

[Cite as *Herrick-Hudson, L.L.C. v. Cleveland-Cuyahoga Cty. Port Auth.*, 2016-Ohio-7716.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 104053

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**HERRICK-HUDSON L.L.C.**

PLAINTIFF-APPELLANT

vs.

**CLEVELAND-CUYAHOGA COUNTY PORT  
AUTHORITY**

DEFENDANT-APPELLEE

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**JUDGMENT:  
AFFIRMED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CV-13-804221

**BEFORE:** McCormack, J., Keough, P.J., and Laster Mays, J.

**RELEASED AND JOURNALIZED:** November 10, 2016

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TIM McCORMACK, J.:

{¶1} This case involves an ongoing, prolonged legal battle between Herrick-Hudson L.L.C. (“Herrick-Hudson”), a Virginia limited liability company, and Cuyahoga County over a parcel of real estate located at the northeast corner of East 9th Street and Prospect Avenue in downtown Cleveland. The parcel is part of a larger site on which the new Cuyahoga County government administrative headquarters stands. The parcel is co-owned by Herrick-Hudson and the Cleveland-Cuyahoga County Port Authority (“the Port Authority”).<sup>1</sup> The Port Authority is also the sole tenant of the subject real estate under a 99-year ground lease.

{¶2} Before 2013, Cuyahoga County and Herrick-Hudson each owned a 50-percent fee simple interest in the parcel. In February 2013, Cuyahoga County transferred its interest in the parcel to Geis Headquarters L.L.C. (“Geis”), which constructed the new county administrative building. Geis subsequently transferred its interest to the Port Authority. As a result of the transfer, the Port Authority is currently both a co-owner of the parcel and the tenant of the ground lease. The ground lease provided for approximately \$70,000 in annual rent. Herrick-Hudson, which received approximately \$35,000 annually as a co-owner, considered the rent amount to be

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<sup>1</sup>Cleveland-Cuyahoga County Port Authority is a body corporate and politic established under R.C. 4581.01 et seq. located in, and serving, Cuyahoga County.

significantly below the market rate. As a result, the property has been the subject of extensive litigation.

{¶3} In the most recent round of litigation, Herrick-Hudson filed a two-count complaint on April 4, 2013, against the Port Authority, requesting partition and equitable accounting for rents and profits.

{¶4} The Port Authority moved to dismiss the equitable accounting claim and to stay the case pending an appeal in a related case.<sup>2</sup> The court denied the motion to dismiss, but stayed the case.

{¶5} While the instant litigation was pending, the Port Authority missed making the rent payment for the third quarter of 2014. Under the ground lease, the Port Authority, as the tenant, is to pay the rent, approximately \$35,000 annually, in four quarterly payments to Herrick-Hudson. The rent for each quarter is due on the last day of that quarter. The rent for the third quarter of 2014, due on September 30, 2014, was not paid by the Port Authority until December 26, 2014, and it was received by Herrick-Hudson on December 28, 2014.<sup>3</sup> The Port Authority was also late on the

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<sup>2</sup>In that case, Cuyahoga County initiated a lawsuit for a determination of the amount of annual rent under the ground lease. The trial court upheld the validity of the ground lease and ordered the parties to arbitration under the terms for arbitration provided for in the ground lease. On January 15, 2013, the arbitration panel determined the net annual rentable value of the parcel to be \$65,325 for 2008, to be adjusted periodically. On November 21, 2013, this court affirmed the trial court's judgment. *Hagan v. Cleveland Times Square Holdings/Six Points, L.L.C.*, 8th Dist. Cuyahoga No. 99696, 2013-Ohio-5128.

<sup>3</sup>The check contained a notation, "Ground Rent for Quarter Commenced 10/01/2014"; the Port Authority maintained this was an inadvertent error and the notation should have been "Ground Rent for Quarter Commenced 7/01/2014."

fourth-quarter rent payment; the fourth-quarter rent was due on December 31, 2014, and the Port Authority paid it by a check dated February 12, 2015.

{¶6} Meanwhile, on January 30, 2015, the instant case was returned to the trial court's active docket. According to Herrick-Hudson, sometime in February 2015, it discovered that the Port Authority was "in default." Herrick-Hudson notified the Port Authority that, due to the default, it would exercise its right under the ground lease to terminate the Port Authority's tenancy. Herrick-Hudson also returned the uncashed rent checks for the third and fourth quarters of 2014 to the Port Authority.

{¶7} In response to Herrick-Hudson's notice of default, the Port Authority amended its answer in the instant case to include a counterclaim for a declaratory judgment, seeking a declaration that the ground lease remained in full force and effect. In turn, Herrick-Hudson filed an amended and supplemental complaint to add two breach-of-duty claims, alleging that the Port Authority breached its duty to its co-owner Herrick-Hudson in attempting to have the court declare the ground lease enforceable.

{¶8} Subsequently, the trial court and the parties agreed that the issue of whether there was a default under the ground lease permitting Herrick-Hudson to exercise its right to terminate the ground lease should be resolved before the adjudication of Herrick-Hudson's claims of partition and equitable accounting. The Port Authority and Herrick-Hudson filed cross motions for partial summary judgment on the issue of whether the lease remained valid in light of Herrick-Hudson's allegation of default.

{¶9} In its motion for partial summary judgment, the Port Authority maintained that, although its payment for the third quarter of 2014 was late, the ground lease provided for a four-month grace period to make a late payment and its rent payment on December 26, 2014, was tendered within the four-month grace period for the third quarter.

{¶10} The trial court agreed. It granted declaratory judgment in favor of the Port Authority, finding that no genuine issue of material fact existed as to the issue of default. In the same judgment entry, the court also dismissed the two breach-of-duty counts Herrick-Hudson raised in its amended complaint based on Herrick-Hudson's allegation that the Port Authority owed a certain duty to Herrick-Hudson as a co-owner of the property and breached its duty when it took actions relating to the rent issue against Herrick-Hudson's interest. The trial court dismissed these counts, stating that the court had earlier found such a duty not to exist in a prior litigation.

{¶11} The trial court subsequently added the Civ.R. 54(B) "no just reason for delay" language to its judgment entry in order to permit this court's interlocutory review of its ruling on the partial judgment. On appeal, Herrick-Hudson presents three assignments of error for our review. They state:

1. Whether the trial court committed reversible error when it denied appellant Herrick-Hudson's Motion for Summary Judgment, and granted Appellee Cleveland-Cuyahoga County Port Authority's Motion for Summary Judgment on the Port's counterclaim for declaratory judgment.

2. Whether the trial court committed reversible error when it denied Appellant, as counterclaim defendant, the opportunity to conduct discovery on the Port's counterclaim for Declaratory Judgment.
3. Whether the trial court committed reversible error in applying the collateral estoppel doctrine to reach a result inconsistent with long-established legal and equitable principles.

{¶12} Under the first assignment of error, Herrick-Hudson contends the trial court erred in denying its motion for partial summary judgment and granting the Port Authority's motion for partial summary judgment on the Port Authority's counterclaim for declaratory judgment.

{¶13} Summary judgment is appropriate when (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) after construing the evidence most favorably for the party against whom the motion is made, reasonable minds can reach only a conclusion that is adverse to the nonmoving party. Civ.R. 56(C). We review the trial court's judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996).

{¶14} In seeking a declaratory judgment that the ground lease remained in effect, the Port Authority maintained that it tendered the rent payment for the third quarter of 2014 on December 26, 2014 — received by Herrick-Hudson on December 28, 2014 — within the four-month grace period provided for in the ground lease, and therefore, no breach of the ground lease occurred triggering Herrick-Hudson's right to terminate the lease.

{¶15} The ground lease stated, in pertinent part:

[I]f at any time there shall be any default on the part of the lessee in the payment of any money by it herein agreed to be paid \* \* \* and *default shall continue for a period of four (4) months*, the lessor may, at any time after the expiration of such four (4) months \* \* \* elect to terminate this lease \* \* \*.

(Emphasis added.)

{¶16} Herrick-Hudson argues it may elect to terminate the lease because the Port Authority “remained in a state of default” for more than four months. This claim is not supported by the plain and unambiguous language of the lease provision, as the trial court correctly found. The Port Authority was in default after September 30, 2014, when it missed the third-quarter payment. The Port Authority ceased to be in default, however, when it tendered the third-quarter rent payment (albeit erroneously designated), within the four-month grace period — it sent the payment on December 26, 2014, and Herrick-Hudson admitted it received the check on December 28, 2014. Although the Port Authority was in default again at the end of December 2014 for the fourth-quarter rent (until February 12, 2015, when it tendered the rent check for that quarter), the Port Authority’s default did not “continue for a period of four months” triggering Herrick-Hudson’s right to terminate the lease.

{¶17} During the period of time between October 1, 2014 (when the default for the third quarter of 2014 began) and February 12, 2015 (when the default for the fourth quarter of 2014 ended), the Port Authority never remained in default for four continuous months. The plain and unambiguous ground lease required the default to “continue for four months” before the owner’s right to terminate the lease could be invoked.



Herrick-Hudson argues that under this interpretation of the ground lease, the Port Authority would be unfairly permitted to remain in a state of default for over four months (as long as not continuously).

{¶18} It has long been established “[w]here a written agreement is plain and unambiguous it does not become ambiguous by reason of the fact that in its operation it will work a hardship on one of the parties thereto and corresponding advantage to the other.” *Ullmann v. May*, 147 Ohio St. 468, 473, 72 N.E.2d 63 (1947). We are also mindful that it is not the responsibility nor the function of the court to rewrite the parties’ contract where a contract is plain and unambiguous. *Aultman Hosp. Assn. v. Community Mut. Ins. Co.*, 46 Ohio St.3d 51, 54-55, 544 N.E.2d 920 (1989). The trial court was correct that no genuine issue of material fact remained on the default issue under the plain and unambiguous language of the lease terms. The first assignment of error is without merit.

{¶19} Under the second assignment of error, Herrick-Hudson claims the trial court “improvidently” prevented Herrick-Hudson from obtaining any discovery, thus affecting its substantial rights.<sup>3</sup>

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<sup>3</sup>The Port Authority argues that this court should not consider this assignment of error because the claim is asserted untimely. It claims that the court’s judgment granting its motion for protective order, entered July 23, 2015, should have been appealed within 30 days of the judgment entry pursuant to App.R. 4(A). The Port Authority is incorrect. Interlocutory orders, such as most discovery orders, are merged into the final judgment. *Grover v. Bartsch*, 170 Ohio App.3d 188, 2006-Ohio-6115, 866 N.E.2d 547, ¶ 9 (2d Dist.).

{¶20} The record reflects that after Herrick-Hudson amended its complaint, it requested extensive discovery from the Port Authority seeking many different types of documents relating to the ground lease, not only from the Port Authority, but also from Geis, L.L.C., Cuyahoga County, and the trustee of a construction bond issued to build the administrative building who has been designated as the Port Authority's agent to pay the rent.

{¶21} The Port Authority sought a protective order from the trial court on the ground that Herrick-Hudson had admitted its receipt of the December 26, 2014 rent check, and therefore, there were no additional factual issues requiring discovery on the question of the Port Authority's default. The trial court granted the Port Authority's request for a protective order and allowed the Port Authority to move for a partial summary judgment on the default issue.

{¶22} As we have discussed in the foregoing, the partial summary judgment here was confined to the limited issue of whether the Port Authority's default "continue[s] for a period of four months" thus permitting Herrick-Hudson to elect a termination of the lease, and the question is resolved by the Port Authority's tendering of the rent check on December 26, 2015. Given the existence of the check on the record, the extensive discovery sought by Herrick-Hudson is not reasonably necessary or relevant to the limited question of whether the Port Authority was in default "which continue[s] for a period of four months." *See* Civ.R. 26(C) (discovery shall be limited to nonprivileged matters that are "relevant to the subject matter involved in the pending action" or "reasonably

calculated to lead to the discovery of admissible evidence”); *Martin v. Budd Co.*, 128 Ohio App.3d 115, 119, 713 N.E.2d 1128 (9th Dist.1998) (documents sought to be subpoenaed must have some relevance to the pending action and be reasonably necessary). The trial court is entitled to exercise considerable discretion in discovery matters. See *In re Disqualification of Holbrook*, 138 Ohio St.3d 1206, 2013-Ohio-5863, 3 N.E.3d 201, ¶ 7. We find no abuse of discretion here in the trial court’s granting the protective order sought by the Port Authority. The second assignment of error lacks merit.

{¶23} Herrick-Hudson’s third assignment of error relates to the trial court’s dismissal of the two counts of breach of duty raised in its amended and supplemental complaint, which were added in response to the Port Authority’s counterclaim for a declaratory judgement. Herrick-Hudson claimed the Port Authority breached the duty as a co-owner of the subject property in its conduct regarding the default, such as filing the counterclaim seeking a declaratory judgment that there was no default.

{¶24} The trial court dismissed the two breach-of-duty counts on the ground that it had previously rejected a similar claim raised in a prior litigation. Herrick-Hudson claims the trial court erred in applying the doctrine of collateral estoppel to dismiss its claims.

{¶25} In an earlier litigation, *Herrick-Hudson L.L.C. v. Cuyahoga Cty. Executive*, Cuyahoga C.P. No. CV-12-785770 (Dec. 12, 2013), Herrick-Hudson claimed that Cuyahoga County (its co-owner at the time) breached a fiduciary duty owed to

Herrick-Hudson as a co-owner of the subject property by taking actions against the best interest of Herrick-Hudson. The trial court rejected the claim, holding that “defendant [Cuyahoga County] owes no duty as a fiduciary as the relationship between the parties is that of a co-owner, not a fiduciary one.” Herrick-Hudson did not appeal the trial court’s ruling.<sup>4</sup>

{¶26} “The doctrine of collateral estoppel [also known as issue preclusion] serves to prevent the relitigation in a second action of an issue that was litigated and decided in a prior action involving the same parties. Issue preclusion applies even if the causes of action differ.” *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.3d 1060, ¶ 40. The claims of breach of duty asserted by Herrick-Hudson in this case are essentially the same as in the prior litigation: Herrick-Hudson claimed its co-owner took actions contrary to the best interest of Herrick-Hudson. As such, the trial court did not err in applying the doctrine of collateral estoppel and dismissing the two breach-of-duty counts asserted by Herrick-Hudson in its supplemental and amended complaint. The third assignment of error is without merit.

{¶27} Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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<sup>4</sup>Herrick-Hudson appealed from the trial court’s judgment in 8th Dist. Cuyahoga No. 100823, but later voluntarily dismissed the appeal pursuant to App.R. 28.

It is ordered that a special mandate issue out of this court directing the common pleas 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.

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TIM McCORMACK, JUDGE

KATHLEEN ANN KEOUGH, P.J., and  
ANITA LASTER MAYS, J., CONCUR