

[Cite as *Namreh, Inc. v. Cleveland*, 2010-Ohio-3185.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93365

NAMREH, INC.

PLAINTIFF-APPELLANT

VS.

CITY OF CLEVELAND

DEFENDANT-APPELLEE

**JUDGMENT:
DISMISSED**

Civil Appeal from the
Cleveland Municipal Court, Housing Division
Case No. 2009 CVG 10671

BEFORE: Rocco, J., Gallagher, A.J., and Blackmon, J.

RELEASED: July 8, 2010

**JOURNALIZED:
ATTORNEYS FOR APPELLANT**

Matthew Gilmartin
Matthew Gilmartin, Attorney at Law, LLC
25300 Lorain Road, Suite 4B
North Olmsted, Ohio 44070

Carol Jackson
3900 Cullen Drive
Cleveland, Ohio 44105

ATTORNEYS FOR APPELLEE

Robert J. Triozzi
Director of Law
City of Cleveland
BY: William H. Armstrong, Jr.
Patricia McGinty Aston
Assistant Directors of Law
601 Lakeside Avenue
Room 106
Cleveland, Ohio 44114-1077

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) 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(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten 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(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

KENNETH A. ROCCO, J.:

{¶ 1} Plaintiff-appellant Namreh, Inc., owner of an apartment building, appeals from the order of the Cleveland Municipal Court, Housing Division, that adopted the magistrate’s decision and recommendation in this case, viz., that the court deny Namreh’s “motion for a temporary restraining order and injunctive relief” and, instead, issue to the defendant-appellee the City of Cleveland an administrative search warrant (“ASW”) for Namreh’s premises.

{¶ 2} Namreh presents two assignments of error. It first argues that the municipal court incorrectly concluded the city presented probable cause to issue the warrant. Namreh further argues that the municipal court’s order must be reversed because Namreh was not afforded “a constitutionally adequate procedure” to contest the warrant.

{¶ 3} Upon a review of the record in this case,¹ this court dismisses this appeal on the basis that the decision Namreh challenges does not constitute a final appealable order.

{¶ 4} According to the record, Namreh filed in the municipal court a “motion to quash” the issuance of an ASW of its premises; the city had informed Namreh of its intent to obtain an ASW in May 2009. The municipal court assigned the matter to a magistrate, who scheduled a probable cause hearing for

¹The record consists of the original papers, a partial transcript with exhibits and a statement approved by the municipal court pursuant to App.R. 9(C).

the ASW to be held together with a hearing on Namreh’s motion.

{¶ 5} By the time of the magistrate’s hearing on May 19, 2009, Namreh had filed a “complaint for injunctive and other relief,” in which it sought a temporary restraining order (TRO) against the city.² In pertinent part, Namreh alleged that the city sought the warrant without probable cause, and asked the municipal court for an order denying the city’s request for an ASW.

{¶ 6} Namreh stipulated at the outset of the hearing that “the relief asked for in the [TRO] motion [wa]s the same as asked for in the motion to quash.” Once this stipulation had been made, the magistrate proceeded with the hearing.

{¶ 7} The city presented the testimony of Housing Inspector Patrick Daley. Daley stated that he was assigned to conduct an exterior inspection of the property. He indicated his department made assignments based on a complaint-driven system.

{¶ 8} Daley stated he went to the premises on April 30, 2009, found some exterior housing code violations, and took photographs of what he observed. Specific problems included: siding and trim missing on the garage, second floor window open and unattended, non-functioning electrical equipment with missing

²Namreh filed its notice of appeal in this case little more than a week later on May 27, 2009. Thus, the city did not file any formal response to Namreh’s “complaint.”

covers, numerous holes in the building's siding, and deteriorated side porch and landing stairs. No one lived on the premises; Daley further stated that the property was boarded-up pursuant to a permit.

{¶ 9} Based upon his observations, Daley prepared an affidavit in order to obtain an ASW. Daley indicated therein: 1) the problems he observed during his April 30 exterior inspection; 2) his contact with Namreh's representative, David Wise; 3) Wise's refusal to permit him to enter the building; and, 4) his discovery that the building had no water service since November 2008. Daley's affidavit was never completed or filed, however, because Namreh filed its motion to quash the ASW.

{¶ 10} Daley testified he returned to the premises the day before the hearing, and took additional photos. He acknowledged that some of the problems observed on April 30 had been corrected. However, he indicated that the building still had no electricity; Namreh's workers were using a generator to perform tasks.

{¶ 11} Moreover, Namreh's "rebuilding of that side deteriorated landing stair system required a [building] permit," which Namreh had not obtained. Daley further stated that the amount of drywall he saw workers taking into the building led him to believe Namreh was making repairs of "more than 10%" to the interior; such repairs also would require a permit.

{¶ 12} Namreh presented the testimony of two witnesses, viz., Wise and

Douglas Orban. Wise testified he arranged for workers to perform some work on the property; some of the work “included but was not limited to repairs that Inspector Daley had informed Mr. Wise about orally.” Wise asserted the stairs were meant to be temporary. Wise also claimed he had been told that the city wanted to condemn his building; Wise believed any interior inspection by city officials would be improperly used only to attain this objective.

{¶ 13} The evidence presented at the hearing included Daley’s photographs of the property. On May 20, 2009, the magistrate issued findings of fact and conclusions of law. In pertinent part, the magistrate concluded “there is probable cause to believe that there are violations of the City’s safety codes inside the subject property.”

{¶ 14} The magistrate based this conclusion on the evidence that the property had been “sitting vacant and boarded without electrical service or running water.” The magistrate reasoned that an investor ordinarily actively pursued rehabilitation rather than simply responding whenever contacted by a city inspector about a specific exterior violation. Furthermore, the Cleveland Codified Ordinances mandated that structures that are boarded but are not in the process of rehabilitation can be declared nuisances and then demolished.

{¶ 15} The magistrate indicated that, “to the extent that [Namreh’s] manager asserted his conclusion that there were no defects in the interior, the Court found him from his demeanor to lack credibility.” Similarly, “[d]espite testifying with

precise recall about work Namreh had done on the exterior,” Namreh’s other witness “claimed to be unsure about the condition of the interior.”

{¶ 16} Finally, the magistrate reasoned that, if the inspection done pursuant to the ASW yielded “an unsupported notice of violations,” Namreh’s remedy was to file an appeal of the notice with the city’s Board of Building Standards and Building Appeals. Thus, the magistrate recommended that the municipal court issue the ASW for Namreh’s premises.

{¶ 17} The trial court adopted the magistrate’s report on May 21, 2009, and indicated the ASW would be issued to the city the following day. On May 22, 2009 Namreh filed objections to the magistrate’s report and requested a stay of execution of the ASW.

{¶ 18} Namreh argued in its brief in support of its objections that the magistrate built unwarranted “inferences” from the evidence. However, Namreh attempted to supplement the evidence presented at the hearing by way of its arguments against the necessity for an ASW.

{¶ 19} On May 27, 2009, the municipal court overruled Namreh’s objections to the magistrate’s report and reiterated its decision to adopt the magistrate’s report and recommendation, but granted Namreh’s motion for a stay of execution of the ASW upon conditions. That same day, Namreh filed its notice of appeal from the foregoing order.

{¶ 20} Namreh presents the following assignments of error for review.

{¶ 21} “I. The trial court erred in finding probable cause to issue an administrative search warrant for the Appellant’s premises.

{¶ 22} “II. The trial court has no constitutionally adequate procedure in place to adjudicate hearings on administrative search warrants.”

{¶ 23} This court cannot address Namreh’s assignments of error, because it lacks jurisdiction over this matter.

{¶ 24} The scope of appellate jurisdiction is limited to orders that are “final.” *Empower Aviation, L.L.C. v. Butler Cty. Bd. of Commrs.*, 185 Ohio App.3d 477, 2009-Ohio-6331, 924 N.E.2d 862, ¶9. R.C. 2505.02 sets forth the definition of a “final order” that confers jurisdiction to this court; it states in pertinent part that,

{¶ 25} “(A) As used in this section:

{¶ 26} “(1) ‘Substantial right’ means a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.

{¶ 27} “(2) ‘Special proceeding’ means an action or proceeding that is *specially created by statute* and that prior to 1853 was not denoted as an action at law or a suit in equity.

{¶ 28} “(3) ‘Provisional remedy’ means a proceeding ancillary *to an action*, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, suppression of evidence, * * *

{¶ 29} “(B) An order is a final order that may be reviewed, affirmed,

modified, or reversed, with or without retrial, *when it is one of the following*:

{¶ 30} “(1) An order that affects a substantial right *in an action* that in effect *determines the action* and prevents a judgment;

{¶ 31} “(2) An order that affects a substantial right made in a special proceeding or upon a summary application *in an action after judgment*;

{¶ 32} “(3) An order that vacates or sets aside a judgment or grants a new trial;

{¶ 33} “(4) An order that grants or denies a provisional remedy and to which both of the following apply:

{¶ 34} “(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment *in the action* in favor of the appealing party with respect to the provisional remedy.

{¶ 35} “(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties *in the action*.

{¶ 36} “(5) An order that determines that an action may or may not be maintained as a class action;

{¶ 37} “(6) An order determining the constitutionality of any changes to the Revised Code made by Am. Sub. S.B. 281 of the 124th general assembly * * *;

{¶ 38} “(7) An order in an appropriation proceeding that may be appealed pursuant to division (B)(3) of section 163.09 of the Revised Code.” (Emphasis

added.)

{¶ 39} It is apparent from the record that none of the foregoing categories applies to this matter. Simply put, no “action” ever was commenced in this case.

{¶ 40} “Civ.R. 3(A) requires a complaint be filed with the court in order to commence a civil action. Civ.R. 7 distinguishes between a complaint and a motion. A motion * * * is not a substitute for commencing an action such as a declaratory judgment or injunctive relief. Unless [the appellant] *commences an action* and the trial court reaches the merits concerning the issues raised, [the appellant] must present those issues *in an action which [the city] commences.*” *Ohio EPA v. Ross Incineration Svcs., Inc.* (1989), 63 Ohio App.3d 648, 579 N.E.2d 758. (Emphasis added.)

{¶ 41} Namreh obviously sought to prevent the issuance of the ASW. Nevertheless, since at the time it filed its “motion to quash,” it had been neither served with the ASW nor cited for any city code violations, it never became a “party” to any legal proceeding. Cf., *Zakaib v. Cleveland* (Apr. 19, 2001), Cuyahoga App. No. 77402; *Cleveland v. Ksiezyk* (Nov.1, 2001), Cuyahoga App. No. 79220; *Cleveland v. Berger* (1993), 91 Ohio App.3d 102, 631 N.E.2d 1085. Assume arguendo Namreh attempted to commence an “action” by filing its “motion for a temporary restraining order and for injunctive relief,”³ the city did not

³But, see, R.C. 2727.03.

have an opportunity to file any response before Namreh filed its notice of appeal.
See Civ.R. 4.

{¶ 42} Under the circumstances presented herein, this court can find no authority, either statutory or stare decisis, upon which it may assume subject matter jurisdiction of Namreh's appeal.

{¶ 43} Consequently, this appeal is dismissed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.

KENNETH A. ROCCO, JUDGE

SEAN C. GALLAGHER, A.J., and
PATRICIA ANN BLACKMON, J., CONCUR