

[Cite as *Hoot v. Pheils*, 2004-Ohio-2999.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Jerald Hoot, Jr., et al.

Court of Appeals No. L-03-1269

Appellants

Trial Court No. CI-2002-02743

v.

Kenneth Pheils, et al.

DECISION AND JUDGMENT ENTRY

Appellees

Decided: June 11, 2004

* * * * *

Rahn M. Huffstutler, for appellants.

David J. Simko, for appellees.

* * * * *

HANDWORK, P.J.

{¶1} This appeal is from the August 28, 2003 judgment of the Lucas County Court of Common Pleas, which dismissed the administrative appeal of appellants, Jerald and Shirley Hoot, for failure to perfect the appeal. Upon consideration of the assignments of error, we affirm the decision of the lower court. Appellants assert the following assignments of error on appeal:

{¶2} “The Lucas County Court of Common Pleas erred in ruling on a matter that was not a final decision of the Spencer Township Board of Zoning Appeals.

{¶3} “The Lucas County Court of Common Pleas erred in ruling on the motion to dismiss where there was no evidence presented by the appellees that there was not filing of the notice of appeal and thus it is against the manifest weight of the evidence.”

{¶4} After carefully reviewing the record, this court finds that the statements of fact and conclusions of law set forth by the trial court in its opinion and judgment entry journalized on August 28, 2003 are an accurate statement of the facts and disposition of the issues raised by appellants. We therefore adopt the trial court's opinion and judgment entry as our own. See Appendix A. Appellants' two assignments of error are found not well-taken.

{¶5} Having found that the trial court did not commit error prejudicial to appellants, the judgment of the Lucas Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellants are hereby ordered to pay the court costs incurred on appeal.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

Peter M. Handwork, P.J.

JUDGE

Richard W. Knepper, J.

JUDGE

Mark L. Pietrykowski, J.
CONCUR.

JUDGE

Appendix A

FILED
LUCAS COUNTY
AUG 27 A 8:34
COMMON PLEAS COURT
BERNIE GUILTER
CLERK OF COURTS

C
THIS IS A FINAL
APPEALABLE ORDER

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

Jerald Hoots, Jr., et al. *
Appellants, * Case No. CI0200202743
vs. * OPINION AND JUDGMENT ENTRY
Kenneth Pheils, et al., * Hon. Charles J. Doneghy
Appellees. *

_____ *

This R.C. Chapter 2506 administrative appeal is before the Court on the Civ.R. 12(B)(1) motion of the appellees to dismiss.¹ Upon review of the pleadings, evidence, memoranda of the parties, and applicable law, the Court finds that it should grant the motion.

On or about November 30, 2001, appellee Kenneth Pheils served two notices of zoning violations on the appellants, Jerald

¹The involvement in this matter of the appellees, Kenneth Pheils (Zoning Inspector of Spencer Township, Ohio), and James Meredith, Keith Miller and Michael Hood (Spencer Township Trustees), arises out of their official duties on behalf of the political sub-division of Spencer Township (the "Township").

JOURNALIZED

AUG 28 2003
Cassette 348
PG. 736 17

Hoot, Jr. and Shirley Hoot, for activities on their real property located in Spencer Township, Ohio. (See Notices of Violation in the record.) One notice ("the auto-salvage violation") indicated that the appellants improperly expanded an automobile salvage yard located on their property. The other notice ("the trucking-business violation") indicated that the appellants were improperly conducting a trucking business on their property. On or about December 11, 2001, the appellants filed an application for appeal with the Township Board of Zoning Appeals ("the Board"). The Board heard the appellants' appeal regarding the two violations on February 28, 2002, and March 28, 2002. (See Minutes of those meetings and transcripts thereof.) On April 25, 2002, the Board formally issued its decision against the appellants as to the auto-salvage violation. The Board notified the appellants and counsel of the decision on that date. The Board held in abeyance the trucking-business violation pending resolution of a separate court case on that issue.

On April 26, 2002, the appellants filed a "NOTICE OF APPEAL" in this Court ("the Court Notice of Appeal"). The appellants attached to and incorporated into the Notice of Appeal several documents: a copy of another "NOTICE OF APPEAL" ("the Board Notice")²; minutes from the March 28, 2002 Board meeting; and

²The Board Notice had the following header at the top of the document: "BEFORE THE SPENCER TOWNSHIP BOARD OF ZONING APPEALS[.]" The certificate of service on the Board Notice indicates that a

JOURNALIZED

AUG 28 2003
Cassette 348
PG. 736

conclusions of fact supporting the Board's decision. The certificate of service of the Court Notice of Appeal reads in pertinent part as follows:

"This is to certify that a copy of the foregoing was served upon Kenneth Pheils [at Township offices] and the Spencer Township Board of Trustees [at Township offices] by ordinary United States First Class Mail, postage prepaid, this 26th day of April, 2002." (Emphasis added.)

In an affidavit, appellants' counsel testified that:

"* * *

"4. I personally filed the Notice of Appeal [the Court Notice of Appeal] with the Court of Common pleas on April 26, 2002 * * *;

"5. I personally mailed a copy of the Notice of Appeals [the Court Notice of Appeal] and Request for a Transcript to 'Secretary, Board of Zoning Appeals [at Township offices] * * *;

"6. I personally proceeded to [Township offices] on the afternoon of April 26, 2002;

"7. I arrived at [Township offices] between the posted hours of 8:00 to 5:00;

"8. I found the doors to the [Township offices] to be locked.

"9. I left a copy of the Notice of Appeal [the Board Notice] with the caption 'BEFORE THE SPENCER TOWNSHIP BOARD OF ZONING APPEALS' and a copy of the Request for a Transcript firmly attached to the door frame on April 26, 2002;

"* * *." (Boldface sic; emphasis added.) (Huffstutler Affid.)

The appellees now seek to dismiss the instant appeal

copy was sent by the appellants to the Board's attorney and an assistant Lucas County prosecutor.

arguing that the Court is without subject matter jurisdiction because the appellants failed to "file" a notice of appeal with the Board as required by R.C. 2505.04.

Pursuant to R.C. 2506.01, the court of common pleas has authority to review "[e]very final order, adjudication or decision of any * * * board * * * or other division of any political subdivision of the state * * * as provided in Chapter 2505." Valley Rd. Properties v. Cleveland (2001), 141 Ohio App.3d 418, 419, 751 N.E.2d 532. R.C. 2505.04 governs the procedure for perfecting an appeal of a zoning appeals board decision. *Id.* at 420. That section reads in relevant part as follows:

"An appeal is perfected when a written notice of appeal is filed, * * * in the case of an administrative-related appeal, with the administrative officer, agency, board, department, tribunal, commission, or other instrumentality involved." (Emphasis added.)

Ohio courts have interpreted this language as clearly and succinctly requiring that the notice of appeal of a zoning appeals board decision be filed with that zoning board, as opposed to the court appealed to. See Guysinger v. Chillicothe Bd. of Zoning Appeals (1990), 66 Ohio App.3d 353, 357, 584 N.E.2d 48. In Zier v. Bureau of Unemp. Comp. (1949), 151 Ohio St. 123, 84 N.E.2d 746, the court held:

"An appeal, the right to which is conferred by statute, can be perfected only in the mode prescribed by statute. The exercise of the right conferred is conditioned upon compliance with the accompanying mandatory requirements." *Id.* at paragraph one of the syllabus.

JOURNALIZED

AUG 28 2003
Cassette 348
PG. 736

The court reasoned as follows:

"No one would contend that a notice of appeal need not be filed within the time fixed by statute. Compliance with a requirement that a notice of appeal shall be filed within the time specified, in order to invoke jurisdiction, is no more essential than that the notice be filed at the place designated and that it be such in content as the statute requires." (Emphasis added.) Id. at 125, 84 N.E.2d 746.

"Literal compliance with appeal provisions [of R.C. 2505.04] must be observed or the reviewing court will be without jurisdiction to entertain the appeal. * * *. These provisions are mandatory, and a court does not have the authority to adopt a substantial compliance test and/or a mailbox depository rule as to the filing of an administrative appeal." (Citation omitted; emphasis added.) Chapman v. Housing Appeals Bd. (Aug. 13, 1977), 9th Dist. No. 18166, 1997 WL 537651, *3. Thus, an appellant must file a notice of appeal with a zoning appeals board instead of serving a copy of the notice filed in the common pleas court. See Trickett v. Randolph Twp. Bd. of Zoning Appeals (Aug. 18, 1995), 11th Dist. No. 94-P-0007, 1995 Ohio App. Lexis 3394, *5-6 (service of a notice of appeal with the zoning appeals board is not the equivalent of filing).

The appellants argue that they complied with the requirements of R.C. 2505.04 by "mail[ing] a copy of the Notice of Appeal [the Court Notice of Appeal]" to the "Secretary" of the Board at the Board's and the Township's offices and by "leav[ing] a copy [of the Board Notice] firmly attached to the door frame" of

those offices. (Emphasis added; Huffstutler Affid. paras.5, 9.) However, mailing to a zoning appeals board a copy of a notice of appeal that was filed in the common pleas court is insufficient and fails to establish jurisdiction over the appeal in the common pleas court. Valley Rd. Properties v. Cleveland, 141 Ohio App.3d at 420, 751 N.E.2d 532. Similarly, serving a copy of a notice of appeal on the secretary, chair, or counsel of a zoning appeals board is out of conformity with the statutory requirement of "filing," Young Israel of Beachwood v. Beachwood (2000), 138 Ohio App.3d 89, 91, 740 N.E.2d 349, as is merely "leaving" a notice of appeal with the township, Trickett v. Randolph Twp. Bd. of Zoning Appeals, supra, 1995 Ohio App. Lexis 3394, *5.

Based on the foregoing, the Court finds that the appellants failed to properly perfect the instant appeal, and the Court is without jurisdiction to entertain the appeal. Accordingly, the Court will grant the appellees' motion to dismiss.

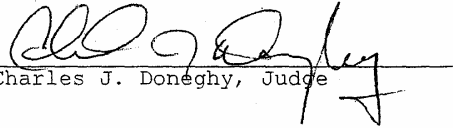
JOURNALIZED

AUG 28 2003
Cassette 348
PG. 736

JUDGMENT ENTRY

It is ORDERED that the motion to dismiss filed by the appellees plaintiff is granted. It is further ORDERED that this appeal is dismissed with prejudice. The Court finds no just reason for delay.

July 23, 2003


Charles J. Doneghy, Judge

pc. Rahn Huffstutler
David J. Simko
Julia R. Bates/Jeffrey Johnston

JOURNALIZED

AUG 28 2003
Cassette 348
PG. 736