

**IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO**

<b>THE SHELLY CO.</b>	)	<b>CASE NO. CV 10 739744</b>
	)	
<b>Plaintiff,</b>	)	<b>JUDGE JOHN P. O'DONNELL</b>
	)	
<b>vs.</b>	)	<b><u>JOURNAL ENTRY</u></b>
	)	
<b>KARAS PROPERTIES, INC.</b>	)	
	)	
<b>Defendant.</b>	)	

*John P. O'Donnell, J.:*

**STATEMENT OF THE CASE**

Plaintiff The Shelly Co. filed this lawsuit against its landlord, defendant Karas Properties, Inc., seeking 1) a declaratory judgment of the parties' rights and obligations under a commercial lease and 2) damages. The essence of the lawsuit is that Shelly claims that the lease obligates Karas to pay to remedy an environmental violation on the property: namely, an unlawful culvert that directs the flow of a stream under the land.

By an entry dated September 6, 2011, the court granted summary declaratory judgment in Shelly's favor as follows:

[T]he plaintiff's motion for summary declaratory judgment on count three of its amended complaint and count four of the defendant's counterclaim is granted. The court declares that the lease requires Karas to indemnify Shelly for all fines, costs of cleanup and any other costs incidental to, or a consequence of, the illegal culverts on the leased premises. Those categories of covered damages include any fine assessed against Shelly under the Cleveland Codified Ordinances and the cost and expense, including attorney's fees, incurred by Shelly in defending against the building code violations alleged by the City of Cleveland. The amount of those damages will be determined at a trial. The court also declares that Karas is obligated to indemnify Shelly for any expense required to cure the environmental violations created by the illegal culverts. The appropriate cure, and the amount to effect it, will be determined at trial.

A bench trial on the damages claims began on September 15 and concluded September 22. The parties waived oral closing argument and each filed proposed findings of fact and conclusions of law on October 28. This entry follows.

### **STATEMENT OF FACTS**

Defendant Karas Properties, Inc., owns the 7.5 acres of real estate at 4900 West 150th Street, Cleveland. The property is bounded by West 150th to the east, railroad tracks to the north, and Interstate 480 to the south. The premises are bisected by a stream, a tributary to Big Creek, running generally southwest to northeast across the middle of the property.

The water in the stream traverses the property through two 98” by 62” underground culverts. If these culverts were not there, the property would be divided by the tributary’s natural streambed and the rear, or western, portion of the property would be inaccessible to vehicle traffic. The culverts were installed without a building permit in about 1993 by Karas Properties, Inc.’s predecessor in interest, Karas Brothers Co., Inc. At that time Karas Brothers Co., Inc. rented the western portion of the property to another Karas entity – Karas Trucking Co., Inc. – and the installation of the culverts allowed Karas Trucking to have access to that part of the land.

Shelly’s predecessor in interest, Cuyahoga Road Products, Inc., then leased the premises from Karas Brothers Co., Inc. Although the lease was not signed until March 21, 1995, CRP took possession on March 1, 1994. The lease includes the following provision:

#### **Z. ENVIRONMENTAL ACKNOWLEDGMENT.**

. . . Lessor acknowledges that it is, and will remain solely responsible for any past or future environmental violations arising or resulting solely and exclusively from Lessor’s prior use or occupancy of the leased premises. Lessor shall hold Lessee harmless for any and all fines, cost of cleanup or any costs incidental to or a consequence of any environmental violations arising out

of the lessor's or any or all of its predecessor's prior use or ownership of the premises, without limitation.

Because of a flood in 2007, the culverts became known to the City of Cleveland around 2008. Through investigation, Cleveland building department officials found not only that the culverts were inadequate to handle the flow of water from a larger storm, but also that they had been installed without a permit required by the city's building code. As a result, Shelly, as lessee, and Karas Properties, Inc., as owner, were notified in December, 2008 that the culverts violated Section 3167.05(b)(7) of the Cleveland Codified Ordinances. That law prohibits encroachment in a floodway unless a technical evaluation demonstrates that the encroachment shall not result in any increase in flood levels during the occurrence of a base flood discharge as defined by the statute. A violation is a first degree misdemeanor. The city asserted that a separate \$1,000 fine could be levied against the lessee (Shelly) and owner (Karas) for each day the violation exists.

Upon being threatened with fines of up to \$365,000 per year as a party to a lease that does not expire until 2014, Shelly began to consider how to fix the violation. Shelly retained Krock Esser Engineering, Inc. and other environmental experts to prepare plans for remedial work to eliminate the impediment in the floodway. This resulted in a proposal to install a bypass box culvert above the ordinary high water mark. That design would avoid the need for additional environmental permits that would be required by the Army Corps of Engineers and other agencies for any construction below the high water mark. Karas and its attorney were kept abreast of the proposal as it was developed and never sought to have Krock Esser or another engineering firm estimate the practicability and cost of other solutions.

Krock Esser's engineer, Jason Popiel, testified that installation of the bypass box culvert would be the most cost-effective means of correcting the environmental violations.

The cost to construct the bypass box culverts is \$589,588 according to Nick Digioia, an excavation and construction contractor with Digioia-Suburban Excavating, LLC. Digioia-Suburban's bid was the lowest of four submitted for the project. Leon Karas is the defendant's president and oversees daily operations. He was kept informed of the plans for the bypass box culvert and the bidding for the project and he admitted in a Civil Rule 30(B)(5) deposition that the box culvert is the least expensive solution to the current violations that would still allow access to the rear of the property.

Nevertheless, the defendant asserted at trial that the environmental violations could be rectified for less money by either tearing out the culverts and returning the streambed to its natural state or by creating a swale in the area of the current culvert. However, Karas introduced no competent evidence on the effectiveness or cost of either solution. To the contrary, Popiel testified that removing the culverts would likely cost more than installing the bypass box culvert.

In the meantime, in May, 2010, Shelly lost an administrative appeal of the notice of violation. The appeal was based, among other things, on the fact that Shelly was a lessee, not the property owner. After the appeal failed the City of Cleveland filed criminal complaints in the Cleveland Municipal Housing Court against Shelly and several of its officers and employees personally. Similar cases were filed against Karas and its employees. During negotiations to settle those cases the Krock Esser plan for the bypass box culvert was presented to the city and became the basis of separate, but similar, settlements. The essence of the parties' separate settlement agreements is that Karas and Shelly each agreed to pay the city \$10,000 in fines and to construct the bypass box culverts engineered by Krock Esser. In

exchange, the city dismissed the criminal complaints. Since then, Shelly obtained a building permit and is ready to have the bypass box culverts installed.<sup>1</sup>

Shelly's costs to date include: \$1,637.50 charged by Bramhall Engineering & Surveying Co., Inc. in January 2009 for a scope of the premises after the initial notice of violation; \$36,953.67 charged by Krock Esser for all of its work to date; \$6,750 charged by Flickinger Wetland Services Group for review of the proposed plans to make sure they did not trigger the need for an expensive and time-consuming Army Corps of Engineers permit; \$2,100 to nearby property owner Norfolk Southern to review and allow an easement that is needed because part of the bypass box culvert will extend onto the railroad's property; and \$10,650 to the City of Cleveland for the fines that settled the criminal complaints and various permit applications.

### **LAW AND ANALYSIS**

The court determined before trial that Karas, under the terms of the contract, was obligated to "hold [Shelly] harmless for any and all fines, costs of cleanup or any costs incidental to, or a consequence of" the unlawful culverts installed by Karas's predecessor. The only issue remaining is to decide what damages fall into the categories of fines, costs of cleanup, and incidental or consequential costs.

A party claiming breach of contract has the duty to prove its damages by a preponderance of the evidence. *Hawkins v. Green*, 8<sup>th</sup> Dist. App. No. 96205, 2011-Ohio-5175, 2011 WL 4599897, ¶10. All of the costs that Shelly has incurred to date, totaling \$58,091.17, were proved by a preponderance of the evidence.

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<sup>1</sup> The building permit was issued post-trial, on December 20, 2011, and filed with the court to supplement the record the next day.

First are the fines. Shelly paid \$10,000 to resolve criminal complaints that, if they had gone to trial and were left to the discretion of the court, could have resulted in total fines greatly exceeding \$10,000. The fact that Shelly stipulated to the amount of the fines does not change their character as fines and their compensability under the lease.

Second, the rest of Shelly's expenses to date were all incurred in the service of finding a way to eliminate the environmental violations and thereby foreclose the possibility of \$1,000 per day fines until the term of the lease ended. Those expenses are, therefore, clearly a consequence of and incidental to the violations. Consequential damages, as with any other contract damages, are awarded to place the aggrieved party in the same position it would have been in had the contract not been breached. *World Metals, Inc. v. AGA Gas, Inc.*, 142 Ohio App.3d 283, 287 (9<sup>th</sup> Dist., 2001). Had Karas not created the environmental violations and continued to tolerate their existence, Shelly would not have incurred the expense to design and get permits for a solution.

Shelly also claims as damages the \$589,588 estimated cost of building the bypass box culverts. Despite the defendant's arguments to the contrary, the court finds that Digioia's testimony established by a preponderance of the evidence that amount as the reasonable cost to construct the bypass box culverts. Moreover, the fact that Shelly has yet to incur that expense does not preclude recovery of that amount. By the contract, Karas agreed to indemnify Shelly for the "cost of cleanup" of environmental violations. Building bypass box culverts to fix the violation is the cost of cleanup, and that cost in this case is \$589,588.

The final category of damages that Shelly seeks to recover is attorney's fees. The attorney's fees can be divided into two subsets: the fees incurred in connection with defending the Cleveland Municipal Housing Court violations and the fees incurred in connection with prosecuting this lawsuit. As for the Housing Court cases, this court has already found that they are compensable as consequential damages, *i.e.*, that Shelly never would have incurred those fees if Karas had corrected the violations and insulated Shelly from criminal charges in the first place.

The fees resulting from this lawsuit are another matter. Ohio follows the so-called American Rule in the context of claims for attorney fees. *Nottingdale Homeowners' Assoc., Inc. v. Darby*, 33 Ohio St.3d 32 (1987). That rule allows a prevailing party in a lawsuit to recover its attorney fees only if provided for by a statute or an enforceable contract. *Acacia on the Green Condominium Assoc., Inc. v. Gottlieb*, 8<sup>th</sup> Dist. No. 92145, 2009-Ohio-4878, 2009 WL2964373, ¶47.<sup>2</sup> The lease between the parties here does not require a breaching party to pay the other's attorney fees. Additionally, the court is not aware of any statute authorizing an award of attorney's fees under the circumstances of this lawsuit.

### **CONCLUSION**

For all of the foregoing reasons, the court enters a judgment in favor of plaintiff The Shelly Co. and against defendant Karas Properties, Inc., for \$647,679.17, interest at the statutory rate from the date of this entry and court costs.

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<sup>2</sup> Attorney's fees may also be awarded where the opposing party has acted in bad faith, but no such claim is made here.

The court also finds that Shelly is entitled to a judgment against Karas in the amount of its reasonable attorney's fees to defend and settle the Cleveland Municipal Housing Court criminal complaints. Evidence of those attorney's fees will be received at an evidentiary hearing on February 28, 2012, at 1:15 p.m., unless stipulated in writing by the parties before then.<sup>3</sup>

**IT IS SO ORDERED:**

\_\_\_\_\_  
Judge John P. O'Donnell

Date: \_\_\_\_\_

<sup>3</sup> Any such agreement may include an explicit provision that, by agreeing to the amount of reasonable fees, Karas is not waiving the ability to appeal the court's finding that the fees are recoverable in the first place.

**SERVICE**

A copy of this journal entry was sent by e-mail, this 31st day of January, 2012, to the following:

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Judge John P. O'Donnell