[Cite as *Rubber City Arches Graham, L.L.C. v. Joe Sharma Properties, L.L.C.*, 2015-Ohio-1630.]

STATE OF OHIO))ss: COUNTY OF SUMMIT)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
RUBBER CITY ARCHES GRAHAM, LLC Appellee/Cross-Appellant v. JOE SHARMA PROPERTIES, LLC, et al. Appellants/Cross-Appellees	C.A. No. 27099 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2011-04-2137

DECISION AND JOURNAL ENTRY

Dated: April 29, 2015

HENSAL, Presiding Judge.

{¶1} Joseph Sharma and Joe Sharma Properties, LLC (collectively "Sharma") appeal a judgment of the Summit County Court of Common Pleas. In addition, Rubber City Arches Graham, LLC, ("RCA Graham") has cross-appealed the trial court's judgment. For the following reasons, this Court affirms in part and reverses in part.

I.

{¶2} In the 1970s, Gaylia Medley owned or co-owned two adjacent parcels of land in Cuyahoga Falls. The eastern parcel, which she owned exclusively, borders Graham Road on the north and a McDonald's restaurant owned by Rubber City Arches, LLC ("RCA") on the east. The western parcel, which she co-owned with John Snoderly, borders Graham Road on the north and Hudson Drive on the west. There is residential property to the south of both parcels.

{¶3} In 1974, Ms. Medley leased the eastern parcel to the Blake Brothers Company so it could build a Friendly's restaurant on the parcel. The term of the lease was 20 years, which

began to run in May 1976. Blake Brothers had the option of extending the lease four times with each extension lasting five years. Accordingly, the original lease could run through May 2016, a total of 40 years.

{¶4} Although the eastern parcel does not border Hudson Drive, the Memorandum of Lease contained a provision granting Blake Brothers and its customers permission to use the western parcel for parking and access to Hudson Drive. The Memorandum of Lease provided that the western-parcel use provision would "remain in force during the term of the Lease referred to above * * * and all extensions thereof and shall terminate with the termination of said Lease as therein provided." Ms. Medley, Mr. Snoderly, and Blake Brothers also signed a separate "Driveway License Agreement," concerning only the western parcel, that contained the same language as was in the Memorandum of Lease's western-parcel use provision.

{¶5} A few years after the Friendly's restaurant opened, Ms. Medley and Mr. Snoderly sold the western parcel to Jessie Tucker. In 1982, Mr. Sharma bought the western parcel from Mr. Tucker's estate. At the time of his purchase, Mr. Sharma was aware that the Memorandum of Lease and Driveway License Agreement allowed the Friendly's restaurant and its customers to use the western parcel for access and parking. He later conveyed the property to Joe Sharma Properties.

{¶6} Blake Brothers operated the Friendly's restaurant until 2004, when it assigned the lease to JEMM Restaurants, Inc. JEMM continued to operate the restaurant until 2010 when RCA became interested in buying the eastern parcel in order to expand its McDonald's restaurant. RCA, however, wanted to preserve the lease, including the right to use the western parcel, so it had RCA Graham buy the eastern parcel from Ms. Medley and then JEMM assigned the lease to RCA.

{¶7} RCA subsequently demolished the Friendly's restaurant and began planning a new McDonald's restaurant. As part of the planning process, it conducted a Phase I environmental site assessment of the eastern parcel. When the study revealed that there was a risk of contamination from a dry cleaning business that operates out of a strip mall that is on the western parcel, it conducted a Phase II environmental site assessment and discovered that tetrachlorothene had migrated onto the parcel. It also discovered that the roof of the strip mall protruded nine inches over the eastern parcel.

{¶8} In 2011, RCA Graham sued Sharma alleging trespass based on the hazardous chemicals that had contaminated its property. It also sought a permanent injunction to prohibit the discharge of any additional hazardous materials and sought the removal of any encroachments from the western parcel. It further requested the declaration of a prescriptive easement and an implied easement that would allow it, its tenants, and its invitees to continue using the western parcel for access to Hudson Drive.

{¶9} At trial, Sharma stipulated to a permanent injunction prohibiting it from discharging hazardous materials onto the eastern parcel. Sharma also stipulated that the Memorandum of Lease and the Driveway License Agreement allowed the western parcel to be used for parking and access to Hudson Drive until at least May 2016. Following trial, the court found that, although Sharma was liable for trespass of the hazardous chemical, the damages were nominal. It entered a permanent injunction prohibiting the discharge of any further hazardous materials and ordered Sharma to remove the part of the strip mall roof that overhangs the eastern parcel. Regarding access to Hudson Drive, the court found that, in light of the express language of the Memorandum of Lease and Driveway License Agreement, it was not necessary to resolve RCA Graham's implied and prescriptive easement claims. The court found that, so long as those

agreements are in effect, RCA Graham, "its customers, employees and those having business with it" are permitted to use the western parcel. Both sides appealed the trial court's judgment, but this Court remanded the case so that the trial court could determine whether the Memorandum of Lease and Driveway License Agreement created a license or an easement. On remand, the court determined that the documents create an express easement over the western parcel that benefits the eastern parcel. Sharma has appealed the trial court's judgment, and RCA Graham has cross-appealed.

II.

ASSIGNMENT OF ERROR

> THE TRIAL COURT ERRED IN DETERMINING THAT THE [SHARMA] PARCEL IS SUBJECT TO THE TERMS OF THE FRIENDLY'S LEASE AND DRIVEWAY LICENSE AGREEMENT SO LONG AS THE FRIENDLY'S LEASE REMAINS IN EFFECT.

{¶10} Sharma argues that the Memorandum of Lease and Driveway License Agreement granted Blake Brothers a personal license to use Ms. Medley's western parcel, not an easement appurtenant. They argue that the license has a definite term that cannot be extended without their consent. They also argue that RCA cannot extend its right to use the western parcel simply by having RCA Graham extend its lease of the eastern parcel. "The construction of written contracts and instruments of conveyance is a matter of law" that this Court reviews de novo. *Bath Twp. v. Raymond C. Firestone Co.*, 140 Ohio App.3d 252, 256 (9th Dist.2000), quoting *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241 (1978), paragraph one of the syllabus.

{¶11} At the time that Ms. Medley and Blake Brothers entered the agreements, Ms. Medley owned or co-owned both the eastern and western parcels. In the Memorandum of Lease and Driveway License Agreement, she agreed to lease the eastern parcel to Blake Brothers and granted it permissive use of the western parcel. Blake Brothers' rights under those agreements

eventually transferred to RCA. RCA, however, is not a party to this case. The only party that filed suit against Sharma was RCA Graham. RCA Graham is the successor to Ms. Medley's exclusive ownership interest in the eastern parcel.

{¶12} The Memorandum of Lease and Driveway License Agreement do not explicitly bestow the owner of the eastern parcel with any right to use the western parcel, only the lessee Blake Brothers. That is not surprising considering Ms. Medley already had the right to use the western parcel at the time she executed the agreements because she co-owned it with Mr. Snoderly. RCA Graham, however, argues that it may enforce the rights given to RCA in the Memorandum of Lease and Driveway License Agreement because Ms. Medley had the right to burden the western parcel and those agreements contain a reservation of rights, providing: "This grant is not exclusive and Landlord reserves for themselves, their customers, employees and all those having business with them similar rights." According to RCA Graham, because Ms. Medley had an ownership interest in both parcels, her reservation of rights applies to both parcels, and those reserved rights in the western parcel passed to RCA Graham when it purchased the eastern parcel.

{¶13} "[I]t is fundamental that a tenant in common cannot convey or incumber the interest of his cotenant * * * and any attempt to do so is ineffectual." *Laurer v. Green*, 99 Ohio St. 20, 25 (1918); *Gleason v. Squires*, 39 Ohio App. 88, 90 (5th Dist.1931). In addition, "[i]t is established that a tenant in common cannot grant an easement which will be binding, even as to [her] own interest, as against a subsequent grantee of all the tenants in common." (Emphasis omitted.) *Warren v. Brenner*, 89 Ohio App. 188, 194 (9th Dist.1950). This Court notes that Mr. Snoderly was not a party to the Memorandum of Lease. Accordingly, the Memorandum of Lease could not create an easement in the western parcel. *Laurer* at 25. Although both Ms.

Medley and Mr. Snoderly were parties to the Driveway License Agreement, it only addressed and concerned the western parcel. Accordingly, to the extent that Ms. Medley and Mr. Snoderly reserved the right to use the western parcel in the Driveway License Agreement, the reservation only extended to them as co-owners of that parcel. Ms. Medley could not reserve rights to herself as the owner of the eastern parcel in the Driveway License Agreement because she had no interest in the western parcel, and was not a party to that agreement, in her capacity as owner of the eastern parcel. There is also no evidence in the record that Ms. Medley reserved to herself, as owner of the eastern parcel, the right to continue using the western parcel when she and Mr. Snoderly jointly conveyed the western parcel to Mr. Tucker. Thus, Ms. Medley did not have an interest in the western parcel that she could pass to RCA Graham when she conveyed the eastern parcel to it.

{¶14} Because RCA Graham is not the successor to any western-parcel use and access rights outlined in the Memorandum of Lease or Driveway License Agreement, we conclude that the trial court incorrectly determined that it did not have to rule on RCA Graham's implied easement and prescriptive easement claims because the agreements expressly allow RCA Graham the right to use the western parcel. Sharma's assignment of error is sustained. Because RCA is not a party to this case, this Court will not determine the scope and extent of its rights and obligations under the agreements. *See State ex rel. Ohio Turnpike Comm. v. Allen*, 158 Ohio St. 168, 178 (1952) ("The title company is not a party to this action, and hence the court, of course, does not assume to adjudicate its rights in its absence."). We remand this case so that the trial court can consider RCA Graham's prescriptive easement and implied easement claims on their merits.

CROSS-APPEAL ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN DETERMINING THAT A CLEAR DAMAGE AMOUNT RESULTING FROM CROSS-APPELLEE'S TRESPASS WAS NOT ESTABLISHED AT TRIAL.

{¶15} In its cross-appeal, RCA Graham argues that the trial court incorrectly found that it suffered only nominal damages as a result of the environmental contamination of its property. It argues that the trial court should have required Sharma to reimburse it for the environmental testing that revealed the contamination. We review the trial court's damage award to determine if it was against the manifest weight of the evidence. "To set aside a [damage] award as inadequate and against the manifest weight of the evidence, a reviewing court must determine that the [award] is so disproportionate as to shock reasonable sensibilities, cannot be reconciled with the undisputed evidence in the case, or indicates that the [trier of fact] lost its way in assessing compensatory damages by failing to include all items making up the plaintiff's claim." *Ohio Natl. Life Assur. Corp. v. Satterfield*, 194 Ohio App.3d 405, 2011-Ohio-2116, ¶ 25 (9th Dist.), quoting *Karson v. Ficke*, 9th Dist. Medina No. 01 CA 3252–M, 2002-Ohio-4528, ¶ 22.

{¶16} Robert Davis testified that "Rubber City" hired his company to perform a Phase I environmental site assessment of the eastern parcel because it was considering buying the property. He said that a Phase I assessment involves inspecting a property's environmental and government records and interviewing the owner and occupants of the property to determine whether there are any environmental conditions associated with it or adjacent properties. He testified that, because the Phase I assessment revealed that there was a dry-cleaning business nearby that could be a source of contamination, he recommended a Phase II environmental site assessment, which Rubber City authorized. The Phase II assessment involved sampling the eastern parcel's soil and groundwater for contamination. Those tests that showed that the eastern

parcel was contaminated with chemicals that are typically used in the dry-cleaning industry. The trial court determined, however, that, even if RCA Graham could recover its testing expenses, it had failed to establish a clear damage amount.

{¶17} In *Weber v. Obuch*, 9th Dist. Medina 05CA0048-M, 2005-Ohio-6993, this Court recognized that "[t]he measure of damages for tort harm to land is the same whether the theory of recovery is trespass, nuisance, negligence, or strict liability." *Id*. at ¶ 12, quoting *Francis Corp. v. Sun Co., Inc.*, 8th Dist. Cuyahoga No. 74966, 1999 WL 1249534, *1 (Dec. 23, 1999). The injured party "is entitled to recover 'reasonable restoration costs, plus the reasonable value of the loss of use of the property between the time of the injury and the time of restoration.'" *Id*., quoting *Bohaty v. Centerpointe Plaza Assocs. Ltd. Partnership*, 9th Dist. Medina No. 3143-M, 2002 WL 242113, *2 (Feb. 20, 2002). This Court has also recognized that "[a] plaintiff bears the burden of proof on damages." *Prince v. Jordan*, 9th Dist. Lorain No. 04CA008423, 2004-Ohio-7184, ¶ 22. "Without adequate proof of damages, an award of damages in any amount cannot be sustained." *Id*. "Furthermore, the resulting damages must be shown with 'reasonable certainty, and cannot be based upon mere speculation or conjecture, regardless of whether the action is contract or tort.'" *Id*., quoting *Henderson v. Spring Run Allotment*, 99 Ohio App.3d 633, 642 (9th Dist.1994).

{¶18} Mr. Davis could not remember what his company charged for the Phase I assessment, but estimated that it was between $2,000 and $2,300. He testified that a Phase II assessment, meanwhile, "costs about $5,800." A representative from RCA Graham testified that the Phase II assessment cost "around $6,000" and that the sum for both assessments was "about $8,000." RCA Graham did not present any other evidence regarding how much it spent on the environmental assessments, such as receipts or bank statements.

{¶19} All of RCA Graham's evidence regarding its environmental assessment costs was in the form of estimates. There was no testimony or other evidence of expenses based on reasonable certainty. We, therefore, conclude that the trial court did not lose its way when it determined that RCA Graham failed to sustain its burden of proof. RCA Graham's cross-appeal assignment of error is overruled.

III.

{¶20} Sharma's assignment of error is sustained. RCA Graham's assignment of error is overruled. The judgment of the Summit County Court of Common Pleas is affirmed in part and reversed in part, and this matter is remanded so that the trial court can issue a new decision regarding RCA Graham's fourth and fifth causes of action.

Judgment affirmed in part,
reversed in part,
and cause remanded.

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 Appellee/Cross-Appellant.

JENNIFER HENSAL
FOR THE COURT

MOORE, J.
CONCURS.

CARR, J.
CONCURRING IN PART, AND DISSENTING IN PART.

{¶21} I respectfully dissent in regard to the majority's resolution of Sharma's assignment of error as I would hold that Sharma forfeited the issue of whether RCA Graham is the appropriate party by not properly raising it in the four years this case has been pending.

{¶22} In 2011, RCA Graham filed a declaratory judgment action seeking, among other things, a prescriptive and implied easement. The complaint made no mention of the Memorandum of Lease or the Driveway License Agreement that was the subject of Sharma's earlier appeal to this Court and remains at issue in the current appeal. The license versus easement issue under these two agreements was raised for the first time in the prior appeal to this Court, and, at that point, had not been raised in the trial court. In fact, in Sharma's original answer and its pretrial statements, it admitted that the agreements created an easement across the property. RCA Graham argued in the previous appeal that the issue had been waived. Despite the fact that the issue was never raised in the trial court, this Court reversed and remanded this matter with express instructions "to consider Sharma's argument that the Driveway License Agreement is a license and not an easement." *Rubber City Arches Graham, LLC v. Joe Sharma*

Properties, LLC, 9th Dist. Summit No. 26557, 2013-Ohio-1773, ¶ 12. We are now bound by this decision.

{¶23} Pursuant to our specific directive, the parties briefed the license/easement issue on remand and the trial court ruled on that issue. At no point at the trial court level or in the previous appeal did either party raise the issue of RCA Graham's standing to file suit or the necessity of RCA being named a party to the declaratory judgment action. Because the complaint neither sought a declaration of rights regarding the Memorandum of Lease or the Driveway License Agreement, nor even made passing reference to those documents, it makes sense that the issue was never raised. Accordingly, in that Sharma has not raised the issue of standing and the trial court followed our specific directive to resolve the easement/license dispute, I would conclude that Sharma forfeited the standing issue. I would address Sharma's assignment of error on the merits and affirm the judgment of the trial court concluding that an express easement exists.

{¶24} I concur in judgment with respect to the majority's resolution of RCA Graham's cross-appeal assignment of error because I agree that RCA Graham was not entitled to damages relating to environmental testing. RCA Graham sought damages based on trespass. "To recover on a claim of trespass, a plaintiff must prove that he or she had actual or constructive possession of the land at the time the trespass occurred." *Abraham v. BP Exploration & Oil, Inc*., 149 Ohio App.3d 471, 2002-Ohio-4392, ¶ 15 (10th Dist.). RCA Graham did not own the property at issue when it procured the environmental testing and did not otherwise demonstrate that it had actual or constructive possession of the property. Accordingly, I agree that the cross-appeal assignment of error must be overruled.

APPEARANCES:

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