2018 IL App (3d) 160329-U

Appellate Court of Illinois,
Third District.

JUDITH MOTTL KERR TRUST, Judith M. Kerr, Trustee; Judith M. Kerr and Alexander D. Kerr, Jr., Individually, Plaintiffs–Appellees/Cross–Appellants,
v.
Loretta HOLM; Adam Holm; Daniel Holm; Nicholas Holm, Defendants–Appellants/Cross–Appellees,
and
Unknown Owners of record and parties in possession, Defendants.

Appeal No. 3–16–0329
|
Order filed June 8, 2018

Appeal from the Circuit Court of the 13th Judicial Circuit, Grundy County, Illinois, Circuit Nos. 14–CH–104, 14–CH–153, 14–CH–91, Honorable Eugene P. Daugherity, Judge, Presiding.

ORDER

JUSTICE HOLDRIDGE delivered the judgment of the court.

***1** ¶ 1 *Held*: The trial court did not err in determining as a matter of law that the defendants could be required to pay a just proportion of the cost of building a division fence between their land and the land of adjoining landowners pursuant to the Fence Act; but (2) the trial court erred in deciding as a matter of law that the defendants were required to pay half the cost of building a division fence between their land and the plaintiffs' land because genuine issues of material fact existed as to whether the defendants violated the Fence Act by removing a preexisting division fence between the parties' properties without giving notice to the plaintiffs, which would require the defendants to pay the entire cost of replacing the fence.

¶ 2 Plaintiffs (the Kerrs) own property in Grundy County. The Kerrs filed a complaint against Defendants (the Holms), who own property adjacent to the Kerrs' property, seeking to establish the boundary between the parties' properties and to rebuild a portion of a border fence that the Kerrs alleged had been improperly removed by the Holms. The Kerrs also sought injunctive relief against the Holms. The Kerrs filed a motion for partial summary judgment on Count I of their complaint, which asserted a claim for boundary by acquiescence. The trial court denied the Kerr's motion because it found there were genuine issues of material fact as to when the initial division fence was taken down and how the parties acted thereafter regarding the presumed location of the boundary between their properties.

¶ 3 The Holms subsequently filed a motion for partial summary judgment against the Kerrs. In their motion, the Holmes argued, *inter alia*, that: (1) the parties' dispute was governed by section 4 of the Fence Act (Act) (765 ILCS 130/4 (West 2014)); and (2) section 4 of the Act did not require the Holms to pay the costs of reestablishing the boundary line between the parties or restoring a border fence.

¶ 4 The Kerrs filed a response to the Holms' motion and a cross-motion for summary judgment. In their response, the Kerrs argued that the Act did not apply because the Act was intended to govern disputes between landowners with livestock or cultivated land, which are not at issue in the instant case. In the alternative, the Kerrs argued that, should the court decide to apply the Act: (1) the fence at issue is a "division" fence (rather than an "inclosure" fence) under the Act; and (2) under section 3 of the Act, the cost to rebuild the division fence at issue should be shared by the parties, with each party paying a proportionate share of the costs to rebuild the fence. Alternatively, the Kerrs argued that, because the Holms improperly removed the fence without providing the Kerrs the notice required by section 14 Act (765 ILCS 130/14 (West 2014)), the court should require the Holms to pay the full cost of rebuilding the fence, pursuant to section 15 of the Act (765 ILCS 130/15 (West 2014)). In their cross-motion for summary judgment, the Kerrs argued that the court should impose a "no contact" zone and order the Holms

to cease and desist their harassing behavior directed at the Kerrs, their guests, and their contractors.

***2** ¶ 5 The trial court granted the Kerrs' cross-motion for partial summary judgment and denied the Holms' motion for partial summary judgment. The trial court found that the fence to be restored was a "division fence," to which section 3 of the Act applied. Pursuant to that section, the trial court ordered the parties to: (1) share equally in the cost to reestablish the boundary line based upon a survey commissioned by the Holms and agreed to by the parties (the "Morrison survey"); (2) share equally in the cost to monument and stake said boundary line according to the Morrison survey; and (3) share equally in the cost of erecting and maintaining a two-strand, wire division fence. The trial court also ordered defendants Daniel and Adam Holm to "adhere to a 20–foot set back south of the boundary line when persons are physically present on both tracts of land," but noted that this "no contact zone" shall not preclude the defendants from using their chicken coop and was not intended to interfere with the ingress or egress of the properties or to prevent maintenance and cleanup of the area. The trial court expressly found that there was "no just cause to delay the enforcement or appeal" of its Order.

¶ 6 These appeals followed. The Holms appeal the trial court's ruling that the fence at issue was a "division fence" which was subject to cost sharing under the Act. The Holms also argue that "material issues of fact precluded summary judgment against the defendants." The Kerrs cross-appeal the trial court's judgment, arguing that they are entitled to recover from the Holms the entire costs of establishing, monumenting and staking the boundary line, erecting and restoring the division fence, and expanding their gravel driveway under section 15 of the Act because the Holms improperly removed the prior boundary fence without giving notice to the Kerrs.

¶ 7 FACTS

¶ 8 In 1965, Wesley and Loretta Holm purchased property situated between Deer Lake and Winterbottom Road in Morris, Illinois (Lot 13). That same year, Irving and Rose Mottl (the plaintiff Judith Kerr's late mother), purchased an adjacent lot (Lot 12) immediately to the north of the Holm's property. Loretta Holm still owns lot 13 in fee simple, and she allows her son, defendant Adam Holm, and her grandsons, defendants Daniel and Nicholas Holm, to reside there. Plaintiff Judith Kerr is the trustee of the Judith Mottl Kerr Trust, which owns Lot 12. Judith and her husband, plaintiff Alexander D. Kerr, Jr., are the successors-in-interest to the property. The Mottl family has owned and been in possession of Lot 12 since 1965.

¶ 9 In July of 2014, the Kerrs filed a two-count complaint against the Holms. Count I sought to quiet title through the principle of boundary by acquiescence, and Count II sought an order enjoining the Holms from harassing the Kerrs or their invitees, guests, or contractors. The case was subsequently consolidated with two other boundary dispute cases that were pending between the Holms and two other parties.

¶ 10 On May 13, 2015, the Kerrs filed a motion for summary judgment on Count I of their complaint (the boundary by acquiescence claim). The Kerrs argued that summary judgment was appropriate on this issue because the undisputed evidence showed that, for almost 50 years, both the Kerrs and the Holms have maintained their respective properties on either side of the preexisting border fence and have otherwise shown by their conduct that they accepted that historic fence line without dispute as the boundary line separating their properties. According to the Kerrs, the Morrison survey confirmed the historic boundary, and it was not until the Holms subsequently commissioned another survey in 2014 which set the boundary at a different location (the Claassen survey) that the Holms began to dispute the historic boundary line. The Kerrs sought the entry of an order declaring that the historic boundary between lots 12 and 13 is the boundary to be respected by the landowners, occupants, and guests.

¶ 11 In support of their motion, the Kerrs submitted the affidavits of Alexander and Judith Kerr. In his affidavit, Alexander swore, *inter alia*, that: (1) when he and Judith returned to Morris in 1974, he observed a two-strand wire fence line "on the property line between lots 12 and 13"; (2) during their lifetimes, Judith's parents maintained the property north of the historic property line "established by the two-strand wire fence line"; (3) since 1974, Alexander has "observed that the Holms have maintained the property to the south of the historic property line delineated by the two-strand wire fence"; (4) since the deaths of Judith's parents, Alexander and Judith

"have maintained the property including causing the area to be mowed and planting trees on the property in 2013"; (5) "a number of years ago," Alexander compensated Adam Holm for "rehabbing the western third of the historic fence"; (6) within the previous year, Adam and Daniel Holm had installed a new six-foot mesh fence "along the identical western [third] of the historic property line on the Holms' side" of the line; (7) after Wesley Holm's death, Alexander and Judith agreed to share the expense of a survey commissioned by the Holms to the extent of the parties' common property line (the Morrison survey), and Alexander personally paid Adam Holm the Kerrs' 50 percent share of the survey cost; (8) the Morrison Survey (which was attached as an exhibit to the Kerrs' motion for summary judgment) "confirmed the historic property line including the finding of the original iron pipes on the property line"; (9) beginning on or about June 22, 2014, Alexander and Judith noticed that surveyor's stakes began appearing on the east side of the Kerrs' property, several feet north of the boundary line with the Holms' property; (10) on July 2, 2014, three five-foot metal fence posts appeared in the Kerr property's gravel driveway blocking the use of portions of the driveway; (11) three days later, three additional five-foot metal fence posts were driven into the same driveway, and a seventh post was added in November 2014; (12) despite demands by the Kerrs and their attorneys to remove the posts, the Holms have not removed them, and the posts prevent use of a portion of the gravel drive and remain an impediment to ingress and egress; (13) the Holms are claiming portions of the Kerr property, including portions of the Kerrs' gravel driveway and 25 feet at the east end of the property line which encompasses trees planted in 2013; (14) due to the metal posts in their driveway, the Kerrs have been forced to expand the driveway at their own expense to improve ingress and egress during inclement weather; and (15) at an unknown time in November 2014, the Holms "removed a major wooden fence post which was part of the historic fence line."

***3** ¶ 12 In her affidavit, Judith Kerr swore (*inter alia*) that her father had "caused a two-strand wire fence line to be put on the property line between Lots 12 and 13, as he understood it," and that the two families had maintained their respective properties on each side the property line established by this fence. Judith also corroborated most of the other averments in her husband's affidavit.

¶ 13 The Holms filed a response in opposition to the Kerrs' motion for partial summary judgment which was supported by the affidavits of Adam and Daniel Holm. In their response, the Holms argued, *inter alia*, that there were genuine issues of material fact precluding summary judgment on Count 1 of the Kerrs' complaint. Specifically, the Holms contended that there were two conflicting surveys (the Morrison Survey and the Claassen Survey) which established different boundary lines, and that the credibility of these conflicting surveys was an issue to be resolved at trial. Moreover, Adam Holm and Daniel Holm swore that, in approximately 1975, Wesley Holm had planted approximately 60 trees 20 feet north of the two-strand wire fence referenced in Kerr's affidavit and had continuously maintained those trees for 40 years (until his death in 2011) without any help from the Mottls or the Kerrs. Adam and Daniel further swore that they had been maintaining these tress up until the present time.

¶ 14 The Holms' affidavits further averred that: (1) Adam and Daniel commissioned the Claassen Survey in 2014 to establish the exact boundary between the parties' properties; (2) according to the Claassen Survey (which was attached to the Holms' Response), the northern boundary line of the Holms' property "extends at a slope from 0 feet to 25 feet North of the 2 strand wire fence described in [paragraph 5 of Kerr's affidavit]"; and (3) Adam and Daniel Holm did not drive stakes into any portion of the driveway area between their property and the Kerrs' property until they had received a survey indicating the proper northern boundary line.

¶ 15 The trial court denied the Kerrs' motion for partial summary judgment because it found that "the removal of the fence, the establishment of when that occurred, the establishment of the occupancy beyond the period of time that the fence was removed, create[d] a sufficient issue of fact" to preclude summary judgment.

¶ 16 Thereafter, the parties engaged in settlement conferences before the trial court. The parties agreed to accept the boundary line as drawn on the Morrison Survey. On December 15, 2015, the trial court issued an Order stating that the parties had agreed on all issues except: (1) sharing the cost of a survey to reestablish the boundary; (2) the cost of restoring and maintaining a boundary fence; and (3) the width of the "no contact zone" to be imposed on the Holms. The trial court subsequently clarified that the parties had agreed to accept and record

the Morrison Survey, and that the remaining cost issues would be addressed by motions to be filed by the parties.

¶ 17 The Holms subsequently filed a motion for partial summary judgment against the Kerrs. In their motion, the Holms argued that the first of the disputed issues identified by the trial court in its December 15, 2015, Order (*i.e.*, whether the parties would share the cost of a survey to reestablish the boundary) was moot because the parties had agreed to accept the Morrison Survey, which was already paid for by the parties, and no new survey was needed. The Holms also argued that they were not required to pay any portion of the cost of erecting a new division fence between the parties' properties. In support of this argument, the Holms maintained that section 4 is the only section of the Act that requires an owner of adjoining land to "pay for the building of" a division fence desired by a neighboring landowner, and that section applies only when the landowner wants to build a fence to "inclose" his land, which is not the case here. The Holms argued that the principle of *expressio unius est exclusio alterius* applied and mandated judgment in their favor as a matter of law. Specifically, the Holms contended that, by expressly requiring adjoining landowners to "pay for the building" of a portion of a division fence only when the fence is an "inclosure" fence, the legislature meant to exclude such a requirement when the fence at issue is not an inclosure fence.

***4** ¶ 18 The Holms supported their summary judgment motion with new affidavits from Adam and Daniel Holm. Adam and Daniel each swore that: (1) "the only fence ever erected during the entire time that [he] resided next to the Kerr/Mottl residence was a fence that separated the two driveways"; (2) "[t]his fence never enclosed the entire Kerr/Mottl property"; (3) "[t]his fence was repaired at the request of Alexander Kerr sometime between 2000 and 2001 but the dimensions of this fence were not extended"; (4) "[a]pproximately four years ago Alexander Kerr requested that this driveway fence be extended"; and (5) a quote to perform that work was obtained, but Alexander Kerr declined to authorize the work.

¶ 19 The Kerrs filed a combined response to the Holms' motion and a cross-motion for partial summary judgment. In their response, the Kerrs argued that the Act did not apply because the Act's purpose was to address certain agricultural issues (specifically, disputes between "landowners with livestock or cultivated land"), which were not at issue in the instant dispute. Alternatively, the Kerrs maintained that, should the court decide to apply the Act, it should treat the fence at issue as a "division" fence under the Act, rather than as an "inclosure" fence governed by section 4 of the Act. Section 3 of the Act provides, in pertinent part, "[w]hen 2 or more persons have lands adjoining, each of them shall make and maintain a just proportion of the division fence between them." 765 ILCS 130/3 (West 2015). The Kerrs argued that, pursuant to section 3, the cost to rebuild the division fence at issue should be shared by the parties, with each party paying a proportionate share of the costs to re-erect the fence. In the alternative, the Kerrs contended that, if the court finds that the Holms improperly removed the fence without providing the Kerrs the notice required by section 14 Act, the court should require the Holms to pay the full cost of rebuilding the fence pursuant to section 15 of the Act. In their cross-motion for summary judgment, the Kerrs argued that the court should impose a 20–foot wide "no contact" zone north of the boundary line and order the Holms to cease and desist their harassing behavior directed at the Kerrs, their guests, and their contractors.

¶ 20 In support of their response and cross-motion for partial summary judgment, the Kerrs submitted a "Responsive Affidavit of Alexander Kerr" and affidavits from two professional surveyors (Kevin Donovan and Joshua Schroeder) whom the Kerrs had previously retained to conduct a survey to establish the boundary line between the parties' properties. In his responsive affidavit, Alexander swore, *inter alia*, that: (1) he and Judith Kerr had utilized the house in Morris from time to time since approximately 1974; (2) when his in-laws purchased Lot 12, they placed a two-strand wire fence on the south side of Lot 12 which ran from Winterbottom Road at the west end of the lot to Deer Lake at the east end of the lot; (3) this fence "had been there since prior to 1974"; (4) the fence remained until the eastern two-thirds of the fence was removed during the pendency of this case, after surveys were conducted by both SpaceCo, Inc. (SpaceCo) and Morrison; (5) the SpaceCo and Morrison surveys "marked the fence as it was before the portion was removed"; (6) at no time has Lot 12 been fully enclosed by the fence; (7) neither Alexander, nor Judith, nor any of their invitees removed the two-thirds segment of the fence or authorized anyone to remove that portion of the fence; (8) there is no public access to the fence, and removal of the fence would have taken some effort

and equipment; (9) Alexander had contracted with Adam Holm to repair and/or replace approximately one-third of the westernmost section of the fence, which ran between the Kerrs' driveway and the Holms' driveway.

***5** ¶ 21 Alexander further swore that he subsequently requested an estimate from Adam Holm to repair and/or replace the remaining two-thirds of the existing fence. In discussing this project, Alexander and Adam walked the entire two-thirds fence segment alongside the fence posts and wire that still existed at the time. However, the parties never entered into a contract for this project. Alexander further averred that the Holms have installed a new six-foot fence running parallel to western one-third segment of the preexisting two-strand wire border fence. Alexander swore that, to the extent that the affidavits of Adam and Daniel Holm suggested that the only fence ever erected on the south side of Lot 12 was the western one-third segment which separated the parties' driveways, or that Kerrs had asked the Holms to place a fence at the eastern two-thirds of the south side of Lot 12 for the "first time," such statements were "absolutely false and contrary to the recorded observations of surveyors." Alexander swore that the Kerrs are "not seeking money for the creation of a first time fence," but rather are "seeking compensation for the improper removal of two-thirds of the historic fence" and for the "removal/destruction of all historic fence line markers" for the two-thirds segment that was there previously. Alexander averred that, as a result of these improper actions by the Holms, a survey was required in order to reestablish the historic property line and to reconnect the remaining border fence with the existing one-third segment.

¶ 22 The Kerrs also submitted the affidavit of Kevin Donovan, a professional land surveyor and a survey group manager for SpaceCo. The Kerrs hired SpaceCo to conduct a survey of the boundary line between the parties' properties in connection with the instant lawsuit. In his affidavit, Donovan swore that he conducted a boundary line survey on July 15, 2014, and August 16, 2014. As part of the survey, Donovan traced the fence line from the west end to the east end of the properties. At that time, Donovan noticed a fence "starting from the west side of the property which ran about halfway down the section line." Where the newer fence ended, there appeared to be an older, two-strand wire fence that "continued along the same fence line all the way down the East section line as far as it could reach to the corner of the section line before meeting the strip mine pond." [1] Donovan averred that the older fence was in poor condition but still had many of its wooden posts intact. Donovan did not notate every wooden post in his survey because "doing so is usually unnecessary and very cumbersome," and because the old two-strand wire fence "was located along a very heavily overgrown and wooded area which was not easily accessible." However, Donovan noted the last few fence posts on the east corner of the properties as superimposed onto Google Map images, which he included as an exhibit to his survey. Donavan "believe[d]" that the newer fence line was reinforced over an old, preexisting fence line which was "the two-strand wire fence." Donavan "believe[d]" that this two-strand wire fence ran in a continuous line from the west end to the east end of the properties and was "the occupation line that has divided the Holmes [*sic*] and the Kerr properties overtime [*sic*]."

1 Donovan noted the fence post on the east side of the properties on his survey, and he included photos of the last wooden fence posts along the east end of the properties. Donavan's survey and photos were attached as exhibits to the Kerrs' combined response and motion.

¶ 23 The Kerrs also submitted an affidavit from Joshua Schroeder, a professional land surveyor and survey technician for SpaceCo. Schroeder's affidavit is almost identical to Donovan's, and it corroborates Donovan's affidavit in all material respects.

¶ 24 The trial court granted the Kerrs motion for partial summary judgment and denied the Holms' motion for partial summary judgment. The trial court found that the fence to be restored was a "division fence," to which section 3 of the Act applied. Pursuant to section 3, the trial court ordered the parties to: (1) "share equally in the cost to re-establish the boundary line" between the parties' properties "based upon the agreed-upon Morrison survey"; (2) share equally in the cost to monument and stake said boundary line according to said survey; and (3) share equally in the cost of erecting and maintaining a two-strand wire division fence. The trial court also ordered Daniel and Adam Holm to "adhere to a 20-foot set back south of the boundary line when persons are physically present on both tracts of land." The court noted that this "no contact zone" shall not preclude the defendants from using their chicken coop and was not intended to interfere with the ingress or egress of the properties or to

prevent maintenance and cleanup of the area. The trial court found that there was "no just cause to delay the enforcement or appeal" of its Order.

***6** ¶ 25 These appeals followed.

¶ 26 ANALYSIS

¶ 27 The Holms appeal the trial court's denial of their motion for partial summary judgment. Specifically, the Holms challenge the trial court's ruling that the fence at issue was a division fence which was subject to cost sharing under section 3 of the Act and its order requiring the Holms to pay half the cost of rebuilding the fence. The Holms also argue that material issues of fact precluded summary judgment against them.

¶ 28 The Kerrs cross-appeal the trial court's judgment. The Kerrs argue that they are entitled to recover from the Holms the entire costs of establishing, monumenting and staking the boundary line, erecting and restoring the division fence, and expanding their gravel driveway under section 15 of the Act because the Holms improperly removed the prior boundary fence without giving notice to the Kerrs, as required by section 14 of the Act.

¶ 29 A motion for summary judgment is properly granted when the pleadings, depositions, admissions, and affidavits on file establish that no genuine issue of material fact exists and, therefore, the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2–1005(c) (West 2014); *Chatham Foot Specialists, P.C. v. Health Care Service Corp.*, 216 Ill. 2d 366, 376 (2005). In ruling upon a motion for summary judgment, a court has a duty to construe the evidence strictly against the movant and liberally in favor of the nonmovant. *Chatham Foot Specialists, P.C.*, 216 Ill. 2d at 376. Where a dispute exits as to a material fact, or where reasonable persons could draw divergent inferences from the undisputed material facts, summary judgment should be denied and the issue decided by the trier of fact. *Espinoza v. Elgin, Joliet and Eastern Railway Co.*, 165 Ill. 2d 107, 113 (1995); *Koziol v. Hayden*, 309 Ill. App. 3d 472, 476 (1999). We review a trial court's ruling on a motion for summary judgment *de novo*. *Chatham Foot Specialists, P.C.*, 216 Ill. 2d at 376. Issues of statutory construction are questions law subject to *de novo* review. *State Building Venture v. O'Donnell*, 239 Ill. 2d 151, 160 (2010).

¶ 30 1. The Holms' Appeal

¶ 31 The Holms contend that the Act requires the Kerrs to bear the cost of erecting a new boundary fence between the properties. According to the Holms, the cost of building a new boundary fence must be borne by the party seeking to build the fence (and not by the adjoining landowner), unless the fence is an "inclosure" fence under section 4 of the Act. Section 4 of the Act provides that:

> "[w]hen any person wishes to inclose his land, located in any county having less than 1,000,000 population according to the last preceding federal census and not within the corporate limits of any municipality in such county, each owner of land adjoining his land shall build, *or pay for the building of*, a just proportion of the division fence between his land and that of the adjoining owner and each owner shall bear the same proportion of the costs of keeping that fence maintained and in good repair. The provisions of this Section shall not apply to fences on lands held by public bodies for roadway purposes." (Emphasis added.) 765 ILCS 130/4 (West 2014).

***7** The Holms maintain that, because section 4 is the only section of the Act that expressly requires adjoining landowners to "pay for the building of" a division fence, and section 4 applies only to inclosure fences, the principle of "*expressio unius est exclusio alterius*" suggests that adjoining landowners do not have to pay for the building of any portion of a division fence that is not an inclosure fence. Because the fence at issue in this case is not an inclosure fence, the Holms argue that the "condition precedent" for requiring them to pay for the construction of the fence is not triggered.

¶ 32 We reject this argument because we find its underlying premise to be false. Contrary to the Holms' assertion, other sections of the Act expressly require adjoining landowners to pay a portion of the cost of building or replacing a fence. For example, section 3 of the Act provides, in pertinent part, that "[w]hen 2 or more persons have lands adjoining, each of them shall make and maintain a just proportion of the division fence between them." 765 ILCS 130/3 (West 2014). By requiring each of the adjoining landowners to "make and maintain" a just proportion of the division fence between them, the Act clearly requires each landowner to bear a just proportion

of the costs associated with the "making and maintaining" of a division fence, regardless of whether the fence is an "inclosure" fence.

¶ 33 The Holms also argue that there are genuine issues of material facts that precluded summary judgment against them. Specifically, the Holms note that Schroeder and Donovan merely averred in their affidavits that they "believed" that the old fence line was the occupation line that had divided the parties' properties over time. Thus, rather than stating a fact based upon their personal knowledge, as required by Supreme Court Rule 191, Schroeder and Donovan merely stated conclusions, which were not admissible in evidence. Moreover, Alexander Kerr's affidavit states that, to the extent that the affidavits of Adam and Daniel Holm purport to suggest that the only fence ever erected on the south side of Lot 12 was the western one-third segment which separated the parties' driveways, or that Kerr's request was for a fence to be placed at the eastern two-thirds of the south side of Lot 12 for the first time, such statements are "absolutely false and contrary to the recorded observations of surveyors." According to the Holms, these statements, which expressly contradict statements made in the Holms' affidavits, create a genuine issue of material fact that precludes summary judgment.

¶ 34 We do not find these arguments persuasive. Contrary to the Holms' assertion, the existence of the prior fence was undisputed. Alexander Kerr swore in his affidavit that a division fence separating the Mottl and Holm properties was erected in 1972 and that this fence extended in a continuous line from the west end of the lots to the east end of the lots. Judith Kerr's affidavit corroborated this statement. Schroeder and Donovan's affidavits and the photographs attached to their affidavits indicate that a fence running from the west to the east end of the lots existed as late as August 2014. Both the Claassen and the SpaceCo surveys showed the original fence line and the original fence posts. The affidavits of Adam and Daniel Holm do not contradict this evidence. The Holms' affidavits merely state that the only fence ever "erected" during the time that Adam and Daniel lived next to the Kerr/Mottl residence was a fence that separated the two driveways on the western side of the lots. Although the Holms' affidavits do not specify when Adam and Daniel lived there, Daniel testified in open court that he resided on the property since his grandfather died in 2009 or 2011. The Holms' affidavits do not address whether a prior fence existed on the eastern two-thirds of the lots before Adam and Daniel began residing at the Holm property, or whether that portion of the fence was removed before Adam or Daniel resided there. In fact, in their affidavits in opposition to the Kerrs' initial motion for summary judgment on the boundary by acquiescence issue, the Holms admitted that a prior fence running the entire length of the properties existed.

***8** ¶ 35 Although the Holms disputed that that the prior fence marked the actual boundary between the parties' properties, this dispute could not preclude the trial court from ordering the Holms to share the cost of rebuilding a division fence pursuant to section 3 of the Act. As noted, Section 3 requires adjoining landowners to share the costs of making and maintaining a division fence. The parties have stipulated that the Morrison Survey properly sets the boundary line between the parties. Thus, the court could have properly ruled that, under section 3, the parties must share the costs of building a new division fence according to the Morrison Survey. Given the parties' stipulation, it does not matter where the former fence was located; the only question is who has to pay for the new division fence in the location specified by the Morrison survey. Section 3 requires each party to pay a just proportion of these costs. Thus, assuming that section 3 governs the dispute, the trial court could have properly decided as a matter of law that the Holms were required to pay a just portion of the costs of building a new fence.

¶ 36 The Holms suggest that the Kerrs could not obtain a remedy from the Holms under the Act because they failed to follow certain mandatory procedures prescribed by sections 6 and 11 of the Act before filing suit. However, neither of those sections applies in this case. Section 6 provides that, if a person "neglect[s] to repair or rebuild a division fence, or a portion thereof, which he ought to maintain," the aggrieved party must submit the dispute to fence viewers after giving notice to the offending party. This section applies only where a party has improperly allowed an existing division fence to fall into disrepair due to neglect, *i.e.,* when the party has wrongfully failed to *repair* or *maintain* a fence or a portion of a fence that he "ought to maintain." Thus, it applies only to cases of neglect, and only after it has already been determined that the party at issue has an obligation to make and maintain a particular portion of the fence. By contrast, disputes regarding a party's duty to share the cost of erecting a division fence in the first instance, and disputes regarding

a party's liability to pay the entire cost of replacing a division fence that the party removed without notice to an adjoining landowner, are governed by different sections of the Act (section 3 and sections 14–15, respectively). The Act does not require the latter types of disputes to be submitted to fence viewers in the first instance. Section 7 of the Act provides that disputes "concerning the proportion of the fence to be made or maintained" by each adjoining landowner "may" be submitted to fence viewers; it does not *require* such disputes to be resolved by fence viewers. See *Hampton v. Village of Washburn*, 317 Ill. App. 3d 439, 442–43 (2000) ("Generally, the use of the word 'may' suggests a permissive rather than a mandatory reading."). Moreover, sections 14 and 15 simply provide that a party that removes a division fence without giving notice to the adjoining landowner "shall pay to the party injured all such damages as he may thereby sustain, to be recovered *with costs of suit*." (Emphasis added.) 765 ILCS 130/15 (West 2014). Section 15's reference to "costs of suit," and its omission of any reference to fence viewers, establishes that claims for relief brought under that section are to be adjudicated by a circuit court, not by fence viewers.

¶ 37 Section 11 of the Act is also inapplicable here. Section 11 provides that, if a person who is "liable" to contribute to the erection or repair of a division fence neglects or refuses to make or repair his portion of the fence, the injured party may make or repair the fence at that person's expense and seek damages plus costs of suit in the circuit court, provided that the party has given the person a certain specified period of written notice before filing suit. The Holms argue that the Kerrs could not file their complaint in this case because they did not give the Holms the written notice required by section 11. However, section 11 is an enforcement provision that applies only after there has been a determination of liability by fence viewers pursuant to section 6 (*i.e.,* a finding that that repairs to a division fence are necessary and that the party at issue is liable to make such repairs). *Bigelow v. Burnside*, 269 Ill. 324, 329 (1915). As noted above, the claims brought in this case are not governed by section 6.

***9** ¶ 38 The Holms also argue that certain statements in other affidavits submitted by the Kerrs in support of their motion for summary judgment were improper and irrelevant. In support of their claim for injunctive relief against the Holms, the Kerrs submitted affidavits from members of the Deer Lake Dam Association which described alleged instances of improper boating activity by the Holms on Deer Lake. The Holms argue that these alleged instances were irrelevant both to the border dispute at issue and to the injunctive relief sought by the Kerrs. (As noted above, the Kerrs sought a setback order preventing the Holms from harassing the Kerrs near the Kerr/Mottl property line). We agree that this evidence was irrelevant. However, the trial court expressly found that "the affidavits pertaining to the [Holms' alleged] activities on the dam and * * * on the lake really have no bearing on the issue [ ] of the setback" sought by the Kerrs, and the court did not consider those affidavits to the extent they addressed any alleged activities on the dam or lake. The Kerrs offered ample evidence of several instances of harassment committed by Adam and Daniel Holm near the subject boundary line. The Holms did not contradict or rebut any of this evidence by counteraffidavit or otherwise. Nor do the Holms expressly challenge the trial court's order of a setback in their briefs on appeal. Accordingly, the trial court did not abuse its discretion by awarding the injunctive relief sought by the Kerrs. Nor did it err in granting the Kerrs' motion for summary judgment on this issue.

¶ 39 2. The Kerrs' Cross–Appeal

¶ 40 The Kerrs cross-appeal the trial court's judgment, arguing that they are entitled to recover from the Holms the entire costs of establishing the boundary line, monumenting and staking the boundary line, and erecting and restoring the division fence, as well as the material and labor costs of expanding their gavel driveway, under section 15 of the Act because the Holms improperly removed the prior boundary fence without giving prior notice to the Kerrs, as required by section 14 of the Act.

¶ 41 Section 14 of the Act provides, in relevant part:

> "[i]f any person is disposed to remove a division fence, or part thereof, owned by him or her, and allow his or her lands to be uncultivated and not used for pasture purposes, *after having first given the adjoining owner one year's notice, in writing, of his or her intention so to do and having received such adjoining owner's permission*, he or she may, at any time thereafter, remove the same, unless such adjoining owner shall previously cause the value of the fence to be ascertained by fence viewers, selected as hereinbefore provided, and pay or tender the same to such person; provided that if, in accordance with

such provisions, the fence has been removed entirely and a new one erected, any person who seeks to make use of the new fence shall pay to the owner one-half of the original cost thereof." (Emphasis added.) 765 ILCS 130/14 (West 2014).

¶ 42 Section 15 of the Act provides that, if a division fence or a portion thereof is removed without notice to the adjoining landowner as required by section 14, "the party removing the same shall pay to the party injured all such damages as he may thereby sustain, to be recovered with costs of suit." 765 ILCS 130/15 (West 2014).

¶ 43 In this case, the trial court ruled that the parties were required to "share equally" in the costs of building and maintaining a division fence according to the Morrison Survey. In so ruling, the court implicitly rejected the Kerrs' argument that the Holms are required to pay the entire cost of replacing the prior division fence under section 15 of the Act. We hold that there is a genuine issue of material fact precluding summary judgment on the issue of whether the Kerrs are entitled to recover the costs they seek under section 15. The dispositive issue is whether the Holms removed a preexisting division fence separating the properties. Alexander Kerr's affidavit does not establish that the Holms removed the fence. It merely states that: (1) the eastern two-thirds of the preexisting fence was removed during the pendency of this litigation, sometime after the Morrison and SpaceCo surveys were conducted; (2) neither Kerr, nor Judith, nor any of their invitees removed the preexisting fence; (3) the Kerrs did not authorize anyone to remove the fence; (4) the fence was not accessible to the public; and (5) removing the fence "would have taken some effort and equipment, especially as related to the east end wood post anchor." These sworn statements provide circumstantial evidence that might support a reasonable inference that the Holms removed the fence. However, they do not entitle the Kerrs to summary judgment, particularly considering that all reasonable inferences must be drawn in favor of the nonmovant.

***10** ¶ 44 Nor did the Kerrs establish as a matter of law that the prior fence marked the actual boundary line between the parties. In his affidavit, Alexander Kerr stated that the old fence was on the historic boundary line and that the Morrison survey confirmed the prior boundary line. However, the Morrison survey itself does not indicate where the prior fence line was or whether it marked the actual boundary line, and there is no affidavit from a Morrison surveyor in the record addressing these matters. Moreover, as the Holms note, the Donovan and Schroeder affidavits merely state that the surveyors "believed" that the prior fence marked the boundary (or "occupation") line between the two properties. Neither surveyor claimed that he had *established* that the old fence line marked the actual boundary line through the application of proper surveying methods and techniques. To the contrary, each surveyor admitted that he did not check all of the surviving posts of the prior fence because they were in an inaccessible, wooded area.

¶ 45 Similarly, the evidence presented by the Holms does not entitle them to summary judgment on this issue. In their affidavits in support of their motion for summary judgment, Adam and Daniel Holm do not explicitly deny that the prior fence ever existed. Rather, they merely state that, *during the time they have resided on Lot 13*, the only fence "erected" between the properties was the western one-third fence separating the parties' driveways, and that fence was not "extended" during the time they lived there. This does not rule out the possibility that a prior division fence existed on the boundary line before the Holms began residing there. In fact, in their affidavits in opposition to the Kerrs' initial motion for summary judgment on the boundary by acquiescence issue, the Holms admitted that a prior fence running the entire length of the properties existed. The Holms have not explicitly denied that they removed a portion of that fence. The parties dispute whether the prior fence marked the actual boundary line between the parties' properties. However, if the parties treated the prior fence as a division fence, and if the Holms improperly removed that fence without giving notice to the Kerrs as required by section 14 of the Act, the Kerrs would be entitled to recover damages under section 15, even if the prior fence was not located entirely on the actual boundary between the properties. See *Brown v. Brown*, 23 Ill. App. 90 (1886) (defendant who improperly removed portion of division fence without giving proper notice to adjoining landowner was liable under section 15 even though a recent survey determined that the portion removed had been located on the adjoining landowner's land, rather than on the actual property division line, where the defendant failed to rebuild the removed portion on the actual division line).

¶ 46 Accordingly, there is a genuine, material factual dispute as to whether the Holms violated section 14 of

the Act and are therefore liable for the entire replacement cost of the preexisting division fence plus the additional damages and costs sought by the Kerrs. In order to decide this issue, the factfinder will need to determine, after a trial: (1) whether the preexisting fence was a "division fence"; and (2) if so, whether the Holms removed the preexisting division fence in violation of section 14. [2]

2 We reject the Holms' argument that the Kerrs cannot obtain damages under section 15 of the Act because the Kerrs allege that the Holms removed only a *portion* of the prior division fence, not an entire division fence spanning the length of the properties. Section 15 must be read in conjunction with section 14, which prohibits a landowner from removing a division fence "or part thereof" without giving proper notice to the adjoining landowner. 765 ILCS 130/14 (West 2014).

¶ 47 CONCLUSION

¶ 48 For the reasons set forth above, we reverse the judgment of the circuit court of Grundy County. We remand the case for trial to determine whether the Holms violated section 14 of the Act and are therefore liable for the entire replacement cost of a division fence, plus the other damages and costs sought by the Kerrs, under section 15 of the Act.

***11** ¶ 49 Reversed; cause remanded.

Justices Lytton and McDade concurred in the judgement.

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