[Cite as *Morgan v. Silver Lake*, 2010-Ohio-3581.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STANLEY G. MORGAN	C.A. No. 25148
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
VILLAGE OF SILVER LAKE, et al.	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellees	CASE No. CV 2008-07-4846

DECISION AND JOURNAL ENTRY

Dated: August 4, 2010

WHITMORE, Judge.

{¶1} Plaintiff-Appellant, Stanley Morgan, appeals from the judgment of the Summit County Court of Common Pleas, granting summary judgment in favor of Defendant-Appellees, the Village of Silver Lake ("the Village") and the Director of the Ohio Environmental Protection Agency ("the Director"). This Court affirms.

I

{¶2} The instant litigation stems from a water well on Morgan's property, located approximately nineteen feet from his residence. After conducting an audit at Morgan's residence, the Village notified him that his well constituted an auxiliary water system and ordered him to install a backflow prevention device to protect against the possibility of his well water contaminating the Village's water supply. Morgan refused to comply with the Village's order to install a backflow prevention device. He insisted that a prevention device was unnecessary because he never connected his well to his residence and the Village's water supply.

The Village eventually informed Morgan that it would terminate the water supply to his residence if he failed to install a prevention device by a specific date.

{¶3} On July 8, 2008, Morgan filed a complaint against the Village, seeking a declaratory judgment and injunctive relief. Specifically, Morgan asked the court to declare that he need not install a backflow prevention device and to enjoin the Village from terminating his water supply. The Village filed an answer as well as a motion to join the Director as a necessary party. The court ordered Morgan to join the Director. After Morgan did so, the Director filed an answer.

{¶4} On July 30, 2009, the Village filed a motion for summary judgment. The Director joined in the Village's motion, filing his own memorandum in support. On September 11, 2009, Morgan filed a memorandum in opposition to summary judgment. Morgan supplemented his memorandum on September 23, 2009. On November 24, 2009, the trial court granted the Village's motion.

{¶5} Morgan now appeals from the trial court's judgment and raises one assignment of error for our review.

II

Assignment of Error

"THE TRIAL COURT ERRED IN GRANTING APPELLEES' MOTION FOR SUMMARY JUDGMENT."

{¶6} In his sole assignment of error, Morgan argues that the trial court erred by granting the Village's motion for summary judgment. Specifically, he argues that he need not install a backflow prevention device because his well is not an auxiliary water system. We disagree.

{¶7} 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.

{¶8} Pursuant to Civ.R. 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.

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.

{¶9} The Ohio Administrative Code requires the installation of a backflow prevention device on "each service line to a consumer's water system" if the consumer has "an auxiliary water system on the premises." O.A.C. 3745-95-04(B)(1).

> "'Auxiliary water system' means any water system on or available to the premises other than the public water system. These auxiliary water systems shall include used water or water from a source other than the public water system, such as

> wells, cisterns or open reservoirs that are equipped with pumps or other prime movers, including gravity." O.A.C. 3745-95-01(C).

A "water system" is "a system for the provision of piped water or process fluids, and includes any collection, treatment, storage or distribution facilities used primarily in connection with such system." O.A.C. 3745-95-01(DD). Assuming an auxiliary water system exists, the owner or operator of a public water system may determine on a case-by-case basis that the installation of a backflow prevention device is unnecessary upon the consideration of certain factors and the implementation of certain measures to protect against possible contamination. O.A.C. 3745-95-04(C)(2). If the owner or operator of a public water system determines that installation is necessary based on a consideration of the items in O.A.C. 3745-95-04(C)(2), however, a backflow prevention device must be installed. Id.

{¶10} The trial court determined that Morgan's well amounted to an auxiliary water system and that, pursuant to O.A.C. 3745-95-04(C), the Village had the authority to require Morgan to install a backflow prevention device if he wished to continue using the Village's water supply. Morgan argues that his well is not an auxiliary water system because: (1) the well is not "available to the premises"; (2) the well does not provide him with "piped water"; and (3) no "ease of connection" exists between the well and the Village's public water system.

{¶11} Morgan bases his argument that his well is not "available to the premises" upon his interpretation of the word "premises." Specifically, he argues that the term "premises" means a house or structure, not merely land. Because his well is not available to his house or structure, Morgan claims that it is not available to his premises. Morgan did not raise this argument at the trial level. He only argued that his well is not "available to the premises" because it would be "very difficult" to connect. This Court will not consider arguments that an appellant raises for the first time on appeal. *Vales v. Akron Metro. Hous. Auth.*, 9th Dist. No. 24818, 2009-Ohio-

6954, at ¶13. Thus, we do not address Morgan's contention regarding the meaning of the word "premises." Id.

{¶12} Next, Morgan argues that his well is not a "water system" because it does not provide him with "piped water." He argues, as he did at the trial level, that a well must be equipped with permanent piping and a tank before it can produce "piped water." The evidence produced by the parties below showed that Morgan's well was equipped with two faucets and that Morgan attached a garden hose to the faucets in order to water his lawn and shrubbery. The trial court concluded that permanent piping was unnecessary and Morgan's usage made the well a "system for the provision of piped water."

{¶13} Even assuming that Morgan's garden hose connection did not transform his well into a "system for the provision of piped water," we see no reason why it did not transform his well into a "system for the provision of *** process fluids." The Ohio Administrative Code defines "process fluids" as:

> "[A]ny fluid or solution which may be chemically, biologically or otherwise contaminated or polluted in a form or concentration such as would constitute a pollutional, system, health or severe health hazard if introduced into the public water system or portion of a consumer's water system. This includes, but is not limited to: *** [c]ontaminated natural waters taken from wells." O.A.C. 3745-95-01(U)(5).

In support of its motion for summary judgment, the Village attached an affidavit from its Service Director, Richard Fenwick. Fenwick indicated that Morgan's well was situated such that contaminants could enter it and such that Morgan could attach a hose from the well to the house. The Director also supported the Village's motion for summary judgment with an affidavit from J. Robert Henn, an Environmental Specialist II in the Ohio Environmental Protection Agency's Division of Drinking and Ground Waters. Henn's affidavit indicated that Morgan's well allowed for the possibility of contamination. It further indicated that Morgan could use a hose to connect

the well to his residence and spread any contamination to the Village's water system. Pictures of Morgan's well corroborate Fenwick's and Henn's affidavits. The pictures depict Morgan's well adjacent to and level with his home, not far from the water meter and pipe servicing his residence. Additionally, the pictures show two industrial hoses attached to the well, each one connected to one of the two t-shaped faucets situated on top of the well.

{¶14} In response to the foregoing affidavits, Morgan relied upon his own affidavit, in which he asserted that there was no evidence of contamination. Yet, the Administrative Code does not require actual contamination. It only requires the possibility of contamination. Id. (defining process fluids as a fluid that "may be" contaminated by any number of items). The natural water in Morgan's well qualifies as a process fluid because the possibility for contamination exists. Further, Morgan has the ability to deliver the well's process fluid to his home via a hose. There is no reason that Morgan's hose could not suffice as a delivery system for the well's process fluid. Therefore, the record supports the conclusion that Morgan's well amounts to a "system for the provision of *** process fluids," if not a "system for the provision of piped water." The court did not err by concluding that Morgan's well amounted to an auxiliary water system. *Fleck v. Hammer*, 9th Dist. No. 23533, 2007-Ohio-3998, ¶12 ("This court will affirm a trial court's decision granting summary judgment on other grounds if the trial court's decision is legally correct.").

{¶15} Finally, Morgan argues that no "ease of connection" exists between the well and the Village's public water system. Ease of connection is only one factor that the owner or operator of a public water system must take into account when considering whether to require the installation of a backflow prevention device. O.A.C. 3745-95-04(C)(2) provides, in relevant part, that:

> "An approved backflow prevention device shall be installed on each service connection serving the consumer's water system, unless the supplier of water does all of the following:
>
> "(a) Determines, on a case-by-case basis, that the installation of an approved backflow prevention device on a service connection is not required in consideration of factors including, but not limited to, the past history of cross connections being established or re-established on the premises, the ease or difficulty of connecting the auxiliary water system with the public water system on the premises, the presence or absence of contaminants on the property or other risk factors;
>
> "(b) Requires the consumer to sign an agreement which specifies the penalties *** for creating a connection between the public water system and the auxiliary water system;
>
> "(c) Conducts or causes to be conducted an inspection at least every twelve months to certify that no connection or means of connection has been created between the public water system and the auxiliary water system;
>
> "(d) Maintains an inventory of each consumer's premises ***; and
>
> "(e) Develops and implements an education program to inform all consumers served by the public water system about the dangers of cross-connections and how to eliminate cross-connections."

Accordingly, the owner or operator of a public water system considers far more than ease of connection in determining whether to require the installation of a prevention device.

{¶16} The Village filed a second affidavit from Fenwick in support of its motion for summary judgment. In his second affidavit, Fenwick acknowledged that O.A.C. 3745-95-04(C)(2) contains an alternative to requiring the installation of backflow prevention devices. Fenwick stated, however, that the Village determined the foregoing alternative would pose a much greater cost to the average taxpayer and would place a greater burden on its employees, who would have to maintain a supervisory role. Additionally, Fenwick stated that the Village found the potential risk to the public water system to be greater under the foregoing alternative. Morgan does not address any of these additional points in his argument. He confines his argument to the "ease of connection" factor set forth above. Even if the trial court erred by

concluding that Morgan could easily connect his well to the public water system, Morgan cannot show prejudice as he did not address any of the other factors set forth above. Morgan's final argument lacks merit, and his assignment of error is overruled.

III

{¶17} Morgan's assignment of error is overruled. The judgment of the Summit 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 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 Appellant.

BETH WHITMORE
FOR THE COURT

DICKINSON, P. J.
MOORE, J.
CONCUR

APPEARANCES:

LEN STAUFFENGER, Attorney at Law, for Appellant.

ROBERT W. HEYDORN, Attorney at Law, for Appellee.

RICHARD CORDRAY, Attorney General, and LAUREN C. ANGELL, Assistant Attorney General, for Appellee.