[Cite as *High St. Properties, L.L.C. v. Cleveland*, 2015-Ohio-1451.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101585

HIGH STREET PROPERTIES L.L.C., ET AL.

PLAINTIFFS-APPELLANTS

vs.

CITY OF CLEVELAND, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-14-820400

BEFORE: Celebrezze, A.J., Keough, J., and Kilbane, J.

RELEASED AND JOURNALIZED: April 16, 2015

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FRANK D. CELEBREZZE, JR., A.J.:

{¶1} Plaintiffs-appellants, High Street Properties, L.L.C. ("High Street Properties") and George Troicky (collectively "appellants"), appeal from the judgment of the common pleas court dismissing all claims asserted against defendants-appellees, the city of Cleveland (the "City") and Rock Ohio Caesars Cleveland, LLC ("Rock Ohio").

I. Procedural and Factual History

{¶2} High Street Properties is an Ohio limited liability company and the owners of the real property known as Permanent Parcel No. 101-28-019 located at 189 High Avenue, Cleveland, Ohio 44115 and Permanent Parcel No. 101-28-070 located at 211 High Avenue, Cleveland, Ohio 44115.

{¶3} George Troicky, is an individual and the owner of real property known as Permanent Parcel No. 101-28-018 located at 211 High Avenue, Cleveland, Ohio 44115 (parcels collectively referred to herein as the "property").

{¶4} The City is a municipal corporation operating pursuant to Charter, Codified Ordinances and the laws of the state of Ohio.

{¶5} Rock Ohio is a Delaware limited liability corporation authorized to conduct business in the state of Ohio and the owner of real property known as the former Gateway North Parking Garage (the "Rock Ohio Parcel").

{¶6} The property is located in Cleveland, Ohio along the northerly side of High Avenue between East 2nd and East 4th Street. The property is improved with a two

building commercial structure that has multiple uses including indoor parking, first floor retail, and upper floor office and storage space.

{¶7} On September 19, 2011, Cleveland City Council adopted Cleveland Codified Ordinances 1304-11 as an emergency measure whereby portions of East 1st Street and High Avenue were vacated. The vacated portions of East 1st and High Avenue were to accommodate the construction of the Cleveland Horseshoe Casino Welcome Center and extension of the Gateway North Parking Garage located on the Rock Ohio Parcel.

{¶8} On August 19, 2011, the City Planning Commission approved the design of the Gateway North Parking Garage, which included a digital display board on the south facade of the building.

{¶9} On February 6, 2012, the City Department of Building & Housing issued an adjudication order disapproving plans to install a 49 foot by 62 foot "internally illuminated wall sign" with electronic moving digital display messaging on the south facade of the Gateway North Parking Garage. The adjudication order stated that the plans were not in compliance with 2008 Building Code provisions that prevent the proposed digital display board from extending above the top of the wall.

{¶10} On February 8, 2012, Brilliant Electric Sign Company, on behalf of Rock Ohio, filed an appeal of the adjudication order to the City Board of Building Standards & Building Appeals ("Board of Building Appeals"). On February 15, 2012, the Board of Building Appeals approved all necessary variances as required by the 2008 Ohio Building

Code, including permitting the "internally illuminated wall sign" to extend above the top wall of the Gateway North Parking Garage. The approval was officially adopted by resolution of the Board of Building Appeals on February 29, 2012.

{¶11} On February 17, 2012, the City Department of Building & Housing issued Permit No. B12002286 to Brilliant Electric Sign Company, on behalf of Rock Ohio, wherein permission was granted to install the "internally illuminated wall sign" on the south facade of the Gateway North Parking Garage.

{¶12} On January 17, 2014, appellants filed a complaint against the City and Rock Ohio, alleging the vacation of a portion of High Avenue impaired reasonable access to their property and that the digital display board installed on the Rock Ohio Parcel was done in violation of Cleveland Codified Ordinances. The complaint sought declaratory judgment, compensatory damages, and injunctive relief. After appellees moved to dismiss the complaint for failure to state a claim, appellants sought and obtained leave to amend their complaint. On April 11, 2014, appellants filed an amended complaint, again seeking declaratory judgment, compensatory damages, and injunctive relief.

{¶13} On April 24, 2014, appellees filed separate motions to dismiss the amended complaint. On June 5, 2014, the trial court issued a journal entry granting appellees' separate motions to dismiss. On June 10, 2014, appellants filed a motion for findings of fact and conclusions of law. The motion was denied on June 24, 2014.

{¶14} Appellants now bring this timely appeal, raising two assignments of error for review.

I. The trial court erred in granting appellee's separate motions to dismiss relative to count one of the amended complaint.

II. The trial court erred in granting appellee's separate motions to dismiss relative to count two of the amended complaint.

II. Law and Analysis

A. Standard of Review

{¶15} This court applies a de novo standard of review when reviewing a trial court's ruling on a Civ.R.12(B)(6) motion to dismiss for failure to state a claim. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5, citing *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480, 768 N.E.2d 1136. Under this standard of review, we must independently review the record and afford no deference to the trial court's decision. *Herakovic v. Catholic Diocese of Cleveland*, 8th Dist. Cuyahoga No. 85467, 2005-Ohio-5985, ¶ 13.

{¶16} Pursuant to Civ.R. 12(B)(6), a complaint is not subject to dismissal for failure to state a claim upon which relief may be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle the plaintiff to relief. *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 2006-Ohio-2625, 849 N.E.2d 268, ¶ 11, citing *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 327 N.E.2d 753 (1975). Therefore, "[a]s long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss." *York v. Ohio State Hwy. Patrol*, 60 Ohio St.3d 143, 145, 573 N.E.2d 1063 (1991).

{¶17} In resolving a Civ.R. 12(B)(6) motion, a court's factual review is generally confined to the four corners of the complaint. *Grady v. Lenders Interactive Servs.*, 8th Dist. Cuyahoga No. 83966, 2004-Ohio-4239, ¶ 6. However, documents attached to or incorporated into the complaint may be considered on a motion to dismiss pursuant to Civ.R. 12(B)(6). *Glazer v. Chase Home Fin. L.L.C.*, 8th Dist. Cuyahoga Nos. 99875 and 99736, 2013-Ohio-5589, ¶ 38, citing *NCS Healthcare, Inc. v. Candlewood Partners, L.L.C.*, 160 Ohio App.3d 421, 2005-Ohio-1669, 827 N.E.2d 797 (8th Dist.). Within those confines, a court accepts as true all material allegations of the complaint and makes all reasonable inferences in favor of the nonmoving party. *Fahnbulleh v. Strahan*, 73 Ohio St.3d 666, 667, 653 N.E.2d 1186 (1995).

B. Count 1

{¶18} In their first assignment of error, appellants argue the trial court erred in granting appellees' separate motions to dismiss relative to Count 1 of the amended complaint.

{¶19} In Count 1 of their amended complaint, appellants allege that the vacation of a portion of High Avenue has resulted in impaired access to their property without other reasonable means of access. Appellants further contend that the vacation has greatly reduced the functional status of the property and has materially depreciated its value by $300,000, as detailed in a appraisal prepared by Roger D. Ritely, ASA, MAI, CRE of Charles M. Ritley Associates, L.L.C.

{¶20} In Ohio, a property owner, having other means of access to his property, may not enjoin the vacation of a public way, or receive damages for its closing, unless his property abuts the vacated street. As the Ohio Supreme Court stated in *Kinnear Mfg. Co. v. Beatty*, 65 Ohio St. 264, 282-83, 62 N.E. 341 (1901):

> * * * The decisions in this state have clearly established that an abutting lot owner has such an interest in the portion of the street on which he abuts, that the closing of it * * * is a taking of private property for a public use, and cannot be done without compensation. * * * But where the party complaining is not an abutter upon the obstructed or vacated portion of a street, or way, and has ample means of access to his property by other streets and public ways, a very different case is presented. In such case he is simply one of the general public, suffering an inconvenience common to all, though he may by reason of proximity, suffer a greater inconvenience than others, he is in no way distinguished from them except in degree. To give the individual a right in such cases to be heard, either in a suit for damages or by injunction, he must aver and show, that the injury he suffers is different in kind from that of the general public. This he may do by showing that his easement in the street, as a means of access to his property, is impaired or destroyed. His easement, however, is limited to the portion of the street on which he abuts, or a street which affords him the only means of access to his property. Where his property is not in physical contact with the vacated portion of the street, and he has other reasonable means of access, the individual has no right of action by which he can enjoin the obstruction, or recover damages. * * *

(Citations omitted.)

{¶21} In the case at hand, appellants do not dispute the fact that the vacated portions of High Avenue and East 1st Street did not abut their property. Instead, appellants contend that the issue of "whether all reasonable means of access to the appellants' property have been impaired and the value thereof materially depreciated are questions of fact that must be determined by the trier of fact and cannot be properly disposed of by a motion to dismiss." We disagree.

{¶22} As shown in Exhibit A affixed to the amended complaint, appellants enjoy reasonable access to their property. While the property is no longer accessible from Ontario Avenue, the property is currently accessible by two existing roadways, East 2nd Street and the remaining portion of High Avenue. Appellants have presented nothing more than an inconvenience; a mere change in traffic flow and traffic patterns. Accordingly, appellants have no right of action by which they can recover damages. *See Kinnear*.

{¶23} Based on the foregoing, we find that there are no set of facts, consistent with the appellants' amended complaint, which would allow the appellants to recover. The trial court did not error in dismissing count one of appellant's amended complaint.

{¶24} Appellant's first assignment of error is overruled.

C. Count 2

{¶25} In their second assignment of error, appellants argue that the trial court erred in granting appellees' separate motions to dismiss relative to Count 2 of the amended complaint.

{¶26} In Count 2 of their amended complaint, appellants allege that the digital display board attached to the south facade of the Rock Ohio Parcel was approved by the City in violation of Cleveland Codified Ordinances. Appellants contend that they were divested of due process and were caused irreparable harm for which there is no adequate remedy at law. Count 2 sought monetary damages, preliminary and permanent injunctive relief, and declaratory relief.

1. Declaratory Judgment

{¶27} Specifically, appellants sought declaratory relief on the following issues:

> (1) a declaration that the Digital Display Board is a "billboard" as defined by the City of Cleveland Codified Ordinances Section 350.03(e)(1) and the installation thereof on the Rock Ohio Parcel is not in compliance with applicable legal requirements relative to location, size, height, setbacks and design;

(2) a declaration that the City of Cleveland violated its Codified Ordinances when authorizing a permit for the Digital Display Board as a "wall sign";

(3) a declaration that the design approval from the Planning Commission and granting variances by the Board of Building Appeals, as adopted on February 29, 2012, for the installation of the Digital Display Board were procedurally defective and in direct contravention of the City of Cleveland Zoning Code;

(4) a declaration that the City's approval of Permit No. B12002286 to allow installation of the Digital Display Board on February 17, 2012, was procedurally defective and in direct contravention of the City of Cleveland Zoning Code, including, without limitation, that the Digital Display Board was installed in the City of Cleveland General Retail Zoning District, wherein billboards are not a permitted use;

(5) a declaration that the City of Cleveland authorized the installation of the Digital Display Board without approval of necessary use and area variances from the Board of Zoning Appeals after proper notice to directly affected property owners and a public hearing, was an abuse of its municipal corporate powers; and

(6) a declaration that the exemption to local zoning and land use laws as provided in Article 15, Section 6(C)(7) of the Ohio Constitution is inapplicable to the property upon which the Digital Display Board was installed.

{¶28} An action for a declaratory judgment may be dismissed pursuant to Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted. *Home Builders Assn. of Dayton & Miami Valley v. Lebanon*, 12th Dist. Warren No. CA2003-12-115, 2004-Ohio-4526, ¶ 13. However, "there are only two reasons for dismissing a complaint for declaratory judgment pursuant to Civ.R. 12(B)(6): (1) where there is no real

controversy or justiciable issue between the parties, and (2) when the declaratory judgment will not terminate the uncertainty or controversy." *Lebanon* at ¶ 13.

{¶29} In order for a justiciable question to exist, "[t]he danger or dilemma of the plaintiff must be present, not contingent on the happening of hypothetical future events * * * and the threat to his position must be actual and genuine and not merely possible or remote." *Mid-Am. Fire & Cas. Co. v. Heasley*, 113 Ohio St.3d 133, 2007-Ohio-1248, 863 N.E.2d 142, ¶ 9. A "controversy" exists for purposes of a declaratory judgment action when there is a genuine dispute between parties having adverse legal interest of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. *Brewer v. Middletown*, 12th Dist. Butler No. CA91-02-039, 1992 Ohio App. LEXIS 3983, *10 (Aug. 3, 1992), citing *Burger Brewing Co. v. Liquor Control Comm*., 34 Ohio St.2d 93, 296 N.E.2d 261 (1973). A claim is not ripe if it rests upon "'future events that may not occur as anticipated, or may not occur at all.'" *State v. McCarty*, 12th Dist. Butler No. CA2006-04-093, 2007-Ohio-2290, ¶ 15, quoting *Texas v. United States*, 523 U.S. 296, 300, 118 S.Ct. 1257, 140 L.Ed.2d 406 (1998). Furthermore, actions become moot when resolution of the issues presented is purely academic and will have no practical effect on the legal relations between the parties. *Brewer*, 1992 Ohio App. LEXIS 3983, at *4.

{¶30} Applying the foregoing standard to the case at hand, we find that the trial court did not err in dismissing appellants' request for declaratory relief for failure to state a claim upon when relief can be granted.

{¶31} With respect to Rock Ohio, we note that the only declaratory relief sought against the corporation is appellants' request for a declaration that Rock Ohio is not a "Casino facility" as contained in Article 15, Section 6(C)(9)(a) on the Ohio Constitution. Because Rock Ohio has not disputed this fact, there is no controversy between the parties on this issue.

{¶32} The remaining declarations sought by appellants rely on their position that the City incorrectly categorized the digital display board as a "wall sign" instead of a "billboard" when it issue Permit No. B12002286, and therefore, failed to comply with the process required for obtaining a variance for the use of a billboard in a restricted zoning area. However, as shown in the documents incorporated by reference in appellants' amended complaint, the City Planning Commission and the Building & Housing Department only had before it applications from Brilliant Electric Sign Company, on behalf of Rock Ohio, to install an "internally illuminated wall sign" on the Rock Ohio Parcel. Thus, the City's approval of the digital display board was made on the good faith belief that it would be used as a "wall sign" as defined under C.C.O. 350.03(f)(12). There was no application for the use of a billboard presented to the City. In light of these undisputed facts, the City had no basis to go through the procedural requirements for obtaining a variance to use a billboard on the Rock Ohio Parcel. Moreover, the City does not dispute the required procedures it would have needed to undergo pursuant to the Cleveland Codified Ordinances and city of Cleveland zoning codes had Rock Ohio

applied to install a billboard on its property. However, those were not the circumstances the City was dealing with in reality.

{¶33} Based on the foregoing, we find the trial court did not err in dismissing appellants' request for declaratory relief. Count 2 of their amended complaint requests declarations of law that are not in dispute and declaration of facts that do not conform to the realities associated with the approval of Permit No. B12002286. Accordingly, appellants failed to present a real controversy or a justiciable issue that would preclude dismissal of their declaratory judgment pursuant to Civ. R. 12(B)(6).

2. Monetary Damages and Injunctive Relief

{¶34} In support of their request for monetary damages and injunctive relief, appellants rely exclusively on R.C. 713.13, which governs when a person may bring suit for a violation of a zoning ordinance. The statute states, in relevant part:

> No person shall erect, construct, alter, repair, or maintain any building or structure or use any land in violation of any zoning ordinance * * *. In the event of any such violation, or imminent threat thereof, the municipal corporation, or the owner of any contiguous or neighboring property who would be especially damaged by such violation, in addition to any other remedies provided by law, may institute a suit for injunction to prevent or terminate such violation.

{¶35} Appellants' request for monetary damages and injunctive relief pursuant to R.C. 713.13 is based on their position that they suffered substantial depreciation in the value of their property due to the City's mischaracterization of the digital display board installed on the Rock Ohio Parcel as a "wall sign" as opposed to a "billboard." However, the documents incorporated by reference in appellants' amended complaint show that the City was provided with an application from Rock Ohio to install an

"internally illuminated wall sign." Any suggestion that the City was aware that Rock Ohio intended to use the digital display board as a "billboard," but nevertheless approved it to be used as a "wall sign" to avoid zoning restrictions, relies on a hypothetical scenario unsupported by appellants' amended complaint. Because the "special damages" claimed against the City rely on a hypothetical set of facts, unsupported by the record, appellants have not established a sufficient claim under R.C. 713.13.

{¶36} Based on foregoing, we find that Count 2 fails to allege facts that would entitle appellants' to relief in the form of a declaratory judgment, monetary damages, or injunctive relief.

{¶37} Appellants' second assignment of error is overruled.

III. Conclusion

{¶38} The trial court did not error in granting appellees' separate motions to dismiss appellants' amended complaint pursuant to Civ. R. 12(B)(6). Counts 1 and 2 of the complaint fail to articulate a set of facts, if taken as true, that would entitled them to relief.

{¶39} Judgment affirmed.

It is ordered that appellees recover from appellants 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.

FRANK D. CELEBREZZE, JR., ADMINISTRATIVE JUDGE

KATHLEEN ANN KEOUGH, J., and
MARY EILEEN KILBANE, J., CONCUR