[Cite as *Cumberland Trail Homeowners' Assn., Inc. v. Pataskala Banking Co.* , 2010-Ohio-4622.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
CUMBERLAND TRAIL	:	Julie A. Edwards, P.J.
HOMEOWNERS' ASSOCIATION,	:	John W. Wise, J.
INC.,	:	Patricia A. Delaney, J.
	:	
Plaintiff-Appellant	:	Case No. 2009 CA 00098
	:	
-vs-	:	
	:	O P I N I O N

THE PATASKALA BANKING COMPANY,

Defendant-Appellee

CHARACTER OF PROCEEDING:	Civil Appeal from Licking County Court of Common Pleas Case No. 08 CV 01190
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	September 23, 2010

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
JONATHAN A. VELEY 3 South Park Place Newark, Ohio 43055	C. DANIEL HAYES W. SCOTT HAYES 195 E. Broad Street P.O. Box 958 Pataskala, Ohio 43062

Edwards, P.J.

{¶1} Plaintiff-appellant, Cumberland Trail Homeowners' Association, Inc., appeals from the June 30, 2009, Judgment Entry of the Licking County Court of Common Pleas granting the Motion for Summary Judgment filed by defendant-appellee, The Pataskala Banking Company.

STATEMENT OF THE FACTS AND CASE

{¶2} Phase I of the Cumberland Trail Subdivision, an upscale golf course community, was platted in 1998. The subdivision, which is governed by appellant, Cumberland Trail Homeowners' Association, Inc., consists of lots and reserve areas. Appellee, The Pataskala Banking Company, is the owner of a parcel of land in the subdivision titled Reserve B.

{¶3} The Cumberland Trail, Section 1, Declaration of Covenants, Conditions and Restrictions, which was recorded in the Licking County Recorder's Office on October 13, 2008, states, in relevant part, as follows:

{¶4} "A. Declarant [the Developer of the subdivision] is the owner in fee simple of the following REAL PROPERTY: Situated in the State of Ohio, in the County of Licking, and in the Township of Etna:

{¶5} "Being Lots Numbered One (1) through Fifty (50), both inclusive, of Cumberland Trail Section 1 and areas designated 'Reserve A' and 'Reserve B' as said lots and reserves are numbered and delineated upon the recorded plat thereof, of record in Plat Book 16, Pages 83 and 84, Instrument No. 199810080038435, Recorder's Office, Licking County, Ohio.

{¶6} "Last Transfer: Deed Record Instrument No. 199711100006585, Recorder's Office, Licking County, Ohio.

{¶7} "Each of these lots is referred to herein as a 'Lot,' and collectively they are referred to herein as the 'Lots.' A 'Lot Owner' is each owner of a fee simple interest in a Lot. The CUMBERLAND TRAIL SECTION 1 Subdivision is referred to herein as the 'Subdivision.'

{¶8} "B. Declarant desires to create a plan of restrictions and covenants concerning the Lots in the Subdivision and to retain in Declarant plan approval of the dwelling units to be constructed on said Lots to protect the interests of Declarant, each Lot Owner and their respective personal representatives, heirs, successors and assigns."

{¶9} After appellee began constructing a road across Reserve B to connect its bank on the adjacent premises to Trail East Drive, appellant, on June 12, 2008, filed a complaint seeking a declaratory judgment, a temporary restraining order, and preliminary and permanent injunctive relief. Appellant, in its complaint, alleged that the "construction and commercial use of the road violates the Declaration of Covenants, Conditions and Restrictions for Cumberland Trail Subdivision…" The complaint sought an order enjoining the construction of the roadway across Reserve B, determining that Reserve B could only be used as a decorative entryway to the subdivision, and requiring appellee to restore Reserve B to its condition prior to the commencement of construction of the roadway.

{¶10} On January 15, 2009, appellee filed a Motion to Dismiss pursuant to Civ.R. 12(B)(6), arguing that Reserve B was not governed by the subdivision

restrictions. Appellee argued that appellant's complaint failed to state a claim because the restrictions only applied to lots within the Cumberland Trail Subdivision and Reserve B was not a "lot." After appellant, on February 26, 2009, filed a memorandum in opposition to the Motion to Dismiss, the trial court, as memorialized in a Judgment Entry filed on March 10, 2009, indicated that it was treating appellee's Motion to Dismiss as a Motion for Summary Judgment. The trial court granted the parties until March 26, 2009 to submit any additional Civ.R. 56 materials. Appellee filed a supplemental memoranda on March 27, 2009.

{¶11} Pursuant to a Judgment Entry filed on June 30, 2009, the trial court granted appellee's Motion for Summary Judgment.

{¶12} Appellant now raises the following assignments of error on appeal:

{¶13} "I. THE TRIAL COURT ERRED BY INTERPRETING THE PLAIN AND UNAMBIGUOUS LANGUAGE OF THE CUMBERLAND TRAIL DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS TO APPLY ONLY TO THE NUMBERED LOTS OF THE SUBDIVISION AND NOT THE RESERVE AREAS.

{¶14} "II. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO CONSIDER CLEAR AND UNCONTROVERTED EVIDENCE OF THE INTENT OF THE DEVELOPER IN ORDER TO INTERPRET THE CUMBERLAND TRAIL DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS."

I, II

{¶15} Appellant, in its two assignments of error, argues that the trial court erred in granting the Motion for Summary Judgment filed by appellee. We disagree.

{¶16} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36, 506 N.E.2d 212. As such, we must refer to Civ.R. 56(C) which provides, in pertinent part:

{¶17} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. * * * A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that 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, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor." Pursuant to the above rule, a trial court may not enter summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the non-moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of

material fact for trial. *Vahila v. Hall*, 77 Ohio St.3d 421, 429, 1997-Ohio-259, 674 N.E.2d 1164, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107, 662 N.E.2d 264.

{¶18} At issue in the case sub judice is whether or not the Declaration of Declaration of Covenants, Conditions and Restrictions for Cumberland Trail Subdivision apply to Reserve B, which is owned by appellee.

{¶19} Generally, a trial court is required to presume that the intent of the parties to a contract resides in the language they chose to employ in the agreement. *Shifrin v. Forest City Ent., Inc.,* 64 Ohio St.3d 635, 638, 1992-Ohio-28, 597 N.E.2d 499, citing *Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St.3d 130, 509 N.E.2d 411, paragraph one of the syllabus; *Aultman Hosp. Assn. v. Community Mut. Ins. Co.* (1989), 46 Ohio St.3d 51, 544 N.E.2d 920, syllabus. Only when the contract is unclear or ambiguous, or when the circumstances surrounding the agreement invest the language of the contract with a special meaning will extrinsic evidence be considered in an effort to give effect to the parties' intentions. *Id.,* citing *Kelly* at 132. When the terms of a contract are unambiguous, courts will not in effect create a new contract by finding intent not expressed in the clear language employed by the parties. *Shifrin,* supra at 638. Whether the terms of a contract are ambiguous is a question of law for the Court. *Westfield Ins. Co. v. HULSAM*., Inc., (1998), 128 Ohio App.3d 270, 291, 714 N.E.2d 934.

{¶20} As is stated above, The Cumberland Trail, Section 1, Declaration of Covenants, Conditions and Restrictions states, in relevant part, as follows:

{¶21} "A. Declarant is the owner in fee simple of the following REAL PROPERTY: Situated in the State of Ohio, in the County of Licking, and in the Township of Etna:

{¶22} "Being Lots Numbered One (1) through Fifty (50), both inclusive, of Cumberland Trail Section 1 and areas designated 'Reserve A' and 'Reserve B' as said lots and reserves are numbered and delineated upon the recorded plat thereof, of record in Plat Book 16, Pages 83 and 84, Instrument No. 199810080038435, Recorder's Office, Licking County, Ohio…..

{¶23} "Each of these lots is referred to herein as a 'Lot,' and collectively they are referred to herein as the 'Lots.' A 'Lot Owner' is each owner of a fee simple interest in a Lot. The CUMBERLAND TRAIL SECTION 1 Subdivision is referred to herein as the 'Subdivision.'

{¶24} "B. Declarant desires to create a plan of restrictions and covenants concerning the Lots in the Subdivision and to retain in Declarant plan approval of the dwelling units to be constructed on said Lots to protect the interests of Declarant, each Lot Owner and their respective personal representatives, heirs, successors and assigns." (Emphasis added).

{¶25} The Declaration contains covenants and restrictions with respect to the "Lots" in the subdivision. Among these restrictions is a restriction contained in Article I that all "Lots" in the subdivision could only be used for single-family residential purposes.

{¶26} We concur with the trial court that the term "Lots" does not include the Reserves. As noted by the trial court, there are no restrictions outlined in the

Declaration specifically pertaining to the Reserves. We note that the Declaration specifically states in Article IV that "[t]he plan of covenants, conditions and restrictions set forth herein has been established with respect to 50 lots." (Emphasis added). While, at such time in the subdivision development, there were 50 numbered lots, there also were two Reserve areas "Reserve A" and "Reserve B." The only mention of the Reserves made in the Declaration of Covenants, Conditions and Restrictions is cited above in paragraph 22. As noted by the trial court, "it is … unreasonable, despite what [appellant] contends were the developer's intentions to the contrary, to imply restrictions from non-existent language…There are no restrictions…concerning the reserves. The restrictions clearly apply to the numbered lots which are single-family residential." Because the Declaration clearly and unambiguously applied only to numbered lots in the subdivision and not to the Reserve areas, the trial court was correct in presuming that such was the intention of the developer.

{¶27} Based on the foregoing, we find that the trial court did not err in granting appellee's Motion for Summary Judgment. Appellant's two assignments of error are, therefore, overruled.

{¶28} Accordingly, the judgment of the Licking County Court of Common Pleas is, therefore, affirmed.

By: Edwards, P.J.

Wise, J. and

Delaney, J. concur

s/Julie A. Edwards

s/John W. Wise

s/Patricia A. Delaney

JUDGES

JAE/d0614

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IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

CUMBERLAND TRAIL HOMEOWNERS' ASSOCIATION, INC.,	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
THE PATASKALA BANKING COMPANY,	:	
Defendant-Appellee	:	CASE NO. 2009 CA 00098

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Licking County Court of Common Pleas is affirmed. Costs assessed to appellant.

s/Julie A. Edwards

s/John W. Wise

s/Patricia A. Delaney

JUDGES