[Cite as *Jefferson Golf & Country Club v. Leonard*, 2011-Ohio-6829.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Jefferson Golf and Country Club,	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-434 (C.P.C. No. 09CVH-4-5526)
Edward Leonard, Treasurer of Franklin County, Ohio,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 30, 2011

The Behal Law Group, *Robert J. Behal*, and *Jack D'Aurora*, for appellee.

Ron O'Brien, Prosecuting Attorney, *Paul M. Stickel*, and *William J. Stehle*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Defendant-appellant, Franklin County Treasurer Edward Leonard, appeals from the judgment of the Franklin County Court of Common Pleas granting summary

judgment in favor of plaintiff-appellee, Jefferson Golf and County Club. For the following reasons, we affirm the judgment of the trial court.

{¶2} This matter concerns appellant's attempts to collect tax arrearages from appellee based on a building housed on certain real property used as a golf and country club. Beginning on September 15, 1989, appellee began leasing approximately 95 acres of land from Davidson Phillips, Inc. ("DPI") pursuant to a 99-year Ground Lease Agreement ("lease"). The lease was to expire by its own terms on September 14, 2088. The lease provided that "DPI is owner in fee simple of the land," and that appellee would "pay to the appropriate governmental agencies real estate and other ad valorem taxes" during the term of the lease. The lease also provided that appellee could use DPI's name in legal proceedings to challenge the property's assessed value.

{¶3} On December 18, 2000, appellee received a ten-year option to purchase the land from DPI. Appellee exercised the option, and, on November 30, 2007, the transaction closed. At the closing, appellee paid DPI $1.75 million and paid closing costs in an amount exceeding $34,000.

{¶4} In May 2008, via a letter from the Franklin County Auditor ("auditor"), appellee learned it was being held responsible for a tax arrearage of $148,012.40 from 2002 to 2007. During that same time, appellee received a tax bill from appellant with instructions for payment. The basis for the arrearages is the valuation of the clubhouse that sits on the property. The original clubhouse was destroyed by fire in 2000 and rebuilt in 2002. The rebuilt clubhouse is worth more than the original one as it contains 50 percent more square footage than the one destroyed by fire.

{¶5} Upon finding that the increased value of the clubhouse was mistakenly omitted from the tax duplicate, appellant exercised its authority to collect the arrearages. Appellee, however, believed it was not responsible to pay the mistakenly omitted taxes prior to the time of it becoming the legal owner of the property on November 30, 2007. Therefore, appellee filed a complaint on April 13, 2009, seeking a declaration, inter alia, that any attempt to collect taxes based on the value of omitted property prior to November 30, 2007 constitutes a violation of R.C. 5713.20(A). The complaint also sought to enjoin appellant from the collection of such taxes.

{¶6} Subsequently, appellee filed a motion seeking judgment as a matter of law pursuant to Civ.R. 56. In response, appellant filed a motion for continuance, pursuant to Civ.R. 56(F), contending additional time for discovery was necessary in order to respond to the summary judgment motion. The trial court granted the Civ.R. 56(F) motion without giving appellee an opportunity to respond, which prompted appellee to seek reconsideration of that decision. The trial court granted appellee's motion for reconsideration and subsequently denied appellant's motion for a continuance, pursuant to Civ.R. 56(F), and allowed appellant to file a response to the motion for summary judgment in accordance with Local Rules.

{¶7} When briefing on the motion for summary judgment concluded, the trial court rendered a decision granting appellee's motion in part. The trial court held that because appellee was not the legal title holder of the property until November 30, 2007, based on R.C. 5713.20, appellee could not be held responsible for omitted taxes prior to that date. However, the trial court went on to conclude that appellee had not

demonstrated that it was entitled to injunctive relief. Therefore, appellee's motion for summary judgment was granted in part and denied in part.

{¶8} This appeal followed, and appellant brings the following two assignments of error for our review:

> [1.] THE TRIAL COURT ERRED IN GRANTING PLAINTIFF-APPELLEE JEFFERSON GOLF AND COUNTRY CLUB'S MOTION FOR SUMMARY JUDGMENT.
>
> [2.] THE TRIAL COURT ERRED IN DENYING DEFENDANT-APPELLANT'S CIVIL RULE 56(F) "MOTION FOR CONTINUANCE TO RESPOND TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT."

{¶9} Prior to addressing the merits of appellant's assigned errors, we first address the motion appellee filed in this court seeking to strike portions of appellant's reply brief and attachment thereof. According to appellee, the reply brief includes arguments not raised and a document not presented to the trial court. The argument appellee challenges is appellant's assertion that the trial court lacked subject-matter jurisdiction to render a decision in this case. " 'Because subject-matter jurisdiction goes to the power of the court to adjudicate the merits of a case, it can never be waived and may be challenged at any time.' " *Rosen v. Celebrezze*, 117 Ohio St.3d 241, 2008-Ohio-853, ¶45, quoting *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, ¶11. Accordingly, appellee's motion to strike regarding arguments contained in appellant's reply brief is denied.

{¶10} Also in the motion to strike, appellee seeks to strike a document attached to the reply brief on the basis that the document was not presented in the trial court. According to App.R. 9(A)(1), "[t]he original papers and exhibits thereto filed in the trial

court, the transcript of proceedings, if any, including exhibits, and a certified copy of the docket and journal entries prepared by the clerk of the trial court shall constitute the record on appeal in all cases." Exhibits solely appended to appellate briefs are not properly part of the record, do not augment the record, and may not be considered by us in the determination of an appeal. See *Leonard v. The Ohio Bd. of Nursing* (June 8, 2000), 10th Dist. No. 99AP-1154, citing App.R. 9; *Paulin v. Midland Mut. Life Ins. Co.* (1974), 37 Ohio St.2d 109, 112; *Upper Arlington v. Cook* (Apr. 18, 2000), 10th Dist. No. 99AP-251. In this case, having reviewed the record, we conclude the document is not part of the record before us. Accordingly, appellee's motion to strike is granted with respect to the document attached to appellant's reply brief.

{¶11} Consequently, appellee's motion to strike is denied in part and granted in part.

{¶12} We now turn to appellant's assignments of error. In its first assignment of error, appellant challenges the trial court's decision granting summary judgment in favor of appellee on its claim for declaratory judgment.

{¶13} We review the trial court's grant of summary judgment de novo. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38. Summary judgment is proper only when the party moving for summary judgment demonstrates: (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, when the evidence is construed in a light most favorable to the non-moving party. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 1997-Ohio-221.

{¶14} Under summary judgment motion practice, the moving party bears an initial burden to inform the trial court of the basis for its motion, and to point to portions of the record that indicate that there are no genuine issues of material fact on a material element of the non-moving party's claim. *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107. Once the moving party has met its initial burden, the non-moving party must produce competent evidence establishing the existence of a genuine issue for trial. Id.

{¶15} Under its first assignment of error, appellant contends the trial court erred in granting summary judgment in favor of appellee on its complaint for declaratory judgment. More specifically, appellant challenges the trial court's definition of the term "owner" as used in R.C. 5317.20.

{¶16} As set forth in the factual summary, it is undisputed that the rebuilt clubhouse has a higher value than the original one and that the increased value had been omitted from the list of real property. As provided by R.C. 5713.20:

> (A) If the county auditor discovers that any building, structure, or tract of land or any lot or part of either, has been omitted from the list of real property, the auditor shall add it to the list, with the name of the owner, and ascertain the taxable value thereof and place it opposite such property. The county auditor shall compute the sum of the simple taxes for the preceding years in which the property was omitted from the list of real property, not exceeding five years, *unless in the meantime the property has changed ownership, in which case only the taxes chargeable since the last change of ownership shall be computed*. No penalty or interest shall be added to the amount of taxes so computed.

(Emphasis added.)

{¶17} Exercising the authority granted in R.C. 5713.20, the auditor determined the increased value of the clubhouse, added it to the tax list, and recalculated the property

taxes for the previous five years. In doing so, the auditor concluded the tax arrearages totaled $148,012.40.

{¶18} In its motion for summary judgment, appellee argued that because ownership had changed from DPI to appellee during the five years prior to the auditor's discovery of the omission, only the tax chargeable since that date, November 30, 2007, can be assessed against it. In contrast, appellant suggested that "owner" as used in R.C. 5713.20 means a bona fide purchaser for value without notice of property omission. Because appellee did not assert it was a bona fide purchaser, appellant argued appellee was not entitled to summary judgment.

{¶19} The trial court agreed with appellee's position regarding the definition of "owner" and consequently granted judgment in favor of appellee on its claim for a declaratory judgment. In doing so, the trial court relied on *Performing Arts School of Metro. Toledo, Inc. v. Wilkins*, 104 Ohio St.3d 284, 2004-Ohio-6389, and *Gilman v. Hamilton Cty. Bd. of Revision*, 127 Ohio St.3d 154, 2010-Ohio-4992, and concluded that in this context, "owner" means the holder of legal title, not the holder of an equitable interest in the property and not a lessee. After review of the pertinent law, we agree with the trial court's conclusion.

{¶20} In *Performing Arts*, the court considered whether the lessee rather than the title holder of property had standing to petition for a property tax exemption as provided for in R.C. 5715.27(A). In that case, the school, a nonprofit corporation, leased property from a for-profit limited partnership. The lease had an initial term of 39 months with the right to renew for two five-year terms. In addition, to rent, the lease required the school to

maintain the property, pay utilities, and reimburse the partnership for real estate taxes and casualty insurance associated with the property.

{¶21} Because the property was being used for an exempt purpose and was not being used for profit, the school petitioned the tax commissioner for an exemption from the real estate taxes. The tax commissioner denied the exemption, but the Board of Tax Appeals ("BTA") reversed and granted the exemption. On further appeal, the Supreme Court sua sponte raised the issue of standing.

{¶22} R.C. 5715.27(A) provided that the owner of any property may file an application with the tax commissioner for exemption, and the court framed the issue before it as whether a lessee is an "owner" under R.C. 5715.27(A). After review, the court concluded that it was not.

{¶23} In its analysis, the court recognized prior cases in which the court proposed that the word "owner" as used in various statutes was one of "flexible meaning." *Performing Arts* at ¶10. But, the court explained that those cases referred to "defunct statutes spanning scores of years and various topics, such as the duty to vent natural gas, the duty to provide protective measures for elevators, and the duty to provide fire exits from upper floors of buildings." Id. at ¶10. The court went on to explain that while several of its cases may have suggested flexibility in the meaning of the word "owner," none of those cases had concerned taxation of real property. Id. at ¶11.

{¶24} The court referred to its prior holding in *Victoria Plaza, L.L.C. v. Cuyahoga Cty. Bd. of Revision*, 86 Ohio St.3d 181, 1999-Ohio-148, that "only a holder of legal title owns real property for the purpose of standing to file a tax valuation complaint under R.C. 5715.19." *Performing Arts* at ¶12, citing *Victoria Plaza*. Because *Victoria Plaza*

addressed the same term within the same chapter of the Revised Code, the court in *Performing Arts* concluded that "owner," as used in R.C. 5715.27, refers "only to a legal title holder of the real property for which a tax exemption is sought." Id. at ¶13.

{¶25} The court reaffirmed its holding in *Gilman*, which concerned the homestead exemption, and "whether the trustee of a trust that holds title to real property qualifies as an 'owner' under R.C. 323.151(A)(2)." *Gilman* at ¶8. The court answered the question in the affirmative and stated, "[i]n its ordinary meaning, 'owner' generally refers to '[o]ne who has the right to possess, use, and convey something; a person in whom one or more interests are vested.' " Id. at ¶16, quoting Black's Law Dictionary (9th ed.2009). The *Gilman* court also recognized that in cases addressing issues of real property taxation, "owner" has been construed narrowly to encompass *only* the legal-title holder and not the holder of an equitable interest in the property. Id. (emphasis added), citing *Performing Arts* and *Victoria Plaza*.

{¶26} Regardless of this precedent set forth by the Supreme Court of Ohio, appellant contends the closing of the property that occurred on November 30, 2007 does not constitute a change of ownership for purposes of R.C. 5713.20 because that statute is intended to aid only bona fide purchasers, one of which appellee is not. In support, appellant relies on *Shields v. Gibson* (Feb. 25, 1903), Hamilton County Circuit Court. In *Shields*, the court reviewed Section 2803, which stated, in part:

> In all cases where any county auditor shall discover * * * that any assessor in any previous year shall have omitted to return * * * any improvements, structures or fixtures thereon, subject to taxation, situated within his county * * * it shall be the duty of said auditor to ascertain the value thereof for taxation, as near as may be, and to enter said lands, town lots or improvements, upon the duplicate of the county * * * and to

> add to the taxes of the current year the simple taxes of each and every preceding year in which such property shall have escaped taxation, as far back as the next preceding decennial appraisement and equalization of real estate in his county, unless in the meantime such property shall have changed ownership, in which case only the taxes chargeable since the last change of ownership shall be added, or the owner of such property may, if he desires, pay the amount of such taxes into the county treasury, on the order of said auditor.

{¶27} The court in *Shields* concluded that the purpose of the provision regarding a real estate's change of ownership set forth in Section 2803 was to protect a bona fide purchaser who might rely on the tax duplicate as it appeared at the time of his purchase. The reason for the court's holding was that "there can be no good reason" why a lessee for a term of years "should be exempted from the taxes legally due upon the land which but for this change of ownership the state would have been able to collect."

{¶28} Though *Shields* suggests a result contrary to that reached by the trial court, there are several reasons why *Shields* is not applicable to the matter herein. First, as concluded by the Supreme Court of Ohio in *Performing Arts*, though flexibility in the word owner has been demonstrated in cases concerning "defunct statutes spanning scores of years," such does not justify multiple definitions of the word "owner" within the context of a current chapter of the Revised Code that deals exclusively with property taxation. Id. at ¶10.

{¶29} Secondly, the trial court's interpretation of R.C. 5713.20, and our affirmance of the same, is consistent with our current rules of statutory construction. In construing statutory law, our obligation is to ascertain and to give effect to the intent of the legislature as expressed in the statute. *Hudson v. Petrosurance, Inc.*, 127 Ohio St.3d 54, 2010-Ohio-4505, ¶30, citing *Dircksen v. Greene Cty. Bd. of Revision*, 109 Ohio St.3d 470,

2006-Ohio-2990, ¶16. In *State ex rel. Russo v. McDonnell*, 110 Ohio St.3d 144, 2006-Ohio-3459, ¶37, the Supreme Court of Ohio explained that "in order to determine this intent, we must ' "read words and phrases in context according to the rules of grammar and common usage." ' " Id., quoting *State ex rel. Cincinnati Bell Tel. Co. v. Pub. Util. Comm*., 105 Ohio St.3d 177, 2005-Ohio-1150, ¶27, quoting *State ex rel. Lee v. Karnes*, 103 Ohio St.3d 559, 2004-Ohio-5718, ¶23; see also R.C. 1.42. Moreover, as recognized in *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, ¶15, "a court may not add words to an unambiguous statute, but must apply the statute as written." Id., citing *Portage Cty. Bd. of Commrs. v. Akron*, 109 Ohio St.3d 106, 2006-Ohio-954, ¶52.

{¶30} R.C. 5713.20 states that the auditor "shall compute the sum of the simple taxes for the preceding years in which the property was omitted from the list of real property, not exceeding five years, *unless in the meantime the property has changed ownership, in which case only the taxes chargeable since the last change of ownership shall be computed*." R.C. 5713.20(A) (emphasis added). This statute refers to a property's change of ownership, but this statute does not suggest that for a change of ownership to have occurred there must have been a transaction involving a bona fide purchaser for value and without notice of the property omission.

{¶31} Moreover, a statutory term susceptible of more than one definition should be afforded its plain and ordinary meaning. *Kimble v. Kimble,* 97 Ohio St.3d 424, 2002-Ohio-6667, ¶6; R.C. 1.42. "In the context of real property, we have consistently held that the plain and ordinary meaning of 'owner' is the holder of legal title." *Victoria Plaza* at 183; *State ex rel. Mutiplex, Inc. v. S. Euclid* (1973), 36 Ohio St.2d 167; and *Bloom v. Wides* (1955), 164 Ohio St. 138. In *Bloom*, the Supreme Court of Ohio stated, "Where

the term, 'owner,' is employed with reference to land or buildings, it is commonly understood to mean the person who holds the legal title." Id. at 141. Both *State ex rel. Mutiplex* and *Victoria Plaza* follow this holding.

{¶32} Thirdly, as stated in *Performing Arts*, "within our lexicon, we do not commonly regard a lessee of real property as the owner. Though the lessee holds certain property interests, we regard the legal title holder as the owner, from whom a lessee acquires an inferior interest." Id. at ¶14. Thus, to be the owner of real property, "the person must hold legal title to the property, not simply an equitable interest in the property." Id. at ¶12.

{¶33} In the case sub judice, the record indisputably establishes that appellee was a lessee of the property until November 30, 2007, at which time it became the owner of the property. This is so because November 30, 2007 is the date legal title of the property transferred from DPI to appellee. Pursuant to R.C. 5713.20, if a change of ownership has occurred within the previous five years, omitted taxes can only be assessed from that date. Accordingly, the auditor can only assess the taxes chargeable since November 30, 2007 against appellee.

{¶34} Alternatively, appellant asserts under its first assignment of error that there is an issue of fact regarding when appellee became the owner of the property because appellee paid a transfer tax in 1989 and listed itself as the owner of the property on a Notice of Commitment filed with the Franklin County Recorder in 2001. However, as we have already stated, based on Supreme Court of Ohio precedent, where the term "owner" is employed with reference to land or buildings, it is commonly understood to mean the person who holds the legal title. *Bloom* at 141. Because it is undisputed that appellee

became the legal title holder of the property on November 30, 2007, there is no issue of fact pertaining to when appellee became the "owner" of the property for purposes of this litigation.

{¶35} Lastly, under this assigned error, appellant contends summary judgment was inappropriate because there are genuine issues of material fact as to whether the jurisdictional requirements of R.C. 2723.01 have been met. This statute provides:

> Courts of common pleas may enjoin the illegal levy or collection of taxes and assessments and entertain actions to recover them when collected, without regard to the amount thereof, but no recovery shall be had unless the action is brought within one year after the taxes or assessments are collected.

{¶36} According to R.C. 2723.04:

> If the plaintiff in an action to enjoin the collection of taxes or assessments admits that a part thereof was legally levied, he first must pay or tender the sum admitted to be due. When an injunction is allowed, bond must be given as in other cases. The injunction shall be a justification of the officers charged with the collection of such taxes or assessments for not collecting them.

{¶37} It is appellant's position that since appellee would be responsible for taxes assessed on the land after November 30, 2007, appellee was required under R.C. 2723.04 to pay the sum "admitted to be due." Without such a payment, appellant contends the trial court lacked jurisdiction to entertain this action. This argument fails because there has been no such admission in this case. Indeed, if appellee is successful in this litigation it follows that appellee will be responsible for taxes assessed on the omitted property after November 30, 2007; however, appellee's complaint seeks only to enjoin the collection of taxes that the auditor has assessed *prior* to that date. Thus,

appellee has not admitted any amount to be due and R.C. 2723.04 does not apply as a jurisdictional bar in this instance.

{¶38} Because we find the trial did not err in concluding that "owner," as used in R.C. 5713.20, means legal title holder, we overrule appellant's first assignment of error.

{¶39} In its second assignment of error, appellant contends the trial court erred in denying its motion for continuance pursuant to Civ.R. 56(F).

{¶40} The provisions in Civ.R. 56(F) are discretionary, not mandatory. *ABN AMRO Mtge. Group, Inc. v. Roush*, 10th Dist. No. 04AP-457, 2005-Ohio-1763, ¶23; *Martinez v. Yoho's Fast Food Equip*., 10th Dist. No. 02AP-79, 2002-Ohio-6756, ¶14; *Carlton v. Davisson* (1995), 104 Ohio App.3d 636, 648. Absent an abuse of discretion, the denial of a Civ.R. 56(F) motion will not be reversed. *Roush* at ¶23. An abuse of discretion connotes more than an error of law or judgment. It implies that the court's exercise of discretion was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶41} Civ.R. 56(F) provides:

> Should it appear from the affidavits of a party opposing the motion for summary judgment that the party cannot for sufficient reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

{¶42} Thus, Civ.R. 56(F) requires the party seeking a continuance to submit an affidavit stating sufficient reasons why the party cannot present facts essential to justify the party's opposition to the summary judgment motion. *Roush* at ¶22; *Bozeman v. Wendy's Internatl., Inc*. (Aug. 21, 2001), 10th Dist. No. 01AP-112, quoting *Gates Mills*

Invest. Co. v. Pepper Pike (1978), 59 Ohio App.2d 155, paragraph two of the syllabus. Simply requesting a continuance in order to conduct discovery is not a sufficient explanation for why a party cannot present affidavits in opposition to the motion for summary judgment. Id.

{¶43} Here, appellant submitted an affidavit from its attorney in support of its Civ.R. 56(F) motion. However, the basis for the motion and the assertions in the affidavit are based on the premise that the meaning of owner as used in R.C. 5713.20(A) is ambiguous and that "owner" under that section means a bona fide purchaser for value and without notice of the alleged property tax error.

{¶44} Our disposition of appellant's first assignment of error explains why Supreme Court of Ohio precedent concerning the meaning of the "owner" in the context of taxation of real property makes appellant's position untenable. As previously stated, in cases that address issues of real property taxation, the Supreme Court of Ohio has "construed 'owner' narrowly to encompass *only* the legal-title holder and not the holder of an equitable interest in the property." *Gilman* at ¶16 (emphasis added).

{¶45} Because there is no issue of fact regarding when appellee became the legal title holder of the property and analysis regarding whether appellee constitutes a bona fide purchaser without notice is not relevant, there is no merit to appellant's assertion that time for discovery was needed in order to respond to the motion for summary judgment. Accordingly, the trial court did not abuse its discretion in denying appellant's Civ.R. 56(F) motion.

{¶46} Consequently, we overrule appellant's second assignment of error.

{¶47} For the foregoing reasons, appellee's motion to strike is granted in part and denied in part, appellant's two assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Motion to strike granted in part, denied in part; judgment affirmed.

KLATT and DORRIAN, JJ., concur.

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