[Cite as *Acacia on the Green Condominium Assoc., Inc. v. Gottlieb*, 2009-Ohio-4878.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92145

ACACIA ON THE GREEN CONDOMINIUM ASSOCIATION, INC.

PLAINTIFF-APPELLEE

vs.

HOWARD GOTTLIEB

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-608308

BEFORE: Kilbane, P.J., Stewart, J., and Sweeney, J.

RELEASED: September 17, 2009

JOURNALIZED:
ATTORNEY FOR APPELLANT

William T. Wuliger
The Brownell Building
1340 Sumner Court
Cleveland, Ohio 44115

ATTORNEYS FOR APPELLEE

Cullen J. Cottle
Kaman & Cusimano
50 Public Square, Suite 2000
Cleveland, Ohio 44113

Phillip R. Bautista
Robert J. Valerian
Taft Stettinius & Hollister LLP
200 Public Square, Suite 3500
Cleveland, Ohio 44114-1824

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).

MARY EILEEN KILBANE, P.J.:

{¶ 1} This action arises from a dispute between a condominium association and one of its members. Appellant, Howard Gottlieb ("Gottlieb"), appeals the trial court's decision that granted appellee, Acacia on the Green Condominium Association's motion for summary judgment, issuing a permanent injunction against Gottlieb, dismissing Gottlieb's counterclaims, and ordering Gottlieb to pay the association's attorney fees. After a review of the pertinent law and the record, we affirm and remand.

{¶ 2} The following facts give rise to the instant appeal.

{¶ 3} In November 2001, Gottlieb purchased a condominium unit located on Acacia Park Drive, in Lyndhurst, Ohio. As owner of a condominium unit, Gottlieb is a member of the Acacia on the Green Condominium Association ("the association"). The association has a declaration and bylaws applicable to all condominium owners. The declaration also allows the association to promulgate additional rules and regulations. The association arranges an orientation for new condominium owners that provides them with information on all of the rules governing the condominium units.

{¶ 4} Pursuant to Rule XV, promulgated by the association, unit owners are required to obtain a permit prior to commencing renovations in their unit. The property manager, Joy Saelzler ("Saelzler"), stated this rule was implemented to ensure that contractors were aware of the association rules so as not to disrupt other unit owners, verify all renovations were compliant with

building codes, contractors were registered with the city, and possessed sufficient insurance to cover potential damage to any of the units. (Affidavit of Saelzler.)

{¶ 5} Gottlieb did not believe he was a member of the association, and therefore, believed he was not bound by its declaration, bylaws, or other rules and regulations. (Gottlieb Deposition at 92-93.) Consequently, Gottlieb did not procure the appropriate permit on the numerous occasions he renovated his unit.

{¶ 6} Gottlieb had electrical work done to accommodate cable modular jacks and lighting fixtures. He also had a new thermostat, toilet, kitchen sink, bathroom sink, kitchen countertops, shower heads, bathroom cabinets, and tile flooring installed. (Gottlieb Deposition at 136-142.)

{¶ 7} On March 29, 2005, Kenneth Jevnikar ("Jevnikar"), the association's maintenance supervisor, observed Gottlieb's son removing construction debris from Gottlieb's unit. Gottlieb had a wetbar removed from his unit and one of his rooms converted into a bathroom. Jevnikar reported the incident to the association. (Jevnikar Deposition at 22-29.) That same day, Saelzler sent Gottlieb a letter, informing him that all renovations required a permit. (Jevnikar Deposition at 30; see, also, Plaintiff/Counterclaim-Defendant Exhibits in Support of Motion for Partial Summary Judgment, Exhibit 9.)

{¶ 8} On July 31, 2006, Jevnikar was outside the complex and heard someone operating a saw. Jevnikar asked another employee if they knew

where the noise was coming from and was told that a contractor was running a saw on Gottlieb's balcony. Jevnikar went to the unit to investigate, and a contractor hired by Gottlieb allowed Jevnikar entrance. Jevnikar discovered the contractor was installing new countertops in the unit. Jevnikar informed the contractor that the association did not have a permit on file for the work being performed; however, the contractor showed Jevnikar that the work was practically completed. (Jevnikar Deposition at 17-18). Jevnikar reported the incident, and the association turned the matter over to its attorney. (Saelzler Deposition at 25.)

{¶ 9} After the last incident in July of 2006, the association's legal counsel sent Gottlieb three separate letters, dated August 14, 2006, October 26, 2006, and November 3, 2006. The letters reiterated the provisions of Rule XV, which required a permit, and also sought to perform an inspection of the renovations to ensure that they met local building codes. (Plaintiff/Counterclaim-Defendant Acacia on the Green Condominium Association, Inc.'s Exhibits in Support of Motion for Partial Summary Judgment, Exhibit 10.) The first of the letters imposed a $100 fine for violation of the permit rule, with an additional $10 per day until Gottlieb submitted to an inspection of his unit.

{¶ 10} On November 28, 2006, the association filed suit. The association sought an injunction to prevent Gottlieb from conducting any further renovations without first obtaining the requisite permit, and further, sought

damages for the costs incurred in bringing the action. On April 5, 2007, Gottlieb filed an answer and counterclaims against the association alleging that the association had interfered with the quiet enjoyment of his property, invaded his privacy, and trespassed into his unit.

{¶ 11} On September 14, 2007, the association filed a partial motion for summary judgment with respect to Gottlieb's counterclaims. On October 12, 2007, the association filed a motion for summary judgment with respect to its complaint. On November 20, 2007, Gottlieb filed a brief in opposition to the association's two motions for summary judgment. On November 26, 2007, Gottlieb filed a cross-motion for summary judgment on his counterclaim for trespass. On December 24, 2007, the association filed a brief in opposition to Gottlieb's motion for summary judgment on his counterclaim.

{¶ 12} On March 14, 2008, the trial court granted the association's motion for summary judgment on the complaint and issued an order requiring the association to provide evidence regarding its claim for attorney fees. The trial court also granted the association's motion for summary judgment on Gottlieb's counterclaims and denied Gottlieb's motion for summary judgment on his counterclaim for trespass. On May 5, 2008, the association filed an affidavit in support of attorney fees. On May 13, 2008, Gottlieb filed a brief in opposition to the affidavit filed by the association. On September 5, 2008, the trial court issued an order awarding the association attorney fees in the amount of $18,642.55.

{¶ 13} On November 10, 2008, Gottlieb filed the instant appeal, asserting four assignments of error for our review.

{¶ 14} ASSIGNMENT OF ERROR NUMBER ONE

"THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING THE ASSOCIATION'S MOTION FOR SUMMARY JUDGMENT AND ISSUING A PERMANENT INJUNCTION WHERE THE RULE AT ISSUE WAS UNREASONABLE, UNLAWFUL, AND UNENFORCEABLE."

{¶ 15} Gottlieb argues that the association failed to meet any of the elements entitling it to a permanent injunction. We disagree.

Standard of Review

{¶ 16} This court reviews the trial court's decision on motions for summary judgment de novo. *Beverly Fagerholm v. General Electric Co.,* Cuyahoga App. No. 91986, 2009-Ohio-2390, at ¶18, citing *Village of Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 1996-Ohio-336, 671 N.E.2d 241. The Ohio Supreme Court has previously held that summary judgment is appropriate when there are no genuine issues of material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds can only come to one conclusion, which is adverse to the nonmoving party. *Staph v. Sheldon*, Cuyahoga App. No. 91619, 2009-Ohio-122, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107, 662 N.E.2d 264.

{¶ 17} This first portion of the association's complaint sought an injunction to prevent Gottlieb from further renovating his unit without first obtaining the required permit from the association. A trial court's decision on

whether to issue injunctive relief is reviewed under an abuse of discretion standard. *Danis Clarkco Landfill Co. v. Clark Cty. Solid Waste Mgt. Dist.*, 73 Ohio St.3d 590, 1995-Ohio-301, 653 N.E.2d 646, paragraph three of the syllabus.

Permanent Injunction

{¶ 18} The party seeking a permanent injunction must demonstrate by clear and convincing evidence that they are entitled to relief under applicable statutory law, that an injunction is necessary to prevent irreparable harm, and that no adequate remedy at law exists. *Proctor & Gamble Co. v. Stoneham* (2000), Hamilton App. No. C-990859, 140 Ohio App.3d 260, 268, 747 N.E.2d 268.

Statutory Claim for Relief

{¶ 19} Chapter 5311 of the Ohio Revised Code governs condominium associations. R.C. 5311.19 provides that individuals who purchase condominiums are bound by all covenants and conditions in the deed, as well as the condominium declaration and bylaws. *Grand Bay of Brecksville Condominium v. Markos* (Mar. 25, 1999), Cuyahoga App. No. 73964. Further, the statute also authorizes an association to seek an injunction where a unit owner fails to comply with any of the rules or regulations. *Georgetown Arms Condominium Unit Owners' Assn. v. Super* (1986), 33 Ohio App.3d 132, 133, 514 N.E.2d 899.

{¶ 20} Condominium declarations and bylaws are contracts between

the association and the purchaser. *Nottingdale Homeowners' Assn., Inc. v. Darby* (1987), 33 Ohio St.3d 32, 35-36, 514 N.E.2d 702. "A contract with clear and unambiguous terms leaves no issue of fact and must be interpreted as a matter of law." *Dutch Maid Logistics, Inc. v. Acuity*, Cuyahoga App. Nos. 91932 and 92002, 2009-Ohio-1783, at ¶19.

{¶ 21} R.C. 5311.081(B)(5) allows for the association to control the common elements of the association, which include any features within an individual unit that may have an impact on other members living in the association. Article XI 9.02(B) of the association's declaration specifically requires a unit owner to obtain the prior written approval of the board before making any structural improvements to his unit. Further, Rule XV specifically requires a permit for all renovations.

{¶ 22} "Compliance with condominium declarations and by-laws is required under R.C. 5311.19 where the restrictions are reasonable." *Pineview Court Condominium v. Andrews* (Oct. 28, 1999), Cuyahoga App. No. 74713. This court has previously utilized a three-part test to determine whether a restriction is reasonable. A restriction is reasonable if (1) it is not arbitrary, (2) it is not applied in a discriminatory manner, and (3) the rule was made in good faith for the common welfare of all occupants of the association. Id.

{¶ 23} Gottlieb argues that the regulation requiring board approval in order to make improvements to the interior portion of his unit is arbitrary. In order for the rule to not be considered arbitrary, there must be some rational

relationship between the rule and the safety and enjoyment of the property owners. *Worthinglen Condominium Unit Owners' Assn. v. Brown* (1989), 57 Ohio App.3d 73, 76, 566 N.E.2d 1275.

{¶ 24} A review of the applicable statutes reveal that portions of individual units are common property to the degree that they support, maintain, or are necessary to support other units. R.C. 5311.03(D). The owners of the condominium units at Acacia on the Green share the same plumbing and electrical systems. Renovations in one individual's unit have the ability to affect other units. Further, certain improvements, such as the installation of hardwood floors, can cause greater noise levels to downstairs neighbors. (Jevnikar Deposition at 13.) Rule XV, which requires a permit prior to renovating, is in place to prevent these issues that may arise among unit owners living in such close proximity to one another.

{¶ 25} Although Rule XV does impose a restriction on the use of the property, this court has previously stated,

> **"A purchaser of a condominium unit voluntarily submits himself to the condominium form of property ownership, which requires each owner to give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property. Condominium unit owners comprise a little democratic sub society of necessity more restrictive as it pertains to use of condominium property than may be existent outside the condominium organization."** ***Pineview***, **supra, quoting** ***Hidden Harbour Estates, Inc. v. Norman*** **(Fla. App. 1975), 309 So.2d 180, 182.**

{¶ 26} Finding sufficient evidence to support the proposition that the

regulation was not arbitrary, we must analyze the second prong of the test and determine if the regulation was applied in a discriminatory manner. Gottlieb argues that he is the only individual that has received a fine for violation of Rule XV. Gottlieb has provided no evidence to demonstrate other individuals were permitted to renovate their units without the required permit. The association maintains Gottlieb is the only resident who has violated the rule, and Gottlieb has presented no evidence to suggest otherwise.

{¶ 27} Finally, this court must look to the third prong of the test and evaluate the record to determine whether the regulation was implemented in good faith for the benefit of the entire community. The purpose of the rule was to ensure that contractors who worked on the premises were aware of the rules as to allow other unit owners to enjoy their property, and further, that the contractors maintained sufficient insurance to cover potential damage to surrounding units. (Saelzler Affidavit.) There is no evidence the rule was not made in good faith, as the rule serves the purpose of ensuring both the safety and enjoyment of condominium residents.

Irreparable Harm

{¶ 28} The association has established the first element entitling it to injunctive relief, that it is entitled to relief based on applicable statutory law. The association must also demonstrate that but for the issuance of the injunction it would suffer immediate and irreparable injury. *Stoneham*, supra.

{¶ 29} Gottlieb admitted to having electrical work done inside of his

unit, and he had no knowledge as to whether the contractor carried insurance. (Gottlieb Deposition at 106, 139.) He also stated that he planned to have plumbing work performed in the future. (Gottlieb Deposition at 106.) Gottlieb admitted that the plumbing work has the potential to affect other unit owners in his building. (Gottlieb Deposition at 109.) Gottlieb admitted to numerous instances of unauthorized renovations for which he did not verify if the contractors had obtained the required permit from the city or possessed any type of liability insurance. (Gottlieb Deposition at 106-139.)

{¶ 30} Saelzler testified that it is crucial for unit owners to obtain a permit for renovations and ensure that contractors maintain liability insurance in order to protect all building residents. (Saelzler Deposition at 69.) Poor workmanship in one individual's unit has the ability to affect other unit owners, who share plumbing and electrical lines.

{¶ 31} The association has demonstrated that injunctive relief is necessary to prevent irreparable harm.

No Other Adequate Remedy Exists

{¶ 32} Finally, the association must demonstrate that no other adequate remedy exists. *Stoneham*, supra. Injunctive relief is necessary in this case because it is essential for all unit owners to be protected from the possible dangers of unscreened and uninsured contractors performing renovations in such close proximity to their units. Absent the permit requirement, contractors could work on the premises without first being informed of the association's

rules, thereby disrupting the quiet enjoyment of other unit owners. Further, unlicensed contractors may perform work that harms the common plumbing or electrical lines, or perform work that does not conform to the applicable building codes.

{¶ 33} Finding that the association has sufficiently demonstrated it is entitled to injunctive relief, we will now determine if either of the defenses raised by Gottlieb apply.

Gottlieb's Defenses

<u>Notice</u>

{¶ 34} Gottlieb argues he is not required to comply because he had no notice of the condominium rules or regulations. The association contends that Gottlieb had both actual and constructive notice. Although the law generally disfavors restricting the use of land, that presumption is overcome when there is a general scheme or plan in place for the land and the purchaser has notice of that plan. *Bailey Dev. Corp. v. MacKinnon-Parker, Inc.* (1977), 60 Ohio App.2d 307, 310, 397 N.E.2d 405.

{¶ 35} Gottlieb had both actual and constructive notice. When specifically asked about Rule XV, which mandates a permit for renovations, Gottlieb stated, "I know of the rule, but as far as I'm concerned it doesn't apply to the property I own because the Association is not on the title with me." (Gottlieb Deposition at 26-27.) Further, Article III of the association's bylaws allow for the association to promulgate additional rules and regulations. The

rules and regulations were contained in the resident's handbook, which Gottlieb admits was in his unit when he moved in, and he read portions of the community newsletters that detailed the rules, until he became "disgusted." (Gottlieb Deposition at 28, 31-32.) Gottlieb also signed the association's form confirming he had received an orientation and was aware of all applicable association rules.

{¶ 36} Gottlieb also had constructive notice of the rules when he purchased the property. When an association records its declaration, it becomes public record and a purchaser is deemed to have constructive notice of its contents. *High Point Assn. v. Salvekar* (July 7, 1994), Cuyahoga App. No. 65725. The bylaws contained a specific provision allowing the association to create additional rules and regulations. Gottlieb was on notice that such rules may have existed and had a duty to inquire into their contents.

Waiver

{¶ 37} Gottlieb also argues that even if Rule XV is determined to be valid, the association waived its right to enforce the rule when it allowed Gottlieb's contractor to enter the premises even though he had not obtained a permit. The condominium units are gated, and entrance can only be gained through the gatekeeper at the front end of the property. Saelzler stated that contractors are only admitted through the gatehouse when they have completed a permit. (Saelzler Deposition at 144-145.) However, Article XXI of the association's declaration specifically states that failure to enforce a rule

does not constitute a waiver.

{¶ 38} Finding that the association presented sufficient evidence to demonstrate it had a statutory right to relief, would suffer irreparable harm, and that no other adequate remedy at law existed, we cannot conclude that the trial court abused its discretion in issuing a permanent injunction.

{¶ 39} Gottlieb's first assignment of error is overruled.

{¶ 40} ASSIGNMENT OF ERROR NUMBER TWO

> **"THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ISSUING A DECLARATION AND INJUNCTION WHERE THERE WAS NO EXISTING CONTROVERSY AND THE ASSOCIATION COULD NOT ESTABLISH IRREPARABLE HARM."**

{¶ 41} Gottlieb argues that at the time the case was filed, he had already completed his renovations, therefore, there was no active dispute. Further, Gottlieb contends that the association cannot prove it would suffer irreparable injury. We disagree.

{¶ 42} The Supreme Court has previously stated, "[t]he primary function of an injunction is to re[s]train motion and to enforce inaction * * *. An injunction is ordinarily employed to prevent future injury * * *." *The State ex rel. Great Lakes College, Inc. v. State Med. Bd.* (1972), 29 Ohio St.2d 198, 201-202, 280 N.E.2d 900, quoting, *State ex rel. Selected Properties v. Gottfried* (1955), 163 Ohio St. 469, 475, 127 N.E.2d 371.

{¶ 43} In his deposition, Gottlieb specifically stated that he was not yet finished with renovations, as he plans to have additional plumbing work

performed. (Gottlieb Deposition at 106.) Gottlieb has been warned on numerous occasions he cannot renovate his unit without first informing the association and obtaining the appropriate permit. Gottlieb has never responded to these requests and admits he has never obtained a permit from the association. Gottlieb's history of complete disregard for the association's requirements is highly indicative that the same problem may arise in the future when he continues with plumbing work. Consequently, there is still an existing conflict.

{¶ 44} For the reasons stated in our analysis regarding assignment of error number one, the association has already established it will suffer irreparable harm absent a permanent injunction. Therefore, assignment of error number two is overruled.

{¶ 45} ASSIGNMENT OF ERROR NUMBER THREE

> **"THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN AWARDING ATTORNEY FEES TO THE ASSOCIATION BASED ON A RETROACTIVE APPLICATION OF R.C. 5311.09(A) WHERE THE ASSOCIATION WAS NOT ENTITLED TO JUDGMENT, WITHOUT CONDUCTING AN EVIDENTIARY HEARING, AND FOR SERVICES NOT CONTEMPLATED BY THE ATTORNEY FEE PROVISIONS OF THE AMENDED DECLARATION AND/OR THE STATUTE."**

{¶ 46} Gottlieb contends that the trial court erred by ordering him to pay the association's attorney fees in the amount of $18,642.55. For the following reasons, we disagree.

{¶ 47} The Ohio Supreme Court has adopted the American Rule in regard to awarding attorney fees. *Nottingdale Homeowners' Assn., Inc.* at 33.

The American Rule allows for a prevailing party to recover attorney fees only if provided for by either statute or an enforceable contract. Id. at 33-34.

{¶ 48} The association argues that it is entitled to its attorney fees pursuant to R.C. 5311.19(A), which provides,

> **"All unit owners, their tenants, all persons lawfully in possession and control of any part of a condominium property, and the unit owners association of a condominium property shall comply with all covenants, conditions, and restrictions set forth in a deed to which they are subject or in the declaration, the bylaws, or the rules of the unit owners association, as lawfully amended. Violations of those covenants, conditions, or restrictions shall be grounds for the unit owners association or any unit owner to commence a civil action for damages, injunctive relief, or both, *and an award of court costs and reasonable attorney's fees in both types of action*." (Emphasis added.)**

{¶ 49} The statute was amended to add the provision allowing for the recovery of attorney fees in 2004. Prior to 2004, the statute did not authorize attorney fees. Gottlieb purchased his unit in 2001, prior to the amendment, and therefore, argues that the statute cannot be retroactively applied to him. The association argues that although the statute is being applied retroactively, this is permissible because the amendment to the statute is remedial, and not substantive. The reasoning of both parties is misplaced.

{¶ 50} While Gottlieb purchased his condominium prior to the amendment in 2004, the association's causes of action did not arise until R.C. 5311.19(A) was amended in 2004. Because the statute, as amended, was in effect at the time Gottlieb committed renovations in 2005 and 2006, the application of the statute to this case is not retroactive. Consequently, we do

not have to analyze whether the statute can be applied retroactively.

{¶ 51} Gottlieb also argues that the evidence presented by the association was insufficient to support the amount awarded in attorney fees. We disagree. In the trial court's entry granting the association's motion for summary judgment, the trial court ordered the association to produce evidence in support of the requested amount in fees.

{¶ 52} The association's attorney submitted an affidavit attesting to the charged fees, and attached copies of detailed billing statements for the work performed. Gottlieb argues this was insufficient. However, "where a trial court is empowered to award attorney fees by statute, the amount of such fees is within the sound discretion of the trial court. Unless the amount of fees determined is so high or so low as to shock the conscience, an appellate court will not interfere." *Bittner v. Tri-County Toyota, Inc*. (1991), 58 Ohio St.3d 143, 146, 569 N.E.2d 464. The Ohio Supreme Court has determined that the trial court, having been present through the proceedings, is in the best position to make a determination on attorney fees. Id.

{¶ 53} Gottlieb maintains that the trial court was required to hold an evidentiary hearing in order to discern the amount of attorney fees. However, this court has previously held that the trial court is not required to hold a hearing, unless the attorney fees stem from frivolous conduct. *Pawul v. Pawul* (Aug. 19, 1996), Cuyahoga App. No. 69462, 113 Ohio App.3d 548, 551, 681 N.E.2d 504, citing *Okocha v. Fehrenbacher* (Feb. 15, 1995), Cuyahoga App.

Nos. 65458, 65645, 65656, 67254, 101 Ohio App.3d 309, 655 N.E.2d 744.

{¶ 54} In the instant case, the trial court was present for the duration of the proceedings, which included extensive motion practice, depositions, and almost two years of litigation. Therefore, the trial court was in the best position to determine the reasonableness of the requested fees. The trial court requested supporting documentation, which the association provided. The value of the legal fees awarded here does not shock the conscience considering the work involved and the length of the litigation.

{¶ 55} While Gottlieb argues he should not have to pay the association's attorney fees with respect to the defense of his counterclaims, we find that argument to be without merit. The counterclaims all stemmed from Gottlieb's refusal to obtain a permit in accordance with Rule XV. Gottlieb's counterclaims were structured around Jevnikar entering his unit, which he was authorized to do as a result of Gottlieb renovating without the requisite permit. Therefore, we cannot conclude that the trial court abused its discretion in its award.

{¶ 56} Gottlieb argues that an entry on the itemized billing statements for $200, dated October 19, 2006, was related to another action pending between the parties, and in no way related to the instant case. The association concedes that after a review of the entry it should have been redacted and not submitted to the trial court. As the association concedes that $200 of the attorney fees should not have been awarded, this issue shall be remanded to

the trial court for the journal entry dated September 5, 2008 to be amended accordingly.

{¶ 57} ASSIGNMENT OF ERROR NUMBER FOUR

"THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING THE ASSOCIATION'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO MR. GOTTLIEB'S COUNTERCLAIMS DESPITE A GENUINE DISPUTE OF MATERIAL FACT."

{¶ 58} As previously outlined in assignment of error number one, this court reviews a trial court's decision on a motion for summary judgment de novo. *Fagerholm*, supra. In order for a party to prevail on a motion for summary judgment they must demonstrate that there are no facts that would entitle the nonmoving party to relief. *Staph*, supra.

{¶ 59} Gottlieb argues that the trial court erroneously granted the association's motion for summary judgment on his counterclaims for both invasion of privacy and trespass. Although Gottlieb had filed four counterclaims, we will only address the two Gottlieb specifically raised on appeal. Based on the following reasons, we conclude summary judgment was appropriately granted.

{¶ 60} Gottlieb argues that his privacy was invaded when Jevnikar entered his unit during one of Gottlieb's renovations. Gottlieb bases his claim on the definition of invasion of privacy as stated by the Ohio Supreme Court in *Housh v. Peth* (1956), 165 Ohio St. 35, 133 N.E.2d 340, paragraph two of the syllabus. *Housh* specifically defines invasion of privacy as "the wrongful

intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities." Id. Gottlieb also maintains Jevnikar's actions that day also constituted a trespass. Trespass is defined as the unauthorized entrance on another's property. *Keesecker v. G.M. McKelvey Co.* (1943), 141 Ohio St. 162, 47 N.E.2d 211.

{¶ 61} Both of Gottlieb's counterclaims were properly dismissed because Gottlieb cannot establish that there was any wrongful intrusion. Gottlieb argues that Jevnikar wrongfully entered his unit on July 31, 2006. However, a review of the testimony reveals that Jevnikar went to the unit only after hearing a contractor running a saw on Gottlieb's balcony. (Jevnikar Deposition at 18.) The contractor was inside Gottlieb's unit with Gottlieb's express permission. The contractor then invited Jevnikar inside the unit. (Jevnikar Deposition at 19.) Jevnikar did not enter without the consent of the occupant. Further, Article XVII of the association's declaration provides in pertinent part:

> **"If any Unit Owner (either by his own conduct or by the conduct of any Occupant of his Unit) shall violate any Rules or breach any covenant or provisions contained in this Declaration or in the By-Laws, the Association shall have the right, in addition to the rights hereinafter set forth in this Article and those provided by law, (a) to enter any Unit in which or as to which such violation or breach exists * * *."**

{¶ 62} Jevnikar had reason to believe there was a breach of Rule XV that required a permit prior to performing renovations, when he observed a contractor with a saw on Gottlieb's balcony. When Jevnikar went to Gottlieb's

unit, he was specifically informed at the door by the contractor that renovations were occurring inside the unit. Therefore, Jevnikar had the right to enter the unit to assess if any violations had occurred.

{¶ 63} Finding that Gottlieb could not provide sufficient evidence to establish there was an unauthorized entrance, we conclude summary judgment was properly granted.

{¶ 64} This assignment of error is overruled.

{¶ 65} Judgment affirmed. However, this matter is remanded for correction of the journal entry dated September 5, 2008.

It is ordered that appellee recover from appellant 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 common pleas court 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.

MARY EILEEN KILBANE, PRESIDING JUDGE

MELODY J. STEWART, J., and
JAMES J. SWEENEY, J., CONCUR