[Cite as *Kennedy v. Green*, 2019-Ohio-854.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

AMY KENNEDY, Executrix of the ESTATE of JANE W. EVERETT

Plaintiff-Appellant

-vs-

LAJOY GREEN

Defendant-Appellee

JUDGES:
Hon. W. Scott Gwin, P. J.
Hon. William B. Hoffman, J.
Hon. John W. Wise, J.

Case No. CT2018-0033

O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Case No. CH2016-0407
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	March 4, 2019

APPEARANCES:

For Plaintiff-Appellant

MATTHEW P. MULLEN
MATHEW E. DONEY
KRUGLIAK, WILKINS, GRIFFITHS & DOUGHERTY CO., LPA
158 North Broadway
New Philadelphia, Ohio 44663

For Defendant-Appellee

RYAN H. LINN
KINCAID, TAYLOR & GEYER
50 North Fourth Street
PO Box 1030

Wise, J.

{¶1} Plaintiff-Appellant Amy Kennedy, Executrix of the Estate of Jane W. Everett, appeals the decision of the Muskingum County Court of Common Pleas granting summary judgment in favor of Defendant-Appellee Lajoy Green.

STATEMENT OF THE FACTS AND CASE

{¶2} The relevant facts and procedural history are as follows:

{¶3} On December 12, 2016, Plaintiff-Appellant Amy Kennedy, POA for Jane W, Everett, filed an action in the Muskingum County Common Pleas Court to establish the existence of an easement across property owned by Defendant-Appellee Lajoy Green.

{¶4} In Count One of the Complaint, Plaintiff-Appellant avers "Certain documents, referenced as Exhibits A-D, have been maintained by the Muskingum County Recorder's Office ... The documents maintained by the Muskingum County Recorder's Office clearly establish the existence of the Everett Easement, and Plaintiffs right, title, and interest to, and use and enjoyment of, said Everett Easement." Plaintiff's Complaint at ¶14 and ¶15. In Count Two Plaintiff-Appellant avers "Plaintiff has acquired the real estate referred to herein as the Everett Easement as her sole and exclusive real property through adverse possession, and/or has acquired an enforceable easement encumbering Defendant's property by conscription, and/or has acquired an enforceable easement encumbering Defendant's property by necessity." ¶31.

{¶5} The trial court set these issues for a one-day trial beginning on January 4, 2017.

{¶6} On or about December 11, 2017, Plaintiff-Appellant filed a Motion for Summary Judgment arguing that "Plaintiff has an express easement over Defendant's

real property for purposes of ingress and egress; and the Plaintiff's easement has a necessary width of thirty-three (33) feet." (Plaintiff-Appellant's Motion for Summary Judgment at 8).

{¶7} By Entry dated December 29, 2017, the trial was continued to permit the parties to fully brief summary judgment filings.

{¶8} On January 4, 2018, with leave of court, Defendant-Appellee filed a Memorandum on Law Contra Plaintiff's Motion for Summary Judgment and in Support of Defendant's Motion for Summary Judgment with affidavits.

{¶9} By Entry dated May 3, 2017, the trial court denied Plaintiff-Appellant's Motion for Summary Judgment and granted Defendant-Appellee's Motion for Summary Judgment.

{¶10} Appellant now appeals, raising the following assignments of error on appeal:

ASSIGNMENTS OF ERROR

{¶11} "I. THE TRIAL COURT ERRED WHEN IT GRANTED APPELLEE'S CROSS-MOTION FOR SUMMARY JUDGMENT AND DENIED APPELLANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE APPELLEE ADMITTED TO THE EXISTENCE OF THE EVERETT EASEMENT.

{¶12} "II. ALTERNATIVELY, IF THE COURT DETERMINES AN EXPRESS EASEMENT DOES NOT EXIST UNDER APPELLANT'S 1967 WARRANTY DEED, THE EVERETT EASEMENT EXISTS UNDER EQUITABLE REMEDIES AND MAY NOT BE CHALLENGED UNDER OHIO'S MARKETABLE TITLE ACT.

{¶13} "III. THE TRIAL COURT ERRED WHEN IT GRANTED APPELLEE'S CROSS-MOTION FOR SUMMARY JUDGMENT AND DENIED APPELLANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE APPELLEE FAILED TO FILE A COMPULSORY COUNTERCLAIM CHALLENGING THE EXISTENCE OF THE EASEMENT AND THEREFORE, WAIVED SUCH RELIEF.

{¶14} "IV. THE TRIAL COURT ERRED WHEN IT GRANTED APPELLEE'S CROSS-MOTION FOR SUMMARY JUDGMENT AND DENIED APPELLANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE IN DOING SO IT FAILED TO DETERMINE THE JUSTICIABLE ISSUES PRESENTED IN THE DECLARATORY JUDGMENT ACTION AND FAILED TO DECLARE THE RIGHTS/OBLIGATIONS OF THE PARTIES.

{¶15} "V. THE TRIAL COURT ERRED WHEN IT GRANTED APPELLEE'S CROSS-MOTION FOR SUMMARY JUDGMENT AND DENIED APPELLANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE THERE IS NO CIV.R. 56(C) EVIDENCE IN THE RECORD TO SUPPORT APPELLEE'S MOTION."

Summary Judgment Standard

{¶16} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36. Civ.R. 56(C) provides, in pertinent part:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to

> any material fact and that the moving party is entitled to judgment as a matter of law. * * * A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor.

{¶17} Pursuant to the above rule, a trial court may not enter a summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the non-moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall*, 77 Ohio St.3d 421, 429, 1997-Ohio-259, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107.

{¶18} It is based upon this standard that we review Appellant's assignments of error.

I., II.

{¶19} In Appellant's first and second assignments of error, she argues the trial court erred in finding that no easement exists in this matter. We disagree.

{¶20} An easement is an interest in the land of another which entitles the owner of the easement, the dominant estate, to a limited use of the land in which the interest exists, the servient estate. *Alban v. R.K. Co.* (1968), 15 Ohio St.2d 229, 231; *Yeager v. Tuning* (1908), 79 Ohio St. 121, 124, 86 N.E. 657, 658; *Colburn v. Maynard* (1996), 111 Ohio App.3d 246, 253. The creation of an easement may be express, implied, or by prescription. *Trattar v. Rausch* (1950), 154 Ohio St. 286, 95 N.E.2d 685, paragraph two of the syllabus.

Express Easement

{¶21} In order to create an express easement, the owner of the servient property must grant or convey to the owner of the dominant property a right to use or benefit from his estate. See *Yaeger v. Tuning* (1908), 79 Ohio St. 121, 124, 86 N.E. 657, 658. An express easement may be created by grant, or by reservation or exception in a deed. *Gateway Park, LLC v. Ferrous Realty Ltd.,* 8th Dist. No. 91082, 2008-Ohio-6161, at ¶ 29. The instrument conveying the easement must comply with the Statute of Frauds. R.C. 1335.04. Once an easement becomes part of the chain of title of the dominant property, such easement passes with the transfer of the property. However, in order for an easement to pass with the transfer of the property, some record of the easement must appear in the chain of title of the dominant parcel. Express easements must appear in the chain of title to property in order to place a servient tenant on notice, at the point of obtaining an interest in the property, of the interest pertaining to the dominant estate. *Lone Star Steakhouse & Saloon of Ohio, Inc. v. Ryska,* 11th Dist. Lake No.2003–L–192, 2005–Ohio–3398, ¶ 50. Consequently, equity does not acknowledge the extinguishment of such an easement by recourse to estoppel and laches." *Id.* at ¶ 50.

{¶22} The express easement must be set forth in the language of the deed, lease, etc. *Kamenar Railroad Salvage, Inc. v. Ohio Edison Co.* (1992), 79 Ohio App.3d 685, 689. No particular words are required, but the language used must evidence an intent to create an easement. *Nedolast v. Frankart* (Oct. 20, 1999), Seneca App. No. 13-99-19, unreported. Once created, the easement must appear in the chain of title of the dominant parcel. *Pence v. Darst* (1989), 62 Ohio App.3d 32, 37.

{¶23} In the case *sub judice*, Appellant points to language contained the Warranty Deed to her from Steve Seibert, which is Appellant's root of title, recorded April 10, 1967, at Deed Volume 550, Page 25, of the Muskingum County Recorder's Office, which states:

{¶24} "There is also conveyed to grantees an easement for ingress and egress to the above land over and upon the land presently known as the Burwell land as the same exists at the present time."

{¶25} Upon review, we find that this reference to an easement only appears in this Everett deed. There is no evidence that Appellee or any of her predecessors in title ever granted an express easement to Appellant, Steve Seibert, or any of their predecessors in title. Nor did Mr. Seibert ever own Appellee's land, the servient estate in this case, so there was never a unity of ownership of the two properties from which Seibert could derive a right to grant an easement across Appellee's property. As such, Mr. Seibert did not have the ability or authority to grant an easement over Appellee's land. An individual cannot grant someone else an easement across a third-party's land without knowledge, consent or authority from the third-party.

{¶26} We therefore find that no express easement was created or exists in this case.

Prescriptive Easement

{¶27} Appellant argues that even if she has no express easement, she has an easement by prescription.

{¶28} A landowner obtains an easement by prescription for a specific use of his neighbor's property when he uses that property in that manner: (a) openly; (b) notoriously; (c) adversely to the neighbor's property rights; (d) continuously; and (e) for at least twenty-one years. Cf. *Griffiths v. Schaefers* (App.1954), 72 Ohio Law Abs. 79, 80, 133 N.E.2d 394, 395; *Ericson v. Grenga* (App.1952), 70 Ohio Law Abs. 504, 506, 128 N.E.2d 668, 669.

{¶29} "Such use never ripens into a prescriptive right unless the use is adverse and not merely permissive." *Pennsylvania RR. Co.* at syllabus. "[W]here the owner of the servient estate claims that the use was permissive, he has the burden of showing it." *Pavey v. Vance* (1897), 56 Ohio St. 162, 46 N.E. 898, at paragraph one of the syllabus. If the burdened landowner can make such a showing, he can defeat the prescriptive easement claim of the other landowner.

{¶30} In this case, Appellee Green testified in her deposition that Appellant's use of the driveway was done with permission. As such, an easement by prescription does not exist.

Implied Easement

{¶31} Appellant also argues that an Implied Easement exists in his matter. Appellant cites *Bank of Am. v. Stevens*, 4th Dist. Hocking No. 16CA24, 2017-Ohio-9040, ¶44, wherein the court stated "[c]ourts may recognize an unrecorded easement or one for

which there was no written agreement via the theory of an "implied" easement, e.g., an easement implied from prior use.

{¶32} The Fourth District Court then went on to state:

> An implied easement is based upon the theory that whenever one conveys property he includes in the conveyance whatever is necessary for its beneficial use and enjoyment and retains whatever is necessary for the use and enjoyment of the land retained." *Trattar* at 291, 95 N.E.2d 685. In other words a court that implies an easement is merely recognizing what the original property owner, who split up his land, intended to do, i.e., grant an easement in favor of the dominant tenement. *Id*. at ¶44

{¶33} The Supreme Court of Ohio has established the following four elements of an easement implied by prior use:

> (1) A severance of the unity of ownership in an estate;
>
> (2) that, before the separation takes place, the use which gives rise to the easement shall have been so long continued and obvious or manifest as to show that it was meant to be permanent;
>
> (3) that the easement shall be reasonably necessary to the beneficial enjoyment of the land granted or retained;
>
> (4) that the servitude shall be continuous as distinguished from a temporary or occasional use only.
>
> *Ciski v. Wentworth* (1930), 22 Ohio St.487.

{¶34} As stated above, Appellant cannot show a unity of title in this matter and therefore her claim for an implied easement fails.

Easement by Estoppel

{¶35} Lastly, Appellant also argues that an easement by estoppel was created in this case. However, upon review we find that this claim is not contained in Appellant's Complaint nor did she raise this argument before the trial court. A party cannot assert new arguments for the first time on appeal. *Stores Realty Co. v. Cleveland,* 41 Ohio St. 41, 42, 322 N.E.2d 629 (1975). As a general rule, a litigant who has the opportunity to raise an issue in the trial court, but declines to do so, waives the right to raise that issue on appeal. *The Strip Delaware, LLC v. Landry's Restaurants, Inc.,* 5th Dist. No. 2010CA00316, 2011–Ohio–4075. Since Appellant failed to make such argument to the trial court, this Court will not review these issues on appeal. *May v. Westfield Village L.P.,* 5th Dist. No. 02–COA–051, 2003–Ohio–5023, citing *Lippy v. Society Nat'l Bank,* 88 Ohio App.3d 33, 623 N.E.2d 108 (1993).

Marketable Title Act

{¶36} Appellant also argues that the Marketable Title Act bars Appellee in this case from "challenging the express easement contained in Everett's 1967 Warranty Deed."

{¶37} As set forth above, no express easement was ever created or recorded in the chain of title from Appellee, or her predecessors in title, to Appellant or her predecessor in title.

{¶38} The purpose of the Marketable Title Act is to correct defects in a chain of title. In this case, there are no defects in Appellee's chain of title to correct.

{¶39} Because there is no recorded instrument evidencing Appellant's easement in appellee's chain of title, the trial court correctly properly quieted title in favor of Appellee.

{¶40} Appellant's first and second assignments of error are overruled.

III.

{¶41} In her third assignment of error, Appellant argues that the relief granted to Appellee by the trial court was improper because Appellee failed to file a compulsory counterclaim challenging the existence of easement. We disagree.

{¶42} Upon review, we find such argument unpersuasive. Appellant filed an action for declaratory judgment seeking an order declaring that an easement for Appellant's use existed over Appellee's property. Here, the trial court found no such easement existed. Appellee was under no requirement to file a counterclaim seeking to establish that an easement did not exist.

{¶43} Appellant's third assignment of error is overruled.

IV., V.

{¶44} In her fourth and fifth assignments of error, Appellant argues the trial court failed to address all justiciable issues and failed to declare the rights/obligations of the parties. Appellant further argued that Appellee's motion for summary judgment was not supported by sufficient Civ.R. 56(c) evidence. We disagree.

{¶45} Here, the trial court had before it the Exhibits attached to Appellant's Complaint, as well as the affidavits and deposition testimony filed in this matter. Based on such, we find that the trial court had before it sufficient evidence to determine that Appellant failed to establish the existence of an easement across Appellee's property. Having found no easement existed, there was nothing further for the trial court to determine.

{¶46} Appellant's fourth and fifth assignments of error are overruled.

{¶47} Accordingly, the judgment of the Court of Common Pleas of Muskingum County, Ohio, is affirmed.

By: Wise, J.

Gwin, P. J., and

Hoffman, J., concur.

JWW/d 0213