[Cite as *State ex rel. Morrison v. Wiener*, 2017-Ohio-364.]

STATE OF OHIO))ss: COUNTY OF SUMMIT)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
STATE OF OHIO ex rel. JACK MORRISON JR., et al. Appellees v. CLARISSA K. WIENER, et al. Appellants	C.A. Nos. 27891 27917 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2012-09-5228

DECISION AND JOURNAL ENTRY

Dated: January 31, 2017

MOORE, Presiding Judge.

{¶1} Defendants, Clarissa K. and Michael Wiener, appeal from the judgments of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} The Wieners reside in The Steeplechase, which is a residential development in the City of Munroe Falls ("the City"). The Wieners are subject to The Steeplechase's restrictions and the City's ordinances. One of the development's restrictions provides that "[a]ny unattached storage buildings, outbuildings, accessory buildings, sheds, barns, etc." is prohibited in the development. Further, the general provisions in the restrictions include the following language: "[f]ailure of The Steeplechase to enforce any of the restrictions contained herein, shall in no event be construed to be in any manner a waiver of, acquiescence in, or consent to a further or succeeding violation of these restrictions." Independent of the restrictions of the development,

the City's ordinances require a zoning certificate be obtained prior to construction of any building or structure. City of Munroe Falls Codified Ordinance ("Loc.Ord.") 1163.02(a).

{¶3} In 2012, the Wieners commenced construction of a playhouse in the backyard of their property. Thereafter, the City's zoning inspector visited the Wieners' property and informed them that they were required to obtain a zoning certificate from the City in order to construct the playhouse. Subsequently, the City issued a stop-work order to the Wieners.

{¶4} In September 2012, the City and its Law Director, Jack Morrison, Jr., on behalf of the State of Ohio, filed a complaint against the Wieners, requesting an injunction and nuisance abatement based upon the Wieners' failure to obtain a zoning certificate for building the playhouse. *See* Loc.Ord. 1163.02(a) and 1167.03; *see also* R.C. 3767.03 and 3767.05(A). Thereafter, the City and the Wieners agreed to a stipulated temporary restraining order and preliminary injunction. Therein, the parties represented that the Wieners had failed to comply with certain City ordinances by failing to obtain a zoning certificate. The parties agreed that the Wieners would be prohibited from performing additional construction on the playhouse absent further order of the trial court, and, if they failed to obtain a zoning certificate prior to October 17, 2012, they would remove the playhouse from the premises.

{¶5} On October 29, 2012, the Wieners moved to vacate the agreed order and to join The Steeplechase Homeowners Association ("the HOA") as a third-party defendant. In 2013, the trial court granted the Wieners' motion for leave to file a counterclaim and third-party complaint. In their combined counterclaim and third-party complaint, the Wieners requested injunctive relief and declaratory judgment against the HOA, arguing that the subdivision's restrictions should not be enforced. The Wieners also asserted a claim for civil conspiracy, alleging that the HOA conspired with the City to prevent the Wieners from building the

playhouse. The HOA filed a counterclaim against the Wieners, claiming that the playhouse violated the restrictions, and requesting declaratory and injunctive relief.

{¶6} Thereafter, the trial court denied the Wieners' motion to vacate the temporary restraining order. The Wieners filed a notice of appeal to this Court from that order. This Court dismissed the appeal because we lacked jurisdiction. *Munroe Falls v. Wiener*, 9th Dist. Summit No. 27100 (Dec. 5, 2014).

{¶7} Subsequently, the City and the HOA filed motions for summary judgment on the Wieners' counterclaim and third-party claims against them. In two orders issued in 2015, the trial court granted the motions for summary judgment with respect to the Wieners' civil conspiracy claim on two grounds. First, the trial court concluded that the Wieners failed to properly plead a claim for civil conspiracy because they did not allege the underlying tort that served as a basis for that claim in their combined counterclaim and third-party complaint. Further, even had the Wieners pled the underlying tort, the trial court concluded no genuine issues of material fact were in dispute with respect to the civil conspiracy claim, and the City and the HOA were entitled to summary judgment on this claim. With respect to the Wieners' remaining claims against the HOA, the trial court concluded that the HOA did not specifically address these remaining claims, and, accordingly, the trial court did not consider the remaining claims. However, with respect to the particular issue of the enforceability of the nonwaiver provision contained in the restrictions and the restriction at issue, the trial court determined that the nonwaiver provision was effective and that the restriction had not been waived. The trial court certified its judgments in accordance with Civ.R. 54(B).

{¶8} The Wieners timely appealed from each of the 2015 judgments, and this Court consolidated the appeals. The Wieners now present four assignments of error for our review.

We have consolidated the first with the second assignment of error, and the third with the fourth assignment of error, to facilitate our discussion.

II.

ASSIGNMENT OF ERROR I

> THE TRIAL COURT ERRED IN FINDING THAT [THE WIENERS] FAILED TO PROPERLY PLEAD A CLAIM FOR CIVIL CONSPIRACY.

ASSIGNMENT OF ERROR II

> THE TRIAL COURT ERRED IN FINDING THAT [THE WIENERS] PRESENTED NO EVIDENCE TO ESTABLISH A GENUINE ISSUE OF MATERIAL FACT IN DISPUTE AS TO ANY ESSENTIAL ELEMENT OF THE CIVIL CONSPIRACY CLAIM.

{¶9} In their first assignment of error, the Wieners argue that the trial court erred in concluding that the Wieners failed to plead a proper claim for civil conspiracy. In their second assignment of error, the Wieners argue that the trial court erred in concluding that there existed no genuine issue of material fact with respect to their claim for civil conspiracy. Accordingly the Wieners argue that the trial court erred in granting summary judgment to the City and the HOA on the Wieners' civil conspiracy claim. We disagree.

{¶10} We review an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). 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.*, 13 Ohio App.3d 7, 12 (6th Dist.1983).

{¶11} Pursuant to Civ.R. 56(C), summary judgment is proper only 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., 50 Ohio St.2d 317, 327 (1977).

{¶12} 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*, 75 Ohio St.3d 280, 292-293 (1996). If the movant satisfies this burden, the non-moving party "must set forth specific facts showing that there is a genuine issue for trial." *Id.* at 293, quoting Civ.R. 56(E).

{¶13} Here, the trial court concluded that summary judgment was properly granted to the City and the HOA on the Wieners' civil conspiracy claim because the complaint failed to allege an underlying unlawful act. A claim for civil conspiracy requires "(1) a malicious combination, (2) involving two or more persons, (3) causing injury to person or property, and (4) the existence of an unlawful act independent from the conspiracy itself. [T]he underlying unlawful act must be a tort." *Bindra v. Fuenning*, 9th Dist. Summit No. 26489, 2013-Ohio-5722, ¶ 31, quoting *LaSalle Bank, N.A. v. Kelly*, 9th Dist. Medina No. 09CA0067-M, 2010-Ohio-2668, ¶ 33.

{¶14} In the claim for civil conspiracy in their combined counterclaim and third-party complaint, the Wieners incorporated all previous allegations in the complaint, and then alleged as follows:

> 26. The HOA has engaged in a course of conduct designed to arbitrarily enforce certain provisions of the HOA's by-laws while waiving some or similar provisions for other homeowners (most notably present and former officers of the HOA).
>
> 27. The HOA has selectively enforced provisions of the HOA bylaws, and communicated and conspired with the City [] to arbitrarily and with malicious intent prevent the [Wieners] from completing a simple playhouse on the premises for the use and enjoyment of their children while ignoring other similar violations of the development's restrictive covenants and by-laws.
>
> 28. The HOA knew or should have known that the restrictive covenants and by-laws it has asserted against [the Wieners] have been waived and are unenforceable.

> 29. The HOA has acted with actual malice toward [the Wieners] by continuing to interfere with their completion of the playhouse on their property. And the HOA and the City [] have conspired to deprive the [Wieners] of the use and enjoyment of their property.

{¶15} In its motion for summary judgment, the City maintained that the civil conspiracy claim must fail because the Wieners could not establish unlawful action by the City in enforcing its own ordinances. In the HOA's motion for summary judgment with respect to this claim, it also contended that it had a lawful purpose for denying the Wieners permission to build their playhouse based upon the restrictions of the development. In response to both motions on this claim, the Wieners maintained that the actions of the City and the HOA constituted the unlawful acts of an abuse of process, a taking of the Wiener's private property rights, and a slander of title. In their replies, the City and the HOA indicated that these three underlying unlawful acts were not contained in the Wieners' complaint, and they argued that the summary judgment evidence established no genuine issue as to whether they had engaged in these acts.

{¶16} In its journal entries, the trial court held that the Wieners were required to allege the requisite elements of the underlying torts in order to maintain the civil conspiracy claim. It further held that the Wieners could not use a brief in opposition to a motion for summary judgment to assert claims beyond those raised in the complaint or to allege new theories of recovery. *See Clucas v. Rt. 80 Express, Inc.*, 9th Dist. Summit No. 27433, 2015-Ohio-2838, ¶ 14. The trial court concluded that the allegations in the complaint provided only that the City conspired with the HOA to deprive the Wieners of the use and enjoyment of their property by preventing them from constructing a playhouse. Because the trial court concluded that this allegation did not set forth any underlying torts, the trial court found that the civil conspiracy claim failed.

{¶17} On appeal, the Wieners maintain that the underlying tort supporting civil conspiracy need not be separately alleged as a claim in the complaint, but, instead, it may be alleged within the civil conspiracy claim itself. In support, the Wieners cite *The Wright Safety Co. v. U.S. Bank, N.A.*, 9th Dist. Summit No. 24587, 2009-Ohio-6428, where this Court concluded, in part, that the trial court should consider whether a civil conspiracy claim itself contained allegations of the independent tort when deciding whether to dismiss a civil conspiracy claim for failure to allege an underlying unlawful act. *Id.* at ¶ 33. We remanded that matter for the trial court to consider this issue. *Id.* Unlike *The Wright Safety Co.*, here, it appears that the trial court did consider whether the civil conspiracy claim sufficiently stated an underlying tort, and it concluded that it did not do so, and instead alleged merely that the City and the HOA had prevented the Wieners from building a playhouse, which deprived them of the use and enjoyment of their property.

{¶18} On appeal, the Wieners maintain that, in addition to paragraphs 26 through 29 of their complaint quoted above, paragraphs 8 through 14 of their complaint, incorporated by reference in the civil conspiracy claim, support the allegations of an underlying tort. The Wieners emphasize in those paragraphs the allegations that: they were unable to obtain a zoning certificate, the City commenced this action by filing a complaint, and that the Wieners' efforts to comply with the stipulated order were compromised by the HOA asserting that the playhouse violated the development's restrictions. The Wieners appear to maintain that these allegations, when combined with the allegations specific to the civil conspiracy claim contained in paragraphs 26 to 29, sufficiently stated facts to support the underlying acts of abuse of process, taking of property, and slander of title.

{¶19} However, the Wieners have not developed an argument as to how these particular allegations put the parties on notice of the purported independent torts they now allege support the civil conspiracy claim. *See* App.R. 16(A)(7), and Civ.R. 8(A); *see also York v. Ohio State Highway Patrol*, 60 Ohio St.3d 143, 144-145 (1991) (Notice pleading contemplated by Civ.R. 8(A) requires the plaintiff to plead "a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover * * *.").

{¶20} Nonetheless, we agree with the trial court's further determination that, even were we to accept these claims as the unlawful acts underlying the civil conspiracy claim, the Wieners failed to meet their summary judgment burden.

{¶21} In their motions for summary judgment with respect to the civil conspiracy claim, the City and the HOA maintained that they were legally entitled to attempt to prevent construction of the playhouse, the City relying on its ordinances, and the HOA relying on the restrictions. We conclude that the City and the HOA met their initial summary judgment burdens with respect to the civil conspiracy claims. *See Dresher*, 75 Ohio St.3d at 292-93. The Wieners responded by alleging that the City and the HOA conspired in the unlawful acts of abuse of process, taking of property, and slander of title.

{¶22} An "abuse of process occurs where someone attempts to achieve through use of the court that which the court is itself powerless to order." *Robb v. Chagrin Lagoons Yacht Club, Inc.*, 75 Ohio St.3d 264, 271 (1996). "The three elements of the tort of abuse of process are: (1) that a legal proceeding has been set in motion in proper form and with probable cause; (2) that the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed; and (3) that direct damage has resulted from the wrongful use of process." *Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A.*, 68 Ohio St.3d 294, (1994), paragraph one of

the syllabus. Here, the Wieners argued that the City's present action against it was perverted to accomplish the purpose of enforcing the deed restrictions, which the Wieners claim it had no authority to do. However, the Wieners pointed to no summary judgment evidence which would indicate that a question of material fact exists that the proceeding had been perverted for an ulterior purpose. *See* Civ.R. 56(E). Accordingly, it did not meet its reciprocal burden to establish a question of fact existed as to an abuse of process serving as the underlying tort to support their civil conspiracy claim.

{¶23} Further, in their response to summary judgment, the Wieners identified a taking of property as the purported underlying unlawful act supporting civil conspiracy, and they cited case law pertaining to takings of property by the government. The Wieners, citing *State ex rel. Duncan v. Mentor City Council*, 105 Ohio St.3d 372, 2005-Ohio-2163, argued that *Duncan* stood for the proposition that a "taking can occur where a city applies restrictive covenants to deny a property owner[']s right to build." They concluded that the HOA and the City conspired to deprive the Wieners of their right to use their property, and they have been deprived the use of the area of their land on which the uncompleted playhouse stands.

{¶24} Assuming without deciding that a civil conspiracy claim can be based upon the underlying action of a "taking," we are unable to discern from the argument presented in the Wieners' response to summary judgment, or in their brief on appeal, in what way prohibition of the construction of the playhouse resulted in a deprivation of their property rights so as to amount to a taking. In *Duncan*, cited by the Wieners, there existed a question of fact as to whether the city planning commission's application of a subdivision's covenants deprived a landowner of all economically viable use of his property. *Id.* at ¶ 18. Although the Wieners conclude that they have been deprived the use of the land where the playhouse sits, they have

developed no argument as to how this constitutes a triable issue as to whether there was a compensable regulatory taking. *See Duncan* at ¶ 18, quoting *State ex rel. Trafalgar Corp. v. Miami Cty. Bd. of Commrs.*, 104 Ohio St.3d 350, 2004-Ohio-6406, ¶ 25, quoting *State ex rel Shemo v. Mayfield Hts.*, 95 Ohio St.3d 56, 63 (2002) ("a compensable regulatory taking could 'occur either if the application of the zoning ordinance to the particular property is constitutionally invalid, i.e., it does not substantially advance legitimate state interests, or denies the landowner all economically viable use of the land'") (Emphasis omitted.). Accordingly, we conclude that the Wieners failed to meet their reciprocal burden of pointing to a triable issue on the civil conspiracy claim based upon a taking, assuming that such an action can serve as the independent action underlying a civil conspiracy claim.

{¶25} With respect to slander of title, to prevail on such a claim, the Wieners would have been required to prove "that a false statement was made, published maliciously, and the false statement resulted in a special pecuniary loss to the property holder." (Internal quotations and citations omitted.) *Elite Designer Homes, Inc. v. Landmark Partners*, 9th Dist. Summit No. 22975, 2006-Ohio-4079, ¶ 38. In support of this claim serving as the underlying unlawful act of their civil conspiracy claim, the Wieners point to evidence pertaining to special assessments that the City had made against the Wieners' property. However, the Wieners point to no evidence that the HOA was in any way involved in these special assessments. Further, these special assessments were levied *after* the Wieners filed their civil conspiracy claim, and thus we cannot discern how slander of title based upon the assessments which had not yet been levied could serve as the predicate tort giving rise to the civil conspiracy claim. Accordingly, we conclude that the Wieners failed to meet their reciprocal burden of pointing to a triable issue with respect to civil conspiracy based upon slander of title.

{¶26} Accordingly, the Wieners' first and second assignments of error are overruled.

ASSIGNMENT OF ERROR III

THE TRIAL COURT ERRED IN FINDING THAT THE NON[W]AIVER PROVISION IN THE STEEPLECHASE HOMEOWNER'S RESTRICTIONS IS EFFECTIVE.

ASSIGNMENT OF ERROR IV

THE TRIAL COURT ERRED IN FINDING THAT [THE HOA] DID NOT WAIVE THE STEEPLECHASE HOMEOWNER'S ASSOCIATION'S RESTRICTIONS.

{¶27} In their third and fourth assignments of error, the Wieners contend that the trial court erred in concluding that the HOA was entitled to summary judgment on the issue of whether the restrictions were waived. We disagree.

{¶28} The standard of review for an order granting summary judgment was set forth in our discussion of the first and second assignments of error above. The HOA moved for summary judgment on the issue of whether its restrictions were enforceable. In support of its position that the restrictions were enforceable, the HOA relied upon the restriction set forth in our recitation of the facts above, that "[a]ny unattached storage buildings, outbuildings, accessory buildings, sheds, barns, etc." are prohibited in the development.[1] Further, the HOA pointed to the general provisions in the restrictions, which include the following language: "[f]ailure of The Steeplechase to enforce any of the restrictions contained herein, shall in no event be construed to be in any manner a waiver of, acquiescence in, or consent to a further or succeeding violation of these restrictions." In response, the Wieners maintained that the HOA waived its right to enforce its restrictions. In support, the Wieners pointed to several purported violations of the restrictions

[1] The trial court has not yet decided whether the HOA is entitled to summary judgment on the issue of whether the Wieners violated the restriction or whether the HOA is entitled to an injunction. Our discussion here is limited to whether the restriction at issue was enforceable.

by other lot owners in the development. The trial court concluded that the restriction was not waived because: the nonwaiver clause was enforceable; there existed no affirmative action on the part of the HOA evincing an intent to waive enforcement of the restrictions; the Wieners did not change their position in reliance on a perceived waiver; and, the Wieners failed to establish that the HOA had knowledge of any other violation and acted with an intention to waive the restriction.

{¶29} "A waiver is a voluntary relinquishment of a known right." *Chubb v. Ohio Bur. of Workers' Comp.*, 81 Ohio St.3d 275, 278 (1998), citing *State ex rel. Athens Cty. Bd. of Commrs. v. Gallia, Jackson, Meigs, Vinton Joint Solid Waste Mgt. Dist. Bd. of Directors*, 75 Ohio St.3d 611, 616 (1996). "Waiver assumes one has an opportunity to choose between either relinquishing or enforcing of the right. A waiver may be enforced by the person who had a duty to perform and who changed his or her position as a result of the waiver." *Chubb* at 279, citing *Andrews v. State Teachers Retirement Sys. Bd.*, 62 Ohio St.2d 202, 205 (1980).

{¶30} Here, the restrictions included the provision that the HOA would not waive its right to enforce the restrictions through its prior nonenforcement. Despite this nonwaiver provision, the Wieners point to contract law in support of waiver, arguing that "even nonwaiver clauses may not preclude a trial court from finding a waiver of rights where a party acts in *an affirmative manner* evincing an intent to waive contractual provisions." (Emphasis added.) *Cokor v. Borden Chem. Div. of Borden*, 8th Dist. Cuyahoga No. 54745, 1988 WL 136012, *4 (Dec. 15, 1988), citing *VanDyne v. Fidelity-Phenix Ins. Co.*, 17 Ohio App.2d 116 (7th Dist.1969); *Kool, Mann, Coffey & Co. v. Castellini Co.*, 1st Dist. Hamilton No. C-930951, 1995 WL 453049, *6 (Aug. 2, 1995). *See also Providence Manor Homeowners Assn., Inc. v. Rogers*, 12th Dist. Butler No. CA2011-10-189, 2012-Ohio-3532, ¶ 48-52 (applying nonwaiver clause in

the context of the restrictions contained in declaration of restrictions, covenants, and conditions of a subdivision).

{¶31} The Wieners have maintained that the HOA clearly waived the nonwaiver provision and the deed restriction by nonenforcement of the restriction against numerous homeowners in the subdivision whose properties contained noncompliant structures. However, pursuant to the language of the nonwaiver provision, nonenforcement of the restrictions is one of the situations that triggers the nonwaiver provision itself. The Wieners pointed to no affirmative act by the HOA through which it could be said to have waived the nonwaiver provision. *See Cokor* at *4. Accordingly, we conclude that the Wieners did not meet their reciprocal burden of demonstrating a triable issue as to whether the nonwaiver provision applied.

{¶32} Because the Wieners premised their arguments alleging waiver of the nonwaiver provision and of the restriction on the HOA's purported failure to enforce the restriction, and we concluded that the nonwaiver clause effectively precluded waiver on this basis, we conclude that the trial court properly granted summary judgment to the HOA on the issue of the enforceability of the restriction. Therefore, we need not reach the Wieners' challenges to the trial court's other bases for concluding that the restriction was not waived.

{¶33} Accordingly, the Wieners' third and fourth assignments of error are overruled.

III.

{¶34} The Wieners' assignments of error are overruled.

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(C). 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.

CARLA MOORE
FOR THE COURT

WHITMORE, J.
CONCURS.

HENSAL, J.
DISSENTING.

{¶35} I do not agree that the City was entitled to summary judgment on the Wieners' civil conspiracy claim. The allegations in the Wieners' complaint are sufficient to state a claim for abuse of process, which serves as the underlying tort for the conspiracy claim. Regarding the merits of the abuse of process claim, I believe that, viewing the evidence submitted by the Wieners in a light most favorable to them, including all reasonable inferences that can be drawn from such evidence, there is some evidence in the record that the City perverted the proceedings

below to accomplish an ulterior purpose. I, therefore, would reverse the award of summary judgment to the City.

{¶36} I also believe that the award of summary judgment to the HOA should be reversed. Although I agree that the Wieners have not demonstrated that the HOA waived the non-waiver provision, I believe that the majority has not properly addressed the Wieners' fourth assignment of error. In their fourth assignment of error, the Wieners argue that, even if the non-waiver provision is effective, the court should refuse to enforce the restrictions on their property because the HOA has unclean hands, because the restrictions are contrary to public policy, because the restrictions have been abandoned by the HOA, and because the restrictions lack substantial value. The Wieners made these arguments to the trial court, but it failed to address them in its judgment entry. I, therefore, would remand this case to the trial court for it to consider the Wieners' overlooked arguments in the first instance.

APPEARANCES:

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