[Cite as *Alkop, Inc. v. Vodicka*, 2010-Ohio-2248.]

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

Alkop, Inc., et al.	Court of Appeals No. OT-09-033
Appellants	Trial Court No. 08 CVC 081
v.	
Roger E. Vodicka, Individually and as Trustee of the Vodicka family trust dated March 30, 2006, et al.	**DECISION AND JUDGMENT**
Appellees	Decided: May 21, 2010

* * * * *

Daniel L. McGookey and Richard B. Hardy III, for appellants.

Justin D. Harris and David R. Hudson, for appellees.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Ottawa County Court of Common Pleas that granted summary judgment in favor of appellees and against appellants on the

basis of res judicata. For the reasons that follow, the judgment of the trial court is affirmed.

{¶ 2} Appellants Alkop, Inc., and Lakevue Marina, Inc., set forth the following assignments of error:

{¶ 3} "Assignment of Error I: The trial court erred as a matter of law when it found that plaintiffs/appellants are estopped from seeking destruction of the boathouse due to res judicata.

{¶ 4} "Assignment of Error II: The trial court erred as a matter of law in finding that other lot owners in the Ott Subdivision could be substituted for the owner of Lot 10, as one of those given permission to construct and maintain the boathouse.

{¶ 5} "Assignment of Error III: The trial court's finding that defendants/ appellees' continued maintenance and use of the boathouse represents a minimal expansion of their easement rights, is against the manifest weight of the evidence."

{¶ 6} The undisputed facts relevant to the issues raised on appeal are as follows. Alkop, Inc. ("Alkop") is the fee simple owner of the Lakevue Marina ("marina") waterfront property located in the Ott Subdivision in Ottawa County, Ohio. Alkop purchased the real estate from Bill Billings in 1970 and since that time has leased the property to the marina. Appellees Lillian Vodicka and her son Russell own Lot 9 in the subdivision, which Lillian purchased with her late husband in 1955. Lillian's other son Roger and his wife Janet – also appellees in this matter – own Lots 4, 6 and 7.

{¶ 7} Within the marina is property referred to as the "Reserved" area, a strip of land that borders the shoreline. The deeds to the marina lots allow each lot owner to dock a boat in the Reserved area. It is undisputed that, pursuant to the deeds, each lot owned by the Vodickas carries with it "* * * the right, easement and privilege of docking a boat within a strip of land in the Reserve portion of said plat fronting on East Harbor, the location thereof to be fixed by the grantors herein. Said strip to be six (6) feet in width." Therefore, based on the language of the deeds, the Vodicka family has a total of four easements allowing 24 feet of dockage width.

{¶ 8} The record reflects that sometime in the late 1950's, Lillian and her husband, along with Frank Propapek, who at that time owned Lot 10, obtained the consent of the owner of the subdivision to construct a boathouse ("Vodicka boathouse"), which the two families would share. The Vodicka boathouse was the last one built in the Reserved area and was built between two existing boathouses, sharing a common wall with each. The space between the two existing boathouses was "pie-shaped" and until that time no one had wanted to build there. It is undisputed that the boathouses were standing when Alkop's current owner, Antone Kopanski, and his late father purchased the marina in 1970.

{¶ 9} On January 31, 2008, appellants Alkop and Lakevue Marina filed a complaint alleging that appellees, Roger Vodicka and various other members of his family, had exceeded the width limits of their easements; maintained their boathouse in an "unsafe, unsightly and otherwise hazardous condition;" stored boats and other property

within the Reserved area; allowed others to use the Reserved area, and claimed an interest in the Reserved area beyond the scope of their rights. Alkop further alleged that the defendants' actions constituted a nuisance and trespass, interfered with Alkop's property rights, and created a justiciable controversy necessitating a declaratory judgment and injunctive relief.

{¶ 10} On May 7, 2008, the current owners of Lot 10, who had equal rights in the boathouse with Lillian and Russell Vodicka and were also named defendants, entered into a consent judgment entry, agreeing "* * * that the boathouse referred to in Plaintiffs' Complaint may be torn down, so long as said Defendants' rights to a six-foot (6') dockage easement in the so-called 'Reserved Area' are preserved * * *." The consent judgment entry ordered that the boathouse be torn down, "* * * subject to the rights, if any, of the remaining parties in this action."

{¶ 11} On June 12, 2008, the Vodickas filed an answer and counterclaims. On March 2, 2009, Alkop filed a motion for partial summary judgment seeking dismissal of the counterclaims and requesting an order allowing them to repossess and tear down the boathouse. The Vodickas filed their own motion for summary judgment on April 9, 2009. In their motion, the Vodickas asserted that the rights and obligations of all parties had been judicially determined by this court's decision in *Ashleman v. Alkop, Inc., et al.* (Aug. 19, 1983), 6th Dist. No. OT-83-2. The Vodickas asserted that the doctrine of res judicata prevented Alkop from re-litigating those issues.

{¶ 12} On October 23, 2009, the trial court granted summary judgment in favor of the Vodickas and against Alkop, finding that Alkop was collaterally estopped from seeking the destruction of the boathouse based on any claimed encroachments. In so doing, the trial court relied on this court's 1982 decision in *Ashleman*, supra, in which we held that Alkop and the marina could not force the owners of a boathouse to tear down the structure. The trial court herein noted that when *Ashleman* was appealed to this court, we held that Alkop did not have standing to assert a claim against the boathouse owners for allegedly exceeding their easement width and that the proper party to file such a suit would be a neighbor whose easement had been encroached upon by the Ashlemans.

{¶ 13} In their first assignment of error, appellants assert that the trial court erred by finding that they were estopped from seeking destruction of the boathouse on the basis of res judicata.

{¶ 14} We note that an appellate court's review of a summary judgment determination is conducted on a de novo basis, applying the same standard as the trial court. Summary judgment will be granted when there remains no genuine issue of material fact and, considering the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C).

{¶ 15} "The doctrine of res judicata bars successive actions when a valid, final judgment has been rendered upon the merits and an identity of parties or their privies exists." *State v. Haney* (Nov. 23, 1999), 10th Dist. No. 99AP-159, citing *Ameigh v.*

Baycliffs Corp. (1998), 81 Ohio St.3d 247, 149, 1998-Ohio-467, citing *Whitehead v. Gen Tel. Co*. (1969), 20 Ohio St.2d 108, paragraph one of the syllabus. Moreover, "res judicata is applicable where an issue has been actually and necessarily litigated and determined in a prior action." Id., citing *Ameigh*.

{¶ 16} The case before us arises from Alkop's claim that the Vodickas' boathouse encroached on a neighboring easement. On appeal, Alkop attempts to distinguish the issues presented in this case from the issues previously litigated in the *Ashleman* case. We find, however, that the trial court was correct in concluding that Alkop is collaterally estopped from pursuing this action based on our decision in *Ashleman*.

{¶ 17} *Ashleman* arose from a lawsuit filed against the appellants in this case by William and Mary Ashleman, who owned a lot in the Lakevue Marina. The Ashlemans sought a permanent injunction to prohibit Alkop from certain actions that included preventing the Ashlemans from driving their car through the Reserved area to their boathouse. Appellants filed a counterclaim against the Ashlemans, seeking damages for trespass and intentional interference with Alkop's business, injunctive relief as to future trespass, and an order requiring that the Ashlemans' boathouse be removed. Alkop and the marina alleged that the Ashlemans' right to "dock" a boat was limited to beaching it on their six-foot strip of the Reserved area, and did not extend out onto the waters of the harbor. Upon consideration, the trial court found that Alkop and the marina did not have standing to file suit claiming that the Ashlemans' boathouse exceeded the width of their

easement; the trial court held that the proper party to bring such an action would be a neighbor who has had his easement width decreased by the Ashlemans' boathouse.

{¶ 18} Alkop and the marina appealed the *Ashleman* decision, arguing that the trial court erred by finding that the six-inch boathouse encroachment affected only the neighboring easement holder. In our decision, we stated that, although the boathouse encroached upon a neighboring dock by a total of six inches, "* * * we fail to see how this could damage [Alkop and the marina] in any way." This court further noted that Alkop had not complained about the existence of the boathouse in the 20 years since it had been built. Additionally, this court found that, due to the absence of any proof by Alkop that the boathouse was not properly located when originally built, Alkop had not shown that the trial court erred by ruling that the placement of the boathouse affected only an easement holder who was not a party to the lawsuit.

{¶ 19} There clearly is an identity of parties, as appellants herein were parties to the *Ashleman* case. In the earlier case, this court found that Alkop was precluded from seeking the destruction of the boathouse, noting that the structure had been built with permission of the previous landowner more than 20 years earlier and that Alkop had not complained about its existence at any time since it purchased the land in 1970. In the case before us, Alkop once again is seeking an order for the destruction of a boathouse in Lakevue Marina. The trial court herein correctly held that, based on its decision in *Ashleman*, Alkop and Lakevue Marina were barred by res judicata from tearing down the

boathouse, and that they have no standing to assert a claim for an encroachment by the Vodickas into a neighboring easement.

{¶ 20} Based on the foregoing, we find that there is no genuine issue of material fact and that appellees were entitled to judgment as a matter of law. Accordingly, appellants' first assignment of error is not well-taken.

{¶ 21} In support of their second and third assignments of error, appellants assert that the trial court erred by finding that the other members of the Vodicka family who own lots in the marina could be substituted for the owner of Lot 10, and by finding that appellees' continued maintenance and use of their boathouse represents only a "minimal expansion" of their easement rights. Upon review of the trial court's decision, we see that the two "findings" cited by appellants in their second and third assignments of error did not serve as the basis for the court's ruling. The trial court's decision in this case was made on the basis of res judicata, as discussed above. In its discussion of the background of this case, the trial court noted that the Vodicka family collectively is entitled to a total of 30 feet of dockage space since they own five lots. This was in no way a "finding" of the trial court and cannot be the basis for reversible error. Secondly, appellants take exception to the trial court's statement in its analysis of this case that the Vodickas' boathouse "* * * exceeds its easement width by 1 foot 4 inches (at best) * * *." Appellants disagree with the trial court's assessment of the extent of the alleged encroachment. However, the trial court's determination as to the extent of any alleged encroachment did not constitute the basis for its decision on summary judgment. Based

on the foregoing, we find that appellants' second and third assignments of error are without merit and not well-taken.

{¶ 22} On consideration whereof, this court finds that the trial court did not err by granting summary judgment in favor of appellees and against appellants. Accordingly, the judgment of the Ottawa County Court of Common Pleas is affirmed. Costs of this appeal are assessed to appellants 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.

Peter M. Handwork, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
JUDGE

Keila D. Cosme, J. _____
CONCUR.
JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.