[Cite as *Marinelli v. Prete*, 2010-Ohio-5168.]

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

Ms. Leah Marinelli, Trustee of the Leah Marinelli Living Trust dtd 2/21/1997

Appellant

v.

Mr. & Mrs. Paul Prete, et al.

Appellee

Court of Appeals No. E-09-057

Trial Court No. 2006-CV-129

DECISION AND JUDGMENT

Decided: October 22, 2010

* * * * *

Steven M. Ott and Kimberly M. Sutter, for appellant.

Robert E. Kmiecik and Kevin M. Fields, for appellee.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal from a judgment of the Erie County Court of Common Pleas, that granted the summary judgment motion of defendant-appellee, Harbour Lagoons Association ("the Association"). This is the second appeal to come before us

from the trial court's proceedings. In the first case, we affirmed the trial court's order granting the summary judgment motion of defendants-appellees, Paul and Debra Prete and Prete Builders, Inc. See *Marinelli v. Prete*, 6th Dist. No. E-09-022, 2010-Ohio-2257. Plaintiff-appellant, Mrs. Leah Marinelli of the Leah Marinelli Living Trust, dated February 21, 1997, now challenges the trial court's order granting the Association summary judgment. She assigns the following as error:

{¶ 2} "Assignment of Error I:

{¶ 3} "That the trial court erred by dismissing plaintiff/appellant Leah Marinelli, Trustee of the Leah Marinelli Trust DTD 2/21/1997's complaint against defendant/ appellee Harbour Lagoons Association for failure to state a claim for which relief can be granted.

{¶ 4} "Assignment of Error II:

{¶ 5} "That the trial court erred by finding that the defendant/appellee's rule requiring construction on a lot within two (2) years of purchase and the rule's subsequent enforcement for a violation are enforceable."

{¶ 6} Appellant is the titled owner in fee simple of Lot 2 in the Hidden Harbour Subdivision of Sandusky, Erie County, Ohio. Appellant purchased Lot 2 on November 15, 2005, from Frederick and Stephanie Pizzedaz. Previously, on November 18, 2004, the Pizzedazes purchased Lot 2 from Paul and Debra Prete. When the Pretes sold Lot 2 to the Pizzedazes, they added the following restriction to the deed: "This Transfer is subject to a restriction that any home to be built hereon must be built by Prete Builders.

This restriction runs with the land." Appellant had full knowledge of the restriction prior to purchasing Lot 2.

{¶ 7} On February 15, 2006, appellant filed a complaint to quiet title in the court below. Appellant named Paul and Debra Prete, Prete Builders, and the Association as defendants and sought a judgment that the restrictive covenant was null and void for the reasons that it: violated the Ohio and United States Constitutions' prohibition of slavery and involuntary servitude (Count 1); violated appellant's right to the free and unrestricted use of her land (Count 2); violated public policy (Count 3); violated the rule against perpetuities (Count 4); created a tortuous interference with a future business relationship (Count 5); violated the Consumer Sales Practices Act (Count 6); did not run with the land (Count 7); and slandered appellant's title to the land (Count 8).

{¶ 8} Only brief mention of the Association is made in the complaint. Under Count 1, the complaint alleges:

{¶ 9} "8. Defendant Harbour Lagoons Association is a corporation for non-profit under the laws of the State of Ohio and has it's [sic] principal place of business in Sandusky, Erie County, Ohio."

{¶ 10} Then, under Count 2, the complaint alleges:

{¶ 11} "20. Book 60 at Page 266, Erie County, Ohio Official Records, Article IV titled Environment and Building Control, pages 9 through 12, state [sic] that any construction has to be approved by the Environment Committee, that within two years of the initial purchase, a home must be commenced, and if a home is not commenced, the

Harbour Lagoons Association can repurchase the lot thereby the lot is conveyed free and clear of all liens and encumbrances except those to the initial purchaser.

{¶ 12} "21. The initial purchase was June 29, 2001.

{¶ 13} "22. As of today's date, it has been over four years after the initial purchase, and no home has been built on Lot 2.

{¶ 14} "23. Defendant Harbour Lagoons Association charges a $2,000.00 quarterly penalty if new lot buyers do not break ground six months from the date of transfer and have been charging this penalty to Lot 2.

{¶ 15} "24. The Harbour Lagoons Association bylaws provide that the land conveyed should be free and clear of all liens and encumbrances except those to the initial purchaser.

{¶ 16} "25. Defendants have violated the Harbour Lagoon Association Bylaws by adding an employment contract to the Frederick E. & Stephanie Pizzedaz deed."

{¶ 17} In its answer, the Association admitted that "it is empowered to charge a quarterly penalty against buyers who fail to break ground within six months from the date of transfer" but denied that appellant had been charged that penalty. The Association further raised the defense that appellant had failed to state a claim upon which relief could be granted. Appellant responded by filing a motion for summary judgment in which she asserted that as of October 11, 2007, she had been charged the $2,000 penalty for failing to break ground on Lot 2 within the required time period. It was at this point

that appellant first alleged that the Association was not authorized to charge lot owners for failing to break ground.

{¶ 18} The Association responded by filing a motion for summary judgment and response to appellant's summary judgment motion. The Association, however, asserted that appellant's complaint failed to state a claim against the Association or request any relief from the Association.

{¶ 19} On August 27, 2009, the lower court issued an opinion and judgment entry granting the Association's motion for summary judgment and dismissing appellant's complaint as against the Association. Specifically, the court determined that appellant's complaint failed to state a claim against the Association upon which relief could be granted and failed to demand a judgment against the Association or state what relief she sought against the Association. It is from this judgment that appellant now appeals.

{¶ 20} We find appellant's first assignment of error to be dispositive of this appeal. Therein, appellant asserts that the lower court erred in granting the Association summary judgment and dismissing her complaint because the Association's summary judgment motion was based on incomplete evidence that was not certified or authenticated. The Association counters that technical errors in the exhibits attached to its summary judgment motion are irrelevant because the lower court evaluated the complaint itself and found it insufficient.

{¶ 21} Although the Association filed a motion for summary judgment, it argued that the complaint failed to state a claim upon which relief could be granted. Such

arguments are typically raised in a motion to dismiss filed pursuant to Civ.R. 12(B)(6). Nevertheless, "[s]ua sponte dismissal of a complaint for failure to state a claim upon which relief can be granted is appropriate if the complaint is frivolous or the claimant obviously cannot prevail on the facts alleged in the complaint." *State ex rel. Kreps v. Christiansen* (2000), 88 Ohio St.3d 313, 316, citing *State ex rel. Bruggeman v. Ingraham* (1999), 87 Ohio St.3d 230, 231. We review the granting of a motion to dismiss for failure to state a claim upon which relief can be granted de novo. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, ¶ 5. "In order to dismiss a complaint for failure to state a claim upon which relief can be granted, it must appear beyond doubt that [the plaintiff] can prove no set of facts warranting relief, after all factual allegations of the complaint are presumed true and all reasonable inferences are made in [the plaintiff's] favor." *State ex rel. Findlay Publishing Co. v. Schroeder* (1996), 76 Ohio St.3d 580, 581.

{¶ 22} In analyzing a complaint, "we note that 'with the adoption of the Civil Rules, Ohio has progressed from "fact pleading" to "notice pleading."' *Hensley v. Toledo Area Regional Transit Auth.* (1997), 121 OhioApp.3d 603, 615, * * * citing *Salamon v. Taft Broadcasting Co.* (1984), 16 Ohio App.3d 336, 338 * * *. Civ.R. 8(A) sets forth the requirements for pleading a claim for relief and provides in pertinent part: 'A pleading that sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the claim showing that the party is entitled to relief, and (2) a demand for judgment for the relief to which the party claims to be entitled.' A complaint therefore 'must contain either direct allegations

on every material point necessary to sustain a recovery on any legal theory, even though it may not be the theory suggested or intended by the pleader, or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial.' *Fancher v. Fancher* (1982), 8 Ohio App.3d 79, 83, * * * quoting 5 Wright & Miller, Federal Practice & Procedure: Civil (1969), at 120-123, Section 1216." *Gammon v. Hinkle*, 6th Dist. No. L-03-1210, 2004-Ohio-473, ¶ 9.

{¶ 23} Appellant's complaint only mentions the Association in the four paragraphs quoted above. In no section of the complaint does appellant make a claim that the Association violated any law, harmed appellant in any way, or did anything wrong. Specifically, she only alleges that the Association charges the $2,000 fee. She does not allege that there is anything wrong with charging that fee. Similarly, in no section of the complaint does appellant demand that she is entitled to any relief from the Association. All of her claims are directed toward Paul and Debra Prete and Prete Builders. Assuming that all of the factual allegations of the complaint are true, and making all reasonable inferences in favor of appellant, it appears to us beyond doubt that appellant can prove no set of facts warranting relief with regard to the Association. Indeed, before both the trial court and this court, when appellant's attention was directed to deficiencies in her complaint with regard to the Association, she simply argued the deficiencies in the Association's evidence. In determining whether a complaint states a claim, evidence is irrelevant.

{¶ 24} Accordingly, the trial court did not err in granting the Association's motion for summary judgment and dismissing the complaint. The first assignment of error is not well-taken. Given our disposition of the first assignment of error, the second assignment of error is further not well-taken.

{¶ 25} On consideration whereof, the court finds that substantial justice has been done the party complaining and the judgment of the Erie County Court of Common Pleas is affirmed. Appellant is 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.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE