

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

2015 CA 0549

STEVE BONFANTI, JR.

VERSUS

THE CITY OF BATON ROUGE, PARISH OF EAST BATON ROUGE

Judgment Rendered: NOV 09 2015

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On Appeal from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
No. C622520

The Honorable Donald Johnson, Judge Presiding

* * * * *

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* * * * *

BEFORE: GUIDRY, HOLDRIDGE, AND CHUTZ, JJ.

HOLDRIDGE, J.

This is an appeal of a trial court judgment dismissing a request for declaratory relief. For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL HISTORY

Steve Bonfanti, Jr. owns two tracts of immovable property, Tract A-2-A and Tract-A-2-B, on Bob Pettit Boulevard at the entrance of a subdivision popularly known in Baton Rouge as "Tigerland." Two lounges are located on Tract A-2-A: Fred's and Reggie's. Tract A-2-B contains a parking lot to accommodate those establishments. A drainage canal is located on the eastern side of Tract A-2-B, beyond the parking lot.

In 1997, the City of Baton Rouge, Parish of East Baton Rouge (City-Parish) initiated the Upper Bayou Fountain Drainage Improvements project (drainage project) in an effort to improve drainage by widening canals such as the one impacting Mr. Bonfanti's property. Consequently, in 1998, Mr. Bonfanti and his then co-owner of Tract A-2-B, Edwin McKnight, entered into an agreement with the City-Parish captioned "Drainage Servitude." Under the express terms of the agreement, Mr. Bonfanti and Mr. McKnight sold and delivered with full warranty of title to the City-Parish "a drainage servitude on, over, under and across [their] property to accommodate, maintain [sic] and which drainage servitude is described as follows." The agreement then set forth the legal description of the portion of Tract A-2-B encumbered by the servitude. According to the attached survey map, the servitude effectively expands a preexisting 52.5 foot drainage servitude and runs alongside the canal, extending outward approximately 30 feet from the western bank of the canal.

A subsequent paragraph in the agreement provided, in pertinent part:

It is understood ... that the City-Parish will have temporary access and/or right-of-way to [the] property for the purpose of spoil removal, as well as right of ingress and egress to restore the property to a neat and presentable state.

The agreement further stated that in consideration for the drainage servitude, the City-Parish paid Mr. Bonfanti and Mr. McKnight \$17,789.00.

At some point, Mr. Bonfanti purchased Mr. McKnight's interests in Tract A-2-B and became the sole owner. Thereafter, Mr. Bonfanti purportedly wanted to erect a new cell tower in Tract A-2-B but encountered problems due to the existence of the 1998 drainage servitude.

In June 2013, Mr. Bonfanti filed a petition seeking a judgment declaring that the drainage servitude had prescribed due to nonuse for a period exceeding ten years. He also sought to have the inscription of the servitude cancelled from the public records. Approximately one year later, the City-Parish filed a motion for summary judgment; however, its motion was denied. Thereafter, the matter proceeded to trial.

At trial, Brian Harmon testified on behalf of the City-Parish's Department of Public Works. He explained that the drainage project was undertaken to improve and widen canals to facilitate drainage for the parish. The widening of the canal in question necessitated the 1998 servitude agreement. During his testimony, Mr. Harmon referred to cross-sections which indicated that, as a result of the widening of the canal, the western top of the bank of the canal had been pushed back approximately 20 feet, so that it was now located within the boundaries of the challenged servitude. Referencing survey maps that had been admitted into evidence, he further demonstrated that the challenged servitude encompassed the top of the western bank and a portion of the western sloping side of the bank.

Finally, he testified that the City-Parish contracted with Louisiana Vegetation Management, Inc. to spray for weeds in the servitude.

Roby Shields, the owner and general manager of Louisiana Vegetation Management, Inc., testified that his company has had the contract with the City-Parish to spray the weeds in the canal since the late 1990's. He testified that his employees park in the parking lot on Mr. Bonfanti's property and use the servitude to access the canal and spray for weeds. He explained that they spray the canal from the top of one bank, down its sloping side, across the bottom of the canal, then up the opposite sloping side up, to the top of the other bank. He testified that he has been present during this spraying within the last ten years. A summary chart detailing the specific dates his company sprayed the canal for the years 2001 through 2014 was admitted into evidence. Mr. Shields testified that after he submits an invoice to the City-Parish for the spraying, the City-Parish waits several days and then sends an employee to check the area and ensure that the weeds are dying before payment of the invoice can be approved. If results from the spraying cannot be visually verified by a City-Parish employee, then his company must "respray" the area. He averred that canals that they do not spray quickly become overgrown with trees and bush in a matter of 10 to 12 months, whereas the banks of the canal in question, as evidenced by the photographs admitted into evidence, reveal a "nice low bermuda, which is what the program strives for." When questioned further, he replied "we do not go out to spray to wipe out the vegetation. We go out to spray to remove obstructions of [water] flow ... without causing any erosion."

The affidavit of Ramo Dizdarevic, an employee of Louisiana Vegetation Management, Inc., was admitted into evidence. Therein, he attested that he has personally used the servitude to access the canal and spray for weeds in and around

the canal. He affirmed that he has done this for most, if not all, of the dates listed on the summary chart that was admitted into evidence.

A stipulation was also entered into evidence that, if called to testify, Shane Nichols and Bob Nash would testify that they work for the City-Parish's Department of Public Works and, as part of their job duties, they confirmed that the weeds were being sprayed in the subject drainage canal. They would further testify that the City-Parish requires confirmation of the spraying before authorizing the payment of invoices submitted by Louisiana Vegetation Management, Inc. for spraying the property.

Darin Adams, Mr. Bonfanti's tenant and the owner of Reggie's, testified that he performs weed spraying solely on the western bank of the canal adjacent to the parking lot three to four times a year. He averred that if the City-Parish was spraying the canal then there would be no need for him to do so. Nevertheless, he stated that although he has never seen anyone else spraying for weeds, he could not say that it did not happen and admitted it was possible that the City-Parish could have sprayed the area.

Pursuant to the stipulation of the parties, the deposition of Mr. Bonfanti's other tenant, Marc Fraioli, the owner of Fred's, was admitted in lieu of his live testimony. Mr. Fraioli testified that he is at his establishment often, but that he has never noticed anyone from the City-Parish spraying for weeds in the servitude area or on the eastern side of the canal for that matter. However, he likewise could not say that it has never happened and admitted it could have occurred without him knowing. He further admitted that he has never noticed any difference between the vegetation on the eastern side of the canal and that on the western side, the side where Mr. Adams testified that he routinely sprayed.

At trial, Mr. Bonfanti testified that he was approached about the servitude to expand the canal, but he maintained that the servitude he granted was merely granted for temporary access/right of way for spoil removal and ingress and regress to restore the property to a neat state. However, he later testified that the “temporary access” was to “use additional property” outside the servitude area to “get equipment back there” when needed. And when questioned by the City-Parish’s attorney, he conceded that the servitude agreement contained two different sections, one being the “drainage servitude” and the second concerning “some extra property” for equipment access. He stated that he checks on his property daily, and that to his knowledge, no one from the City-Parish has ever sprayed for weeds or done any maintenance work in the servitude area.

At the trial’s conclusion, the trial court took the matter under advisement pending the submission of post-trial briefs by the parties. The trial court ultimately denied the declaratory relief sought by Mr. Bonfanti, finding that the servitude had not prescribed due to nonuse. Mr. Bonfanti now appeals asserting the following assignments of error:

1. The trial court erred in failing to follow the well-settled law that the language of a contract of conventional servitude governs the extent and manner of its use.
2. The trial court erred in failing to recognize that the sole purpose of the ... servitude was to grant the City-Parish “temporary access and/or [right-of-way]” for the purpose of spoil removal and to restore the property.
3. The trial court erred in determining that the City-Parish met its burden of proof that the prescription of [nonuse] was interrupted.
4. The trial court erred in considering as trial evidence, affidavits submitted by the City-Parish in support of its Motion for Summary Judgment.
5. The trial court erred in considering as trial evidence, a computer generated Google Map which was not disclosed in the Pre-Trial Order and for which no proper foundation was made.

RELEVANT LAW AND DISCUSSION

Evidentiary Issues

We must first address the evidentiary challenges raised in Mr. Bonfanti's fourth and fifth assignments of error since a finding of an evidentiary error may affect the applicable standard of review; for if the trial court committed an evidentiary error that interdicted the fact finding process, this court would be required to conduct a de novo review. Devall v. Baton Rouge Fire Department, 07-0156 (La.App. 1 Cir. 11/2/07), 979 So.2d 500, 502; Wright v. Bennett, 04-1944 (La.App. 1 Cir. 9/28/05), 924 So.2d 178, 182.

Generally, the trial court is granted broad discretion in its evidentiary rulings and its determinations will not be disturbed on appeal absent a clear abuse of that discretion. Wright, 924 So.2d at 183. Moreover, La. C.E. art. 103(A) provides, in pertinent part, that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." The proper inquiry for determining whether a party was prejudiced by a trial court's alleged erroneous ruling on the admission or denial of evidence is whether the alleged error, when compared to the entire record, had a substantial effect on the outcome of the case. Wright, 924 So.2d at 183. Thus, even if we determine that the trial court abused its discretion and improperly admitted certain evidence, we must then also find that the error, when compared to the entire record, had a substantial effect on the outcome of the case in order for the error to warrant a reversal. A party alleging prejudice by the evidentiary ruling of the trial court bears the burden of so proving. Id.

In his fourth assignment of error, Mr. Bonfanti complains that the trial court erred in considering, as trial evidence, the affidavits the City-Parish previously

submitted in support of its motion for summary judgment. He argues that such hearsay cannot be considered as trial evidence. He further asserts that the only evidence supporting the trial court's judgment was the improperly considered affidavits, and therefore, the judgment must be reversed. Based upon our review of the record, we must disagree.

At the beginning of the trial, Mr. Bonfanti's attorney offered 14 exhibits into evidence, which were admitted without objection. Thereafter, defense counsel submitted eight exhibits he wished to offer into evidence. Specifically, he stated: "And Judge, my exhibit 1 will just be all pleadings that are in the record, **including affidavits and exhibits for the summary judgment.**" (Emphasis added.) He then continued delineating the remaining seven exhibits to be offered into evidence. When the trial court asked Mr. Bonfanti's attorney whether he had any objection to the exhibits offered on behalf of the City-Parish, he simply responded "No." The trial court then admitted the exhibits into evidence, noting that their admission was without objection.

While we recognize that pleadings do not include affidavits or exhibits unless, of course, attached to and incorporated therein, the City-Parish's attorney plainly indicated that his first exhibit included the "affidavits and exhibits" submitted for purposes of the motion for summary judgment. Mr. Bonfanti's attorney certainly had grounds to object to the admission of the affidavits on the grounds of hearsay; however, he failed to do so.¹

Because they were entered without objection, Bonfanti cannot now be heard to complain on appeal. A failure to object to hearsay evidence when admitted at trial constitutes a waiver of the right to object to its admissibility, and such

¹ The cases Mr. Bonfanti expounds upon in his brief in support of this assignment of error are cases in which an objection of hearsay was raised or involved a default judgment.

evidence may be considered and given probative effect. Walley v. Vargas, 12-0022 (La.App. 1 Cir. 9/21/12), 104 So.3d 93, 104. Having waived the objection, an aggrieved party, such as Mr. Bonfanti, “may not subsequently, upon appeal, urge that such evidence was actually inadmissible.” Nitro Gaming, Inc. v. D.I. Foods, Inc., 34,301 (La.App. 2 Cir. 11/1/00), 779 So.2d 817, 821. Therefore, we find this assignment of error to be without merit.²

In his fifth assignment of error, Mr. Bonfanti contends that the trial court erred in admitting a “Google map” into evidence. A review of the challenged exhibit reveals that it is not a “map” but rather a Google Earth satellite image that was purportedly taken in 2002.³ In support of his contention that it was improperly admitted, Mr. Bonfanti asserts several arguments, some of which, upon cursory view, appear to lack merit.⁴ Nevertheless, we need not address the merits of Mr. Bonfanti’s arguments. Assuming *arguendo* that the admission of the satellite image was an abuse of discretion, we find that it did not have a substantial effect on this case, and therefore its admission was harmless.⁵

During trial, Mr. Bonfanti testified that the full extent of the parking facilities in Tract A-2-B was completely paved in 1997. Later in the trial, the City-Parish sought to offer the satellite image which had been obtained via a special feature of the Google Earth application that purports to show “historical” images of locations at certain dates in the past. The City-Parish contended that the image shown on Google Earth as depicting the property in 2002 “potentially suggest[ed]”

² Even if the affidavits had been improperly admitted, any error would have been harmless, since the complained-of affidavits were substantially duplicative of the testimony given at trial by Mr. Harmon and Mr. Shields.

³ A satellite image is akin to a photograph, and thus, is distinguishable from a written or drawn map.

⁴ For instance, in the Nineteenth Judicial District Court, exhibits intended to be used for impeachment or rebuttal purposes need not be included in the pre-trial order. See La. Dst. Crt. Rule Appendices 9.14(G).

⁵ The trial court acknowledged Mr. Bonfanti’s assertion that there was no way to verify that the image in question had actually been taken in 2002 but stated that it would consider Mr. Bonfanti’s objection as going to the weight of the evidence.

that the full extent of the parking lot had not been paved in 1997. Thus, the image was offered to impeach Mr. Bonfanti's testimony on this fact.⁶

At the outset, we point out that when and to what extent the parking lot was paved are tangential facts immaterial to the merits of this case.⁷ Secondly, based on the record before us, we find that Mr. Bonfanti's credibility was not a decisive factor bearing upon the ultimate factual issue in this case: whether or not the City-Parish made use of the servitude through its weed spraying activities.

Mr. Bonfanti simply testified that to his knowledge, the City-Parish had not sprayed for weeds on the banks of the canal. Moreover, the witnesses who testified on Mr. Bonfanti's behalf conceded that, although they did not see any City-Parish agents spraying for weeds, it was possible that they had done so. Thus, their testimony, like that of Mr. Bonfanti, merely indicated a lack of knowledge of such activities. Neither Mr. Bonfanti nor his witnesses could directly dispute the City-Parish's assertion that it had performed, through its agents, weed spraying in the servitude. In other words, this was simply not an instance wherein one witness's testimony directly contradicted that of another witness.

Consequently, a factual finding as to whether the City-Parish had sprayed for weeds in the servitude at any time during the preceding ten years ultimately rested, not on the credibility of Mr. Bonfanti, but rather on the credibility of the City-Parish's witnesses as well as the demonstrative evidence submitted at trial. Such non-testimonial evidence included the summary chart of Louisiana Vegetation Management, Inc. going back 15 years showing the dates on which it sprayed within the servitude, as well as photographs showing vegetation on the eastern bank of the canal to be similar in quality and quantity to that on the western

⁶ Mr. Fraoili and Mr. Adams, who testified on behalf of Mr. Bonfanti, likewise stated that the parking lot had been fully paved to the bank of the canal in 1997.

⁷ The photographs and survey maps admitted into evidence show that only a sliver of the parking lot, primarily a relatively small corner in the northeastern portion of the parking lot, falls within the ambit of the servitude.

side, indicating that both sides were being treated as opposed to just the western bank by Mr. Adams. Therefore, given the evidence adduced at trial, and the fact that the crucial factual issue in this case did not implicate Mr. Bonfanti's credibility, we cannot say that admission of the satellite image had a substantial effect on the outcome of this case. Accordingly, we find this assignment of error to be without merit.

Extent and Use of Servitude

Mr. Bonfanti's remaining assignments of error pertain to the extent and use of the servitude. He contends that the "plain language of the ... servitude shows that its sole purpose was to grant the City-Parish temporary access/right of way to conduct spoil removal operations and [to] restore the property." Therefore, he argues that the spraying for weeds in the servitude did not constitute "use" of the servitude and thus did not interrupt prescription. Alternatively, he argues that the City-Parish failed to prove that it conducted weed control activities in the servitude or that it used the servitude to access the canal to conduct such activities. To address Mr. Bonfanti's arguments, we must first interpret the servitude agreement at issue.

There are two kinds of servitudes, personal and predial. La. C.C. art. 533. A personal servitude is a charge on a thing for the benefit of a person. La. C.C. art. 534. A right of use is a personal servitude that confers in favor of a natural person or a legal entity a specified use of an estate less than full enjoyment. La. C.C. arts. 534, 639, and 641. Conversely, a predial servitude is a charge on a servient estate for the benefit of a dominant estate. La. C.C. art. 646. Without a dominant estate, no predial servitude exists. See La. C.C. art. 647. Although Mr. Bonfanti characterizes the servitude in question as a predial servitude, it is actually a personal servitude of right of use established in favor of the City-Parish (a legal

entity.) Nevertheless, a right of use servitude is regulated by application of the rules governing usufruct and predial servitudes to the extent that their application is compatible with the rules governing a right of use servitude. La. C.C. art. 645. Thus, a right of use servitude, like a predial servitude, is extinguished by nonuse for ten years. See La. C.C. arts. 621, 645, 753, and 3448; Ritter v. Commonwealth Land Title Ins. Co., 12-1654 (La.App. 1 Cir. 8/12/13) (unpublished), writ denied, 13-2462 (La. 1/17/14), 130 So.3d 945.

A right of use servitude may be established by juridical act, such as a contract. In the present matter, the right of use servitude was established by contract via the 1998 “Drainage Servitude” Agreement. The use and extent of the servitude is regulated by this contract, which must be interpreted according to rules for contractual interpretation as well as the special rules applicable to servitude contracts. La. C.C. art. 697; Carbo v. City of Slidell, 01-0170 (La.App. 1 Cir. 1/8/03), 844 So.2d 1, 11 writ denied, 03-0392 (La. 4/25/03), 842 So.2d 400.

According to the well-settled rules of contractual interpretation, contracts have the effect of law for the parties, and the interpretation of a contract is the determination of the common intent of the parties. See Clovelly Oil Co., LLC v. Midstates Petroleum Co., LLC, 12-2055 (La. 3/19/13), 112 So.3d 187, 192. This intention “must be determined from the stipulations in the entire instrument, with a view to giving effect to all of the provisions therein contained and thereby avoid neutralizing or ignoring any of them as surplusage.” A.N. Yiannopoulos, *Louisiana Civil Law Treatise, Personal Servitudes* vol. 3, § 8:6, 532–534 (5th ed., West 2011). When the words of a contract are clear and explicit and lead to no absurd consequences, no interpretation may be made in search of the parties' intent. La. C.C. art. 2046. However, if the instrument is ambiguous, extrinsic evidence is admissible to show the kind of right the parties intended to create. See Amitech

U.S.A., Ltd. v. Nottingham Const. Co., 09-2048 (La.App. 1 Cir. 10/29/10), 57 So.3d 1043, 1057, writs denied, 11-0866, 11-0953 (La. 6/17/11), 63 So.3d 1036, 1043.

A contract is considered ambiguous on the issue of intent when it lacks a provision bearing on the issue, its written terms are susceptible to more than one interpretation, there is uncertainty as to the provisions, or the parties' intent cannot be ascertained. Campbell v. Melton, 01-2578 (La. 5/14/02), 817 So.2d 69, 75; Guest House of Slidell v. Hills, 10-1949 (La.App. 1 Cir. 8/17/11), 76 So.3d 497, 499-500. In such cases, the instrument shall be construed according to the intent of the parties, which is an issue of fact to be inferred from all of the surrounding circumstances. Guest House of Slidell, 76 So.3d at 499. A doubtful provision must be interpreted in light of the nature of the contract, equity, usages and the conduct of the parties before and after the formation of the contract. La. C.C. art. 2053.

According to the pertinent servitude provisions, a right of use servitude includes the rights contemplated or necessary to enjoyment at the time of its creation as well as rights that may later become necessary, provided that a greater burden is not imposed on the property unless otherwise stipulated in the title. La. C.C. art. 642. Rights that are necessary for the use of a servitude are acquired at the time the servitude is established. La. C.C. art. 743. Implicit in any servitude is the right to use it for purposes for which it was intended, and the exercise of the right does not depend upon consent of the landowner. Weigand v. Asplundh Tree Experts, 577 So.2d 125, 127-29 (La.App. 1 Cir.), writ denied, 580 So.2d 379 (La. 1991); Miller v. Prairie Canal Co., 229 So.2d 752, 755 (La.App. 3 Cir. 1969). For instance, the servitude holder has the right to enter and perform at his expense all the works that are necessary for the use and preservation of the servitude. La. C.C.

arts. 744 and 745. However, rights necessary for use are to be exercised in a way least inconvenient for the property burdened by the servitude. La. C.C. art. 743; Carbo, 844 So.2d at 12. Any doubt as to the existence, extent, or manner of exercise of a predial servitude shall be resolved in favor of the property burdened by the servitude. See La. C.C. art. 730.

Whether a contract is ambiguous or not is a question of law subject to de novo review. Where factual findings are pertinent to the interpretation of a contract, those factual findings shall not be disturbed unless manifest error is shown. Guest House of Slidell, 76 So.3d at 499.

The 1998 “Drainage Servitude” agreement at issue herein reflects that Mr. Bonfanti and his co-owner sold the City-Parish “a drainage servitude on, over, under and across [their] property to accommodate, maintain [sic] and which drainage servitude is described as” followed by the legal description of the physical dimensions of the servitude which are parallel with the canal itself. The following paragraph further denotes that it was understood that the City-Parish would have “temporary access and/or right-of-way to [the] property for the purpose of spoil removal, as well as right of ingress and egress to restore the property to a neat and presentable state.”

Clearly, the initial conveyance paragraph of the agreement fails to specify what the City-Parish has a right to “accommodate” and “maintain.” Therefore, we find the servitude agreement herein to be ambiguous. Applying the rules of contractual interpretation as well as the provisions applicable to servitudes, we conclude that the intent of the parties herein was to grant the City-Parish a drainage servitude to accommodate and maintain drainage in the servitude area, plus additional rights, which are arguably more burdensome, to access Mr. Bonfanti’s

property outside of the confines of the servitude to conduct spoil removal as well as ingress and regress to restore the property to a neat and presentable state.

Mr. Bonfanti's contention that the servitude was solely to grant the City-Parish a right of "access/right of way" to conduct spoil removal is simply not reasonable in light of the language of the contract as a whole, the location of the servitude, and the conduct of the parties following its execution.

With regard to the language of the contract, we note that the contract is titled "Drainage Servitude," not "Right of Temporary Access" or "Right of Way," and that it purports to convey a "drainage servitude" to the City-Parish. To find that the sole purpose of the contract was to provide a temporary access as provided for in the second paragraph, would effectively render the first paragraph and its terms "drainage servitude" and "accommodate" and "maintain" superfluous. Because the terms "accommodate" and "maintain" appear in the sentence conveying the "drainage servitude," it is only reasonable to conclude they are intended to apply to "drainage." Moreover, the use of the term "temporary" to describe the access to Mr. Bonfanti's "property" (which, as described below, is necessarily beyond the confines of the servitude) would suggest that this was a restricted grant of an additional right, which, due to its burdensome nature, had to be stipulated to in the contract according to La. C.C. art. 642. We find that such an interpretation gives effect to all of the provisions of the contract.

In addition, we note that the geographical location and boundaries of the servitude also belie Mr. Bonfanti's suggested interpretation. The challenged servitude is contiguous with a pre-existing drainage servitude, and it is aligned with the course of the canal. If all that was intended was to grant a right of access or right of way, the servitude would not have been oriented to the canal, but would have covered property from the street and through the parking lot area to the canal.

Based on the demonstrative evidence presented at trial, the servitude impinges on only a small corner of the parking lot that is not only inadequate to function as a right of access but is located at the opposite end of the property from that containing the street access. Based on the evidence, it is clear that any vehicular access to the servitude would entail crossing portions of Mr. Bonfanti's property outside the bounds of the servitude.

Finally, we find the conduct of the parties further negates Mr. Bonfanti's interpretation. The evidence presented at trial shows that as a result of the widening of the canal, the top of the western bank was pushed back approximately 20 feet so that it is now located within the servitude. Indeed, one of the survey maps Mr. Bonfanti offered into evidence reflects that the top and a portion of the sloping side of the western bank comprise nearly half of the servitude in some places. This widening of the canal into the servitude was done without any complaint from Mr. Bonfanti, who visits his property daily. If he believed the servitude was merely one for access, then this substantial widening would surely have been outside the ambit of such a servitude and would have prompted some protest from Mr. Bonfanti. It did not. Conversely, the actions of the City-Parish in widening the canal to improve drainage would be encompassed by, and would comport with, a drainage servitude granting it the right to accommodate and maintain drainage in the servitude area. Accordingly, we find no merit in Mr. Bonfanti's argument that the sole purpose of the servitude was to grant a temporary right of access for spoil removal.

In brief, Mr. Bonfanti seemingly concedes that should his interpretation be rejected, then the spraying of weeds would constitute use of the servitude, because he alternatively argues that the City-Parish failed to prove that it sprayed for weeds in the servitude or used the servitude as access for its weed spraying activities.

Regardless, we find that such activities would constitute use of the servitude, as the record reflects that the spraying of weeds was performed to prevent or remove any obstruction of water flow through the canal.

Accordingly, we turn to Mr. Bonfanti's remaining argument that the trial court erred in determining that the City-Parish bore its burden of proving that it sprayed for weeds in the servitude or used the servitude as access for its weed spraying activities in the preceding ten years.⁸ Based on our review of the record, we discern no error in the trial court's conclusion.

The evidence presented at trial established that the top and part of the side sloping wall of the western bank were moved into the servitude at issue in 1998. Mr. Shields testified at trial that his company has continuously had the contract to spray the canal since the late 1990's. He further testified that the canal was sprayed from the top of one bank, down the side slope, across the bottom, and up the opposing side slope to the top of the other bank. This would necessarily involve spraying a portion of the servitude. He further testified that his employees used the servitude to access the canal for their weed spraying activities. Although Mr. Bonfanti repeatedly states in his brief that Mr. Shields testified that he had not been present for any sprayings during the last ten years, this assertion is categorically untrue. Mr. Shields specifically testified that he had been present within the past ten years while the canal was sprayed.

Although Mr. Bonfanti and his tenants testified that they had never witnessed any such sprayings, they could not directly dispute that such sprayings had occurred. And while Mr. Adams testified that he sprayed the western bank, we note that the photographs submitted into evidence reflect vegetation of a similar

⁸ Louisiana Civil Code article 764 provides that when the prescription of nonuse is pleaded, the owner of the dominant estate has the burden of proving that he or some other person has made use of the servitude as appertaining to his estate during the period of time required for the accrual of the prescription. In this matter, the City-Parish would be analogous to the "dominant estate."

quality and quantity on the eastern bank indicating that both sides of the canal were treated, comporting with Mr. Shields' testimony about his company's sprayings. Louisiana Vegetation Management, Inc.'s summary chart detailing the specific dates that sprayings occurred in addition to the visual verification procedure mandated by the City-Parish further support a finding that the sprayings did take place. Because we find that the record reasonably supports the trial court's determination, we find Mr. Bonfanti's last remaining argument to be without merit.

In summary, we find that the servitude agreement granted the City-Parish the right to maintain and accommodate drainage in the servitude area and provided additional rights of temporary access to use the servitude area and beyond to conduct spoil removal and to allow for ingress and egress to restore the property to a neat and presentable state. Moreover, we find that the spraying of weeds to ensure the flow of drainage and to prevent erosion of the banks located within the servitude is a right of use contemplated by the servitude agreement herein. Finally, we find that the trial court was not manifestly erroneous in concluding that the City-Parish bore its burden of proving that it had sprayed for weeds in the servitude within the last ten years, so that the servitude was not extinguished for nonuse.

CONCLUSION

For all of the reasons set forth herein, we affirm the trial court judgment. All costs of this appeal are assessed to Steve Bonfanti, Jr.

AFFIRMED.