[Cite as *Serbin v. Hartville*, 2009-Ohio-6940.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
JOSEPH B. SERBIN, et al.,	:	Sheila G. Farmer, P.J.
	:	W. Scott Gwin, J.
Plaintiffs-Appellants/Cross-Appellees	:	Julie A. Edwards, J.
	:	
-vs-	:	Case No. 2008 CA 00293
	:	
	:	
VILLAGE OF HARTVILLE, et al.,	:	O P I N I O N

Defendants-Appellees/Cross-Appellants

CHARACTER OF PROCEEDING:	Civil Appeal from Stark County Court of Common Pleas Case No. 2007 CV 04405
JUDGMENT:	Reversed & Remanded
DATE OF JUDGMENT ENTRY:	December 29, 2009

APPEARANCES:

For Plaintiffs-Appellants/ Cross-Appellees	For Defendants-Appellees/ Cross Appellants
JON A. TROYER 1953 Gulf Street, N.W. Uniontown, Ohio 44685	PAUL J. PUSATERI THOMAS R. HIMMELSPACH Buckingham, Doolittle & Burroughs, LLP 4518 Fulton Drive, N.W. P.O. Box 35548 Canton, Ohio 44735-5548

Edwards, J.

{¶1} Plaintiffs-appellants, Joseph Serbin and Bernice Serbin, Trustees of the Serbin Family Trust, appeal from the August 27, 2008, and November 26, 2008, Judgment Entries of the Stark County Court of Common Pleas. Defendants-appellees Village of Hartville, Board of Public Affairs, and Mayor Beverly Green have filed a cross-appeal.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellants Joseph Serbin and Bernice Serbin, trustees of the Serbin Family Trust, are the title owners of property located in Hartville, Ohio. Appellants' property is subject to an easement for a sanitary pump lift station known as the Cornerstone Lift station.

{¶3} On October 29, 2007, appellants filed a complaint for declaratory judgment and other relief against appellees Village of Hartville, Hartville's Board of Public Affairs and the Village of Hartville's then Mayor, Beverly Green. Appellants, in their complaint, alleged that on October 16, 2007, appellee Board of Public Affairs had given final approval for the construction of a 27' x 27' asphalt slab and a 25' x 25' six foot high padlocked privacy fence around the lift station on their property. Appellants alleged that construction of the same was a substantial material interference with their rights in fee to that portion of the parcel not burdened by any easement and was a substantial material interference with their remaining subservient rights to that portion of their parcel subject to any easement. Appellants sought a declaratory judgment that appellee Village of Hartville had initiated an appropriation proceeding "through the action of the Board of Public Affairs on October 16, 2007, instructing the Engineer to

proceed" with construction of the slab and fence on appellants' property and that appellee Village of Hartville may not appropriate that portion of their property impacted by the slab and fence "without first satisfying constitutional requirements and the statutory limits of Ohio R.C. Chapter 163." Appellants asked the trial court to deny appellee Village of Hartville's attempted appropriation and to award them costs, expenses and attorney fees associated in bringing the action necessary to stop the attempted appropriation. Appellants also asked that appellees be further enjoined from any further action on the construction of the slab and fence until all constitutional and statutory requirements were met.

{¶4} On June 11, 2008, appellees filed a Motion for Summary Judgment. Appellees, in their motion, argued that appellants' complaint should be dismissed because there was no justiciable controversy. Appellees noted that appellee Village of Hartville and appellee Board of Public Affairs had decided not to construct the fence on appellants' property at this time. Attached to appellees' motion were authenticated minutes from the January 21, 2008 and February 4, 2008 minutes of the meeting of the Board of Public Affairs. The January 21, 2008 minutes stated, in relevant part, as follows: "Motion presented to withdraw the fence stipulation around Cornerstone Lift Station and let the homeowner who has been contesting this issue [know] that the matter is dropped. Motion made by Campbell and seconded by Miller…Motion carried." In turn, the February 4, 2008 minutes stated, in relevant part, as follows: "reviewed Cornerstone Lift Station issue. Previous meeting, the BPA [Board of Public Affairs] passed a motion to drop the fence expectation from the homeowner who had been contesting this issue. A letter was sent to the homeowner's (Joseph Serbin) lawyer. .."

Also attached to appellees' motion was appellees' response to the following request for admissions:

{¶5} "Request No. 11: The Village of Hartville and the Board of Public Affairs have now abandoned their plans for constructing a fence on Stark County Parcel ID No. 23-13247.

{¶6} "Answer: Deny. The Village of Hartville and the Board of Public Affairs decided not to construct the fence at this time as a way to encourage plaintiffs to dismiss this lawsuit."

{¶7} On June 11, 2008, appellants filed a Motion for Summary Judgment. On June 25, 2008, appellants filed a memorandum contra appellees' Motion for Summary Judgment. Appellants, in the same, argued that there was a justiciable controversy. Appellants noted that the Mayor Beverly Green had stated at the October 27, 2007 meeting of the Board of Public Affairs that the only thing holding up the project was the contractor's schedule. Appellants argued that appellee Village of Hartville might decide in the future to pursue the project and that the Village's use of the phrase "at this time" in their answer to the request for admissions is "all the evidence needed to establish an ongoing threat to [appellants'] property rights."

{¶8} Pursuant to a Judgment Entry filed on July 30, 2008, the trial court denied appellees' Motion for Summary Judgment. The trial court found that there was "a reasonable expectation that the construction of the asphalt slab and privacy fence will again be pursued by the Defendant in the future subjecting the Plaintiffs to further litigation over this issue." The trial court, in its Entry, also granted the Motion for

Summary Judgment filed by appellants in part, and denied the same in part. The trial court found that there were genuine issues of material fact as to the following**:**

{¶9} "The Court finds that there are genuine issues of material fact as to the above issues, including, but not limited to: (1) the exact location of the pump lift station on the Plaintiff's property, which would affect Plaintiff's property right, i.e. whether the sanitary lift station is located within the 'sanitary and drainage easement' running across Plaintiff's property; (2) whether an implied easement exists, which would allow construction of the asphalt slab and privacy fence; and (3) whether the easement for maintenance of the sewer system would include construction of the asphalt slab and privacy fence."

{¶10} The trial court scheduled a non-jury trial for August 28, 2008.

{¶11} At the request of the trial court, the parties filed briefs addressing the issue of whether appellants' claim for attorney fees was properly at issue in the case sub judice.

{¶12} As memorialized in a Judgment Entry filed on August 27, 2008, the trial court found, as a matter of law, that no appropriation had occurred because nothing had been constructed on appellants' property. The trial court further found that appellants' action was strictly a declaratory judgment action regarding appellees' easement rights, if any. The trial court, in its August 27, 2008, Judgment Entry, specifically stated, in relevant part, as follows:

{¶13} "…While declaratory judgment would normally be a matter of law decided on briefs, the Court again finds, as it did in ruling on the parties' motions for summary judgment, that hearing is required to determine the exact location of the sanitary pump

lift station on the Plaintiff's property. If the evidence shows that the sanitary pump lift station is located inside of the Defendant's easement, then the Court must determine, as a matter of law, whether the actions of the Defendant are permitted pursuant to the language of the easement. If the Court determines, on the other hand, that the sanitary pump lift station is located outside of the Defendant's easement, then the Court finds that this matter would be a proper case for an appropriation proceeding."

{¶14} The trial court further found that appellants were not entitled to attorney fees.

{¶15} On August 28, 2008, the date of the non-jury trial, the parties stipulated on the record that the pump station was located within the easement. The trial court then verbally directed the parties to brief the issue of whether the construction of the proposed slab and fence were permitted pursuant to the language of the easement.

{¶16} After briefs were submitted by the parties, the trial court, pursuant to a Judgment Entry filed on November 26, 2008, found that "the proposed construction of the asphalt slab and privacy fence around the sanitary pump lift station in the instant case is within the scope of the easement, which is dedicated to public use, and is reasonably necessary for the operation of the sewer system. The Court agrees with the Defendant that any damage that may be sustained to the lift station should the proposed construction not go forward would threaten the health and public safety of the citizens of Hartville."

{¶17} Appellants appealed from the August 27, 2008, and November 26, 2008, Judgment Entries raising the following assignments of error:

{¶18} "I. THE TRIAL COURT ERRED BY GRANTING JUDGMENT AS A MATTER OF LAW TO DEFENDANTS.

{¶19} "II. THE TRIAL COURT ERRED BY NOT PROVIDING PLAINTIFFS A MEANINGFUL OPPORTUNITY TO OFFER RELEVANT EVIDENCE.

{¶20} "III. THE TRIAL COURT ERRED BY MISCONSTRUING THE EASEMENT.

{¶21} "IV. THE TRIAL COURT ERRED BY FAILING TO APPLY OHIO R.C. CHAPTER 163."

{¶22} In turn, appellees filed a Cross-Appeal, raising the following assignment of error:

{¶23} "THE TRIAL COURT ERRED IN DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT."

{¶24} For purposes of judicial economy, we shall address the assignment raised in the cross-appeal first.

Cross-Appeal

{¶25} Appellees, in their sole assignment of error on Cross-Appeal, argue that the trial court erred in denying their Motion for Summary Judgment. We agree.

{¶26} As is stated above, appellees, on June 11, 2008, filed a Motion for Summary Judgment, arguing that appellants' complaint should be dismissed because there was no justiciable controversy. In Ohio, the need for a justiciable issue arises from the Ohio Constitution. Section 4(B), Article IV of the Ohio Constitution provides that "[t]he courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters ... as may be provided by law." 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. *Burger Brewing Co. v. Liquor Control Comm.* (1973), 34 Ohio St.2d 93, 97-98, 296 N.E.2d 261. Generally, 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, 118 S.Ct. 1257, 1259, 140 L.Ed.2d 406, citing *Thomas v. Carbide Agricultural Products Co.* (1985), 473 U.S. 568, 580-581, 105 S.Ct. 3325.

{¶27} There is no dispute that appellee Village of Hartville planned to construct a fence around the lift station on appellants' property. However, the record clearly shows that such plan was dropped before any construction was authorized. As is stated above, the minutes from the January 21, 2008, and February 4, 2008, Board of Public Affairs show that the plan to construct a fence was withdrawn. In addition, Robert Graham, who was at the relevant times the village engineer, testified during his deposition that the plans to install an asphalt slab and a fence at the lift station on appellants' property never proceeded because the Board of Public Affairs never issued a purchase order that would allow the materials to be ordered and the work to be done. See Graham Deposition at page 64.

{¶28} While appellants argue that appellees could later resurrect the plan to build the fence and slab around the lift station on their property, we note that, as stated by the court in *Kuhar v. Medina Cty. Bd. Of Elections*, Medina App. No. 06CA0076-M, 2006-Ohio-5427 at paragraph 14, "Courts only have the power to resolve present disputes and controversies, but do not have the authority to issue advisory opinions to prevent future disputes." The construction of a slab and fence may or may not ever

occur. Even assuming that plans to construct the slab and fence proceed in the future we note that appellants may not own the subject property at such time.

{¶29} We further note that the trial court, in its July 30, 2008, Judgment Entry, found, in part, that the "issues in this case fall under the exception to the mootness doctrine in that the issues are 'capable of repetition,' 'yet evade review.'" The Supreme Court of Ohio has held that "[t]his exception applies only in exceptional circumstances in which the following two factors are both present: (1) the challenged action is too short in its duration to be fully litigated before its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *State ex rel. Calvary v. Upper Arlington* (2000), 89 Ohio St.3d 229, 231, 729 N.E.2d 1182. As noted by the court in *Ashtabula County Joint Vocational School v. O'Brien*, Ashtabula App. No. 2004-A-0092, 2006-Ohio-1794 at paragraph 32. "Under this exception, a trial court will rule, for example, on the legality of an abortion, or a student's suspension from school, because, in the case of an abortion, the pregnancy will be over by the time of appellate review; and, in the case of a student's suspension from school, the student who challenges "school board rules generally graduate[s] before the case winds its way through the court system." (Citations omitted).

{¶30} While the fact situation between appellees and appellants may be capable of repetition in the future, we do not agree that it evades review. In the event that appellees decide in the future to proceed with construction of the slab and fence, appellants will have an opportunity to pursue legal action at that time.

{¶31} In short, we find that there was no justiciable controversy and that the trial court, therefore, erred in denying appellees' Motion for Summary Judgment.

{¶32} Appellees' sole assignment of error on cross-appeal is, therefore, sustained.

APPELLANTS' APPEAL

{¶33} Based on our disposition of appellees' sole assignment of error on cross-appeal, appellants' assignments of error are moot.

{¶34} Accordingly, the judgment of the Stark County Court of Common Pleas is reversed and this matter is remanded to the trial court for further proceedings.

By: Edwards, J.

Farmer, P.J. and

Gwin, J. concur

s/Julie A. Edwards

s/Sheila G. Farmer

s/W. Scott Gwin

JUDGES

JAE/d1002

[Cite as *Serbin v. Hartville*, 2009-Ohio-6940.]

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

JOSEPH B. SERBIN, et al.,	:	
Plaintiffs-Appellants/Cross-Appellees	:	
-vs-	:	JUDGMENT ENTRY
VILLAGE OF HARTVILLE, et al.,	:	
Defendants-Appellees/Cross-Appellants	:	CASE NO. 2008 CA 00293

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Stark County Court of Common Pleas is reversed and this matter is remanded to the trial court for further proceedings. Costs assessed to plaintiffs-appellants.

s/Julie A. Edwards

s/Sheila G. Farmer

s/W. Scott Gwin

JUDGES