[Cite as *Spearman v. Am. Elec. Power Co., Inc.*, 2015-Ohio-928.]

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
HARDIN COUNTY

DENISE I. SPEARMAN, ET AL.,

PLAINTIFFS-APPELLANTS, **CASE NO. 6-14-13**

v.

AMERICAN ELECTRIC POWER COMPANY, INC., ET AL., **O P I N I O N**

DEFENDANTS-APPELLEES.

Appeal from Hardin County Common Pleas Court
Trial Court No. CVH20141006

Judgment Reversed and Cause Remanded

Date of Decision: March 16, 2015

APPEARANCES:

Keith A. Lange and Terrence G. Stolly **for Appellants**

Derek A. Younkman **for Appellees, American Electric Power Company, Inc. and Ohio Power Company**

Melvin J. Davis **for Appellee, Nelson Tree Service, Inc.**

PRESTON, J.

{¶1} Plaintiffs-appellants, Denise I. and Jan P. Spearman (collectively, the "Spearmans"), appeal the July 7, 2014 judgment entry of the Hardin County Court of Common Pleas granting defendants-appellees', American Electric Power Company, Inc. ("AEP") and Ohio Power Company's ("OPC") (collectively, the "AEP Parties"), motion to compel arbitration and stay proceedings. For the reasons that follow, we reverse.

{¶2} On January 10, 2014, the Spearmans filed a complaint against the AEP Parties and defendant-appellee, Nelson Tree Service, Inc. ("Nelson"). (Doc. No. 1). In their complaint, the Spearmans alleged that they own property at 5587 Township Road 139 in Hardin County, Ohio (the "Property") that is subject to an easement (the "Easement") held by OPC. (*Id.* at ¶ 6, 8). The instrument granting the Easement (the "Deed of Easement") provides, in relevant part:

> Witnesseth: That for One Dollar ($1.00) in hand paid to the parties of the first part [i.e., the Spearmans' predecessors] by the party of the second part [i.e., OPC], the receipt of which is hereby acknowledged, and the contemplated plan of furnishing service in the vicinity, said parties of the first part hereby grant, bargain, sell, convey, and warrant, to the party of the second part, its successors and assigns forever, a right of way and easement with the right,

privilege and authority to said party of the second part, its successors, assigns, lessees, and tenants to construct, erect, operate and maintain a line of poles and wires for the purpose of transmitting electric or other power, including telegraph or telephone wires in, on, along, over, through or across, and also along any highway as now or hereafter laid out or widened abutting, the following described lands situated in Blanchard Township, in the County of Hardin in the State of OHIO, and part of Section No. 31 Township No. 3-S and Range No. 11-E and bounded:

On the North by the lands of Union Central Life Ins. Co.

On the East by the lands of Philip Kurtz

On the South by the lands of Hardin Co. Bank, Roscoe Gardner, Virginia Mielke

On the West by the lands of Anna Kurt

TOGETHER with the right to said party of the second part, its successors and assigns, to place, erect, maintain, inspect, add to the number of, and relocate at will, poles, crossarms or fixtures, and string wires and cables, adding thereto from time to time, across, through or over the above described premises, to cut and, at its option, remove from said premises or the premises of the parties of

the first part adjoining the same on either side, any trees, overhanging branches or other obstructions which may endanger the safety or interfere with the use of said poles or fixtures or wires attached thereto or any structure on said premises, and the right of ingress and egress to and over said above described premises, and [sic] of the adjoining lands of the parties of the first part, at any and all times, for the purpose of patrolling the line, of repairing, renewing or adding to the number of said poles, structures, fixtures and wires, and for doing anything necessary or useful or convenient for the enjoyment of the easement herein granted, also the privilege of removing at any time any or all of said improvement erected upon, over, or on said land, together with the rights, easements, privileges and appurtenances in or to said lands which may be required for the full enjoyment of the rights herein granted. Grantee will immediately repair or replace all fences, gates, drains and ditches injured or destroyed by it on said premises or pay Grantor all damages done to the fences, drains, ditches, crops and stock on the premises herein described, caused by the construction, operation and maintenance of said lines. All claims for damages caused in the operation and maintenance of said lines, shall be made at the office

> of the Grantee at 21 South First Street, Newark, Ohio, or mailed to P.O. Box 911, Newark, Ohio, within thirty days after such damages accrue. If Grantor and Grantee cannot agree on the amount of damages, the same shall be arbitrated. Any trees cut will be paid for by Board Measure, using Scribner's Lumber Rules, at the market price in vicinity, and this indenture contains all agreements, expressed or implied, between the parties hereto.

(*Id.* at Ex. B).

{¶3} The Spearmans allege in their complaint that, while "the Property contains hundreds of old growth trees," "[t]he Easement runs parallel to the tree line" and "[t]here are no trees within the Easement, nor do any tree branches encroach on the Easement or are otherwise within the Easement." (*Id.* at ¶ 10, 11, 13). They also allege that "the trees are located, at the minimum, [40 to 50] feet from the Easement." (*Id.* at ¶ 15). The Spearmans assert that Nelson, at the direction of the AEP Parties, and without the Spearmans' permission, entered and cut over 250 trees on the Property that "were beyond" the Easement. (*Id.* at ¶ 16, 17, 19, 30). According to the Spearmans, "[t]he cutting of trees * * * was in retaliation" for a default judgment the Spearmans obtained against AEP in another case "for previous unauthorized cutting of trees on the Property." (*Id.* at ¶ 28).

The Spearmans' complaint contains five counts: violation of R.C. 901.51,[1] conversion, trespass, intentional destruction of real property, and negligent destruction of real property. (*Id.* at ¶ 34-60).

{¶4} Nelson filed its answer on January 24, 2014. (Doc. No. 5). The AEP Parties filed their answer on February 12, 2014. (Doc. No. 6). In their answer, the AEP Parties admit that OPC is the holder of the Easement, and they "state that the easement was originally a blanket easement and that as presently located runs parallel to County Road 135 on the east side thereof and which is also the western portion of [the Property]." (*Id.* at ¶ 5, 7). The AEP Parties state that Nelson cut or trimmed the trees and branches "in accordance with the vegetation management program," and the AEP Parties "deny for lack of knowledge whether or not the trees were within the easement or whether tree branches were encroaching within the easement or otherwise within the easement prior to the cutting and trimming by [Nelson]." (*Id.* at ¶ 9). Nevertheless, the AEP Parties state that the Deed of Easement "granted the requisite authority to enter and cut the trees." (*Id.* at ¶ 13). Among their affirmative defenses, the AEP Parties assert "arbitration," which they

[1] R.C. 901.51 provides:

> No person, without privilege to do so, shall recklessly cut down, destroy, girdle, or otherwise injure a vine, bush, shrub, sapling, tree, or crop standing or growing on the land of another or upon public land. In addition to the penalty provided in section 901.99 of the Revised Code, whoever violates this section is liable in treble damages for the injury caused.

said "is a condition precedent before the instant Complaint may be adjudicated." (*Id.* at ¶ 28).

{¶5} On the day they filed their answer, the AEP Parties also filed a motion to compel arbitration and stay proceedings. (Doc. No. 7). In their motion, the AEP Parties argued that based on the Deed of Easement's arbitration clause, and because the Spearmans' claims "relate to the cutting of trees and damages caused in the operation and maintenance of the power lines," "it follows that this matter should be arbitrated and the proceedings herein stayed." (*Id.* at 1).

{¶6} On March 4, 2014, the Spearmans filed their memorandum in opposition to the AEP Parties' motion to compel arbitration and stay proceedings. (Doc. No. 10). On March 6, 2014, Nelson filed its memorandum in support of the AEP Parties' motion to compel arbitration and stay proceedings. (Doc. No. 12).

{¶7} On July 7, 2014, the trial court filed its judgment entry granting the AEP Parties' motion to compel arbitration and staying the proceedings pending arbitration. (Doc. No. 13). In its judgment entry, the trial court explained:

> Upon a review of the Deed of Easement alone the Court cannot determine the exact location of the easement on Plaintiffs' land, although this may be established by other evidence at trial. However, this deed is the only written agreement the Court needs to

> review for purposes of the motion to compel arbitration and stay the proceedings.

(*Id.* at 5). In support of its decision, the trial court cited the public policy favoring the enforcement of arbitration agreements and the rule that any uncertainty regarding the applicability of an arbitration clause should be resolved in favor of coverage. (*Id.* at 6). The trial court concluded, "Based upon the plain language contained in the deed, this Court cannot find, to a high degree of certainty, that the arbitration clause does not cover the asserted dispute." (*Id.* at 7).

{¶8} On August 4, 2014, the Spearmans filed their notice of appeal. (Doc. No. 14). They raise one assignment of error for our review.

Assignment of Error

> **The trial court erred in granting defendants' motion to compel arbitration and to stay the proceedings. Appendix A: Trial Court's Judgment Entry, July 7, 2014.**

{¶9} In their assignment of error, the Spearmans argue that the trial court erred by granting the AEP Parties' motion to compel arbitration and stay proceedings because the AEP Parties and Nelson "acted outside the scope of the Easement because the Easement provides and the Spearmans intended that only claims for damages that are caused from the maintenance and operation of the power lines are to be arbitrated" and because the AEP Parties and Nelson's "tree

cutting and the Spearmans [sic] resulting claims therefrom are unrelated to the Easement." (Appellants' Brief at 7).

{¶10} "Ohio and federal courts recognize that there is a strong presumption in favor of arbitration and they encourage arbitration to settle disputes." *Kellogg v. Griffiths Health Care Group*, 3d Dist. Marion No. 9-10-59, 2011-Ohio-1733, ¶ 8, citing *ABM Farms, Inc. v. Woods*, 81 Ohio St.3d 498, 500 (1998). R.C. 2711.02 governs the issuance of a stay of proceedings pending arbitration:

> If any action is brought upon any issue referable to arbitration under an agreement in writing for arbitration, the court in which the action is pending, upon being satisfied that the issue involved in the action is referable to arbitration under an agreement in writing for arbitration, shall on application of one of the parties stay the trial of the action until the arbitration of the issue has been had in accordance with the agreement, provided the applicant for the stay is not in default in proceeding with arbitration.

R.C. 2711.02(B).

{¶11} "Pursuant to R.C. 2711.02, a court must first determine that the issue involved in an action is referable to arbitration under a written agreement that calls for arbitration." *Albrechta & Coble v. Baumgartner*, 6th Dist. Sandusky No. S-03-006, 2004-Ohio-3906, ¶ 11, citing *Cross v. Carnes*, 132 Ohio App.3d 157, 164

(11th Dist.1998). To make that determination, the court must examine the contract and determine the scope of the arbitration clause. *See Citibank S. Dakota, N.A. v. Wood*, 169 Ohio App.3d 269, 2006-Ohio-5755, ¶ 49 (2d Dist.), citing *Divine Constr. Co. v. Ohio-Am. Water Co.*, 75 Ohio App.3d 311, 316 (10th Dist.1991). "R.C. 2711.02 does not necessarily require an evidentiary hearing." *Taylor-Winfield Corp. v. Winner Steel, Inc.*, 7th Dist. 06-MA-176, 2007-Ohio-6623, ¶ 18, citing *Cross* at 166. "Rather, the trial court must be 'satisfied' that the dispute is referable to arbitration under such an agreement." *Id.*, citing *Cross* at 166. "One method to ensure that is to hold an evidentiary hearing on the matter." *Id.*, citing *Cross* at 166.

{¶12} In *Council of Smaller Enterprises v. Gates, McDonald & Co.*, the Supreme Court of Ohio adopted "four general principles * * * to be applied when considering the reach of an arbitration clause": (1) that arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute that he has not agreed to arbitrate; (2) that unless the parties provide otherwise, the question of arbitrability—that is, whether the agreement creates a duty for the parties to arbitrate the particular grievance—is an issue to be decided by the court, not the arbitrator; (3) that in deciding the arbitrability of a particular grievance, the court must not rule on the potential merits of the underlying claims; and (4) that when a "'contract contains an arbitration clause, there is a presumption of

arbitrability in the sense that '[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" 80 Ohio St.3d 661, 665-666 (1998), quoting *AT & T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648-650, 106 S.Ct. 1415 (1986), quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-588, 80 S.Ct. 1347 (1960).

{¶13} When reviewing a trial court's decision to grant or deny a motion to stay proceedings and compel arbitration, an appellate court generally applies an abuse-of-discretion standard of review. *Kellogg*, 2011-Ohio-1733, at ¶ 9, citing *Morris v. Morris*, 189 Ohio App.3d 608, 2010-Ohio-4750, ¶ 15 (10th Dist.). An abuse of discretion suggests the trial court's decision is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). "However, a de novo standard of review is appropriate when the appeal presents a question of law." *Kellogg* at ¶ 9, citing *Morris* at ¶ 15 and *Barhorst, Inc. v. Hanson Pipe & Prods. Ohio, Inc.*, 169 Ohio App.3d 778, 2006-Ohio-6858, ¶ 10 (3d Dist.).

{¶14} In this case, the parties do not dispute that the Property is subject to the Easement. Rather, the issue presented in this appeal is whether the trial court properly determined that the Spearmans' claims are referable to arbitration under

the Deed of Easement's arbitration clause. The Deed of Easement, excerpted above, grants OPC the right "to construct, erect, operate and maintain a line of poles and wires for the purpose of transmitting electric or other power." The Deed of Easement also grants OPC the right "to cut and, at its option, remove from said premises * * * any trees, overhanging branches or other obstructions which may endanger the safety or interfere with the use of said poles or fixtures or wires attached thereto or any structure on said premises." Regarding arbitration, the Deed of Easement provides that "[i]f Grantor and Grantee cannot agree on the amount of damages" "caused in the operation and maintenance of said lines," "the same shall be arbitrated." The Deed of Easement does not contain a metes-and-bounds description of the Easement.[2]

{¶15} "When an easement is created by an express grant, the extent and limitations of the easement depend upon the language of the grant." *Andrews v. Columbia Gas Transm. Corp.*, S.D.Ohio No. 2:05-cv-501, 2007 WL 1057388, *1 (Apr. 6, 2007), citing *Alban v. R.K. Co.*, 15 Ohio St.2d 229, 232 (1968), *Columbia Gas Transm. Corp. v. Bennett*, 71 Ohio App.3d 307, 318 (2d Dist.1990), and *Ashland Pipe Line Co. v. Lett*, 5th Dist. Ashland No. CA-942, 1990 WL 52505, *3

[2] Based on the Deed of Easement's lack of "dimensional boundaries or location of the easement," the trial court referred to the Easement as a "floating easement." (Doc. No. 13 at 4, citing *Black's Law Dictionary* 549 (8th Ed.2004) (defining a "floating easement" as "[a]n easement that, when created, is not limited to any specific part of the servient estate"). The Sixth District Court of Appeals in *Bayes v. Toledo Edison Co.* referred to an easement lacking a metes-and-bounds description as a "global easement." 6th Dist. Lucas Nos. L-03-1177 and L-03-1194, 2004-Ohio-5752, ¶ 69, 72. In their answer and brief on appeal, the AEP Parties refer to the Easement as a "blanket easement," as well as a floating and global easement. (Doc. No. 6 at ¶ 7); (AEP Parties' Brief at 2).

(Apr. 11, 1990). "The failure to describe an easement by metes and bounds does not render the conveying instrument invalid." *H & S Co., Ltd. v. Aurora*, 11th Dist. Portage No. 2003-P-0104, 2004-Ohio-3507, ¶ 16, citing *Roebuck v. Columbia Gas Transm. Corp.*, 57 Ohio App.2d 217, 219-220 (1977). "'Where the dimensions of the easement are not expressed in the instrument granting the easement, the court determines the width, length, and depth from the language of the grant, the circumstances surrounding the transaction, and that which is reasonably necessary and convenient to serve the purpose for which the easement was granted.'" *Andrews* at *1, quoting *Bayes v. Toledo Edison Co.*, 6th Dist. Lucas Nos. L-03-1177 and L-03-1194, 2004-Ohio-5752, ¶ 69, citing *Aurora* at ¶ 16, *Phoenix Concrete, Inc. v. Reserve-Creekway, Inc.*, 100 Ohio App.3d 397, 405 (10th Dist.1995), and *Roebuck* at 224. *See also Voisard v. Marathon Ashland Pipe Line, L.L.C.*, 3d Dist. Marion No. 9-05-49, 2006-Ohio-6926, ¶ 6, citing *Bayes* at ¶ 69.

{¶16} If the court cannot determine from the granting instrument the location of the easement as intended by the transacting parties, then it is proper for the court to consider extrinsic evidence to determine the extent and scope of the easement. *Aurora* at ¶ 16, citing *Roebuck* at 220 and *Amsbary v. Little*, 4th Dist. Washington No. 90 CA 16, 1991 WL 37916, *3 (Mar. 11, 1991); *Munchmeyer v. Burfield*, 4th Dist. Washington No. 95CA7, 1996 WL 142579, *3 (Mar. 26, 1996).

See also Andrews at *1 ("When the specific terms of an easement are not expressed in the grant itself, determining the dimensions or reasonableness of use becomes a question of fact."), citing *Crane Hollow, Inc. v. Marathon Ashland Pipe Line*, 138 Ohio App.3d 57, 67 (4th Dist.2000); *Bayes* at ¶ 69 (same), citing *Crane Hollow, Inc.* at 67 and *Murray v. Lyon*, 95 Ohio App.3d 215, 220 (9th Dist.1994).

{¶17} The location of the easement as intended by the parties is typically indicated by use. *Aurora* at ¶ 16, citing *Amsbary* at *4. *See also Munchmeyer* at *3 ("Use, existing at the time of the easement's creation, is considered strong evidence of the intended location and dimensions of the easement."). "Evidence may be introduced to show the situation and condition of the easement and properties involved, the use made of the way, what obstructions, if any, existed at the time of the grant, and all other facts bearing upon the situation and relation of the parties in order to determine what was granted by one party and received by the other." *Amsbary* at *3, citing *Lyon v. Fels*, 8 Ohio N.P. 450, 453, 11 Ohio Dec. 706, 1901 WL 867 (1901). Based on the extrinsic evidence, the court "will fix a width, length, etc. that is 'reasonable' to accomplish the purposes of the easement." *Munchmeyer* at *3. *See also Stone v. Coats*, 1 Ohio Law Abs. 422, 422 (9th Dist.1923) ("Where a conveyance of a right of way does not describe or

define it by metes and bounds, the grantee is entitled to a convenient, reasonable and accessible way.").

{¶18} In this case, in explaining its decision that the Spearmans' claims are referable to arbitration under the Deed of Easement's arbitration provision, the trial court stated that "[u]pon a review of the Deed of Easement alone," it could *not* "determine the exact location of the easement on Plaintiffs' land." (Doc. No. 13 at 5). The trial court explained that the location of the Easement "may be established by other evidence at trial" and that the Deed of Easement "is the only written agreement the Court needs to review for purposes of the motion to compel arbitration and stay the proceedings." (*Id.*). It appears from the judgment entry that the trial court examined the Spearmans' complaint, determined that their action involves "damages for the cutting of trees," examined the arbitration provision in the Deed of Easement, determined that it applies "if the parties cannot agree on the amount of damages" caused by tree cutting, and concluded that the Spearmans' claims are referable to arbitration under the Deed of Easement's arbitration provision. (*Id.* at 5-6).

{¶19} We hold that the trial court abused its discretion by granting the AEP Parties' motion to compel arbitration and stay proceedings without first determining the location of the Easement. Whether the Spearmans' action for tree cutting is arbitrable under the Deed of Easement first depends on the physical

dimensions of the Easement and, specifically, whether the trees cut by Nelson were within the physical dimensions of the Easement. If the trees cut by Nelson were outside the physical dimensions of the Easement, then the Deed of Easement's arbitration clause does not govern the Spearmans' claims. *See Cottrell v. Am. Elec. Power*, 190 Ohio App.3d 518, 2010-Ohio-5673, ¶ 18 (3d Dist.) ("[W]hen public utilities exceed the scope of their easements, the injured party may seek recourse in the court of common pleas for common-law trespass or under R.C. 901.51."), citing *Bayes*, 2004-Ohio-5752.

{¶20} Even if the trees cut by Nelson were within the physical dimensions of the Easement, it is possible that Nelson and the AEP Parties exceeded or acted outside the rights granted under the Easement. *See Bayes* at ¶ 72, 74. The Easement grants OPC the right to, among other things, cut or remove trees that "may endanger the safety or interfere with the use of said poles or fixtures or wires attached thereto or any structure on said premises." If the trial court determines that Nelson and the AEP Parties exceeded or acted outside the rights granted under the Easement, then the Deed of Easement's arbitration clause does not govern the Spearmans' claims. *See Cottrell* at ¶ 18, citing *Bayes*. Finally, if the trees cut by Nelson were within the physical dimensions of the Easement, and if Nelson and the AEP Parties acted within the rights granted under the Easement, then the trial court must determine whether the Spearmans' claims are referable to arbitration

under the Deed of Easement's arbitration provision, which applies to "damages caused in the operation and maintenance of said lines."

{¶21} In rendering our decision, we need not and do not address: the physical dimensions of the Easement; whether the trees cut by Nelson were within the Easement's physical dimensions; whether Nelson and the AEP Parties exceeded or acted outside the rights granted under the Easement; and, assuming that the trees cut by Nelson were within the Easement's physical dimensions and that Nelson and the AEP Parties acted within the rights granted under the Easement, whether the Spearmans' claims are subject to arbitration under the Deed of Easement's arbitration clause. These are questions for the trial court to decide on remand.

{¶22} In summary, to determine whether the Spearmans' claims are arbitrable under the Deed of Easement's arbitration provision, it was essential for the trial court to determine the physical dimensions of the Easement. The trial court abused its discretion by granting the AEP Parties' motion to compel arbitration and stay proceedings without first determining the physical dimensions of the Easement.

{¶23} The Spearmans' assignment of error is sustained.

{¶24} Having found error prejudicial to the appellants herein in the particulars assigned and argued, we reverse the judgment of the trial court and remand for further proceedings consistent with this opinion.

Judgment Reversed and
Cause Remanded

SHAW and WILLAMOWSKI, J.J., concur.

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