

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

American Metal Works, LLC,	:	
Plaintiff-Appellant,	:	Case No. 16CA869
v.	:	
City of Waverly, Ohio,	:	<u>JUDGMENT ENTRY</u>
Defendant-Appellee,	:	<u>DECISION AND</u>
v.	:	RELEASED: 1/6/17
Pike County Board of Commissioners, et al.	:	
Counterclaim Defendants-Appellees	:	

APPEARANCES:

James K. Cutright, Cutright & Cutright LLC, Chillicothe, Ohio, for appellant.

Yvette A. Cox and Adam J. Biehl, Bailey Cavalieri LLC, Columbus, Ohio, for appellees
Clarksville Stave & Veneer Co., Inc. and Oak Chips, Inc.

Edward J. Dowd and Kevin A. Lantz, Surdyk, Dowd & Turner Co., LPA, Dayton, Ohio,
for appellee City of Waverly, Ohio.¹

Harsha, J.

{¶1} American Metal Works, LLC (“American Metal”) filed suit against the
village of Waverly seeking to require Waverly to establish a street, to declare that
American Metal have access as a member of the general public over the street, or to

¹ Although Waverly refers to itself as a city, it is actually now a village. *Bodager v. Campbell*, 4th Dist. Pike No. 12CA828, 2013-Ohio-4650, fn. 1. It is referred to as a village throughout this opinion even though at times during the pertinent events, it was a city. See also *Today & Tomorrow Heating & Cooling v. Greenfield*, 4th Dist. Highland No. 13CA14, 2014-Ohio-239, fn. 1, citing R.C. 703.01(A) (municipality is reclassified as a village from a city if the latest federal census shows that the population has decreased to less than 5,000 residents).

require the village to compensate it for its denial of access to the street. The trial court granted summary judgment in favor of the village.

{¶2} American Metal asserts that the trial court erred in denying its first claim to establish a street under R.C. 723.09 because its summary judgment evidence raised a genuine issue of material fact about whether the creation of the street “will conduce to the general interests” of Waverly. We reject this assertion because the trial court denied American Metal’s claim based on an additional reason that American Metal does not challenge on appeal—that R.C 723.09 does not grant the court the authority to establish a municipal street outside the municipal corporation limits. Although Waverly owns the land upon which the road was built, that land is not within the geographical boundaries of the village.

{¶3} Next American Metal asserts that the trial court erred in denying its second claim because the village cannot use real property improved through the use of community development block grants (“CDBG”) for the benefit of a private for-profit entity. But federal regulations did not prohibit the recipient of CDBG funds from providing assistance to private for-profit businesses. And more importantly, Waverly was not the recipient of the CDBG funds; it used money from an account funded by private money to acquire the property.

{¶4} American Metal also argues that the approval of the lot split for its real property by Waverly and Pike County planning commissions established that its access to the road was contemplated. This argument is meritless because American Metal represented at the planning commission meeting where the lot split was approved that it was not concerned about its lack of access to its property. There is no evidentiary

support for American Metal's claim that Waverly's actions constituted a common-law dedication of the access drive for public use.

{¶15} We overrule American Metal's assignments of error and affirm the judgment of the trial court.

I. FACTS

{¶16} American Metal owns a 10-acre landlocked parcel of real estate located in Pike County. A small portion of the parcel lies within Pee Pee Township but the majority of the 10 acres is located in the village of Waverly. The only current access to the property is by way of a non-dedicated road on land Waverly owns; however this land is not located within the village's municipal boundaries. Waverly has in the past granted a perpetual non-exclusive right-of-way easement over the road to a different private corporate landowner. That easement is now owned by successors-in-interest to its original grantee. Because Waverly refuses to grant similar access to American Metal, this litigation ensued.

{¶17} American Metal filed a complaint in the Pike County Court of Common Pleas that set forth two causes of action against Waverly. (OP1) In its first cause of action American Metal requested that under R.C. 723.09 the court establish and dedicate a street abutting American Metal's property in the village. (*Id.*) In its second cause of action, which it captioned as an inverse-condemnation claim, American Metal first requested a judgment declaring that it have access over the street abutting its property or that Waverly be required to grant it an easement under the same terms and conditions as an easement the village granted another business. (*Id.*) American Metal also claimed in its second cause of action that the village had denied it access to a

public right of way, which required the village to compensate the company for its taking of its property interest. (*Id.*)

{¶8} After various and sundry procedural pleadings, Waverly filed a motion for summary judgment, which American Metal opposed. (OP86, 93) The parties' summary-judgment evidence established the following facts.

{¶9} In 1994, Grand Trunk Western Railroad, Inc. sold real property to Waverly for \$68,000. (OP86, Ex. 5, ¶ 7, Ex.1) This property included land that now has the access drive, which runs from North Street in Waverly to property owned by Clarksville Stave and Veneer Co., Inc. ("Clarksville"), at issue. (OP99, Ex. 3, ¶ 5) Waverly did not use CDBG funds to buy the property; the village instead used funds from the South Central Revolving Loan Account, which was comprised of money from private entities. (*Id.* at ¶ 6-7) The property and access road are not in the village because Waverly had de-annexed this property and attached it to Pee Pee Township in 1991; the village has not re-annexed it since that time. (OP86, Ex. 5, ¶ 5-6, Ex. 9, ¶ 4-5)

{¶10} In 1994, the state awarded Pike County a CDBG of \$414,000 to assist in the development of a new manufacturing facility by Randall Homes (aka Randal Homes), a private, for-profit company that produced and sold modular homes. (OP95, ¶ 5, Exs. A, B) Pike County engaged a private contractor for over \$168,000 to build the access road from North Street to the Randall Homes facility. (OP86, Ex. 4) The former site of the Randall Homes facility was subsequently transferred to J & G Property Holdings, Ltd. ("J & G"). (OP86, Ex. 5)

{¶11} In 2007, Waverly and Pike County granted J & G a non-exclusive perpetual easement appurtenant and right-of-way for ingress and egress over the

access road. (OP86, Ex. 5, ¶ 8) That same year, J & G sold its property and easement to Clarksville. (OP86, Ex. 7, ¶ 8-9) The easement that Clarksville owns grants it the right, but not the obligation, to perform maintenance and repairs to the access road. (*Id.* at ¶ 10) Clarksville has performed those acts, including maintaining water and sewer lines that it owns and that exclusively serve its business. (*Id.* at 11, 31)

{¶12} American Metal manufactures conveyor-related components, primarily for the automotive industry. (OP83, p. 8) It wanted to expand and move its business, so it became interested in purchasing a 10-acre lot that abuts the village's access road leading to Clarksville's property. (*Id.* at 8, 12, 21-22)

{¶13} American Metal wanted to purchase the 10-acre lot from a larger tract owned by a private entity. (OP83, Deft. Exs. 2-3) At a December 2012 Waverly Planning Commission meeting the commission approved a property split to create that lot. At that time American Metal represented that it was "not concerned" about the lack of access for its landlocked ten-acre lot and that it would request a similar easement to one approved for Clarksville in the next year. (OP86, Ex. 2-1, p. 40-41)

{¶14} In November 2013, American Metal asked the Waverly Village Council to grant it an easement similar to the one granted to Clarksville, but the request failed because the village took no action to approve it. (OP86, Ex. 9, ¶ 6-7) American Metal subsequently filed this litigation.

{¶15} The trial court ultimately granted Waverly's motion for summary judgment. (OP112)

II. ASSIGNMENTS OF ERROR

{¶16} American Metal assigns the following errors for our review:

1. THE TRIAL COURT'S GRANTING SUMMARY JUDGMENT AGAINST APPELLANT ON ITS FIRST CAUSE OF ACTION FOR DECLARATORY JUDGMENT WAS CONTRARY TO LAW AND GENUINE ISSUES OF MATERIAL FACT EXISTED.
2. THE TRIAL COURT'S GRANTING SUMMARY JUDGMENT AGAINST APPELLANT ON ITS SECOND CAUSE OF ACTION FOR DECLARATORY JUDGMENT WAS CONTRARY TO LAW AND GENUINE ISSUES OF MATERIAL FACT EXISTED.

III. STANDARD OF REVIEW

{¶17} Appellate review of summary judgment decisions is de novo, governed by the standards of Civ.R. 56. *Vacha v. N. Ridgeville*, 136 Ohio St.3d 199, 2013-Ohio-3020, 992 N.E.2d 1126, ¶ 19 .Summary judgment is appropriate if the party moving for summary judgment establishes 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) reasonable minds can come to but one conclusion, which is adverse to the party against whom the motion is made. Civ.R. 56(C); *New Destiny Treatment Ctr., Inc. v. Wheeler*, 129 Ohio St.3d 39, 2011-Ohio-2266, 950 N.E.2d 157, ¶ 24; *Martin v. Jones*, 2015-Ohio-3168, 41 N.E.3d 123, ¶ 29 (4th Dist.).

{¶18} The moving party has the initial burden to inform the trial court of the basis for the motion and to identify the parts of the record that demonstrate the absence of a genuine issue of material fact on the pertinent claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). Once the moving party satisfies this initial burden, the non-moving party has the reciprocal burden under Civ.R. 56(E) to set forth specific facts to show that genuine issues exist for trial. *Id.*; *Schultheiss v. Heinrich Ents., Inc.*, 2016-Ohio-121, ___ N.E.3d ___, ¶ 15 (4th Dist.).

IV. LAW AND ANALYSIS

A. Establishing a Street under R.C. 723.09

{¶19} Initially American Metal asserts that the trial court erred in granting Waverly summary judgment on its declaratory-judgment action because the judgment was contrary to law, and genuine issues of material fact existed. In its first cause of action American Metal requested that the court establish and dedicate a street abutting its property in the village pursuant to R.C. 723.09. American Metal asked the court to establish the village's access road that abuts the American Metal property as a public street.

{¶20} R.C. 723.09 provides that the court may order the establishment or vacation of a street or alley in the immediate vicinity of a person owning a lot in the municipal corporation if it will be conducive to the general interests of the municipality:

The court of common pleas may, upon petition filed in such court by any person owning a lot in a municipal corporation, for the establishment or vacation of a street or alley in the immediate vicinity of such lot, upon hearing, and upon being satisfied that it will conduce to the general interests of such municipal corporation, declare such street or alley established or vacated, but this method shall be in addition to those prescribed in sections 723.04 to 723.08, inclusive, and section 723.02 of the Revised Code.

{¶21} The trial court rejected American Metal's request for two different reasons. (OP112) First, it determined that establishing a public street on the private access road abutting American Metal's property would not be conducive to the general interests of Waverly because of the present capacity use of the road, its condition, and the estimated cost of constructing a street along the easement granted to Clarksville. (*Id.* at 6-7) Second, the trial court concluded that R.C. 723.09 does not grant the court authority to establish a street outside the limits of the municipal corporation. (*Id.* at 7)

{¶22} American Metal challenges only the trial court's first reason for denying the requested relief. It claims an affidavit of one of the partners owning American Metal raised a genuine issue of material fact whether the requested street would be conducive to the general interests of Waverly.

{¶23} Because it failed to contest all of the court's reasons for doing so, American Metal cannot establish that the trial court committed reversible error in rejecting its first cause of action. See, e.g., *State ex rel. Miller v. Brady*, 123 Ohio St.3d 255, 2009-Ohio-4942, 915 N.E.2d 1183, ¶ 12 ("The court of appeals' judgment granting the writ and determining that [appellee] is entitled to an award of attorney fees is not subject to reversal, because [appellant] does not challenge all of the independent reasons given by the court of appeals for granting the writ"); *State ex rel. Schmidt v. School Emp. Retirement Sys.*, 100 Ohio St.3d 317, 2003-Ohio-6086, 798 N.E.2d 1088, ¶ 5 ("Even if the [lower] court's rationale on this latter ground was incorrect, its judgment * * * is not subject to reversal because [appellant] does not challenge all of the independent reasons given by the [lower] court"). Here, American Metal has not assigned as error the trial court's decision that it is not statutorily authorized to establish a road outside its municipal boundaries.

{¶24} Moreover, the trial court correctly determined that R.C. 723.09 does not authorize a court to establish a street or alley outside the confines of the municipal corporation. "The Constitution and statutes of Ohio grant to municipal corporations the power to establish streets and highways within their corporate limits and prescribe the procedure by which such power shall be exercised." *State ex rel. Sun Oil Co. v. Euclid*, 164 Ohio St. 265, 270, 130 N.E.2d 336 (1955); see also *Clifton v. Blanchester*, 131

Ohio St.3d 287, 2012-Ohio-780, 964 N.E.2d 414, ¶ 29 (“A municipality’s liability for a regulatory taking is limited to the property that it is authorized to regulate, i.e., the property within its limits”).

{¶25} R.C. 723.09 should be construed in pari materia² with comparable provisions limiting the establishment of streets to those within the municipality’s territorial limits. See R.C. 723.01 (“Municipal corporations shall have special power to regulate the use of the streets. * * * [T]he legislative authority of a municipal corporation shall have the care, supervision, and control of the public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts within the municipal corporation”); R.C. 723.02 (“The legislative authority of a municipal corporation may open, straighten, alter, divert, narrow, or widen any street, alley, or public highway within the limits of the municipal corporation”); R.C. 715.19 (“Any municipal corporation may lay off, establish, plat, grade, open, widen, narrow, straighten, extend, improve, keep in order and repair, light, clean, and sprinkle, streets, alleys, public grounds, places and buildings, wharves, landings, docks, bridges, viaducts, and market places, within such municipal corporation”). Because the access road was located in Pee Pee Township, the trial court lacked authority under R.C. 723.09 to establish a village street there.

² This rule of statutory construction provides that statutes relating to the same subject matter should be construed together so that the legislature’s intent can be gathered from the whole of the enactments. See *Chesapeake Exploration, L.L.C. v. Oil & Gas Comm.*, 135 Ohio St.3d 204, 2013-Ohio-224, 985 N.E.2d 480, ¶ 14 (“Because these statutes relate to the same subject matter, they are considered in pari materia so as to give full effect to the provisions”).

{¶26} Therefore, the trial court did not err in granting summary judgment to Waverly on American Metal's first cause of action. We overrule American Metal's first assignment of error.

B. Inverse Condemnation

{¶27} In its second assignment of error American Metal contends that the trial court erred in granting summary judgment to Waverly on its claim for inverse condemnation.

{¶28} "An owner of property abutting on a public highway possesses, as a matter of law, not only the right to the use of the highway in common with other members of the public, but also a private right or easement for the purpose of ingress and egress to and from his property, which latter right may not be taken away or destroyed or substantially impaired without compensation therefor." *State ex rel. Merritt v. Linzel*, 163 Ohio St. 97, 126 N.E.2d 53 (1955), paragraph one of the syllabus; *Smith v. Ohio Dept. of Transp.*, 10th Dist. Franklin No. 15AP-521, 2015-Ohio-5240, ¶ 8.

{¶29} In essence American Metal argues because CDBG funds cannot be used for the benefit of a private for-profit entity, the private access road constituted a public highway because Waverly used these funds to improve the property, including constructing the private access road for Randall Homes in 1995.

{¶30} American Metal's argument is meritless because 24 C.F.R. 570.203(b) permits recipients of CDBG funds to provide assistance to private for-profit businesses. This regulation specifies that CDBG funds may be used under certain circumstances for "[t]he provision of assistance to a private for-profit business."

{¶31} Moreover, the summary-judgment evidence established that it was Pike County, not Waverly that received the CDBG funds. Waverly used money from an account funded by private money to acquire the property that included the access road.

{¶32} American Metal also argues that the approval by the Waverly and Pike County planning commissions for the lot split that resulted in its 10-acre parcel established the creation of a public road providing it access to North Street. It claims that the village's actions resulted in the common-law dedication of the access road to the public. "Three elements are required to prove a common law dedication: (1) the existence of an intention on the part of the owner to make such dedication; (2) an actual offer on the part of the owner, evidenced by some unequivocal act, to make such dedication; and (3) the acceptance of such offer by or on behalf of the public." See *McNamara v. Wilson*, 12th Dist. Butler No. CA2013-12-239, 2014-Ohio-4520, ¶ 28, citing *Doud v. Cincinnati*, 152 Ohio St. 132, 87 N.E.2d 243 (1949).

{¶33} The evidence established none of the elements required to prove a common-law dedication. In fact, American Metal's attorney representative at the December 2012 Waverly Planning Commission meeting specified that American Metal was not concerned about its lack of access to the landlocked parcel. The company's subsequent request for an easement was rejected by the village. There was no expressed intention by the village to dedicate the private access road for public use, no actual offer on the part of the village to make that dedication, and no acceptance of the offer on behalf of the public. Although acceptance of an offer can be accomplished by the public's continuous use of the property or through the actions of authorities such as performing maintenance on or improving the road, there is no evidence of public use of

the access road; Clarksville, not the village, has performed maintenance and repairs on the road. *Compare McNamara* at ¶ 30, and cases cited therein.

{¶34} Therefore, there is no evidence that the access road abutting American Metal's ten-acre landlocked property is a public way to which it has a right of access. In the absence of that property interest, American Metal is not entitled to compensation. The trial court correctly denied American Metal's second cause of action. We overrule its second assignment of error.

V. CONCLUSION

{¶35} Waverly established that there is no genuine issue of fact, it is entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion, which is adverse to American Metal. The trial court correctly granted summary judgment in favor of Waverly. Having overruled American Metal's assignments of error, we affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

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

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

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

Abele, J. & McFarland, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, 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.