[Cite as *Terry v. Kellstone, Inc.*, 2013-Ohio-4419.]

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

Ted Terry	Court of Appeals No. E-12-061
Appellant	Trial Court No. 91 CV 343
v.	
Kellstone, Inc.	**DECISION AND JUDGMENT**
Appellee	Decided: October 4, 2013

* * * * *

D. Jeffery Rengel and Thomas R. Lucas, for appellant.

Shawn W. Maestle, for appellee.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} Appellant, Ted Terry, appeals the judgment of the Erie County Court of Common Pleas, ordering appellee, Kellstone, Inc., to pay damages in the amount of $3,600 for its storage of limestone on appellant's property. We affirm.

A. Facts and Procedural Background

{¶ 2} Appellant is the current owner of four parcels of real estate located on Kelleys Island, Ohio, collectively known as the "buffer zone." The buffer zone occupies roughly 5.82 acres on Kelleys Island, and acts as a buffer between nearby residential lots and an adjoining quarry. The buffer zone properties and the quarry property originally formed a single, larger parcel owned by the Kelleys Island Park Development Company ("KIPDC"). However, at some point, KIPDC's owner, Leonard Weintraub, decided to divide the larger parcel into several smaller parcels. The quarry property was subsequently sold to Kellstone in 1963. The buffer zone properties were transferred to Leonard.

{¶ 3} In 1989, after going through a series of ownership changes, Kellstone was purchased by its current owner, James Palladino. The quarry was shut down at the time of Palladino's purchase. However, the quarry property contained a large stockpile of previously mined limestone "shot rock." The stockpiled limestone encroached on a 2.69 acre parcel within the buffer zone, commonly referred to as "Parcel D." Despite the expense and delay associated with resuming quarry operations, Palladino was persuaded to purchase Kellstone. Palladino believed that the revenue generated by the sale of the stockpiled limestone would provide adequate cash flow during the startup period.

{¶ 4} In February 1991, Leonard, together with his wife, Judith, entered into a purchase agreement with appellant for the sale of the buffer zone properties in exchange for appellant's services valued at $8,000. Before appellant could complete the services,

however, Leonard passed away. Consequently, the title to the properties was not formally transferred until August 30, 1991.

{¶ 5} Shortly after Palladino purchased Kellstone, workers began to remove the stockpiled limestone for further processing, starting on the eastern edge and working west. During the summer of 1991, as the workers reached the western edge of the pile, they began to approach the portion of stone that was stored on Parcel D. Unaware of the pile's encroachment on appellant's property, the workers continued removing the stone.

{¶ 6} On July 9, 1991, after discovering Kellstone's trespass onto his property, appellant, along with Mrs. Weintraub, filed a complaint with the Erie County Court of Common Pleas, seeking a temporary restraining order, permanent injunction, and monetary damages. The next day, the court granted appellant's request for a temporary restraining order. However, the restraining order was dissolved following a hearing on the matter. Kellstone then proceeded to remove the remainder of the stone from Parcel D.

{¶ 7} On July 23, 1993, appellant and Mrs. Weintraub amended their complaint and removed the requests for equitable relief, leaving only a request for monetary damages for trespass, nuisance, conversion, and improper quarrying under R.C. 713.13. Following discovery and motion practice, a bench trial was held to determine liability on July 10, 1995. Nine years later, the trial court issued its judgment entry, stating: "Verdict for the Plaintiffs against the Defendant for storage of the subject stone on Plaintiffs'

property and any damages to the Plaintiffs' property proximately resulting from the removal of the subject stone by the Defendant."

{¶ 8} Another eight years passed before the trial court resumed trial on the issue of damages. During that time, Mrs. Weintraub passed away, and was subsequently dismissed from the action. At the damages hearing, appellant presented several witnesses in support of his claim that Kellstone caused significant damage to Parcel D during the process of removing the limestone stockpile. Specifically, appellant alleged that Kellstone removed topsoil, damaged trees located on the property, and altered the grade of the land. As a result, appellant claimed that he was entitled to recover the cost of restoring Parcel D to its original condition prior to Kellstone's trespass. Despite purchasing the entire buffer zone for $8,000, appellant argued that his damages were in excess of $1.5 million.

{¶ 9} Kellstone maintained that it did not damage Parcel D. Instead, Kellstone argued that the topsoil was removed from appellant's property prior to Kellstone's ownership of the quarry. Because the property consisted of solid bedrock, Kellstone contended that its removal of the stone with a front-end loader could not have altered the grade of the land. Further, Kellstone argued that the stockpile did not contain any trees. While Kellstone acknowledged that small brush was destroyed during the removal process, it vehemently denied destroying any trees and argued that it would be impossible for trees to grow on Parcel D due to its rocky surface.

{¶ 10} At the conclusion of trial, the court found that appellant was entitled to damages in the amount of $3,600 for Kellstone's trespass onto Parcel D during the 12-month period between when appellant purchased the property and when the stone was finally removed. However, the court denied appellant's request for damages due to grade change, topsoil loss, and tree destruction. Appellant's timely appeal followed.

B. Assignments of Error

{¶ 11} On appeal, appellant assigns the following errors for our review:

I. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN FINDING THAT THE SUBJECT STONE LOCATED ON APPELLANT'S REAL PROPERTY, KNOWN AS THE BUFFER ZONE, WAS OWNED BY APPELLEE.

II. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN FAILING TO AWARD ANY DAMAGES FOR RESTORATION AND LOSS OF USE OF APPELLANT'S PROPERTY UPON APPELLEE'S REMOVAL OF THE SUBJECT STONE.

III. IN THE ALTERNATIVE, SHOULD THIS COURT FIND THAT THE TRIAL COURT DID NOT ERR IN FINDING THAT APPELLEE OWNED THE SUBJECT STONE ON APPELLANT'S PROPERTY, THEN THE TRIAL COURT'S FINDING OF TWELVE (12) MONTHS STORAGE FROM 1991 TO 1992 AT $300 PER MONTH

WAS AN ARBITRARY, CAPRICIOUS AND UNCONSCIONABLE ABUSE OF DISCRETION.

II. Standard of Review

{¶ 12} In appellant's first assignment of error, he argues that the trial court abused its discretion in arriving at its decisions following the 1995 bench trial on liability. In his remaining assignments of error, he argues that the trial court's decision following the bench trial on damages constitutes an abuse of discretion. However, as Kellstone appropriately stated in its brief, "[t]his Court's review of both judgments issued following bench trials is performed subject to the manifest weight of the evidence standard of review." *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517; *Orchard Villa v. Suchomma*, 6th Dist. Lucas No. L-12-1213, 2013-Ohio-3186, ¶ 10; *see also Tillimon v. Hasan*, 6th Dist. Lucas No. L-01-1455, 2002 WL 31002810 (Sept. 6, 2002) (indicating that a manifest weight standard of review is applicable to judgments following a bench trial).

{¶ 13} The standard of review for manifest weight is the same in a civil case as in a criminal case. *Volkman* at ¶ 17. Under the manifest weight standard of review, we are "guided by a presumption" that the fact-finder's findings are correct. *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 79-80, 461 N.E.2d 1273 (1984). When reviewing a manifest weight claim,

> The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines

> whether in resolving conflicts in the evidence, the [trier of fact] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 220, quoting *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997).

III. Analysis

A. Ownership of the Limestone

{¶ 14} In his first assignment of error, appellant argues that the trial court erred during the liability phase of trial when it determined that the limestone stockpile was owned by Kellstone. In response, Kellstone argues that we must affirm the trial court since appellant has failed to provide a transcript of the liability proceedings for our review. Appellant contends that, although the transcripts are unavailable, the record demonstrates that the trial court's judgment should be reversed. In support, appellant cites deposition evidence, exhibits, and deeds purportedly establishing the chain of title of the parcels at issue, which were allegedly admitted during the liability phase.

{¶ 15} We initially note that appellant "bears the burden of showing error by reference to matters in the record." *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199, 400 N.E.2d 384 (1980). App.R. 9(B)(4) provides that "[i]f the appellant intends to present an assignment of error on appeal that a finding or conclusion is unsupported by

the evidence or is contrary to the weight of the evidence, the appellant shall include in the record a transcript of proceedings that includes *all* evidence relevant to the findings or conclusion." (Emphasis added.) "Or, if no record was made from which a transcript can be made, either the appellant may prepare and file a statement of the evidence or the parties may prepare and file an agreed statement of the record." *PNC Mtge. v. Guenther*, 2d Dist. Montgomery No. 25385, 2013-Ohio-3044, ¶ 9, citing App.R. 9(C) and (D); *Ott v. Reynolds*, 2d Dist. Montgomery No. 20076, 2004-Ohio-2733, ¶ 3.

{¶ 16} Here, appellant has failed to provide a transcript or other record of the liability phase of trial as required by App.R. 9. Consequently, we cannot be certain whether the deposition evidence and demonstrative evidence cited by appellant was or was not admitted during the liability phase. Further, without a complete record, we are unable to ascertain the basis for the trial court's judgment to determine if it was in error. Therefore, because appellant has provided nothing to contradict "the presumption of regularity accorded all judicial proceedings," we cannot conclude that the trial court's judgment with respect to the ownership of the limestone was against the manifest weight of the evidence. *State v. Sweet*, 72 Ohio St.3d 375, 376, 650 N.E.2d 450 (1995); *see also Shamblin v. Leal*, 2d Dist. Montgomery No. 24742, 2012-Ohio-2667, ¶ 11 ("Without a transcript of the evidence [presented at the bench trial], we are unable to overcome the presumption in regularity in the proceedings in the trial court."); *Collins v. Collins*, 3d Dist. Marion No. 9-11-32, 2012-Ohio-749, ¶ 29 ("[W]ithout a complete record, we must

presume that the findings of the fact-finder are correct, as the fact-finder based the decision upon hearing all of the testimony at the time of the hearing.").

{¶ 17} Accordingly, appellant's first assignment of error is not well-taken.

B. Trial Court's Award of Damages

{¶ 18} In appellant's second and third assignments of error, he argues that the trial court erroneously calculated the damages associated with Kellstone's trespass onto Parcel D and its subsequent removal of the limestone.

{¶ 19} Appellant's second assignment of error challenges the trial court's failure to award damages for the restoration of Parcel D and for appellant's loss of use of the property. With respect to appellant's alleged restoration damages, the trial court stated the following:

> The Plaintiff must prove the existence of his damages to a reasonable degree of certainty. This burden requires proof that the damage exists and is measurable. With regard to claims made by the Plaintiff for grade change, topsoil loss and tree destruction, the Court finds that the Plaintiff has failed to prove the existence of damages by a greater weight of the evidence. In the Court's eye, the amount and degree of these damages have been greatly exaggerated and manufactured.

{¶ 20} Appellant argues that the trial court erroneously determined that Kellstone's actions did not damage Parcel D. Kellstone responds by noting several

examples of testimony offered during trial that supports the trial court's determination on damages.

{¶ 21} As to appellant's claim that Kellstone's trespass resulted in a change in the grade of the land, appellant admitted on cross-examination that he had no evidence of what the property looked like prior to the placement of the limestone stockpile. Without such evidence, the trial court was unable to conclude whether Kellstone's removal of the limestone altered the grade of the land from its original condition. Further, there was ample testimony from Kellstone's witnesses that the removal process could not have altered the grade of the land. Indeed, Palladino testified that the use of a front-end loader to remove limestone off solid bedrock was akin to removing a pile of material from a concrete parking lot. He stated, "[y]ou just – you go into the pile and pick up the loose stone." Palladino's testimony was echoed by the operator who removed the stone, Mike Dwight. Dwight stated that he used a front-end loader to remove the stone from Parcel D, which consisted of "solid rock" that could not be altered without blasting it out.

{¶ 22} Concerning appellant's claim that Kellstone removed topsoil from Parcel D, both Palladino and Dwight testified that there was no topsoil in the limestone stockpile. Dwight testified that Kellstone would not have been able to use the stockpile if it contained topsoil, because doing so would "plug the plant up." Palladino stated that the presence of topsoil in the processed stone would render it unmarketable because state law requires the material to be pure and uncontaminated.

{¶ 23} Next, appellant argues that the trial court erred in failing to award him damages under R.C. 901.51 for Kellstone's alleged destruction of trees on Parcel D. However, Theodore Klonaris, a neighbor who owns land overlooking Parcel D and Kellstone's quarry, testified that there were no trees growing on the limestone. He further examined numerous exhibits on cross-examination and called into question whether the trees pictured in the exhibits were actually growing on the land in question. In addition, Palladino called appellant's statement concerning Kellstone's destruction of mature trees a "blatant lie," indicating that "[t]here wasn't a tree on it. It was flat bedrock, * * * limestone rock, not a tree at all."[1]

{¶ 24} In light of the foregoing, we conclude that the trial court's decision with respect to restoration damages was not against the manifest weight of the evidence.

{¶ 25} As to appellant's argument that the trial court erred by not awarding damages for lost use of the property, we again find that the record supports the trial court's decision. According to its judgment entry, the trial court relied on four factors in arriving at its decision:

1. the presence of the stockpile on Parcel D prior to Plaintiff's purchase, and

2. the likelihood of development of Parcel D given its location and proximity to the quarry, and

[1] It is also worth noting that appellant's amended complaint makes no mention of trees or vegetation, nor does it allege a claim for destruction of vegetation pursuant to R.C. 901.51.

3. the original purchase price of all parcels by Mr. Terry in 1991, including in part, Parcel D, and

4. the original stated purpose of Parcel D as a "buffer zone," and the fact that its usefulness as a buffer has not been adversely affected by the trespass.

{¶ 26} As to the first factor, appellant does not dispute that the limestone stockpile was on Parcel D long before he purchased the property. Under the second factor, the evidence demonstrates that Parcel D neighbored the land on which the quarry was located, making development unlikely. Regarding the third factor, the sale price of all four parcels constituting the buffer zone was only $8,000. Finally, as to the fourth factor, the original purpose for the buffer zone (i.e. to act as a buffer between the quarry operations and the nearby residential property) was not adversely affected by the removal of the limestone stockpile. Furthermore, while appellant testified that he considered developing Parcel D, he also admitted that he was motivated to purchase the property by the idea that the limestone stockpile that was stored on it would become his property if he purchased the land. Thus, the trial court could have concluded that his claim for lost use was really just a disguised attempt to recoup some of the money he expected to receive through the sale of the limestone, which was thwarted by the court's determination that Kellstone was the actual owner of the limestone. Therefore, we conclude that the trial court's determination on damages for appellant's lost use was not against the manifest weight of the evidence.

{¶ 27} Having reviewed the record in its entirety, we conclude that the trial court, acting as the finder-of-fact in the underlying bench trial, did not clearly lose its way in determining that no damages should be awarded for physical destruction of the property or for loss of use of the property. Moreover, we do not believe appellant has presented the "exceptional case" in which the evidence weighs heavily against the trial court's judgment.

{¶ 28} Accordingly, appellant's second assignment of error is not well-taken.

{¶ 29} In his third assignment of error, appellant argues that the trial court erred in only awarding storage costs for a one-year period from 1991 to 1992. Notwithstanding the fact that Parcel D was not transferred to appellant until August 30, 1991, he argues that he "held an equitable interest in the property prior to 1991." As an equitable owner, appellant contends that he was entitled to receive compensation for storage costs dating back to the time the stone was initially placed on the property. Additionally, appellant asserts that the right to recover storage costs for previous years was assigned to him via the purchase agreement and the deed. We disagree.

{¶ 30} As to appellant's argument concerning equitable ownership of Parcel D, it is well-established that a claim for trespass is conditioned upon the plaintiff having actual or constructive possession at the time of the trespass. *See Van Buskirk v. Dunlap*, 2 Ohio Dec.Rep. 233 (C.P.1859), paragraph one of the syllabus ("To maintain a civil action in the form of an action of trespass at law, the plaintiff must have an actual or a constructive possession at the time of the trespass. The gist of the action is injury to the possession.").

Moreover, Ohio law is clear that "[t]he holder of an executory contract to purchase has an equitable interest in the property, which does not constitute constructive possession for purposes of trespass, unless the contract affords a right to immediate possession." *Kay Homes, Inc. v. South*, 11th Dist. Lake No. 93-L-182, 1994 WL 660600, *2 (Nov. 18, 1994), citing 75 American Jurisprudence 2d, Trespass, Section 27, at 28 (1974).

{¶ 31} In the case sub judice, the purchase agreement states, in pertinent part:

> Title shall transfer to the Buyer by the recording of the deed on or about April 15, 1991, unless such date is changed by the agreement of Buyer or Seller. Seller shall deliver possession of the property to Purchasers within twenty-four (24) hours after transfer of title.

{¶ 32} Under the express terms of the purchase agreement, appellant was not entitled to possession of the property until *after* the recording of the deed, which occurred on August 30, 1991. Consequently, appellant was not entitled to pre-1991 storage costs as an equitable owner of Parcel D.

{¶ 33} Alternatively, appellant argues that he is entitled to pre-1991 storage costs as a transferee of Judith's "accrued interest in the stone storage." Essentially, appellant contends that the purchase agreement and the deed demonstrate Judith's intent to assign her rights to the storage costs. In support, he cites the following language from the purchase agreement: "Upon signature, this Agreement shall become binding upon and [inure] to the benefit of Purchasers and Seller and their respective heirs, executors, administrators and assigns." Additionally, appellant relies upon language from the deed,

which grants Parcel D to appellant, "To have and to hold * * *, with the appurtenances thereunto belonging." Having reviewed the cited language in context, we find that appellant was not an assignee of Judith's interest in the pre-1991 storage costs.

{¶ 34} As an initial matter, we note that the subject matter of the purchase agreement was limited to the transfer of ownership of the buffer zone properties. As such, it makes no mention of any potential tort claims attributable to the storage of the limestone on Parcel D, nor does it contain an assignment of such claims. Thus, appellant's reliance on the purchase agreement is misplaced. In addition, the word "appurtenances" used in the deed does not support appellant's position. An appurtenance is defined as "[s]omething that belongs or is attached to something else." *Black's Law Dictionary* 118 (9th Ed.2009). In this case, the limestone stockpile was not affixed to the land. On the contrary, the record clearly reveals that the limestone was previously mined from the adjoining quarry property and stored, in part, on Parcel D. Thus, it was not an appurtenance to Parcel D.

{¶ 35} In his brief, appellant also contends that the award of $300 per month was based on the storage value as of 1992 and should have been adjusted upward to reflect present value. However, having reviewed the record in its entirety, we find that appellant's own expert testified that the storage value was $300 per month. The testimony does not indicate that the value was determined using 1992 dollars.

{¶ 36} In light of the foregoing, we cannot say that the trial court's determination of damages for storage of the stone was against the manifest weight of the evidence. Accordingly, appellant's third assignment of error is not well-taken.

IV. Conclusion

{¶ 37} For the foregoing reasons, the judgment of the Erie County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this 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, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE