koester was asked, "If a metal gate was put on your side of Southern so as to block the culvert and there was a rain storm, where would the water go, do you know?" He answered, "I would imagine there would be a big mess." The court found no evidence to contradict that answer and concluded, "therefore, to grant a declaratory judgment affirming Plaintiff's right to permanently block and close the storm water drainage culvert would not 'terminate the uncertainty or controversy giving rise to [these] proceedings.'" *See* Iowa R. Civ. P. 1.1105.

Deron Muehring, an engineer with the City also opined what might happen if the culvert were shut off:

> I did visit the site in the last thirty days, just to see what would happen, and it appears that the water would probably start running down the east side of the road, towards the north, but eventually, it would sheet across the road, before it gets all the way down to the low spot on Southern.
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> Q. Would that be acceptable drainage to the City of Dubuque engineering department? A. We would not want to have water sheeting across the roadway like that, for safety reasons.

We agree with the district court's conclusion the uncertainty or controversy giving rise to this proceeding would not be terminated by a declaration of Handee's right to block the storm water drainage culvert. We find no abuse of discretion in the court's refusal to issue a declaratory judgment on the evidence before it. Accordingly, we affirm.

AFFIRMED.