

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 CA 0156

FAIR HILLS FARMS, L.L.C.

VERSUS

ROBERT TODD NEEDHAM

Judgment Rendered: December 28, 2006

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Appealed from the
Twenty-First Judicial District Court
In and for the Parish of Tangipahoa
State of Louisiana
Suit Number 2001-002061

Honorable Ernest G. Drake, Jr., Presiding

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BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

Parro, J., dissents.

McCleendon J., concurs and assigns reasons.

GUIDRY, J.

In this action, plaintiff, Fair Hills Farms, L.L.C. (Fair Hills Farms),¹ appeals the trial court's denial of its request for a judgment declaring a right of way through property owned by the defendant, Robert Todd Needham. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

On October 19, 1978, Alton J. Matherne, Needham's ancestor in title, granted a predial servitude of way and passage to Cecil McAdoo, Fair Hills Farms' ancestor in title, consisting of a fifty foot wide and a one thousand, three hundred, forty-five foot long strip of immovable property. The servitude was granted in consideration of four thousand dollars, cash in hand, so as to enable McAdoo access to his one hundred sixty acre "landlocked" tract of land. Thereafter, on June 22, 2001, Fair Hills Farms filed a petition for declaratory judgment, alleging Needham denied it access to the servitude, and requested that a judgment be entered declaring a servitude or right of way to exist to the benefit of Fair Hills Farms and enjoining Needham from obstructing and/or interfering with use of the right of way. Needham answered Fair Hills Farms' petition and asserted that the servitude alleged by Fair Hills Farms had prescribed by nonuse.

Following a trial on March 18, 2003, the trial court granted Needham's motion for involuntary dismissal. Fair Hills Farms filed a motion for new trial, which was granted. Following a new trial, the trial court entered judgment in favor of Needham, rejecting Fair Hills Farms' petition for declaratory judgment, and in particular, its claim for a right of way through Needham's property. Fair Hills Farms now appeals from this judgment.

¹ The record indicates, by act of sale and corporate resolution, that the correct spelling of the plaintiff is "Fair Hill Farm, L.L.C., although the petition was filed as "Fair Hill Farms, L.L.C. For consistency in the opinion, we will refer to the plaintiff as Fair Hill Farms.

STANDARD OF REVIEW

An appellate court's review of factual findings is governed by the manifest error-clearly wrong standard. As such, an appellate court may not reverse a trial court's factual determinations unless, after reviewing the record in its entirety, it determines: 1) a reasonable factual basis does not exist for the finding of the trial court, and 2) the record establishes that the finding is clearly wrong. See Stobart v. State, through Department of Transportation and Development, 617 So. 2d 880, 882 (La. 1993). Furthermore, when findings are based on determinations regarding the credibility of witnesses, the manifest error-clearly wrong standard demands great deference to the trier of fact's findings. Rosell v. ESCO, 549 So. 2d 840, 844 (La. 1989). Nevertheless, the issue to be resolved by a reviewing court is not whether the trier of fact was right or wrong, but whether the factfinder's conclusion was a reasonable one. Even though an appellate court may feel its own evaluations and inferences are more reasonable than the factfinder's, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review where conflict exists in the testimony. Stobart, 617 So. 2d at 882. Additionally, where there are two permissible views of the evidence, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong. Rosell, 549 So. 2d at 844.

DISCUSSION

A predial servitude, such as a servitude of passage, is preserved by the use made of it by anyone, even a stranger, so long as it is used as appertaining to the dominant estate. See La. C.C. art. 757; Palace Properties, L.L.C. v. Sizeler Hammond Square Limited Partnership, 01-2812, p. 11 (La. App. 1st Cir. 12/30/02), 839 So. 2d 82, 94; writ denied, 03-0306 (La. 4/4/03), 840 So. 2d 1219. "So long as it is used as appertaining to the dominant estate" has been interpreted by this court as requiring that "someone must use the property for the purpose of

going onto that property for some legitimate purpose, either to see the owner or for something connected with the use of that property.” Latour v. Francis, 417 So. 2d 485, 489 (La. App. 1st Cir.), writ denied, 420 So. 2d 983 (La. 1982).

However, if a predial servitude is not used for ten years, it is extinguished and cannot be revived except by following the formalities of creating it anew. See La. C.C. art. 753; Church v. Bell, 00-0286, p. 4 n.3 (La. App. 1st Cir. 3/28/01), 790 So. 2d 82, 84 n.3, writ denied, 01-1214 (La. 6/15/01), 793 So. 2d 1247. Nonuse is measured from the date of the last use of an affirmative servitude. La. C.C. art. 754; Palace Properties, L.L.C., 01-2812 at p. 12, 839 So. 2d at 94. When the prescription of nonuse is pled, the owner of the dominant estate, in this case, Fair Hills Farms, has the burden of proving that someone has made use of the servitude in the manner contemplated by the grant of the servitude and as appertaining to the dominant estate during the period of time required for the accrual of prescription, such that no consecutive ten-year period of nonuse occurred. See La. C.C. art. 764; Palace Properties, 01-2812 at p. 12, 839 So. 2d at 94.

In the instant case, several witnesses were called at trial to testify, either in person or by deposition. Needham and several other witnesses testified that the right of way was not maintained or marked, and that they never saw anyone walk on or otherwise use the disputed right of way. In fact, several of these witnesses stated that they saw individuals access the one hundred sixty acre tract by parking in Needham’s driveway and walking straight back to the tract, through two fences and across Needham’s pasture, which did not require use of the disputed right of way.. Witnesses on behalf of Fair Hills Farms, however, testified that they in fact walked on the disputed right of way, which they located by written survey or visible markings, in order to access the one hundred sixty acre tract.

The trial court prepared extensive written reasons for judgment, addressing the various witnesses’ testimony, as well as the documentary evidence admitted at

trial. In its reasons, the trial court determined that Pamela Jo Sullivan, the daughter of McAdoo, used the right of way as late as 1982 to access the one hundred sixty acre tract. However, after 1982, the trial court determined that the testimony and documentary evidence admitted at trial conflicted as to the use of the disputed right of way and specifically found Needham's witnesses to be more credible.

Additionally, the trial court looked at the documentary evidence, particularly a purchase agreement executed in 1994 and a deed executed in 1999, in support of the argument that the right of way had expired for nonuse. The purchase agreement, executed by James Calhoun, specifically noted that the purchase was contingent on the seller, at that time McAdoo, obtaining a servitude from Needham Road to the one hundred sixty acre tract. According to the testimony, the servitude was never obtained, and the sale was not completed. Additionally, the deed, transferring ownership of the one hundred sixty acre tract from Thomas Keaty to Fair Hills Farms, specifically provided that the property was "land locked" and was being purchased accordingly, and that any right of ingress and egress would be the responsibility of the purchaser. The trial court reasoned that if the disputed right of way were still valid, mention of it would have been made in the 1994 purchase agreement and in the 1999 deed. We do not find this to be an unreasonable inference in light of the entire record.

Therefore, based on our review of the record, we find that the trial court was presented with conflicting testimony and made reasonable credibility determinations and inferences of fact. As such, we find that there was no manifest error in its finding that the right of way was prescribed for nonuse of ten years.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court. All costs of this appeal are to be borne by the appellant, Fair Hills Farms, L.L.C.

AFFIRMED.

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McCLENDON, J., concurs, and assigns reasons.

 As an appellate court we cannot set aside the trial court's factual findings unless we determine that there is no reasonable factual basis for the findings and the findings are clearly wrong (manifestly erroneous). **Stobart v. State, Dep't of Transp. and Dev.**, 617 So.2d 880, 882 (La.1993). If the findings are reasonable in light of the record reviewed in its entirety, an appellate court may not reverse even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. **Rosell v. ESCO**, 549 So.2d 840, 844 (La.1989).

After reviewing the entire record, I cannot say that the trial court lacked any reasonable basis for its finding and was clearly wrong. Accordingly, I concur with the result reached by the majority.