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NO. COA02-1695

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2003

CDC PINEVILLE, LLC,
Plaintiff,

v.

Guilford County
No. 01 CVS 10277

UDRT OF NORTH CAROLINA, LLC,
Defendant.

Appeal by defendant and cross-appeal by plaintiff from judgment and order entered 1 July 2002 by Judge John O. Craig, III, Superior Court, Guilford County. Heard in the Court of Appeals 16 September 2003.

Smith Moore LLP, by Stephen P. Millikin and Lisa Kaminski Shortt for defendant.

Isaacson Isaacson & Sheridan, LLP, by Jennifer N. Fountain and Forman Rossabi Black, P.A., by Amiel J. Rossabi for plaintiff.

WYNN, Judge.

This appeal arises from the trial court's judgment awarding damages based upon trespass. In its appeal, Defendant, UDRT of North Carolina, LLC, argues that the trial court erred by finding that the evidence failed to show that it had an easement over property owned by Plaintiff, CDC Pineville, LLC. In its cross-

appeal, CDC argues that the trial court erred by reducing its damages. After review, we remand for additional findings of fact and conclusions of law.

I. Facts

The underlying facts show that the separate and adjoining properties of CDC and UDRT were owned by a common grantor, Korbler Development Corporation. In the early 1970s, the Korbler family and some partners formed Korbler Development Corporation and Hill Haven Developers to build a large apartment complex in five phases on land owned by the Korbler family. Apparently, in preparing the construction plans, the developer tried to put in place everything on Phase I such that the next phase would conveniently tie into it. However, while the findings of fact appear to indicate that pipe was laid to service the entire area with stub-outs being placed on the water pipe for future use, the findings fail to establish when the stub-out was placed on the pipe, and the original location of the stub-out.

After completion of apartments on Phase I, Korbler and Hill Haven abandoned further development plans due to financial difficulties. In December 1974, after all construction was completed on Phase I and tenants were living in the apartments, Korbler deeded the portion of land containing the apartments to Hill Haven Developers which later deeded the property to UDRT. As to the second parcel involved in this litigation, in 1981, W.A. and A.J. Lucas, two partners in Hill Haven Developers, obtained it by foreclosure sale; they ultimately deeded the property to CDC.

The incident giving rise to this action arose in October 2000 when CDC began developing its land for an apartment complex. While grading for a private street on CDC's property, a construction crew apparently employed by CDC broke a stub-out from the water pipe serving UDRT's property causing UDRT's apartment complex to lose water pressure and supply. Water flowing from the broken pipe caused damage to the street compaction, sedimentation pond, wetlands and silt collected in the pipes that had been installed for CDC's property.

CDC alleged the damage caused a 30-day delay in construction and filed a civil trespass and negligence action against UDRT; in defense, UDRT contended it either had an implied easement by necessity or prior use. In a bench trial, the trial court entered directed verdict in favor of UDRT on the negligence claim but granted judgment in favor of CDC on the trespass claim. Both parties appeal.

II. Standard of Review

"The standard of review on appeal from a judgment entered after a non-jury trial is whether there is competent evidence to support the trial court's findings of facts and whether the findings support the conclusions of law and ensuing judgment." *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176 (2002); *See also Creech v. Ranmar Props.*, 146 N.C. App. 97, 100, 551 S.E.2d 224, 227 (2001).

III. Trespass

In its judgment, the trial court concluded that CDC was

entitled to damages arising out of UDRT's trespass upon CDC's property. "The elements of a trespass claim are that plaintiff was in possession of the land at the time of the alleged trespass; that defendant made an unauthorized, and therefore unlawful, entry on the land; and that plaintiff was damaged by the alleged invasion of his rights of possession." *Young v. Lica*, 156 N.C. App. 301, 305, 576 S.E.2d 421, 424 (2003).

In its conclusions of law, the trial court determined:

9. In that Plaintiff established its prima facie case on trespass and Defendant failed to establish any affirmative defense (including any easement to enter upon Plaintiff's property), Defendant is liable to Plaintiff in trespass.

However, after careful review of the judgment, we conclude there are insufficient and inconsistent findings of fact supporting this conclusion of law.

In the findings of fact regarding the trespass claim, the trial court stated:

1. This action was commenced by Plaintiff for the purpose of recovering money for damages pursuant to Defendant's alleged trespass and negligence when a water pipe on the Plaintiff's property was struck by Plaintiff, which caused water to flow on Plaintiff's property causing damage to Plaintiff's property.

. . .

11. It was stipulated that Plaintiff owned the land at the time when and place where the pipe was damaged.

12. The damaged water pipe and the water flowing through it, though located on Plaintiff's property, was owned by Defendant at the time of the break.

13. Water flowed from Defendant's property, through Defendant's pipe and onto Plaintiff's property, causing damage to Plaintiff's property. Plaintiff did not authorize Defendant's entry onto Plaintiff's property.

These findings of fact appear to indicate that the pipes were located on property owned by CDC and conveyed by the common grantor, Korbler. Moreover, the findings indicate CDC stipulated to ownership of the land. However, the findings fail to establish when the pipes were placed on CDC's land. Indeed, the record shows that before the conveyances by Korbler, the apartments currently owned by UDRT were in operation and water flowed to the tenants. Thereafter, Korbler conveyed the adjoining property to CDC. When the pipe was damaged by CDC's contractors, the apartments lost water pressure and supply. Upon investigation, it was determined CDC's contractors damaged a stub-out which lay underneath a gas line, also damaged by the contractor. The gas line, phone line, and water system ran underneath a paved road and served UDRT's property. This evidence suggests that the pipe was installed by the common grantor, Korbler, before the properties were separately conveyed to CDC and UDRT property. Although CDC argues that UDRT did not meet its burden in demonstrating the pipes were in place before the initial 1974 conveyance, the burden was upon CDC to establish each element of trespass in order to shift the burden to UDRT to present an affirmative defense.

Moreover, a comparison of the 1969 construction plans and the surveys of the land currently owned by CDC and UDRT indicates a difference in the acreage allotted to Phase I and the land conveyed

to CDC and UDRT. Indeed, the record appears to indicate that CDC owned some of the land in which the water pipes were installed prior to the initial conveyance. However, the findings of fact fail to indicate whether the trial court evaluated this evidence nor are there findings of fact regarding the current ownership of the property as it relates to how it was developed in the early 1970s when the pipes were installed. The significance of additional findings on this issue would shed light on the issue of whether the location of the pipe when it was damaged was the same as it was when the property was commonly owned. If so, then the common grantor would have conveyed ownership of that part of the pipe located on CDC's property to CDC, not UDRT. It would therefore follow that if CDC owned the part of the pipe that it damaged on its property, it could not recover damages based upon a trespass claim. See *Cheape v. Chapel Hill*, 320 N.C. 549, 359 S.E.2d 792 (1987) (stating "at common law, the holder of a fee simple also owned the earth beneath and the air above--*cujus est solum, ejus usque ad coelum et ad inferos*").

Moreover, the findings are inconclusive in determining the ownership of the water that flowed through the pipes. The record appears to suggest that the entire loop water system, consisting entirely of private water pipes, was connected to the city water main. Scott Phillips, CDC's construction superintendent, testified that once water flowing from the city water main is registered on a private water meter, the water is owned by the private entity whose water usage is being measured. However, Scott

Phillips testified he did not have any knowledge regarding UDRT's water system and none of the testimony presented indicates the location of UDRT's water meter. Hence, the findings are inadequate to determine whether UDRT owned the water that damaged CDC's property.

Accordingly, we remand for additional findings of fact and conclusions of law consistent with this opinion.

Remanded.

Judges TYSON and LEVINSON concur.

Report per rule 30(e).