

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

PAUL WOJCIK, et al.

C.A. No. 24583

Appellants

v.

EDWARD PRATT, et al.

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2006-07-4434

Appellees

DECISION AND JOURNAL ENTRY

Dated: September 30, 2009

MOORE, Presiding Judge.

{¶1} Appellants, Paul and Heidi Wojcik, appeal from the judgment of the Summit County Court of Common Pleas. This Court reverses.

I.

{¶2} The court below found the following relevant facts to be undisputed: In 1987, Appellee, Edward Pratt, purchased approximately seven acres of undeveloped land located at 85 W. Highland Road in Northfield Center Township. The land included a small pond fed by runoff. In 1988, Pratt hired a contractor to expand the pond. As part of the expansion project, the contractor installed a culvert pipe under Pratt's driveway to allow for drainage of the pond. To raise the level of the pond, Pratt covered this pipe with two-by-fours immediately after construction was completed. After receiving a letter from the Summit County Engineer's office in December 2003, Pratt finally removed these two-by-fours, which lowered the water level.

{¶3} In 2004, Pratt sold the 85 W. Highland property to Appellees, Joseph and Angela Butano. The Butanos have not altered the pond in any way since taking possession of the property.

{¶4} In 1998, Appellants, Paul and Heidi Wojcik, purchased the property located at 99 W. Highland Road. This parcel sits adjacent to 85 W. Highland Road. At the time of purchase, the 99 W. Highland property contained three buildings including an uninhabited house built in approximately 1840, a garage and an outbuilding. Soon after they purchased the property, the Wojciks noticed that approximately 20 inches of standing water had accumulated in the basement of the house. The Wojciks have since removed the original house and have been attempting to build a new residence on the property.

{¶5} Due to the swampy nature of the property, Paul Wojcik, a self-employed contractor, constructed at least two swales to divert water. Wojcik constructed the first swale in 2000. As early as 2000 or 2001, Wojcik also noticed a discharge of water from the pond that affected his property. At that time, he followed a trail of water from his property to the pond on the 85 W. Highland property. Until that time, the basement had only occasionally filled with water; however, he had never made the connection between the pond and the wet basement.

{¶6} The Wojciks filed a complaint on July 29, 2005 and later voluntarily dismissed it before obtaining service of process on Pratt.

{¶7} On July 17, 2006, the Wojciks re-filed their complaint against Pratt and included the Butanos as defendants. On February 6, 2007, the Wojciks amended their complaint by leave of court to add Northfield Center Township as a defendant.¹ The Wojciks raised claims of negligence, trespass and intentional tort with regard to Pratt and the Butanos. The Wojciks also

alleged that the Butanos tortiously interfered with a contract between the Wojciks and Northfield Center. The Wojciks' primary contention is that water above and below the ground is migrating from the pond and causing damage to the basement, preventing the completion of construction on their house. With regard to Northfield Center, the Wojciks raised claims of breach of contract and trespass. On August 16, 2006, the Butanos filed a counterclaim against the Wojciks and a cross-claim against Pratt.

{¶8} On September 5, 2008, Pratt, the Butanos and Northfield Center each filed separate motions for summary judgment. In their motions, Pratt and the Butanos argued that the creation of the pond constituted a permanent trespass completed at the time of the pond's construction and subject to a four-year statute of limitations. With regard to the tortious interference with contract claim, the Butanos argued that they were wholly unaware of any contract and that the Wojciks could not prove the existence of a contract between themselves and Northfield Center. Northfield Center moved for summary judgment on the basis that 1) the Wojciks failed to exhaust all available remedies through administrative procedures; 2) that it was immune from liability; and 3) that no contract existed between the Wojciks and Northfield Center.

{¶9} On December 10, 2008, prior to the trial court's ruling on the summary judgment motions, the Butanos dismissed both their counterclaim against the Wojciks and their cross-claim against Pratt. On December 18, 2008, the Butanos moved to vacate the notice of dismissal with regard to the cross-claim against Pratt. The trial court did not expressly rule on either motion. Instead, on December 22, 2008, the trial court granted Pratt's, the Butanos' and Northfield Center's motions for summary judgment.

¹ The parties have stipulated that July 29, 2005 is the operative date from which to

{¶10} In its order granting summary judgment, the trial court applied the Supreme Court’s holding in *Sexton v. Mason*, 117 Ohio St.3d 275, 2008-Ohio-858, and this Court’s holding in *Stewart v. Allen*, 9th Dist. No. 06CA0039, 2008-Ohio-1645. The trial court found that the creation of the pond constituted a permanent trespass. The trial court also found that neither Pratt nor the Butanos altered the pond in any way to increase the harm to the Wojciks’ property subsequent to the construction of the pond. The trial court further determined that the permanent trespass occurred in 1988, thus barring the Wojciks’ claims against Pratt and the Butanos.

{¶11} The trial court determined that a four-year statute of limitations applied. The trial court appears to have relied on the date of completion of the pond in 1988 as the relevant date for the statute of limitations. Observing that the action was not brought until 2005, the trial court applied the four-year statute of limitations and determined that the Wojciks’ claims were barred as untimely.

{¶12} The Wojciks timely filed a notice of appeal. They have raised two assignments of error for our review. The Wojciks did not appeal the trial court’s decision granting summary judgment in relation to the claims involving Northfield Center. We have rearranged the assignments of error to facilitate our review.

II.

ASSIGNMENT OF ERROR II

“THE TRIAL COURT ERRED BY FINDING A PERMANENT TRESPASS WHERE [PRATT AND THE BUTANOS] RETAINED CONTROL OVER THE SOURCE OF THE DAMAGE.”

{¶13} In the Wojciks’ second assignment of error they contend that the trial court erroneously determined the trespass was permanent, rather than continuous, resulting in the

calculate the statute of limitations.

erroneous application of R.C. 2305.09(D) and its four-year statute of limitations to bar the Wojciks' claims. We agree.

{¶14} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. We apply the same standard as the trial court, viewing the facts of the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12.

{¶15} Pursuant to Civil Rule 56(C), summary judgment is proper if:

“(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.

{¶16} The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-93. Specifically, the moving party must support the motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). *Id.* Once this burden is satisfied, the non-moving party bears the burden of offering specific facts to show a genuine issue for trial. *Id.* at 293. The non-moving party may not rest upon the mere allegations and denials in the pleadings but instead must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735.

Continuous vs. Permanent Trespass

{¶17} A permanent trespass “occurs when the defendant’s tortious act has been fully accomplished, but injury to the plaintiff’s estate from that act persists in the absence of further conduct by the defendant.” *Reith v. McGill Smith Punshon, Inc.*, 163 Ohio App. 3d 709, 2005-Ohio-4852, at ¶49. In contrast, a continuing trespass or nuisance “results when the defendant’s tortious activity is ongoing, perpetually creating fresh violations of the plaintiff’s property rights.” *Id.*; see *Haas v. Sunset Ramblers Motorcycle Club Inc.* (1999), 132 Ohio App. 3d 875, 878.

{¶18} “The defendant’s ongoing conduct *or* retention of control is the key to distinguishing a continuing trespass from a permanent trespass.” (Emphasis added.) *Sexton*, *supra*, at ¶45; *State v. Swartz* (2000), 88 Ohio St.3d 131, 135 (holding that “[w]here one creates a nuisance *** and permits it to remain, so long as it remains, and is within the control of the actor, the nuisance constitutes a continuing course of conduct ****” and thereby a continuous trespass); *Valley Ry. Co. v. Franz* (1885), 43 Ohio St. 623 (finding that controlling and directing the flow of a river from one’s own land in a manner that it continues to damage another’s land constitutes a continuous trespass); *Boll v. Griffith* (1987), 41 Ohio App.3d 356 (holding that one act of demolition completed in the past causing continuous harm to a neighbor’s property allows for an action in continuing trespass against the landowner responsible for the demolition for failure to remedy the situation, and reinstating the claims against a subsequent purchaser); But see *Frisch v. Monfort Supply Co.* (Nov. 21, 1997), 1st Dist. No. C-960522, (holding that because a contractor who improperly installs a home-aeration or septic system on an owner’s property does not retain control of the property he has completed the tortious act at the moment of installation and the trespass is permanent in nature); and *Weir v. East Ohio Gas Co.*, 7th Dist.

No. 01 CA 207, 2003-Ohio-1229, (determining that although East Ohio caused a one-time natural gas and petroleum leak that continued to damage plaintiff's property, because East Ohio had no control over the property or the contaminants the trespass was permanent in nature).

{¶19} Here, the trial court found that construction of the pond was the single act that created a permanent trespass. We agree that the expansion of the pond to its current size was the single act creating the trespass. The record reflects that Pratt performed the only other maintenance to the pond in 2003 when he removed the two-by-fours. Notably, Pratt's efforts actually lowered the water level and, if anything, reduced any damage the pond was causing. Accordingly, the record does not demonstrate ongoing conduct on the part of Pratt and the Butanos.

{¶20} However, the trial court's decision fails to address the issue of control. *Sexton*, supra, at ¶45. The Wojciks argued in opposition to summary judgment as well as on appeal that because Pratt and the Butanos retained ownership of the instrumentality causing the trespass, they also retained control. They further argued that due to the retention of control, the water flowing from the pond constituted a continuous rather than permanent trespass. We agree.

{¶21} An owner of real property has "an absolute right of dominion, use, or disposition over it." *Akron v. Molyneaux* (2001), 144 Ohio App.3d 421, 428, citing *Lucas v. Carney* (1958), 167 Ohio St. 416, 423. Neither Pratt nor the Butanos dispute their actual ownership of the real property. Further, in 2003 Pratt removed the two-by-fours blocking the culvert and consequently lowered the level of the pond. In addition to ownership, this action indicates that Pratt exercised actual control over the pond.

{¶22} This Court recently addressed a factually similar case in *Stewart v. Allen*, supra. In contrast to this matter, the appellant in *Stewart* did not raise the issue of control. Accordingly,

it was not addressed. However, in this case, the Wojciks have placed the issue of control squarely before the Court. In addressing the issue, we hold that the trespass at issue was a continuing as opposed to a permanent trespass.

Statute of Limitations

{¶23} Here, the trial court applied a four-year statute of limitations to bar the Wojciks' claims entirely. "The application of a statute of limitations presents a mixed question of law and fact. Determination of when a plaintiff's cause of action accrues is to be decided by the factfinder. But, in the absence of such factual issues, the application of the limitation is a question of law." *Cyrus v. Henes* (1993), 89 Ohio App. 3d 172, 175, reversed on other grounds by *Cyrus v. Henes*, 70 Ohio St. 3d 640.

{¶24} R.C. 2305.09(D) provides a four-year statute of limitations for trespass and any other tort action for injury or damage to real property. A cause of action for permanent trespass accrues, and the statute of limitations begins to run, at the completion of the tortious act. *Reith*, supra, at ¶50-51. However, the statute of limitations is tempered by the discovery rule. *Harris v. Liston* (1999), 86 Ohio St.3d 203, 207. The discovery rule tolls the statute of limitations until the permanent trespass is "discovered, or in the exercise of reasonable diligence it should have been discovered[.]" *Id.*, at paragraph two of the syllabus.

{¶25} The statute of limitations operates differently for continuous trespass. The difference in application is due to the fact that the continuous trespass perpetually creates "fresh violations of the plaintiff's property rights." *Reith*, supra, at ¶49. An action for continuous trespass "may be brought at any time until, by adverse use or possession, the trespasser has enforced an adverse claim that has ripened and has become a presumptive right or a valid estate." *Valley Ry. Co.*, 43 Ohio St. at 626; *Haas*, 132 Ohio App.3d at 878. With regard to continuing

trespass, R.C. 2305.04 sets an outside limit of 21 years within which an action must be brought to recover real estate. The four-year statute of limitations found in R.C. 2305.09(D) interacts with R.C. 2305.04 not to bar recovery entirely, but instead to limit recovery to the four-year period prior to the filing of the complaint. *Haas*, 132 Ohio App.3d at 878. The facts of this case do not require, and therefore we do not address, whether the underlying facts satisfy the requirements of adverse possession or a prescriptive easement.

{¶26} In light of our conclusion that the trial court erred in finding a permanent trespass, it was error to apply the four-year statute of limitations in R.C. 2305.09 to dismiss all of the Wojciks' claims. Due to the evidence of both Pratt's and the Butanos' retention of control over the pond through ownership, as well as the removal of the two-by-fours, the trial court erred as a matter of law in finding a permanent trespass. Therefore, the trial court erred in applying the four-year statute of limitations to bar, rather than limit, the Wojciks' claims.

{¶27} Accordingly, the Wojciks' second assignment of error is sustained.

ASSIGNMENT OF ERROR I

“THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT BECAUSE [PRATT AND THE BUTANOS], WHO MOVED FOR SUMMARY JUDGMENT, FAILED TO MEET THEIR BURDEN OF PROVING THAT THERE ARE NO GENUINE ISSUES OF MATERIAL FACT.”

{¶28} In light of our disposition of the Wojciks' second assignment of error, we need not address their first assignment of error as it is rendered moot. See App.R. 12(A)(1)(c).

III.

{¶29} The Wojciks' second assignment of error is sustained. The Wojciks' first assignment of error is rendered moot. The judgment of the Summit County Court of Common

Pleas is reversed and the cause remanded for proceedings consistent with this opinion.

Judgment reversed,
and cause remanded.

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 Summit, 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 Appellees.

CARLA MOORE
FOR THE COURT

DICKINSON, J.
CONCURS

CARR, J.
DISSENTS, SAYING:

{¶30} I respectfully dissent.

{¶31} I disagree with the majority's implication that mere ownership of the property equates to the retention of control necessary to create a continuing trespass.

{¶32} I believe this case falls squarely within our reasoning in *Stewart v. Allen*, 9th Dist. No. 06CA0039, 2008-Ohio-1645, because any tortious act was fully accomplished at the time of the completion of the pond. Accordingly, I believe the pond constituted a permanent trespass, thereby implicating the four-year statute of limitations. I would affirm the trial court's judgment.

APPEARANCES:

BRUCE H. WILSON, Attorney at Law, for Appellants

CRAIG S. COBB, Attorney at Law, for Appellees.

JEAN ANN SHOWALTER, Attorney at Law, for Appellee.

GREGORY ALAN BECK, Attorney at Law, for Appellee.