

[Cite as *Walker v. Brewster*, 2016-Ohio-1463.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

N. KATHRYN WALKER
Plaintiff-Appellant

-vs-

THE VILLAGE OF BREWSTER, ET AL.
Defendants-Appellees

JUDGES:
Hon. William B. Hoffman, P.J.
Hon. John W. Wise, J.
Hon. Craig R. Baldwin, J.

Case No. 2015CA00142

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Stark County Court of
Common Pleas, Case No. 2014CV01197

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

March 31, 2016

APPEARANCES:

For Plaintiff-Appellant

For Defendants-Appellees

CRAIG T. CONLEY
604 Huntington Plaza
220 Market Avenue South
Canton, Ohio 44702

GREGORY A. BECK
JAMES F. MATHEWS
ANDREA K. ZIARKO
Baker, Dublikar, Beck, Wiley & Mathews
400 South Main Street
North Canton, Ohio 44720

Hoffman, P.J.

{¶1} Plaintiff-appellant Kathryn Walker appeals the July 20, 2015 Judgment Entry entered by the Stark County Court of Common Pleas, which granted summary judgment in favor of defendants-appellees the Village of Brewster, et al.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellant owns and operates a commercial mobile home park, Hillview Mobile Home Park (“Hillview”). As part of the commercial operation of Hillview, Appellant owned and maintained a private water and sewer system to provide water and sewer services to its renter residents. Hillview was located in Sugarcreek Township, until it was annexed into the Village of Brewster (“the Village”), effective June 2, 2010.

{¶3} On December 1, 2008, the Ohio Attorney General on behalf of the Ohio Environmental Protection Agency (“Ohio EPA”) filed an action against Appellant alleging the private water and sewer system in use at Hillview “created risks to both human health and the environment” and sought an injunction ordering Appellant to abandon the private water and sewer system and connect to the Village water and sewer system.

{¶4} In light of the pending action against her by the Ohio EPA, Appellant entered into negotiations with the Village for extension of the Village water and sewer system to Hillview. The Village obtained cost estimates. Because the Ohio EPA offered partial funding of the water project but no funding for the sewer project, Appellant requested the cost of the sewer line connection be estimated separately.

{¶5} In July, 2009, the Village presented Appellant with two separate agreements. The first agreement addressed the extension of the Village water service (“the water service agreement”) to Hillview. The water service agreement required

Appellant to pay the entire cost of the infrastructure improvements necessary to extend the Village water system to Hillview. It also required Appellant to annex into the Village. Appellant signed the water service agreement. The second agreement addressed the extension of the Village sewer service (“the sewer service agreement”) to Hillview. Like the water service agreement, the sewer service agreement required Appellant to pay the entire cost of the infrastructure improvements necessary to extend the Village sewer system to Hillview. Appellant did not sign the sewer service agreement, but offered to pay one-half the costs to extend the Village sewer line to Hillview. The estimated cost of the sewer line extension was \$153,750.00. The parties did not reach an agreement relative to the sewer line.

{¶6} The Village completed construction of the water line extension to Hillview in November, 2009. The Village financed the project with a grant from the state as well as a no interest loan also from the state. Appellant repaid the cost of the water line extension through a payment plan. The Village did not construct the sewer line extension to Hillview.

{¶7} On October 20, 2009, the Village and the Board of Trustees for Sugarcreek Township (“the Sugarcreek Board”) entered into an Annexation Agreement wherein the Village and the Sugarcreek Board agreed to the annexation into the Village of certain real property, including Hillview. With respect to governmental services, the Annexation Agreement provides:

ARTICLE 5

POST ANNEXATION GOVERNMENTAL SERVICES

Village shall provide to the Property all standard Governmental Services provided to all other property located within the Village. These

standard services currently include: fire, police, water and sewer services.

The parties agree that the Property is entitled to standard governmental services by the Village in the same manner such services are provided to other areas of the Village.

{¶8} On August 13, 2010, Appellant entered into a Consent Order with the Ohio Attorney General to settle the Ohio EPA's enforcement action. The Consent Order provides, in relevant part:

[Appellant] is hereby enjoined and ordered to submit to the Ohio EPA, by no later than September 1, 2010, a fully signed legally binding Agreement and Declaration of Covenants for Extension of Village Sewer Services, entered into between the Village and Defendants, that states that the Village authorizes [Appellant] to connect the Hillview WWTW¹ into the Village's Publicly Owned Treatment Works and that binds [Appellant] to pay for the cost of connecting the Hillview WWTW into the Village's Publicly Owned Treatment Works.

{¶9} Appellant failed to submit to the Ohio EPA a fully signed, legally binding Agreement and Declaration of Covenants for Extension of Village Sewer Services as required by the Consent Order. The Ohio EPA filed a contempt proceeding against Appellant in 2013, which is still pending.

{¶10} On May 19, 2014, Appellant filed the instant action against the Village, alleging breach of contract and seeking a declaratory judgment that Article 5 of the Annexation Agreement between the Village and Sugarcreek Township obligated the

¹ Wastewater Treatment Works.

Village, at its own expense, to extend the sewer trunk line to Hillview. Appellant was not a party to the Annexation Agreement, but asserted intended third party beneficiary status. Appellant also sought relief under R.C. 121.22. The Village filed an answer on June 11, 2014.

{¶11} The Village filed a motion for judgment on the pleadings. Via Judgment Entry filed September 12, 2014, the trial court granted the Village's motion for judgment on the pleadings relative to Appellant's R.C. 121.22 claim, but found Appellant had standing to enforce the contractual terms of the Annexation Agreement as a third party beneficiary. The trial court further found Appellant had properly pled her breach of contract claim.

{¶12} The parties filed motions for summary judgment on the issue of contractual interpretation, each presenting extrinsic evidence to support their respective positions. The extrinsic evidence included a 2005 annexation agreement between Sugarcreek Township and the Village for the annexation of certain Fairless School District property ("the Fairless Annexation Agreement") into the Village, as well as side agreement on the same date with the Byers, owners of property situated between the Village and Fairless High School ("the Byers' Side Agreement").

{¶13} The Fairless Annexation Agreement and the Annexation Agreement at issue herein are substantially identical, including Article 5, which, in the Fairless Annexation Agreement provides:

Village shall provide to the Property all standard Governmental Services provided to all other property located within the Village. These standard services currently include: fire, police, water and sewer services.

The parties agree that the Property is entitled to standard governmental services by the Village in the same manner such services are provided to other areas of the Village.

{¶14} Pursuant to the Fairless Annexation Agreement, the Fairless School District paid the entire cost of approximately \$400,000.00 for the construction of the infrastructure improvements and the extension of the sewer mains necessary to connect Fairless property to the Village sewer system. The Village did not incur any costs associated with the extension of the sewer mains.

{¶15} The Byers' Side Agreement provided for the construction of lateral connection lines across the Byers' property to the sewer main. The Village paid the approximately \$15,000.00 cost of this project.

{¶16} On May 29, 2015, Appellant filed a motion to strike documents submitted by the Village which pre-dated the annexation of Hillview into the Village as well as the affidavit of former mayor and current council member Michael Schwab.

{¶17} Via Judgment Entry filed July 20, 2015, the trial court granted the Village's summary judgment, overruled Appellant's motion for summary judgment, and denied Appellant's motion to strike. The trial court found the language of Article 5 of the Annexation Agreement was ambiguous; therefore, examined parole evidence to determine the parties' intent. Upon review of the evidence provided, the trial court determined Article 5 of the Annexation Agreement did not require the Village to pay the cost of extending the sewer trunk line to Hillview, but allowed Appellant to tie into the Village sewer system at her own expense. In light of this determination, the trial court found Appellant's breach of contract claim failed as a matter of law. The trial court also

overruled the equal protection argument Appellant asserted in her motion for summary judgment, finding Appellant had failed to present evidence she had been treated differently from others similarly situated.

{¶18} It is from this judgment entry Appellant appeals, raising the following assignments of error:

{¶19} “I. THE TRIAL COURT ERRED IN DENYING SUMMARY JUDGMENT TO PLAINTIFF/APPELLANT AND IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS/APPELLEES.

{¶20} “II. THE TRIAL COURT ERRED IN DENYING PLAINTIFF’S/APPELLANT’S MOTION TO STRIKE.”

II

{¶21} For ease of discussion, we shall begin by addressing Appellant’s second assignment of error, in which she contends the trial court erred in denying her motion to strike.

{¶22} Our standard of review for a motion to strike is abuse of discretion by the trial court. *Abernethy v. Abernethy*, Cuyahoga App. No. 81675, 2003-Ohio-1528. An abuse of discretion implies the trial court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. “[A]n abuse of discretion most commonly arises from a decision that was unreasonable.” *Wilson v. Lee*, 172 Ohio App.3d 791, 2007–Ohio–4542, 876 N.E.2d 1312, ¶ 11 (2d Dist.). “A decision is unreasonable if there is no sound reasoning process that would support that decision.” *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3d 157, 161, 553 N.E.2d 597.

{¶23} Appellant argues the trial court erred in failing to strike numerous documents submitted by the Village in support of its motion for summary judgment as well as the affidavit of Mayor Michael Schwab. Appellant explains the Village's references and documents pre-dating the Walker Annexation Agreement were irrelevant; therefore, inadmissible. Appellant submits Scwab's affidavit is not based on "his own personal knowledge"; therefore, is hearsay. We disagree.

{¶24} The trial court found Article 5 of the Annexation Agreement was ambiguous, and pursuant to the parole evidence rule, looked to extrinsic evidence to determine the parties' intent. Appellant submitted extrinsic evidence in support of her assertion the parties intended for the Village to pay for the connection costs of the sewer line. The Village responded with extrinsic evidence supporting its position to the contrary. We find the evidence presented by the Village was relevant to determine the intent of the parties. With respect to Mayor Schwab's affidavit, we find his averments were based on "his own personal knowledge" as Schwab was mayor of the Village during the time period which he references. Pursuant to Civ. R. 30(B)(5), he was qualified to testify regarding matters related to the Village.

{¶25} Appellant's second assignment of error is overruled.

I

{¶26} In her first assignment of error, Appellant maintains the trial court erred in denying her motion for summary judgment and granting summary judgment in favor of the Village. Appellant submits as a third party beneficiary to the Annexation Agreement she was "entitled to some benefit from performance of that contract; and, for the instant purposes, that benefit can only be the relief request in [her] Complaint." Brief of Appellant

at 6. Appellant adds, if not, “the only ‘benefit’ conferred upon [her] under the Agreement would be her post-annexation payment of municipal income tax to the Village.” *Id.*

{¶27} Civ. R. 56 states in pertinent part:

{¶28} “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 of 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 stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed mostly strongly in the party's favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.”

{¶29} A trial court should not enter a summary judgment if it appears a material fact is genuinely disputed, nor if, construing the allegations most favorably towards the non-moving party, reasonable minds could draw different conclusions from the undisputed facts. *Hounshell v. Am. States Ins. Co.* (1981), 67 Ohio St.2d 427, 424 N.E.2d 311. The court may not resolve any ambiguities in the evidence presented. *Inland Refuse Transfer Co. v. Browning–Ferris Inds. of Ohio, Inc.* (1984), 15 Ohio St.3d 321, 474 N.E.2d 271. A fact is material if it affects the outcome of the case under the applicable substantive

law. *Russell v. Interim Personnel, Inc.* (6th Dist.1999), 135 Ohio App.3d 301, 733 N.E.2d 1186.

{¶30} When reviewing a trial court's decision to grant summary judgment, an appellate court applies the same standard used by the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 506 N.E.2d 212. This means we review the matter de novo. *Doe v. Shaffer*, 90 Ohio St.3d 388, 2000–Ohio–186, 738 N.E.2d 1243.

{¶31} The party moving for summary judgment bears the initial burden of informing the trial court of the basis of the motion and identifying the portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the non-moving party's claim. *Drescher v. Burt* (1996), 75 Ohio St.3d 280, 662 N.E.2d 264. Once the moving party meets its initial burden, the burden shifts to the nonmoving party to set forth specific facts demonstrating a genuine issue of material fact does exist. *Id.* The non-moving party may not rest upon the allegations and denials in the pleadings, but instead must submit some evidentiary materials showing a genuine dispute over material facts. *Henkle v. Henkle* (12th Dist.1991), 75 Ohio App.3d 732, 600 N.E.2d 791.

{¶32} As stated supra, the trial court found Article 5 of the Annexation Agreement was ambiguous and examined extrinsic evidence to determine the intent of the parties. Neither party challenges the trial court's finding of ambiguity. Appellant offered the Fairless Annexation Agreement and the Byers' Side Agreement to establish she was entitled to the post-annexation benefit of having the Village bear the cost of the connection of the sewer system. In response, the Village presented evidence showing the course of dealing between the parties while Appellant sought to avoid the repercussions from the Ohio EPA.

{¶33} Pursuant to the Fairless Annexation Agreement, Fairless was responsible for the cost of connecting to the Village water and sewer systems. Fairless did, in fact, pay the entire cost of the infrastructure improvements and the cost of extending the Village sewer main to the Fairless property involved. The Village did not bear any costs. However, pursuant to the Byers' Side Agreement, the Village bore the costs for the construction of lateral connection lines across the Byers' property to the sewer main. The entire cost of the construction associated with the Byers' Side Agreement was nominal compared to the fiscal benefits the Village would receive with the annexation of the Fairless School District into the Village. In addition, the Byers had not voluntarily agreed to the annexation. Annexation of the Byers' property was necessary for the entire Fairless Annexation to occur. The Village's decision to incur the cost of the connection lines across the Byers' property was based upon the benefits the Village would receive, and was an exception rather than the rule.

{¶34} We find the evidence presented by the Village established Appellant sought to connect to the Village water and sewer systems years earlier and was aware she would be responsible for the costs associated therewith. The Ohio EPA had initiated a lawsuit against Appellant due to the health risks threatening the renter residents at Hillview. Appellant had already completed negotiations relative to the water lines. She was attempting to negotiate to share the costs of the sewer line connection with the Village. Appellant's actions belie her assertion the Village should pay the connection expenses.

{¶35} Within this assignment of error, Appellant also asserts an equal protection argument. We find this argument to be without merit. Appellant is not part of a suspect

class. Further, Appellant has failed to establish she was treated differently from other similarly situated.

{¶36} Based on the foregoing, we overrule Appellant's first assignment of error.

{¶37} The judgment of the Stark County Court of Common Pleas is affirmed.

By: Hoffman, P.J.

Wise, J. and

Baldwin, J. concur