[Cite as *Sowers v. Noce*, 2015-Ohio-1906.]

COURT OF APPEALS
PERRY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

VERNON SOWERS, ET AL.

Plaintiff-Appellant

-vs-

EDDIE C. NOCE, ET AL.

Defendant-Appellee

JUDGES:
Hon. William B. Hoffman, P.J.
Hon. Sheila G. Farmer, J.
Hon. John W. Wise, J.

Case No. 14-CA-00023

O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Perry County Court of Common Pleas, Case No. 11CV00258

JUDGMENT: Reversed

DATE OF JUDGMENT ENTRY: May 18, 2015

APPEARANCES:

For Defendant-Appellee

SCOTT D. EICKELBERGER
DAVID J. TARBERT
RYAN H. LINN
Kincaid, Taylor & Geyer
50 N. Fourth Street
Zanesville, Ohio 43701

For Plaintiff-Appellant

JAMES R. KRISCHAK
Gottlieb, Johnston, Beam
& Dal Ponte PLL
320 Main Street, PO Box 190
Zanesville, Ohio 43702-0190

Hoffman, P.J.

{¶1} Plaintiff-appellant Vernon Sowers appeals the July 24, 2014 Judgment Entry entered by the Perry County Court of Common Pleas, which found him in contempt of court for violating an injunction. Defendants-appellees are Eddie C. Noce, et al.

STATEMENT OF THE FACTS AND CASE

{¶2} On July 14, 2011, Appellant and Richard Ruff filed a complaint to quiet title. Appellees were named as defendants along with a number of other individuals who allegedly had an interest in the property subject to the complaint. Appellees filed a timely answer. On December 23, 2011, the trial court granted default judgment against all of the defendants except Appellees. Appellant filed an amended complaint, to which Appellees responded with an answer and counterclaim.

{¶3} On October 22, 2013, Appellees filed a motion for injunctive relief. Therein, Appellees requested Appellant "be restrained from damaging, destroying or in any way modifying the Disputed Acreage until such time that this Court renders its decision." October 22, 2013 Defendant's Motion for Injunctive Relief Pending Judgment. Appellant filed a response, advising the trial court he "has no intention of damaging or destroying his own property." October 24, 2013 Plaintiffs' Response to Defendants' Motion for Injunctive Relief Pending Judgment. Appellant added he did not oppose the issuing of an order that restrains him from destroying or damaging his own property. *Id.* Via Judgment Entry filed November 22, 2013, the trial court sustained Appellees' motion and ordered: "Plaintiffs, and anyone acting of their behalf, are hereby

restrained from damaging, destroying or in any way modifying the acreage at issue * * *."

{¶4} Appellees filed a motion to show cause on April 1, 2014, requesting the trial court find Appellant in contempt for violating the injunction. In their motion in support, Appellees explained Appellant had installed a fence along the right side of the subject property while Appellees were out of town. The fence ran over and across Appellees' driveway, preventing vehicle access to their home, barn, and garage. In response, Appellant did not dispute setting up the fence, but claimed he did not believe the fence violated the trial court's order.

{¶5} The trial court conducted a contempt hearing on July 3, 2014. Appellant appeared pro se.[1] Via Judgment Entry filed July 24, 2014, the trial court found Appellant in contempt and ordered him to pay a $250.00 fine. The trial court suspended the fine on the condition Appellant not interfere with Appellees' use of the easement as ordered in its May 9, 2014 judgment entry and pay Appellees attorney fees in the amount of $2,375.00, as well as $3,553.63, in expenses arising from the installation of the fence.

{¶6} It is from this judgment entry Appellant appeals, raising the following as error:

{¶7} "I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING THAT THE APPELLANT WAS IN CONTEMPT WHERE THE MOTION FOR CONTEMPT WAS NEVER SERVED ON THE APPELLANT, BUT SIMPLY ON THE PARTY'S COUNSEL. *BIERCE V. HOWELL*, 2007 OHIO 3050 AND *EWING V. EWING*, 2007 OHIO 7108, APPROVED AND FOLLOWED.

[1] On May 9, 2014, the trial court granted Attorney J. William Merry's motion to withdraw as counsel of record for Appellant.

{¶8} "II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHERE THE TRIAL COURT ISSUES AN INJUNCTION AND FINDS THE PARTY IN CONTEMPT OF THE INJUNCTION, WHEN THE PARTY NEVER RECEIVES ACTUAL NOTICE OF THE ORDER UNTIL AFTER THE ALLEGED CONTEMPTUOUS ACTIONS HAVE ALREADY OCCURRED.

{¶9} "III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHERE A PARTY IS FOUND GUILTY OF CONTEMPT WHERE THE INJUNCTION FAILS TO MEET THE REQUIREMENTS OF CIV.R. 65, INCLUDING (A) FAILURE TO STATE THE REASONS FOR ITS ISSUANCE (CIV.R. 65(D)); (B) FAILURE TO SERVE (CIV.R. 65(E); (C) FAILURE TO SET BOND (CIV.R. 65(C); AND (D) FAILURE TO PROVIDE REASONABLE DETAILS FOR THE ACTS TO BE RESTRAINED (CIV.R. 65(D) AND THUS IT IS AN UNLAWFUL ORDER."

II

{¶10} We address Appellant's second assignment of error first as we find it dispositive of his appeal. In his second assignment of error, Appellant contends the trial court erred in finding him in contempt of an injunction when he was not served with notice of the order until after the alleged contemptuous actions had already occurred. We agree.

{¶11} As set forth in our Statement of the Facts and Case, supra, Appellees filed a motion for injunctive relief, requesting Appellant "be restrained from damaging, destroying or in any way modifying the Disputed Acreage until such time that this Court renders its decision." In his response, Appellant advised the trial court he "has no intention of damaging or destroying his own property" and did not oppose the issuing of

an order that restrains him from destroying or damaging his own property. Via Judgment Entry filed November 22, 2013, the trial court sustained Appellees' motion and ordered: "Plaintiffs, and anyone acting of their behalf, are hereby restrained from damaging, destroying or *in any way modifying* the acreage at issue * * *." (emphasis added).

{¶12} Appellant was found in contempt of the November 22, 2013 injunction. However, upon our review of the entire record, we find absolutely no indication he was ever served with the trial court's judgment entry issuing the injunction. While Appellant may be judicially estopped from arguing he was not enjoined from damaging or destroying the property based on his response to Appellee's motion for injunction, he had no notice he was prohibited from "in any way modifying the acreage." To support a contempt finding, the moving party must establish by clear and convincing evidence that a valid court order exists, that the offending party had knowledge of the order, and that the offending party violated such order. *Hetterick v. Hetterick,* 12th Dist. Brown No. CA2012–02–002, 2013–Ohio–15, ¶ 35. Accordingly, we find the trial court erred in finding Appellant in contempt as he was unaware he was violating the injunction.

I, III

{¶13} In light of our disposition of Appellant's second assignment of error, we find Appellant's first and third assignments of error to be moot.

{¶14} The judgment of the Perry County Court of Common Pleas is reversed.

By: Hoffman, P.J.

Farmer, J. and

Wise, J. concur