IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

THE CHAFFEE COURTS II CONDOMINIUM ASSOCIATION, INC. ("CHAFFEE II"), *et al.*	)	**CASE NO: CV 09 711150**
	)	**JUDGE JOHN P. O'DONNELL**
Plaintiffs,	)	
vs	)	
THE COURTS OF CHAFFEE CONDOMINIUM ASSOCIATION, INC. ("CHAFFEE I"), *et al*.	)	**JOURNAL ENTRY**
Defendants.	)	

John P. O'Donnell, J.:

STATEMENT OF THE CASE

Plaintiffs The Chaffee Courts II Condominium Association, Inc., and its individual members filed this lawsuit on November 25, 2009. Pertinent to the pending motion, the complaint includes a cause of action for declaratory judgment of the rights and obligations of the owner and users of an easement.

The defendants are two neighboring condominium associations: The Courts of Chaffee Condominium Association, Inc., and The Brecksville West Condominium Owners Association, Inc.

The plaintiffs filed a motion for summary declaratory judgment on March 19, 2010. Each defendant then filed a brief setting forth its position and the plaintiffs replied on May 17. This entry follows.

STATEMENT OF THE FACTS

The three condominium associations occupy land in Brecksville just south of the intersection of Highland and Royalton Roads. Plaintiff Chaffee II has seven units, defendant Chaffee I has 31 units, and defendant Brecksville West has 66 units. Access to the development that includes the three associations may be gained only by traveling west on Chaffee Court from Elm Street. Where Chaffee Court ends, a driveway/pedestrian easement owned by Chaffee II begins. The easement is shaped like a backward 7, first going west and then turning sharply to the southeast. None of the Brecksville West units and a majority, if not all, of the Chaffee I units may be reached without using the easement.

Chaffee II is the fee owner of the land subject to the easement. However, the easement was granted by predecessors of Chaffee II.

Chaffee I is the first grantee of the easement. The original deed of easement is not of record in this case, but no party disputes the accuracy of its description as Attachment 1-1 to Amendment No. 1 to the declaration of condominium ownership for the Courts of Chaffee Condominium, filed January 14, 1988, at Volume 88-0158, Pages 10-12. That easement to Chaffee I has no terms describing either the grantor or grantee's duty to maintain and repair the easement.

Brecksville West is the second grantee of the easement. That grant was made by a fiduciary deed to Brecksville West from the Estate of Howard Ferguson dated March 30, 1990, and filed with the Cuyahoga County Recorder on April 3, 1990, at Volume 90-1832, Pages 22-28. That deed is in evidence and it provides, in pertinent part:

FIDUCIARY DEED

. . . Dennis G. Fedor, Executor of the Estate of Howard E. Ferguson, . . ., grants, . . . to:

BRECKSVILLE WEST, INC.,

. . . the following real property:

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Cuyahoga County Auditor's Permanent Parcel No. 601-33-34 and Part of former 601-33-37.

[redacted]

TOGETHER with a non-exclusive easement in, on, over and under the following described premises for vehicular and pedestrian traffic and for utility services:

Situated in the City of Brecksville, County of Cuyahoga and State of Ohio and known as being part of Original Brecksville Township Lot No. 31, and being further bounded and described as follows:

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Bearings are to an assumed meridian and are used to described angles only.

SUBJECT TO THE FOLLOWING:
(EASEMENT)

RESERVING unto Ann McCabe, Trustee, her successors and assigns, a non-exclusive easement in, on, over and under the following described premises for vehicular and pedestrian traffic and for utility services.

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Bearings are to an assumed meridian and are used to described angles only.

Parts of the two foregoing areas (EASEMENTS) are presently subject to easements for pedestrian and vehicular traffic and utility services granted to The Courts of Chaffee Condominium in accordance with provisions contained in Amendments to said Condominium recorded in Volume 88-0158 at Page 68 and Volume 88-4492 at Page 12 of Cuyahoga County, Ohio, Records.

> The fee owners of each easement area (EASEMENTS 1 and 2) described above shall be responsible to maintain in good and usable condition that part of the easement area located on its fee. Maintenance means paving and keeping the roadway area free of chuckholes and snow. It includes keeping the berms clean, neat and orderly. . .
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> ***
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> AND FURTHER RESERVING unto Grantor, her successors and assigns, an easement to landscape, at the sole cost and expense of Grantor, her successors and assigns, the area between the first easement reservation above (EASEMENT 2) (for vehicular and pedestrian traffic and utilities) and the land to the east thereof constituting common area of the Courts of Chaffee Condominium.
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> ***

Plaintiff Chaffee II is the fee owner of the area of the first easement described in the deed. That easement covers most of Page 24 and the top of Page 25 of the recorded deed. The easement description has what appears to be a heading that was obscured by ink. The heading is illegible. The heading of the second easement described in the deed – at most of Pages 25 and 26 and currently owned in fee by Brecksville West – reads

(EASEMENT)

and it is difficult to tell what was written where the ink smudge is. Moreover, after those two easements, but before listing two underground sewer easements and one landscape easement (none of which are at issue in this case), the deed reads, at the bottom of Page 26:

> Parts of the two foregoing areas (EASEMENTS) are presently . . .

Because of the ink smudges and resulting illegibility, a reader cannot be certain that the headings are supposed to read "EASEMENT 1" AND "EASEMENT 2," respectively. However, there is no doubt that they are the first two easements described in the deed, so that the parenthetical reference at the top of Page 27 to "EASEMENTS 1 and 2" clearly refers to the

same two easements, and not to any of the later easements pertaining to underground sewers and landscaping.

LAW AND ANALYSIS

Ohio Revised Code section 2721.03 allows "any person interested under a deed" to bring a declaratory judgment action for the purpose of determining "any question of construction or validity arising under the instrument." A grant of an easement is a deed and is a proper subject for a declaratory judgment action.[1] An action for declaratory judgment which has as its principal purpose the interpretation of a written instrument, such as a deed, and a declaration of the rights of the parties, is equitable in nature.[2] Equitable relief should not be granted unless a clear right to such relief has been demonstrated.[3]

The construction of a deed is a matter of law for the courts.[4] The cardinal rule in the construction of deeds is that the parties' intention at the time of the execution controls.[5] Contracts are to be interpreted to carry out the intent of the parties as evidenced by the actual language of the contract.[6] When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties.[7] As a matter of law, a contract is unambiguous if it can be given a definite legal meaning.[8]

An easement is defined as an interest in the land of another which entitles the owner of the easement to a limited use of the land in which the interest exists.[9] By contrast, a fee simple

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[1] An easement may be created by any one of four methods: grant, implication, prescription, or estoppel. *Gateway Park, L.L.C. v. Ferrous Realty Ltd.*, 2008-Ohio-6161, Cuyahoga Co. App. No. 91082, at ¶29.
[2] *Skelton v. Skelton* (1955), 163 Ohio St. 409.
[3] *Mock v. Boyle* (1949), 53 O.L.Abs. 567.
[4] *Ball v. Crabtree* (Dec. 10, 1998), 4th Dist. App. No. 97 CA 2557, 1998 WL 895911, unreported.
[5] *Sword v. Sword* (1993), 86 Ohio App.3d 161.
[6] *Skivolocki v. East Ohio Gas Co.* (1974), 38 Ohio St.2d 244, 248.
[7] *Blake v. Thornton*, 182 Ohio App. 3d 716, 2009-Ohio-2487, at ¶15.
[8] *Id.*
[9] *Brandt v. Daugstrup* (Nov. 18, 1999), Cuyahoga Co. App. No. 75065, 1999 WL 1044499, unreported.

estate is defined as absolute ownership of the land.[10] Because the owner of land subject to an easement must allow the use by others of the easement area, even though ownership does not transfer, a fee simple estate with an easement is known as the servient estate; the land benefited by the easement is called the dominant estate. Here, Chaffee II, the fee owner, is the servient estate and the defendants' parcels constitute the dominant estate.

The parties to an easement contract may enter into any agreement for the repair and upkeep of the easement area. In the absence of an explicit agreement about the parties' maintenance duties, the dominant estate is responsible for repairing and maintaining the easement.[11]

In this case, the duty to maintain the easement from Chaffee II to Brecksville West is in writing. The deed provides that "the fee owners of each easement area (Easements 1 and 2) described above shall be responsible to maintain" the portion of the easement located on its fee.[12]

The fiduciary deed describes five separate easement areas. Plaintiff Chaffee II refers in its summary judgment motion to the first of these as the "Chaffee Court Easement."[13] The plaintiffs refer to the other easements as "Brecksville West Easements."[14] Chaffee II is the fee owner of the "Chaffee Court Easement" and Brecksville West is the fee owner of what the plaintiff calls "Brecksville West Easement No. 1." That easement abuts the "Chaffee Court Easement" at its southern terminus and, in practice, is a continuation of the road southward into the development.

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[10] See, *e.g., Muirfield Assn., Inc. v. Franklin Cty. Bd. of Revision* (1995), 73 Ohio St. 3d 710, 711.
[11] *National Exchange Bank v. Cunningham* (1889), 46 Ohio St. 575, 589.
[12] Fiduciary deed, Page 27.
[13] Plaintiffs' motion for summary judgment, Page 9, Line 2. This is the easement referred to earlier in this entry as a backwards 7.
[14] *Id.*, Page 10, Lines 7-8.

The plaintiff argues that only the four easements appurtenant to the fee simple estate of Brecksville West are covered by the express duty to maintain and that the easement on its fee simple estate – the "Chaffee Court Easement" – is silent on the duty to maintain so that the common law rule placing the duty to maintain on the dominant estate applies. In support, the plaintiff claims that the easement deed for the "Chaffee Court Easement" has "no express language or provision regarding any kind of repair and maintenance duty."[15]

The plaintiff's argument is not supported by the plain language of the contract. The contract sets forth, at Pages 24 through 26, the first two easements: the "Chaffee Court Easement" and the "Brecksville West Easement No. 1." Then, at the top of Page 27, and before listing any other easements, the deed provides that "the fee owners of each easement area (EASEMENTS 1 and 2), *described above* shall be responsible" for maintenance.[16] This can only refer to the "Chaffee Court Easement" and the "Brecksville West Easement No. 1" since they are the only two easements "described above" that paragraph on Page 27. This interpretation is supported by the plural reference to "fee owners" since the servient estates are owned by different entities. If each servient estate were owned by Brecksville West, the singular "fee owner" would have been used.

The plaintiff cites the paragraph headings, and the parenthetical reference on Page 27 to "EASEMENTS 1 and 2," to argue that the maintenance provision really only applies to the second and third easements in the deed. That evidence is unpersuasive. First, as noted already, that conclusion ignores the unambiguous reference to the easement areas "described above," and that language is not rendered ambiguous – or, from the plaintiff's perspective, meaningless – by the description in parentheses of the easements as "EASEMENTS 1 and 2." Second, the

[15] *Id.*, Page 9, Lines 16-17.
[16] Emphasis in italics added.

paragraph headings are mostly illegible. In particular, the "Chaffee Court Easement" at Page 24 contains an obliterated paragraph heading, and a reference at the bottom of Page 26 to the "two foregoing easements" includes a partially obliterated reference in parentheses to "EASEMENTS ▓ ." These notations, or lack thereof, are simply insufficient to either support an interpretation of the contract at variance with its express terms or to create an ambiguity about the parties' intent. Finally, even if an ambiguity exists, the intent that each fee owner would maintain its easement is supported by the fact that the two easements comprise different sections of the same road and it makes sense that each owner would be responsible for its portion.

The court therefore holds that plaintiff Chaffee II is obligated to "maintain in good and usable condition" the entirety of the "Chaffee Court Easement" at Pages 24 to 25 (top of page) of the March 30, 1990, fiduciary deed to Brecksville West, and that defendant Brecksville West has no duty to maintain that easement but continues to have the right to use the easement.

The same easement was conveyed two years earlier to defendant Chaffee I without expressly providing for the duty to maintain it. Ordinarily, the common law rule that where a deed is silent on the duty to maintain it falls to the dominant estate would apply and Chaffee I, the holder of the dominant estate, would have the duty to repair. However, Chaffee II's predecessor in the 1990 conveyance to Brecksville West reserved for the "fee owner" the duty to maintain the easement, suggesting that the duty with the fee owner after the 1988 conveyance to Chaffee I. That uncertain state of the evidence leaves the court unable to enter summary declaratory judgment on the duty to maintain between Chaffee II and Chaffee I.

This leaves remaining for decision the question of whether Chaffee I has a duty to maintain the easement and, if so, the apportionment of that duty between Chaffee II and Chaffee I. (Two obvious possibilities include 50/50 between the two estates or *pro rata* based on the

proportion of the number of units on each estate to the total number of units in both estates.) A decision on the first issue is a matter for a jury after hearing all evidence on the intent of the parties to the 1988 conveyance. If a jury concludes that the intent of the 1988 conveyance was that the grantee (Chaffee I) would have the duty to maintain then the second question – the apportionment of the duty – is for the court as a matter of equity and cannot be decided here.

CONCLUSION

Consistent with the reasoning given in this entry, the court hereby enters summary declaratory judgment on Count V of the complaint in favor of defendant Brecksville West and against the plaintiffs. All other non-dismissed causes of action remain pending. Although this decision effectively moots Counts I and II against Brecksville West, that defendant has not moved for summary judgment on those counts and the court is unwilling to enter a judgment that has not been sought, hence those counts remain pending for adjudication.

IT IS SO ORDERED:

Date: _____ _____

Judge John P. O'Donnell

SERVICE

A copy of this Journal Entry was sent by e- mail, this _____ day of June, 2010, to the following:

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and by regular U.S. mail[17] to the following:

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_____
Judge John P. O'Donnell

[17] Counsel is directed to Local Rule 5.0(G), which requires that "all attorneys entering an appearance within the case thereafter shall also be required to provide the clerk with a business e-mail address."