

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
CLERMONT COUNTY

TOM SCOVANNER, et al.,	:	
Plaintiffs-Appellants,	:	CASE NO. CA2012-02-017
- vs -	:	<u>OPINION</u>
	:	8/13/2012
OHIO VALLEY VOICES, et al.,	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS  
Case No. 2011 CVH 1731

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Tom & Sharon Scovanner

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defendant-appellee, Miami Twp. Bd. of Trustees

**PIPER, J.**

{¶ 1} Plaintiffs-appellants, Tom and Sharon Scovanner, appeal a decision of the  
Clermont County Court of Common Pleas granting summary judgment in favor of  
defendants-appellees, Ohio Valley Voices and Miami Township Board of Trustees.

{¶ 2} In June 2006, Ohio Valley Voices purchased real estate that was formerly used as a church. Ohio Valley Voices applied for a permit to modify the church so that it could be used for a nonprofit school for the vocally and hearing impaired. The use would have been nonconforming to the Miami Township zoning regulations, and Ohio Valley Voices applied for a permit to allow for such nonconforming use. As a result of Ohio Valley Voices' request for a permit, the abutting owners living in a residential area were placed on notice of Ohio Valley Voices' application for a variance. One of the homes abutting the property is owned by Tom and Sharon Scovanner (the Scovanners).

{¶ 3} The Scovanners voiced several objections to the nonconforming use. Ohio Valley Voices, the Scovanners, and the Miami Township Trustees entered into negotiations regarding the Scovanners' objections. Ultimately, Ohio Valley Voices and the Scovanners entered into a written agreement in 2006 (the Agreement). As part of the Agreement, Ohio Valley Voices agreed to construct a fence 12-13 feet inside the border separating its property from the Scovanners' residential lot. The fence was to be placed so that the extra 12-13 feet of Ohio Valley Voices' property created an additional buffer between the fence and the residential lot lines. Vegetation grew within the buffer zone, which was at all times owned by Ohio Valley Voices.

{¶ 4} In September 2011, Ohio Valley Voices took down the fence, and reconstructed it so that it ran along and abutted the residential property lines, thus removing the additional buffer of vegetation that had before existed between the fence line and the residential lots. The Scovanners filed a complaint against Ohio Valley Voices, as well as the Trustees, who had issued a permit to move the fence from its original 2006 position. The Scovanners moved for a temporary restraining order and preliminary injunction to prohibit the new location of the fence. The Scovanners' complaint also alleged that the Trustees had refused to enforce its zoning code and had refused to produce public records. However, the

Scovanners did not allege any property rights to the other lots in their subdivision.

{¶ 5} Nine days after the Scovanners filed their complaint, Ohio Valley Voices moved the fence back to its original position as it related to the Scovanners' property, reinstating the 12-13 foot buffer zone. The fence, therefore, was returned to its original position as it was situated in 2006 in relation to the Scovanners' property. However, the fence was not placed back in the original position as it related to the other residential property owners.

{¶ 6} Despite moving the portion of the fence that abutted the Scovanners' property back to its original position, the Scovanners moved forward with their suit, though they abandoned their public records claim and request for a temporary restraining order. Ohio Valley Voices and the Trustees filed motions for summary judgment. On the same day that the Trustees filed their motion for summary judgment, the Scovanners moved for leave to amend their complaint. Approximately two weeks later, the Scovanners filed a second motion for leave to amend their complaint. The Scovanners also filed memoranda in opposition to the motions for summary judgment by Ohio Valley Voices and the Trustees.

{¶ 7} The trial court issued a decision in which it overruled the Scovanners' motions for leave to amend their complaint, and further granted summary judgment to Ohio Valley Voices and the Trustees. The Scovanners now appeal the trial court's decision, raising the following assignments of error.

{¶ 8} Assignment of Error No. 1:

{¶ 9} THE TRIAL COURT PREJUDICIALLY ERRED IN GRANTING SUMMARY JUDGMENT TO [OHIO VALLEY VOICES].

{¶ 10} The Scovanners argue in their first assignment of error that the trial court erred in granting summary judgment in favor of Ohio Valley Voices. The Scovanners, however, do not argue that the trial court erred in granting summary judgment in favor of the Trustees. As such, this court will not address any of the merits specific to the Trustees' motion for

summary judgment, as the Scovanners have waived all issues regarding that decision on appeal.

{¶ 11} This court's review of a trial court's ruling on a summary judgment motion is de novo. *Broadnax v. Greene Credit Serv.*, 118 Ohio App.3d 881, 887 (2nd Dist.1997). Civ.R.56 sets forth the summary judgment standard and requires that (1) there be no genuine issues of material fact to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to only one conclusion being adverse to the nonmoving party. *Slowey v. Midland Acres, Inc.*, 12th Dist. No. CA2007-08-030, 2008-Ohio-3077, ¶ 8. The moving party has the burden of demonstrating that there is no genuine issue of material fact. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64 (1978).

{¶ 12} The nonmoving party "may not rest on the mere allegations of his pleading, but his response, by affidavit or as otherwise provided in Civ.R. 56, must set forth specific facts showing the existence of a genuine triable issue." *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 385 (1996). A dispute of fact can be considered "material" if it affects the outcome of the litigation. *Myers v. Jamar Enterprises*, 12th Dist. No. CA2001-06-056, 2001 WL 1567352,\*2 (Dec. 10, 2001). A dispute of fact can be considered "genuine" if it is supported by substantial evidence that exceeds the allegations in the complaint. *Id.*

{¶ 13} The Scovanners argue that the trial court improperly interpreted the written agreement from 2006 as a contract because it was actually a restrictive covenant that runs with the land. Essentially, the Scovanners argue that the written agreement was a restrictive covenant that required Ohio Valley Voices to always keep the fence 12-13 feet away from *all* residential lots, and to always maintain the additional buffer zone of vegetation between the fence and *all* the residential lots, not just their own.

{¶ 14} The Scovanners filed the complaint against Ohio Valley Voices, claiming that it failed to comply with the 2006 "Agreement" by moving the fence. The Scovanners did not

claim that their dispute was centered on a restrictive covenant, and no such assertion was set forth in the complaint or the accompanying affidavits. Instead, the Scovanners attached a copy of the "Agreement" to their complaint and referred to the written terms as the Agreement, and not a restrictive covenant.<sup>1</sup> According to the Agreement, the site plan for the school would be changed to employ 45-degree angular parking, removal of the light post nearest the residential areas, shielding other lights near the parking lot, and the placement of timers on the lights to extinguish illumination no later than 8:30 p.m.

{¶ 15} The Agreement also set forth the following clause regarding the fence, "Ohio Valley Voices shall construct a fence on the parking lot a distance of 12-13 feet from the residential lots to the East. The fence shall extend to the front corner of the parcel and may at that point be constructed in small part on the residential lot owned by Thomas and Sharon Scovanner." The only parties/signatories to the agreement were Ohio Valley Voices and the Scovanners, and nowhere in the agreement did it indicate that the intent of the parties was to create a restrictive covenant.

{¶ 16} "In order for a restrictive covenant to run with the land, the following three factors must be met: (1) an intent for the restrictive covenant to run with the land, (2) the covenant 'touches and concerns' the land, and (3) the parties are in privity of contract." *National City Bank v. Welch*, 188 Ohio App.3d 641, 2010-Ohio-2981, ¶ 14 (10th Dist.). While the Agreement demonstrates that the parties were in privity of contract, the other elements are not met.

{¶ 17} As previously stated, there is no indication that the parties ever intended that their "Agreement" become a restrictive covenant to run with the land. There is no language within the Agreement demonstrating such intent. Nor is there any reference made to future

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1. During oral arguments before this court, the Scovanners referred to the Agreement as a "contract" and "settlement agreement."

or other possible parties who would be bound by the terms or would be able to enforce the terms of the Agreement. Nor is there any indication in the record that the Agreement was to be recorded or binding on future grantees, heirs, assigns, or owners in interest. The Agreement contained no legal descriptions, lot numbers or addresses of the properties involved.

{¶ 18} The Agreement also does not touch and concern the land. Instead, the Agreement makes reference to how lighting would be regulated, and that Ohio Valley Voices agreed to construct a fence. There was no mention made of maintaining the fence, nor any future responsibilities imposed upon the land.

{¶ 19} In sum, there is no indication that the parties negotiated the terms of the Agreement intending that such terms would be a restrictive covenant, binding on any other party. We further note that the Scovanners' affidavits opposing summary judgment did not reflect that the Scovanners considered the Agreement to be a restrictive covenant running with the land.

{¶ 20} The trial court, therefore, properly analyzed the Scovanners' breach of contract action using traditional notions of contract law, rather than any specific analysis of restrictive covenants. "To recover upon a breach-of-contract claim, a plaintiff must prove the existence of a contract, performance by the plaintiff, breach by the defendant, and damage or loss to the plaintiff." *Jarupan v. Hanna*, 173 Ohio App.3d 284, 2007-Ohio-5081, ¶ 18 (5th Dist.). (Internal citations omitted.) "In order to prove a breach by the defendant, a plaintiff must show that the defendant 'did not perform one or more of the terms of the contract.'" *Id.* quoting *Little Eagle Prop. v. Ryan*, 10th Dist. No. 03AP-923, 2004-Ohio-3830, ¶ 15.

{¶ 21} Neither party disputes the existence of the Agreement, or that the fence was moved. However, the Scovanners did not suffer any damage or loss because the fence was returned to its original position, as it related to the Scovanners' property, within nine days.

The Scovanners first claimed that they suffered damage because the fence has not been moved back to its original position from the other residential lots, only theirs. However, the Scovanners have not asserted property rights in the other residential lots, nor are the owners of the other lots parties to this action. The Scovanners offer no evidence to substantiate their claim that their property was financially damaged as a result of the fence not being moved back as to the other lots. The Scovanners cannot rely on general averments contained in their complaint, and they have not put forth material facts to indicate that the alleged breach of contract action caused them pecuniary harm. Without financial damages, the trial court was correct in determining a breach of contract action cannot survive.

{¶ 22} Alternatively, the Scovanners argued to the trial court that they were damaged because moving the fence destroyed the vegetation within the original 12-13 foot buffer zone. However, the vegetation growing within the buffer zone was on property owned by Ohio Valley Voices. The land did not belong to the Scovanners and they cannot prove damages for the loss of something in which they have no property rights. Further, the Agreement did not contain any clause that required Ohio Valley Voice to maintain the vegetation, only the buffer zone. Moreover, the Scovanners did not support their claim with any facts that their property value decreased or that they suffered any damages to their own property based on the destruction of the buffer zone vegetation.

{¶ 23} According to Civ.R. 56(E), the Scovanners were required to set forth "specific facts" showing that there is a genuine issue of material fact regarding their breach of contract claim that requires additional litigation. However, they have failed to do so. As such, the trial court properly granted summary judgment to Ohio Valley Voices, and the Scovanners' first assignment of error is overruled.

{¶ 24} Assignment of Error No. 2:

{¶ 25} THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT

OVERRULED THE MOTION(S) FOR LEAVE TO AMEND THE COMPLAINT.

{¶ 26} The Scovanners argue in their second assignment of error that the trial court erred in denying their two motions for leave to amend their original complaint.

{¶ 27} According to Civ.R. 15(A), a party may amend the complaint within the initial 28-day time frame for responsive pleading, and may request leave of court to amend the complaint once the 28-day time frame has passed. As recently stated by the Ohio Supreme Court, "the language of Civ.R. 15(A) favors a liberal amendment policy and a motion for leave to amend should be granted absent a finding of bad faith, undue delay or undue prejudice to the opposing party." *State ex rel. Doe v. Caper*, slip opinion, 2012-Ohio-2686 ¶ 8.

{¶ 28} An appellate court reviews a trial court's decision to grant or deny a motion to amend a complaint using an abuse of discretion standard. *Wagoner v. Obert*, 180 Ohio App.3d 387, 2008-Ohio-7041, ¶ 111 (5th Dist.). "While Civ.R. 15(A) allows for liberal amendment, the trial court does not abuse its discretion if it denies a motion to amend pleadings if there is a showing of bad faith, undue delay, or undue prejudice to the opposing party." *Id.* citing *Hoover v. Sumlin*, 12 Ohio St.3d 1(1984), paragraph two of the syllabus. "Where a plaintiff fails to make a *prima facie* showing of support for new matters sought to be pleaded, a trial court acts within its discretion to deny a motion to amend the pleading." *Wilmington Steel Products, Inc. v. Cleveland Electric Illuminating Co.*, 60 Ohio St.3d 120 (1991), syllabus.

{¶ 29} The trial court considered the Scovanners' proposed amendments, and found that they had not produced any evidence to establish a *prima facie* showing of support for the new matters to be pled. The trial court determined that absent the supporting evidence, any amendments to the complaint would have caused an undue delay and prejudice to Ohio Valley Voices and to the Trustees. After reviewing the record, we cannot say that such a



decision was arbitrary, unreasonable, or unconscionable.

{¶ 30} The record indicates that the Scovanners moved the court to permit leave to amend their complaint in regard to how the Trustees enforced the applicable zoning ordinances. The original complaint alleged that the Scovanners made "numerous requests of Defendant Trustees to enforce the zoning and land use regulations of Miami Township as to Defendant Voices [sic] real estate use," and that the Trustees had "refused to enforce such regulations as against Defendant Voices." The Scovanners requested a writ of mandamus directing the Trustees to enforce the land use regulations as it related to Ohio Valley Voices' use of its property.

{¶ 31} The Scovanners' requested to amend their complaint to include an allegation that Laurence Fronk, who is employed by the Trustees, failed to enforce the zoning regulations, and that the Trustees denied the Scovanners' "numerous requests of Defendant Trustees and Defendant Fronk to enforce the zoning and land use regulations of Miami Township as to Defendant Voices [sic] real estate use." However, neither the Scovanners' motion to amend, nor the amended complaint itself, set forth any facts to support their argument that Fronk failed to enforce the zoning regulations, or that the modifications made by Ohio Valley Voices to its property were not proper absent variance permits. Instead, the proposed amendment merely echoed the original allegation that the Trustees failed to enforce the zoning regulations, and simply added Fronk as a party.

{¶ 32} The Scovanners also alleged that the Trustees had permitted Ohio Valley Voices to make multiple changes to its property without first securing the necessary variances. These changes included building a bridge over the creek on its property, constructing outdoor playgrounds, building a deck onto mature trees, erecting outbuildings, and relocating a dumpster pad. By way of the Scovanners' amended complaint, they asked the trial court to order removal of all structures on the Ohio Valley Voices property that had

not been constructed pursuant to a valid zoning variance permit. The trial court found that the Scovanners had not offered any support to establish that the structures referred to, such as the deck, bridge, and dumpster pad, had been constructed in violation of any zoning ordinance, or that such required any permits.

{¶ 33} The Scovanners' amended complaint asked that the trial court order Ohio Valley Voices to proceed in conformance with the Agreement. However, the trial court found that specific performance was not a possible remedy unless no other remedy existed at law, and that the Scovanners had failed to assert that no other remedy existed or how they were entitled to specific performance.

{¶ 34} We also note that the Scovanners stated that their original complaint had been "hastily drafted in order to get the matter before the court." While the complaint may have been hastily drafted, the Scovanners' argument that it was done so in order to stop the fence from being moved lacks merit, as the fence had been moved two days before the complaint was filed, and all the structures referred to by the Scovanners had been on the Ohio Valley Voices property well before the fence was ever moved.

{¶ 35} The Scovanners moved for and were granted additional time to respond to Ohio Valley Voices' motion for summary judgment. Despite the grant of extra time, the Scovanners did not file their motion for leave to file an amended complaint until the day that their memorandum in opposition to Ohio Valley Voices' motion for summary judgment was due, which was also the same day that the Trustees filed their motion for summary judgment. We agree with the trial court that the Scovanners' attempt to amend their complaint would have caused undue delay and prejudice to Ohio Valley Voices and to the Trustees. Having found no abuse of discretion in the trial court's denial of the Scovanners' motion to amend the complaint, the Scovanners' second assignment of error is overruled.

{¶ 36} Judgment affirmed.

POWELL, P.J., and YOUNG, J., concur.

Young, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.