IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MYKHAYLO and HANNA STEFANKIV, husband and wife, Appellants, v. BERN and SAVOUTH KEO, husband and wife, Respondents.	)	NO. 63128-4-I DIVISION ONE Unpublished Opinion FILED: December 7, 2009

Lau, J.—Mykhaylo and Hanna Stefankiv challenge the summary dismissal of their trespass and nuisance claims against their neighbors, Bern and Savouth Keo. They contend the trial court erred in considering inadmissible evidence and in determining the Keos' sewer line, which runs over their property, occupies an implied easement. But we conclude the Stefankivs' evidentiary arguments are without merit and no genuine issues of material fact exist with respect to the implied easement. The only reasonable inference from the uncontradicted evidence is that the Stefankivs' predecessor in interest, who owned both properties and installed the sewer line, intended to burden the Stefankivs' property with a sewer line easement. Accordingly, we affirm.

FACTS

In 1988, Steven and Mary Stafford applied to the City of Lynnwood for permission to subdivide their property into two parcels of land. The city approved their application, and they recorded a short plat. The Staffords lived in a house on the northern parcel ("lot 1" or "front lot") directly abutting 188th Street Southwest. There was no house on the other lot ("lot 2" or "rear lot"). The Staffords' house was served by a sewer line extending to 188th Street Southwest that was originally permitted in 1963.

In 1989, while the Staffords still owned both parcels, they applied for a side sewer permit running across lot 1 to serve a house to be built on lot 2. After obtaining the permit, the Staffords installed the sewer line. In 1991, they sold lot 2 to Charles and Christine Cox, but they did not include an express sewer line easement as part of the conveyance. In 1993, the Coxes obtained a permit to improve the sewer line. In 1995, Bern and Savouth Keo acquired lot 2.[1]

The Staffords sold lot 1 in 1994. After a series of transfers, the Stefankivs acquired it in 2005. At the time of their purchase, the Stefankivs' title insurance company provided them with the short plat recorded in 1988. While it did not show the location of any sewer lines, it referenced a drainage system for both houses. Two visible manholes in front of the Stefankivs' property on 188th Street Southwest serve the public sewer main. In 2007, the Stefankivs began a remodeling project. During

[1] It is not clear from the record exactly when the house on lot 2 was built, but the parties agree it was in place by the time of the Keos' purchase. Regardless of when the house was built, the record is clear that the Staffords installed a sewer line over lot 1 to serve lot 2 while they still owned both parcels.

excavation, they damaged the sewer line serving the Keos' property.

Consequently, the Stefankivs filed suit against the Keos for trespass and nuisance. They sought damages and an injunction ordering the Keos to remove the sewer line. The Keos moved for summary judgment dismissal, arguing that the sewer line occupied an implied easement. They submitted 16 exhibits in support of their motion, along with a declaration from their attorney that the exhibits were "true and correct" copies of various documents. The Stefankivs moved to strike several of the exhibits. Specifically, they objected to exhibit B (the 1963 side sewer permit), exhibit D (the 1989 side sewer permit), exhibit F (the 1993 side sewer permit), exhibit O (pictures of the two properties), and exhibit P (an estimate for the cost to relocate the Keos' sewer line). They also brought a cross-motion for summary judgment. The trial court denied the Stefankivs' motion to strike and granted the Keos' motion for summary judgment, dismissing the Stefankivs' claims with prejudice. The Stefankivs appeal.

ANALYSIS

Evidentiary Objections

Initially, the Stefankivs contend the trial court erroneously denied their motion to strike because the evidence they objected to was inadmissible under CR 56(e). This court reviews evidentiary rulings made in connection with a summary judgment ruling using the de novo standard. Ross v. Bennett, 148 Wn. App. 40, 45, 203 P.3d 383 (2008); Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

Under CR 56(e), affidavits submitted in support of a party's summary judgment motion must be made on personal knowledge, set forth facts that would be admissible

in evidence, and show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. CR 56(e); Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 359, 753 P.2d 517 (1988). However, an attorney need not have personal knowledge of the information conveyed by documents that he or she proffers in support of a summary judgment motion. Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co., 122 Wn. App. 736, 745–46, 87 P.3d 774 (2004). In International Ultimate, the defendants objected to exhibits offered in support of a summary judgment motion, arguing that the affiant attorney lacked personal knowledge such that the exhibits were inadmissible under ER 602. Int'l Ultimate, 122 Wn. App. at 745. The court rejected their argument, concluding that the proper evidentiary challenge was based on either authenticity or hearsay. "If the documents are properly authenticated and are not excluded because of hearsay, then an attorney may rely on them in a summary judgment motion regardless of any lack of personal knowledge." Int'l Ultimate, 122 Wn. App. at 746.

The Stefankivs argue that the side sewer permits, exhibits B, D, and F, were not properly authenticated under ER 901[2] and that they are hearsay. But ER 901 is satisfied "when the party challenging the document originally provided it through discovery," as the Stefankivs did here. Int'l Ultimate, 122 Wn. App. at 747. And there is a well-established exception to the hearsay rule for public records. See Brundridge v. Fluor Fed. Servs., 164 Wn.2d 432, 450, 191 P.3d 879 (2008) (noting that the

[2] ER 901(a) provides, "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

exception applies "when a hearsay declarant who is a public official makes an out-of-court statement while acting pursuant to her or his official duty"). The Stefankivs do not claim the permits are not what they purport to be or were not obtained from the City of Lynwood as public records.[3] They also assert that exhibit B is irrelevant, but they are incorrect. This document is relevant because it shows the sewer lateral that existed at the time the short plat was approved. The Stefankivs' motion to strike these exhibits was properly denied.

The Stefankivs also object to the admission of the pictures in exhibit O and the corresponding declaration by the Keos' attorney describing what the pictures show. They argue that the Keos' attorney did not have personal knowledge of the lots. In replying to this objection below, the Keos submitted a declaration by Bern Keo stating that he took the pictures and that the copies were a fair and accurate representation of the properties. This declaration is sufficient to authenticate exhibit O.

Finally, the Stefankivs argue that the cost estimate of relocating the Keos' sewer line, exhibit P, should have been stricken. This exhibit consists of a two-page estimate from Roto-Rooter, a plumbing and drain service. The Stefankivs object that the document amounts to expert opinion testimony and that the "author's qualifications and status as an expert witness were not disclosed notwithstanding the service of an interrogatory seeking information regarding experts." Appellant's Opening Br. at 18.

[3] The Stefankivs do argue that the exhibits are not covered by the public records exception because they are "not under seal." Appellant's Reply Br. at 6. But even assuming the public records exception is inapplicable, at least one other exception would make the documents admissible. See ER 803(a)(16) (excepting "[s]tatements in a document in existence 20 years or more whose authenticity is established").

But the document in question was available to the Stefankivs months before the summary judgment hearing, so there was no discovery violation. Moreover, the Stefankivs cite no pertinent authority to support their claim that the estimate constitutes expert testimony, inadmissible absent evidence that Roto-Rooter's employees are qualified to make such estimates. And their contention that the estimate is inadmissible hearsay is without merit because the document falls within the business record exception to the hearsay rule. It is apparent from the document that the estimate was made "in the regular course of business, at or near the time of the act, condition or event" recorded and that its "method and time of preparation were such as to justify its admission."[4] RCW 5.45.020.

Implied Easement

The Stefankivs next argue that summary judgment was improper because there are genuine issues of material fact as to whether their property is burdened by an implied easement. In reviewing a summary judgment order, an appellate court engages in the same inquiry as the trial court.[5] Wingert v. Yellow Freight Sys., Inc., 146 Wash.2d 841, 847, 50 P.3d 256 (2002). Summary judgment is appropriate when there

[4] The parties also dispute whether the Stefankivs' motion to strike was properly before the court based on their failure to accompany the motion with a "*note for motion calendar" identifying "*the type or nature of the relief being sought" in accordance with Snohomish County Local Civil Rule 7(B)(2)(A). But it appears that the trial court considered the motion and ruled based on the merits. In any event, this court's review is de novo, and the Stefankivs' evidentiary objections, as noted above, are without merit.

[5] The Stefankivs point to numerous comments purportedly made by the trial court during the summary judgment hearing, but these comments are not part of the record. In any event, this court's review is de novo.

is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). We will affirm an order of summary judgment if reasonable persons could reach only one conclusion. Venwest Yachts, Inc. v. Schweickert, 142 Wn. App. 886, 893, 176 P.3d 577 (2008).

While easements are usually created expressly in a written instrument, the law also recognizes implied easements in some situations. See 17 William B. Stoebuck, Washington Practice, Real Estate & Property Law, § 2.4 at 89 (2d ed. 2004). "The party seeking to establish an easement implied from prior use generally must establish three key elements: (1) unity of title and subsequent separation by grant of the dominant estate; (2) apparent and continuous user; and (3) the easement must be reasonably necessary to the proper enjoyment of the dominant estate." MacMeekin v. Low Income Hous. Inst., Inc., 111 Wn. App. 188, 195, 45 P.3d 570 (2002). However, unity of title and subsequent separation is the only absolute requirement. Roberts v. Smith, 41 Wn. App. 861, 865, 707 P.2d 143 (1985). The other two elements are merely "aids to construction in determining the cardinal consideration—the presumed intention of the parties as disclosed by the extent and character of the user, the nature of the property, and the relation of the separated parts to each other." Adams v. Cullen, 44 Wn.2d 502, 505–06, 268 P.2d 451 (1954); see also Rogers v. Cation, 9 Wn.2d 369, 376, 115 P.2d 702 (1941) (holding that "the presumed intention of the parties, is the prime factor in determining whether an easement by implication has been created").

Here, all three elements are satisfied and the presumed intention to burden lot 1 with a sewer line is clear. The Staffords owned both lots 1 and 2 before conveying lot 2

to the Coxes in 1991, so there was unity of title and subsequent separation by grant of the dominant estate. The Stefankivs do not dispute that this element is satisfied, but they argue the easement was not apparent at this point because the house on lot 2 had not yet been built. Appellant's Opening Br. at 28. But the purpose of the "apparent" element is to show the easement was within the grantor and grantee's contemplation. 17 Stoebuck, supra, § 2.4 at 92. Here, the evidence shows that the Staffords subdivided their property and proposed that a house be built on the rear lot, they installed a sewer line over the front lot to serve the rear lot, they sold the rear lot to the Coxes, and they retained the front lot for four years, during which time the Coxes improved the sewer line. The only reasonable inference is that the Staffords intended to burden lot 1 with the sewer line.

Additionally, an easement need not be "visible" in order to be apparent. In Berlin v. Robbins, 180 Wn 176, 180–85, 38 P.2d 1047 (1934), the court considered whether an underground water pipe should be characterized as "apparent" despite the fact that it was largely hidden from view. After reviewing cases from other jurisdictions involving water and sewer pipes, it stated, "That the pipe line was beneath the earth's surface does not negative the character of the easement as apparent." Berlin, 180 Wn. at 181. It then held that the easement at issue was apparent, relying on the fact that the pipe was partially visible after heavy rains, that a faucet on the dominant estate was visible, and that people in the community were aware of the pipe. Berlin, 180 Wn. at 181. Here, while the sewer line was beneath the surface, it was "apparent" based on its connection to the Keo property behind the Stefankivs' house and to the public sewer

main (served by two visible manholes) in front of their house. Additionally, the recorded short plat map referenced a drainage system for both houses and showed that lot 2 was largely cut off from direct access to the street containing the public sewer main. And it is undisputed that the sewer line was continuously used for many years before the Stefankivs damaged it during their renovation.

Finally, there is uncontradicted evidence showing that the easement is reasonably necessary for the Keos' enjoyment of their property. Absolute necessity is not required to establish an implied easement. Evich v. Kovacevich, 33 Wn.2d 151, 157–58, 204 P.2d 839 (1949). "The test of necessity is whether the party claiming the right can, at reasonable cost, on his own estate, and without trespassing on his neighbors, create a substitute." Bays v. Haven, 55 Wn. App. 324, 329, 777 P.2d 562 (1989). Here, the Keos presented an estimate from Roto-Rooter for $30,650 to create a substitute sewer line. This substantial cost also supports the creation of an implied easement.

Because the Stefankivs fail to demonstrate there is a genuine issue of material fact related to the existence of an implied easement, the trial court properly granted summary judgment. And because the Keos have an easement right to use the Stefankivs' property for their sewer line, the Stefankivs' claims for nuisance and trespass were properly dismissed.[6]

[6] The Keos argue that they should be awarded fees under RAP 18.9 because the Stefankivs' appeal is frivolous. "[A]n appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal." Streater v. White, 26 Wn. App. 430, 435, 613 P.2d 187 (1980). The court considers the record as a whole and resolves all doubts against finding an appeal frivolous. Delaney v. Canning, 84 Wn. App. 498, 510,

For the foregoing reasons, we affirm.

WE CONCUR:

Ellington, J.

Becker, J.

929 P.2d 475 (1997). Here, looking at the record as a whole, the appeal is not frivolous. The Stefankivs cite applicable case law and raise arguments that are at least debatable. Accordingly, we deny attorney fees.