IN THE COURT OF APPEALS OF IOWA

No. 9-394 / 08-1797
Filed June 17, 2009

RONALD D. ALLEN and NADEAN A. ALLEN,
Plaintiffs-Appellants,

vs.

CITY OF PANORA,
Defendant-Appellee.

Appeal from the Iowa District Court for Guthrie County, Peter A. Keller, Judge.

Plaintiffs-appellants Ronald and Nadean Allen appeal the court's ruling refusing to issue a writ of mandamus ordering the defendant-appellee city to remove an alleged nuisance from a public alley. **AFIRMED.**

Frank Murray Smith & Tyler Murray Smith of Frank Smith Law Office, Des Moines, for appellants.

Matthew J. Hemphill and Randy V. Hefner of Hefner & Bergkamp, P.C., Adel, for appellee.

Considered by Sackett, C.J., and Vogel and Miller, JJ.

SACKETT, C.J.

Plaintiffs-appellants, Ronald and Nadean Allen, sued defendant-appellee, the City of Panora, contending, among other things, that the City should order a decorative fence, electrical access box, telephone pedestal, and cable television pedestal located in an alley adjacent to plaintiffs' property, moved. The district court denied their claim. We affirm.

I. SCOPE OF REVIEW. We must first determine our scope of review. The Allens say it is de novo citing Iowa Code section 661.3 (2005). This section provides that a mandamus action is an equitable action. Iowa Code § 661.3. Yet plaintiffs' statement of their sole issue on appeal is: "The district court erred when it found the encroachments at issue were not a nuisance *per se* under Iowa Code § 657.2(5)."

The City contends our review is at law, noting correctly that this was filed as an action at law and the Allens sought, in addition to mandamus and other things, damages for nuisance and civil rights violations.

Iowa Code chapter 661 addresses mandamus and provides mandamus actions should be tried as equitable actions. Iowa Code section 661.3 provides all mandamus actions "shall be tried as equitable actions." Review of a mandamus action is generally de novo. *Fitzgarrald v. City of Iowa City*, 492 N.W.2d 659, 663 (Iowa 1992); *Bellon v. Monroe County*, 577 N.W.2d 877, 878-79 (Iowa Ct. App. 1998).

The Allens' appellate brief makes little mention of a mandamus claim. The City, however, has addressed the Allens' claim on appeal as a challenge to the

district court's denial of their request for a writ of mandamus directing the City to abate the alleged nuisance under Iowa Code section 657.2(5). The Allens' reply brief makes it clearer that they are requesting that the denial of mandamus be reversed. We determine that the refusal of the district court to issue a writ of mandamus is the sole issue on appeal and therefore we will review de novo.

II. BACKGROUND AND PROCEEDINGS. In 1988 the Allens purchased property located at 210 Southwest Fifth Street in Panora. Property to the north of the Allen property, locally known as 204 Southwest Fifth Street, is owned by the Dungans. Between the two properties running east and west is a sixteen-foot-wide alley that was platted and dedicated to the City in 1901. At the time the Allens purchased their property the utility structures were in the same place they are now. The fence was placed in 1998 or 1999. In the summer of 2003, a survey revealed that the utility structures and the fence were seven feet into the alley. The Allens claim this was the first they were aware of this fact.

The Allens requested the city order the structures moved and when this did not happen, the Allens filed this suit against the City. The Allens also included as defendants the title holders of the Dungan land and the Panora Cooperative Telephone Association.[1] The Allens' petition sought a writ of mandamus to compel (1) the city to remove the utility structures and fence, (2) condemnation for taking their access without compensation, and (3) compensation for vacation of the alley. They further sought damages and attorney fees for deprivation of their civil rights and for damages for nuisance and

[1] It does not appear that either of these defendants is a party to the appeal.

injury to their property. Finally they sought a temporary and permanent injunction to abate the nuisance. The Allens' motion for summary judgment was denied and the matter came on for trial. The district court denied all of the Allens' claims and entered judgment for the City.

III. THE ALLENS' CLAIM ON APPEAL. We first need to determine if the Allens proved that there was a nuisance as defined under Iowa Code section 657.2(5), which provides in applicable part:

> The following are nuisances:
>
> . . . .
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> 5. The obstructing or encumbering by fences, buildings, or otherwise the public roads, private ways, streets, alleys, commons, landing places, or burying grounds.

The Allens contend the evidence supports a finding that the structures meet this definition of a nuisance. The district court found otherwise holding, "The evidence establishes these structures do not unreasonably obstruct or encumber this alley or Plaintiffs' access to their property." The court found that the Allens have, and always had, reasonable and convenient access to their property from Southwest 5th Street, nine feet of the alley was not affected by the utility structures, and the alley still provided the Allens reasonable secondary access to their property. Finally, the court reasoned that the City has taken no action that would limit access to the Allens' property to any greater extent than the access they had when they purchased the property in 1988. We agree with this finding and affirm on this issue.

IV. WRIT OF MANDAMUS. Even if there was a nuisance, we do not believe that under these facts a writ of mandamus should be issued.

The decision to issue a writ of mandamus involves an exercise of discretion. *See Baird v. City of Webster City*, 256 Iowa 1097, 1114, 130 N.W.2d 432, 442 (1964); *Bellon*, 577 N.W.2d at 878-79. Principles governing mandamus are well established. *Hewitt v. Ryan*, 356 N.W.2d 230, 233 (Iowa 1984). It is a drastic remedy to be applied only in exceptional circumstances. *Id*. It is not to be used to establish rights but to enforce rights that have already been established. *Stith v. Civil Serv. Comm'n of Des Moines*, 159 N.W.2d 806, 808 (Iowa 1968). The writ can be used to compel a tribunal to act but not to control its discretion. *Id.* If there is a plain, speedy, and adequate remedy at law, mandamus does not lie. Iowa Code § 661.7. When such a remedy is available through certiorari or appeal, mandamus should not be ordered. *Reed v. Gaylord*, 216 N.W.2d 327, 331-32 (Iowa 1974). The other available remedy, however, "must be competent to afford relief on the very subject matter in question, and be equally convenient, beneficial and effectual." *Virginia Manor, Inc. v. City of Sioux City*, 261 N.W.2d 510, 514-15 (Iowa 1978).

We agree with the Allens that Iowa Code section 364.12(2) provides in applicable part that "a city shall keep all . . . alleys . . . free from nuisance . . . ." However, section 364.12(3) also provides in part that "a city *may*: (a) Require the abatement of a nuisance, public or private, in any reasonable manner." (Emphasis supplied.) Iowa Code section 661.2, providing for the issuance of a writ of mandamus states in applicable part, "Where discretion is left to the inferior tribunal or person, the mandamus can only compel it to act, *but cannot control such discretion.*" (Emphasis supplied.)

The decision as to whether to seek to abate a nuisance is discretionary with the city. Mandamus is not available to control a city's discretionary authority. We affirm.

AFFIRMED.