[Cite as *USA Freight, L.L.C. v. CBS Outdoor Group, Inc.*, 2015-Ohio-1474.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

USA FREIGHT, LLC, et al.	:	
	:	
Plaintiff-Appellants	:	Appellate Case No. 26425
	:	
v.	:	Trial Court Case No. 2013-CV-7247
	:	
CBS OUTDOOR GROUP, INC.	:	(Civil Appeal from
	:	Common Pleas Court)
Defendant-Appellee	:	
	:	

. . . . . .

O P I N I O N

Rendered on the 17th day of April, 2015.

. . . . . .

CHARLES F. ALLBERY, III, Atty. Reg. No. 0006244, Allbery Cross Fogarty, 137 North Main Street, Suite 500, Dayton, Ohio 45402
Attorney for Plaintiff-Appellants

KEVIN L. SWICK, Aty. Reg. No. 0023149, Aronoff Rosen & hunt, 425 Walnut Street, Suite 2200, Cincinnati, Ohio 45202
Attorney for Defendant-Appellee

. . . . . .

HALL, J.

{¶ 1} The plaintiffs, USA Freight, LLC and Izmir Koch, appeal from the entry of

summary judgment for the defendant, OUTFRONT Media LLC, formerly CBS Outdoor LLC,[1] on its counterclaim for declaratory judgment. The trial court concluded that OUTFRONT Media acquired title by adverse possession to a narrow strip of land owned by the plaintiffs on which a billboard owned by OUTFRONT Media has encroached for 47 years.

{¶ 2} Finding no error, we affirm.

I. FACTS

{¶ 3} Just south of the Hillrose Avenue-Leo Street intersection in Dayton, right beside Interstate 75, stands a large billboard. The billboard is supported by nine wood telephone-pole like posts, and just underneath the advertising space on both sides, a catwalk is suspended, presumably for sign replacement and maintenance. The billboard was erected in 1968 by National Advertising Company along the northern edge of Lot 30633, land which National leased from that lot's owner.

{¶ 4} In 1979, the owner of the adjacent lot to the north, Lot 84709, discovered that the billboard encroaches on his property: four of the billboard's supporting posts sit partly on Lot 84709 and the north-side catwalk hangs over the lot. The owner had his attorney contact Lot 30633's owner, who told National about the claim. In August 1979, National sent a letter to the attorney saying that it has a recorded lease for the billboard and that the attorney should contact National about any matter concerning the billboard. No further action was taken by Lot 84709's owner.

{¶ 5} In 2000, the billboard's then owner obtained perpetual easements for the billboard, access, utilities, and visibility. OUTFRONT Media now owns the billboard and is

[1] According to the appellee's brief, on November 20, 2014, Defendant-Appellee CBS Outdoor LLC changed its name to OUTFRONT Media LLC.

the successor in interest to the easement. In 2013, the plaintiffs purchased Lots 30633 and 84709. Soon after, in November 2013, they filed a complaint against OUTFRONT Media claiming that the billboard trespasses on Lot 84709 and that OUTFRONT Media was in breach of its easement. OUTFRONT Media responded with a counterclaim for a declaratory judgment that it "has actual ownership of that portion of the Leo Property [Lot 84709] upon which the Billboard is located under the doctrine of adverse possession, or, in the alternative, under the doctrines of proscriptive [sic] easement and/or easement of necessity." (Counterclaim, ¶ 5).

{¶ 6} In January 2014, the original plaintiffs' counsel withdrew, and the following month they retained new counsel. In June, this new counsel moved for leave to withdraw. After a conference with counsel for the parties, the trial court entered an order on June 30 allowing the withdrawal. In the order, the court also set an in-chambers scheduling conference for July 24. The court ordered that "[c]ounsel for all parties must be present * * *, unless new counsel for USA Freight, LLC and Izmir Koch files a notice of appearance of counsel prior to the scheduling conference, and also notifies both the Court's Bailiff and opposing counsel * * * that new counsel would like to participate in the Pretrial by telephone." Neither counsel for the plaintiffs nor Koch appeared at the July 24 conference, asked to participate by telephone, or contacted the court or counsel for OUTFRONT Media.

{¶ 7} The trial court entered a notice of dismissal saying that the complaint would be dismissed for failure to prosecute unless, in the next 14 days, the plaintiffs showed why the case should not be dismissed. They did not respond. On August 11, the trial court dismissed the complaint without prejudice and allowed OUTFRONT Media to proceed

with its counterclaim. The partial dismissal order also established the schedule for summary judgment: any summary-judgment motion was due by September 2, any reply by September 23, and the matter would be decided on September 24.

{¶ 8} On August 26, the trial court finally heard from the plaintiffs. Koch filed a pro se motion asking the court for a conference. The handwritten motion in its entirety says, "I (Izmir Koch) would like to have conference with [Judge] Michael Tucker and CBS Outdoor Group [OUTFRONT Media], because why laywers [sic] are stopping to work as soon as they get in contact with CBS." The court denied the motion, noting that the only reason that Koch gave for a conference is that the plaintiffs are not represented by counsel. The court then reviewed the withdrawal of previous counsel and noted the plaintiffs' failure to appear at the July 24 conference and their failure to respond to the notice of dismissal.

{¶ 9} OUTFRONT Media also heard from Koch on August 26, when Koch denied its workers access to the billboard for the second time. After the first time, in March, the trial court ordered the plaintiffs not to interfere with OUTFRONT Media's easement rights during the pendency of the case. So when Koch denied it access the second time, OUTFRONT Media moved to hold the plaintiffs in contempt. A contempt hearing was set for September 3, and notice of the hearing was served on the plaintiffs both by counsel for OUTFRONT Media and by the trial court. The plaintiffs did not appear at the hearing. On September 8, the trial court found the plaintiffs in contempt for violating the March order.

{¶ 10} At the end of August, OUTFRONT Media moved for summary judgment on its counterclaim. The plaintiffs did not oppose the motion or in any way respond to it. On September 26, the trial court sustained the motion and entered summary judgment on the counterclaim. The court declared that OUTFRONT Media had acquired title by adverse

possession to 0.0053 acres (roughly 231 sq.ft.) of Lot 84709.

{¶ 11} The plaintiffs (timely) appealed.

II. ANALYSIS

{¶ 12} The plaintiffs assign four errors to the trial court. The first two challenge the court's denial of the motion for a conference. The third assignment of error challenges the entry of summary judgment. And the fourth assignment of error challenges the relief granted by the trial court.

A. The Motion for a Conference

{¶ 13} In the first assignment of error, the plaintiffs argue that they were entitled to leniency because Koch did not understand the relevant legal procedures and principles and needed an attorney. In the second assignment of error, they argue that the trial court abused its discretion because the court knew that the plaintiffs were not represented and that they lacked the ability to adequately respond because Koch was unfamiliar with the nuances of pleading and the defenses that were available.

{¶ 14} As a preliminary matter, OUTFRONT Media contends that the plaintiffs did not properly appeal the order denying the motion for a conference, because it is not mentioned in the notice of appeal. OUTFRONT Media asks that we strike that part of the plaintiffs' brief concerning this matter.

{¶ 15} "Although App.R. 3(D) provides that a notice of appeal ' "shall designate the judgment, order, or part thereof appealed from," ' it 'does not require an appellant to separately identify each interlocutory order issued prior to a final judgment.' " *Aber v. Vilamoura, Inc.*, 184 Ohio App.3d 658, 2009-Ohio-3364, 922 N.E.2d 236, ¶ 7 (9th Dist.),

quoting *Beatley v. Knisley*, 183 Ohio App.3d 356, 2009-Ohio-2229, 917 N.E.2d 280, ¶ 9 (10th Dist.), quoting App.R. 3(D). "[I]nterlocutory orders * * * are merged into the final judgment. Thus, an appeal from the final judgment includes all interlocutory orders merged with it * * *." (Citation omitted.) *Grover v. Bartsch*, 170 Ohio App.3d 188, 2006-Ohio-6115, 866 N.E.2d 547, ¶ 9 (2d Dist.). An interlocutory order is "[a]n order that relates to some intermediate matter in the case; any order other than a final order." *Black's Law Dictionary* (10th Ed.2014). For example, "[a] court's decision to deny [a] motion for continuance is interlocutory in nature." *McCoy v. McCoy*, 2d Dist. Greene No. 87 CA 76, 1988 WL 53932, *2 (May 16, 1988).

{¶ 16} The motion for a conference here is interlocutory, so it merged into the final judgment. Therefore the matter is properly before us.

{¶ 17} Turning to the merits, Ohio courts have concluded that a trial court does not abuse its discretion by denying a motion to continue when a party fails to seek new counsel in a timely manner. *E.g. Graham v. Audio Clinic*, 3rd Dist. Hancock No. 5-04-35, 2005-Ohio-1088, ¶ 27 (one month to obtain substitute counsel); *Henderson v. Henderson*, 11th Dist. Geauga No. 2012-G-3118, 2013-Ohio-2820, ¶ 45 (over one month to obtain new counsel); *Swedlow v. Riegler*, 9th Dist. Summit No. 26710, 2013-Ohio-5562, ¶ 11 (no evidence that the appellant attempted to retain alternate counsel). The motion for a conference here is analogous to a motion to continue for the purpose of obtaining counsel. The plaintiffs' second counsel withdrew on June 30, yet they did not file the motion for a conference until August 26—almost two months later. Moreover, the plaintiffs failed to attend the July 24 conference and failed to respond in any way to the notice of dismissal. We note too that even after the motion for a conference

was denied, almost a month passed before the trial court entered summary judgment during which time the plaintiffs did nothing.

{¶ 18} The trial court did not abuse its discretion by denying the motion for a conference.

{¶ 19} The first and second assignments of error are overruled.

B. Summary Judgment

{¶ 20} The third assignment of error alleges that the trial court erred by entering summary judgment on OUTFRONT Media's counterclaim. The plaintiffs contend that OUTFRONT Media failed to show that there is no issue of fact as to the element of exclusivity in their adverse-possession claim. OUTFRONT Media contends that the plaintiffs waived this claim of error by failing to oppose summary judgment in the trial court.

{¶ 21} Any error committed by the trial court in granting summary judgment is waived if the non-moving party fails to file a brief or evidence in opposition or fails to challenge the movant's evidence. *Rodger v. McDonald's Restaurants of Ohio, Inc.*, 8 Ohio App.3d 256, 258, fn. 7, 456 N.E.2d 1262 (8th Dist.1982). As the Ninth District has said, " '[a]lthough this Court conducts a *de novo* review of summary judgment, it is nonetheless a *review* that is confined to the trial court record. The parties are not given a second chance to raise arguments that they should have raised below.' " (Emphasis sic.) *Roberts v. Reyes*, 9th Dist. Lorain No. 10CA009821, 2011-Ohio-2608, ¶ 9 (saying that because the plaintiff, in opposing summary judgment, failed to raise the issue of whether there was evidence about a particular matter the court need not address the issue), quoting *Owens v. French Village Co.*, 9th Dist. Wayne No. 98CA0038, 1998 WL 635722,

*1 (Aug. 18, 1999). Indeed, "[t]he very word 'review,' " Justice Scalia has pointed out, "presupposes that a litigant's arguments have been raised and considered in the tribunal of first instance." *Freytag v. Commissioner*, 501 U.S. 868, 895, 111 S.Ct. 2631, 115 L.Ed.2d 764 (1991) (Scalia, J., concurring in part and concurring in the judgment).

{¶ 22} The plaintiffs here did not oppose summary judgment in the trial court, so our review is confined to looking for plain error. "The plain-error doctrine 'is not favored and may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself.' " *Citibank v. Wood*, 177 Ohio App.3d 103, 2008-Ohio-2877, 894 N.E.2d 57, ¶ 50 (2d Dist.), quoting *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 122-123, 679 N.E.2d 1099 (1997).

{¶ 23} The trial court concluded that OUTFRONT Media showed that there is no issue of fact, *see* Civ.R. 56(C), as to its adverse-possession claim. "Adverse possession is established when a party proves by clear and convincing evidence exclusive possession that is open, notorious, continuous, and adverse for a period of 21 years." (Citations omitted.) *Jacks v. Brewington*, 177 Ohio App.3d 844, 2008-Ohio-4393, 896 N.E.2d 226, ¶ 32 (2d Dist.). The evidence presented by OUTDOOR Media—documents and an affidavit—shows that the billboard has encroached on Lot 84709 ever since it was erected over 45 years ago and that the encroachment has been known about for at least 35 years. Since the billboard was erected, it has always had advertising and has always been maintained. This maintenance includes servicing and upgrading electrical equipment; repairing and replacing supports for the billboard; installing safety features to

meet national billboard safety codes; and trimming the trees and removing and controlling the vegetation around the billboard. The billboard is indisputably open and obvious. As to the element of exclusive possession, "[p]ossession * * * does not have to be absolutely exclusive. '[I]t need only be the type of possession which would characterize an owner's use * * *.' " *Alpha Church of Nazarene v. Hoos*, 2d Dist. Greene No. 99CA0036, 1999 WL 980338, *3 (Oct. 29, 1999), quoting *Jennewine v. Heinig*, 2d Dist. Greene No. 95 CA 12, 1995 WL 766005, *2 (Dec. 29, 1995). The evidence here shows that the type of possession exercised by OUTFRONT Media and its predecessors is typical of an owner.

{¶ 24} We see no plain error in the entry of summary judgment.

{¶ 25} The third assignment of error is overruled.

C. The Relief Granted

{¶ 26} The fourth assignment of error alleges that the trial court erred by granting OUTFRONT Media title to the property. The plaintiffs assert that OUTFRONT Media (through its predecessors in interest) has encroached as the holder of an easement, not as a trespasser asserting a claim of exclusive possession. The plaintiffs contend that OUTFRONT Media cannot expand its existing rights under the easement to that of a holder of fee simple title. Again we refer to the uncontested motion for summary judgment which was consistent with the relief requested in the counterclaim. In the motion, CBS sought judgment "that it has actual ownership of that portion of Plaintiffs' property (Lot 84709) upon which the Billboard is partially situated." Motion for Summary Judgment at 6. The motion was adequately supported by affidavit asserting that CBS's use of the strip of land of Lot 84709 was exclusive and therefore the trial court did not err by granting the relief requested.

{¶ 27} The trial court's judgment does not expand the easement which applies to the adjacent Lot 30633. "A successful adverse possession action results in a legal titleholder forfeiting ownership to an adverse holder without compensation." *Grace v. Koch*, 81 Ohio St.3d 577, 580, 692 N.E.2d 1009 (1998). The easement gives OUTFRONT Media rights on Lot 30633. The judgment, resulting from the uncontested motion for summary judgment, gives OUTFRONT Media title to part of Lot 84709 by adverse possession. We see no plain error in the court's action.

{¶ 28} The fourth assignment of error is overruled.

{¶ 29} The judgment of the trial court is affirmed.

. . . . . .

DONOVAN, J., and WELBAUM, J., concur.

Copies mailed to:

Charles F. Allbery, III
Kevin L. Swick
Hon. Michael Tucker