[Cite as *Calo v. Ohio Real Estate Comm.*, 2011-Ohio-2413.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Christopher J. Calo,	:	
Appellant-Appellant,	:	
		No. 10AP-595
v.	:	(C.P.C. No. 09CVF10-16222)
Ohio Real Estate Commission,	:	(REGULAR CALENDAR)
Appellee-Appellee.	:	

D E C I S I O N

Rendered on May 19, 2011

Madison & Rosan, LLP, Kristin E. Rosan and *Darcy A. Shafer,* for appellant.

Michael DeWine, Attorney General, and *Janyce C. Katz,* for appellee.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, P.J.

{¶1} Appellant-appellant, Christopher J. Calo, appeals from a judgment of the Franklin County Court of Common Pleas granting the motion to dismiss of appellee-appellee, Ohio Real Estate Commission. Because (1) the commission complied with the procedural requirements in R.C. 119.09 and (2) the common pleas court lacked subject matter jurisdiction over appellant's R.C. 119.12 appeal, we affirm.

I. Facts and Procedural History

{¶2} Appellant was a licensed Ohio real estate broker in 2008. On May 8, 2008, an individual filed a complaint with the Ohio Department of Commerce, Division of Real Estate and Professional Licensing, alleging appellant, and the real estate salesperson working for him, failed to return her calls and otherwise failed to do what they promised regarding the sale of her home. The division's file contained two business contact addresses for appellant, one in Solon, Ohio and one in Mayfield, Ohio.

{¶3} On May 14, 2008 the division mailed notice of the complaint to the Solon address. Although the notice requested appellant send certain documents to the division, appellant did not send the requested documents. By certified mail, the division mailed a subpoena to appellant at his Mayfield address on August 18, 2008, instructing him to produce the requested documents within seven days; an individual other than appellant signed the return receipt. An investigator the division assigned to handle the complaint testified appellant did not respond to either the complaint or subpoena. The investigator further stated she spoke with appellant on three occasions but was unable to obtain the requested documents.

{¶4} Again by certified mail, the division on May 28, 2009 sent to appellant's Mayfield address a "Notification of Formal Hearing" set for June 26, 2009. The division advised appellant it had evidence that appellant violated R.C. Chapter 4735; "Schedule A," attached to the notification, detailed the factual allegations against appellant. In response, appellant forwarded some, but not all, of the requested documents to the division. Appellant neither attended the June 26, 2009 hearing, nor had an attorney present to represent him.

{¶5} On July 21, 2009 a hearing officer issued a report and recommendation concluding appellant failed not only to comply with the subpoena but also to cooperate in the investigation when he failed to respond to the division's written request for documents. Contrary to the allegations in the notice, the hearing officer determined appellant did not fail to keep complete and accurate records for a period of three years. With those determinations, the hearing officer recommended the commission find appellant violated R.C. 4735.18(A)(6) for the two instances of misconduct. The division sent the report and recommendation to appellant's Solon address on July 21, 2009, but the report was returned unclaimed. On August 26, 2009, the division sent the report by certified mail to appellant's Mayfield address, and appellant received it. Appellant responded with written objections.

{¶6} With appellant present, the commission reviewed the hearing officer's report and recommendation on October 7, 2009. Following an executive session, the commission adopted the hearing officer's report and recommendation and voted to revoke appellant's license. On October 14, 2009, the commission sent appellant, by certified mail, a copy of the adjudication order.

{¶7} Appellant timely filed notices of appeal with the division and the Franklin County Court of Common Pleas, which denied appellant's motion for a stay. Appellant's brief supporting his appeal asserted the commission's adjudication order violated his right to due process because the division never served him with a copy of the complaint or the subpoena. The commission not only responded to appellant's assertions but also filed a motion to dismiss the appeal, asserting the common pleas court lacked subject matter jurisdiction over the appeal because appellant filed his appeal in the incorrect county

under R.C. 119.12. Although appellant admitted in his reply that his place of residence and place of business both were located in Cuyahoga County, appellant contended the commission's motion to dismiss raised an issue of venue, not subject matter jurisdiction. He also asserted the commission failed to comply with the procedural requirements of R.C. 119.09, meaning he still had the opportunity to perfect his appeal in Cuyahoga County.

{¶8} The common pleas court filed its judgment on May 25, 2010, dismissing appellant's appeal for lack of subject matter jurisdiction. The court noted R.C. 119.12 required appellant to file his appeal in the county of his residence or the county where his place of business was located. Because appellant resided and had a place of business in Ohio, but not in Franklin County, the court concluded it was without jurisdiction to hear appellant's appeal.

II. Assignments of Error

{¶9} Appellant appeals, assigning the following errors:

> 1. The Lower Court Erred As A Matter Of Law When It Dismissed The Appeal Without Addressing Whether The Appellee's Order Complied With R.C. 119.09.
>
> 2. The Lower Court Erred As A Matter Of Law When It Dismissed The Appeal Because It Had Jurisdiction Over Appeals By Persons Who Have Been Adversely Affected By The Ruling Of An Agency.
>
> 3. The Lower Court Abused Its Discretion When It Denied Appellant's Motion For Stay.

III. Standard of Review

{¶10} Under R.C. 119.12, when a common pleas court reviews an order of an administrative agency, the common pleas court must consider the entire record to

determine whether reliable, probative, and substantial evidence supports the agency's order, and the order is in accordance with law. *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 110-11; see also *Andrews v. Bd. of Liquor Control* (1955), 164 Ohio St. 275, 280.

{¶11} An appellate court's review of an administrative decision is more limited than that of the court of common pleas. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. We review to determine whether the court of common pleas abused its discretion in determining whether substantial, reliable, and probative evidence supports the agency's order. *Roy v. Ohio State Med. Bd.* (1992), 80 Ohio App.3d 675, 680. We conduct a plenary review of issues of law. *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 339, 343.

IV. Compliance with R.C. 119.09

{¶12} Appellant's first assignment of error contends the common pleas court erred in dismissing his appeal for lack of subject matter jurisdiction without first considering whether the commission complied with the procedural requirements of R.C. 119.09. Appellant contends the commission's failure to comply with R.C. 119.09 renders appellant's appeal to the common pleas court premature and provides appellant the opportunity to file a timely appeal when the commission eventually complies with R.C. 119.09.

{¶13} Appellant asserts the adjudication order failed to comply with R.C. 119.09 in four respects: (1) the commission failed to send appellant a certified copy of the adjudication order, (2) the commission failed to approve, modify or disaffirm the hearing officer's report and recommendation, (3) the commission failed to adequately notify

appellant of the time and method for perfecting his appeal, and (4) a hearing officer who did not preside over the hearing wrote the report and recommendation.

A. Certified Copy

{¶14} Although appellant admits the commission mailed the adjudication order to him by certified mail, return receipt requested, appellant asserts the order cannot be considered a "certified copy" because it contains extra information that would not have been included in the order entered on the commission's journal.

{¶15} R.C. 119.09 requires an agency, after it enters a final order on its journal, to "serve by certified mail, return receipt requested, upon the party affected thereby, a certified copy of the order and a statement of the time and method by which an appeal may be perfected." The affected party who desires to appeal the order then must file a notice of appeal with the agency and the court "within fifteen days after the mailing of the notice of the agency's order." R.C. 119.12. "The fifteen-day appeal period provided in R.C. 119.12 does not commence to run until the agency whose order is being appealed fully complies with the procedural requirements set forth in R.C. 119.09." *Sun Refining & Marketing Co. v. Brennan* (1987), 31 Ohio St.3d 306, syllabus. Strict compliance with the procedural requirements in R.C. 119.09 is necessary for the R.C. 119.12 appeal period to commence. *Hughes v. Ohio Dept. of Commerce*, 114 Ohio St.3d 47, 2007-Ohio-2877, paragraph one of the syllabus (*Sun Refining* followed).

{¶16} Because R.C. Chapter 119 does not define "certified copy," the Supreme Court in *Hughes* turned to Black's Law Dictionary (8th ed.2004), which defined it as "[a] duplicate of an original (usu. official) document, certified as an exact reproduction usu. by the officer responsible for issuing or keeping the original." *Hughes* at ¶14. The court

concluded, "[b]ecause the removal order served on Hughes [did] not contain a signed statement that it [was] a true and exact reproduction of the original document, the agency failed to comply with R.C. 119.09." Id. at ¶15. By contrast, the adjudication order mailed to appellant contains a certification, signed by the superintendent of the commission, stating the document is a true and exact reproduction of the original adjudication order the commission entered on its journal on October 7, 2009.

{¶17} Appellant contests such a conclusion, pointing to various data included in the letter to him that, he contends, are extraneous to the adjudication order and preclude it from complying with R.C. 119.09. Appellant initially notes the commission did not discuss the effective date of revocation at its October 7, 2009 meeting but included the effective date of his license revocation in the order mailed to him. Appellant similarly claims the October 14, 2009 date at the top of the letter, plus the certified mailing numbers following the R.C. 4735.051(G) required notice, preclude the document from being a certified copy because such extra information would not have been present on the copy of the order entered on the commission's journal.

{¶18} Contrary to appellant's argument, the effective date of revocation necessarily is included in the order. Its not being discussed at the October 7 meeting does not mean it was not entered in the commission's journal. Similarly, although the correspondence to appellant included the letter's October 14, 2009 date, appellant's name and address, and the certified mailing numbers, all such information that preceded or followed the adjudication order, was not represented to be part of the certified copy of the order. Accordingly, they do not affect whether the correspondence mailed to appellant meets the requirements of R.C. 119.09.

{¶19} Indeed, appellant points to no authority, and we find none, even suggesting such information, typically included in correspondence, affects the body or substance of the order and prevents the document from being the certified copy of the order called for under R.C. 119.09. Cf. *Drago v. Ohio Dept. of MRDD*, 10th Dist. No. 07AP-838, 2008-Ohio-768, ¶9 (noting the R.C. 119.09 notice, which states the time and method for perfecting an appeal from an agency order, may either be included in the order or in a separate cover letter). The adjudication order sent to appellant was a certified copy that complied with the procedural requirements of R.C. 119.09. Pursuant to *Hughes* and *Sun Refining*, the appeal period properly commenced.

B. Approval of the Report and Recommendation

{¶20} Appellant alleges internal inconsistencies in the adjudication order demonstrate the commission failed to comply with R.C. 119.09 in that the commission failed to approve, modify or disapprove the hearing examiner's report and recommendation. Appellant asserts the commission did not specify what portion of the allegations in the first paragraph of the Schedule A, attached to his notice, it was adopting. Appellant's contentions suffer two deficiencies.

{¶21} Initially, appellant contends the statutory provision that requires the agency to adopt, modify or disapprove the hearing officer's report and recommendation is a procedural requirement of R.C. 119.09 and a condition precedent to the commencement of the appeal period. See *Sun Refining* at 308 (stating the "procedural requirements of R.C. 119.09 [are] a condition precedent to the running of the fifteen day appeal period"); *Hughes* at paragraph one of the syllabus (stating the "administrative agency must strictly comply with the procedural requirements of R.C. 119.09 *for serving*

the final order of adjudication upon the party affected by it before the 15-day appeal period prescribed in R.C. 119.12 commences") (emphasis added). Appellant's contention, however, arguably is more substantive than procedural, as it challenges the content of the commission's order.

{¶22} More significantly, whether the statutory requirement is procedural or substantive, the commission complied with it when the commission properly adopted the hearing officer's report and recommendation. The adjudication order expressly states the commission adopts "the Findings of Fact and Conclusions of Law of the hearing examiner and **Christopher J. Calo** is found to have violated Revised Code 4735.18 as set out in paragraphs 1 and 2 in the Schedule A of the Notification of Formal Hearing." (Emphasis sic.) See R.C. 119.09 (stating the hearing officer's report is not "final until confirmed and approved by the agency as indicated by the order entered on its record of proceedings, and if the agency modifies or disapproves the recommendations of the referee or examiner it shall include in the record of its proceedings the reasons for such modification or disapproval").

{¶23} Secondly, although R.C. 119.09 also requires the agency to adopt, modify or disaffirm the report and recommendation, only the requirements in the last paragraph of R.C. 119.09 that relate to serving the final order of adjudication and providing appeal information affect the appeal period in R.C. 119.12 under the Supreme Court's decisions in *Hughes* and *Sun Refining*. Appellant has not directed our attention to any case, nor have we found any, holding that the other requirements in R.C. 119.09 are procedural prerequisites to trigger the 15-day appeal period. Appellant's contentions about whether the commission technically was consistent in adopting, modifying or

disapproving the report and recommendation thus are irrelevant to whether the 15-day appeal period commenced.

C. Time and Method for Appeal

{¶24} Appellant alleges the appeal period on his case has not commenced because the commission failed to adequately notify him of the time and method for perfecting his appeal. R.C. 119.09 requires the agency to serve on the affected party "a statement of the time and method by which an appeal may be perfected." Compliance with that statutory provision is a procedural prerequisite to triggering the 15-day appeal period. *Hughes* at paragraph one of the syllabus.

{¶25} The statement in the commission's order, titled "Time and Method to Perfect an Appeal," states that "[a]ny party desiring to appeal shall file a Notice of Appeal with the Ohio Division of Real Estate at 77 South High Street 20th Floor, Columbus, Ohio 43215-6133 setting forth the order appealed from and the grounds of the party's appeal." (C.R. 6.) According to the statement, "[a] copy of such Notice of Appeal shall be filed by the appellant with the appropriate Court of Common Pleas." (C.R. 6.) In terms of the time for filing, the statement also advises "[s]uch Notices of Appeal shall be filed within fifteen (15) days after the mailing of the Notice of the Ohio Real Estate Commission's Order as provided in Section 119.12 of the Ohio Revised Code." (C.R. 6.)

{¶26} *Hughes* deemed the statement sufficient when the "agency's description of Hughes's appeal rights track[ed] the language" of R.C. 119.12. Id. at ¶17. Similarly, here, the commission's notice tracks the language in R.C. 119.12 regarding appeal procedure so as to comply with *Hughes*. Appellant nonetheless asserts the commission's statement

is deficient because it does not advise appellant he must file the "original" notice of appeal with the division.

{¶27} H.B. 215 recently amended R.C. 119.12 which now expressly states that "[i]n filing a notice of appeal with the agency or court, the notice that is filed may be either the original notice or a copy of the original notice." H.B. 215's changes are to be applied retrospectively to all appeals filed after May 7, 2009. Because appellant filed his notices of appeal on October 29, 2009, he was not required to file the original notice of appeal with the agency. The commission's statement did not affect appellant's appeal rights.

{¶28} Although appellant also contests what he deems the ambiguous nature of the title the commission ascribed to its adjudication order, his contentions do not detract from the content of the statement that properly advised him of his appellate rights. Appellant further contends the entire statement is ambiguous because it fails explicitly to direct appellant to examine R.C. 119.12 for the method for perfecting an appeal. Contrary to appellant's contentions, the last sentence of the statement instructs appellant to file the notice of appeal within 15 days after the order was mailed, as provided in R.C. 119.12. "[A]ppellant cannot claim that the generality of such notice was misleading or ambiguous given the direct citation to R.C. 119.12." *G&D, Inc. v. Ohio State Liquor Control Comm.*, 10th Dist. No. 01AP-1189, 2002-Ohio-2806, ¶12. Cf. *Robinson v. Richter*, 10th Dist. No. 03AP-979, 2004-Ohio-2716, ¶8, 10.

{¶29} R.C. 119.09 requires the statement to inform the affected party of the time and method for appeal. Here, the statement informed appellant he had 15 days after the mailing of the order to file an appeal. It further instructed him to file notices of appeal with

the division and with the appropriate court of common pleas. The commission adequately informed appellant of the time and method to perfect an appeal.

D. Two Hearing Officers

{¶30} Appellant contends the commission failed to comply with R.C. 119.09 when it used one hearing officer to preside over the hearing and another hearing officer to write the report. Appellant's argument assumes using a single hearing officer is a procedural requirement of R.C. 119.09, and the failure to comply with such requirement suspends the 15-day appeal period in R.C. 119.12.

{¶31} Appellant's argument runs afoul of *Hughes* and *Sun Refining*, as they require compliance only with the procedural requirements in the last paragraph of R.C. 119.09 that relate to serving the affected party with a certified copy of the order and informing the party of the time and method by which to perfect an appeal. Appellant fails to suggest how using two hearing examiners touches on either procedural requirement in R.C. 119.09. Accordingly, appellant's argument regarding the use of two hearing examiners is irrelevant to determining whether the 15-day appeal period in R.C. 119.12 commenced. Rather, appellant's argument raises a substantive due process issue to be addressed in the event appellant timely perfected an appeal. See, e.g., *Laughlin v. Pub. Util. Comm.* (1966), 6 Ohio St.2d 110, 112 (concluding that even though one attorney examiner presided over a hearing before the public utilities commission and another issued the report and recommendation, the procedure did not deprive the appellant of due process rights as "[i]t [was] not essential that a person who prepares findings and recommendations in an administrative proceeding hears the evidence, if he reviews and examines the record of the proceeding").

{¶32} Accordingly, the commission properly served appellant with a certified copy of the order revoking appellant's license and properly notified appellant of the time and method for perfecting an appeal, thus complying with the procedural requirements in R.C. 119.09. The 15-day appeal period commenced on October 14, 2009 when the commission mailed appellant a certified copy of the adjudication order. Appellant's first assignment of error is overruled.

V. Jurisdiction of the Common Pleas Court

{¶33} Appellant's second assignment of error contends the common pleas court erred in dismissing his appeal for lack of subject matter jurisdiction because the provisions of R.C. 119.12 relating to where an appeal must be filed address venue, not jurisdiction.

{¶34} Absent some constitutional or statutory authority, a party has no inherent right to appeal from an order of an administrative agency. *Perry Twp. Bd. of Trustees v. Franklin Cty. Bd. of Zoning Appeals* (1983), 10 Ohio App.3d 103, 104. Appellant claims the Ohio Constitution grants the Franklin County Court of Common Pleas jurisdiction over his appeal. Section 4(B), Article IV, Ohio Constitution, however, specifically states the courts of common pleas have jurisdiction "and such powers of review of proceedings of administrative officers and agencies as may be provided by law." R.C. 4735.19, in turn, provides a real estate "licensee * * * dissatisfied with an order of the commission may appeal in accordance with Chapter 119. of the Revised Code." The law governing appellant's appeal is R.C. 119.12.

{¶35} The first paragraph of R.C. 119.12 provides that a "party adversely affected" by an adjudication order of an agency "revoking or suspending a license" may

appeal to the common pleas court "of the county in which the place of business of the licensee is located or the county in which the licensee is a resident." See *BP Exploration & Oil, Inc. v. Ohio Dept. of Commerce*, 10th Dist. No. 04AP-619, 2005-Ohio-1533, ¶25 (noting "may appeal" references "the option of an aggrieved party to initiate an appeal" and does not suggest an option as to the proper forum for an appeal); *Davis v. State Personnel Bd. of Review* (1980), 64 Ohio St.2d 102. When a statute confers the right to appeal, the statutory provisions solely govern perfecting such an appeal. *Hansford v. Steinbacher* (1987), 33 Ohio St.3d 72. Under the plain language of R.C. 119.12, appellant was required to perfect his appeal in the common pleas court in Cuyahoga County, the county of his residence and business.

{¶36} Appellant, however, claims the Supreme Court in *Davis* held the common pleas court in Franklin County has exclusive jurisdiction over the appeals of parties adversely affected by an agency order. (Appellant's brief, 16.) *Davis* concluded the general forum provision contained in the second paragraph of R.C. 119.12, which states "[a]ny party adversely affected by any order of an agency issued pursuant to any other adjudication may appeal to the court of common pleas of Franklin County," does not apply where a more specific forum provision such as R.C. 123.34 applies. Id. at 105; see also *BP Exploration* at ¶40-41. If we apply the rational of *Davis,* then appellant's appeal of his license revocation falls squarely within the specific language of the first paragraph of R.C. 119.12, rendering him ineligible to use the appeal provisions in the second paragraph of R.C. 119.12 that apply to "any other adjudication."

{¶37} Appellant contends that, even if that be so, the issue is one of venue, not jurisdiction. Relying on *Mays v. Kroger Co.* (1998), 129 Ohio App.3d 159, 164, appellant

claims the common pleas court should have transferred his case rather than dismissed it. *Mays* does not address the issue before us. *Mays* dealt with the provisions of R.C. 4123.512 that specified an appeal of an Industrial Commission decision resolving a claim allowance is begun by filing a complaint that initiates a de novo proceeding in the common pleas court. The statute stated that "[i]f no common pleas court has jurisdiction for the purposes of an appeal by the use of the jurisdictional requirements described in this division, the appellant may use the venue provisions in the Rules of Civil Procedure to vest jurisdiction in a court." Id. at 162. The statute further allowed an action commenced in the court of a county lacking jurisdiction to be transferred "to a court of a county having jurisdiction." Id. Given such statutory language, the appellate court concluded " 'the jurisdictional provisions of [R.C. 4123.512] are properly regarded as venue provisions.' " Id. at 163, quoting *Shondel v. Am. Ship Bldg. Co.* (Sept. 4, 1991), 9th Dist. No. 90CA004939.

{¶38} By contrast, no provision in R.C. 119.12 permits a common pleas court to transfer, rather than dismiss, a case filed in the incorrect county. Appellant seeks to appeal an administrative agency order under the provisions of R.C. 119.12. His rights are as set forth in the statute, and he must comply with the terms of the statute to perfect his appeal, including the county where the appeal is filed. *Hughes* at ¶17 (noting "[j]ust as we require an agency to strictly comply with the requirements of R.C. 119.09, a party adversely affected by an agency decision must likewise strictly comply with R.C. 119.12 in order to perfect an appeal").

{¶39} R.C. 119.12 required appellant to appeal to the common pleas court in the county of his residence or the county where his business was located, both of which are

Cuyahoga County. Because appellant failed to comply with R.C. 119.12 to perfect his appeal, the Franklin County Court of Common Pleas properly concluded it lacked subject matter jurisdiction. Appellant's second assignment of error is overruled.

VI. Motion to Stay

{¶40} Appellant's third assignment of error maintains the common pleas court abused its discretion when it denied his motion to stay the commission's order. Under the circumstances of this case, including the deficiencies in appellant's appeal, the propriety of the common pleas court's decision to deny appellant's request for a stay is moot. *G&D, Inc. v. Ohio State Liquor Control Comm.*, 3d Dist. No. 3-02-04, 2002-Ohio-4407, ¶13. Appellant's third assignment of error is overruled.

{¶41} Having overruled appellant's first and second assignments of error, rendering his third assignment of error moot, we affirm the judgment of the Franklin County Court of Common Pleas dismissing appellant's appeal for lack of subject matter jurisdiction.

Judgment affirmed.

SADLER and TYACK, JJ., concur.

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