[Cite as *State ex rel. Cleveland v. Shaughnessy*, 2018-Ohio-4797.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 107403

STATE OF OHIO, EX REL.
CITY OF CLEVELAND

RELATOR

vs.

THE HONORABLE MICHAEL P. SHAUGHNESSY

RESPONDENT

JUDGMENT:
WRIT GRANTED

Writ of Mandamus
Motion No. 520422
Order No. 522384

RELEASE DATE: November 27, 2018

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MARY EILEEN KILBANE, P.J.:

{¶1} Relator, the city of Cleveland ("Cleveland"), seeks a writ of mandamus directing respondent judge to proceed with a hearing mandated by this court as directed in *Westlake v. Cleveland*, 8th Dist. Cuyahoga No. 104282, 2017-Ohio-4064 ("*Westlake I*"). We grant a writ of mandamus and direct respondent to hold a hearing to determine what constitutes reasonable notice as directed by this court in the aforementioned appeal.

{¶2} The facts of the underlying dispute between the city of Westlake ("Westlake") and Cleveland can be found in this court's prior opinion. A brief summary of facts from that case follows. Westlake and Cleveland entered into a contract for the provision of municipal water

from Cleveland to Westlake. After the contract was in effect for numerous years, Cleveland alleged Westlake began to explore alternative sources for water. Cleveland then imposed significant cost increases to recover "stranded costs" created by Westlake's purported decision to terminate the agreement. Westlake filed a declaratory judgment action in the Cuyahoga County Common Pleas Court seeking to enjoin Cleveland from imposing cost increases and interpreting the rights of the parties under the agreement. The trial court, on summary judgment, ruled that the contract had terminated by its own terms in 2015, provisions requiring five-year prior notice of intent to terminate were no longer effective, and Cleveland could not recover "stranded costs." *Id*. at _ 5.

{¶3} Cleveland appealed. This court reversed the trial court's grant of summary judgment, finding that the contract continued to renew year to year. *Id*. at ¶ 39. This made the five-year notice of termination provision unenforceable in a year-to-year contract. *Id*. at _ 40. This court concluded:

> In summary, we conclude that the water service agreement was a non-exclusive agreement for a minimum period of ten years, with annual renewals that constitute new agreements each year. As annual agreements, they do not violate the terms of the Westlake charter that limit the term of non-exclusive franchises to 25 years. With the five-year notice of termination inapplicable to a yearly agreement, a question of fact exists as to how much notice should be provided. Cleveland has no contractual right to enact surcharges to recover stranded costs.

Id. at _ 53.

{¶4} The trial court, and then this court, determined the rights of the parties under the contract at issue. This court identified a single remaining issue that was a question of fact to be determined, in the first instance, by the factfinder. Therefore, this court remanded the matter to the trial court for that determination.

{¶5} In its verified complaint, Cleveland alleges that on remand, respondent scheduled, among other things, a proceeding to determine what constitutes reasonable notice under the contract. That proceeding commenced on March 27, 2018. A single witness was called out of order to accommodate her schedule. The proceeding was then continued to April 27, 2018. On April 24, 2018, Westlake filed a notice of voluntary dismissal premised on Civ.R. 41(A)(1)(a). Cleveland filed a motion to strike the notice of voluntary dismissal, but respondent ruled that he no longer had jurisdiction to rule on the motion to strike because the notice of voluntary dismissal was effective upon filing.

{¶6} Cleveland then filed the instant mandamus action. Cleveland also filed a notice of appeal challenging the trial court's finding that it lacked jurisdiction to rule on its motion to strike. Respondent filed for summary judgment, which Cleveland opposed.

{¶7} In order for this court to issue a writ of mandamus, Cleveland must clearly establish that: 1) it possesses a clear legal right to the requested relief, 2) respondent possesses a clear legal duty to perform the requested relief, and 3) there exists no other adequate remedy in the ordinary course of the law. *State ex rel. Waters v. Spaeth*, 131 Ohio St.3d 55, 2012-Ohio-69, 960 N.E.2d 452, _ 6. Cleveland must prove these elements by clear and convincing evidence. *Id*. at _ 13.

{¶8} Cleveland can establish a clear legal right to the requested relief and a clear legal duty on the part of respondent judge by establishing that the lower court has failed to comply with a mandate of a superior court. *See State ex rel. Frailey v. Wolfe*, 92 Ohio St.3d 320, 321, 750 N.E.2d 164 (2001), citing *Berthelot v. Dezso*, 86 Ohio St.3d 257, 259, 714 N.E.2d 888 (1999) (stating that a writ of mandamus is the appropriate vehicle to compel a lower court to comply with a mandate issued by a superior court).

{¶9} Further, an appeal is an inadequate remedy at law when the above is established. *State ex rel. Heck v. Kessler*, 72 Ohio St.3d 98, 100-102, 647 N.E.2d 792 (1995). In *Heck*, the Supreme Court of Ohio explained, "[t]o hold otherwise might lead to the result of a lower court perpetually refusing a superior court's mandate, necessitating repeated, ineffective appeals." *Id*. at 102. As quoted approvingly by the *Heck* court, the United States Supreme Court has held:

> "When a case has been once decided by this court on appeal, and remanded to the Circuit Court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The Circuit Court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded. * * * If the Circuit Court mistakes or misconstrues the decree of this court, and does not give full effect to the mandate, its action may be controlled, either upon a new appeal (if involving a sufficient amount) or by a writ of mandamus to execute the mandate of this court. * * * But the Circuit Court may consider and decide any matters left open by the mandate of this court; and its decision of such matters can be reviewed by a new appeal only. * * * The opinion delivered by this court, at the time of rendering its decree, may be consulted to ascertain what was intended by its mandate; and, either upon an application for a writ of mandamus, or upon a new appeal, it is for this court to construe its own mandate, and to act accordingly."

Id. at 101, quoting *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255-256, 16 S.Ct. 291, 40 L.Ed.414 (1978). Therefore, whether the appeal filed by Cleveland from the denial of its motion to strike Westlake's notice of voluntary dismissal constitutes an adequate remedy at law is immaterial if Cleveland can show that respondent has ignored a clear mandate from this court.

{¶10} This court determined that a single question of fact remained outstanding in the underlying case between Cleveland and Westlake — what constituted reasonable notice under the terms of the contract given that it continued to renew on a year-to-year basis. *Westlake I* at _ 54. This court's decision remanded the case for a hearing on that matter.

{¶11} Cleveland argues this is a clear mandate from this court directing respondent to determine that issue. Respondent claims the opinion did not remand for a hearing because the language used in the final paragraph of the opinion was indefinite, i.e., "reversed and remanded for proceedings consistent with this opinion." Now reading the opinion as a whole, the mandate from this court is clear. All the rights and responsibilities of the parties have been construed under the contract except what constituted reasonable notice, and only because that is a question of fact that must be resolved by the trier of fact. *Westlake I* at _ 41, citing *Davis v. Loopco Indus., Inc.*, 66 Ohio St.3d 64, 66, 1993- Ohio-195, 609 N.E.2d 144. As a result, a determination on that matter is required.

{¶12} Respondent argues it was not he who has disregarded a mandate from this court, but through Westlake's actions, he was deprived of jurisdiction to proceed. He asserts that the notice of voluntary dismissal deprived him of jurisdiction to conduct the mandated hearing.

{¶13} Civ.R. 41(A)(1)(a) provides a plaintiff with a unilateral means of dismissing an action. It states, subject to other civil rules, that a plaintiff, "without order of court, may dismiss all claims asserted by that plaintiff against a defendant by * * * filing a notice of dismissal at any

time before the commencement of trial unless a counterclaim which cannot remain pending for independent adjudication by the court has been served by that defendant[.]" The filing of a valid notice of voluntary dismissal is effective on filing, and deprives the court of further jurisdiction to act. *Rini v. Rini*, 8th Dist. Cuyahoga No. 80225, 2002-Ohio-6480, ¶ 11.

{¶14} The Ohio Supreme Court has determined that "'a civil trial commences when the jury is empaneled and sworn, or, in a bench trial, at opening statements.'" *Schwering v. TRW Vehicle Safety Sys.*, 132 Ohio St.3d 129, 2012-Ohio-1481, 970 N.E.2d 865, ¶ 16, quoting *Frazee v. Ellis Bros. Inc.*, 113 Ohio App.3d 828, 831, 682 N.E.2d 676 (5th Dist.1996). At least one other court has recognized that "the commencement of a hearing on the merits would be equivalent to the commencement of a trial." *Small v. Small*, 11th Dist. Geauga Nos. 97-G-2057 and 97-G-2063, 1998 Ohio App. LEXIS 1435, at 10

(Apr. 3, 1998). This court has further explained that "McCormac has stated that under this rule, 'commencement of the trial * * * takes place when the case is called by the court and counsel indicates that they are ready to proceed.'" *Kracht v. Kracht*, 8th Dist. Cuyahoga Nos. 70005 and 70089, 1997 Ohio App. LEXIS 2412, 17 (June 5, 1997), quoting McCormac, *Ohio Civil Rules Practice*, Section 13.03, at 352, (2d Ed.1992). *See also Smith v. Smith*, 8th Dist. Cuyahoga No. 81374, 2003-Ohio-3323, _ 13 (noting that "evidence was taken; therefore, for the purposes of Civ.R. 41(A)(1), a bench trial had commenced").

{¶15} After remand, a proceeding began that was to determine the sole question left by this court's decision. Respondent classifies this proceeding as an evidentiary hearing commenced to accommodate the schedule of the testifying witness. Respondent further argues that the evidentiary hearing did not constitute a trial. He points to the fact that, in 2013, Cleveland had requested a jury trial, and the hearing that was going forward had no jury.

Respondent also argues that the mere taking of testimony as an accommodation to a witness's schedule is not the start of trial.

{¶16} Respondents' classification of the proceeding as merely an evidentiary hearing and an accommodation is unavailing. This court remanded the matter for a hearing on the merits of the last outstanding issue to be resolved between the parties. On remand, respondent set pretrial hearings and the parties to the action filed pretrial briefs. On January 16, 2018, respondent issued the following order:

> Pretrial held 01/16/2018. Counsel for the respective parties appeared and provided the court with an update on the case. Pursuant to the court of appeals 06/01/2017 decision, an evidentiary hearing on what constitutes reasonable notice for termination of the parties' contract is scheduled as follows: briefs due 03/22/2018. Hearing set for 03/27/2018 at 10:00 am. Courtroom 16-C.

{¶17} After additional discovery was conducted, the parties submitted briefs addressing the sole remaining issue. Those briefs treated the March, 27, 2018 proceeding as a trial on the merits. Neither party renewed any request for a jury trial. At the beginning of the hearing, the transcript attached to Cleveland's complaint for a writ of mandamus discloses that the trial court stated,

> We are here pursuant to a Court of Appeals order that reversed and remanded a decision made by my predecessor * * *.
>
> Pursuant to the journal entry and opinion number 104282, this court is directed to hold a hearing. I'm complying with that order. For scheduling purposes, we are going to take a witness out of order.

After the commencement of that hearing, the testimony of a witness was taken. Respondent, in a March 28, 2018 journal entry, then specifically noted that "the evidentiary hearing is continued

as follows: Hearing set for 4/27/2018 * * *." Four days before the proceeding was to reconvene, Westlake filed its notice of voluntary dismissal.

{¶18} The parties treated the proceeding that occurred as a bench trial on the merits of the reasonable notice issue. Trial briefs were filed addressing the issue, and a hearing on the merits went forward on March 27, 2018. For all intents and purposes, trial had commenced on that date. It would be irrational to find that an adverse party could listen to the testimony of a witness given before the factfinder, and then use a notice of voluntary dismissal simply because opening statements were waived or the parties failed to advance any opening statements.

{¶19} As the Ohio Supreme Court has recognized, trial has commenced under these circumstances:

> witnesses were called and testimony was adduced. The purpose of the rule limiting voluntary dismissals after the start of trial would be violated if this did not constitute the start of trial. The Ohio Supreme Court has explained that "Civ.R. 41(A)(1)(a)'s 'commencement of trial' language was adopted to prevent a situation in which parties could try and retry their causes indefinitely until the most favorable circumstances for submission were finally achieved. *Frysinger v. Leech*, 32 Ohio St.3d 38, 42, 512 N.E.2d 337 (1987), quoting *Beckner v. Stover*, 18 Ohio St.2d 36, 40, 247 N.E.2d 300 (1969). In *Beckner*, we expressly cautioned against a rule whereby the plaintiffs "could substitute a voluntary dismissal without prejudice for an appeal from claimed errors occurring during a trial." *Id.*

Schwering, 132 Ohio St.3d 129, 2012-Ohio-1481, 970 N.E.2d 865, at ¶ 20.

{¶20} Other cases where courts have distinguished a pretrial or evidentiary hearing from a trial are significantly different from the present situation. For instance, in *Capital One Bank v. Woten*, 169 Ohio App.3d 13, 2006-Ohio-4848, 861 N.E.2d 859 (3d Dist.), the Third District determined that a hearing conducted by the trial court did not constitute the commencement of trial. There, the parties received notice of an "evidentiary hearing." Believing this to be a pretrial hearing about what evidence would be submitted at trial, the plaintiff was not prepared for trial. At the scheduled hearing, when it became clear that the court intended to move forward with the trial, the plaintiff sought to voluntarily dismiss the action. Instead, the trial court dismissed the action with prejudice after the plaintiff failed to present evidence. *Id*. at _ 4. The *Woten* court reversed, finding that the evidentiary hearing did not constitute a trial, and even if it did, trial had not yet commenced. *Id*. at _ 9. Here, evidence was adduced and testimony was taken before the trier of fact going to the ultimate issue in the case.

{¶21} Therefore, Westlake could not use a notice of voluntary dismissal to terminate the action because trial had commenced. The notice was ineffective and respondent has jurisdiction to rule on Cleveland's motion to strike, and to conduct the hearing mandated by this court.

{¶22} However, a writ of mandamus to "enforce an appellate court's mandate is reserved for extreme cases of direct disobedience." *State ex rel. Cowan v. Gallagher*, 153 Ohio St.3d 13, 2018-Ohio-1463, 100 N.E.3d 407, ¶ 12. Therefore, even if the trial court is not purposefully refusing to fulfill this court's mandate in *Westlake I*, Cleveland is still entitled to a writ of mandamus because they possess a clear legal right to relief, respondent has a clear legal duty to perform the requested relief, and Cleveland has no other adequate remedy in the ordinary course of the law. *See State ex rel. Waters*, 131 Ohio St.3d 55, 2012-Ohio-69, 960 N.E.2d 452, _ 6.

{¶23} The above analysis has demonstrated that Cleveland is entitled to have the trial court rule on its motion to strike and to move forward with the trial regardless of Westlake's notice of voluntary dismissal. Further, Cleveland has satisfied the third requirement for mandamus: It has no adequate remedy in the ordinary course of law. "An adequate remedy at law is one that is 'complete, beneficial, and speedy.'" *State ex rel. Kerns v. Simmers*, 153 Ohio St.3d 103, 2018-Ohio-256, 101 N.E.3d 430, ¶ 10, quoting *State ex rel. Natl. Elec. Contrs. Assn., Ohio Conference v. Ohio Bur. of Emp. Servs.*, 83 Ohio St.3d 179, 183, 699 N.E.2d 64 (1998).

{¶24} Respondent argues that Cleveland possesses an adequate remedy at law by way of appeal, and points to the fact that Cleveland has filed a notice of appeal.

{¶25} Generally, an appeal from a dismissal without prejudice is not a final, appealable order. "Under well-established precedent, a dismissal under Civ.R. 41(A)(1)(a) is not considered a final appealable order because, under most circumstances, it does not have any prejudicial effect upon the parties' future rights." *State ex rel. Die Co. v. Court of Common Pleas Lake Cty.*, 11th Dist. Lake No. 2010-L-107, 2011-Ohio-5232, ¶ 26, citing *Thorton v. Montville Plastics & Rubber, Inc.*, 121 Ohio St.3d 124, 2009-Ohio-360, 902 N.E.2d 482, ¶ 24. *See also Dewalt v. Tuscarawas Cty. Health Dept.*, 5th Dist. Tuscarawas No. 2012 AP 05 0031, 2012-Ohio-5294 (appeal from a dismissal without prejudice dismissed for lack of jurisdiction).

{¶26} A determination about whether the trial court's decision stating that it does not have jurisdiction to rule on Cleveland's motion to strike constitutes a final, appealable order has not been made by this court, but it is doubtful. Further, the appeal filed by Cleveland is limited to a determination of whether the trial court retained jurisdiction to rule on Cleveland's motion to strike. Whether the trial court erred in failing to conduct the hearing ordered by this court in *Westlake I* is not a part of Cleveland's notice of appeal precisely because Cleveland recognizes

that an abundance of case law supports the understanding that a notice of voluntary dismissal without prejudice is not a filing capable of invoking this court's jurisdiction absent some narrow exceptions. As a result, an appeal from this decision is not an adequate remedy because it could require multiple proceedings and appeals in order to arrive at a determination of the issue ordered by this court in *Westlake I*.

{¶27} When a matter is decided on appeal, that matter is the law of the case, and further filings or appeals should not be required to effectuate what has already been decided. Requiring such is not complete, beneficial, and speedy. *State ex rel. Cleveland v. Astrab*, 139 Ohio St.3d 445, 2014-Ohio-2380, 12 N.E.3d 1197, _ 26.

{¶28} This court finds that the equities of the situation demand that a writ of mandamus issue directing respondent to adhere to this court's prior mandate to determine the issue of reasonable notice. Respondent is directed to proceed with the hearing to determine what constitutes reasonable notice as directed in *Westlake I*.

{¶29} Writ granted.

MARY EILEEN KILBANE, PRESIDING JUDGE

EILEEN T. GALLAGHER, J., and
SEAN C. GALLAGHER, J., CONCUR