

[Cite as *Cleveland v. Abrams*, 2010-Ohio-662.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

---

JOURNAL ENTRY AND OPINION  
**Nos. 92843 and 92844**

---

**CITY OF CLEVELAND**

PLAINTIFF-APPELLEE

vs.

**IAN J. ABRAMS, ET AL.**

DEFENDANTS-APPELLANTS

---

**JUDGMENT:**  
**REVERSED AND VACATED**

---

Civil Appeal from the  
Cleveland Municipal Court  
Case No. 2006 CVH 11526

**BEFORE:** Gallagher, A.J., Sweeney, J., and Jones, J.

**RELEASED:** February 25, 2010

**JOURNALIZED:**

**ATTORNEYS FOR APPELLANTS**

Joseph W. Diemert, Jr.  
Diane A. Calta  
Joseph W. Diemert, Jr. & Associates Co., LPA  
1360 SOM Center Road  
Cleveland, Ohio 44124

Paul M. Greenberger  
Berns, Ockner & Greenberger, LLC  
3733 Park East Drive  
Suite 200  
Beachwood, Ohio 44122-4334

**ATTORNEYS FOR APPELLEE**

Robert J. Triozzi  
Director of Law  
City of Cleveland

Patricia McGinty Aston  
William H. Armstrong, Jr.  
Assistant Directors of Law  
601 Lakeside Avenue, Room 106  
Cleveland, Ohio 44114

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).

SEAN C. GALLAGHER, A.J.:

{¶ 1} In this consolidated appeal, defendants-appellants, Ian J. Abrams and The Scrap Yard, LLC (“Cleveland Scrap”), appeal the judgment of the Cleveland Municipal Court, Housing Division, that granted a permanent injunction against them and in favor of plaintiff-appellee, city of Cleveland (“city”), based on violations of the city’s zoning code. For the reasons stated herein, we reverse the decision of the housing court, vacate the permanent injunction order, and enter judgment on the complaint in favor of defendants-appellants.

{¶ 2} On April 26, 2006, the city filed a verified complaint for injunctive and other relief against appellants. The city alleged various zoning code violations with regard to appellants’ operation of a scrap yard on property located at 3018 East 55<sup>th</sup> Street in Cleveland, Ohio. During the course of the proceedings, the parties agreed that appellants would apply to the city and appeal to the board of zoning appeals for three variances on the property. Following a public hearing, the board of zoning appeals denied the variance requests.

{¶ 3} On or about September 15, 2006, the housing court granted a preliminary injunction against Cleveland Scrap. The preliminary injunction order was appealed to this court, but the interlocutory appeal was dismissed for a lack of a final appealable order.

{¶ 4} The housing court later found that Cleveland Scrap was in contempt of the preliminary injunction order and imposed sanctions against Cleveland Scrap. Cleveland Scrap appealed the housing court's finding of contempt and the imposition of sanctions to this court.

{¶ 5} This court issued a decision reversing the decision of the housing court on September 11, 2008. *Cleveland v. Abrams*, Cuyahoga App. Nos. 89929 and 89904, 2008-Ohio-4589. The prior decision held that the housing court's preliminary injunction order was vague and unclear. In reviewing the propriety of the contempt finding, the court specifically considered the merits of the nonconforming use issue. The decision held that the housing court erred by finding Cleveland Scrap in contempt and determined that "Cleveland Scrap is currently maintaining a prior nonconforming use on the property." In reaching this decision, the previous panel considered the evidence of Cleveland Scrap's historic use of the property as a scrap yard, as well as the effective dates of various city ordinances. The decision held that "the 1929 city code authorized Cleveland Scrap's property to be used as a scrap yard[.]" that "the use of Cleveland Scrap's property as a scrap yard predates any city of Cleveland ordinance imposing screening or junk pile height limitations[.]" and that "neither the lower or upper parcel is subject to comply with the aesthetic junk pile height limitations enacted in 1970."

{¶ 6} With respect to using expanded areas of the property as a scrap yard, the prior decision determined that “[a]lthough the upper parcel may not have been exclusively used as a scrap yard until the 1980’s, it was used, prior to 1970, to transport scrap metals to the railroad for further transportation to an end user. In addition, the 1929 city code authorized the extension of the use of the lower parcel as a scrap yard to the upper parcel.”

{¶ 7} The prior decision determined that “the use of the property in question has not changed since the early 1940’s[.]” that it was variances that were granted per Calendar 40-176 and Calendar 42-151 in the early 1940s, that “[a] certificate of occupancy is not required in this case because there have been no changes of the uses on the property[.]” and that “the 2001 building permit authorized the use of the entire property measuring 7.6 acres as a scrap metal yard.” *Id.* The effect of this decision rendered Cleveland Scrap’s use of the property a lawful, prior nonconforming use. This court remanded the case back to the lower court “for further proceedings in accordance with this decision.”

{¶ 8} The city filed an appeal from this court’s ruling, and the Ohio Supreme Court declined to exercise jurisdiction to review the case on February 4, 2009. *Cleveland v. Abrams*, 120 Ohio St.3d 1508, 2009-Ohio-361, 900 N.E.2d 624.

{¶ 9} In the meantime, the housing court proceeded to conduct a trial from August 12 to August 15, 2008. Subsequent to this court's decision on the contempt appeal, the magistrate issued a decision on October 29, 2008. On January 20, 2009, the housing court overruled objections, adopted the magistrate's decision, and issued a judgment that granted the permanent injunction and other relief against appellants. The housing court found that appellants were in violation of the city's zoning code and ordered, among other relief, that Cleveland Scrap cease any use of the property for which a certificate of occupancy has not been issued and comply with express variance requirements.

{¶ 10} Abrams and Cleveland Scrap both appealed the housing court's decision, and their appeals were consolidated for review.

{¶ 11} The first assignment of error raised by each party challenges the housing court's subject matter jurisdiction to proceed on the permanent injunction during the pendency of the appeal from the contempt of the preliminary injunction.

{¶ 12} We apply a de novo standard of review to questions of subject-matter jurisdiction. *Udelson v. Udelson*, Cuyahoga App. No. 92717, 2009-Ohio-6462. "Subject-matter jurisdiction is the power conferred on a court to decide a particular matter on its merits and render an enforceable judgment over the action." *Id.*, citing *Morrison v. Steiner* (1972), 32 Ohio

St.2d 86, 290 N.E.2d 841, paragraph one of the syllabus. The lack of subject-matter jurisdiction may be raised at any stage of the proceeding. *In re Byard*, 74 Ohio St.3d 294, 296, 1996-Ohio-163, 658 N.E.2d 735.

{¶ 13} Generally, the filing of a notice of appeal divests the trial court of jurisdiction of any further authority over those aspects of the case on appeal. When an appeal is pending before a court of appeals, “the trial court retains all jurisdiction not inconsistent with the reviewing court’s jurisdiction to reverse, modify, or affirm the judgment.” *Howard v. Catholic Social Serv. of Cuyahoga Cty., Inc.*, 70 Ohio St.3d 141, 146, 1994-Ohio-219, 637 N.E.2d 890. This retained jurisdiction includes the trial court’s jurisdiction to rule on collateral issues such as contempt, appointment of a receiver, and injunction. *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas* (1978), 55 Ohio St.2d 94, 97, 378 N.E.2d 162.

{¶ 14} While we have found no Ohio law directly on point, federal courts have recognized that a trial court “retains jurisdiction over matters that are collateral to the appeal, such as the merits of a case when the appeal concerns a preliminary injunction.” *Collin County, Texas v. Siemens Business Services, Inc.* (E.D.Tex.2006), 560 F.Supp.2d 525, 527; see, also, *Moltan Co. v. Eagle-Picher Industries, Inc.* (C.A. 6, 1995), 55 F.3d 1171, 1174 (recognizing that a district court has jurisdiction to continue with the merits of the litigation while an appeal from a preliminary injunction is pending).

Although the appeal at issue herein was from the order of contempt of the preliminary injunction, it nonetheless pertained to the enforcement of the preliminary injunction order. This court does not find that the appeal prevented the housing court from proceeding to address collateral matters, including proceeding on the merits of the permanent injunction.

{¶ 15} We recognize that this is an unusual case because during this court's exercise of jurisdiction over the contempt appeal, a previous panel ultimately resolved matters pertaining to the use of the property, applicable ordinances, and any requirement for a certificate of occupancy that were also before the housing court with regard to the permanent injunction. However, we do not find that the contempt appeal divested the housing court of jurisdiction to take continuing action in the underlying case.

{¶ 16} Appellants' first assignments of error are overruled.

{¶ 17} In their second assignments of error, appellants each challenge the housing court's judgment as being contrary to the law of the case announced in the prior appeal.

{¶ 18} The doctrine of law of the case provides that "the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels." *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3, 462 N.E.2d 410.

"[T]he doctrine functions to compel trial courts to follow the mandates of



reviewing courts” and is to be applied “absent extraordinary circumstances.” *Id.* at 3-4. This court has recognized the following exceptions to the doctrine’s application: “(1) the evidence at a subsequent trial is substantially different; (2) there has been an intervening change of law by a controlling authority; and (3) the earlier decision is clearly erroneous and would work a manifest injustice.” *State v. Kelly*, Cuyahoga App. No. 89393, 2007-Ohio-6838.

{¶ 19} Here, there has been no intervening change of law and our earlier decision is not clearly erroneous. The issue in this case is whether the evidence that was before the housing court at trial was substantially different from the evidence that was before this court when the previous panel determined that Cleveland Scrap is maintaining a prior legal nonconforming use on the property.

{¶ 20} We recognize that the housing court conducted a trial at which testimony and documentary evidence were presented on the merits of the permanent injunction. However, we do not find that the housing court was presented with “substantially different” evidence for purposes of determining whether appellants’ use of the property was a prior legal nonconforming use. The housing court relied upon essentially the same material facts, documents,

and ordinances as this court did in reaching its decision.<sup>1</sup> Upon this record, the housing court reached a different legal result. In doing so, the housing court did not follow the law of the case as determined by this court in the prior appeal.

{¶ 21} Additionally, we reject the city's argument that the law of the case doctrine does not apply because the issue was not decided originally by the trial court. When the contempt appeal was filed, this court had jurisdiction over the matter and properly considered the nonconforming use issue and related matters in determining "the propriety of the order of the court claimed to have been violated." See *Smith v. Chester Township Bd. of Trustees* (1979), 60 Ohio St.2d 13, 15, 396 N.E.2d 743.

{¶ 22} This case is distinguishable from *Crestmont Cleveland Partnership v. Ohio Dept. of Health* (2000), 139 Ohio App.3d 928, 746 N.E.2d 222, a case relied upon by the city. In *Crestmont*, the court declined to apply the law of the case doctrine to certain issues that the appellant argued could have been litigated in a prior appeal from a motion to dismiss and that had not been addressed by the trial court. *Id.* In this matter, we recognize that the housing court had not ruled on the nonconforming use issue at the time of the contempt appeal. Nevertheless, this court had jurisdiction over the

---

<sup>1</sup> The 2001 building permit was among the documents that both courts considered.

matter and properly considered the nonconforming use issue in determining the propriety of the contempt of the preliminary injunction.

{¶ 23} In the prior appeal, the panel found that “[a] certificate of occupancy is not required in this case because there have been no changes of the uses on the property.” The decision further recognized that the use of the property in question has not changed since the early 1940s and that “variances” had been granted in the early 1940s. The prior panel determined the merits of the nonconforming use issue, found that Cleveland Scrap was maintaining a prior nonconforming use on the property, that the use of the property as a scrap yard and the extension of that use was authorized by the 1929 city code, and that neither parcel at issue is subject to the aesthetic screening or junk pile height limitations. The Ohio Supreme Court declined discretionary review of the case. Thus, the law of the case as established by the prior appeal was that the use of the subject property is a prior legal nonconforming use. This court remanded the matter to the housing court for proceedings consistent with that decision.

{¶ 24} As stated by the Ohio Supreme Court in *Nolan*, 11 Ohio St.3d at 3-4: “Thus, where at a rehearing following remand a trial court is confronted with substantially the same facts and issues as were involved in the prior appeal, the court is bound to adhere to the appellate court’s determination of

the applicable law. Moreover, the trial court is without authority to extend or vary the mandate given.” (Citations and quotations omitted.)

{¶ 25} Here, the trial court was confronted with substantially the same facts and issues as were involved in the prior appeal. As no extraordinary circumstances were presented to the lower court and the result is not unjust, the housing court was required to adhere to the mandate of this court’s prior decision. The trial court erred in disregarding the law of the case, in rendering different legal conclusions, and in granting the permanent injunction order. Accordingly, appellants’ second assignments of error are sustained.

{¶ 26} Having determined that the law of the case doctrine applies in this matter, we reject the additional arguments pertaining to waiver, affirmative defenses, burden of proof, and other assertions raised by the city. We recognize that no nuisance claim was brought in this action. We also recognize that the action was not brought under R.C. Chapters 3767 and 4737. We find that the remaining assignments of error raised by appellants are moot.

{¶ 27} The decision of the housing court is reversed, and the permanent injunction order is vacated in its entirety. Pursuant to App.R. 12(B), we enter judgment for defendants-appellants on the city’s complaint. We determine that the law of the case doctrine applies in this matter, that the

legal conclusions set forth in *Cleveland v. Abrams*, Cuyahoga App. Nos. 89929 and 89904, 2008-Ohio-4589, are controlling and incorporated herein, and that the city is not entitled to a permanent injunction or other requested relief in this matter.

Judgment reversed, order vacated.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the 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.

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

JAMES J. SWEENEY, J., and  
LARRY A. JONES, J., CONCUR