[Cite as *Marinelli v. Prete*, 2010-Ohio-2257.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Mrs. Leah Marinelli of the Leah Marinelle Living Trust dtd 2/21/1997	Court of Appeals No. E-09-022
Appellant	Trial Court No. 2006-CV-129
v.	
Mr. & Mrs. Paul Prete, et al.	**DECISION AND JUDGMENT**
Appellees	Decided: May 21, 2010

* * * * *

Elizabeth F. Wilber, for appellant.

James C. Barney, for appellees.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal from a judgment of the Erie County Court of Common Pleas, that granted summary judgment in favor of defendants-appellees, Paul and Debra Prete and Prete Builders, Inc. (collectively referred to as the "Pretes"), on all of the claims

asserted against them by plaintiff-appellant, Mrs. Leah Marinelli of the Leah Marinelli Living Trust, dated February 21, 1997. Appellant now challenges that judgment through the following assignments of error.

{¶ 2} "1. The trial court erred in failing to identify the parties.

{¶ 3} "2. The trial court erred when it found no genuine issue of material fact or in ruling that there is not a violation of the Rule Against Perpetuities.

{¶ 4} "3. The trial court erred when it found no genuine issue of material fact or in ruling that there is not a violation of the free and unrestricted use of land.

{¶ 5} "4. The trial court erred when it found no genuine issue of material fact or in ruling that there is not a public policy violation.

{¶ 6} "5. The trial court erred when it found no genuine issue of material fact or in ruling that there is not a tortuous interference with a future business relationship.

{¶ 7} "6. The trial court erred when it found no genuine issue of material fact or in ruling that the Consumer Sales Practices Act does not apply.

{¶ 8} "7. The trial court erred when it found no genuine issue of material fact or in ruling that the covenant runs with the land.

{¶ 9} "8. The trial court erred when it found no genuine issue of material fact or in ruling that there was no slander of title.

{¶ 10} "9. The trial court erred when it found no genuine issue of material fact or in ruling that Leah Marinelli is not being held in slavery or involuntary servitude."

{¶ 11} Appellant is the titled owner in fee simple of Lot 2 in the Hidden Harbour Subdivision of Sandusky, Erie County, Ohio. Appellant purchased Lot 2 on November 15, 2005, from Frederick and Stephanie Pizzedaz. Previously, on November 18, 2004, the Pizzedazes purchased Lot 2 from appellees Paul and Debra Prete. When the Pretes sold Lot 2 to the Pizzedazes, they added the following restriction to the deed: "This Transfer is subject to a restriction that any home to be built hereon must be built by Prete Builders. This restriction runs with the land." Appellant had full knowledge of the restriction prior to purchasing Lot 2.

{¶ 12} On February 15, 2006, appellant filed a complaint to quiet title in the court below. In addition to the Pretes, appellant named the Harbour Lagoons Association as a defendant. Through her complaint to quiet title, appellant sought a judgment that the restrictive covenant was null and void as it violated the Ohio and United States Constitutions' prohibition of slavery and involuntary servitude (Count 1), violated appellant's right to the free and unrestricted use of her land (Count 2), violated public policy (Count 3), violated the rule against perpetuities (Count 4), created a tortuous interference with a future business relationship (Count 5), violated the Consumer Sales Practices Act (Count 6), did not run with the land (Count 7), and slandered appellant's title to the land (Count 8). The Pretes filed an answer and counterclaim for a declaratory judgment, seeking a determination that the restrictive covenant was valid.

{¶ 13} Subsequently, appellant and appellees filed summary judgment motions on all claims. On April 15, 2009, the lower court issued an opinion and judgment entry granting appellees' motion for summary judgment, denying appellant's motion for summary judgment, and thereby dismissing appellant's case against appellees. The court further determined, pursuant to Civ.R. 54(B), that there was no just reason for delay. It is from that judgment that appellant now appeals.

{¶ 14} Appellate review of a trial court's grant of summary judgment is de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Accordingly, we review the trial court's grant of summary judgment independently and without deference to the trial court's determination. *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. Summary judgment will be granted only when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66; Civ.R. 56(C). The burden of showing that no genuine issue of material fact exists falls upon the party who moves for summary judgment. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 294. However, once the movant supports his or her motion with appropriate evidentiary materials, the nonmoving party "may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this

rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E).

{¶ 15} In her first assignment of error, appellant contends that the lower court erred in "failing to identify the parties." Appellant argues that the lower court's decision and judgment is somehow in error because the court did not separately identify the parties in discussing the individual claims. In reviewing the trial court's decision, we conclude that it is quite clear to whom the court is referring in its discussions of the various claims. Moreover, the record reveals that all of the parties knew in the proceedings below that Prete Builders and Prete Builders, Inc. are one and the same, that it is a commercial and residential construction business owned by Paul and Debra Prete, and that it is the business to which the restrictive covenant refers. We find no error in the trial court's decision with regard to its identification of the parties and the first assignment of error is not well-taken.

{¶ 16} Next, we will address the seventh assignment of error which challenges the trial court's treatment of appellant's claim that the deed restriction should be declared void because it did not run with the land.

{¶ 17} In Count 7 of her complaint to quiet title, appellant asserted that the deed restriction was in fact an employment contract which applied only to the original parties to the contract and did not run with the land. As such, appellant asserted, the restriction could not be enforced against her. On this issue, the trial court applied the three-part test

set forth in *LuMac Dev. Corp. v. Buck Point Ltd. Partnership* (1988), 61 Ohio App.3d 558, 562, and concluded that the undisputed evidence established that the covenant was a real covenant that did run with the land. The court further held that even if it were, instead, a personal covenant, it would still be valid and enforceable in equity because appellant had constructive and actual knowledge of the covenant before she purchased Lot 2.

{¶ 18} "The determination of whether the covenant runs with the land depends on whether the covenant is real or personal. A covenant is determined to run with the land when the liability to perform it or the right to take advantage of it passes to the assignee of the land. *35 Ohio Jurisprudence 3d (1982)* 341, Deeds, Section 110. A real covenant runs with the land; a personal covenant usually does not run with the land." *Lone Star Steakhouse & Saloon of Ohio, Inc. v. Quaranta*, 7th Dist. No. 01 CA 60, 2002-Ohio-1540, ¶ 15. In *LuMac Dev. Corp.*, supra, we recognized the prerequisites for a covenant to run with the land as:

{¶ 19} "' * * * (1) The intent of the original grantor and grantee must have been that the covenant run with the land; (2) the covenant must either "affect" or "touch and concern" the land in question; (3) there must be privity of estate between the party claiming the benefit of the covenant and the party who is called upon to fulfill it. 21 Corpus Juris Secundum 923, Covenants, Section 54; 20 American Jurisprudence 2d 600,

601, Covenants, Section 30; 15 Ohio Jurisprudence 2d 19-22, Covenants, Sections 16-19.'" Citing *Peto v. Korach* (1969), 17 Ohio App.2d 20, 23.

{¶ 20} Applying these factors to the present case, it is undisputed that the intent of the original grantor and grantee, the Pretes and the Pizzedazes, was that the covenant runs with the land. The language of the deed itself states that the restriction runs with the land.

{¶ 21} In determining whether the restriction "affects" or "touches and concerns" the land in question, we must determine if the property was made more useful or valuable by the covenant. *LuMac Dev. Corp,* supra at 563. In *LuMac*, we determined that a restriction precluding the establishment of a "trailer court" or placement of a "house trailer" on the property at issue was a burden on the conveyed property (the "servient estate") in order to benefit the property from which it was taken (the "dominant estate"). The restriction therefore touched and concerned the land by increasing the value of the unrestricted property and decreasing the value of the restricted property by limiting its use. Id. Similarly, in *Glenmoor Properties Ltd. Partnership v. Joseph*, 5th Dist. No. 2003CA00126, 2003-Ohio-6152, a property owner purchased land that included a covenant requiring marketing and promotional fees to be paid to the developer upon the construction of a home. The court held that the covenant touched and concerned the land because the fees related directly to the house or related improvements built on the lot and, by promoting the development, ultimately made the property more valuable. Id. at ¶ 13.

{¶ 22} In the present case, the restriction requiring that any home to be built on Lot 2 must be built by Prete Builders benefits Prete Builders and the Pretes. We cannot say, however, that it is undisputed that the Pretes' construction of a home on the property would ultimately make the property more valuable than if a home were constructed by another contractor. The lower court determined that the covenant touched and concerned the land because it made the property more valuable to those who value Prete Builders' construction services and less valuable to those who do not value those services. However, in our view, it is the property itself that must benefit from the covenant, not an individual. The covenant, therefore, was personal and did not run with the land.

{¶ 23} Our inquiry, however, does not end here, for a personal covenant can still be enforceable against a subsequent purchaser. In *Glenmoor Properties Ltd. Partnership*, supra, at ¶ 14, the court recognized that " * * * a personal covenant or agreement will be held valid and binding in equity on a purchaser taking the estate with notice. *Counts v. Baltimore & Ohio R.R. Co.* (1961), 177 N.E.2d 606, 609. The covenant is not binding on a successor merely because he stands as an assignee of the party who made the agreement, but because he has taken the estate with notice of a valid agreement concerning it, which he cannot equitably refuse to perform. Id."

{¶ 24} In the present case, it is undisputed that appellant was well aware of the covenant that required her to hire Prete Builders to build a house on Lot 2 prior to her purchase of Lot 2. Indeed, she had detailed discussions regarding the construction of a

home with Paul Prete prior to her purchase of Lot 2. We therefore cannot say that the lower court erred in holding the covenant enforceable against appellant and the seventh assignment of error is not well-taken.

{¶ 25} In her second assignment of error, appellant asserts that the lower court erred in determining that there was no genuine issue of material fact and that appellees were entitled to judgment on appellant's claim that the restriction was void as a violation of the rule against perpetuities.

{¶ 26} In Ohio, the rule against perpetuities is codified in R.C. 2131.08, which reads in relevant part:

{¶ 27} "(A) * * * no interest in real or personal property shall be good unless it must vest, if at all, not later than twenty-one years after a life or lives in being at the creation of the interest."

{¶ 28} As we stated in *Schafer v. Deszcz* (1997), 120 Ohio App.3d 410, 414, "[t]he fundamental purpose of the rule against perpetuities was, and is, to prevent restraints on the alienation of property that might be perpetual or unreasonably long, while, in recognition of a property owner's rights to the use and disposition of his property, allowing restraints limited within the strict period of the rule. *Quarto Mining Co. v. Litman* (1975), 42 Ohio St.2d 73, 76-77 * * *." The rule, however, by its very terms, does not apply to property rights that have already vested. *Cleveland Trust Co. v. McQuade* (1957), 106 Ohio App. 237, 256. Similarly, the rule does not apply to

contractual rights. *Zyndorf/Serchuk, Inc. v. Sparagowski* (May 21, 1999), 6th Dist. No. L-98-1300.

{¶ 29} In the present case, the deed restriction grants Prete Builders the present and future right to build a house on Lot 2. That is, Prete Builders' right to build a house on Lot 2 has already vested. Accordingly, whether the deed restriction is viewed as conveying a property right or a contractual right, the rule against perpetuities has not been violated, the trial court did not err in granting appellees summary judgment on this claim, and the second assignment of error is not well-taken.

{¶ 30} In her third assignment of error, appellant contends that the lower court erred in granting appellees summary judgment on her claim that the deed restriction violated her right to the free and unrestricted use of her land.

{¶ 31} Appellant has not cited any authority which recognizes a cause of action for a violation of a person's right to the free and unrestricted use of her land. Rather, the case law cited addresses situations in which an ambiguity exists in a deed restriction. Where an ambiguity exists, the deed must be construed against limitations or restrictions on the free use of the property. *Driscoll v. Austintown Assoc.* (1975), 42 Ohio St.2d 263, 277. In the court below, appellant asserted that an ambiguity existed because the restriction used the term "home" and that any structure built by Prete Builders would have to be a "house." The lower court rejected this argument, finding that the words "home" and

"house" were synonymous in that they both referred to a "place of abode that serves as a dwelling."

{¶ 32} Appellant now asserts that that the restriction should fail as there was no privity of contract or privity of estate between appellant and Prete Builders. We find the issue of privity to be irrelevant. As the court in *Allen v. Pine Top Estates* (Dec. 18, 1985), 9th Dist. Nos. 12070 & 12164, noted:

{¶ 33} "'While it has been said that Ohio law does not favor restrictions on the use of property and that there is a policy favoring the free and unrestricted use of land, it is a well-established principle that the owner of real estate may place restrictions or limitations upon the future use of the property about to be conveyed, which will become a binding obligation upon purchasers, provided that such restrictions are not illegal, or of a character inimical to public policy, or in restraint of trade or the like, * * *.'" Quoting 10 Ohio Jurisprudence 3d (1979) 242, Buildings Etc., Section 57.

{¶ 34} The record contains undisputed evidence that appellant contacted Paul Prete prior to purchasing Lot 2 to discuss Prete Builders building a house and the issue of the restrictive covenant. Prete told her that either Prete Builders would have to build the house pursuant to the restrictive covenant or he would need to be adequately compensated if appellant chose to use another builder. Thereafter, appellant bought Lot 2. Nothing in the covenant or these facts indicates that appellant's *use* of the land is limited in any way. She bought the property with the full knowledge of the restriction.

She can still build the house of her dreams on it. She simply must abide by the restriction to which she agreed when she purchased the lot. The trial court did not err in granting appellees summary judgment on this claim and the third assignment of error is not well-taken.

{¶ 35} In her fourth assignment of error, appellant asserts that the lower court erred in granting appellees summary judgment on her claim that the deed restriction violated public policy.

{¶ 36} The Supreme Court of Ohio has explained the term "public policy" as follows:

{¶ 37} "'That principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good.' It is a relative term, and must be interpreted in the light of the circumstances surrounding a particular contract or transaction; generally speaking, whatever is not forbidden by statute, nor contrary to judicial decision, nor against the public health, morals, safety, or welfare, or the like, is not against public policy. It attaches to the right to contract, and the public good requires that such right be protected and upheld when no principle above enumerated is violated." *Dixon v. Van Sweringen Co.* (1929), 121 Ohio St. 56, 62-63.

{¶ 38} In support of her summary judgment motion, and in opposition to the summary judgment motion of appellees, appellant presented no evidence in the court below that the deed restriction requiring her to hire Prete Builders to build a house on Lot

2, was forbidden by statute, contrary to a judicial decision, or against the public health, morals, safety, welfare or the like. Indeed, she failed to establish how the public was affected at all by the deed restriction. The trial court therefore did not err in granting appellees summary judgment on this claim and the fourth assignment of error is not well-taken.

{¶ 39} In her fifth assignment of error, appellant asserts that the lower court erred in granting appellees summary judgment on her claim that by placing the restriction into the deed, appellees tortuously interfered with a future business relationship.

{¶ 40} "The tort of interference with a business relationship occurs when a person, without a privilege to do so, induces or otherwise purposely causes a third person not to enter into or continue a business relationship with another. *A & B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Contr. Trades Council* (1995), 73 Ohio St.3d 1, 14 * * *. The elements of tortuous interference with a business relationship are (1) a business relationship, (2) the wrongdoer's knowledge thereof, (3) an intentional interference causing a breach or termination of the relationship, and (4) damages resulting therefrom. *Chandler & Assoc., Inc. v. America's Healthcare Alliance, Inc.* (1997), 125 Ohio App.3d 572, 583 * * *." *Geo-Pro Serv., Inc. v. Solar Testing Laboratories, Inc.* (2001), 145 Ohio App.3d 514, 525. "The main distinction between tortuous interference with a contractual relationship and tortuous interference with a business relationship is that interference with a business relationship includes intentional interference with prospective contractual

relations, not yet reduced to a contract." *Diamond Wine & Spirits, Inc. v. Dayton Heidelberg Distrib. Co., Inc.*, 148 Ohio App.3d 596, 2002-Ohio-3932, ¶ 23.

{¶ 41} The record reveals no evidence that appellant had a business relationship with anyone or a prospective contractual relationship with anyone with which appellees intentionally interfered. Specifically, appellant never identified anyone with whom she had a business relationship or prospective contractual relationship that was terminated because of appellees' alleged intentional interference. Appellant bought Lot 2 with full knowledge of the restriction. She cannot now complain of the effects of that restriction. Accordingly, the lower court did not err in granting appellees summary judgment on this claim and the fifth assignment of error is not well-taken.

{¶ 42} In her sixth assignment of error, appellant asserts that the lower court erred in granting appellees summary judgment on her claim that appellees violated the Consumer Sales Practices Act ("CSPA") by placing an employment contract into the deed.

{¶ 43} The CSPA provides that no supplier shall commit an unfair, deceptive or unconscionable act or practice in connection with a consumer transaction. R.C. 1345.02 and 1345.03. A supplier is "a seller, lessor, assignor, franchisor, or other person engaged in the business of effecting or soliciting consumer transactions." R.C. 1345.01(C). A consumer is "a person who engages in a consumer transaction with a supplier." R.C. 1345.01(D). A consumer transaction is defined as "a sale, lease, assignment, award by

chance, or other transfer of an item of goods, a service, franchise, or an intangible, to an individual for purposes that are primarily personal, family, or household, or solicitation to supply any of these things." R.C. 1345.01(A). It is well-established that the CSPA does not apply to "pure" real estate transactions. *Brown v. Liberty Clubs, Inc.* (1989), 45 Ohio St.3d 191, 193. The CSPA is, however, "applicable to the personal property or services portion of a mixed transaction involving both the transfer of personal property or services and the transfer of real property." Id. at the syllabus. In this regard, Ohio Adm.Code 109:4-3-01(C)(2) provides that "[s]ervices include, but are in no way limited to, the construction of a single-family dwelling unit by a supplier on the real property of a consumer."

{¶ 44} Upon review, we cannot find that appellant and appellees were involved in a consumer transaction as contemplated by the CSPA. First, appellant did not engage in a consumer transaction with a supplier. Rather, she bought Lot 2 in a pure real estate transaction from the Pizzedazes. Second, appellant has not entered into a contract for the construction of a home with the Pretes and/or Prete Builders. She still may have another builder build her home and simply compensate the Pretes, or she may sell Lot 2. Accordingly, the trial court did not err in granting appellees summary judgment on appellant's CSPA claim and the sixth assignment of error is not well-taken.

{¶ 45} In her eighth assignment of error, appellant asserts that the lower court erred in granting appellees summary judgment on her claim that appellees slandered her title to Lot 2 by including the restriction in the deed to the property.

{¶ 46} Slander of title "is a tort action which may be '"brought against any one who falsely and maliciously defames the property, either real or personal, of another, and thereby causes him some special pecuniary damage or loss."'" *Green v. Lemarr* (2000), 139 Ohio App.3d 414, 430, quoting *Buehrer v. Provident Mut. Life Ins. Co. of Philadelphia* (1930), 37 Ohio App. 250, 256. To prevail in a slander of title action, "a claimant must prove '(1) there was a publication of a slanderous statement disparaging claimant's title; (2) the statement was false; (3) the statement was made with malice or made with reckless disregard of its falsity; and (4) the statement caused actual or special damages.'" Id. at 430-431, quoting *Colquhoun v. Webber* (Me.1996), 684 A.2d 405, 409.

{¶ 47} Assuming arguendo that the filing of the deed to Lot 2 qualifies as a publication, there is no evidence in the record to support a finding that any statement in the deed was false or that any statement in the deed was made with malice or reckless disregard of its falsity. Accordingly, the lower court did not err in granting appellees summary judgment on appellant's claim of slander of title and the eighth assignment of error is not well-taken.

{¶ 48} Finally, in her ninth assignment of error, appellant contends that the lower court erred in granting appellees summary judgment on her claim that the deed restriction

subjects her to involuntary servitude in violation of the United States Constitution and the Constitution of the state of Ohio.

{¶ 49} The Thirteenth Amendment to the United States Constitution and Section 6, Article I of the Ohio Constitution prohibit involuntary servitude except as punishment for a crime. *State ex rel. Carriger v. Galion* (1990), 53 Ohio St.3d 250, 251. Appellant asserts that because she is forced to hire Prete Builders to build her house on Lot 2, this constitutes involuntary servitude. The record is clear, however, that appellant bought Lot 2 with full knowledge of the deed restriction. If she did not want to hire Prete Builders, she should not have bought the property. There is nothing about this situation that even remotely constitutes involuntary servitude. The lower court did not err in granting appellees summary judgment on this claim and the ninth assignment of error is not well-taken.

{¶ 50} On consideration whereof, the court finds that substantial justice has been done the party complaining and the judgment of the Erie County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of the appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE