[Cite as *Liberty Self-Stor v. Porter*, 2009-Ohio-5624.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

LIBERTY SELF-STOR, et al. :

Plaintiffs-Appellants : C.A. CASE NO. 23396

v. : T.C. NO. 2008 CV 6033

MARK J. PORTER, et al. : (Civil appeal from Common Pleas Court)

Defendants-Appellees :

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O P I N I O N

Rendered on the 23rd day of October, 2009.

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FROELICH, J.

{¶ 1} Liberty Self-Stor, Ltd., and U-Store-It, L.P., appeal from a judgment of the Montgomery County Court of Common Pleas, which granted summary judgment to Mark Porter, Lori Porter, Lillie Hoffman, and Miriam Friedman (collectively, "Defendants") on the ground that Liberty's and U-Store-It's claims did not fall within Ohio's Saving Statute, R.C. 2305.19, and were barred by the statute of limitations. For the following reasons, the trial court's judgment will be reversed, and the matter will be remanded for further proceedings.

I

{¶ 2} The pertinent facts leading to this appeal were set forth in an appeal from a prior related litigation between the parties, *Liberty Self-Stor, Ltd. v. Porter*, Montgomery App. Nos. 21699, 21728, 2007-Ohio-1510, and we repeat them here.

{¶ 3} "Liberty Self-Stor, Ltd. ('Liberty'), owned and operated a self-storage facility on the north side of Shiloh Springs Road in Trotwood. Defendants *** also own real property on the north side of Shiloh Springs Road.

{¶ 4} "In 1998, Liberty sought zoning approval from the City of Trotwood to expand its existing operations. Liberty presented a Planned Unit Development ('PUD') application to the Trotwood City Council. At the time Liberty sought zoning approval, Shiloh Springs Road was not serviced by Trotwood municipal sewer system.

{¶ 5} "Defendants voiced objections to Liberty's proposed plans for expansion. The Trotwood Planning and Zoning Administrator recommended approval of Liberty's PUD application if the concerns of the adjacent property owners were mitigated. Based on the expressed concerns of the adjacent property owners, the Trotwood Planning Commission

rejected approval of Liberty's PUD application.

{¶ 6} "After speaking with a representative of Liberty, Defendants agreed to withdraw their objections to Liberty's proposed expansion plans. The parties disagree as to what Liberty promised in return for the Defendants' withdrawal of their objections. According to Liberty, the withdrawal of Defendants' objections was given in return for Liberty's promise to submit modifications to the proposed plan, which included Liberty's construction of an extension to the city's sewer main along Shiloh Springs Road, so that connections to the line might be offered to other property owners along Shiloh Springs Road, that is, the Defendants. Liberty would then convey the lateral extension to Trotwood to serve as an extension of the city's municipal main. In return, Trotwood would enter into a protective agreement whereby Liberty could recoup its construction costs. According to Defendants, Liberty promised to allow Defendants to tap-in to the lateral sewer extension at no charge.

{¶ 7} "Defendants withdrew their objections and Liberty received zoning approval to expand its operations. Liberty subsequently obtained an easement from a third party that owned real property on the south side of Shiloh Springs Road. Liberty constructed the lateral sewer extension within this easement at a cost of $75,020.00. But Liberty and Trotwood failed to enter into a protection agreement and Liberty never conveyed the lateral extension to Trotwood.

{¶ 8} "Defendants applied for permits to connect with Liberty's sewer line. Trotwood issued the permits to the Porters and the Hoffmans, who then made connections to Liberty's lateral extension, which ran to Trotwood's main sewer line. Friedman also made

a connection to the sewer line, although it appears that Friedman was not issued a connection permit by Trotwood. Defendants then removed their existing sewage disposal systems.

{¶ 9} "In December 2002, Liberty commenced an action against Defendants, asserting ejectment, trespass, and conversion, and requesting mesne profits, and against Trotwood, seeking mandamus relief for an involuntary taking. Subsequently, Liberty moved for partial summary judgment on its ejectment claim, which the trial court granted on August 30, 2005. But the trial court vacated that order on September 8, 2005, because Liberty no longer had standing to maintain the action against Defendants as a result of Liberty's conveyance of its real property to U-Store-It, L.P. ('U-Store-It').

{¶ 10} "On September 19, 2005, U-Store-It filed a motion for leave to join as a party plaintiff and for partial summary judgment in ejectment on the same grounds previously asserted by Liberty. The trial court granted U-Store-It's motion for partial summary judgment in ejectment on July 11, 2006. U-Store-It voluntarily dismissed its remaining claims pursuant to Civ. R. 41(A)(1). U-Store-It then moved for judgment on the pleadings and for entry of judgment, which the trial court granted on August 10, 2006. Defendants filed a timely notice of appeal." Id. at ¶2-9.

{¶ 11} On March 30, 2007, we sustained Defendants' assignment of error that the trial court erred in granting summary judgment to U-Store-It on its ejectment claim. We noted that ejectment actions are available where the plaintiff has legal title and is entitled to possession of the real property, but is unlawfully kept out of the possession by the defendant. Id. at ¶20, citing *Turnbull v. Xenia* (1946), 80 Ohio App. 389, 392. We concluded that U-Store-It had "failed to plead and prove that the easement Liberty had obtained from a third

party created a possessory interest in U-Store-It sufficient to support an action in ejectment. Further, U-Store-It did not plead and prove that Defendants' tap-ins interfered with or prevented U-Store-It's use of its easement." Accordingly, we reversed the trial court's grant of summary judgment to U-Store-It on its ejectment claim and remanded for further proceedings.

{¶ 12} On remand, Liberty and U-Store-It moved to amend their complaint to re-assert their trespass[1] and conversion claims. On March 25, 2008, that motion was denied. Liberty and U-Store-It sought reconsideration of the trial court's decision, but that motion was also denied. *Liberty Self-Stor, Ltd. v. Porter* (June 5, 2008), Montgomery C.P. No. 2002 CV 8752.

{¶ 13} On July 1, 2008, Liberty and U-Store-It initiated the instant litigation against Defendants, raising trespass to chattel and conversion claims and seeking compensatory and punitive damages. They also sought, in the form of equitable relief, that Defendants be ordered to disconnect from the lateral extension and restore the adjacent surface property to the condition it was in prior to the connection. Alternatively, they sought an order granting Defendants "the permanent right to maintain their respective Unpermitted Connection to the Private Lateral" and award compensatory damages from each defendant in the amount of the defendant's equitable share of the cost of construction of the lateral extension.

{¶ 14} Friedman and Hoffman moved to dismiss the action on the ground that the

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[1]Although Liberty and U-Store-It argued that they were re-asserting the previously dismissed trespass claim, the original trespass claim appears to have been a trespass to real property claim, not a trespass to chattel claim.

conversion and trespass claims were barred by the statute of limitations and that the equitable claim, which they assert is a restatement of the ejectment claim, is barred by res judicata. Friedman also asserted that she had not been properly served with the complaint. In response, U-Store-It asserted that the four-year statute of limitations for conversion and trespass had not run, because Defendants' actions constituted a continuing trespass, for which the statute of limitations is tolled. It further argued that its equitable claim was not the same as its prior ejectment claim.

{¶ 15} Lori Porter and Mark Porter each subsequently filed a motion to dismiss, incorporating Friedman's and Hoffman's motion. Mark Porter also asserted that the City of Trotwood and Montgomery County should be joined as indispensable parties. He claimed that ownership of the lateral sewer line was in dispute, noting that Trotwood had issued permits to tap-in to the sewer in 1999, and he supported his motion with an affidavit. In its opposition memorandum, U-Store-It incorporated its response to Hoffman and Friedman's motion. It further argued that joinder was not required, because its claims implicated Defendants only. U-Store-It supported its response with a "declaration" from Thomas Smith, former President of Liberty. Mark Porter sought to strike the portion of U-Store-It's response that asserted that Liberty had paid service and connection fees to Trotwood, and he requested sanctions.

{¶ 16} Hoffman and Friedman filed a supplemental brief asserting, based on *Pattison v. W.W. Granger, Inc.*, 120 Ohio St.3d 142, 2008-Ohio-5276, that the conversion and trespass claims could not be "resurrected." (*Pattison* held that "when a plaintiff has asserted multiple claims against one defendant, and some of those claims have been ruled

upon but not converted into a final order through Civ.R. 54(B), the plaintiff may not create a final order by voluntarily dismissing pursuant to Civ.R. 41(A) the remaining claims against the same defendant." *Pattison* at ¶1.) U-Store-It responded that *Pattison* was inapplicable.

{¶ 17} In February 2009, the trial court notified the parties that it was converting the motions to dismiss into motions for summary judgment, stating that it could not address Defendants' res judicata argument in a motion to dismiss, and it provided an opportunity for the parties to supplement their briefing. Friedman and Hoffman provided authenticated copies of the complaint from Case No. 2002 CV 8752, the Civ.R. 41(A) dismissal of the trespass and conversion claims in that case, the trial court's denial of the motion for reconsideration in that case, and our appellate ruling reversing the judgment on the ejectment claim. These were all matters the court could take judicial notice of; no additional factual evidentiary material was submitted.

{¶ 18} On March 26, 2009, the trial court granted the motions for summary judgment, denied the motion for joinder as moot, and denied Mr. Porter's motion to strike and for sanctions. With regard to the motions for summary judgment, the court concluded that the conversion and trespass claims were barred by the statute of limitations, because Liberty and U-Store-It's complaint asserted a permanent, rather than a continuing, trespass claim. The court further found that the claims were not saved by Ohio's Saving Statute, R.C. 2305.19, because this action was filed more than one year after March 30, 2007, the last possible date for the one-year savings period to begin to run.

II

{¶ 19} Liberty and U-Store-It appeal from the trial court's ruling. Their sole

assignment of error states that the trial court erred, as a matter of law, in granting the motions for summary judgment and finding that, as a matter of law, their Complaint was for a permanent trespass for which the statute of limitations had run.

{¶ 20} Civ.R. 56(C) provides that summary judgment may be granted when the moving party demonstrates that (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, 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. *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 183, 1997-Ohio-221; *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64. Our review of the trial court's decision to grant summary judgment is de novo. See *Helton v. Scioto Cty. Bd. of Commrs.* (1997), 123 Ohio App.3d 158, 162.

{¶ 21} On appeal, Liberty and U-Store-It assert that their complaint raised a continuing trespass claim and, consequently, the four-year statute of limitations for their claim was tolled. They state: "Presently, it is undisputed that the Defendants connected to, and have continually utilized the sewer lateral owned by the Plaintiffs. It is precisely the persistence of the trespass – their refusal to disconnect – which makes the claim a continuing tort." Liberty and U-Store-It do not address any other portion of the trial court's ruling.

{¶ 22} In their briefs, the parties rely upon case law related to trespass to real property. Although this action involves trespass to chattel, we agree with the parties that the authority concerning real property is instructive.

{¶ 23} A continuing trespass occurs "when there is some continuing or ongoing

allegedly tortious activity attributable to the defendant." *Sexton v. Mason*, 117 Ohio St.3d 275, 2007-Ohio-858, at ¶45. In contrast, a permanent trespass "occurs when the defendant's tortious act has been fully accomplished, but injury to the plaintiff's estate from that act persists in the absence of further conduct by the defendant." *Reith v. McGill Smith Punshon, Inc.*, 163 Ohio App.3d 709, 2005-Ohio-4852, at ¶49. See, also, *Sexton* at ¶45. The key factor in distinguishing a continuing trespass from a permanent trespass is whether the defendant has engaged in ongoing conduct or has retained control over the cause of the trespass. *Sexton* at ¶45.

{¶ 24} If a plaintiff has raised a permanent trespass, the claim must be brought within four years. R.C. 2305.09. (Liberty and U-Store-It agree that the four-year statute of limitations governs their claims for trespass to chattel and conversion.) However, a continuing trespass "perpetually creat[es] fresh violations of the plaintiff's property rights," resulting in a tolling of the statute of limitations. *Frisch v. Monfort Supply Co.* (Nov. 21, 1997), Hamilton App. No. C-960522. When the continuing trespass concerns real property, the action may be brought at any time until the claim has ripened into a presumptive right by adverse possession, which takes 21 years. *Reith* at ¶50.

{¶ 25} In holding that Liberty and U-Store-It had alleged a permanent trespass, the trial court found the circumstances surrounding this case to be analogous to *Sexton* and *Frisch*. In *Sexton*, a housing developer constructed a residential subdivision next to the plaintiffs' property, which contained a creek. As the development progressed, the Sextons began to experience water problems, which progressively worsened over the years. The Sextons eventually filed suit against the developer and the company that designed the

stormwater drainage system for the subdivision, alleging that their negligence had caused the flooding on the Sextons' property. The trial court granted summary judgment to the defendants on the ground that the Sextons' claims were based on a permanent, rather than continuing trespass, and the four-year statute of limitations barred the claims. An appellate court affirmed the judgment.

{¶ 26} The Supreme Court of Ohio also affirmed. The Court stated that, while the developer and his contractor engaged in work on the development, the statute of limitations was tolled. However, once they completed their respective work and no longer exerted control over the property, the alleged trespass was completed and the statute of limitations began to run, even though the Sextons continued to suffer water problems on their property. *Sexton* at ¶54. Because the Sextons had filed suit more than four years after the work had been completed, the trial court had properly granted summary judgment to the defendants. Id. at ¶55.

{¶ 27} In *Frisch*, the developer of a subdivision installed a home-aeration system that processed sewage discharge for a home that the plaintiff ultimately purchased. Upon moving into the house, the plaintiff discovered a pipe from the aeration system was discharging foul-smelling black sludge into her back yard, which interfered with her use of her property. A month later, Frisch moved the discharge line back farther in her yard in an attempt to alleviate the problem, and she began discussing the matter with the board of health and her neighbors. More than seven years later, the plaintiff brought suit against several parties, claiming nuisance, trespass to property, and breach of contract. The trial court granted summary judgment in favor of all but one defendant (who had defaulted),

concluding that the statute of limitations barred the plaintiff's claims. The First District agreed that Frisch had alleged a permanent trespass. It reasoned: "The damage to Frisch's property occurred when the home-aeration was improperly installed. The tortious act was completed at that time, and there was no ongoing conduct by the defendants even though damage to Frisch's property continued."

{¶ 28} In finding that Liberty and U-Store-It had asserted a permanent trespass claim, the trial court stated: "This is the exact situation in this case: each of the Defendants allegedly installed tap-ins on their own property to connect to Plaintiffs' sewer lateral. Like in *Sexton*, once the tap-in was installed, the Defendants' actions ceased and the Statute of Limitations began to run. Moreover, this case is also highly similar to *Frisch*, as even if the tap-ins continue to pump sewage through the Plaintiffs' lateral, this does not constitute ongoing action by the Defendants. Accordingly, the four year Statute of Limitations applies."

{¶ 29} Upon review of the record, we must conclude that genuine issues of material fact preclude the grant of summary judgment on statute of limitations grounds. As stated above, the *Sexton* Court held that the keystone to distinguishing a continuing trespass from a permanent trespass was whether the defendant had engaged in ongoing conduct or retained control. *Sexton* at ¶45. At this juncture, the parties have not provided any evidence, as identified in Civ.R. 56(C), relevant to the underlying facts of this case. In particular, there is no evidence – or there are genuine issues – regarding, among other controversies, whether each of the Defendants continues to own the property, how Defendants tapped in to the sewer line, whether Defendants retain control over the tap-ins, whether the tap-ins were

permitted by Trotwood, and whether the tap-ins can be removed. Assuming, arguendo, that the tap-ins were a discrete act of trespass, the trial court did not address – and could not address, given the lack of evidence – whether Defendants continued to retain control over the tap-ins and could disconnect, if they desired, albeit possibly at great expense. In the absence of undisputed evidence regarding Defendants' retention of control or their on-going conduct, the trial court erred in granting summary judgment to Defendants by finding, as a matter of law, that Defendants' conduct was a permanent trespass.

{¶ 30} We are not sure that the situation before us is analogous to *Sexton* and *Frisch*. Liberty and U-Store-It have alleged that "in or about November of 1999, each of Porter, Hoffman, and Friedman connected their respective property to the Private Lateral on the south side of Shiloh Springs Road without Liberty's permission" and they have "refused to terminate the Unpermitted Connections." Liberty and U-Store-It seek, as one remedy, an order for Defendants to disconnect the tap-ins and to restore the adjacent surface property to the condition it was in immediately prior to the connections. Thus, construing those claims in the light most favorable to Liberty and U-Store-It, the allegations are not that Defendants engaged in discrete conduct that has detrimentally affected Liberty and U-Store-It's lateral extension, which is located on a third-party's property. Rather, Liberty and U-Store-It assert that Defendants have trespassed onto their personal property – the lateral sewer extension – by connecting to the extension without consent, have continued to encroach upon it, and have refused to remove the tap-ins despite their ability to do so. In other words, Defendants implicitly allege that Defendants retain control over the tap-ins and are in a position to remove them. In this respect, Defendants' alleged conduct is unlike the

defendant in *Frisch*, who installed the home aeration system and no longer had any connection with or control over the property, and the defendants in *Sexton*, whose trespass became permanent after they no longer had control over the subdivision property.

{¶ 31} This case may resemble *Wojcik v. Pratt*, Summit App. No. 24583, 2009-Ohio-5147, and *Boll v. Griffith* (1987), 41 Ohio App.3d 356, which was discussed in *Sexton*. In *Wojcik*, property owners expanded a pond, which caused water to accumulate on an adjacent property. Reviewing whether the neighbor-plaintiffs had raised a permanent or continuing trespass claim, the Ninth District noted that, although the expansion of the pond was "the single act creating the trespass," the plaintiffs had raised a continuing trespass because the property owners retained control over the water flowing from the pond.

{¶ 32} *Boll* involved adjoining landowners who each owned a series of row houses connected by a common brick wall. More than four years after the defendant had the row houses on his property razed, the plaintiff sued, alleging that the remnants of the razed buildings remaining attached to the common wall and that their weight gradually damaged the wall. The Fourth District found that the claim was for a continuing trespass, and it further reinstated the claim against a subsequent purchaser of the defendant's property because she had a duty to remove the remnants of the razed structures and her failure to do so constituted a continuing trespass. Similarly, Defendants allegedly have, without permission, tapped-in to the alleged private lateral sewer extension and have continuously used the sewer line to their benefit all the while, allegedly, having the means to cease the trespass.

{¶ 33} To suggest that the distinction between a permanent trespass and a continuing

trespass is, in this sewer tap-in case, murky, is not to make light of the situation. We are sympathetic to the parties' justifiable frustration regarding the protracted nature of this dispute and to their desire for a final resolution. Nonetheless, we are constrained to address only the issue before us, which, in this appeal, was whether it was appropriately determined, as a matter of law, that the trespass was continuing or permanent. Due process requires that the material facts be determined prior to the decision on the statute of limitations.

{¶ 34} The assignment of error is sustained.

III

{¶ 35} The judgment of the trial court will be reversed, and the matter will be remanded for further proceedings.

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DONOVAN, J. and WOLFF, J., concur.

(Hon. William H. Wolff, Jr., retired from the Second District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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