

[Cite as *Huth v. Bolivar*, 2014-Ohio-4889.]

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IRVIN W. HUTH

Plaintiff-Appellant

-vs-

VILLAGE OF BOLIVAR, ET AL.

Defendants-Appellees

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. Sheila G. Farmer, J.

Hon. Patricia A. Delaney, J.

Case No. 2014 AP 02 0005

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Tuscarwas County Court of
Common Pleas, Case No. 2013CV070569

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

October 29, 2014

APPEARANCES:

For Plaintiff-Appellant

For Defendants-Appellees
Village of Bolivar

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Hoffman, P.J.

{¶1} Plaintiff-appellant Irvin W. Huth appeals the January 14, 2014 Judgment Entry entered by the Tuscarawas County Court of Common Pleas, which denied his motion for a temporary restraining order and preliminary injunction, and dismissed the action with prejudice. Defendants-appellees are the Village of Bolivar, et al.

STATEMENT OF THE FACTS AND CASE

{¶2} On April 2, 2012, Appellee Village Council for Appellee Village of Bolivar conducted its regularly scheduled meeting at the Bolivar Village Hall. Times Reporter Barb Limbacher was present at the meeting. Council heard a first reading of Ordinance O-31-2012 (“the Ordinance”), an ordinance to declare the Burfield property unnecessary for any village purpose and to authorize the sale of said property. Council also heard an oral resolution to authorize the surveying of the Burfield property. Following a vote, council unanimously passed the survey ordinance.

{¶3} Upon conclusion of the hearing, Appellee Mayor Rebecca Hubble asked Limbacher to place a notice in the newspaper announcing a special session of the Council on April 16, 2012. The purpose of the special session was to discuss personnel issues as well as to have a second reading of the Ordinance. The Times Reporter published a notice of the special session in its April 14, 2012 edition, which read:

BOLIVAR Council, special meeting, 6 p.m., village hall; second reading of ordinance to have Burfield farm property surveyed and discussion of personnel issues.

{¶4} The notice was obviously incorrect, but the error was not caught prior to the special session. Council conducted the special session on April 16, 2012. During

the open session of the meeting, Council heard a second reading by title only of the Ordinance. Council adjourned to executive session to discuss unrelated personnel issues.

{¶15} Council conducted its next regularly scheduled monthly session on May 7, 2012. Council heard a third reading of the Ordinance. A vote was taken and the Ordinance passed unanimously. Thereafter, notice of the sale of the Burfield property was published in the Times Reporter for five consecutive weeks.

{¶16} Bolivar Properties, Ltd. was the only bidder for the property. At the regularly scheduled monthly session on August 6, 2012, Council passed Emergency Ordinance O-38-2012, an ordinance which authorized the Village to enter into a contract for the sale of the Burfield property. On November 5, 2012, the Village and Appellee Lake Region Development, LLC (“LRD”), Bolivar Properties’ assignee, signed a development agreement. The transfer of the property was recorded on December 21, 2012.

{¶17} At some point, Appellant requested a copy of Ordinance O-31-2012. The copy of the Ordinance Appellant received was titled: “An Ordinance to Declare the Burfield Property Unnecessary for Any Village Purpose and to Authorize the Sale of Said Property; Establishing an Emergency”. The version of Ordinance No. O-31-2012 which was read at the April 2, and 16, 2012 Council meeting did not contain the “Establishing an Emergency” language. Minutes of the May 7, 2012 meeting have not been located.

{¶18} On July 26, 2013, Appellant filed a motion for a temporary restraining order and request for preliminary injunction, seeking to bar Appellees Village of Bolivar,

its mayor, and council members from any and all actions contemplated, adopted, and/or implemented as a result of Appellees' violation of R.C. 121.22(F).

{¶9} On August 2, 2013, Appellees filed a memorandum in response as well as a motion to dismiss. On August 5, 2013, LRD filed a motion to intervene, claiming intervention was necessary because LRD was the owner of the Burfield property, which was the subject of Appellant's action. LRD asserted its interests could not be protected by the existing parties. LRD also filed a memorandum in opposition to Appellant's motion for temporary restraining order and preliminary injunction, and a motion to dismiss.

{¶10} On August 9, 2013, Appellant filed a reply to Appellees' response. Appellees filed a response to Appellant's reply. Appellant subsequently filed a motion to strike Appellees' response to his reply; a motion for leave to file a response to Appellees' response to Appellant's reply; and a motion to strike LRD's memorandum in opposition to his motion for temporary restraining order and preliminary injunction as well as a motion to strike LRD's motion to dismiss. Other replies and responses were filed.

{¶11} Via Judgment Entry filed January 14, 2014, the trial court 1) granted LRD's motion to intervene as a matter of right; 2) denied Appellant's motion to strike LRD's memorandum in opposition to Appellant's motion for temporary restraining order and preliminary injunction as well as Appellant's motion to strike LRD's motion to dismiss; and 3) denied Appellant's motion for temporary restraining order and preliminary injunction. With respect to the denial of the temporary restraining order and preliminary injunction, the trial court found "no indication or evidence that the Village of

Bolivar violated R.C. 121.22(F)”; “the evidence suggests that the Village of Bolivar gave the Times Reporter proper notice of the special session to be held on April 16, 2012”; and “[Appellant] has not otherwise shown that he is entitled to a temporary restraining order or a preliminary injunction as requested.” The trial court dismissed Appellant’s action with prejudice to refiling.

{¶12} It is from the January 14, 2014 Judgment Entry Appellant appeals, assigning as error:

{¶13} "I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND ABUSED ITS DISCRETION WHEN IT GRANTED NON-PARTY LAKE REGION DEVELOPMENT, LLC'S MOTION TO INTERVENE.

{¶14} "II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND ABUSED ITS DISCRETION WHEN IT DENIED PLAINTIFF'S MOTION TO STRIKE NON-PARTY LAKE REGION DEVELOPMENT'S OPPOSITION TO PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION AND MOTION TO STRIKE SAME PARTY'S MOTION TO DISMISS.

{¶15} "III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND ABUSED ITS DISCRETION WHEN IT FOUND 'NO INDICATION OR EVIDENCE THAT THE VILLAGE OF BOLIVAR VIOLATED R.C. 121.22(F).'

{¶16} "IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND ABUSED ITS DISCRETION WHEN IT FOUND 'THAT THE EVIDENCE SUGGESTS THAT THE VILLAGE OF BOLIVAR GAVE THE TIMES REPORTER PROPER NOTICE OF THE SPECIAL SESSION TO BE HELD ON APRIL 16, 2012; HOWEVER THE

TIMES REPORTER MADE AN ERROR IN MISPRINTING THE PURPOSE OF THE MEETING.'

{¶17} "V. THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND ABUSED ITS DISCRETION WHEN IT FOUND 'THAT PLAINTIFF HAS NOT OTHERWISE SHOWN THAT HE IS ENTITLED TO A TEMPORARY RESTRAINING ORDER OR A PRELIMINARY INJUNCTION AS REQUESTED BY PLAINTIFF.'

{¶18} "VI. THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND ABUSED ITS DISCRETION WHEN IT DENIED PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION.

{¶19} "VII. THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND ABUSED ITS DISCRETION WHEN IT DISMISSED WITH PREJUDICE TO RE-FILING, PLAINTIFF'S CLAIMS."

{¶20} In his Motion for Temporary Restraining Order and Preliminary Injunction, Appellant sought to bar Appellees "as well as their agents, representatives, and assigns, from any and all actions contemplated, adopted and or implemented, as a result of [Appellees'] violation of R.C. 121.22(F)". Likewise, in his Brief to this Court, Appellant states he was "seeking to bar Appellees, the Village of Bolivar, its mayor, and council members * * *, from any and all actions contemplated, adopted, and or implemented as a result of [Appellees'] violation of Ohio Revised Code 121.22(F)." Brief of Appellant at 4. In the Conclusion section of his Brief, Appellant states, "[t]he failure of [Appellees]to follow the notice provisions of the law renders any resolution, rule or formal action adopted at the special meeting invalid." *Id.* at 20.

{¶21} R.C. 121.22(F) provides:

(F) Every public body, by rule, shall establish a reasonable method whereby any person may determine the time and place of all regularly scheduled meetings and the time, place, and purpose of all special meetings. A public body shall not hold a special meeting unless it gives at least twenty-four hours' advance notice to the news media that have requested notification, except in the event of an emergency requiring immediate official action. In the event of an emergency, the member or members calling the meeting shall notify the news media that have requested notification immediately of the time, place, and purpose of the meeting.

The rule shall provide that any person, upon request and payment of a reasonable fee, may obtain reasonable advance notification of all meetings at which any specific type of public business is to be discussed. Provisions for advance notification may include, but are not limited to, mailing the agenda of meetings to all subscribers on a mailing list or mailing notices in self-addressed, stamped envelopes provided by the person.

{¶22} Assuming, arguendo, the notice of the purpose of the April 16, 2012 special meeting violated R.C. 121.22, the Ordinance was not adopted at that meeting. The Ordinance was not adopted until the meeting conducted on May 7, 2012. Both the April 16, 2012, and the May 7, 2012 meetings were open to the public. Thereafter, publication of the offering for sale the Burfield property was made on May 29, 2012, June 5, 2012, June 12, 2012, June 19, 2012, and June 26, 2012. The property was

sold to Bolivar Properties, Ltd., and transferred on December 21, 2012. Under these circumstances, we do not find the April 16, 2012 second reading of the Ordinance constitutes formal action within the meaning of R.C. 121.22(F).

{¶23} Appellant's subsequent attempt to invalidate the sale to Bolivar Properties, Ltd., which is not alleged to be anything other than a bona fide purchaser, comes too late. Appellant clearly had constructive notice of the adoption of the Ordinance on May 7, 2012, through the published notices of sale and the subsequent sale and transfer of the Burfield property. However, he chose not to seek timely injunctive relief. Accordingly, we find Appellant's attempt to invalidate the sale and transfer of the Burfield property is now moot.

{¶24} Appellant's assignments of error are overruled.

{¶25} The judgment of the Tuscarawas County Court of Common Pleas is affirmed.

By: Hoffman, P.J.

Farmer, J. and

Delaney, J. concur