[Cite as *Providence Manor Homeowners Assn., Inc. v. Rogers,* 2012-Ohio-3532.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

PROVIDENCE MANOR HOMEOWNERS ASSOCIATION, INC.,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-10-189
	:	O P I N I O N
- vs -	:	8/6/2012
	:	
JANET ROGERS,	:	
Defendant-Appellant.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2010-01-0259

Cuni, Ferguson & LeVay Co., L.P.A., Amy Schott Ferguson, 10655 Springfield Pike, Cincinnati, Ohio 45215, for plaintiff-appellee

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HUTZEL, J.

{¶ 1} Defendant-appellant, Janet Rogers, appeals a decision of the Butler County Court of Common Pleas granting summary judgment in favor of plaintiff-appellee, Providence Manor Homeowners Association, Inc. (HOA), on its complaint for injunctive relief requiring appellant to remove a Kentucky Board fence from her property.

{¶ 2} Appellant lives in the Providence Manor Subdivision in West Chester, Ohio.

Kamal Kumar likewise lives in the subdivision on the same street. The subdivision is subject to a Declaration of Covenants, Conditions and Restrictions and Reservation of Easements for Providence Manor Home Owners Association (Declaration), as well as a set of rules known as the Guidelines. Provisions relevant to this appeal are as follows.

{¶ 3} Article V, Section 5.1 of the Declaration states in pertinent part:

> Approval Required. No building, fence, wall or other structure shall be commenced, erected or maintained upon the Properties * * * until the plans and specifications showing the nature, kind, shape, height, materials and location of the same shall have been submitted to and approved in writing by the appropriate entity. * * * Such plans and specifications Shall be reviewed as to harmony of external design and location in relation to surrounding structures and topography in accordance with the requirements hereinafter set forth. [sic]

{¶ 4} Article VI, Section 6.1.7 of the Declaration in turn states:

> No fences or other Lot dividers, swing sets, clothes hanging fixtures or swimming pools may be erected or installed by any Lot owner unless such owner has first obtained the written approval. The Declarant and Association shall promulgate guidelines for fence styles which may deny or restrict installation on specific Lots.

{¶ 5} With regard to boundary and perimeter fencing, the Guidelines provide that "[p]roperty line fencing shall be three (3) split rail, unpainted-pressure treated lumber only. Wire liners may be used for the containment of pets and children."

{¶ 6} In 2009, Kumar started building a fence on his property. After being told he needed to get a written approval from the homeowners association board, he submitted an application on March 3, 2009. The application was for a fence in the back yard, "split rail with some portion of private fence." Attached to the application was a sketch illustrating where Kumar wanted to build the fence. The sketch referred to "Kentucky Board." Kumar's application was denied on the ground the board needed more detailed information with regard to the location of the privacy fence and its relation to the property line. Kentucky

Board was not mentioned as a ground for denying the application. On March 28, 2009, Kumar submitted a new application to build a "fence in the back yard." Attached to the application was a sketch of the project with the legend "split rail" as well as a photograph of a split-rail fence. The board approved the application as submitted. Thereafter, Kumar built a Kentucky Board fence on his property, not a split-rail fence.

{¶ 7} When appellant moved to the subdivision in 2003, a three-board split-rail fence separated her property from her next-door neighbor's property. In 2009, after years of repairing the fence torn by the neighbor's lawn mower, appellant decided to build a fence on her property (the three-board split-rail fence belonged to her neighbor). After noticing Kumar's Kentucky Board fence, appellant decided she wanted the same fence on her property. On June 5, 2009, a fence company submitted a proposal to install a four-board Kentucky Board fence on appellant's property.

{¶ 8} Around that time, appellant called board member Rita Ballman and told her she wanted to install the same type of fence as Kumar's. According to appellant, Ballman told her that the fence had been approved but that she needed to submit an application. In her deposition, Ballman denied telling appellant that the fence had been approved. To the contrary, Ballman repeatedly told appellant that Kumar's fence style was not an approved style, appellant could not put that kind of fence on her property, and Kumar would be asked to remove his fence.

{¶ 9} On June 24, 2009, appellant submitted an application to "replace fence around rear yard. Split rail / Ky post[.]" By then, construction had already started and posts were up. On June 25, the board denied the application "based on the style fence, KY Board, you have started to install, without the required prior approval. This style fence is not permitted." The board asked appellant to "stop construction and remove the non-compliant fence[.] If you would like to resubmit [an] application for an approved style fence, split rail, the Board will be

glad to review." Construction of the fence on appellant's property was subsequently completed. The fence is a Kentucky Board fence and has four boards.

{¶ 10} On January 21, 2010, HOA filed a complaint for injunctive relief against appellant, seeking to have appellant remove her noncompliant fence or to allow HOA to enter her property and remove the fence at her costs. Appellant and HOA subsequently both moved for summary judgment. Appellant argued that HOA was barred under the doctrine of collateral estoppel from enforcing the Declaration and the Guidelines against her. Appellant also argued that the Declaration and the Guidelines were ambiguous as to whether a Kentucky Board fence was a compliant fence

{¶ 11} On September 19, 2011, the trial court granted HOA's motion for summary judgment and denied appellant's motion for summary judgment. The trial court found that (1) appellant never obtained a written approval for installing a fence of any kind on her property in violation of the Declaration; (2) the fence erected on appellant's property contained four boards, and not three as required under the Guidelines; (3) the term "split rail" as used in the Guidelines was not ambiguous; (4) rather, it was "well defined in the building industry" and conjured up "using rails, not boards, that are set into precut holes within the posts"; and (5) HOA was not barred from enforcing the Declaration and the Guidelines under either the doctrine of collateral estoppel or the Declaration's nonwaiver provision.

{¶ 12} Appellant appeals, raising three assignments of error.

{¶ 13} Assignment of Error No. 1:

{¶ 14} THE TRIAL COURT ERRED TO THE PREJUDICE OF JANET ROGERS BY RELYING ON A "BUILDING INDUSTRY" DEFINITION OF "SPLIT RAIL" FENCE TO FIND THE COVENANTS AND GUIDELINES UNAMBIGUOUS WHEN NEITHER PARTY SUBMITTED RULE 56 EVIDENCE SUPPORTING SUCH RELIANCE. [sic]

{¶ 15} Appellant argues that the trial court impermissibly relied on a "building industry"

definition of split rail when it found that the term used in the Guidelines was not ambiguous. Appellant asserts that because neither party offered Civ.R. 56 evidence of the "building industry" definition, the trial court was not permitted to rely on such definition.

{¶ 16} On appeal, a trial court's decision granting summary judgment is reviewed de novo. *Burgess v. Tackas*, 125 Ohio App.3d 294, 296 (8th Dist.1998). Summary judgment is proper when there is no genuine issue of material fact remaining for trial, the moving party is entitled to judgment as a matter of law, and reasonable minds can only come to a conclusion adverse to the nonmoving party, construing the evidence most strongly in that party's favor. *See* Civ.R. 56(C); *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66 (1978). The movant bears the initial burden of informing the court of the basis for the motion and demonstrating the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). Once this burden is met, the nonmovant has a reciprocal burden to set forth specific facts showing a genuine issue for trial. *Id.*

{¶ 17} The trial court found that the term "split rail" as used in the Guidelines was not ambiguous because it was "well defined in the building industry" and "conjure[d] up the thought of fencing, using rails, not boards, that are set into precut holes within the posts."

{¶ 18} Civ.R. 56(C) provides in relevant part:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, 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. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, 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, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

{¶ 19} We agree with appellant that neither party presented evidence per se of the "building industry" definition of "split rail." We note, however, that several references to fence manufacturers were made by Ballman and Mark Haverkos, the current president of the board, during their depositions.

{¶ 20} Ballman testified that while the term "split rail" was not defined in the Guidelines, one can know what it means "from fence manufacturers naming of fence styles." Ballman also testified that any fence with three evenly spaced boards, but without triangular-shaped boards, would not be compliant under the Guidelines as she believed "there is a standard among fence manufacturers that I've never seen a split rail fence that is anything but the triangular shaped board."

{¶ 21} Haverkos testified that to him, a split-rail fence was a type of fence "where the ends are smaller in nature to fit into a socketed upright. In general installation, it comes in three of those rails, three rails high." Haverkos testified that his definition of split rail came from conducting a Google search and from "the fence contractors that serve our area, their literature defines split rail and shows pictures of split rails as I have defined." Haverkos also testified that while the Guidelines did not specify the particular shape of the rails, it was his "understanding that a split rail fence common to the industry would dictate what type of shape that is."

{¶ 22} Given Ballman's and Haverkos' foregoing testimony, we find that the trial court did not err in relying on a "building industry" definition of split rail. Appellant's first assignment of error is overruled.

{¶ 23} Assignment of Error No. 2:

{¶ 24} THE TRIAL COURT ERRED TO THE PREJUDICE OF JANET ROGERS BY FAILING TO CONSTRUE AMBIGUOUS CONTRACT LANGUAGE IN HER FAVOR AND GRANTING SUMMARY JUDGMENT FOR THE PROVIDENCE MANOR HOMEOWNERS'

ASSOCIATION ON THE INJUNCTIVE RELIEF IT SOUGHT.

{¶ 25} The issue is whether building a Kentucky Board fence on a property in the subdivision violates the Declaration and the Guidelines. Appellant argues that the Guidelines' definition of a compliant property line fence is ambiguous because it does not specifically define the term "split rail" and does not address what is or is not a Kentucky Board fence. Appellant further argues that given Ballman's and Haverkos' definition in their deposition of a split-rail fence, and the "neighborhood precedent" represented by Kumar's fence, her fence satisfies the definition of split rail.

{¶ 26} The construction of a written contract is a matter of law to be resolved by the court. *Graham v. Drydock Coal Co.*, 76 Ohio St.3d 311, 313 (1996). Thus, when reviewing issues of contract interpretation, this court applies a de novo standard of review. *Merritt v. Anderson*, 12th Dist. No. CA2008-04-101, 2009-Ohio-1730, ¶ 18. Any factual findings by the trial court must be accorded appropriate deference. *Graham* at 313.

{¶ 27} The primary role of the court in reviewing a contract is to ascertain and give effect to the intent of the parties. *Hamilton Ins. Serv., Inc. v. Nationwide Ins. Cos.*, 86 Ohio St.3d 270, 273 (1999). A contract that is, by its terms, clear and unambiguous requires no interpretation or construction and will be given the effect called for by the plain language of the contract. *Cooper v. Chateau Estate Homes, L.L.C.*, 12th Dist. No. CA2010-07-061, 2010-Ohio-5186, ¶ 12. A contract is ambiguous if its provisions are susceptible of two or more reasonable interpretations. *Covington v. Lucia*, 151 Ohio App.3d 409, 2003-Ohio-346, ¶ 18 (10th Dist.). Whether a contract's terms are clear or ambiguous is a question of law for the court. *Cooper* at ¶ 12.

{¶ 28} We note at the outset that the Declaration clearly requires property owners to obtain a *written approval* from the board *before* the property owner builds a fence on his property or begins a fence building project. It is undisputed that appellant never obtained

written approval from the board for the fence she built on her property. Thus, appellant violated the Declaration when she built her fence. It is also clear that the Guidelines require a property line fence to have *three* boards or rails. Appellant's fence has four boards and thus violates the Guidelines.

{¶ 29} We find that the provision in the Guidelines governing what property line fence is allowed in the subdivision is not ambiguous. Under the Guidelines, the property line fence that a property owner may install on his property "*shall be* three (3) split rail, unpainted-pressure treated lumber *only*." (Emphasis added.) The provision only allows one type of fence, a split-rail fence; it follows that any other type of fence, including Kentucky Board fences, is not allowed under the Guidelines and is not a compliant fence. As allowed under Article VI, Section 6.1.7 of the Declaration, the Guidelines restrict the permitted property line fences to split-rail fences only and deny all other types of property line fences.

{¶ 30} Further, while the Guidelines do not define "split rail," this does not mean that the provision governing property line fences is ambiguous. Nor does it mean that appellant's fence is a compliant fence under the Guidelines. As the trial court noted, split rail is a well-defined term in the fencing industry. Appellant herself testified that when she moved into the subdivision in 2003, her house had a "three-board split rail" fence with wire mesh. She further testified that when she considered installing a fence on her side of the property line, she did not research what kind of fence she should put up but simply noticed Kumar's fence and liked it. Then, based on Kumar's assertion that his Kentucky Board fence had been approved by the board, a fence company employee's assertion that Kumar's fence was approved, and Ballman's alleged statement to appellant that the fence was approved, appellant had a Kentucky Board fence installed on her property. Appellant admitted that she never applied to install a split-rail fence.

{¶ 31} Ballman testified that the term "split rail," while not defined in the Declaration or

the Guidelines, was defined by the fencing industry as well as by the subdivision "precedence," that is, by the "hundred split rail fences that are in our neighborhood that everyone refers to as split rail." She further testified that (1) "a split-rail fence has three rails or posts or boards that are spaced approximately evenly up the post that is attached to it;" (2) any fence with three evenly spaced boards would not automatically comply with the Guidelines because under the standard of the fence manufacturers, a split-rail fence has triangular shaped boards; (3) in fact, triangular shaped boards are what define a fence as a split-rail fence; (4) by contrast, a Kentucky Board fence has flat boards; (5) by solely referring to "split rail," the Guidelines prohibit any other type of fences; and (6) there is only one type of split-rail fence.

{¶ 32} Haverkos testified that (1) "split rail" is "in and of itself a definite defined type of fence"; (2) a split-rail fence is "a type of fence that * * * has an appearance where the ends are smaller in nature to fit into a socketed upright. In general installation, it comes in three of those rails, three rails high"; (3) the three boards of a split-rail fence are generally equally spaced; (4) the Guidelines state that a property line fence must be a split-rail fence; and (5) the Guidelines do not refer to the term "Kentucky Board."

{¶ 33} With regard to the "neighborhood precedent" represented by Kumar's fence, the record indicates that while Kumar's noncompliant Kentucky Board fence was built before appellant's fence, it was also the exception rather than the norm as to the type of fences used in the subdivision.

{¶ 34} In light of the foregoing, we find that while the testimony of Ballman and Haverkos varied slightly, they do not constitute different interpretations of the term "split rail." Nor is the term "split rail" in the Guidelines susceptible of two or more interpretations, notwithstanding appellant's argument to the contrary. As the trial court aptly noted, appellant "attempts to create ambiguity where none exists." We further find that appellant's fence does

not comply with the Guidelines, nor does it satisfy the definition of split rail as provided by Ballman and Haverkos. The trial court, therefore, did not err in granting summary judgment to HOA on the injunctive relief it sought.

{¶ 35} Appellant's second assignment of error is overruled.

{¶ 36} Assignment of Error No. 3:

{¶ 37} THE TRIAL COURT ERRED TO THE PREJUDICE OF JANET ROGERS BY FAILING TO PRECLUDE THE INJUNCTIVE RELIEF SOUGHT BY THE PROVIDENCE MANOR HOMEOWNERS' ASSOCIATION PURSUANT TO OHIO'S DEFENSIVE COLLATERAL ESTOPPEL DOCTRINE AND OHIO'S WAIVER PRINCIPLES.

{¶ 38} The record shows that in July 2010, HOA filed a complaint against Kumar for injunctive relief and costs. The complaint sought to have Kumar's Kentucky Board fence removed for being in violation of the Declaration and the Guidelines. On February 9, 2011, the trial court granted Kumar's motion to compel discovery and ordered HOA to provide responses to Kumar's discovery requests (which had been served in October 2010) no later than February 10, 2011. HOA failed to do so. In March 2011, the trial court granted Kumar's motion to dismiss HOA's complaint for failure to prosecute and to provide discovery pursuant to the court's February 2011 order. HOA's complaint against Kumar was dismissed with prejudice.

{¶ 39} In her third assignment of error, appellant first argues that the trial court's dismissal with prejudice of HOA's complaint against Kumar was an adjudication upon the merits under Civ.R. 41(B)(3). As a result, HOA is barred under Ohio's defensive collateral estoppel doctrine from relitigating the issue of whether a Kentucky board fence can be installed in the subdivision where appellant and Kumar both live. Appellant also argues that HOA waived its right to enforce the Declaration and the Guidelines against appellant by failing to prosecute its claim against Kumar and subsequently appeal the dismissal of its

complaint against Kumar.

{¶ 40} Collateral estoppel "preclu[des] the relitigation in a second action of an issue or issues that have been actually and necessarily litigated and determined in a prior action." *Goodson v. McDonough Power Equip., Inc.*, 2 Ohio St.3d 193, 195 (1983). Offensive use of collateral estoppel "'occurs when the plaintiff seeks to foreclose the defendant from litigating an issue that the defendant has previously litigated unsuccessfully in an action with another party.'" *Brunswick Hills Twp. Bd. of Trustees v. Ludrosky*, 9th Dist. No. 11CA0026-M, 2012-Ohio-2556, ¶ 10, quoting *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, 99 S.Ct. 645 (1979). Defensive use of collateral estoppel "occurs when a defendant seeks to prevent a plaintiff from asserting a claim that the plaintiff has previously litigated unsuccessfully in another action." *Ludrosky* at *id.* In other words, defensive use of collateral estoppel "seeks to use a prior judgment as a shield, not a sword[.]" *Frank v. Simon*, 6th Dist. No. L-06-1185, 2007-Ohio-1324, ¶ 12.

{¶ 41} Ohio traditionally has made mutuality of parties a requirement for collateral estoppel. *Goodson* at paragraph one of the syllabus. However, the Ohio Supreme Court has acknowledged that there may be exceptions to the requirement of mutuality, in particular "where justice would reasonably require it." *Id.* at 199. Following *Goodson*, Ohio courts have relaxed the mutuality requirement and allowed nonmutual defensive use of collateral estoppel "when a party against whom the doctrine is asserted previously had his day in court and was permitted to fully litigate the specific issue sought to be raised in a later action." *Hoover v. Transcontinental Ins. Co.*, 2d Dist. No. 2003-CA-46, 2004-Ohio-72, ¶ 17; *Frank*, 2007-Ohio-1324; *Mitchell v. Internatl. Flavors & Fragrances, Inc.*, 179 Ohio App.3d 365, 2008-Ohio-3697 (1st Dist.).

{¶ 42} "A court in its sound discretion may permit an exception to the mutuality requirement where justice reasonably requires it." *Balboa Ins. Co. v. S.S.D. Distrib. Sys.,*

Inc., 109 Ohio App.3d 523, 527 (12th Dist.1996). In the case at bar, the trial court found that notwithstanding the dismissal with prejudice of HOA's complaint against Kumar, HOA was not collaterally estopped from bringing suit against appellant for injunctive relief. We agree for the following reasons.

{¶ 43} To successfully assert collateral estoppel, a party must plead and prove that (1) there is mutuality of parties, (2) there was a final judgment on the merits in the previous case after a full and fair opportunity to litigate the issue, (3) the issue was either admitted or actually tried and decided and was necessary to the final judgment, and (4) the issue was identical to the issue involved in the prior suit. *Id.* at 527-528.

{¶ 44} We find that the first two elements are met. As stated earlier, defensive use of collateral estoppel deals away with the requirement of mutuality. With regard to the second element, the trial court's dismissal with prejudice of HOA's claim against Kumar for failure to prosecute and comply with the trial court's discovery order was an adjudication on the merits under Civ.R. 41(B)(1) and (3).

{¶ 45} We find, however, that the third element requiring actual litigation is not satisfied. In the case pitting HOA against Kumar, the trial court dismissed HOA's complaint for failure to prosecute and failure to comply with the court's discovery order. The issue of whether Kumar's Kentucky Board fence was in compliance with or in violation of the Declaration and the Guidelines was never actually litigated and directly determined by the trial court. The dismissal of HOA's complaint against Kumar was purely procedural in nature.

{¶ 46} As the Ohio Supreme Court stated, "an absolute due process requisite to the application of collateral estoppel is that the party asserting the preclusion must prove that the identical issue was actually litigated, directly determined, and essential to the judgment in the prior action." *Goodson*, 2 Ohio St.3d at 201; *State ex rel. Davis v. Pub. Emps. Retirement Bd.*, 120 Ohio St.3d 386, 2008-Ohio-6254, ¶ 28. "When an issue is not actually litigated and

decided in the previous proceeding, collateral estoppel does not preclude the issue from being litigated in the subsequent proceeding." *Davis* at ¶ 30. *See also Hemphill v. Dayton*, 2d Dist. No. 23782, 2011-Ohio-1613, ¶ 48 (collateral estoppel occurs when, inter alia, the issue was both "actually litigated" and "actually decided" in the first action, and it was necessary to decide the issue in disposing of the first action).

{¶ 47} The trial court, therefore, did not err in finding that HOA was not collaterally estopped from litigating the issue of whether appellant's Kentucky Board fence was in violation of the Declaration and the Guidelines.

{¶ 48} Appellant also argues that HOA waived its right to enforce the Declaration and the Guidelines against appellant by failing to prosecute its claim against Kumar and subsequently appeal the dismissal of its complaint against Kumar.

{¶ 49} Article VII, Section 7.1 of the Declaration (the nonwaiver provision) provides:

> The Declarant [identified earlier in the document as the Declaration], the Association, or any Owner, shall have the right to enforce, by any proceeding at law or in equity, all restrictions, conditions, covenants, reservations, liens and charges now or hereafter imposed by the provisions of this Declaration. Failure by the Declarant, the Association or by any Owner to enforce any covenant or restriction herein contained shall in no event be deemed a waiver of the right to do so thereafter.

{¶ 50} Appellant asserts that the nonwaiver provision "is premised on a failure to enforce, which is tantamount to inaction," and that the intent of the provision is "to protect the Declarant, the Association or any Owner from waiver arguments for inaction." That is, the nonwaiver provision "is only triggered by inaction[.]" As a result, appellant asserts, HOA "waived its right to proceed against [her] for removal of her fence, not because [HOA] did nothing," but because it took affirmative, albeit insufficient and unsuccessful, steps against Kumar.

{¶ 51} In other words, appellant is arguing that the phrase "failure to enforce" in the

nonwaiver provision necessarily and only means failure to do anything, and that because HOA took action against Kumar, rather than doing nothing, the nonwaiver provision is inapplicable. We decline to read the phrase "failure to enforce" as narrowly as appellant does. While a failure to enforce can stem from complete inaction, it can also stem from insufficient or incomplete action, such as a failure to prosecute a claim, a failure to challenge a motion to dismiss, or a failure to appeal the dismissal of a complaint.

{¶ 52} We therefore find that the nonwaiver provision is applicable and that HOA did not waive its right to enforce the Declaration and the Guidelines against appellant by failing to prosecute its claim against Kumar and subsequently appeal the dismissal of its complaint against Kumar.

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

{¶ 54} Judgment affirmed.

HENDRICKSON, P.J., and PIPER, J., concur.