[Cite as *Zagrans v. Elek*, 2009-Ohio-2942.]

STATE OF OHIO))ss: COUNTY OF LORAIN)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
MAURA POSTON ZAGRANS, et al. Appellants v. GREGORY J. ELEK, et al. Appellees	C. A. No. 08CA009472 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 05CV144069

DECISION AND JOURNAL ENTRY

Dated: June 22, 2009

WHITMORE, Judge.

{¶1} Plaintiffs-Appellants, Maura Zagrans, James Dall, Patricia Sabga, Steve Kaplan, Kathy Kaplan, Lou Kaplan, and Gilda Kaplan (collectively "Appellants"), appeal from the judgment of the Lorain County Court of Common Pleas, concluding that they lacked standing to maintain this action, or in the alternative, that Defendants-Appellees, Gregory Elek and Sharon Elek (collectively "the Eleks"), were entitled to judgment. This Court affirms.

I

{¶2} In December 1992, several landowners who lived nearby each other entered into separate conservation easement agreements with the Lorain County Metropolitan Park District ("MetroParks"). Scribner and Ann Fauver (collectively "the Fauvers") were one of the couples who agreed to place a perpetual conservation easement on a portion of their property. The Fauvers agreement with MetroParks provided that the easement property would be "kept in its natural state" and that "no buildings or structures of any kind" would be placed on the property.

The easement further provided that its purpose was "to preserve the Easement Property in its present state pursuant to the terms and conditions set forth above for the preservation of woodlands, wetlands and wildlife." The only parties to the Fauvers' easement were the Fauvers and a MetroParks representative.

{¶3} In July 2003, the Fauvers sold their property, subject to the easement, to the Eleks. In June 2004, the Eleks entered into a modification agreement with MetroParks to subject a previously unburdened portion of their property to a conservation easement with MetroParks in exchange for MetroParks releasing another portion of the property, which was subject to the original conservation easement. The Eleks sought to build a house on the property that MetroParks agreed to release from the original easement.

{¶4} Appellants are composed of individuals who live nearby the Eleks' property and who either: (1) had no part in the December 1992 conservation easement agreements entered into by various landowners; (2) purchased their property from one of the landowners (other than the Fauvers) who entered into a conservation easement agreement with MetroParks in December 1992; or (3) were one of the landowners who entered into their own conservation easement agreement with MetroParks in December 1992. On November 7, 2005, Appellants filed suit against the Eleks and MetroParks for declaratory judgment and an injunction, seeking to enforce the conservation easement that the Fauvers had entered into with MetroParks and that continued to apply to the property when the Eleks purchased it. On January 5, 2007, the trial court dismissed MetroParks from the suit so that only the Eleks remained as defendants. On June 18, 2007, the matter proceeded to a bench trial. On September 9, 2008, the trial court issued its judgment, concluding that Appellants lacked standing or, in the alternative, that the Eleks were entitled to judgment.

{¶5} Appellants now appeal from the trial court's judgment and raise two assignments of error for our review.

II

Assignment of Error Number One

> "THE TRIAL COURT ERRED IN CONCLUDING THAT APPELLANTS LACK STANDING TO BRING THIS ACTION WHERE CONTROLLING DECISIONS OF THE UNITED STATES SUPREME COURT PROVIDE THAT APPELLANTS HAVE STANDING AS (I) PARTIES TO THE CONSERVATION EASEMENTS, (II) INTENDED THIRD-PARTY BENEFICIARIES OF SUCH AGREEMENTS, AND (III) PERSONS WHO HAVE SUFFERED ACTUAL INJURY-IN-FACT THAT DIFFERENTIATES THEM FROM MEMBERS OF THE PUBLIC GENERALLY[.]"

{¶6} In their first assignment of error, Appellants argue that the trial court erred in concluding that they lacked standing. Specifically, Appellants argue that they had standing to enforce the easement on the Eleks' property because: (1) some of Appellants were either "parties to the original conservation agreements" or successors in interest to individuals who were "parties to the original conservation agreements"; (2) all of Appellants are "property-owning taxpayers of Elyria" with special interest in keeping the Eleks' property protected under the conservation easement; and (3) Appellants are the intended-beneficiaries of the conservation easement agreement between the Eleks, as purchasers of the Fauvers' property, and MetroParks. We disagree.

{¶7} "The issue of standing is a threshold test that, once met, permits a court to determine the merits of the questions presented." *Hicks v. Meadows*, 9th Dist. No. 21245, 2003-Ohio-1473, at ¶7. "When one's standing is questioned, his capacity to bring an action is being challenged." *Kuhar v. Medina Cty. Bd. of Elections*, 9th Dist. No. 06CA0076-M, 2006-Ohio-5427, at ¶7. "A person has standing to sue only if he or she can demonstrate injury in fact, which requires showing that he or she has suffered or will suffer a specific, judicially redressible injury

as a result of the challenged action." *Fair Hous. Advocates Assn., Inc. v. Chance*, 9th Dist. No. 07CA0016, 2008-Ohio-2603, at ¶5, citing *Eng. Technicians Assn., Inc. v. Ohio Dept. of Transp.* (1991), 72 Ohio App.3d 106, 110-11. Because standing is an issue of law, this Court applies a de novo standard of review. *Hicks* at ¶7.

{¶8} "*A party to an easement* may invoke the equitable jurisdiction of a court by seeking an injunction to enforce his or her rights pursuant to the easement." (Emphasis added.) *Mays v. Moran* (Mar. 18, 1999), 4th Dist. Nos. 97CA2385 & 97CA2386, at *9, citing *Murray v. Lyon* (1994), 95 Ohio App.3d 215, 221. An individual who is not a party to a written easement or who does not own any property subject to the easement has no standing to bring suit on the easement. *Lake Community Ass'n, Inc. v. Lucas* (Dec. 13, 1990), 4th Dist. No. 432, at *2 (holding that association lacked standing to bring suit over easement on behalf of individual members because claim required participation of actual members and not all members were property owners that had "deeds with language creating an express easement"). Here, there is no dispute that Appellants are not parties to the easement that they are seeking to enforce. Although other landowners entered into separate conservation easement agreements with MetroParks during the same time as the Fauvers, only the Fauvers (and the Eleks as their successor) and MetroParks were parties to the easement at issue in this case. Appellants argue that they have standing to enforce the easement between the Eleks and MetroParks because they were parties to similar conservation easement agreements in the same area (or successors to those parties) and intended that all of the easements form one cohesive, protected area at the time that they entered into them. Yet, the original easement between the Fauvers and MetroParks makes no mention of other conservation easement agreements. The easement agreement only pertains to the Fauvers' property, later purchased by the Eleks, and provides that "the covenants contained herein shall

run with the land in perpetuity and forever bind [the Fauvers], their heirs, executors, administrators and assigns and all persons claiming rights in the property *by or through them*." (Emphasis added.)

{¶9} When an easement is set forth in a written agreement, it is subject to the rules of contract law. *Wimmer Family Trust v. FirstEnergy*, 9th Dist. No. 08CA009392, 2008-Ohio-6870, at ¶12, quoting *Beaumont v. FirstEnergy Corp.*, 11th Dist. No. 2004-G-2573, 2004-Ohio-5295, at ¶18-19. By its plain language, the easement at issue is only binding upon MetroParks, the Fauvers, and those claiming rights in the property "by or through them." Appellants do not fall into any of the foregoing categories. The mere fact that several of Appellants either have or have had nearby property with similar easements does not suffice to give Appellants standing to enforce the Eleks' easement. *Lake Community Ass'n, Inc.*, at *2. See, also, *Lasiewski v. Landen Farm Community Servs., Ass'n., Inc.* (June 8, 1992), 12th Dist. No. CA91-12-095, at *2 (concluding that appellants lacked standing to challenge easement when easement neither conveyed an interest, nor an estate in the land to appellants). Additionally, Appellants' argument that the testimony at trial demonstrated the common intent of the easement grantors to create a common, cohesive easement in favor of MetroParks lacks merit. There is no need to examine the intent of the parties when plain language of a written agreement is unambiguous. *Wheeler v. Wheeler*, 9th Dist. No. 23538, 2007-Ohio-4418, at ¶7, quoting *Metcalfe v. Akron*, 9th Dist. No. 23068, 2006-Ohio-4470, at ¶18 ("[C]ourts may resort to extrinsic evidence of the parties' intent 'only where the language is unclear or ambiguous, or where the circumstances surrounding the agreement invest the language of the contract with a special meaning.'"). Even if it were proper for this Court to consider the parties' intent, Appellants have not provided this Court with trial transcripts. As such, it would be impossible for this Court to review the trial testimony to which

Appellants point in support of their argument. Finally, R.C. 5301.70 provides, in relevant part, that "[t]he terms of a conservation easement may be enforced by injunction or in any other civil action *by the holder of the easement*." (Emphasis added.) Appellants are in no way the holders of the Eleks' easement. As the named grantee of the easement, MetroParks is the holder of the easement in this matter. Accordingly, R.C. 5301.70 also contravenes Appellants' argument that they have standing to enforce the Eleks' easement.

{¶10} Next, Appellants argue that they have standing to enforce the Eleks' easement as "property-owning taxpayers of Elyria." Appellants rely on *State ex rel. Masterson v. Ohio State Racing Commission* (1954), 162 Ohio St. 366, in support of their argument that, as taxpayers with some special interest in the Eleks' easement agreement, they have standing to enforce the easement. *Masterson* involved a tax payer action to restrain the Ohio State Racing Commission from expending state funds or issuing permits for the conducting of horse racing. *State ex rel. Masterson*, 162 Ohio St. at 367. *State ex rel. Masterson* provides, in relevant part, that:

> "[A] taxpayer can not bring an action to prevent the carrying out of a public contract or the expenditure of public funds unless he had some special interest therein by reason of which his own property rights are put in jeopardy." Id. at 368.

The Eleks' easement is not a public contract and does not involve the "expenditure of public funds." See R.C. 2921.42(I) (defining "public contract" as a contract for the purchase or acquisition of property or services by or for the use of the State, a contract for a state employee, or a contract dealing with public property); Black's Law Dictionary (8th Ed. 2004) 347 (defining "public contract" as "[a] contract that, although it involves public funds, may be performed by private persons and may benefit them"). The easement agreement grants certain private land to the MetroParks for purposes of preservation. Accordingly, *State ex rel. Masterson* does not apply to Appellants.

{¶11} Finally, Appellants argue that they have standing because they were intended beneficiaries of the easement agreement between the Fauvers (subsequently, the Eleks) and MetroParks. "Performance of a contract will often benefit a third person[,] [b]ut unless the third person is an intended beneficiary *** no duty to him is created." *Hill v. Sonitrol of Southwestern Ohio, Inc.* (1988), 36 Ohio St.3d 36, 40, quoting Restatement of the Law 2d, Contracts (1981) 439-40, Section 302, Comment *e*. "[A] third party who merely receives a benefit from a contract, without more, is only an incidental beneficiary and may not sue under the contract." *Laurent v. Flood Data Serv., Inc.* (2001), 146 Ohio App.3d 392, 397.

{¶12} Once again, the easement agreement at issue in this matter made no mention of Appellants. The agreement only pertained to the Fauvers' (and now the Eleks') private property and provided that the purpose of the easement was to protect the natural habitat. The easement agreement specifically provided that:

> "THE IMPOSITION OF THE COVENANTS AND RESTRICTIONS SET FORTH HEREIN IN NO WAY GRANT THE PUBLIC THE RIGHT TO ENTER THE EASEMENT PROPERTY FOR ANY PURPOSE."

Accordingly, although Appellants and the general public might benefit from an agreement that provides for the preservation of nature, the easement here quite clearly provided that the land at issue was to remain private and was not available for public access. Appellants received a benefit from the easement conservation agreement because, up until the Eleks sought to modify the agreement, they were able to enjoy the aesthetics of the property and to maintain continuity amongst the various surrounding properties, which were also subject to conservation easements. As previously noted, however, the mere receipt of a benefit from a contract does not transform the recipient of that benefit into an intended beneficiary. Id. The Fauvers and MetroParks entered into their easement agreement for the stated purpose of maintaining the property "in its

present state *** for the preservation of woodlands, wetlands and wildlife." There is no evidence that the Fauvers and MetroParks intended to benefit Appellants by entering into their easement agreement. Consequently, Appellants' argument that they were intended beneficiaries lacks merit.

{¶13} The trial court correctly concluded that Appellants lack standing to enforce the Eleks' conservation easement. Accordingly, Appellants' first assignment of error lacks merit.

Assignment of Error Number Two

> "THE TRIAL COURT ERRED IN CONCLUDING THAT ELEK AND METROPARKS HAD THE RIGHT TO MODIFY THE EASEMENT IN QUESTION BECAUSE, UNLIKE COMMON LAW EASEMENTS, STATUTORY CONSERVATION EASEMENTS MAY NOT BE MODIFIED OR TERMINATED BY THE AGREEMENT OF THE PARTIES BUT ONLY WHEN SPECIFIED 'CHANGED CIRCUMSTANCES' HAVE OCCURRED, IN ORDER TO PROTECT THE PUBLIC INTEREST INVOLVED AND TO DETER THE SERVIENT OWNERS FROM CONDUCT THAT WOULD THREATEN OR FRUSTRATE THE ORIGINAL PURPOSES, INTENT AND INTERESTS PROTECTED BY THE SERVITUDE[.]"

{¶14} In their second assignment of error, Appellants argue that the trial court erred in concluding that the Eleks and MetroParks had the right to modify the conservation easement. Because we have already determined that Appellants lack standing, this assignment of error is moot, and we decline to address it. App.R. 12(A)(1)(c).

III

{¶15} Appellants' first assignment of error is overruled, and their second assignment of error is moot. The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellants.

BETH WHITMORE
FOR THE COURT

MOORE, P. J.
CONCURS

BELFANCE, J.
CONCURS IN JUDGMENT ONLY, SAYING:

{¶16} I concur in the judgment only as it is not possible to fully review the Appellants' assignments of error without a transcript of the proceedings.

APPEARANCES:

ERIC H. ZAGRANS, Attorney at Law, for Appellants.

ERIK A. BREUNIG, and JAMES N. TAYLOR, Attorneys at Law, for Appellees.