COURT OF APPEALS
DECISION
DATED AND FILED

March 12, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1188 **Cir. Ct. No. 2010CV372**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

ENBRIDGE ENERGY, LIMITED PARTNERSHIP, A DELAWARE LIMITED PARTNERSHIP AND ENBRIDGE PIPELINES (SOUTHERN LIGHTS) L.L.C., A DELAWARE LIMITED LIABILITY COMPANY,

PLAINTIFFS-RESPONDENTS,

V.

JEREMY D. ENGELKING, GERALD D. ENGELKING AND BARBARA A. ENGELKING,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Douglas County: GEORGE L. GLONEK, Judge. *Affirmed in part; reversed in part and cause remanded for further proceedings*.

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Jeremy, Gerald, and Barbara Engelking appeal a judgment resolving an easement dispute with Enbridge Energy and Enbridge Pipelines. The Engelkings argue the circuit court erroneously dismissed their trespass and ejectment counterclaims, and erroneously interpreted the pipeline easement to cover their entire parcel and to not require payment prior to installing new pipelines. We conclude the court properly interpreted the easement language concerning the timing of payments for new pipelines. However, we reject the court's interpretation that the easement covered the entire parcel. Further, we reinstate the Engelkings' counterclaims for trespass and ejectment.

BACKGROUND

¶2 The Engelkings own a twenty-acre parcel that is subject to a pipeline easement now owned by Enbridge. The Engelkings' predecessor granted the easement in 1949. Shortly thereafter, the first pipeline, sixty rods in length, was constructed across the parcel. The "RIGHT OF WAY GRANT" provided that for consideration of $60 "cash in hand paid, receipt of which is hereby acknowledged" the owner granted:

> a right of way and easement for the purpose of laying, maintaining, operating, patrolling …, altering, repairing, renewing and removing … a pipe line for the transportation of crude petroleum, its products and derivatives, … together with the necessary fixtures, equipment and appurtenances, over, through, upon, under and across [legal description of entire twenty-acre parcel] together with the right to clear the right of way and remove or trim trees and brush, and remove other obstructions, for a sufficient distance along both sides of [the] pipe line so as to prevent damage or interference with its efficient operation and patrol; and together with the right of ingress and egress to and from [the] right of way through and over [the] above described land ….
>
> Grantee, its successors and assigns, may at any time lay additional lines of pipe upon payment of like consideration

> per rod for each additional line so laid and subject to the same conditions.
>
> ….
>
> The … Grantor reserves the right to the full use and enjoyment of [the] premises except as the same may be necessary for the purposes herein granted; provided that … Grantor shall not erect over any line or lines of Grantee any improvement of a nature such as to interfere with the rights hereby granted.

The grant further provided that the grantee would pay for any damages to crops, fences, and timber, and that the parties agreed to arbitrate the amount of such damages if disputed.

¶3 A second and third pipeline were constructed in 1956 and 1966, while the property was still owned by the Engelkings' predecessor. In 2002, Enbridge negotiated with the Engelkings to build a fourth pipeline. After the parties were unable to reach an agreement, Enbridge constructed the line, forty feet from the third line. Failed negotiations occurred again in 2009, and Enbridge constructed a fifth and sixth pipeline. Those lines were constructed eighteen and twenty-one feet, respectively, from the prior lines. Enbridge did not compensate the Engelkings prior to constructing any of the three lines.

¶4 On September 24, 2009, the Engelkings filed a "verified petition/complaint for temporary and permanent restraining order," alleging Enbridge had entered their parcel in anticipation of constructing new pipelines, had not paid in advance, was committing a current and continuing trespass, and

was causing physical damage to the land and trees.[1] That same day, the Engelkings received an ex parte order granting a temporary injunction prohibiting Enbridge from entering onto the parcel. The order further required Enbridge to show cause why a permanent injunction should not be granted, and to do so at a hearing scheduled the following afternoon. Following the hearing, the court entered an order providing, "the motion of plaintiffs for a temporary and permanent injunction is denied, and the temporary injunction and desist and refrain order … is hereby dissolved."

¶5 Enbridge subsequently filed an answer and counterclaim requesting declaratory judgment, a restraining order, and monetary damages. The circuit court, however, held that its order was a "final Order" and had "dispose[d] of Plaintiffs' Petition in its entirety and the matter was basically closed." The court therefore granted the Engelkings' motion to strike Enbridge's pleading. Enbridge later filed the present action, alleging a breach of contract and seeking a declaratory judgment and an injunction. The Engelkings filed numerous counterclaims, including trespass and ejectment. They also sought damages for property damage and, like Enbridge, sought declaratory judgment concerning the parties' future rights under the easement.

¶6 The court granted Enbridge's motions to dismiss many of the Engelkings' counterclaims. As relevant to the appeal, the court dismissed the trespass counterclaim as to the 2002 pipeline because the statute of limitations had

[1] We observe that temporary or permanent injunctions do not appear to constitute a cause of action in and of themselves. Rather, injunctions are remedies that may be granted as part of a properly commenced action. *See* WIS. STAT. § 813.01. All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

expired, concluding any trespass ceased once the pipeline was buried. It also dismissed the trespass counterclaim as to the 2009 pipelines, concluding it was barred by claim preclusion based on the Engelkings' failed attempt to obtain a permanent injunction. The court dismissed the ejectment counterclaim because it determined there was no allegation that the Engelkings were deprived of possession. The issue of physical damage was referred to arbitration, as required by the easement language. Ultimately, the court proceeded to a hearing concerning the issues of "like consideration" for installing the 2002 and 2009 pipelines and a declaration of the parties' respective future rights under the easement grant.

¶7 Following the hearing, the court awarded the Engelkings $4037 as compensation for the pipeline installations. Further, it held that the easement grant did not require payment prior to installation, and that, therefore, the pipelines were not unlawfully constructed. Given that determination, the court concluded the easement was not limited in location to the area encompassed by the initial three pipelines. Additionally, the court determined that the easement was located across the entirety of the twenty-acre parcel. The Engelkings now appeal.

DISCUSSION

Scope of easement

¶8 We first address the court's determination that the easement consisted of a "blanket easement" inclusive of the entirety of the Engelkings' twenty-acre parcel. Construction of a deed granting an easement presents a question of law unless there is an ambiguity requiring resort to extrinsic evidence. ***Atkinson v. Mentzel***, 211 Wis. 2d 628, 638, 566 N.W.2d 158 (Ct. App. 1997). Whether an ambiguity exists is also a question of law that we review de novo. ***Id.***

¶9 In determining that the easement was not limited in location, the court relied on the grant's overall broad language and its recitation of the entire parcel description. However, a right-of-way easement that is not particularly described cannot be construed to encompass the entirety of the parcel it crosses. Rather, we have held:

> When the location of a right-of-way easement is not defined by the grant, a reasonably convenient and suitable way is presumed to be intended, and the right cannot be exercised over the whole of the land. If the parties cannot agree upon a location, the court has the power to affirmatively and specifically determine the easement's location. In doing so, the reasonable convenience of both parties is of prime importance. Furthermore, the court cannot act arbitrarily and must proceed with due regard for the rights of the parties.

Id. at 641-42 (citation omitted).

¶10 Enbridge argues that ***Atkinson*** is distinguishable because there the easement was not defined, whereas here it is. The distinction Enbridge seeks to draw simply does not exist. In fact, contrary to Enbridge's argument, the description in ***Atkinson*** was more precise. Whereas here the right was identified only with respect to the parcel description, there the right-of-way was explicitly limited to a paved parking lot located within the parcel description. *See* ***id.*** at 641. Furthermore, any interpretation that the right-of-way encompassed the entire parcel would be unreasonable. If it covered the entire twenty acres, there would have been no need to grant Enbridge "the right of ingress and egress *to and from* [the] right of way through and over [the entire parcel]." (Emphasis added.) Further, such an interpretation would essentially deprive the Engelkings of their entire property.

¶11 On remand, the circuit court must therefore determine the location of the right-of-way; its location may not be expanded arbitrarily or without due regard to the Engelkings' rights.[2] Further, the fact that Enbridge elected to construct its additional pipelines prior to a determination of its rights should not now operate as a benefit to Enbridge when considering the reasonable convenience of both parties.

Timing of payment

¶12 We next address the circuit court's construction of the deed concerning the timing of payment for additional pipelines. The deed granted the right to "at any time lay additional lines of pipe upon payment of like consideration per rod for each additional line so laid …." The court determined that, in context, the term "upon" was ambiguous. Further, it concluded that, given the broad rights granted by the deed, it would be unreasonable to interpret it to require payment before construction. It reasoned that doing so would allow the Engelkings to delay projects merely by unreasonably failing to accept payments, even if the amount tendered was later determined to be sufficient "like consideration."

¶13 We agree with the circuit court's interpretation. Significantly, the right granted by the deed is to lay pipe "at any time." Citing ***People v. Williams***, 151 P.2d 244, 246 (Cal. 1944), the circuit court explained, "It has long been held

[2] We do not intend to prejudge the outcome on remand. However, if the court determines Enbridge exceeded the scope of the easement, we observe that perhaps the proper course would be WIS. STAT. ch. 32 condemnation, inverse condemnation, or perfect title proceedings, rather than continuation of trespass or ejectment proceedings. *See* WIS. STAT. §§ 32.02, 32.04, 32.06, 32.10, 32.12.

that the term 'upon' may mean before, after or simultaneously with, according to the context of the provision in which it is used." Indeed, while primarily not utilized to denote temporality, upon is defined variously as "immediately following on : very soon after" or "on the occasion of : at the time of."[3] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2518 (unabr. 1993). The Engelkings do not proffer any dictionary definition, much less one indicating that "upon" means "preceding." Moreover, it is not clear that the term "upon" was intended to have any temporal meaning whatsoever here. The awkwardly worded provision, drafted in 1949, might reasonably be interpreted as allowing new pipe construction "at any time," with the phrase "upon payment of like consideration" merely designating the payment *amount*.

¶14 When a contract term is ambiguous, a "court may rely on the canons of construction[,] which are designed to ascertain the intentions of the parties entering into a contract." ***Capital Invs., Inc. v. Whitehall Packing Co.***, 91 Wis. 2d 178, 190, 280 N.W.2d 254 (1979). One such principle is that "unreasonable results should be avoided[.]" ***Id.*** at 193. Thus,

> the court may look to the consequences which would result should it adopt one construction as opposed to another, because where there is ambiguity the more reasonable meaning should be given on the probability that persons situated as the parties were would be expected to contract in that way as opposed to a way which works an unreasonable result.

Carey v. Rathman, 55 Wis. 2d 732, 737-38, 200 N.W.2d 591 (1972).

[3] The temporal definitions recited are listed as definitions 10a and 10b respectively. They are last in the list of alternatives, save for an archaic definition and a Scottish one.

¶15 We agree with the circuit court that, considering the language of the deed as a whole and the broad powers it grants, it would be unreasonable to interpret it such that the Engelkings could significantly delay an entire large-scale construction project by—reasonably or not—rejecting what may ultimately be determined to constitute "like consideration." Further, this construction is consistent with the procedure applicable in condemnation proceedings. *See* WIS. STAT. § 32.12.[4]

Trespass counterclaims

¶16 We turn now to the Engelkings' trespass counterclaims. The court dismissed the counterclaim as to the 2002 pipeline as time-barred, and as to the 2009 pipelines due to claim preclusion.

¶17 The Engelkings argue the pipeline built in 2002 constitutes a continuing trespass, the line's burial notwithstanding.[5] We agree. A landowner's rights extend below the surface of the property. ***Steiger v. Nowakowski***, 67

[4] WISCONSIN STAT. § 32.12 provides:

> At any stage of the proceedings the court in which they are pending may authorize the person [having the power to acquire property by condemnation], if in possession, to continue in possession, and if not in possession to take possession and have and use the lands during the pendency of the proceedings ….

[5] The Engelkings improperly cite, and discuss at length, several unpublished court of appeals decisions, despite discrediting one of them as "an unpublished decision, without any precedential value as a matter of law. WIS. STAT. [RULE] 809.23(3)." They cite three unpublished decisions that predate 2009. They also cite a 2012 case that may be cited for persuasive value only if a copy is served and filed. *See* WIS. STAT. RULE 809.23(3)(b), (c).

The Engelkings' counsel was clearly aware of the rule prohibiting citation of unpublished opinions. We therefore penalize counsel $75 for each of the three disallowed citations, and further admonish counsel to comply in the future with the requirement to provide copies of any cases cited for persuasive value. *See* WIS. STAT. RULE 809.83(2).

Wis. 2d 355, 359, 227 N.W.2d 104 (1975); ***Piper v. Ekern***, 180 Wis. 586, 592, 194 N.W. 159 (1923). Moreover, the deed grants Enbridge the continuing right to enter the Engelkings' property to maintain the line, and prohibits the Engelkings from building any structures over it.

¶18 Further, Enbridge primarily responds that there was simply no trespass because it acted within its easement rights. This, however, fails to refute the Engelkings' argument, and simply begs the question whether the counterclaim would prevail if tried. Unrefuted arguments are deemed conceded. ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). Enbridge also observes a factual distinction between this case and one of the cases the Engelkings rely on. While this appears merely to be further argument that there was no trespass, Enbridge does not develop any legal argument concerning the distinction. We will not decide issues that are not, or inadequately, briefed. ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994).

¶19 We also agree with the Engelkings that their trespass counterclaims regarding the 2009 pipelines were erroneously dismissed. The circuit court held the claims were barred by claim preclusion. Claim preclusion applies when there is: "(1) an identity between the parties or their privies in the prior and present suits; (2) an identity between the causes of action in the two suits; and (3) a final judgment on the merits in a court of competent jurisdiction." ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 551, 525 N.W.2d 723 (1995). "[W]hether claim preclusion applies under a given factual scenario is a question of law that this court reviews de novo." ***Id.***

¶20 We conclude the third requirement of claim preclusion was not satisfied here. The cause of action identified in the Engelkings' initial suit was one for temporary and permanent injunction. As noted above, those remedies do not appear to constitute a cognizable cause of action in the first instance. In any event, the court's order denying the request for an injunction, rendered just one day after the "action" was filed and prior to the filing of any responsive pleading, cannot be viewed as a final judgment on the merits. The order stated no reasons for the denial, and it did not mention any claims for trespass. Moreover, the order failed to resolve any issues concerning the parties' respective rights under the deed. We further conclude that by instituting the present action concerning the same underlying facts and legal instrument, Enbridge is deemed to have forfeited any right to assert claim preclusion.

¶21 Enbridge relies on ***Luebke v. City of Watertown***, 230 Wis. 512, 284 N.W. 519 (1939), to argue the order denying an injunction constituted a final decision on the merits. Indeed, that case proceeded similarly. However, after explaining what occurred in the circuit court, the supreme court disapproved of the procedure and observed that the "practice [was] entirely without precedent." ***Id.*** at 514. Nonetheless, because the parties there had agreed to the procedure, the court deemed the case as one submitted upon an agreed case pursuant to WIS. STAT. § 269.01 (1937). ***Id.*** at 515-16. That statute (and procedure) no longer exists, having been repealed in 1975. Moreover, here there was no such agreement; Enbridge subsequently attempted to file an answer and continue the case.[6]

[6] We decline to apply the equitable doctrine of judicial estoppel against the Engelkings.

Ejectment counterclaim

¶22 Finally, the Engelkings argue the court erroneously determined they failed to state a claim for ejectment. A motion to dismiss a complaint for failure to state a claim tests the legal sufficiency of the complaint. ***Alsteen v. Wauleco, Inc.***, 2011 WI App 105, ¶8, 335 Wis. 2d 473, 802 N.W.2d 212. This presents a question of law that we review de novo. ***Id.*** In so doing, we accept the facts alleged in the complaint as true and draw all reasonable inferences in favor of stating a claim. ***Id.*** A complaint should not be dismissed unless it appears certain that no relief can be granted under any set of facts that the plaintiff can prove in support of the allegations. ***Id.***

¶23 In ***Chris Schroeder & Sons v. Lincoln County***, 244 Wis. 178, 180-81, 11 N.W.2d 665 (1943), the court identified the elements of an ejectment claim as follows: "There must be an allegation setting forth the plaintiff's estate or interest in the premises claimed 'that he is entitled to possession and that the defendant unlawfully withholds possession from him.' [WIS. STAT. §] 275.05 [(1941)]."[7] The circuit court held that the Engelkings failed to allege facts supporting either element. We disagree.

[7] We make no judgment as to whether a cause of action for ejectment exists in the first instance or, if so, what the elements are. The Engelkings fail to clearly identify the elements of an ejectment claim, and, in fact, assert that ejectment is merely a remedy available for a continuing trespass claim. Nonetheless, no argument is made that the claim is not known in law. As did the circuit court, the parties address whether an ejectment claim was pleaded under ***Chris Schroeder & Sons v. Lincoln County***, 244 Wis. 178, 180-81, 11 N.W.2d 665 (1943). That case set forth the elements of an ejectment claim under WIS. STAT. § 275.05 (1941), which no longer exists. However, a related claim is identified in WIS. STAT. § 843.01, titled, "Action for possession." *See also* WIS. STAT. § 840.03 (Real property remedies.).

¶24 The Engelkings alleged that they owned the subject parcel and that the pipelines constituted a continuing trespass and encroachment beyond the scope of the easement. They further recited the easement language that forbade them from constructing any structures over the pipelines. Additionally, the Engelkings alleged that when they attempted to exercise their possession rights to the property, Enbridge contacted the local sheriff, and that one of them was in fact ordered to the ground and arrested for trespassing, under threat of a taser. Under any view, the foregoing adequately alleges that the Engelkings were entitled to possession and that Enbridge was withholding possession. We therefore reinstate the Engelkings' ejectment claim.

¶25 Enbridge argues the Engelkings cannot state a claim for ejectment because they must be deprived of possession of their *entire* parcel. The cases Enbridge relies on fail to support its argument. In both ***Rahn v. Milwaukee Electric Railway & Light Co.***, 103 Wis. 467, 79 N.W. 747 (1899), and ***Zander v. Valentine Blatz Brewing Co.***, 95 Wis. 162, 70 N.W. 164 (1897), the defendant had constructed building foundations that minimally intruded across the property line, beneath the wall or foundation of the plaintiff's building. The court held in each case that ejectment was unavailable because the plaintiff nonetheless maintained full use and possession of the lot to the property line. Here, on the other hand, the Engelkings have alleged they cannot use and possess that portion of the property on which they allege Enbridge is trespassing. The other case relied upon, ***Peters v. Reichenbach***, 114 Wis. 209, 90 N.W. 184 (1902), is entirely irrelevant. There, the party lacked legal title to a strip of land and sought to prove title to it based upon *having* possession.

¶26 No WIS. STAT. RULE 809.25 costs allowed to either party.

¶27 The Engelkings's counsel shall remit a $225 penalty to the clerk of this court within forty-five days of the date of this decision. *See supra* n. 5.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded for further proceedings.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.