

[Cite as *N. Fairfield Baptist Church v. G129, L.L.C.*, 2011-Ohio-3016.]

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

NORTH FAIRFIELD BAPTIST CHURCH, :
 :
 Plaintiff-Appellee, : CASE NO. CA2010-11-298
 :
 - vs - : OPINION
 : 6/20/2011
 :
 G129, LLC, et al., :
 :
 Defendants-Appellants. :

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV 2008-12-5379

Clayton G. Napier, 29 North D Street, Hamilton, Ohio 45013, for plaintiff-appellee

Jeff J. Cornwell, 7182 Liberty Centre Drive, Suite N, West Chester, Ohio 45069, for defendant-appellant

U.S. National Bank Association, 425 Walnut Street, Cincinnati, Ohio 45202, defendant

POWELL, P.J.

{¶1} Defendant-appellant, G129, LLC, appeals a decision of the Butler County Court of Common Pleas denying its motion for a restraining order against plaintiff-appellee, North Fairfield Baptist Church.

{¶2} The facts of this case were outlined in *N. Fairfield Baptist Church v. G129, L.L.C.*, Butler App. No. CA2009-11-281, 2010-Ohio-2543, and are restated here along with the subsequent history.

{¶3} This case involves a dispute regarding the installation of two sanitary sewer lines. G129 and North Fairfield own real property on Gilmore Road in Fairfield Township. The record indicates that in January 2007, after negotiations between the parties for a private sewer line easement were unsuccessful, North Fairfield began constructing a sewer line within the public road improvement easement granted to Butler County on G129's property (the "county easement").

First Sewer Line

{¶4} According to G129, it was unaware that North Fairfield was installing a sewer line. Once construction was complete in 2008, questions arose as to whether the line had been installed outside of the county easement, thereby encroaching on G129's property. North Fairfield claimed that G129 had installed sewer plugs in the line, resulting in the loss of sewer service to the church. On December 16, 2008, North Fairfield filed a complaint for injunctive relief against G129, requesting permission to enter G129's property to determine whether an encroachment existed. North Fairfield also sought damages as a result of G129's alleged attempts to block North Fairfield's use of the line.

{¶5} A hearing on North Fairfield's injunction request was held on January 22, 2009. North Fairfield presented evidence that approximately four inches of the eight-inch line were encroaching on G129's property. North Fairfield indicated that it was amenable to removing the line at its cost in order to remedy the issue. The

record indicates that the trial court did not rule on North Fairfield's injunction request at the hearing. The matter was continued in progress to March 19, 2009.

{¶16} In the interim, G129 filed an answer and counterclaim, as well as its own request for a preliminary injunction. In its January 20, 2009 counterclaim, G129 alleged four counts of trespass, wrongful appropriation/taking of private property, unjust enrichment, and conversion. G129 also sought injunctive relief, requesting the court to prohibit North Fairfield from continuing to trespass on its property, and require the church to remove the sewer line at its cost. G129 alleged that the encroachment had diminished the value of its property, and sought damages in the amount of \$250,000.

{¶17} G129 filed a motion for a preliminary injunction on March 3, 2009, raising similar arguments to those alleged in its counterclaim for injunctive relief. On March 11, 2009, based upon the agreement of the parties, the trial court entered an order granting G129's request for a preliminary injunction. The order enjoined North Fairfield from "entering, either above or below ground, inside or outside of the road improvement easement, upon the land of G129 or in any other manner disturbing, disrupting, and/or tampering with or using the sewer line located on G129's property." The matter was continued for a further hearing on March 19, 2009.

{¶18} At the subsequent hearing, G129 withdrew its request that North Fairfield remove the sewer line. However, the trial court continued the March 11 preliminary injunction order after finding that North Fairfield had trespassed on G129's property. The court indicated at the hearing that the order did not prohibit North Fairfield from constructing a second sewer line entirely within the county easement. The court stated: "There is nothing about this [c]ourt's order that would

forbid the church, for example, of proceeding with a lateral construction if that's what they chose to do."

Second Sewer Line

{¶9} Based upon the court's March 19, 2009 ruling, North Fairfield began construction on a second sewer line within the county easement. After construction commenced, North Fairfield claimed that G129 was interfering with the installation of the new sewer, and on June 24, 2009, filed a motion for a preliminary injunction requesting that the court enjoin G129 from interfering with North Fairfield's efforts to install the line.

{¶10} On September 30, 2009, G129 filed a motion seeking a temporary restraining order against North Fairfield. G129 argued that the Butler County Board of Commissioners failed to journalize an entry pursuant to R.C. 5547.05 demonstrating that the county's easement rights had been subordinated to North Fairfield. G129 also argued that the county failed to place the sewer line installation out for competitive bidding pursuant to the requirements of R.C. 307.10.

{¶11} North Fairfield filed a memorandum in opposition to G129's request for a temporary restraining order, claiming that it was entitled to install a sewer line within the county easement pursuant to the court's decision at the March 19 hearing. North Fairfield also argued that the county was the real party in interest with regard to G129's claim that a violation of R.C. 5547.05 occurred, and that the statute was inapplicable because it pertained only to conveyances of county-owned land.

{¶12} The trial court held a hearing on G129's restraining order request on October 27, 2009. At the hearing, North Fairfield stated that it had been granted a permit to install the sewer from the county department of environmental services.

Based on North Fairfield's representation that a permit had been granted, the trial court denied G129's motion for a restraining order, and rejected G129's argument that North Fairfield lacked authority to install the line. The court noted that if G129 wanted to challenge the procedure used by the county to issue the permit, or otherwise claim that it was improperly granted, G129 would need to file an action against the county.

{¶13} At the conclusion of the hearing, the court amended the March 11, 2009 order to permit North Fairfield to enter onto the county easement for the purpose of installing a sewer line, provided that the installation "is approved by Butler County and other appropriate governmental entities, which determination shall be made by the appropriate governmental agency."

{¶14} This court dismissed G129's subsequent appeal, finding that the matter lacked a final appealable order. The case then proceeded to trial on the issue of damages resulting from the installation of the first sewer. Following a jury verdict in G129's favor, a final appealable order was entered.

{¶15} G129 now appeals the denial of the motion for a restraining order, advancing the following assignment of error for review:

{¶16} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT/APPELLANT IN DENYING ITS MOTION FOR RESTRAINING ORDER AND AFFIRMATIVELY RULING THAT PLAINTIFF/APPELLEE MAY INSTALL A PRIVATE SEWER LINE ON APPELLANT'S PRIVATE PROPERTY."

{¶17} In G129's sole assignment of error, it argues that the trial court erred by denying its motion for a restraining order to enjoin North Fairfield from installing the second sewer line. Within this assignment of error, G129 raises two issues for our

review. First, G129 argues that, "[i]n a trespass action, the trial court may not shift the burden to the landowner to negate authority or privilege, rather it must require the alleged trespasser to prove the claimed authority or privilege is valid." Second, G129 argues that, "the trial court erred by granting North Fairfield permission to install a sewer line inside the road improvement easement when the records [sic] clearly establishes that Butler County did not provide North Fairfield permission to install the sewer line on G129's property."

{¶18} The grant or denial of a motion for injunctive relief is solely within the trial court's discretion, and a reviewing court should not disturb the judgment of the trial court absent a showing of a clear abuse of discretion. *Back v. Faith Properties, LLC*, Butler App. No. CA2001-12-285, 2002-Ohio-6107, ¶9; *Garono v. State* (1988), 37 Ohio St.3d 171, 173. Abuse of discretion is typically defined as an attitude that is unreasonable, arbitrary, or unconscionable. *AAA Enterprises, Inc. v. River Place Comm. Urban Redevelopment Corp.* (1990), 50 Ohio St.3d 157, 161.

{¶19} G129 claims that the installation of the second sewer line represents a trespass. In turn, North Fairfield asserts that it was authorized to do so, subject to approval from Butler County and other appropriate governmental entities, in accordance with an order of the trial court. The assertion of authority or privilege is an affirmative defense. *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 124, 1997-Ohio-401. An affirmative defense must be proven by a preponderance of the evidence. *Sur-Gro Plant Food Co. v. Morgan* (1985), 29 Ohio App.3d 124, 129. A preponderance of the evidence is "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it." *In re M.D.*, Butler App. No. CA2006-09-223, 2007-Ohio-4646, ¶26.

{¶20} In the present case, North Fairfield stated that it received a building permit from the county to go ahead with the construction. As the trial court noted at the time, such a permit is a matter of public record. In addition, North Fairfield read into the record the following portion of the permit and stated that it was available to be entered into evidence:

{¶21} "THE COURT: Mr. Napier, has a building permit been issued?

{¶22} "MR. NAPIER: Yes.

{¶23} "THE COURT: Okay. So what you're saying is that – and the building permit permits what?

{¶24} "MR. NAPIER: Your Honor, we have the permits and we can offer them into evidence. Permit to install slash approval application. Enclosed please find four sets of construction plans and new development. If there is any further information, please do not hesitate to contact -- * * *."

{¶25} Accordingly, the record shows that the trial court was presented with competent, credible evidence with which to find that a permit existed by a preponderance of the evidence. Furthermore, the burden of proof was not shifted to G129 when the trial court simply weighed the evidence presented by both parties and arrived at a conclusion as to which evidence was more convincing.

{¶26} Therefore, having found that the trial court did not improperly shift the burden of proof, and did not err in finding by a preponderance of the evidence that Butler County approved the installation, we find that the trial court did not abuse its discretion in denying the motion for a restraining order.

{¶27} Judgment affirmed.

RINGLAND and HENDRICKSON, JJ., concur.