[Cite as *Terry v. Hancock-Wood Elec. Coop., Inc.*, 2009-Ohio-4925.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Theodore W. Terry, et al.	Court of Appeals No. E-08-060
Appellants	Trial Court No. 2006-CV-0683
v.	
Hancock-Wood Electric Cooperative, et al.	**DECISION AND JUDGMENT**
Appellees	Decided: September 18, 2009

* * * * *

D. Jeffery Rengel and Thomas R. Lucas, for appellants.

Scott A. Campbell and Julieann Gonzi Dreher, for appellees Hancock-Wood Electric Cooperative, Inc. and James St. Julian.

David W. Stuckey, for appellee Murray's Tree Care, Inc.

* * * * *

WILLAMOWSKI, J.

{¶ 1} Appellants, Theodore W. Terry and Sunrise Point, Ltd., appeal a decision by the Erie County Court of Common Pleas entering summary judgment against

appellants and in favor of appellees, Hancock-Wood Electric Cooperative, Inc., James St. Julian, and Murray's Tree Care, Inc. For the reasons that follow, we affirm the judgment of the trial court.

{¶ 2} Appellant Terry is a resident of Kelleys Island, Ohio. He is the sole unit holder of Sunrise Point, Ltd., an Ohio limited liability company. Terry resides in a rooming unit at the Sunrise Point resort motel located at 515 East Lakeshore Drive. He owns an adjacent parcel of property that contains a duplex cottage. This property, located at 607 East Lakeshore Drive, is accessed by a narrow gravel lane down the street from the Sunrise Point resort motel. Terry and Sunrise Point rent out the cottage and resort motel units to tourists who visit Kelleys Island.

{¶ 3} Appellee Hancock-Wood is an electric cooperative that supplies electrical power to its members. Hancock-Wood services a number of communities in northwest Ohio, including Kelleys Island. Terry, in order to receive from Hancock-Wood electricity for his various properties signed an "Application for Membership and Electric Service." Pursuant to this document, Terry agreed "to permit access to his premises for all purposes necessary to operate the electric distribution system of [Hancock-Wood] * * * and to allow the cutting down or trimming of all trees and spraying of brush under or near the electric line * * *."

{¶ 4} Appellee James St. Julian is an employee of Hancock-Wood. St. Julian is employed as a lineman and works primarily on Kelleys Island. In his capacity as a

lineman, St. Julian is responsible for electric line repair, maintenance, service work, trouble calls and outages.

{¶ 5} Appellee Murray's is a tree cutting business based in Vermilion, Ohio. At some point in 2005, Hancock-Wood entered into a contract with Murray's, pursuant to which Murray's was to perform line clearance work on Kelleys Island. Undisputed testimony by representatives from both Hancock-Wood and Murray's established that the goal of the project was to clear vegetation that existed within 15 feet of either side of the electrical line, pursuant to Rural Utility Service Specifications. Also undisputed is that St. Julian, in connection with this project, exercised authority over Murray's in the trimming and removal of trees.

{¶ 6} Murray's began work on the Kelleys Island project in October 2005, and continued its work through March 2006. In March 2006, Murray's, as part of the project, entered onto the properties belonging to Terry and Sunrise Point and removed a number of trees, all of which were within the 30-foot corridor that was designated to be cleared and some of which had actually grown up into the power lines. All of the trees that were cut down on Terry's property were chipped and hauled to the dump.

{¶ 7} On August 22, 2006, appellants filed a complaint against Hancock-Wood and St. Julian, alleging claims for: (1) violation of R.C. 901.51 (injuring vines, bushes, trees, or crops on land of another); (2) trespass; and (3) conversion. Appellants

subsequently amended their complaint to include, and assert the same claims against, Murray's.

{¶ 8} Following the completion of discovery, all parties moved for summary judgment. On July 7, 2008, the trial court issued its decision, denying appellants' motion for summary judgment and granting appellees' motions for summary judgment.

{¶ 9} On July 31, 2008, appellants filed a motion for relief from judgment pursuant to Civ.R. 60(B). Appellants also filed the present appeal on or about August 6, 2008, raising the following assignments of error:

{¶ 10} I. "THE TRIAL COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT TO APPELLEES."

{¶ 11} II. "THE TRIAL COURT ERRED WHEN IT STRUCK THE AFFIDAVIT OF APPELLANT TERRY."

{¶ 12} On August 8, 2008, this court remanded the case to the trial court for a period of 60 days for the purpose of allowing that court to rule on the pending Civ.R. 60(B) motion. On September 2, 2008, the trial court denied the Civ.R. 60(B) motion. Appellants did not file an appeal from this decision.

{¶ 13} Appellants argue in their first assignment of error that the trial court erred when it granted summary judgment to appellees. An appellate court reviewing a trial court’s granting of summary judgment does so de novo, applying the same standard used

by the trial court. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Civ.R. 56(C) provides:

{¶ 14} "* * * Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as considered in this rule. * * *"

{¶ 15} Summary judgment is proper where: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) when the evidence is viewed most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion, a conclusion adverse to the nonmoving party. *Ryberg v. Allstate Ins. Co.* (July 12, 2001), 10th Dist. No. 00AP-1243, citing *Tokles & Son, Inc. v. Midwestern Indemnity Co.* (1992), 65 Ohio St.3d 621, 629.

{¶ 16} The moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of fact as to an essential element of one or more of the non-moving party's claims. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292. Once this burden has been satisfied, the non-moving party has the burden, as set forth at Civ.R. 56(E), to offer specific facts showing a genuine issue for trial. Id.

{¶ 17} Appellants argue that the Hancock-Wood "Application for Membership and Electric Service," which unambiguously allows the company to enter onto Terry's premises for the purpose of cutting down or trimming "all trees" under or near the electric line was an "unconscionable adhesion contract."

{¶ 18} "Unconscionability is generally recognized as the absence of meaningful choice on the part of one of the parties to a contract, combined with contract terms that are unreasonably favorable to the other party." *Melia v. OfficeMax North America, Inc.*, 8th Dist. No. 87249, 2006-Ohio-4765, ¶ 24. A party asserting that a contract is unconscionable must prove that the contract is both procedurally and substantively unconscionable. *Taylor Building Corp. of America v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, at ¶ 34.

{¶ 19} Procedural unconscionability considers the circumstances surrounding the contracting parties' bargaining, such as the parties' age, education, intelligence, business acumen and experience, the identity of the drafter of the contract, whether alterations in the printed terms were possible, and whether there were alternative sources of supply for the goods in question. *Taylor*, supra, at ¶ 44. Procedural unconscionability additionally involves consideration of the following factors: "belief by the stronger party that there is no reasonable probability that the weaker party will fully perform the contract; knowledge of the stronger party that the weaker party will be unable to receive substantial benefits from the contract; knowledge of the stronger party that the weaker

party is unable reasonably to protect his interests by reason of physical or mental infirmities, ignorance, illiteracy or inability to understand the language of the agreement, or similar factors." Id., quoting Restatement of the Law 2d, Contracts (1981), Section 208, Comment d.

{¶ 20} Substantive unconscionability, on the other hand, refers to the actual terms of the agreement. Contract terms are considered substantively unconscionable if they are unfair and commercially unreasonable. *Porpora v. Gatliff*, 160 Ohio App.3d 843, 2005-Ohio-2410, ¶ 8.

{¶ 21} In the case at bar, appellants have not presented any evidence or allegation to establish that Terry was incapable of understanding the terms of the one-page membership application because of advanced age or a lack of education, intelligence or business acumen. In addition, there is no evidence or allegation to suggest that Hancock-Wood: (1) had any reason to believe that there was "no reasonable probability" that appellants would not live up to any obligation that was imposed upon them by the membership application; (2) had any reason to believe that appellants would "be unable to receive substantial benefits from the contract;" or (3) had any reason to believe that appellants were unable to protect their interests "by reason of physical or mental infirmities, ignorance, illiteracy or inability to understand the language of the agreement." Accordingly, appellants have failed to create any genuine issue of material fact concerning the matter of procedural unconscionability.

{¶ 22} As to substantive unconscionability, we find that there is nothing unfair or commercially unreasonable about the membership application, including the provision which establishes that the landowner agrees to permit access to his or her premises to allow the cutting down or trimming of all trees near the electric line. Evidence contained in the record reveals that Hancock-Wood's power lines carry 7,200 volts of electricity and that contact with such lines could kill a person. Appellants have failed to create any genuine issue of material fact concerning the matter of substantive unconscionability.

{¶ 23} For all of the foregoing reasons, we find that the trial court properly determined that the membership application was not an unconscionable adhesion contract.

{¶ 24} Appellants next argue that the membership agreement does not apply to appellant Sunrise Point, Ltd., because: (1) Terry signed the membership application in his individual capacity, and not as a corporate representative; and (2) Terry signed the membership application before Sunrise Point, Ltd. was formed.

{¶ 25} We decline to address the merits of this argument, because it is not properly before us on appeal. In the instant case, the trial court granted final judgment to appellees on July 7, 2008. Prior to July 7, 2008, appellees relied upon the terms of the membership application to argue that they were entitled to summary judgment with respect to all of the claims that were made against them by appellants. At no time prior to July 7, 2008, did appellants ever argue that the membership application could not be applied to Sunrise

Point, Ltd. Rather, appellants first claimed that the membership application could not be applied to Sunrise Point, Ltd. in their July 31, 2008 motion for relief from judgment.

{¶ 26} The trial court recognized that appellants' attempt to raise the issue of the applicability of the membership agreement to Sunrise Point, Ltd. in a Civ.R. 60(B) motion was merely a masked attempt to file a motion for reconsideration based on evidence that should have been argued on summary judgment. As noted by the trial court, "Civ.R. 60(B) is not the procedural vehicle to argue about evidence that should have been argued on summary judgment." *Rakosky v. Physician Providers, Inc.*, 4th Dist. No. 07CA758, 2007-Ohio-6574, ¶ 12. Further, where a party first raises an issue by way of a motion for reconsideration after the trial court enters final judgment by way of ruling on a summary judgment motion, the party's failure to timely raise the issue at the trial level constitutes a waiver, which prevents that party from raising the issue on appeal. *Shalkhauser v. Medina*, 148 Ohio App.3d 41, 2002-Ohio-222, ¶ 11.

{¶ 27} Appellants next argue that they are third-party beneficiaries to the line clearance agreement that was executed by Hancock-Wood and Murray's, and that, in such capacity, appellants "can avail themselves of the very specific terms and restrictions upon which appellees were authorized to remove trees." We disagree.

{¶ 28} Under Ohio law, "[o]nly a party to a contract or an intended beneficiary may claim rights under the contract. * * * For a person to be considered an intended third-party beneficiary, the contract must have been entered into directly or primarily for

the benefit of that person. * * * " *Ramminger v. Archdiocese of Cincinnati*, 1st Dist. No. C-060706, 2007-Ohio-3306, ¶ 16 (citations omitted). The receipt of incidental or indirect benefit from a contract is not sufficient to establish a third-party cause of action. *Hill v. Sonitrol of Southwester Ohio, Inc.* (1988), 36 Ohio St.3d 36, 40.

{¶ 29} The line clearance agreement contains nothing to suggest that it was entered into directly and primarily for appellants' benefit; rather, it indicates that Hancock-Wood entered into the agreement to safeguard its property and to keep its electrical lines in working order. Although appellants might receive some incidental or indirect benefit from the agreement (in the form of continuing electrical service or heightened protection against downed electrical wires), such is not enough to establish a third-party cause of action. See *Hill*, supra.

{¶ 30} Even if appellants were intended third-party beneficiaries under the line clearance agreement, their reliance on the agreement is misplaced, because Hancock-Wood had the authority, under the express terms of the agreement, to modify the specifications contained therein. Specifically, the line clearance agreement provides:

{¶ 31} "16.b. CO-OP [Hancock-Wood] hereby appoints Jim St. Julian as CO-OP representative, who shall have authority to review CONTRACTOR'S [Murray's] performance of work hereunder, and approve alterations in plans or specifications and who shall cooperate with CONTRACTOR to the end that the greatest economy and speed consistent with good workmanship may be attained, and to whom all communications

from CONTRACTOR shall be directed and from whom CONTRACTOR shall receive all requests for changes and other communications made on behalf of CO-OP."

{¶ 32} To the extent that appellees may have deviated from the precise specifications contained in the line clearance agreement (and Hancock-Wood denies that it did), we note that deviations were authorized under the line clearance agreement itself.

{¶ 33} Appellants next claim that the trial court erred in granting summary judgment to appellees with respect to appellants' claims for trespass and pursuant to R.C. 901.51.

{¶ 34} A "common law tort in trespass upon real property occurs when a person, without authority or privilege, physically invades or unlawfully enters the private premises of another whereby damages directly ensue * * *." *Apel v. Katz* (1998), 83 Ohio St.3d 11, 19. "Actionable trespass requires an interference with the exclusive possessory interest of the property owner." *Bayes v. The Toledo Edison Co.*, 6th Dist. Nos. L-03-1177, L-03-1194, 2004-Ohio-5752, ¶ 59.

{¶ 35} Here, appellants cannot show that appellees did not have authority to enter upon the subject properties. First, Hancock-Wood was granted express permission to enter the properties by way of the membership application. In addition, at deposition, Terry himself acknowledged that appellees had the right to come onto his property to take care of the trees and that he expected Hancock-Wood and its contractors to keep the

electrical lines at a safe distance from trees and poles. Accordingly, the trial court properly dismissed appellants' claims for trespass.

{¶ 36} R.C. 901.51 relevantly provides:

{¶ 37} "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."

{¶ 38} An individual acts recklessly when, "with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature." *Collins v. Messer*, 12th Dist. No. CA2003-06-149, 2004-Ohio-3007, ¶ 11. "A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist." *Bayes*, supra, at ¶ 64.

{¶ 39} Here, appellees' acts were in compliance with the rights granted to Hancock-Wood pursuant to the membership application. Under the express terms of the membership application, permission was granted both with respect to entry onto the properties and to cutting down or trimming "all trees" under or near the electric line.[1] As appellees had both a privilege to enter the properties and permission to cut all of the trees

[1]We note that appellants do not dispute that all of the trees that were cut were within the 30-foot corridor that appellees had testified was designated for clearance around the electrical lines. Nor do appellants dispute the reasonableness of Hancock-Woods' decision to clear the 30-foot corridor.

that were proximate to the electrical line, we find no wrongful conduct on the part of appellees. Accordingly, we find that the trial court properly dismissed appellants' claim pursuant to R.C. 901.51. See *Shinaberry v. Toledo Edison Co.* (July 17, 1998), 6th Dist. No. L-97-1389 (Holding that appellant was unable to establish claim for conversion because conversion requires a wrongful act and the evidence showed that appellee's acts were in compliance with rights that were granted to appellee under various easements.)

{¶ 40} Appellants further argue that the trial court erred in dismissing their claims for conversion. It is appellants' contention that appellees are liable for conversion because they disposed of the trees from appellants' properties without determining appellants' wishes about what should happen to the resulting wood.

{¶ 41} Conversion is the "wrongful exercise of dominion over property in exclusion of the right of the owner, or withholding it from his possession under a claim inconsistent with his rights." *Shinaberry*, supra.

{¶ 42} Unfortunately for appellants, the law is clear that with regard to the cutting and removal of trees from a utility company's right-of-way, if the cutting of the landowner's trees is authorized, the removal of the wood from the landowner's property is not "wrongful" so as to give rise to a claim for conversion. See id. Because appellees were authorized, pursuant to the membership agreement, to cut down trees on appellants' properties, they cannot be liable for conversion. The trial court did not err in dismissing appellants' claims for conversion.

{¶ 43} For all of the foregoing reasons, appellants' first assignment of error is found not well-taken.

{¶ 44} Appellants argue in their second assignment of error that the trial court erred when it struck Terry's July 31, 2008 affidavit. This affidavit, which contains information concerning Sunrise Point, Ltd.'s incorporation date, was attached to and filed in support of appellants' July 31, 2008 Civ.R. 60(B) motion for relief from judgment and was filed after the July 7, 2008 entry of summary judgment that is presently under consideration.

{¶ 45} As indicated above, appellants did not appeal the trial court's September 25, 2008 judgment entry denying their motion. Where a party appeals from a trial court's decision on a motion for summary judgment, and also moves for relief from judgment under Civ.R. 60(B), that party must file a second notice of appeal if the Civ.R. 60(B) motion is denied in order to preserve the issues raised therein. Because appellants did not file a second notice of appeal, the issues raised in the post-judgment motion were not preserved for appellate review. Accordingly, appellants' second assignment of error is found not well-taken.

{¶ 46} For all of the foregoing reasons, the judgment of the Erie County Court of Common Pleas is affirmed. Appellants are ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

John R. Willamowski, J. _____
CONCUR.
JUDGE

Judge John R. Willamowski, Third District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.