[Cite as *B&N Coal, Inc. v. Blue Racer Midstream, L.L.C.*, 2023-Ohio-2641.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
NOBLE COUNTY

B&N COAL, INC.,

Plaintiff-Appellant,

v.

BLUE RACER MIDSTREAM, LLC,

Defendant-Appellee.

OPINION AND JUDGMENT ENTRY
Case No. 22 NO 0490

Civil Appeal from the
Court of Common Pleas of Noble County, Ohio
Case No. 216-0116

BEFORE:
Mark A. Hanni, Carol Ann Robb, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. Gary W. Smith, Smith Law Firm, 316 South Main Street, P.O. Box 599, Woodsfield, Ohio 43793, for Plaintiff-Appellant and

Atty. John Kevin West and *Atty. Dallas F. Kratzer, III*, Steptoe & Johnson PLLC, 41 South High Street, Suite 2200, Columbus, Ohio 43215, for Defendant-Appellee.

Dated: July 28, 2023

HANNI, J.

{¶1} Plaintiff-Appellant, B&N Coal, Inc. (B&N), appeals from a Noble County Common Pleas Court judgment granting summary judgment in favor of Defendant-Appellee, Blue Racer Midstream, LLC (Blue Racer), on B&N's claim for a permanent injunction ordering the removal of a natural gas pipeline, a declaratory judgment that Blue Racer's surface rights are subservient to B&N's coal mining rights, and damages.

{¶2} This case involves three adjacent parcels of property in Noble County (collectively "the Property"): a 40.50-acre parcel with the surface owned by Rebecca Clutter; a 41.43-acre parcel with the surface also owned by Clutter; and a 45.31-acre parcel with the surface owned by the Hannahs Family. The mineral estates of the Property are located in a mining site referred to as the Little Buffalo site.

{¶3} B&N acquired the mineral rights to the Property on August 13, 2015, and the deeds were recorded on December 7, 2015.

{¶4} Clutter granted Blue Racer a right-of-way easement, recorded August 19, 2015, "to lay and maintain a gas pipeline" across the surface of her property. The Hannahs Family likewise granted Blue Racer a right-of-way easement, recorded March 11, 2016, "to lay and maintain a gas pipeline" across the surface of their property.

{¶5} On August 4, 2016, B&N notified Blue Racer that it intended to strip/surface mine the Property in the future. The parties then engaged in discussions about possible alternatives to laying the pipeline across the Property. They did not reach an agreement, however.

{¶6} In accordance with its easements, Blue Racer commenced construction of the Miley Pipeline in September 2016. Construction was completed in December 2016. Blue Racer currently uses the Miley Pipeline to transport customers' natural gas to market.

{¶7} On October 4, 2016, during construction of the Miley Pipeline, B&N filed a complaint against Blue Racer in the Noble County Common Pleas Court asserting claims for (1) a permanent injunction enjoining Blue Racer from continuing to lay a pipeline across the Property, (2) damages, and (3) a declaratory judgment that Blue Racer's

easements are either null and void or are subservient to B&N's right to mine. Blue Racer had the case removed to the United States District Court for the Southern District of Ohio, which eventually granted Blue Racer's summary judgment motion. On appeal, however, the Sixth Circuit vacated the district court's judgment finding the district court did not have subject matter jurisdiction due to lack of diversity of citizenship of the parties. It remanded the case to the district court, which in turn, remanded the case back to the Noble County Common Pleas Court.

{¶8} Upon remand, Blue Racer filed a motion for summary judgment on January 7, 2021. B&N filed a memorandum in opposition to Blue Racer's motion on April 5, 2021. That same day, B&N also filed its own motion for summary judgment. The court set the matter for a hearing on the competing motions.

{¶9} The court held a hearing on August 13, 2021 where it heard arguments from both parties. On January 25, 2022, the court entered judgment granting Blue Racer's summary judgment motion and denying B&N's summary judgment motion. The court found B&N's claim for a permanent injunction was not ripe for review. It also found B&N could not prove that it has suffered irreparable harm for which there is no adequate remedy at law. As to damages, the court found that because B&N's claims were not yet ripe, B&N could not establish that Blue Racer is liable for trespass and, any damages would be speculative at this point. As to the claim for a declaratory judgment that Blue Racer's rights are subservient to B&N's right to mine, the court found that this issue was moot. And as to the claim for a declaratory judgment that Blue Racer's rights are subservient to B&N's right to "otherwise operate for its coal reserves," the court found this issue was not yet ripe.

{¶10} B&N filed a timely notice of appeal on February 22, 2022. It now raises two assignments of error for our review. Both assignments of error allege that summary judgment in favor of Blue Racer was improper and the trial court should have granted B&N's motion for summary judgment. Thus, we will address them together.

{¶11} An appellate court reviews a summary judgment ruling de novo. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 8. Thus, we shall apply the same test as the trial court in determining whether summary judgment was proper.

{¶12} A court may grant summary judgment only when (1) no genuine issue of material fact exists; (2) the moving party is entitled to judgment as a matter of law; and (3) the evidence can only produce a finding that is contrary to the non-moving party. *Mercer v. Halmbacher*, 9th Dist. Summit, 2015-Ohio-4167, 44 N.E.3d 1011, ¶ 8; Civ.R. 56(C). The initial burden is on the party moving for summary judgment to demonstrate the absence of a genuine issue of material fact as to the essential elements of the case with evidence of the type listed in Civ.R. 56(C). *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). A "material fact" depends on the substantive law of the claim being litigated. *Hoyt, Inc. v. Gordon & Assoc., Inc*., 104 Ohio App.3d 598, 603, 662 N.E.2d 1088 (8th Dist.1995), citing *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247-248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

{¶13} "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Dresher*, 75 Ohio St.3d at 296. The trial court's decision must be based upon "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action." Civ.R. 56(C).

{¶14} If the moving party meets its burden, the burden shifts to the non-moving party to set forth specific facts to show that there is a genuine issue of material fact. *Id*.; Civ.R. 56(E). "Trial courts should award summary judgment with caution, being careful to resolve doubts and construe evidence in favor of the nonmoving party." *Welco Industries, Inc. v. Applied Cos.*, 67 Ohio St.3d 344, 346, 617 N.E.2d 1129 (1993).

{¶15} B&N's first assignment of error states:

> THE TRIAL COURT ERRED, AS A MATTER OF FACT AND LAW, BY GRANTING DEFENDANT-APPELLEE'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE EVIDENCE PRESENTED BY PLAINTIFF-APPELLANT'S VARIOUS MOTIONS, MEMORANDUMS AND REPLIES WAS NOT REBUTTED BY DEFENDANT-APPELLEE.

{¶16} B&N's second assignment of error states:

THE TRIAL COURT ERRED, AS A MATTER OF LAW, BY GRANTING SUMMARY JUDGMENT UPON AND IN FAVOR OF DEFENDANT-APPELLEE'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF-APPELLANT'S MOTION FOR SUMMARY JUDGMENT.

{¶17} In support of its argument, B&N first points to the affidavit of its president and CEO, Carl Baker, Jr. In his affidavit, Baker averred that B&N had completed the preliminary work on the Little Buffalo permit applications, including the test drilling. (Baker Aff. ¶ 12). He further averred that to move forward, B&N must have a timely and clear decision as to whether the Miley Pipeline will be removed or not. (Baker Aff. ¶ 12). If a clear decision is not timely made, B&N will have to assume the Miley Pipeline will not be removed. (Baker Aff. ¶ 12). If that is the case, B&N may not have sufficient time to obtain the necessary permits for the Little Buffalo Mine before the coal removal at its Whigville 6 Mine is complete. (Baker Aff. ¶ 12). If that happens, Baker averred, B&N would not be able to fulfill its contractual obligation with East Kentucky Power. (Baker Aff. ¶ 12). Baker went on to aver that if the Miley Pipeline remains in place, then B&N must design plans that include staying at least 300 feet away from either side of the pipeline in addition to another 20 to 60 feet of offset, which in effect would sterilize 25.03 acres of its coal reserves. (Baker Aff. ¶¶ 13, 15). Baker also averred that once the permit process begins, it is difficult to make changes to the mining plan. (Baker Aff. ¶ 16).

{¶18} B&N also relies on the affidavit of Rick Bailey, its employee who worked on the permit application. Bailey averred that B&N submitted its mining application to the Ohio Department of Natural Resources (ODNR) on May 7, 2021. (Bailey Aff. ¶ 5). On July 23, 2021, B&N received a letter from ODNR referencing its permit application and stating that B&N needed to show a 300-foot setback on either side of the Miley Pipeline. (Bailey Aff. Ex. A).

{¶19} B&N asserts Blue Racer failed to set forth any evidence to rebut the above evidence.

{¶20} B&N further argues that the Ohio Revised Code and Ohio Administrative Code require it to identify all structures on the proposed mining area and all surface and subsurface owners. Thus, it notes, it must include Blue Racer and the Miley Pipeline in its permit application. Additionally, B&N points out that blasting is not permitted within

300 feet of an oil or gas pipeline. Thus, if the Miley Pipeline were to remain in place, B&N would lose the ability to surface mine the 600 feet surrounding the pipeline, causing significant financial damage.

{¶21} B&N asserted three separate claims. We will address each claim in turn.

{¶22} First, B&N asserted a claim for a declaratory judgment. B&N sought a declaration that its rights as a mineral owner are superior to Blue Racer's rights as a surface owner as granted to it by way of the easements. Specifically, it sought a declaration that Blue Racer's rights are subservient to its "right to mine" and "otherwise operate" for its coal reserves.

{¶23} As to B&N's "right to mine" for its coal reserves, the trial court found the issue to be moot.

{¶24} "A case becomes moot when its issues are no longer live, or when the parties no longer have a legally cognizable interest in the outcome." *U.S. Bank Natl. Assn. v. Marcino*, 7th Dist. Jefferson No. 09 JE 29, 2010-Ohio-6512, ¶ 7, citing *State ex rel. Gaylor, Inc. v. Goodenow*, 125 Ohio St.3d 407, 2010-Ohio-1844, 928 N.E.2d 728, ¶ 10. An issue becomes moot when it is "academic"; that is, the court can issue no decision that will have any practical effect on the controversy at hand. *State v. Austin*, 7th Dist. Mahoning No. 16 MA 0068, 2019-Ohio-1185, ¶ 90. Generally, courts will not decide cases where there is no actual controversy. *In re A.G.*, 139 Ohio St.3d 572, 2014-Ohio-2597, 13 N.E.3d 1146, ¶ 37.

{¶25} As to B&N's "right to mine," Blue Racer has acknowledged that its rights are subservient to B&N's right to mine. (See June 28, 2021 Sur-Reply to B&N's Memorandum in Support of Motion for Summary Judgment; October 31, 2022 Response Brief of Appellee Blue Racer Midstream LLC). Blue Racer has acquiesced that at some point in time it may have to remove the Miley Pipeline, relocate the pipeline, or pay some amount of damages to B&N once B&N begins mining. Thus, the trial court correctly found this issue to be moot.

{¶26} As to B&N's right to "otherwise operate" for its coal reserves, the trial court found the issue was not yet ripe for review. In addressing ripeness, this court has stated:

> "Ripeness 'is peculiarly a question of timing.' *Regional Rail Reorganization Act Cases* (1974), 419 U.S. 102, 140." *State ex rel. Elyria Foundry Co. v.*

> *Industrial Comm. of Ohio* (1998), 82 Ohio St.3d 88. Therefore, in order "for a cause to be justiciable, there must exist a real controversy presenting issues which are ripe for judicial resolution and which will have a direct and immediate impact on the parties." *State v. Stambaugh* (1987), 34 Ohio St.3d 34, 38, citing *Burger Brewing Co. v. Liquor Control Comm*. (1973), 34 Ohio St.2d 93, 97-98. Typically, a claim is not ripe if the claim rests upon "future events that may not occur as anticipated, or may not occur at all." *Texas v. United States* (1998), 523 U.S. 296, 300.

Brown v. Bordenkircher, 7th Dist. Jefferson No. 05 JE 51, 2006-Ohio-3904, ¶ 28.

{¶27} In determining if an issue is ripe for review, the court should consider the likelihood that the alleged future harm will ever occur, the likelihood that delayed review will cause hardship to the parties, and whether the record is sufficiently developed to provide fair adjudication. *Eagle Fireworks, Inc. v. Ohio Dept. of Commerce*, 4th Dist. Washington No. 03CA28, 2004-Ohio-509, ¶ 9, citing *Ohio Forestry Assn., Inc. v. Sierra Club*, 523 U.S. 726, 731-733, 118 S.Ct. 1665, 140 L.Ed.2d 921 (1988).

{¶28} Particularly relevant at the time the trial court considered this issue was the letter from the ODNR to B&N addressing B&N's permit application. The letter informed B&N of many items it had to correct before the permit would be granted. (Bailey Aff. Ex. A). One of those items was to "[s]how a 300-ft. blasting setback along the Blue Racer Pipeline, or a lesser setback to match any written consent that might be obtained during the permit review process." (Bailey Aff. Ex. A). Of particular note is the fact that B&N might not necessarily lose 300 square feet on each side of the pipeline if they can obtain written consent during the permit review process.

{¶29} Also significant is the fact that the letter was eight pages long and identified over 100 items that B&N must address and/or correct "before processing can continue." (Bailey Aff. Ex. A). Some of these items appear to be minor corrections such as providing signed consent forms and fixing some inconsistencies in the application. However, other items appear to require significant work before the permitting process can move forward. For example, B&N is required to show an appropriate blasting setback to protect the Genesis Resources Injection Well. It is also required to address and discuss any effects to the stability analyses given that the upper lifts of the proposed fills will not rest on

original ground. And B&N must provide designs of underdrain systems to account for subsurface water sources in Fills 1, 2, and 3 because they have wetlands within their footprints.

{¶30} Thus, when the trial court examined the issue, B&N still had significant work to complete in the permitting application phase before the ODNR would consider granting B&N a mining permit.

{¶31} Additionally, president and CEO Carl Baker's affidavit speaks in terms of possibilities, assumptions, and what may occur in the future. Baker states that "*If* a clear decision to remove the Blue Racer Midstream gas line is not made timely, then B&N will have to *assume* that the gas line will not be removed in order to advance the permitting stage." (First emphasis added; Second emphasis sic.; Baker Aff. ¶ 12). He further states: "*If* a clear decision is not made timely and B&N Coal, Inc. waits for a decision, then B&N Coal, Inc. *may* not have sufficient time to obtain necessary permits for the Little Buffalo Mine before the Whigville 6 mine coal removal is complete." (Emphasis added; Baker Aff. ¶ 12). And "*If* this occurs, then B&N Coal, Inc. would not have sufficient reserves permitted to mine coal; thus, B&N Coal, Inc. would not be able to fulfill its contractual obligations with East Kentucky Power." (Emphasis added; Baker Aff. ¶ 12). Thus, B&N's claims are based on speculation at this point in time.

{¶32} As noted above, a claim is not ripe if it rests upon "future events that may not occur as anticipated, or may not occur at all." *Brown*, 2006-Ohio-3904, ¶ 28, quoting *Texas v. United States*, 523 U.S. 296, 300. Based on the above evidence, B&N's claim for a declaratory judgment that its right to "otherwise operate" for its coal reserves is superior to Blue Racer's rights is not yet ripe for review. Thus, the trial court properly granted summary judgment in favor of Blue Racer on this claim.

{¶33} Second, B&N asserted a claim for a permanent injunction. The trial court first found that because B&N's claim for superior rights while "otherwise operating for its coal reserves" is not yet ripe, the request for a permanent injunction to remove the Miley Pipeline is also not ripe. Alternatively, the trial court found that B&N could not meet the requirements of a permanent injunction, specifically the element of irreparable harm.

{¶34} Because the trial court properly found that B&N's claim for superior rights while "otherwise operating for its coal reserves" is not yet ripe for review, it logically follows

that B&N's request for a permanent injunction is likewise not ripe for the same reasons set out above.

{¶35} In any event, even considering the permanent injunction factors, summary judgment in favor of Blue Racer was appropriate.

{¶36} In determining whether a preliminary injunction is appropriate, four factors are relevant: (1) is there a substantial likelihood of success on the merits; (2) will the plaintiff suffer irreparable harm for which there exists no adequate remedy at law if the injunction is not granted; (3) will no third parties be unjustifiably harmed by the injunction; and (4) will the public interest be served by an injunction. *DeRosa v. Parker*, 197 Ohio App.3d 332, 2011-Ohio-6024, 967 N.E.2d 767 (7th Dist.), ¶ 56. The party seeking the injunction must demonstrate that it is entitled to such by clear and convincing evidence. *Id*.

{¶37} The test for granting a permanent injunction is similar to the test used for granting a preliminary injunction; however, the permanent injunction test requires a higher standard. *W. Branch Local School Dist. Bd. of Edn. v. W. Branch Edn. Assn*., 7th Dist. Mahoning No. 14 MA 53, 2015-Ohio-2753, ¶ 15. While the preliminary injunction test requires the moving party to prove a substantial likelihood of success on the merits, the permanent injunction test requires the moving party to demonstrate a right to relief under the applicable substantive law.

{¶38} The trial court properly found that B&N cannot show that it will suffer irreparable harm for which there exists no adequate remedy at law if the injunction is not granted. B&N's own evidence demonstrates this.

{¶39} B&N claims it will suffer irreparable harm if the Miley Pipeline is not removed. Yet in its Memorandum in Opposition to Defendant's Motion for Summary Judgment, B&N states:

> As for Plaintiff's damages, the *Affidavit of Randy Keitz* sets forth the fact that just the loss of coal reserves due to not being able to mine under the pipeline would cost B&N Coal lost coal sales in the amount of approximately $7,106,000.00. The *Affidavits of Carl Baker, Jr.* and *Randy Keitz* clearly set-forth [sic] that B&N Coal would also suffer additional damages in having

> to permit and mine the area on either side of the pipeline[.] These damages are neither speculative nor remote.

(Emphasis sic.; Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment). The affidavits B&N cites to support its statements. Thus, B&N has itself demonstrated that it will not suffer irreparable harm for which there is no adequate remedy at law. If the Miley Pipeline is not removed when B&N is ready to mine, B&N will suffer significant monetary damages. B&N would then be able to sue Blue Racer to recoup these damages. But B&N is not yet ready to mine. And B&N has not yet suffered monetary damages.

{¶40} Third, B&N asserted a claim for damages. The trial court noted that it was not clear under what theory B&N was requesting damages. After reviewing the complaint, the court stated that it appeared the request for damages was either part of the permanent injunction claim or a claim for trespass. The court then stated that because it had already determined that B&N's claims for declaratory judgment and injunctive relief were "moot, not ripe, or fail to establish an essential element," B&N was not entitled to damages under either of those claims. Thus, the trial court considered whether B&N might be entitled to damages under a trespass claim. It determined that no damages were warranted because B&N could not establish Blue Racer's liability.

{¶41} Initially, we should note that, as the trial court pointed out, B&N did not specifically raise a claim for trespass in its complaint. Thus, it is questionable whether such a claim was even properly before the trial court.

{¶42} In any event, to establish a trespass claim a property owner must prove (1) an unauthorized intentional act and (2) an intrusion that interferes with the owner's right of exclusive possession of their property. *Merino v. Salem Hunting Club*, 7th Dist. Columbiana No. 07 CO 16, 2008-Ohio-6366, ¶ 41.

{¶43} In this case, B&N cannot meet even the first trespass element. It is undisputed that Blue Racer obtained valid easements from the surface owners prior to constructing the Miley Pipeline. Thus, there is no unauthorized intentional act as is required for a trespass claim.

{¶44} Therefore, the trial court properly granted summary judgment in favor of Blue Racer on the damages claim.

{¶45} Accordingly, B&N's assignments of error are without merit and are overruled.

{¶46} For the reasons stated above, the trial court's judgment is hereby affirmed.

Robb, J., concurs.

D'Apolito, P.J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Noble County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.