

[Cite as *Shaker Hts. v. Liberty Title Ins. Agency, Inc.*, 2004-Ohio-2396.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
No. 83373

CITY OF SHAKER HEIGHTS,	:	
Plaintiff-Appellee	:	JOURNAL ENTRY
vs.	:	AND
LIBERTY TITLE INSURANCE	:	OPINION
AGENCY INC.,	:	
Defendant-Appellant	:	
	:	
DATE OF ANNOUNCEMENT		MAY 13, 2004
OF DECISION	:	
	:	
CHARACTER OF PROCEEDING	:	Criminal appeal from
	:	Shaker Heights Municipal
	:	Court
	:	Case No. 03-CRB-177
JUDGMENT	:	VACATED AND REMANDED FOR
	:	DISMISSAL
DATE OF JOURNALIZATION	:	
APPEARANCES:		
For Plaintiff-Appellee:		MARGARET ANNE CANNON
		Director of Law
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		Shaker Heights, Ohio 44120

For Defendant-Appellant: THOMAS N. MICHAELS
 4204 Detroit Avenue #204
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ANNE L. KILBANE, J.

{¶1} Liberty Title Insurance Agency, Inc. ("Liberty"), appeals from an order of Acting Shaker Heights Municipal Court Judge Daniel L. Lovinger, who found it guilty of a first degree misdemeanor for facilitating a real estate title transfer without first ensuring that point-of-sale violations had been repaired, or for failing to place funds in escrow to ensure their repair. It claims the conviction should be overturned because the City of Shaker Heights ("Shaker") failed to provide sufficient evidence that it was involved in the transaction, and also failed to prove a required mens rea element of the crime. Because Shaker lacked the territorial jurisdiction to charge Liberty with such an offense, we vacate the conviction and order that the complaint be dismissed.

{¶2} On August 6, 2002, Shaker's Housing Department made a point-of-sale inspection of a two-family home at 3372 Colwyn Road.

It is unclear whether the property was owned by Clara Clemens or Annie Perkins Lane, who acted on her behalf through a purported power of attorney. Ms. Lane was informed that a number of violations needed to be corrected and that the property could not

be sold until all repairs were made or funds were put in an escrow account to ensure their repair.¹

{¶3} Although there are no documents evidencing any transfer of title, it appears that, on August 21, 2002, the property was transferred/sold to Yelena Mayzel, who then transferred title to L.A. Property Management two days later. At some point Shaker learned the property had been sold, but the violations had not been corrected and no escrow account had been established. In February 2003, Shaker filed a complaint against Liberty, alleging a violation of Shaker Heights Cod.Ord. 1415.08, which states:

No person, firm or corporation acting in the capacity of an escrow agent in any real estate transaction, shall transfer title, file any instrument to transfer title, or disburse funds from any sale unless the provisions of this chapter have been satisfied, including but not limited to the specific provisions of Section 1415.05.

{¶4} Shaker claimed that Liberty had acted as escrow agent in the transactions between Clemens/Lane, Mayzel and L.A. Property Management, and that it failed to ensure that housing violations had been corrected or that funds were placed in escrow. Judge K.

¹Shaker Heights Cod.Ord. 1415.05(d) requires an escrow account containing 150% of the cost of estimated repairs if a property is to be sold without a certificate of compliance showing that the violations have been corrected.

J. Montgomery appointed Daniel L. Lovinger to serve as Acting Judge,² and a bench trial was held on May 27, 2003.³

{¶5} Keith Williams, Shaker's Assistant Director of Housing, testified that he learned of Liberty's involvement from real estate agents involved in the sale but, as noted, no records of either transaction were introduced and, when called upon to testify, real estate agent Vladimir Khutoryan asserted his privilege against self-incrimination. Ms. Mayzel testified that Khutoryan acted as the real estate agent, and that he had given her notice of the violations prior to the sale. She also testified that Liberty acted as the escrow agent, and that she made payments to Liberty when she bought the property.

{¶6} At the close of Shaker's case, Liberty moved for directed verdict and argued that the judge lacked territorial jurisdiction because any actions it took occurred in its Cleveland offices and, therefore, it did not commit an offense within Shaker Heights. It also argued that the ordinance required a mens rea of recklessness, and that Shaker had failed to show that it was reckless in

²R.C. 1901.10.

³Although the order appointing Lovinger literally states that he is to serve only on May 27, 2003, his status as Acting Judge has not been challenged, and it reasonably appears that the order was intended to appoint him as Acting Judge for both the hearing and decision of the case. In the absence of any challenge, the appointment gave him adequate color of authority to decide the case. *Huffman v. Shaffer* (1984), 13 Ohio App.3d 291, 292, 13 OBR 356, 469 N.E.2d 566.

transferring title or disbursing funds without first ensuring that the housing violations had been corrected or that repair funds had been placed in escrow.

{¶7} On August 18, 2003, the judge found Liberty guilty and imposed a fine of \$1,000. It moved for a stay of judgment pending appeal⁴ and asserts two assignments of error, which are included in an appendix to this opinion.

{¶8} Before addressing these issues, however, we must face a jurisdictional question. In *Cleveland Hts. v. Midland Title Sec., Inc.*,⁵ we held that a municipality could not enforce a similar ordinance against a non-resident escrow agent, at least when the transfer of title and disbursement of funds took place outside that municipality. Although not an assignment of error, the issue of territorial criminal jurisdiction under R.C. 1901.20 is part of the municipal court's subject matter jurisdiction, and cannot be waived.⁶ Therefore, unless we determine that *Cleveland Hts. v.*

⁴Although there is no record showing a ruling on the motion, we find that Liberty has adequately shown a continuing controversy because it moved for a stay and there is no evidence showing that it paid the fine. Cf. *Cleveland v. Martin*, Cuyahoga App. No. 79896, 2002-Ohio-1652 (voluntary satisfaction of misdemeanor sentence can render appeal moot).

⁵(Feb. 14, 1980), Cuyahoga App. No. 40500.

⁶*Rose v. Mays* (Nov. 1, 1995), Montgomery App. No. CA 15084, citing *Thomas v. Holiday Inn of Lima* (1992), 62 Ohio Misc.2d 487, 489-491, 601 N.E.2d 688.

Midland Title Sec., Inc., supra, is inapplicable or should not be followed, the complaint must be dismissed for lack of jurisdiction.

{¶9} When Liberty challenged the judge's territorial jurisdiction in its motion for directed verdict, Shaker countered that the property's location provided a sufficient nexus to find that Liberty's acts occurred in the city. We agree that, for some parties, the act or failure to act with respect to housing violations must be presumed to have occurred within the city, lest enforcement become impossible. However, such acts do not extend to non-resident escrow agents.

{¶10} Shaker Heights Cod.Ord. 1415.05 requires the seller to obtain the certificate of inspection, the certificate of compliance, and to make any required escrow deposit. These acts can be held to occur within the city of Shaker Heights and, because ownership of property can also be considered an "act" that occurs within the city limits, a seller can also be held responsible for the failure to act with respect to the property.

{¶11} An escrow agent, however, is not charged with any duty to obtain an inspection, correct violations, or place funds in escrow, and its connection to the property is limited to its participation in the transaction of sale. However, Shaker Heights Cod.Ord. 1415.08 purports to criminalize an agent's act of title transfer or disbursement of funds if violations have not been corrected or funds have not been placed in escrow. If the agent is a non-

resident, the purported criminal acts of fund disbursement or title transfer may occur outside the municipality and, if so, the municipality does not have territorial jurisdiction to prosecute.

{¶12} We reiterate that our decision here does not prevent a municipality from enforcing housing inspection ordinances against a seller or the seller's agent, because the duties to obtain an inspection, correct violations, and notify purchasers can be held to occur in the city. However, even though a housing code enforcement scheme might be more efficient when provisions like Shaker Heights Cod.Ord. 1415.08 are broadly interpreted, a municipality does not have jurisdiction to hold an escrow agent criminally liable for the seller's failures if the agent's acts do not occur in the city. Shaker failed to prove that Liberty disbursed funds or transferred title within Shaker Heights and, therefore, it failed to show jurisdiction over the alleged crime.

{¶13} Because Shaker lacked territorial jurisdiction, Liberty's assignments of error are moot.⁷ The judge shall dismiss the complaint.

Judgment vacated and case remanded.

TIMOTHY E. McMONAGLE, J., concurs.

MICHAEL J. CORRIGAN, A.J., CONCURS IN JUDGMENT ONLY IN PART AND DISSENTS IN PART (See separate Concurring and Dissenting Opinion).

⁷App.R. 12(A)(1)(c).

MICHAEL J. CORRIGAN, A.J., CONCURRING IN JUDGMENT ONLY IN PART AND DISSENTING IN PART.

{¶14} I agree with the majority that this appeal should be vacated, but on grounds that the judge who signed the judgment lacked authority to do so because the term of his appointment expired and thus the judgment was void.

{¶15} In *Vergon v. Vergon* (1993), 87 Ohio App.3d 639, 642, this court stated, "the term of a common pleas judge is set for a fixed amount of time and, once that time expires, the judge is without authority to act in an official capacity. There is no such thing as holding over. For every purpose, the judge goes out at the expiration of the fixed term. 'No power remains in his hands beyond the one term by reason of the authority given.'", citing *State ex rel. Belford v. Hueston* (1886), 44 Ohio St. 1, 9.

{¶16} R.C. 1901.10(A)(2) provides that if a judge of a municipal court that has only one judge is temporarily absent, incapacitated, or otherwise unavailable, the judge may appoint a substitute. The statute states:

{¶17} "The appointee shall serve during the absence, incapacity, or unavailability of the incumbent, shall have the jurisdiction and powers conferred upon the judge of the municipal court, and shall be styled acting judge. *During that time of*

service, the acting judge shall sign all process and records and shall perform all acts pertaining to the office, except that of removal and appointment of officers of the court. ***" (Emphasis added.)

{¶18} The sole judge of the Shaker Heights Municipal Court appointed Daniel Lovinger as an acting judge on May 27, 2003. The journal entry memorializing the appointment stated, "Appointment is hereby made of Daniel L. Lovinger, as and for the Judge of this Court for the period beginning May 27, 2003, and ending on May 27, 2003, pursuant to Section 1901.10 Ohio Revised Code."

{¶19} Although the court appointed Judge Lovinger for just one day, Lovinger presided over the case well-beyond that date, ultimately issuing a guilty finding on August 18, 2003. There is nothing in the record to show that the court renewed the appointment after May 27, 2003, nor did the court's entry appointing Lovinger give him jurisdiction over the case beyond the date of the appointment. Because R.C. 1901.10(A)(2) limits the power of the acting judge to the "time of service," which in this case was for one day only, Lovinger could not validly act beyond that one day time of service without an additional appointment.

{¶20} I am aware that there are a number of cases that hold that a judgment entered by an acting municipal judge is not subject to attack by way of appeal and that a failure to object constitutes a waiver of any irregularity in appointment. See *State ex rel.*

Sowell, et al. v. Lovinger (1983), 6 Ohio St.3d 21, 23; *Stiess v. State* (1921), 103 Ohio St. 33, 42-43; *Leach v. Dixon* (1990), 66 Ohio App.3d 757; *Williams v. Banner Buick, Inc.* (1989), 60 Ohio App.3d 128, paragraphs four and five of the syllabus; *Huffman v. Shaffer* (1984), 13 Ohio App.3d 291. However, this is not a case of "procedural irregularity;" it is a case of an acting judge exercising jurisdiction over the matter beyond the specified time of service. As stated in *Vergon*, once the fixed term of the judge expired (whether by statutory term or by limited appointment), "the judge is without authority to act in an official capacity." Absent a valid reappointment present in the record, I believe we must assume that the acting judge lacked authority to render judgment in this case. Absent authority over the matter, the judgment appealed from is void and should be vacated.

APPENDIX - ASSIGNMENTS OF ERROR

"I. THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN OVERRULING APPELLANT'S MOTION FOR ACQUITTAL PURSUANT TO CRIMINAL RULE 29 OF THE OHIO RULES OF CRIMINAL PROCEDURE."

"II. THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY FAILING TO AFFORD APPELLANT THE RIGHT TO BE HEARD PRIOR TO SENTENCING IN ACCORDANCE WITH CRIMINAL RULE 32(A) OF THE OHIO RULES OF CRIMINAL PROCEDURE."

It is ordered that the appellant recover from appellee costs herein taxed.

The Court finds that there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of the Shaker Heights Municipal Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANNE L. KILBANE
JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc. App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E), unless a motion for reconsideration with supporting brief, per App.R. 26(A) is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).