[Cite as *Sunshine Diversified Invests., III, L.L.C. v. Chuck*, 2009-Ohio-4226.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92464

SUNSHINE DIVERSIFIED INVESTMENTS, III, LLC

PLAINTIFF-APPELLANT

vs.

JORETHIA L. CHUCK, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-651232

BEFORE: Dyke, J., Gallagher, P.J., and Sweeney, J.

RELEASED: August 20, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

ANN DYKE, J.:

{¶ 1} Plaintiff Sunshine Diversified Investments, III, LLC ("Sunshine Diversified") appeals from the order of the trial court that denied its motion for a permanent injunction. For the reasons set forth below, we reverse and remand for further proceedings consistent with this opinion.

{¶ 2} On February 19, 2008, Sunshine Diversified filed a complaint for injunctive relief against defendant Jorethia L. Chuck ("Chuck") and various John Doe defendants, to bar them from interfering with alleged prescriptive easements and/or easements implied by necessity. In relevant part, Sunshine Diversified asserted that it purchased property located at 2155 Superior Avenue in 2006, and Chuck purchased the adjoining parcel located at 2125 Superior Avenue in 2007. At the time of its purchase, Sunshine Diversified was informed that since 1983, the successive owners and tenants of 2155 Superior Avenue have openly and continuously used the only driveway from Superior to the parcels and that the driveway is on Chuck's property. Sunshine Diversified further asserted that since 1983, the successive owners and tenants of 2155 Superior Avenue have parked vehicles on, improved, and maintained 12 parking spots on the westerly side of the building, thus encroaching upon Chuck's property by two to three feet at the westerly boundary. Sunshine Diversified further asserted that Chuck now demands compensation for Sunshine Diversified's use of the driveway and parking spots and threatens to forcibly remove vehicles using the parking spots.

{¶ 3} On June 19, 2008, Sunshine Diversified filed an amended complaint that included an additional claim against Chuck for intentional interference with a business relationship. Within this pleading, Sunshine Diversified alleged that Chuck harassed Phoenix Coffee, causing the tenant to terminate its lease.

{¶ 4} Chuck denied liability and asserted a counterclaim for trespass, and third- party complaints against M & L Leasing Co., Michael J. Morris, and Lionel Meister for breach of warranty deed. She later set forth an additional counterclaim that alleged that Sunshine Diversified interfered with her business relationship with Phoenix Coffee, whereby Phoenix Coffee agreed to pay her $600 per month for use of the disputed area for parking, ingress, and egress.

{¶ 5} The trial court issued a temporary injunction barring Chuck from interfering with Sunshine Diversified's use of the disputed areas. Sunshine Diversified subsequently filed a "Bench Brief in Support of Petition for Preliminary and/or Permanent injunction." It also filed the affidavit of Michael Morris and the deposition of Ann Hawkins "In Support of Petition for Preliminary and/or Permanent Injunction." Morris, the former owner and manager of 2125 Superior Avenue, averred that he was aware that from 1979 to 2007, the owners of 2155 Superior Avenue openly and continuously used the driveway and parking spaces along the westerly side of the building. Ann Hawkins, attorney for the former owner of 2155 Superior Avenue, testified that although there was no formal agreement regarding the encroaching use of the adjacent parcel, there were also no legal disputes regarding any encroachment.

{¶ 6} On April 8, 2008, the trial court issued an order, which stated:

{¶ 7} "* * * Preliminary injunction hearing is rescheduled to 4/14/08 at 1:00 p.m."

{¶ 8} Thereafter, Sunshine Diversified filed documents "In Support of its Motion for Preliminary Injunction."

{¶ 9} The trial court held an evidentiary hearing on April 14, 2008. As of this date, Chuck had not yet filed an answer. In relevant part, the transcript of the hearing states:

{¶ 10} "THE COURT: * * * We're here today on the plaintiff's motion for petition for the preliminary and/or permanent injunction * * *.

{¶ 11} "And then did you file a brief in opposition to the motion for the preliminary injunction?

{¶ 12} "So I'll treat this one as that * * *.

{¶ 13} "* * *

{¶ 14} "[BY PLAINTIFF'S COUNSEL]: * * * And both the affidavit and the deposition testimony are being offered in support for our motion for preliminary injunction."

{¶ 15} On October 6, 2008, the trial court issued an order in which it denied Sunshine Diversified's motion for a permanent injunction. The court found that there was insufficient evidence to establish that Sunshine Diversified has a prescriptive easement over the parking space area, but that Sunshine Diversified did have an easement by necessity as to the shared driveway and a small

"cross-over" portion for access to a parking area at the rear of the Sunshine Diversified parcel. On November 10, 2008, the trial court additionally ordered that there is no just reason for delay.

{¶ 16} Sunshine Diversified now appeals and assigns one error for our review.

{¶ 17} For its sole assignment of error, Sunshine Diversified contends that the trial court erred in consolidating a hearing on the motion for preliminary injunctive relief with a trial on the merits of the request for permanent injunctive relief, and in failing to afford the parties notice of such consolidation. As an initial matter, we find that there is a final appealable order in this matter. The order denying the permanent injunction is a final order pursuant to R.C. 2505.02. See *Groveport-Madison Local Educ. Ass'n. v. State Employment Relations Bd.* (Nov. 13, 1990), Franklin App. No. 89AP-1252. The order also denotes that there is no just reason for delay, as required pursuant to Civ.R. 54. *Ankrom v. Hageman,* Franklin App. No. 06AP-735, 2007-Ohio-5092.

{¶ 18} As to the trial court's consolidation of the hearing on the preliminary injunction with the trial on the merits, we note that Civ.R. 65(B) sets forth the procedure regarding hearings for preliminary injunctions and states:

{¶ 19} " (1) Notice. No preliminary injunction shall be issued without reasonable notice to the adverse party. The application for preliminary injunction may be included in the complaint or may be made by motion.

{¶ 20} "(2) Consolidation of hearing with trial on merits. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (B)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury."

{¶ 21} In *Ohio Serv. Group, Inc. v. Integrated & Open Sys., L.L.C.,* Franklin App. No. 06AP-433, 2006-Ohio-6738, court read this provision as requiring advance notice of consolidation. The court stated:

{¶ 22} "'[I]t is generally improper to dispose of a case on the merits following a hearing for a preliminary injunction without consolidating that hearing with a trial on the merits or otherwise giving notice to counsel that the merits would be considered.' *Seasonings Etcetera, Inc. v. Nay* (Feb. 23, 1993), Franklin App. No. 92AP-1056, 1993 Ohio App. LEXIS 1182, citing *George P. Ballas Buick-GMC, Inc. v. Taylor Buick, Inc*. (1982), 5 Ohio App.3d 71, 5 Ohio B. 182, 449 N.E.2d 503; *Turoff v. Stefanac* (1984), 16 Ohio App.3d 227, 16 Ohio B. 243, 475 N.E.2d 189. 'Before consolidation, the parties should normally receive clear and unambiguous notice of the court's intent to consolidate the trial and the hearing either before the hearing commences or at a time which will still afford

the parties a full opportunity to present their respective cases.' *Bd. of Edn. Ironton City Schools v. Ohio Dept. of Edn*. (Jun. 29, 1993), Lawrence App. No. CA92-39, 1993 Ohio App. LEXIS 3476, citing *Univ. of Texas v. Camenisch* (1981), 451 U.S. 390, 395, 101 S.Ct. 1830, 68 L.Ed.2d 175; *Warren Plaza v. Giant Eagle, Inc*. (June 15, 1990), Trumbull App. No. 88-T-4122, 1990 Ohio App. LEXIS 2381, jurisdictional motion allowed, 55 Ohio St.3d 705, 562 N.E.2d 898, appeal dismissed (1992), 63 Ohio St.3d 497, 589 N.E.2d 23."

{¶ 23} Accord *City of Bexley v. Duckworth* (Mar. 7, 2000), Franklin App. No. 99AP-414. Thus, "the general rule is that a court must: ***order*** the consolidation of a hearing on the application for a preliminary injunction with a trial on the merits, thus providing the parties with notice that the case is, in fact, being heard on the merits." *Lend-A-Paw Feline Shelter v. Lend-A-Paw Found. of Greater Toledo, Inc.* (Nov. 9, 2001), Lucas App. No. L-01-1052 (italics in original). See, also, *Hardrives Paving & Constr. v. Mecca Twp. Bd. of Trustees* (Sept. 30, 1999), Trumbull App. No. 98-T-0192.

{¶ 24} Moreover, courts have also concluded that it is error to proceed with the trial on the merits prior to the defendant filing an answer. *Board of Edn. Ironton City Sch. v. Ohio Dept. of Edn.* (June 29, 1993), Lawrence App. No. CA92-39.

{¶ 25} In this matter, Sunshine Diversified filed a petition for "Preliminary/Permanent Injunction." Nonetheless, the trial court advised the parties of a hearing on the "preliminary injunction" prior to Chuck's filing of an

answer. On this record, we cannot say that the parties should normally have received "clear and unambiguous notice of the court's intent to consolidate the trial and the hearing either before the hearing commences or at a time which will still afford the parties a full opportunity to present their respective cases."

{¶ 26} As to whether this failure was prejudicial, the "United States Supreme Court has noted that 'the purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held.' *Univ. of Texas v. Camenisch* (1981), 451 U.S. 390, 101 S.Ct. 1830, 1834, 68 L.Ed.2d 175. Given this limited purpose, a preliminary injunction is 'customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits,' and thus a party 'is not required to prove his case in full at a preliminary-injunction hearing.' Id." *City of Bexley v. Duckworth,* supra. Accord *Ohio Serv. Group, Inc. v. Integrated & Open Sys., L.L.C.,* supra.

{¶ 27} Herein, Sunshine Diversified asserts and the record indicates that it did not have the opportunity to conduct discovery prior to the court's hearing. Therefore, and in accordance with the foregoing, we conclude that Sunshine Diversified failed to receive proper unambiguous notice of consolidation and were denied the "full opportunity" to develop its arguments and present its case. Accordingly, the judgment of the trial court that denied Sunshine Diversified's request for a permanent injunction is reversed and the matter is remanded for further proceedings consistent with this opinion.

It is ordered that appellant recover from appellees its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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

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

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ANN DYKE, JUDGE

JAMES J. SWEENEY, J., CONCURS
SEAN C. GALLAGHER, P.J., CONCURS IN JUDGMENT ONLY