[Cite as *Eddy v. Tidd*, 2014-Ohio-4616.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

CLIFFORD AMAZIAH EDDY,	:	
Plaintiff-Appellant,	:	Case No. 13CA19
v.	:	DECISION AND
CLYDE TIDD, et al.,	:	JUDGMENT ENTRY
Defendants-Appellees.	:	RELEASED 10/9/2014

APPEARANCES:

William L. Burton, Marietta, Ohio, and Michael G. Gallaway, Spilman Thomas & Battle, PLLC, Wheeling, West Virginia, for appellant Clifford Amaziah Eddy.

Michael D. Buell, Buell & Sipe Co., L.P.A., Marietta, Ohio, for appellee Thomson Properties, Ltd.

Hoover, J.

{¶ 1} Clifford Amaziah Eddy ("appellant") appeals the judgment of the Washington County Common Pleas Court that denied his motion for leave to amend his complaint, granted Thomson Properties, Ltd.'s ("appellee") motion for summary judgment, and ordered the "case" dismissed. For the following reasons, we reverse the trial court's judgment.

I. FACTS

A. Background Information & Procedural History

{¶ 2} This case involves a property line dispute between appellant and appellee, adjacent property owners in rural Washington County, Ohio. In particular, the parties dispute ownership of a nearly 5-acre tract of land on appellant's southern boundary and appellee's northern boundary.

{¶ 3} The dispute arose shortly after appellee purchased its property in 2008. Appellee claimed ownership of the disputed property by virtue of a 1977 survey of its property conducted by surveyor Robert Vernon, which allegedly placed monuments depicting the boundary line. Appellant claimed that the survey was inaccurate, because the result of the survey left him with approximately five acres less than the acreage that was called for in his deed. Appellant commenced this action on September 22, 2011, to establish a boundary line, to quiet title to the disputed property as against appellee, to enjoin appellee from trespassing on the property, and for damages. Appellee denied the pertinent allegations of the complaint and asserted a counterclaim alleging it was the rightful deed owner of the disputed property, or in the alternative, was the rightful owner by virtue of adverse possession.

{¶ 4} The trial court initially scheduled a two-day jury trial to commence January 16, 2013. However, the trial was continued to May 8, 2013, so that the parties could complete discovery.

{¶ 5} On February 15, 2013, appellant filed a motion for leave to amend his complaint to include an alternative claim for adverse possession of the disputed property. Appellee filed a memorandum in opposition to appellant's motion on March 5, 2013.

{¶ 6} Also on March 5, 2013, appellee filed its motion for summary judgment with supporting memorandum, seeking summary judgment on appellant's claims. Thereafter, appellant filed a verified response to the motion for summary judgment. In April 2013, the trial court entered a decision and a judgment entry[1], in separate documents, denying appellant's motion for leave to amend his complaint, granting summary judgment in favor of appellee on

[1] The trial court subsequently filed a First Amended Decision and a Nunc Pro Tunc First Amended Decision and one additional journal entry. With the exception of minor corrections to typographical and clerical errors, all the decisions and journal entries appear to be nearly identical to the original decision and original journal entry.

appellant's claims, and ordering the case dismissed. On May 2, 2013, appellee filed a notice of voluntary dismissal of his counterclaim. This appeal followed.

B. Property Origins & Summary Judgment Evidence

{¶ 7} Both appellant's property and appellee's property can be traced to a larger parent property. A deed of the parent parcel, recorded the year 1874, indicates that the parent parcel contained 104 acres. On the same date in 1888, the parent parcel was subdivided into three separate parcels, including the parcels now owned by appellant and appellee. The new parcels were described in their respective deeds of consisting of 15 acres; 37 acres, more or less; and 70 acres, more or less. Thus, when subdivided, the parent property inexplicitly grew from 104 acres, to approximately 122 acres.

{¶ 8} Appellant owns the aforementioned described 37-acre parcel. The 1888 root deed describes the parcel as:

> [T]hirty Seven (37) acres more or less in the North West Corner of Section No. ten (10), bounded as follows, viz: Beginning at the North West corner of said section, thence East thirty three (33) Rods, thence South to a corner set by Surveyor Hulbert, 84.41 chains North of the centre of said Turnpike [referred to earlier in the deed as the Marietta and Newport Turnpike, now Route 7] thence West 8.25 chains to the Section line, thence North to the place of beginning.

The current deed description is nearly identical to the root deed description.

{¶ 9} At deposition[2], appellant testified that he became owner of his property in 1984, but that family members have owned the land since 1960. He contends that his deed describes the property as containing 37 acres, and he and his predecessors in interest have been paying taxes on 37 acres since 1960. Regarding the disputed property, appellant testified at deposition that he

[2] Appellant's deposition transcript was filed in the trial court.

and his family have enjoyed the property throughout his life and has timbered the property since the 1970's, hunted the land, and used the land for recreational purposes such as four-wheeling. Appellant further indicated that appellee's predecessor in interest had erected a wire fence marking the boundary line between the properties, and that parts of the wire fence remain. In his verified response to appellee's motion for summary judgment, appellant also indicated that the "property line was distinct because the owners preceding [appellee] had dairy cattle on the property below. There was (and still is evidence of) a fence separating the land." Appellant's verified response also indicated, like his deposition testimony, that he and his father timbered the land clear to the fence line, and that he and the previous neighbor treated the fence line as the property line.

{¶ 10} Appellee owns the aforementioned described 70-acre parcel. The 1888 root deed describes the parcel as:

> Beginning in the centre of the Marietta and Newport Turnpike at the intersection with the West line of said Section no nine (9) thence North in the section line 87.78 chains to a corner of 37 acres set by Surveyor Hulbert, thence East 8.25 chains, thence South 84.41 chains to the centre of said Turnpike, thence Westerly following the pike to the place of beginning, containing Seventy acres, more or less * * *.

The current deed description, which is bounded and described in more detail and in accordance with the 1977 Vernon Survey, indicates that the property contains 70.7566 acres.

{¶ 11} The deposition transcript of Theodore Sushka was also filed with the trial court. Sushka is a retired licensed engineer and surveyor, former Washington County Engineer, and former surveyor and engineer with the Ohio Department of Transportation in Washington

County, Ohio. Sushka was hired by appellee to determine the accuracy of the 1977 Vernon Survey. Sushka testified that he went back and traced appellee's property to its origin, the parent property, and from there he went forward in time to see the history of the property. Sushka also identified the meeting point of the properties, written in the root deeds as 84.41 chains from "the middle of the county road", as a key marker in establishing the property line. Sushka explained that any deviation in the amount of acreage the parties owned from the amount stated in the deeds, and thus to which owner the disputed property belonged, would be caused by a shift of the road (Route 7). Sushka then explained that he reviewed old surveys on file at the tax map office, aerial photographs dating from the early 1930's to present time, and other records and opined that Route 7 had not significantly moved such that the property lines established by the Vernon Survey would be inaccurate. Sushka also testified that he tried to determine appellant's acreage based on the metes and bound description in his deed, but was unable to do so because of insufficient information in the deed.[3]

{¶ 12} Appellee's motion for summary judgment relies heavily on the 1977 Vernon Survey. For instance, appellee wrote that: "At the heart of the Complaint is [appellant's] interpretation of the language of his deed and that interpretation's conflict with the boundaries established by a 1977 survey conducted by Robert Vernon." [Memorandum in Support at 1.] Appellee later alleges that in 1977, Vernon used the deed descriptions to establish a boundary line wherein Vernon concluded that appellee's land consisted of 70.7566 acres, and that appellant's land consisted of 32.0173 acres. *Id*. at 3, 5. Finally, appellee argued that the appellant "has produced no additional surveys to contradict the established metes and bounds established by Robert Vernon in 1977." *Id*. at 6. In essence, appellee argued that the metes and bounds

[3] Specifically, Sushka explained that there is only one dimension stated in appellant's deed, that being the "east-west deed dimension."

survey conducted by Vernon, indicating that appellant owned 32 acres, trumped appellant's deed language that indicated that appellant owned 37 acres, more or less. It bears noting that the Vernon Survey was not properly attached to the motion for summary judgment; nor is the survey otherwise a part of the record.

{¶ 13} In granting summary judgment in favor of appellee, it is clear that the trial court also relied heavily on the Vernon Survey. Notably, the trial court treats as undisputed fact, the existence of the Vernon Survey, noting that: "In 1977, Robert Vernon, a surveyor, used the deed descriptions to establish a boundary between the two properties. Where established, [appellee] has 70.7566 acres, leaving [appellant] with 32.0173 acres." [Nunc Pro Tunc First Amended Decision at 4.] The trial court continues, stating that: "[Appellant] has produced no additional survey to contradict the established metes and bounds established by Robert Vernon in 1977. * * * Based on the clearly established law of this State, this survey must prevail to establish the property line between the two parties." *Id*. at 6.

II. ASSIGNMENTS OF ERROR

{¶ 14} Appellant asserts the following assignments of error for review:

First Assignment of Error:

> THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING DEFENDANT/APPELLEE THOMSON PROPERTIES, LTD'S MOTION FOR SUMMARY JUDGMENT.

Second Assignment of Error:

> THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING PLAINTIFF/APPELLANT CLIFFORD AMAZIAH EDDY'S MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT.

III. LAW AND ANALYSIS

A. The Motion for Summary Judgment

{¶ 15} In his first assignment of error, appellant contends that the trial court erred in awarding appellee summary judgment because, inter alia: (1) the trial court erroneously relied upon evidence that was not properly before it; and (2) genuine issues of material fact remain for trial.

{¶ 16} We review the trial court's decision on a motion for summary judgment de novo. *Smith v. McBride*, 130 Ohio St.3d 51, 2011-Ohio-4674, 955 N.E.2d 954, ¶ 12. Accordingly, we afford no deference to the trial court's decision and independently review the record and the inferences that can be drawn from it to determine whether summary judgment is appropriate. *Harter v. Chillicothe Long-Term Care, Inc.*, 4th Dist. Ross No. 11CA3277, 2012-Ohio-2464, ¶ 12; *Grimes v. Grimes*, 4th Dist. Washington No. 08CA35, 2009-Ohio-3126, ¶ 16.

{¶ 17} Summary judgment is appropriate only when the following have been established: (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to only one conclusion, and that conclusion is adverse to the nonmoving party. Civ.R. 56(C); *DIRECTV, Inc. v. Levin*, 128 Ohio St.3d 68, 2010-Ohio-6279, 941 N.E.2d 1187, ¶ 15. In ruling on a motion for summary judgment, the court must construe the record and all inferences therefrom in the nonmoving party's favor. Civ.R. 56(C). The party moving for summary judgment "bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). To meet its burden, the moving party must specifically refer to "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action," that affirmatively

demonstrate that the nonmoving party has no evidence to support the nonmoving party's claims. Civ.R. 56(C); *Dresher* at 293. Moreover, the trial court may consider evidence not expressly mentioned in Civ.R. 56(C) if such evidence is incorporated by reference in a properly framed affidavit pursuant to Civ.R. 56(E). *Discover Bank v. Combs*, 4th Dist. Pickaway No. 11CA25, 2012-Ohio-3150, ¶ 17; *Wagner v. Young*, 4th Dist. Athens No. CA1435, 1990 WL 119247, *4 (Aug. 8, 1990). "If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied." *Dresher* at 293. However, once the initial burden is met, the nonmoving party then has a reciprocal burden to set forth specific facts to show that there is a genuine issue for trial. *Id*.; Civ.R. 56(E).

{¶ 18} In the case sub judice, we are constrained to reviewing the Civ.R. 56(C) materials filed below. These materials include the pleadings; the deposition transcripts of appellant and Sushka; and the verified response[4] of appellant. Put simply, these materials do not satisfy appellees' initial burden to show that there is no genuine issue of material fact regarding the location of the property line.

{¶ 19} Throughout these proceedings, appellee has relied upon the Vernon Survey to establish its claim to the disputed property; yet this survey is not a part of the record certified for our review. It is not attached as an exhibit to a Civ.R. 56(E) affidavit, it is not an exhibit of the Sushka deposition, and is not attached as an exhibit to any of the pleadings in the case. Thus, we have no means of determining its content or verifying, as appellee argued to the trial court, that it demonstrated the absence of genuine issues of material fact entitling him to judgment as a matter of law.

[4] *See El Bey v. Roop*, 530 F.3d 407, 414 (6th Cir.2008) (noting that where a party files a verified complaint, the allegations contained therein have the same force and effect as an affidavit for purposes of responding to a motion for summary judgment).

{¶ 20} We also note that Sushka did not conduct an independent survey of the properties. Rather, Sushka testified that in his opinion Route 7 had not significantly moved since the root deeds of the properties were created, and thus the Vernon Survey was accurate. Again, however, the Vernon Survey was not evidence that could be properly considered under Civ.R. 56(C).

{¶ 21} Without the Vernon Survey, appellee has failed to establish a boundary line between the two properties, and the issue remains for trial. Put another way, appellee has not filed evidentiary materials under Civ.R. 56(C) to carry his initial burden on summary judgment to show that there is no genuine issue of material fact.

{¶ 22} Appellee argues that courts often consider evidence other than that listed in Civ.R. 56 when there is no objection to its use. However, courts do "not apply that doctrine where there was essentially no evidence before the trial court that complied with Civ.R. 56(C)." *Walker v. Hodge*, 1st Dist. Hamilton No. C-080002, 2008-Ohio-6828, ¶ 15. In this case, the Vernon Survey was never submitted to the trial court, whether properly or improperly, and was never a part of the record. Thus, this case is distinguishable from the cases cited by appellee, which all involve the scenario where non-proper Civ.R. 56 evidence was *actually submitted* but not objected to by the opposing party.

{¶ 23} Appellee failed to properly introduce the Vernon Survey in accordance with Civ.R. 56, and since appellee, the moving party, relied upon the unsupported conclusions of the Vernon Survey in support of its motion for summary judgment, appellee failed to meet its initial burden. Accordingly, the trial court, which also relied on the Vernon Survey, erred in entering summary judgment.

B. Appellant's Motion for Leave to File Amended Complaint

{¶ 24} In his second assignment of error, appellant contends that the trial court erred in denying his request for leave to file an amended complaint to assert a claim for adverse possession.

{¶ 25} Civ.R. 15(A) provides in pertinent part:

> (A) Amendments.
>
> A party may amend its pleading once as a matter of course within twenty-eight days after serving it or, if the pleading is one to which a responsive pleading is required within twenty-eight days after service of a responsive pleading or twenty-eight days after service of a motion under Civ.R. 12(B), (E), or (F), whichever is earlier. In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court shall freely give leave when justice so requires. * * *

{¶ 26} An appellate court will reverse a trial court's decision on a motion to amend a complaint only when the trial court abuses its discretion. *Brannan v. Fowler*, 100 Ohio App.3d 577, 581, 654 N.E.2d 434 (4th Dist.1995), citing *Wilmington Steel Prods., Inc. v. Cleveland Elec. Illum. Co.*, 60 Ohio St.3d 120, 122, 573 N.E.2d 622 (1991). A trial court abuses its discretion when it connotes an attitude on the part of the court that is unreasonable, unconscionable, or arbitrary. *Fultz v. Fultz*, 4th Dist. Pickaway No. 13CA9, 2014-Ohio-3344, ¶ 18.

{¶ 27} "Generally, the language of Civ.R. 15(A) favors a liberal policy of allowing amendments to pleadings beyond the time when such amendments are automatically allowed." *Brannan* at 581, citing *Wilmington Steel* at 122. "The Ohio Supreme Court has stated that a trial court abuses its discretion by denying a timely filed motion for leave to file an amended

complaint 'where it is possible that the plaintiff may state a claim upon which relief may be granted and no reason otherwise justifying denial of the motion is disclosed.' " *Id*. at 581-582, quoting *Peterson v. Teodosio*, 34 Ohio St.2d 161, 297 N.E.2d 113 (1973), paragraph six of the syllabus. The Ohio Supreme Court has also noted that: "[A] motion for leave to amend should be granted absent a finding of bad faith, undue delay or undue prejudice to the opposing party." *Hoover v. Sumlin*, 12 Ohio St.3d 1, 6, 465 N.E.2d 377 (1984). Finally, the procedure allowing amendment of pleadings was designed so that parties could "include matters occurring before the filing of the complaint, but either overlooked or not known at the time." *Brannan* at 582, citing *Steiner v. Steiner*, 85 Ohio App.3d 513, 519, 620 N.E.2d 152 (4th Dist.1993).

{¶ 28} Here, appellant's motion was filed nearly three months prior to the scheduled trial date, and prior to appellee's motion for summary judgment. Appellant had already been deposed in relation to his use of the disputed property, and time remained for appellee to further investigate the claim. We also note that appellee's counterclaim asserted ownership by adverse possession, and thus, it presumably had knowledge of facts to effectively defend against such claim. In light of the foregoing, it cannot be said that the motion was untimely, was made in bad faith, or was unduly prejudicial to appellee.

{¶ 29} Moreover, the only reason the trial court gave in support of its denial was the statement that: "[Appellant] has asserted no reason for amending his complaint that would be based on information that was not known to him when this case was filed." However, as discussed above, the procedure to amend pleadings was designed so that parties could include claims that, while available, were simply overlooked at the time of filing the original complaint. *See Brannan*, supra, at 582. This intent is consistent with the policy that leave of court to amend

a pleading shall be freely and liberally granted. Accordingly, we conclude that the trial court abused its discretion when it denied appellant's motion for leave to amend his complaint.

IV. CONCLUSION

{¶ 30} Based on the foregoing, we sustain appellant's first and second assignments of error, reverse the judgment, and remand this matter to the trial court with instructions to allow appellant to amend his complaint.

JUDGMENT REVERSED AND
CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE REVERSED and CAUSE REMANDED for further proceedings consistent with this opinion. Appellee shall pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, P.J. and Harsha, J.: Concur in Judgment and Opinion.

For the Court

By:_____
Marie Hoover, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.