

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

JEFF PALMER, In His Capacity as :  
Clearcreek Township, Ohio Zoning :  
Inspector, : CASE NO. CA2011-04-034  
  
Plaintiff-Appellee, : O P I N I O N  
 : 12/30/2011  
  
- vs - :  
  
HOWARD J. GRAY, et al., :  
  
Defendants-Appellants. :

CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS  
Case No. 09 CV 74026

Surdyk, Dowd & Turner Co., L.P.A., Robert J. Surdyk, Kevin A. Lantz, One Prestige Place, Suite 700, Miamisburg, Ohio 45342 and David P. Fornshell, Warren County Prosecuting Attorney, Michael Greer, Gary Loxley, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

Andrew P. George, 1160 East Main Street, P.O. Box 36, Lebanon, Ohio 45036, for defendants-appellants, Howard J. and Lisa J. Gray

**PIPER, J.**

{¶1} Defendants-appellants, Howard and Lisa Gray, appeal the decision of the Warren County Court of Common Pleas, granting summary judgment in favor of plaintiff-appellee, Jeff Palmer, in his capacity as Clearcreek Township Zoning Inspector. We affirm the decision of the trial court.

{¶2} At issue in this case is a ten-acre parcel of land, with the southern portion

located in Clearcreek Township, Warren County, and the northern portion located in Miami Township, Montgomery County. The Clearcreek Township portion is zoned residential, and contains two homes. The Grays reside in one home, and rent the other home to tenants. The Miami Township portion is zoned light industrial. The portions have separate legal descriptions, and are owned by separate parties. The Grays own the residential portion in Clearcreek Township, and HL Gray Enterprises, Inc. (HL Enterprises) owns the commercial portion in Miami Township. Howard and Lisa Gray wholly own HL Enterprises.

{¶3} Before purchasing the land, the Grays contacted zoning officials from both Miami and Clearcreek Townships to determine if they could use the Miami Township property to construct a storage facility. The Grays needed to use a strip of the Clearcreek Township property to construct a gravel driveway to provide ingress and egress for the Miami Township portion of the property because it is otherwise landlocked. The Grays asked Palmer whether or not the Clearcreek Township Zoning Resolution would permit the construction and use of the gravel driveway, and Palmer stated that no permit would be necessary because the commercial structure was located on the Miami Township side of the property. With these assurances, the Grays purchased the property, and constructed the storage facility at a cost of \$300,000. The Grays also constructed the gravel driveway off Pennyroyal Lane as the only entrance/exit. The driveway therefore provides ingress/egress to the two residential homes, and the storage facility on the Miami Township property.

{¶4} The Grays met with Palmer in May 2006 to discuss a permit for a sign at the entrance of the gravel driveway off Pennyroyal Lane to advertise the storage facility. Once the sign was constructed, the Grays began renting storage units to the public. However, in June 2006, Palmer sent a letter to the Grays titled, "Notice of Zoning Violation," which indicated that the advertisement signage was inappropriate. The violation letter also informed the Grays that they had to cease using the gravel driveway for access to the

storage facility. In July 2006, the Grays applied for and were granted a permit for their advertisement sign after the sign was inspected by Clearcreek officials. For several months, there was no further communication from the township.

{¶5} In February 2007, the Grays contacted Miami Township zoning officials to discuss possible expansion of the storage facility. At Miami Township's suggestion, the Grays discussed expansion with Clearcreek officials, specifically Palmer. In April 2007, Palmer issued a letter in which he stated he had reviewed the Clearcreek Zoning Resolution and found that nothing prohibited the Grays from using the gravel driveway as ingress/egress for the storage facility. Despite this representation, the Grays were informed in May 2007 that they were in violation of the zoning regulations because of the commercial use of the gravel driveway. According to the Grays, Palmer informed them to do nothing and see if they hear from the prosecutor regarding the violation. The Grays also assert that Palmer advised them not to apply for a variance because the public had reacted negatively to construction of the storage facility, and a variance would not meet approval.

{¶6} In July 2007, the Grays received a letter from Clearcreek Township's Code Enforcement Officer, Fred Hill, stating that the Grays were in violation of the zoning ordinance. The Grays did nothing in response to the letter from Hill. The Grays did not receive any further correspondence from Clearcreek Township until nearly two years later, with the township's filing of a complaint and application for permanent injunction and abatement in April 2009.

{¶7} The complaint was filed against the Grays in their individual capacity, and did not include HL Enterprises as a party. The Grays answered the complaint, and included counterclaims of mandamus, injunction, and declaratory judgment. The Grays also asserted that the township's actions constituted a taking. Palmer then filed a motion for summary judgment in which he argued that the gravel driveway as ingress/egress to the storage facility

is a violation of the zoning code, and that there had not been a taking.

{¶8} The trial court denied in part and granted in part Palmer's motion for summary judgment, bifurcating the issues for trial. More specifically, the trial court found that (1) there were genuine issues of material fact to be litigated regarding whether or not the use of the gravel driveway was a zoning violation; (2) the Grays failed to exhaust administrative remedies and could not seek mandamus, injunction, or declaratory relief and; (3) Palmer was not entitled to summary judgment on the taking issue.

{¶9} Soon after the trial court's decision, Palmer moved for reconsideration of the trial court's decision, and the Grays filed a response in which they moved the court to add HL Enterprises as a necessary party. The trial court agreed to reconsider the issue, and gave the Grays the opportunity to provide the trial court with additional authority. After the deadline for presenting case law expired, the trial court granted Palmer's motion for summary judgment. In doing so, the trial court also granted a permanent injunction and abated the Grays' use of the driveway for ingress/egress of the storage facility. The trial court also denied the Grays' motion to add HL Enterprises as a necessary party. The Grays now appeal the decision of the trial court, raising the following assignments of error. For ease of discussion, the Grays' first and third assignments of error will be combined.

{¶10} Assignment of Error No. 1:

{¶11} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY GRANTING PLAINTIFF A PERMANENT INJUNCTION AND ORDERING ABATEMENT."

{¶12} Assignment of Error No. 3:

{¶13} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY GRANTING PLAINTIFF'S MOTION TO RECONSIDER AND GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT."

{¶14} In the Grays' first and third assignments of error, they argue that the trial court

erred by granting Palmer's motion for summary judgment and by issuing injunction and abatement.

{¶15} This court's review of a trial court's ruling on a summary judgment motion is de novo. *Broadnax v. Greene Credit Serv.* (1997), 118 Ohio App.3d 881, 887. Civ.R. 56 sets forth the summary judgment standard and requires that there be no genuine issues of material fact to be litigated, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to only one conclusion being adverse to the nonmoving party. *Slowey v. Midland Acres, Inc.*, Fayette App. No. CA2007-08-030, 2008-Ohio-3077, ¶8. The moving party has the burden of demonstrating that there is no genuine issue of material fact. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64.

{¶16} The nonmoving party "may not rest on the mere allegations of his pleading, but his response, by affidavit or as otherwise provided in Civ.R. 56, must set forth specific facts showing the existence of a genuine triable issue." *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 385, 1996-Ohio-389. A dispute of fact can be considered "material" if it affects the outcome of the litigation. *Myers v. Jamar Enterprises* (Dec. 10, 2001), Clermont App. No. CA2001-06-056, 2001 WL 1567352 at \*2. A dispute of fact can be considered "genuine" if it is supported by substantial evidence that exceeds the allegations in the complaint. *Id.*

{¶17} The Grays assert that the injunction and abatement orders were inappropriate because Palmer assured them that using the gravel driveway was not in contravention of the township's zoning ordinance. They cite case law regarding equitable estoppel principles, and ask this court to hold the township to its representations and reverse the trial court's decision. The Grays are correct in asserting that courts in the past have analyzed similar situations using promissory/equitable estoppel principles to hold a municipality to its representations. See *Whiteco Metrocom, Inc. v. Columbus* (1994), 94 Ohio App.3d 185.

{¶18} However, since then the Ohio Supreme Court has specifically held that

promissory and equitable estoppel principles are inapplicable against municipalities when the municipality is engaged in a government function. *Hortman v. Miamisburg*, 110 Ohio St.3d 194, 2006-Ohio-4251. In *Hortman*, the court explained the difference between the concepts of promissory and equitable estoppel, and held that those doctrines "are inapplicable against a political subdivision when the political subdivision is engaged in a governmental function." *Id.* at ¶25.

{¶19} In an earlier decision, the Ohio Supreme Court explained that "if a government agency is not permitted to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of all citizens in obedience to the rule of law is undermined." *Ohio State Bd. of Pharmacy v. Frantz* (1990), 51 Ohio St.3d 143, 146. This precedent places the emphasis on statutes and regulations as setting forth the laws and regulations that citizens must follow, rather than representations from individuals. "[W]hoever relies on the conduct of public authorities must take notice of the limits of their power." *Cooney v. Independence* (Nov. 23, 1994), Cuyahoga App. No. 66509, 1994 WL 663453, \*5.

{¶20} Despite the temptation to hold Palmer to his representations that the Grays were not prohibited from using the gravel driveway to provide ingress/egress to the storage facility, this court is bound by the precedent established by the Ohio Supreme Court that forbids application of estoppel principles to Clearcreek Township.

{¶21} In its decision and entry, the trial court concluded that it "very much sympathizes with [the Grays'] plight in that they were misled by Mr. Palmer, the zoning inspector, to believe that no permit was necessary since he mistakenly concluded that a commercial usage was not being conducted on the subject property. \* \* \* If the court had equitable power to grant the relief sought by the Grays, it would do so. However the Court has taken an oath to enforce the law as written and not to legislate different results based solely on sympathy towards the affected parties." This court also would grant relief to the

Grays; however, like the trial court, we must adhere to legal principles set forth by the Ohio Supreme Court, and cannot diverge from established law.

{¶22} The Grays next argue that even if estoppel does not apply, res judicata bars Palmer from disregarding his first determination that the gravel driveway was not a zoning violation. Res judicata encompasses related concepts of claim preclusion and issue preclusion (also known as collateral estoppel). *State ex rel. Schachter v. Ohio Pub. Emples. Retirement Bd.*, 121 Ohio St.3d 526, 2009-Ohio-1704. "Collateral estoppel applies when (1) the fact or issue was actually and directly litigated in the prior action, (2) the fact or issue was passed upon and determined by a court of competent jurisdiction, and (3) the party against whom collateral estoppel is asserted was a party in privity with a party to the prior action." *Vickers v. Vasu Communications, Inc.*, Richland App. No. 2007CA0120, 2008-Ohio-5800, ¶ 24.

{¶23} Although res judicata is traditionally applied to judicial hearings, the doctrine can be employed to prohibit the retrying of issues once they have been determined by an administrative agency. *Gerstenberger v. City of Macedonia* (1994), 97 Ohio App.3d 167. "Res judicata, whether claim preclusion or issue preclusion, applies to quasi-judicial administrative proceedings. An administrative proceeding is quasi-judicial for purposes of res judicata if the parties have had an ample opportunity to litigate the issues involved in the proceeding." *State ex rel. Schachter*, at ¶ 29. (Internal citations omitted.)

{¶24} Here, however, no such proceedings occurred. Instead, the Grays did not appear before the zoning board, offer evidence or testimony regarding their use of the gravel driveway, nor did either party litigate the issue of whether or not the Grays' use was in violation of the zoning regulations. Res judicata does not apply in the case at bar, as no decision was handed down by the Clearcreek Zoning Commission after a quasi-judicial proceeding. See *Lamar Outdoor Advertising v. Dayton Bd. of Zoning Appeals*, Montgomery

App. No. 18902, 2002-Ohio-3159, \*3, (finding that notice of zoning violation "was not issued in a judicial proceeding, or even a quasi-judicial administrative proceeding. It was a purely administrative determination, made by an administrative officer *ex parte*. Therefore, it lacks the elements that the *res judicata* bar requires").

{¶25} Palmer was correct in seeking an order from the trial court for injunction and abatement, and the trial court did not err in granting such. According to R.C. 519.24, "in case \* \* \* any land is or is proposed to be used in violation of sections 519.01 to 519.99, inclusive, of the Revised Code, or of any regulation or provision adopted by any board of township trustees under such sections, \* \* \* the township zoning inspector \* \* \* in addition to other remedies provided by law, may institute injunction, mandamus, abatement, or any other appropriate action or proceeding to prevent, enjoin, abate, or remove such unlawful location, erection, construction, reconstruction, enlargement, change, maintenance, or use." This court has interpreted this statute to authorize "a township zoning board to institute an action for an injunction when a building or land is used in violation of a township's zoning laws. Because the statute grants the injunctive remedy, [a township is] not required to plead or prove an irreparable injury or that there is no adequate remedy at law, as is required by Civ.R. 65." *Union Township Bd. of Trustees v. Old 74 Corp.* (2000), 137 Ohio App.3d 289, 294.

{¶26} Section 6.52 of the Clearcreek Township Zoning Regulation sets forth the permitted uses for properties, such as that owned by the Grays, which are zoned suburban residence. "A building or lot shall be used only for the following purposes:

{¶27} "A. Single family dwellings.

{¶28} "B. Home occupation as described in Section 5.752 (B).

{¶29} "C. Community fire house as described in Section 5.752 (C).

{¶30} "D. The sale of household goods, furnishings, clothing, toys, tools and books

that have been used by members of the family occupying the premises may be advertised and sold on the premises, provided such sale is not held oftener than every six (6) months, for a period of three (3) days each sale; the items sold were not acquired for the sale. [sic]

{¶31} "E. Publicly owned or operated properties including parks, playgrounds and community centers.

{¶32} "F. Model homes as described in Section 5.752 (H).

{¶33} "G. A temporary or permanent building for protection from the weather elements shall be required for animals other than for two (2) dogs, which reside on parcels less than five (5) acres. This building shall be established as an accessory and located at least eighty-five (85) feet from every property line.

{¶34} "H. Accessory buildings defined as either temporary or permanent and uses customarily incidental to any permitted uses, provided the primary use or structure has been established or constructed."

{¶35} While the zoning regulation neither expressly permits nor denies the use of the driveway, the Grays are using the driveway for a commercial purpose by directing its customers to use the driveway as ingress/egress to the storage facility. Even though the driveway also provides ingress/egress to the residential homes on the Clearcreek Township side of the property, the Grays do not deny that they constructed the gravel drive so that their customers could access the storage facility.

{¶36} The Tenth District Court of Appeals considered a similar case, and held that use of a driveway across residential property as ingress/egress to a commercial shopping center constituted commercial use. *Windsor v. Lane Dev. Co.* (1958), 109 Ohio App. 131. In *Windsor*, the court held that "day to day use of the driveway \* \* \* for ingress and egress over [the residential portion] to and from defendant's shopping center by the customers thereof and for their benefit and the benefit of said shopping center constituted a commercial use of

said [residential property]." Id. at 143.

{¶37} The Grays attempt to limit the application of *Windsor* by arguing that the storage unit is not frequented by numerous customers, as a shopping center would be. The Grays also argue that the facts are distinguishable from *Windsor* because their gravel driveway provides the sole means for ingress/egress for the storage facility, whereas the drive across the residential property in *Windsor* was one of several points of ingress/egress for the shopping center. However, neither of these differences diminishes the fact that the Grays are using the gravel driveway for commercial purposes, whether it is to service 20 or 200 customers.

{¶38} As referenced by the Grays, the court in *Windsor* recognized that the purpose of restricting land use was to promote the "safety, comfort, health, and general welfare of the public." Id. at 138. The Grays argue that their use of the gravel driveway to provide access to the commercial storage facility does not pose the same risk as a shopping center. However, Clearcreek Township codified its Zoning Code with commercial and residential uses in mind. The Township specifically enumerated its purpose in regulating zoning as to "provide for the citizens of Clearcreek Township adequate light, pure air, and safety from fire and other dangers, to conserve the value of land and buildings, to lessen or avoid congestion of traffic in the public streets and to promote the public health, safety, morals, comforts, conveniences and general welfare \* \* \*."

{¶39} Regarding the Grays argument that "use of the [storage] facility does not, in any way, constitute an annoyance or disturbance to any party," Palmer indicated that he was prompted to inquire into the Grays' commercial usage of the driveway because of complaints from Clearcreek Township residents. Although we do not disagree that a storage facility may be frequented less than a shopping center, the purpose of prohibiting commercial use in a residential area remains the same.

{¶40} The Grays also argue that the Ohio Supreme Court recognized the long-standing right of property owners to have access to a public street in *Northern Boiler Co. v. David* (1952), 157 Ohio St. 564. While the court did recognize that right, such right applied to "the owner of property abutting on the street in question." *Id.* at 569. The Court further stated that the right of access included the right to "cut the curb and construct a driveway to provide ingress and egress, subject to the reasonable and lawful regulations which may be presented by ordinance of the council." *Id.* However, the storage facility and the Miami Township property do not abut Pennyroyal Lane so that a simple curb cut could provide ingress and egress. Nor does the commercial use of the driveway across residential property comport with the Clearcreek Township Zoning Regulations.

{¶41} The trial court did not err in granting the injunction and ordering abatement because the Grays' commercial use of the driveway violates the Clearcreek Township Zoning Regulation. The trial court also did not err by granting Palmer's motion for summary judgment based on the Grays' mandamus, declaratory judgment, and takings claims, as there are no genuine issues of material fact to be litigated.

{¶42} "Mandamus will not issue if there is a plain and adequate remedy in the ordinary course of law." *State ex rel. Hamilton v. Brunner*, 105 Ohio St.3d 304, 2004-Ohio-1735, ¶6. Generally, an administrative appeal process provides an adequate remedy in the ordinary course of law, and precludes relief by way of mandamus. *State ex rel. Hilltop Basic Resources, Inc. v. Cincinnati*, 118 Ohio St.3d 131, 2008-Ohio-1966, ¶23.

{¶43} The Grays did not seek a variance, nor avail themselves to the administrative remedies provided by the Clearcreek Zoning Commission. The township specifically offers its citizens the right to appeal a decision of the zoning inspector. "Any applicant has the right to appeal a decision of the zoning inspector. A zoning resolution is complicated and often technical. A property owner and the zoning inspector may read the same requirement of the

zoning resolution and come to different conclusions on the way it applies to a particular piece of property. The zoning inspector can only approve a zoning permit if the application conforms to all the requirements of the zoning resolution, as he understands them. However, any applicant has the right to appeal his decision."

{¶44} Understandably, the Grays cite to the fact that they are incredulous of any "decision" by zoning personnel given their past experiences with Palmer and his vacillating representations. "While it is true that mandamus relief will be denied if administrative avenues are not exhausted, it also is true that a person need not pursue administrative remedies if such an act would be futile." *State ex rel. Cotterman v. St. Marys Foundry* (1989), 46 Ohio St.3d 42, 44. However, the fact that Palmer has offered conflicting representations makes exhausting the administrative appeal anything but futile. The Palmers were entitled to a clear and final decision of the Clearcreek Zoning Commission, and could have sought such through the administrative appellate process to expressly set forth whether or not their use of the gravel driveway was a zoning violation.

{¶45} The Grays failed to exhaust their administrative remedies, and Palmer is therefore entitled to summary judgment on the Grays' counterclaims of mandamus, injunction, taking, and declaratory judgment. The Ohio Supreme Court has held that "when \* \* \* the affirmative defense of failure to exhaust administrative remedies is applicable and has been timely raised and maintained, a court will deny declaratory and injunctive relief." *Clagg v. Baycliffs Corp.*, 82 Ohio St.3d 277, 281, 1998-Ohio-414. Here, Palmer expressly raised the affirmative defense that the Grays had failed to exhaust their administrative remedies in his answer to the Grays' amended counterclaim. Moreover, the Grays based their mandamus, taking, injunction, and declaratory judgment arguments on equitable principles of estoppel. As previously discussed, the Ohio Supreme Court's pronouncement in *Hortman v. Miamisburg*, 110 Ohio St.3d 194, 2006-Ohio-4251, forecloses the possibility of relying on

such principles to seek relief.

{¶46} The trial court did not err in granting Palmer's motion for summary judgment or in ordering injunctive relief or abatement. The Grays' first and third assignments of error are overruled.

{¶47} Assignment of Error No. 2:

{¶48} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY DENYING THE MOTION TO ADD H.L. GRAY ENTERPRISES AS A PARTY."

{¶49} The Grays argue in their second assignment of error that the trial court erred in denying their motion to add HL Enterprises as a party to the suit. An appellate court reviews the trial court's decision regarding necessary parties for an abuse of discretion. *Ford Motor Credit Co. v. Ryan*, 189 Ohio App.3d 560, 2010-Ohio-4601.

{¶50} The Grays argue that according to Civ.R. 21, the trial court could have joined HL Enterprises as a party. Civ.R. 21 states, "parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just." However, Civ.R. 19(A) sets forth the criteria for joining necessary parties, and states, "a person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (a) as a practical matter impair or impede his ability to protect that interest or (b) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest, or (3) he has an interest relating to the subject of the action as an assignor, assignee, subrogor, or subrogee."

{¶51} HL Enterprises is not a necessary party under Civ.R. 19(A) because the trial court's judgment was able to accord complete relief to the parties. HL Enterprises does not

control the use of the gravel driveway, as it is owned by the Grays individually. HL Enterprises has not been regulated by Clearcreek Township's ordinance, and the zoning violation was not brought against HL Enterprises for the use of its property in Miami Township. While we recognize that HL Enterprises owns the commercial property, the trial court's orders do not apply to the use of the Miami Township property. The trial court's ruling, and the resulting injunction and abatement orders, are not specific to HL Enterprises, but to the Grays and their permitting or allowing a commercial use of their gravel driveway in Clearcreek Township.

{¶52} According to Civ.R. 20, "all persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or succession or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action."

{¶53} Palmer's notice of violation, and the resulting suit, was filed against the Grays individually, and not against HL Enterprises. The Grays are the parties who own the Clearcreek Township property, and are therefore solely implicated by Palmer's suit. Palmer did not file the current action against the Grays and HL Enterprises jointly or severally, nor is the zoning regulation directed at HL Enterprises or property owned in Miami Township.

{¶54} The Grays argue that HL Enterprises is a necessary party because it uses the driveway for ingress/egress. However, the record does not contain any evidence that the Grays granted HL Enterprises an easement across their property to use the land for ingress/egress. If we were to subscribe to the Grays' theory, then all customers who store their possessions in the storage facility would also be proper parties and Palmer should have named them as well. However, Palmer named the Grays because they are the owners of the residential property located in Clearcreek Township, and control the use of that property. HL

Enterprises cannot control the use of the gravel driveway, and is not a necessary party to the suit.

{¶55} Having found that the trial court did not abuse its discretion in denying the Grays' motion to join HL Enterprises, the Grays' second assignment of error is overruled.

{¶56} Judgment affirmed.

HENDRICKSON, P.J., and DINKELACKER, V.J., concur.

Dinkelacker, J., of the First Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 5(A)(3), Article IV of the Ohio Constitution.