[Cite as *Klocker v. Zeiger*, 2010-Ohio-5605.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94555

THOMAS G. KLOCKER

PLAINTIFF-APPELLANT

vs.

ROBERT ZEIGER, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-637240

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

RELEASED AND JOURNALIZED: November 18, 2010

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PATRICIA ANN BLACKMON, P.J.:

{¶ 1} Appellant Thomas G. Klocker ("Klocker") appeals the trial court's decision granting summary judgment in favor of Robert Zeiger, Thomas Friel, Allan Bobey, and the Clifton Lagoon Trust ("the Trustees"). Klocker assigns the following errors for our review:

> **"I. The trial court failed to declare or determine the key issue set forth by the Court of Appeals in Case No. CA 92044 and its grant of summary judgment as a declaratory**

judgment is both an insufficient analysis of the deeds and issues as well as an inaccurate reading of the Record which is clearly erroneous as a matter of law."

"II. The trial court erred in its summary judgment and in denying Appellant a trial on the facts in dispute because the purported 'Clifton Park Lagoons Trust' has no proven existence or power to enforce an architectural or aesthetic standard over Appellant's dominant easement rights in the 'Strip' property of Appellees servient thereto which is adjacent to and integral to the Appellant's use of his residential property, in that:

(a) Appellant had no notice in his chain of title by his Deed or otherwise through his root Deed or deeds of his predecessors in interest of any puported limitation upon his dominant easement right to install pavers of his choice on his residence property and the access portion of the 'Strip' servient thereto;

(b) The purported Trustees of the Clifton Park Lagoons Trust, by and through their Trusteeship Deed in Fee to the Strip, never had any relevant 'rules or regulations' governing the aesthetics of the Strip, all rules and regulations contained in the Trusteeship Deed expired after 50 years by January 1, 1963, and no relevant rules and regulations that might have been authorized by any Trustees were ever issued or promulgated with notice to any of the adjacent property owners in the position of the appellant in advance of any purported administration or enforcement of such rules and regulations;

(c) The purported trustees utterly failed to provide any proof of authority and acted individually or ultra vires or without any legal authority at all; and/or

(d) The Trustees' alleged oral 'Gentlemen's Agreement' violates the Ohio Statutes of Frauds."

"III. The Court's summary judgment is erroneous as a matter of fact and law and, as applied to Appellant, the Court should have entered its Order that the Trustees who hold the servient estate

do not have the power to restrict or limit the Appellant's dominant estate by architectural or aesthetic rules or regulations governing surface materials or color so long as Appellant's use or intended use conforms with local law and does not interfere with the fee owner's servient estate or the use by similarly situated lot owners."

{¶ 2} Having reviewed the record and pertinent law, we affirm the trial court's decision. The apposite facts follow.

{¶ 3} The instant appeal flows from a dispute over a strip of property (the "Strip") in the Clifton Lagoon development in Lakewood, Ohio. The background facts are sufficiently set forth in our previous decision in *Klocker v. Zeiger*, Cuyahoga App. No. 92044, 2009-Ohio-3102.

{¶ 4} Appellees Zeiger, Friel (now deceased), and Bobey, as Trustees of the Clifton Lagoon Trust, own the Strip, along with other common area property in the development. The Strip runs in front of and abuts a series of sublots on which private homes, including one owned by Klocker, are located. The fronts of the private homes face Beach Road and the Rocky River. The area of the Strip in front of each home is used as a driveway for the homes.

{¶ 5} On May 15, 2003, Klocker purchased his property at 908 Beach Road. Klocker's property was granted to his predecessor in title, Franklin Schneider, by deed recorded on January 12, 1920. The grantor of the deed to Schneider was The Clifton Park Land Company. Along with granting the residential sublot, the deed to Schneider conveyed:

"[T]he right to pass over and across other lands of the grantor adjacent to the lot hereby conveyed [i.e., the Strip]; also the

> **right to use in common with others, the lagoon or basin constructed herein, and the passage or cut therefrom to Rocky River; but the use of the land hereby conveyed and of said roads and ways, and of said lagoon or basin shall be subject to such rules and regulations as may from time to time be established by said Company; its successors and assigns."**

{¶ 6} By deed recorded April 20, 1920, The Clifton Park Land Company conveyed title to certain common area property within the Clifton Lagoon development, including the Strip, to the Trustees's predecessors in interest. The Trustees hold the property in trust, for the sole use and benefit of the owners of sublots or part of lots, in the Clifton Park development.

{¶ 7} In 1996, at the behest of the Trustees and by general agreement of the other homeowners along Beach Road, whose properties faced the Rock River, it was decided that a certain style of red interlocking driveway pavers would be utilized on the Strip. Pursuant to the agreement, the homeowners were required to use red interlocking bricks if they chose to resurface the portion of the Strip in front of their property. Subsequently, by motion dated July 9, 1996, the Trustees sought, and the city of Lakewood Board of Building Standards approved, their application for a variance and use of the red interlocking driveway bricks on the Strip.

{¶ 8} Sometime after Klocker purchased his property, he proceeded to install yellow interlocking bricks on the Strip of property in front of his home. Prior to the installation, Klocker, his wife, and their architect had represented to the Trustees and the city of Lakewood that they would utilize the red interlocking

bricks in front of his home. The Trustees subsequently removed the yellow interlocking bricks without notice to Klocker.

{¶ 9} On September 28, 2007, Klocker filed suit against the Trustees. The complaint contained ten counts: (1) adverse possession, (2) easement by prescription, (3) easement by necessity, (4) fraud, (5) breach of fiduciary duty and waste, (6) unlawful conspiracy and intentional infliction of emotional distress, (7) declaratory judgment, (8) accounting, (9) conversion of appellant's property (the pavers), and (10) estoppel.

{¶ 10} Klocker subsequently filed a motion for a temporary restraining order, seeking to compel the Trustees to permit him to install the yellow interlocking bricks on the Strip despite the Trustees' objections. On January 15, 2008, the trial court denied the motion. On April 11, 2008, Klocker filed a motion for a preliminary injunction that the trial court also denied.

{¶ 11} On June 11, 2008, Klocker filed a partial motion for summary judgment on his claim for declaratory judgment. On June 30, 2008, the Trustees filed a motion for summary judgment on all counts of Klocker's complaint. On August 14, 2008, the trial court granted the Trustees' motion for summary judgment and denied Klocker's partial motion for summary judgment.

{¶ 12} Thereafter, Klocker filed motions for reconsideration and relief from judgment, which the trial court denied. On September 5, 2008, Klocker filed a notice of appeal, but on October 29, 2008, filed a motion to dismiss for lack of a final appealable order.

{¶ 13} We dismissed the appeal and remanded the matter to the trial court because we found that the trial court had failed to fulfill its function regarding the declaratory judgment claim because it did not construe the documents at issue in the case and advise the parties of their rights and obligations under those documents and the pertinent law.

{¶ 14} On remand, the trial court granted summary judgment in the Trustees' favor and issued an opinion declaring the respective rights of the parties. Klocker now appeals.

Summary Judgment

{¶ 15} We will address the assigned errors together. After distilling all the issues raised, Klocker's core argument is the propriety of the trial court's decision granting summary judgment in favor of the Trustees.

{¶ 16} We review an appeal from summary judgment under a de novo standard of review. *Baiko v. Mays* (2000), 140 Ohio App.3d 1, 746 N.E.2d 618, citing *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 506 N.E.2d 212; *N.E. Ohio Apt. Assn. v. Cuyahoga Cty. Bd. of Commrs.* (1997), 121 Ohio App.3d 188, 699 N.E.2d 534. Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate. Under Civ.R. 56, summary judgment is appropriate when: (1) no genuine issue as to any material fact exists, (2) the party moving for summary judgment is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the non-moving party,

reasonable minds can reach only one conclusion that is adverse to the non-moving party.

{¶ 17} The moving party carries an initial burden of setting forth specific facts that demonstrate his or her entitlement to summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107, 662 N.E.2d 264. If the movant fails to meet this burden, summary judgment is not appropriate; if the movant does meet this burden, summary judgment will be appropriate only if the non-movant fails to establish the existence of a genuine issue of material fact. Id. at 293.

{¶ 18} In the instant case, the record reveals that on remand from this court, the trial court issued an opinion, construing the documents at issue and declaring the rights of the parties, which states in pertinent part as follows:

> **"* * * Based upon this Court's construction of the deeds and based upon the applicable law cited by the parties in their briefs, and pursuant to the Ohio Trust Code R.C. 5808.15 and R.C. 5808.16, this Court hereby finds that the strip of property at issue is owned by the Trustees. Mr. Klocker wishes to put non-conforming pavers on Defendant's property. However, Mr. Klocker only has a limited right to pass over that property. Even if this right is considered an easement, the Trustees, as owners, may use and regulate the development of their land in any way not inconsistent with Mr. Klocker's limited right to pass over the Strip. *Colbura v. Maynard* (1996), 111 Ohio App.3d 246. Nothing that the defendants did in this case interfered with Mr. Klocker's right to pass over the strip. Pursuant to Ohio's Trust Code, R.C. 5808.15 and R.C. 5808.16 and pursuant to the rights that the Trustees retain as owners of the Strip and pursuant to their right to make and enforce rules and regulations pursuant to the reservation of rights retained by the Trustees predecessors in interest. The non-conforming pavers which were installed by Mr. Klocker despite his knowledge that the**

owners of the property objected to those non-conforming pavers." January 8, 2010 Journal Entry.

{¶ 19} In the instant case, it is undisputed that the Trustees own the property herein referred to as the Strip. R.C. 5808.15, that sets forth the general power of a trustee states in pertinent part as follows:

> **"(A) A trustee, without authorization by the court, may exercise powers conferred by the terms of the trust and, except as limited by the terms of the trust, may exercise all of the following powers:**
>
> **'(1) All powers over the trust property that an unmarried competent owner has over individually owned property;**
>
> **'(2) Any other powers appropriate to achieve the proper investment, management, and distribution of the trust property * * *."**

{¶ 20} With respect to real property, R.C. 5808.16, states in pertinent part as follows:

> **"Without limiting the authority conferred by section 5808.15 of the Revised Code, a trustee may do all of the following:**
>
> **'(H) With respect to an interest in real property, construct, or make ordinary or extraordinary repairs to, alterations to, or improvements in, buildings or other structures, demolish improvements, raze existing or erect new party walls or buildings, subdivide or develop land, dedicate land to public use or grant public or private easements, and make or vacate plats and adjust boundaries * * *."**

{¶ 21} The record reveals that pursuant to the broad powers as outlined above, in 1996 the Trustees sought and obtained a variance from the city of Lakewood to install red interlocking bricks on the Strip in front of the privately owned properties. The record also reveals that subsequent to the issuance of

the variance, several homeowners installed the red interlocking bricks on the Strip in front of their homes. The record further reveals that Robert Tomisch, the immediate prior owner of the property that Klocker now owns, installed red interlocking bricks on the Strip in front of his property. Consequently, though Klocker argues the contrary, he was on notice of the requirement to use red interlocking bricks.

{¶ 22} Moreover, the record reveals that when Klocker began renovation and extension of the existing home on the property, he sought to put a snow melt system underneath the Strip in front of his property. As previously noted, red interlocking bricks had already been installed on the Strip in front of his home. In a letter dated February 27, 2006, authored by Klocker's wife, the Klockers acknowledged that the Strip was the property of the Trustees, acknowledge that the installation of the snow melt would not entitle them to any special privilege associated with the property, and acknowledged that the upkeep of said system would be their responsibility.

{¶ 23} Finally, at the May 9, 2005, meeting of the Lakewood Board of Building Standards Architectural Review Board, Klocker's architect Ronald Reed presented the architectural proposal for the renovation and extension of Klocker's home. Reed represented to the Review Board that the existing red interlocking blocks would remain. (Defendant's Exhibit C.) The Klockers followed up with a letter to the Clifton Lagoon Association, dated June 23, 2005, in which they

indicated that undamaged existing interlocking bricks may be reused after installation of the snow melt system underneath the Strip.

{¶ 24} However, despite his prior acknowledgment that the Strip was the property of the Trustees, his acknowledgment that the red interlocking bricks would be replaced after the installation of the snow melt system underneath the Strip, Klocker proceeded to put yellow interlocking bricks on the Strip.

{¶ 25} We conclude there are no genuine issues of material fact. The property referred to as the strip is owned by the Trustees, there was a valid agreement by property owners to use red interlocking bricks on the Strip, and the evidence clearly established that Klocker was aware of the requirement. As such, the trial court did not err when it granted summary judgment in favor of the Trustees. Accordingly, we overrule all of the assigned errors.

Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.

PATRICIA ANN BLACKMON, PRESIDING JUDGE

MARY J. BOYLE, J., and
LARRY A. JONES, J., CONCUR