[Cite as *Schumacher v. Apple*, 2010-Ohio-5372.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94871

GARY SCHUMACHER, ET AL.

PLAINTIFFS-APPELLEES

vs.

SUSANNAH M. CUSHING APPLE, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-686301

BEFORE: Jones, J., McMonagle, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: November 4, 2010

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LARRY A. JONES, J.:

{¶ 1} Defendants-appellants, Susannah Cushing Apple and Mark Apple ("the Apples"), appeal the trial court's August 17, 2009 order granting plaintiffs' motion for summary judgment and denying appellants' motion for summary judgment. Having reviewed the arguments of the parties and the pertinent law, we hereby affirm the trial court.

STATEMENT OF THE CASE

{¶ 2} On March 2, 2009, plaintiffs-appellees, Gary and Jean Schumacher ("the Schumachers") filed a complaint against the Apples. The Schumachers petitioned the court to protect their right to privacy and the quiet and peaceful enjoyment of their home from unwarranted and unreasonable invasions by the Apples. The dispute involved an alleged driveway easement through the

Schumachers' property that the Apples used.

{¶ 3} The Schumachers argued that the easement that the Apples claimed existed had terminated as a matter of law due to abandonment on June 29, 2001. The Schumachers asked the trial court to declare their rights, status, or other legal relations as owners of their home and grant them declaratory relief that would prevent the Apples and others from trespassing upon their property in the future. The action was brought by the Schumachers under R.C. 2721.03.

{¶ 4} On June 15, 2009, both parties filed their respective motions for summary judgment. A settlement conference was held on July 16, 2009 and on August 17, 2009, and both parties submitted cross-motions for summary judgment. On August 17, 2009, the Schumachers' motion for summary judgment was granted and the Apples' motion for summary judgment was denied. The Apples now appeal the trial court's rulings on the motions for summary judgment.

STATEMENT OF THE FACTS

{¶ 5} There are two adjacent properties involved in this dispute. Originally, when the two parcels were still joined as one single property, one continuous driveway was built through the entire property. This driveway ran from Wilton Road through the property out onto Euclid Heights Boulevard. This single driveway still runs through both properties. The properties are on a corner and are not landlocked. Both properties have access to the street without the easement. The properties are located at the intersection of Euclid Heights

Boulevard and Wilton Road in Cleveland Heights, Ohio. One parcel is now owned by the Schumachers and the other parcel is now owned by the Apples.

{¶ 6} Mr. William D. Crouse was the original owner of both properties. Crouse acquired the land on August 2, 1967. On August 1, 1968, Crouse transferred the land to the Cleveland Trust Company, as Trustee, with Crouse as the primary beneficiary. The land consisted of two separate parcels. The Trustee sold the parcel that fronts on Wilton Road to Morton and Eleanor Slobin on July 23, 1976 ("Slobin Property").

{¶ 7} The Trustee continued ownership of the other remaining parcel that fronts on Euclid Heights Boulevard. Crouse lived alone in a house on this remaining parcel (later sold to the Apples), both before and after the sale of the Slobin property, until he died on May 28, 2000. After Crouse died, this remaining parcel was sold to the Apples on June 28, 2001. On October 18, 2004, the Slobin property was purchased by plaintiff-appellee Gary Schumacher.

ASSIGNMENTS OF ERROR

{¶ 8} Appellants assign two assignments of error on appeal:

{¶ 9} "[1.] The trial court erred in granting appellees' motion for summary judgment and holding that the subject easement was an easement in gross and/or not subject to apportionment.

{¶ 10} "[2.] The trial court erred in denying appellants' cross-motion for summary judgment and holding that the subject easement was an easement in gross and/or not subject to apportionment."

LEGAL ANALYSIS

{¶ 11} Due to the substantial interrelation between appellants's two assignments of error we shall address them together. Civ.R. 56(C) specifically provides that before summary judgment may be granted, it must be determined that: "(1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

{¶ 12} It is well established that the party seeking summary judgment bears the burden of demonstrating that no issues of material fact exist for trial. *Celotex Corp. v. Catrett* (1986), 477 U.S. 317, 330, 106 S.Ct. 2548, 91 L.Ed.2d 265; *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115, 526 N.E.2d 798. Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 1992-Ohio-95, 604 N.E.2d 138.

{¶ 13} In *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107, 662 N.E.2d 264, the Ohio Supreme Court modified and/or clarified the summary judgment standard as applied in *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, 570 N.E.2d 1095. Under *Dresher*, "the moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of

fact or material element of the nonmoving party's claim." Id. at 296. The nonmoving party has a reciprocal burden of specificity and cannot rest on mere allegations or denials in the pleadings. Id. at 293. The nonmoving party must set forth "specific facts" by the means listed in Civ.R. 56(C) showing a genuine issue for trial exists. Id.

{¶ 14} This court reviews the lower court's granting of summary judgment de novo. *Brown v. Scioto Cty. Commrs.* (1993), 87 Ohio App.3d 704, 622 N.E.2d 1153. An appellate court reviewing the grant of summary judgment must follow the standards set forth in Civ.R. 56(C). "The reviewing court evaluates the record * * * in a light most favorable to the nonmoving party * * *. [T]he motion must be overruled if reasonable minds could find for the party opposing the motion." *Saunders v. McFaul* (1990), 71 Ohio App.3d 46, 50, 593 N.E.2d 24; *Link v. Leadworks Corp.* (1992), 79 Ohio App.3d 735, 741, 607 N.E.2d 1140.

{¶ 15} It is with the above standards in mind that we now address the case at bar. Language used in a deed, surrounding circumstances at the time the right is created, and the intention of parties at the time the deed is executed, determine whether an easement set forth in a deed is an appurtenance running with the land. *Siferd v. Stambor* (1966), 5 Ohio App.2d 79, 214 N.E.2d 106.

{¶ 16} In the case at bar, the language of the deed, the intention of the parties and the surrounding circumstances at the time the deed was executed support the trial court's ruling. There were two easements created in a July 23, 1976 document. The first easement was the driveway easement through the

Slobin property. The second easement, which does not apply to this situation, was made expressly over an adjacent servient tenement being burdened (i.e., the property retained by Crouse) and was in favor of an adjacent dominant tenement being benefitted (i.e., the Slobin property).

{¶ 17} On July 23, 1976, an easement was created across the Slobin property when the Wilton Road parcel was sold to the Slobins. The 1976 deed grants legal title to a parcel, the legal description that conforms to the dimensions of the entire Slobin property. The deed grants to the grantees (i.e., the Slobins), their heirs, and assigns, for purposes of driveway and barn access only, a private right of way over a defined area of the property retained by Crouse.

{¶ 18} Additional language in that same document states that the grantor, i.e., the Cleveland Trust Company, Trustee, reserved the right of way unto itself:

> "Grantor reserves, however, unto itself, its successors or assigns, *as an appurtenance to the premises hereinbefore described* and for driveway access only, that private right of way now in existence, which reserved easement is more particularly described as:
>
> "Situated in the City of Cleveland Heights* * *and known as being part of sublot No. 2* * *."

{¶ 19} The only property "herein before described" in the document is the Slobin property itself. Accordingly, the grant did not make this easement expressly appurtenant to the retained property. The language specifically defined the easement as a feature of the Slobin property for the retained benefit of the grantor and not as an interest in real property that accrued to the adjacent property retained by Crouse.

{¶ 20} The Trustee simply retained a right for its primary beneficiary, William Crouse, to have driveway access through the Slobin property out to Wilton Road. This way Crouse could continue to have his old access out to Wilton Road after the property was sold to the Slobins.

{¶ 21} An easement appurtenant is attached to the land that it benefits even if that land is not physically adjacent to the land subject to the easement; however, there must be two estates or distinct tenements: the dominant estate, to which the right belongs, and the servient estate, upon which the obligation rests. *Walbridge v. Carroll*, 172 Ohio App.3d 429, 2007-Ohio-3586, 875 N.E.2d 144.

{¶ 22} An easement in gross is not appurtenant to any estate in land and does not belong to any person by virtue of ownership of estate in other land but is a mere personal interest in or right to use land of another. *Centel Cable Television Co. of Ohio v. Cook* (1991), 58 Ohio St.3d 8, 567 N.E.2d 1010, fn. 2.

{¶ 23} As previously stated, two easements were created in the 1976 document. The express easement created over the *retained property* by the 1976 grant to the Slobins does define two estates, which is why that easement is appurtenant. However, the easement created in that same grant over the Slobin property, which is at issue in this case, does not define two estates, which is why it cannot be an easement appurtenant, and after further review, must be an easement in gross.

{¶ 24} When the retained property was sold to the Apples on June 29, 2001, the Trustee, Cleveland Trust Company, gave up all interest in the property.

There was no express reservation of any rights to an easement. The sale and subsequent vacation of the retained property were unequivocal and decisive acts inconsistent with the continued use and enjoyment of the easement by the Trustee, thereby constituting an abandonment that terminated the easement.

{¶ 25} The sale of the retained property to the Apples occurred after Crouse died. The primary beneficiary of the trust could no longer use the easement. The purpose of allowing Crouse to travel through land he had previously owned was no longer applicable. Any easement over the Slobin property for Crouse's personal benefit terminated when Crouse died.

{¶ 26} In addition, the duration of the easement retained by Cleveland Trust was not expressly stated. Such duration depends upon a reasonable construction of the language to effect the reasonable intention of the parties deduced from the words used, as applied to the surrounding circumstances. *Gateway Park, L.L.C. v. Ferrous Realty Ltd.*, Cuyahoga App. No. 91082, 2008-Ohio-6161. If the Slobins wanted a duration past the time the Trustee owned the property, they could have easily provided so in the document, yet they did not.

{¶ 27} The driveway easement is not reasonably necessary to the beneficial enjoyment of the Euclid Heights Boulevard parcel. The driveway portion that connects to the street on Euclid Heights Boulevard provides an independent means of ingress and egress for the appellees. Moreover, we find that the easement created in 1976 was created as an easement in gross and therefore

terminated in 2001 upon the sale of the retained property to the Apples.

{¶ 28} We find no error on the part of the trial court in its decision to grant summary judgment in favor of the Schumachers and deny summary judgment for the Apples.

{¶ 29} Appellants' first and second assignments of error are overruled.

It is ordered that appellees recover of appellants their 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 Cuyahoga County 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.

LARRY A. JONES, JUDGE

CHRISTINE T. MCMONAGLE, P.J., CONCURS
IN JUDGMENT ONLY;
PATRICIA A. BLACKMON, J., CONCURS