**[Cite as *Brostek v. O'Connell*, 2010-Ohio-4544.]**

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| STATE OF OHIO | ) | IN THE COURT OF APPEALS |
| | )ss: | NINTH JUDICIAL DISTRICT |
| COUNTY OF LORAIN | ) | |

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| JOSEPH L. BROSTEK, et al. | C.A. No. 10CA009779 |
| Appellants | |
| v. | APPEAL FROM JUDGMENT ENTERED IN THE |
| DENNIS O'CONNELL | COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO |
| Appellee | CASE No. 08CV158621 |

DECISION AND JOURNAL ENTRY

Dated: September 27, 2010

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MOORE, Judge.

**{¶1}** Appellants, Joseph and Johanna Brostek, appeal from the decision of the Lorain County Court of Common Pleas. We reverse and remand for proceedings consistent with this opinion.

I.

**{¶2}** In 1977, Dennis and Bonnie O'Connell owned property in Avon, Ohio that was almost six-acres in size. A home was located on one half of the property. The Brosteks wanted to purchase the home, but could not afford to purchase the entire property. Therefore, the O'Connells split the property into two parcels, one upon which the home was situated, and one that was vacant. The Brosteks and the O'Connells entered into an agreement pursuant to which the Brosteks would purchase the piece of land that contained the home. The O'Connells would retain the vacant property. In addition to the terms of the sale, the 1977 purchase agreement contained a statement that the Brosteks "shall have the right of first refusal on lot 105 feet by

1228 immediately to North of above property[,]" which referred to the piece of property retained by the O'Connells. The septic system and tank, a portion of the sanitary sewer lines and a portion of the storm drain and sewer that served the home were located on the piece of property the O'Connells retained. While the purchase agreement referenced the right of first refusal, the 1977 deed made no mention of it.

**{¶3}** At some point prior to 2006, Bonnie O'Connell died and Dennis O'Connell became the sole owner of the retained piece of property. In March of 2006, Mr. O'Connell entered into an agreement to sell the retained portion of the property to Geoff Dilik. When the Brosteks learned of the agreement, they contacted O'Connell to inform him that they wished to exercise their right of first refusal. Despite the Brosteks attempt to purchase the property, at the end of March of 2006, a deed was filed with the Lorain County Recorder's office transferring ownership of the property from O'Connell to Dilik. Dilik then required the Brosteks to remove from his newly purchased property the portions of the septic system, sewer and storm lines that served their home. The Brosteks filed suit against Dilik and in September of 2008, filed the instant action against O'Connell.

**{¶4}** In October of 2009, O'Connell filed his motion for summary judgment. In December, the Brosteks filed a motion to strike the exhibits attached to O'Connell's motion. They also filed their brief in response to his summary judgment motion. O'Connell responded by submitting his affidavit in an attempt to authenticate the exhibits he had previously attached to his motion. He also filed a reply to the Brosteks' response in opposition to his summary judgment motion. On January 27, 2010, the trial court denied the Brosteks' motion to strike. On January 28, 2010, the trial court granted O'Connell's summary judgment motion. The Brosteks timely appealed this decision, and have raised two assignments of error for our review.

II.

**ASSIGNMENT OF ERROR I**

> "THE TRIAL COURT ERRED IN ITS JANUARY 28, 2010 ORDER, WHEN IT GRANTED [O'CONNELL'S] MOTION FOR SUMMARY JUDGMENT AS THERE EXISTED A GENUINE ISSUE OF MATERIAL FACT AND [O'CONNELL WAS] NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW."

**{¶5}** In their first assignment of error, the Brosteks contend that the trial court erred in its January 28, 2010 order, when it granted O'Connell's motion for summary judgment. We agree.

**{¶6}** This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. We apply the same standard as the trial court, viewing the facts of the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12.

**{¶7}** Pursuant to Civil Rule 56(C), summary judgment is proper if:

> "(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

**{¶8}** The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-93. Specifically, the moving party must support the motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). Id. Once this burden is satisfied, the non-moving party bears the burden of offering specific facts to show a genuine issue for trial. Id. at 293. The non-

moving party "may not rest upon the mere allegations and denials in the pleadings" but instead must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735.

**{¶9}** The Brosteks initially contend that the trial court incorrectly applied the merger doctrine to this case. We agree.

**{¶10}** O'Connell moved for summary judgment, in part, on the ground that there could be no breach of contract because the 1977 purchase agreement, which contained a right of first refusal, merged into the 1977 deed, which did not contain a right of first refusal. The Brosteks moved to strike the exhibits as attached to O'Connell's summary judgment motion, which included the 1977 deed. The trial court denied this motion. Even assuming the motion to strike was incorrectly denied, and that O'Connell did not appropriately attach the 1977 deed to his motion, this Court notes that Mr. Brostek referred to the document during his deposition, which was made a part of the trial court record. Although there is some contention with regard to the evidence which O'Connell attached to his summary judgment motion, it is clear that he correctly directed the trial court to Mr. Brostek's deposition testimony, in which Brostek affirmed that the 1977 deed did not mention a right of first refusal. See Civ.R. 56(C). Accordingly, it is clear that there was no genuine issue of material fact with regard to whether the right of first refusal was included in the deed. The inquiry, however, does not end here. The trial court found that, as a matter of law, the doctrine of merger applied in this case, and therefore, no cause of action could be brought upon the 1977 purchase agreement. We do not agree.

> "The doctrine of 'merger by deed' holds that whenever a deed is delivered and accepted 'without qualification' pursuant to a sales contract for real property, the contract becomes merged into the deed and no cause of action upon said prior agreement exists. The purchaser is limited to the express covenants of the deed only." *Baker v. Fish* (Dec. 6, 2000), 9th Dist. No. 19912, at *3, citing *37*

> *Robinwood Associates v. Health Industries, Inc.* (1988), 47 Ohio App.3d 156, 157-158.

**{¶11}** An exception to the merger doctrine exists.

> "Provisions in the contract that are collateral to and therefore independent of the main purpose of the transaction are not merged in the deed. An agreement is collateral if it does not concern the title, occupancy, size, enjoyment, possession, or quantity of the parcel of land conveyed. If the agreements concern the use or enjoyment of the land, they are not collateral to the purchase agreement and are merged upon acceptance of the deed." (Internal citations omitted.) *Westwinds Dev. Corp. v. Outcalt*, 11th Dist. No. 2008-G-2863, 2009-Ohio-2948, at ¶82.

Thus, the question in this case is whether the right of first refusal on a wholly separate piece of property than the one described in the purchase agreement, and subsequently in the deed, merged into the deed or whether the agreement was collateral.

**{¶12}** In the instant case, the 1977 purchase agreement, which was attached to the complaint, stated that "Purchasers shall have the right of first refusal on lot 105 feet by 1228 immediately to North of above property." When the Brosteks purchased the property in 1977, they could not afford the entire lot. Therefore, O'Connell split the lot and sold the Brosteks only the portion that contained the home. As a result, the parties included in the 1977 purchase agreement a right of first refusal so that the Brosteks could purchase the lot immediately adjacent to their home if ever O'Connell decided to sell. It is clear that the 1977 purchase agreement involved only the piece of property at "3085 Lear Nagle Rd., Avon, Ohio to be subdivided with lot of 100 foot frontage and 1228 feet deep (approx. 2.819 acres)[.]" The description of the property contemplated by the purchase agreement explicitly exempted the piece of property O'Connell retained.

**{¶13}** We must look to the language of the purchase agreement to determine whether the exception to the general merger doctrine applies. *Mayer v. Sumergrade* (1960), 111 Ohio App. 237, 239. The language in the 1977 purchase agreement, as stated above, "does not concern the

title, occupancy, size, enjoyment, possession, or quantity of the parcel of land conveyed nor does it set down any condition or contingency upon which the sale of the property depends and which could only be satisfied by incorporation in the deed." Id. Although O'Connell points to the Brosteks' use of the split parcel as their own, as well as Mr. Brostek's statement in his deposition that he would not have bought the home had he not been given the right of first refusal on the neighboring lot as proof that the right of first refusal was concerned with the use and enjoyment of the land conveyed, these observations do not alter the express language of the purchase agreement. This language does not reflect that the right of first refusal was concerned with the enjoyment of the land conveyed, or that the land conveyance was in anyway contingent upon the grant of the right of first refusal. Instead, it was a wholly separate agreement of the parties. Thus, this Court concludes that the right of first refusal did not merge into the deed, and therefore, the trial court improperly determined that O'Connell was entitled to judgment as a matter of law.

**{¶14}** To support a conclusion that the right of first refusal merged into the deed, O'Connell and the trial court point to this Court's decision in *Baker*, supra. This case, however, is distinguishable and provides no discussion that would aid our decision. Initially, this Court explained that "[n]one of the parties has appealed the court's determination that the restrictions originally appearing in the April 1990 contract between the Fishes and George Baker were no longer valid because they were never incorporated into the deed. Thus, we presume the correctness of the trial court's determination of this issue." Id. at *3. Accordingly, we declined to create an argument for the parties, and presumed the regularity of the trial court proceedings. This was the extent of our discussion on the merger doctrine. Therefore, O'Connell's contention on appeal that "[t]he most relevant case cited is Ninth District precedent approving the

application of the merger doctrine to extinguish a right of first refusal where that right was included in a written purchase agreement but not included in the final warranty deed[,]" is an inaccurate statement of the case.

**{¶15}** Further, even if we determined that *Baker* was applicable to the instant case, it is factually distinguishable. In *Baker*, the right of first refusal at issue concerned the property that was the subject of the deed. In contrast, the right of first refusal in the instant case involved a wholly separate piece of property from the one that was described in the deed. Therefore, O'Connell's and the trial court's reliance upon this case is misplaced.

**{¶16}** Because we have determined that the right of first refusal was a collateral agreement, "it was not merged into the deed and its breach gave rise to a cause of action in favor of the purchaser against the vendor." *Medeiros v. Guardian Title & Guar. Agency, Inc.* (1978), 57 Ohio App.2d 257, 259. Accordingly, the trial court erred on this ground.

**{¶17}** We next turn to the Brosteks' contention that the trial court improperly determined that any costs they incurred in removing the septic system, sanitary sewer lines and storm water drains were the result of an order of the Lorain County General Health District. We agree.

**{¶18}** To support his argument on summary judgment that any costs the Brosteks incurred were not from his alleged failure to create an easement or due to his alleged breach of the right of first refusal, O'Connell attached a judgment entry from a prior court case, in which he was not a party. He also attached a letter from the Lorain County General Health District, which was addressed to the Brosteks. On appeal, O'Connell concedes that "these materials do not fall within the purview of Civ.R. 56(C) and, thus, should have been incorporated into a properly framed affidavit."

**{¶19}** Pursuant to Civ.R. 56(C), when considering a motion for summary judgment, the trial court is limited to "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action[.] *** No evidence or stipulation may be considered except as stated in this rule." "If a party wishes to rely on a piece of evidence excluded from Civ.R. 56(C)'s exclusive list, the evidence must be incorporated by reference through a properly framed affidavit." *Hudson Presbyterian Church v. Eastminster Presbytery*, 9th Dist. No. 24279, 2009-Ohio-446, at ¶18. Accordingly, the admission of these documents, upon which the trial court relied, required a properly framed affidavit. Id.

**{¶20}** In their motion to strike, the Brosteks objected to O'Connell's failure to properly authenticate the attached evidence. In response, O'Connell executed an affidavit attempting to incorporate the evidence originally attached to O'Connell's motion for summary judgment. Although there are questions raised by the trial court's decision to allow this supplementation, we conclude that we do not need to determine the validity of such a decision. Assuming without deciding that the trial court was correct in allowing O'Connell to supplement his motion with his affidavit, we conclude that this affidavit was not made with personal knowledge and therefore has no evidentiary value. Civ.R. 56(E) requires that affidavits "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit." Nowhere does O'Connell's affidavit explain or aver how he would have personal knowledge of the law suit in which he was not a party or of any conversations or letters between the Lorain County General Health District and the Brosteks. Accordingly, we conclude that this affidavit is not based upon personal knowledge of these documents.

**{¶21}** "Unauthenticated documents and affidavits not based on personal knowledge 'have no evidentiary value and should not be considered by the court in deciding whether summary judgment is appropriate.'" *Cheriki v. Black River Indus., Inc.*, 9th Dist. No. 07CA009230, 2008-Ohio-2602, at ¶6, quoting *Modon v. Cleveland* (Dec. 22, 1999), 9th Dist. No. 2945-M, at *3. Accordingly, the trial court's decision to grant O'Connell's summary judgment on the ground that any cost the Brosteks incurred in moving their sewer system was a result of the Lorain County General Health District rather than by any inaction of O'Connell was in error.

**{¶22}** The Brosteks' first assignment of error is sustained.

**ASSIGNMENT OF ERROR II**

"THE TRIAL COURT ERRED IN ITS JANUARY 27, 2010 ORDER, WHEN IT DENIED THE [BROSTEKS'] MOTION TO STRIKE."

**{¶23}** In their second assignment of error, the Brosteks contend that the trial court erred in its January 27, 2010 order, when it denied their motion to strike. Our disposition of the Brostek's first assignment of error renders this assignment of error moot. Accordingly, we decline to address the alleged error. App.R. 12(A)(1)(c).

III.

**{¶24}** The Brosteks' first assignment of error is sustained. Their second assignment of error is moot. The judgment of the Lorain County Court of Common Pleas is reversed and remanded for proceedings consistent with this opinion.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

CARLA MOORE
FOR THE COURT

WHITMORE, J.
DICKINSON, P. J.
CONCUR

APPEARANCES:

KENNETH R. RESAR, Attorney at Law, for Appellants.

RUSSELL T. MCLAUGHLIN, Attorney at Law, for Appellee.