

FILE

BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

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Carl N. Lukehart,)
Complainant,)
)
v.)
) Case No. 09-916-EL-CSS
Ohio Power Company,)
)
Respondent.)
)

ANSWER AND MOTION TO DISMISS OF
OHIO POWER COMPANY

Ohio Power Company ("Ohio Power" or "Respondent") responds to the Complaint filed in this proceeding by Mr. Carl Lukehart ("Mr. Lukehart" or "Complainant") through its Answer and Motion to Dismiss.

INTRODUCTION

The issues in this Complaint have already been determined in Common Pleas Court. The Complaint in this matter follows the proceedings in the Allen County Court of Common Pleas, Case Number CV 2008-1443. Ohio Power filed a request for a declaratory judgment that it has a valid easement, a request for a permanent injunction against Mr. Lukehart's interference with the easement, and a claim related to Mr. Lukehart's tortuous interference with the easement. The Common Pleas Court granted a summary judgment in favor of Ohio Power on the first two points. The Court rejected the claims made by Mr. Lukehart in the Common Pleas action that he

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now raised in this Complaint. The Common Pleas' Court's findings may be instructive for the Commission (the August 26, 2009 Judgment Entry is attached¹). The Judge found:

- 1) Plaintiff Ohio Power Company has a valid easement with the right to trim, cut and remove trees, branches and other obstructions within 75 feet on both sides of the centerline.
- 2) An Ohio EPA permit is not required for the removal of trees and shrubs on defendant's property;
- 3) Defendant is permanently enjoined from interfering with plaintiff's exercise of its rights under the easement;
- 4) Defendant is permanently enjoined from threatening defendant or defendant's employees or contractors who are exercising plaintiff's easement rights;
- 5) Defendant shall pay all the court costs of this action.

Mr. Lukehart now brings this claim to the Commission challenging the ability of Ohio Power to cut trees in its valid easement, a matter already determined. This Complaint is nothing more than a collateral attack on the Allen County Common Pleas decision. The Commission need not entertain this Complaint and should look to the record in the Allen County proceeding to see the matter is already resolved.

ANSWER TO ALLEGATIONS

1. Ohio Power admits that it has an easement on Mr. Lukehart's property as verified by the Allen County Common Pleas Court.
2. Ohio Power asserts that the documents provided by Mr. Lukehart as exhibits that were provided to him by third parties speak for themselves and appear incomplete without a signature lines and do not require an admission or denial.

¹ In the Court's findings, the Defendant is Mr. Lukehart and the Plaintiff is Ohio Power Company.

3. Ohio Power admits that Ohio Administrative Code 3745-1-5(O) speaks for itself.
4. Ohio Power is without sufficient knowledge or information to form a belief as to the truth of the allegations based on the pictures provided by Mr. Lukehart.
5. Ohio Power is without sufficient knowledge or information to form a belief as to the truth of the allegation that this is a “forested wetland” in the manner represented by Mr. Lukehart.
6. Ohio Power admits that it will maintain its easement by cutting trees in the area that could interfere with the transmission facilities.
7. Ohio Power admits that these same parties were involved in Case #CV 2008-1443 in the Allen County Court of Common Pleas.
8. Ohio Power admits that the case before the Allen County Court of Common Pleas determined the “deed of easement.”
9. Ohio Power admits that the Supreme Court of Ohio did issue an opinion in *Corrigan v. Clev. Elec. Illum Co.*, 122 Ohio St.3d 265, 2009-Ohio-2524. Ohio Power will allow the case to speak for itself on its application to this case.
10. Ohio Power denies that it failed to follow proper procedures in its efforts to maintain its facilities as asserted in Mr. Lukehart’s Complaint.
11. Ohio Power is without sufficient knowledge or information to form a belief as to the validity or authenticity of the pictures provided by Mr. Lukehart and the arguments based on those photographs.
12. Ohio Power denies that it wants to turn a wetland into a wasteland.
13. Ohio Power denies that its facility maintenance efforts are unjust and unreasonable.

14. Ohio Power denies that it failed to follow its rules and regulations.
15. Ohio Power admits that utility Forrester Kristall Wadsworth contacted Mr. Lukehart in April of 2008.
16. Ohio Power admits that it has performed vegetation management on its easement.
17. Ohio Power denies that it failed to follow its policies. Ohio Power offered to do further cleanup on the property, an offer that was declined by Mr. Lukehart.
18. Ohio Power admits that the Understanding Line Clearing Efforts includes a discussion about the most economic and practical manner in disposing of branches and limbs.
19. Ohio Power denies that it failed to follow its rules.
20. Ohio Power denies that it is in any manner discriminating against Mr. Lukehart.
21. Ohio Power denies that it cut trees within the alleged wetland as described by Mr. Lukehart.
22. Ohio Power is without sufficient knowledge or information to form a belief as to the validity or authenticity of the pictures provided by Mr. Lukehart concerning the property of Robert Wireman as discussed in the Complaint, and the arguments based on those photographs.
23. Ohio Power is without sufficient knowledge or information to form a belief as to the fact that its actions caused a fire as indicated by Mr. Lukehart in the Complaint.
24. Ohio Power admits that Exhibits H and I speak for themselves.
25. Ohio Power admits that Fire Chief Tim Mosher sent a letter to Ms. Kristalle Wadsworth. The letter was attached to the Complaint as Exhibit J.

26. Ohio Power admits that Mr. Lukehart spoke at the public hearing and spoke with an attorney from Ohio Power. The transcripts of the public hearing should contain provide any statements made by Mr. Lukehart, to the extent Mr. Lukehart spoke or presented any documentation at the October 20, 2008 public hearing.
27. Ohio Power denies that the letter from Mr. Mosher is incriminating evidence and that Mr. Lukehart is being discriminated against for any reason.
28. Ohio Power is without sufficient knowledge or information to form a belief on the authenticity of the letter from Tim Mosher to Mr. Lukehart. To the extent the letter is valid it does express that the conditions complained of by Mr. Lukehart exist all over the township in the dry season.
29. Ohio Power denies that the relief requested in the Complaint is warranted or permissible.
30. Ohio Power denies any allegations not specifically named in this Answer.

AFFIRMATIVE DEFENSES

1. Ohio Power asserts as an affirmative defense that under R.C. 4905.26 and O.A.C. 4901:1-9-01(B)(3), Complainant has failed to set forth reasonable grounds for a Complaint.
2. Ohio Power asserts as an affirmative defense that at all time relevant to Complainant's claims, Ohio Power has provided reasonable and adequate service to the Complainant according to all applicable provisions of Title 49 of the Ohio Revised Code and regulations promulgated thereunder, and in accordance with all of Ohio Power's filed tariffs.

3. Ohio Power asserts as an affirmative defense that Complainant has not stated relief which can be granted by this Commission.
4. Ohio Power asserts as an affirmative defense that it is required by regulation to maintain its easements around distribution and transmission lines.
5. Ohio Power asserts as an affirmative defense that this action is a collateral attack on the Honorable Judge Jeffrey Reed's decision in Allen County Court of Common Pleas decision in Case Number CV 2008 1443.
6. Ohio Power reserves the right to raise additional affirmative defenses or to withdraw any of the foregoing affirmative defenses as may become necessary during the investigation and discovery of this matter.

MOTION TO DISMISS

1. Ohio Power breached no legal duty owed to Complainant, and Complainant failed to state reasonable grounds upon which relief may be granted.
2. Complainants have not identified any Commission rule or regulation that they believe Ohio Power has violated.
3. Ohio Power has a valid easement as ordered by the Allen County Court of Common Pleas. Mr. Lukehart may not agree that Ohio Power must maintain vegetation in the easement, but that does not equate to grounds for a statutory complaint before the Commission. The duty to maintain the vegetation is valid and the easement providing Ohio Power the right to maintain the management is valid. Mr. Lukehart's Complaint amounts to a collateral attack on the Allen County Court of Common Pleas Judgment.

Again the Allen County Court of Common Pleas already dealt with the claims asserted by Mr. Lukehart and found in favor of Ohio Power. Specifically, the Court found:

- Plaintiff Ohio Power Company has a valid easement with the right to trim, cut and remove trees, branches and other obstructions within 75 feet on both sides of the centerline.
- An Ohio EPA permit is not required for the removal of trees and shrubs on defendant's property;
- Defendant is permanently enjoined from interfering with plaintiff's exercise of its rights under the easement;
- Defendant is permanently enjoined from threatening defendant or defendant's employees or contractors who are exercising plaintiff's easement rights;
- Defendant shall pay all the court costs of this action.

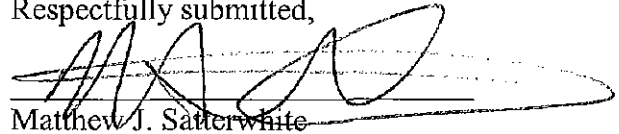
The case should be dismissed as a further attempt by Mr. Lukehart to interfere with Ohio Power's exercise of its rights under the easement in violation of the Judgment by the Allen County Court of Common Pleas.

WHEREFORE, Respondent, Ohio Power Company, respectfully requests that the instant action be dismissed.

CONCLUSION

Having fully answered, Ohio Power respectfully moves this Commission to dismiss the Complaint of Mr. Lukehart for failure to set forth reasonable grounds for the Complaint and to deny Complainant's request for relief.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Matthew J. Satterwhite', is written over a horizontal line.

Matthew J. Satterwhite

Ohio Power Company

1 Riverside Plaza, 29th Floor

Columbus, OH 43215

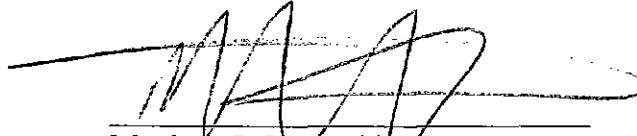
Tel: (614) 716-1915

Email: mjsatterwhite@aep.com

Attorney for Ohio Power Company

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Answer and Motion to Dismiss of Ohio Power Company was served by First-Class United States Mail, postage prepaid, upon Mr. Carl N. Lukehart at the address listed below on this 27th day of October, 2009.


Matthew J. Satterwhite

Carl N. Lukehart
4809 S. Dixie Highway
Cridersville, OH 45806

ATTACHMENT 1

COMMON PLEAS COURT
FILED

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JANICE GALEY BURLEY
CLERK OF COURTS
ALLEN COUNTY, OHIO

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

OHIO POWER COMPANY,

Plaintiff[s]

-v-

CARL LUKEHART,

Defendant[s]

CASE NO. CV2008 1443

**JUDGMENT ENTRY
Civ. R. 56**

* * * * *

This matter comes on for consideration of the motion for summary judgment filed by the plaintiff on August 7, 2009 and the response, entitled "Motion for Leave to file Instanter," filed by the defendant on August 11, 2009. In his responsive "motion," defendant asked the Court to "withdraw a motion to file summary judgment as I dispute the validity..." The Court considers this "motion" to be defendant's response in opposition to the plaintiff's motion for summary judgment.

This action was brought by plaintiff for a declaratory judgment that plaintiff had an easement unto defendant's property to inspect, protect, maintain, repair, renew, operate and remove its facilities and to cut, trim or remove trees, branches and other obstructions the "may endanger the safety or interfere with the [plaintiff's] facilities." (See Count One) Plaintiff also seeks a permanent injunction against defendant to enjoin him from

interfering with or threatening plaintiff's workers. (See Count Two) Plaintiff also made a claim for damaged because of defendant's alleged tortuous interference with their easement. (See Count Three) Defendant filed an answer in which he made a counterclaim that plaintiff needed an EPA permit, that he was threatened and that plaintiff caused damage to his property.

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, 364 N.E.2d 267.

To prevail on a motion for summary judgment, 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, 293-294, 662 N.E.2d 264.

The Ohio Supreme Court has explained the summary judgment burden as follows:

"[T]he movant must be able to point to evidentiary materials of the type listed in Civ.R. 56(C) that a court is to consider in rendering summary judgment. The evidentiary materials listed in Civ. R. 56(C) include 'the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any.' These evidentiary materials must show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. While the

movant is not necessarily obligated to place any of these evidentiary materials in the record, the evidence must be in the record or the motion cannot succeed." *Id.* at 292- 293, 662 N.E.2d 264.

Plaintiff has presented and pointed to evidence that shows that it is identified as the grantee in a deed of easement filed in 1968 and that defendant agrees that plaintiff has easement rights. (See certified copy of deed of easement attached to the motion, the defendant's Answer, ¶¶ 2, 4, defendant's response to Interrogatory No.13, and defendant's response to Request for Admission Nos. 1, 2, 4). Plaintiff has also pointed to evidence that demonstrates its right to trim, cut or remove trees, branches or other obstructions within the easement. (See deed, defendant's Answer, ¶ 4 and defendant's response to Request for Admission No. 3). Plaintiff has pointed to evidence that it does not need to get an EPA permit to trim, cut or remove trees, branches and other obstructions. (See affidavit of Jeff Boyles and attached letter dated 7/31/09). Plaintiff also points to evidence that defendant has interfered with plaintiff's easement rights. (See affidavit of Kristalle Wadsworth) Defendant partially admitted he has interfered in paragraph five of his Answer. Plaintiff has pointed to evidence that shows there is no genuine dispute that defendant has tortuously interfered with plaintiff's easement rights, but plaintiff has not pointed to any evidence that shows it was damaged by the interference.

After the movant satisfies the initial *Dresher* burden, the nonmoving party must then present evidence that some issue of material fact remains for the trial court to resolve. *Id.* at 294, 662 N.E.2d 264. Defendant stated in his responsive "motion" that he disputed the validity of the easement, the

EPA requirements and Wadsworth's affidavit. The parties' briefs, memoranda of law, and the unsworn, undated statements of the parties are not proper Civ.R. 56 evidence. *Hickman v. Ford Motor Co.* (1977), 52 Ohio App.2d 327, 370 N.E.2d 494.

Defendant explains his objections, but does not point to or provide evidentiary material to support his objections. For example, there is no evidence that the width of the easement was increased *after* it was granted. The letter from Seibert is not presented by way of a proper affidavit. When a motion for summary judgment has been supported by proper evidence, the nonmoving party may not rest on the mere allegations of the pleading, but must set forth specific facts, by affidavit or otherwise, demonstrating that there is a genuine triable issue. *Jackson v. Alert Fire & Safety Equip. Inc.* (1991), 58 Ohio St.3d 48, 52. Unsworn and unsigned statements are not materials authorized by Civ.R. 56(C) for consideration on a motion for summary judgment. *Dorsey v. Morris* (1992), 82 Ohio App.3d 176, 611 N.E.2d 509; *Butler v. Young* (Jan. 14, 1999), Cuyahoga App. No. 73549, unreported; *Celinski v. Benke* (Nov. 29, 1996), Ashtabula App. No. 95-A-0030, unreported; *Botello v. Reyes* (Jan. 24, 1997), Sandusky App. No. S-96-003, unreported; *Potter v. Troy* (1992), 78 Ohio App.3d 372, 377, 604 N.E.2d 828; *State ex rel. Boggs v. Springfield Local School Dist. Bd. of Edn.* (1995), 72 Ohio St.3d 94, 97, 647 N.E.2d 788, 792. Defendant states in his responsive "motion" that he disputes the affidavit of Wadsworth, but does not submit, by affidavit or otherwise evidence to create a genuine issue of fact.

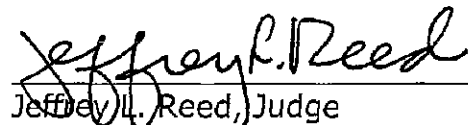
If the nonmoving party does not demonstrate a genuine triable issue, summary judgment shall be entered against that party. Civ.R. 56(E). It is therefore ORDERED, ADJUDGED and DECREED that plaintiff's motion for summary judgment is granted, as to Count One and Two, and it is further ORDERED, ADJUDGED, DECREED and DECLARED that:

- 1) Plaintiff Ohio Power Company has a valid easement with the right to trim, cut and remove trees, branches and other obstructions within 75 feet on both sides of the centerline;
- 2) An Ohio EPA permit is not required for the removal of trees and shrubs on defendant's property;
- 3) Defendant is permanently enjoined from interfering with plaintiff's exercise of its rights under the easement;
- 4) Defendant is permanently enjoined from threatening defendant or defendant's employees or contractors who are exercising plaintiff's easement rights;
- 5) Defendant shall pay all the court costs of this action.

However, it is also ORDERED, ADJUDGED and DECREED that summary judgment is denied with respect to the plaintiff's third count since there is a genuine issue with regards to what, if any, damages plaintiff has sustained.

Pursuant to Civ. R. 54, this is a final judgment as to one or more but fewer than all of the claims or parties, so the Court expressly determines that there is no just reason for delay.

August 26, 2009
The Clerk of this Court shall forward a stamped copy of this Judgment by regular mail to each attorney of record and each party not represented by counsel. The fact of mailing shall be noted on the docket and entered on the


Jeffrey L. Reed, Judge