

**IN THE COURT OF APPEALS OF OHIO  
THIRD APPELLATE DISTRICT  
MARION COUNTY**

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**333 JOSEPH LLC,**

**PLAINTIFF-APPELLANT,**

**CASE NO. 9-14-27**

**v.**

**NA-CHURS PLANT FOOD  
COMPANY, ET AL.,**

**OPINION**

**DEFENDANTS-APPELLEES.**

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**Appeal from Marion County Common Pleas Court  
Trial Court No. 11-CV-0328**

**Judgment Affirmed**

**Date of Decision: March 30, 2015**

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**APPEARANCES:**

***Scott A. Winckowski* for Appellant**

***Robert H. Nichols* for Appellee, Norfolk Southern Railway Company**

**PRESTON, J.**

{¶1} Plaintiff-appellant, 333 Joseph LLC (“333 Joseph”), appeals the June 16, 2014 and March 27, 2013 judgment entries of the Marion County Court of Common Pleas granting summary judgment in favor of defendant-appellee, Norfolk Southern Railway Company (“Norfolk”), on 333 Joseph’s claim for the right to fees paid under a lease to Norfolk, as lessor and easement holder, by lessee, defendant-appellee, Na-Churs Plant Food Company (“Na-Churs”). For the reasons that follow, we affirm.

{¶2} 333 Joseph filed a complaint against Na-Churs on May 16, 2011, then filed an amended complaint on February 23, 2012 against Na-Churs, Norfolk, and defendant-appellee, First American Title Insurance Company (“First American”).<sup>1</sup> (Doc. Nos. 2, 28). In its amended complaint, 333 Joseph asserted a claim against Norfolk that 333 Joseph “is entitled to the previously paid, currently due and future ‘fee rights’ paid or to be paid to the easement holder, NORFOLK.” (Doc. No. 28 at ¶ 19). 333 Joseph alleged that on March 1, 1977, Norfolk entered into a lease agreement with Na-Churs for, among other things, the temporary storage of railcars on a portion of railroad track. (*Id.* at ¶ 7). Under its fee-rights claim, 333 Joseph alleged that “NORFOLK has received ‘fee rights’ compensation from

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<sup>1</sup> Na-Churs filed a counterclaim against 333 Joseph. (Doc. No. 30). However, 333 Joseph and Na-Churs ultimately dismissed their respective claims against one another. (Doc. No. 79). In addition, 333 Joseph dismissed its claims against First American. (Doc. No. 89).

NA-CHURS and other entities using, leasing, renting and/or [sic] on the property.”  
(*Id.* at ¶ 17).

{¶3} On August 15, 2012, Norfolk filed a motion for summary judgment as to, among other claims, 333 Joseph’s fee-rights claim. (Doc. No. 50). 333 Joseph filed a memorandum in opposition to Norfolk’s motion for summary judgment on October 1, 2012. (Doc. No. 63). On October 9, 2012, Norfolk filed a reply in support of its motion for summary judgment. (Doc. No. 65). On December 28, 2012, 333 Joseph filed a supplemental memorandum in opposition to Norfolk’s motion for summary judgment. (Doc. No. 75).

{¶4} On March 27, 2013, the trial court filed a judgment entry in which it granted summary judgment in favor of Norfolk on 333 Joseph’s fee-rights claim. (Doc. No. 78). In its judgment entry, the trial court explained:

It is undisputed that Norfolk has an express easement over the southern fourteen feet of the 553 feet strip of land on which the railroad track has been constructed. Moreover, it is undisputed that said easement grants Norfolk the right to construct, maintain, and use the side track. Plaintiff has not set forth any set of facts by which it may prevail on its claim against Norfolk, or presented evidence which would support such a claim.

(*Id.* at 6).

{¶5} On June 16, 2014, after 333 Joseph and Norfolk settled the claims that remained following the trial court’s March 27, 2013 judgment entry, the trial court entered a consent judgment and a judgment entry closing the case. (Doc. Nos. 90, 91).

{¶6} 333 Joseph filed its notice of appeal on July 16, 2014. (Doc. No. 97).

It raises one assignment of error for our review.

#### **Assignment of Error**

**Summary judgment was in error since JOSEPH is entitled to compensation for fees received by NORFOLK under the Easement Lease Agreement.**

{¶7} In its assignment of error, 333 Joseph argues that the trial court erred when it granted summary judgment in Norfolk’s favor on 333 Joseph’s fee-rights claim. 333 Joseph agrees that Norfolk holds an express easement over 333 Joseph’s real property that “clearly covers the 600 feet by 14 feet as outlined in the easement.” (Appellant’s Brief at 9). 333 Joseph argues that, under the easement, Norfolk has the right “to construct, maintain and operate said side track” but that Norfolk’s lease with Na-Churs exceeds the easement rights because it allows Na-Churs to use the side track “for the temporary storage of railroad cars.” (Doc. No. 50, Ex. 2, Exs. B, D). 333 Joseph argues, “Provided that the lease agreement provides for additional burden on the JOSEPH land genuine issues regarding a material fact exist.” (Appellant’s Brief at 11). According to 333 Joseph, if the

rights under the lease exceed the easement rights, then 333 Joseph is entitled to the fees that Norfolk received under the lease.

{¶8} We review a decision to grant summary judgment de novo. *Doe v. Shaffer*, 90 Ohio St.3d 388, 390 (2000). Summary judgment is proper where there is no genuine issue of material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds can reach but one conclusion when viewing the evidence in favor of the non-moving party, and the conclusion is adverse to the non-moving party. Civ.R. 56(C); *State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn.*, 69 Ohio St.3d 217, 219 (1994).

{¶9} As an initial matter, we note that 333 Joseph does not argue that Na-Churs acted outside the scope of its rights under the lease to store railroad cars temporarily. Therefore, the question presented in this case is simply whether the lease between Norfolk and Na-Churs “for the temporary storage of railroad cars” exceeds the scope of Norfolk’s rights under the easement to “construct, maintain and operate said side track.” For the reasons below, we conclude that the trial court properly granted summary judgment in favor of Norfolk on 333 Joseph’s fee-rights claim because Na-Churs’s rights under the lease are consistent with and included in Norfolk’s easement rights.

{¶10} Deeds of easement and lease agreements are written agreements that are subject to traditional rules governing contract interpretation. *Beaumont v.*

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*FirstEnergy Corp.*, 11th Dist. Geauga No. 2004-G-2573, 2004-Ohio-5295, ¶ 18, citing *Murray v. Lyon*, 95 Ohio App.3d 215, 219 (9th Dist.1994); *Heritage Court, L.L.C. v. Merritt*, 187 Ohio App.3d 117, 2010-Ohio-1711, ¶ 14 (3d Dist.), citing *Mark-It Place Foods, Inc. v. New Plan Excel Realty Trust*, 156 Ohio App.3d 65, 2004-Ohio-411, ¶ 29 (4th Dist.). “The fundamental purpose of contract interpretation is to determine and carry out the intention of the parties \* \* \*.” *Merritt* at ¶ 14, citing *Mark-It Place Foods, Inc.* at ¶ 29. “Courts presume that the intent of the parties to a contract resides in the language they chose to employ in the contract.” *Judson v. Lyendecker*, 10th Dist. Franklin No. 12AP-615, 2013-Ohio-1060, ¶ 12, citing *Kelly v. Med. Life Ins. Co.*, 31 Ohio St.3d 130 (1987), paragraph one of the syllabus. In interpreting the language of a contract, “common words are presumed to hold their ordinary meaning unless ‘(1) manifest absurdity results, or (2) some other meaning is clearly evidenced from the instrument.’” *Merritt* at ¶ 14, quoting *Mark-It Place Foods, Inc.* at ¶ 29. “If a contract is clear and unambiguous, then its interpretation is a matter of law and there is no issue of fact to be determined.” *Barhorst, Inc. v. Hanson Pipe & Prods. Ohio, Inc.*, 169 Ohio App.3d 778, 2006-Ohio-6858, ¶ 10 (3d Dist.), quoting *Inland Refuse Transfer Co. v. Browning-Ferris Industries of Ohio, Inc.*, 15 Ohio St.3d 321, 322 (1984).

{¶11} In this case, the original parties to the deed of easement entered into an agreement “for the construction and *operation* of a certain side track, in the City of Marion, Ohio.” (Emphasis added.) (Doc. No. 50, Ex. 2, Ex. B). The deed of easement grants the easement holder “the right and privilege as an easement, to construct, maintain and *operate* said side track.” (Emphasis added.) (*Id.*). Concerning the duration of the easement, the deed of easement provides, “TO HAVE AND TO HOLD the above described and mentioned rights and privileges, with the appurtenances, to the said Grantee, its successors and assigns, for so long a time as said Grantee, its successors or assigns, shall desire to continue the use of said premises for railroad purposes \* \* \*.” (*Id.*). The lease agreement between Norfolk, as lessor, and Na-Churs, as lessee, provides, in relevant part: “Lessor hereby leases unto Lessee, solely for the *temporary storage* of railroad cars containing phosphoric acid, anhydrous ammonia and caustic potash, which are owned, leased or controlled by Lessee, six hundred (600) feet of Lessor’s Track No. 36 at Marion, Ohio \* \* \*.” (Emphasis added.) (Doc. No. 50, Ex. 2, Ex. D).

{¶12} Black’s Law Dictionary does not contain a definition of “operate” or “operation.” Webster’s Third New International Dictionary defines “operate” as, in relevant part: “to perform a work or labor,” “to perform an operation or series of operations,” “to cause to function usu[ally] by direct personal effort,” and “to manage and put or keep in operation whether with personal effort or not.”

*Webster's Third New International Dictionary* 1580-1581 (2002). Webster's Third New International Dictionary defines "operation" as, in relevant part: "method or manner of functioning," "the whole process of planning for and operating a business or other organized unit," "a phase of a business or of business activity," and "the operating of or putting and maintaining in action of something (as a machine or an industry)." *Id.* at 1581. Black's Law Dictionary defines "temporary" as: "Lasting for a time only; existing or continuing for a limited (usu[ally] short) time; transitory." *Black's Law Dictionary* 1693 (10th Ed.2014). Black's Law Dictionary defines "storage" as, in relevant part: "The act of putting something away for future use; esp[ecially], the keeping or placing of articles in a place of safekeeping, such as a warehouse or depository. *Id.* at 1646.

{¶13} We hold that the lease and deed of easement in this case are clear and unambiguous and that "the temporary storage of railroad cars" is consistent with and included in the right to "operate said side track" under the deed of easement. To "operate" includes, among other things, the performance of "an operation or series of operations." An "operation" includes, among other things, "the whole process of \* \* \* operating a business." The "whole process" of operating a railroad track can include the temporary storage of railroad cars—that is, putting railroad cars on the track for a limited time so that they may be used in the future. *See Schenck v. Cleveland, C., C. & St. L. Ry. Co.*, 11 Ohio App. 164, 167-168 (1st

Dist.1919) (“[T]he record falls short of establishing a case of nonuser [of the right of way]. The defendant was using the right of way for railway purposes in storing cars and for access to the stock pen, even though the main track had been moved.”), citing *Cleveland & P. Ry. v. Ward*, 30 Ohio C.D. 642, 40 Ohio C.C. 642, 23 Ohio C.C.(N.S.) 465 (1912). This is not a case where Norfolk authorized the use of the railroad track for something other than the operation of the track. *See Sparrow v. Dixie Leaf Tobacco Co.*, 232 N.C. 589, 594-595 (1950) (holding that the erection of warehouse buildings and “conducting a general tobacco storage and curing business” on a right of way under a lease between a railroad company and a tobacco company were not “railroad purposes” and therefore exceeded the scope of the railroad company’s easement rights). For these reasons, we conclude that the trial court did not err in granting summary judgment in Norfolk’s favor on 333 Joseph’s fee-rights claim.

{¶14} 333 Joseph’s assignment of error is overruled.

{¶15} Having found no error prejudicial to the appellant herein in the particulars assigned and argued, we affirm the judgment of the trial court.

***Judgment Affirmed***

**WILLAMOWSKI, J., concurs.**

**ROGERS, P.J., dissents.**

/jlr