[Cite as *Jacobs v. Cuyahoga Metro. Hous. Auth.*, 2015-Ohio-2278.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102248

VENZELLA JACOBS

PLAINTIFF-APPELLANT

vs.

CUYAHOGA METROPOLITAN HOUSING AUTHORITY

DEFENDANT-APPELLEE

JUDGMENT:
REVERSED AND REMANDED

Administrative Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-14-829646

BEFORE: Boyle, P.J., S. Gallagher, J., and Laster Mays, J.

RELEASED AND JOURNALIZED: June 11, 2015

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MARY J. BOYLE, P.J.:

{¶1} This cause came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1.

{¶2} Appellant, Venzella Jacobs, appeals from the trial court's judgment entry dismissing her administrative appeal for lack of jurisdiction. Finding merit to the appeal, we reverse and remand for further proceedings.

Procedural History and Facts

{¶3} Jacobs had been a participant in the Section 8 Housing Choice Voucher Program administered by appellee, Cuyahoga Metropolitan Housing Authority ("CMHA"). In April 2014, CMHA sent Jacobs a "Proposal for Termination" letter, seeking to terminate Jacobs from the voucher program after she missed her annual re-examination meeting. Jacobs requested a hearing on the matter, which was heard by a hearing officer on June 4, 2014. CMHA ultimately issued a hearing decision, dated June 13, 2014, which terminated Jacobs's participation in the voucher program, effective June 30, 2014.

{¶4} On July 11, 2014, Jacobs electronically filed a notice of appeal from the administrative hearing decision with the court of common pleas and mailed a copy of the notice of appeal to CMHA by regular U.S. mail. The notice of appeal contained a certificate of service stating that a copy had been served on CMHA by regular U.S. mail on July 11, 2014. Jacobs also electronically filed with the trial court a motion for stay of administrative decision pending appeal, praecipe to administrative agency for transcript,

and a motion for R.C. 2506.03 evidentiary hearing, all of which were also served on CMHA by regular mail on July 11, 2014.

{¶5} On September 18, 2014, the trial court scheduled a hearing on the motion for stay for the following week. The trial court, however, sua sponte cancelled the hearing and subsequently issued a journal entry stating the following:

> Upon review of the docket and notice of appeal, the court is on notice that appellant has failed to properly serve appellee in this matter. Hearing on motion for stay of administrative decision pending appeal reset to 10/08/2014 at 1:30. Failure to perfect service may result in dismissal for failure to prosecute.

{¶6} On October 6, 2014, Jacobs hand-delivered an additional copy of the notice of appeal and the accompanying motions to CMHA and electronically filed a notice with the trial court of such action on the same day.

{¶7} Two days later, CMHA did not appear at the hearing on the motion for stay; instead, it moved to dismiss Jacobs's action under Civ.R. 12(B)(2), 12(B)(4), and 12(B)(5) for lack of personal jurisdiction, insufficiency of process, and insufficiency of service of process. In its motion, CMHA noted that, although "the only act necessary to perfect [an administrative appeal under R.C. 2506.01] is the filing of a notice of appeal with the appropriate administrative agency and that 'no step subsequent of the appeal is jurisdictional,' that language refers to subject matter jurisdiction not personal jurisdiction." CMHA argued that Jacobs's mere mailing of the notice of appeal by regular mail was insufficient to effectuate service of process; it contended that it was necessary for Jacobs to obtain service through the clerk of courts.

{¶8} On October 20, 2014, the trial court granted CMHA's motion to dismiss, stating in pertinent part the following:

> To satisfy the jurisdictional requirement, the administrative agency must receive the appropriate complaint and notice within 30 days after entry of the final administrative order. * * * While appellant's certificate of service states that a copy of the notice of appeal was sent via ordinary U.S. mail, there is no evidence in the record that the administrative body actually received notice of the appeal within the required 30 days.

{¶9} From that decision, Jacobs appeals, raising two assignments of error, namely, that (1) the trial court erred in holding that the regular U.S. mail service on CMHA failed to effect proper and timely service on CMHA to satisfy the jurisdictional requirement, and (2) the sole ground asserted in CMHA's motion to dismiss is contrary to well-established law.

Standard of Review

{¶10} The issue of subject matter jurisdiction is a question of law that we review de novo. *Bank of Am. v. Macho*, 8th Dist. Cuyahoga No. 96124, 2011-Ohio-5495, ¶ 7. Here, although CMHA moved to dismiss the action on insufficiency of process and insufficiency of service of process grounds, the trial court dismissed the action based on a finding that jurisdiction was lacking. The trial court specifically referenced the 30-day filing deadline necessary to invoke the subject matter jurisdiction of the court. We therefore review the trial court's decision to dismiss the action under a de novo standard.

Perfecting an R.C. Chapter 2506 Administrative Appeal

{¶11} In her first assignment of error, Jacobs argues that "the trial court erred, as a matter of law, in holding that the regular U.S. mail service by Ms. Jacobs on CMHA failed to effect proper and timely service on CMHA in this R.C. Ch. 2506 appeal." We agree.

{¶12} Article IV, Section 4(B), of the Ohio Constitution provides, "The courts of common pleas * * * shall have * * * such powers of review of proceedings of administrative officers and agencies as may be provided by law." In accordance with this provision, the General Assembly enacted R.C. 2506.01, which authorizes an appeal from a final order of a political subdivision of the state, such as a county housing authority. *AT&T Communications of Ohio, Inc. v. Lynch*, 132 Ohio St.3d 92, 2012-Ohio-1975, 969 N.E.2d 1166, ¶ 9, citing *In re Incorporation of Carlisle Ridge Village*, 15 Ohio St.2d 177, 180-182, 239 N.E.2d 26 (1968). The common pleas court, however, does not acquire subject-matter jurisdiction over the appeal unless and until the appeal is perfected. *Lynch* at ¶ 17.

{¶13} When the right to appeal is conferred by statute, an appeal can be perfected only in the manner prescribed by the applicable statute. *Welsh Dev. Co. Inc. v. Warren Cty. Regional Planning Comm.*, 128 Ohio St.3d 471, 2011-Ohio-1604, 946 N.E.2d 215, ¶ 14.

{¶14} R.C. Chapter 2506 governs appeals from orders of administrative officers and agencies. R.C. 2506.01(A) provides in relevant part that

> every final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department, or other division of any political

> subdivision of the state may be reviewed by the court of common pleas of the county in which the principal office of the political subdivision is located as provided in Chapter 2505 of the Revised Code.

{¶15} "While R.C. 2506.01 authorizes an administrative appeal, R.C. Chapter 2505 instructs as to the procedure for bringing the actual appeal." *Horner v. Bd. of Washington Twp. Trustees*, 12th Dist. Clermont No. CA2011-02-008, 2011-Ohio-5871, ¶ 12.

{¶16} Under R.C. 2505.04, a party perfects an administrative appeal by filing "a written notice of appeal * * * with the administrative officer, agency, board, department, tribunal, commission, or other instrumentality involved." Additionally, R.C. 2505.07 prescribes the time period for perfecting an appeal and requires a party wishing to appeal an administrative decision to perfect the appeal within 30 days after the administrative body enters that decision.

{¶17} R.C. 2505.04 is silent as to the permissible method for filing and serving the notice of appeal. The Ohio Supreme Court, however, has held that an "appellant may use any method reasonably certain to accomplish delivery to the agency within the required 30 days, which is filing that satisfies the jurisdictional requirement for an administrative appeal." *Welsh Dev. Co. Inc.*, 128 Ohio St.3d 471, 2011-Ohio-1604, 946 N.E.2d 215, at ¶ 40. In reaching this conclusion, the Ohio Supreme Court reinforced that "the purpose of a notice of appeal is to inform the opposing party of the taking of an appeal." *Id.* at ¶ 29. Thus, although the person attempting to appeal does not have to use a particular method to deliver the notice of appeal to the administrative body, "'[f]iling does

not occur until there is actual receipt by the agency within the time prescribed by R.C. 2505.07.'" *Harris v. Akron*, 9th Dist. Summit No. 25689, 2011-Ohio-6735, ¶ 5, quoting *Welsh Dev. Co. Inc*. at ¶ 39.

{¶18} Notably, in *Welsh*, the Ohio Supreme Court emphasized that service by the clerk of court is not required. Specifically, the court stated that "[p]ractioners should not be confused or think that filing under R.C. 2505.04 is accomplished only if the clerk of courts serves upon the administrative agency a copy of the notice of appeal filed in the court of common pleas." *Id.* at ¶ 40.

{¶19} In this case, Jacobs sent a copy of the notice of appeal by regular mail to a destination in the same city two days prior to the expiration of the statutory time limit. CMHA never disputed that it timely received a copy of Jacobs's notice of appeal. Nor is there any evidence that the envelope containing the notice of appeal was returned for failure of delivery. To the contrary, Jacobs's counsel represented to the court that the envelope was not returned for failure of delivery. There is nothing in the record to overcome the presumption of timely delivery in this case. *See Dudukovich v. Lorain Metro. Hous. Auth.*, 58 Ohio St.2d 202, 206-207, 389 N.E.2d 1113 (1979) ("Appellant having presented no evidence of late delivery, a presumption of timely delivery controls[.]"); *In re Jones-Smith*, 8th Dist. Cuyahoga No. 93276, 2009-Ohio-6470, ¶ 14 ("We presume that service was effective when the certificate of service was entered on the record and the envelope was not returned for failure of delivery.").

{¶20} Indeed, the burden of proving the deficiency in the service of the notice of appeal, such as not being timely delivered, rests with CMHA — the party moving to dismiss the appeal. *Roseman v. Reminderville*, 14 Ohio App.3d 124, 126, 470 N.E.2d 224 (9th Dist.1984). And here, CMHA made no showing, let alone any allegation, that the notice was not timely received. Accordingly, we find that the trial court erred as a matter of law in concluding that Jacobs failed to timely perfect her appeal.

{¶21} The first assignment of error is sustained.

Application of Ohio Civil Rules of Procedure

{¶22} In her second assignment of error, Jacobs argues that the trial court erred in granting CMHA's motion to dismiss when the sole argument raised in support of the motion is contrary to well-established law. As stated above, CMHA did not move to dismiss the appeal on the basis that Jacobs failed to timely deliver the notice of appeal. Instead, its sole argument for dismissal was that Jacobs "wholly failed to instruct the clerk of court to serve her notice of appeal" upon CMHA, thereby failing to effect proper service of process.

{¶23} The crux of CMHA's argument on appeal is that Civ.R. 4 and 4.1 apply to this administrative appeal and that compliance with R.C. 2505.04 alone is insufficient for the trial court to properly acquire "personal jurisdiction over a party." In essence, CMHA contends that, although Jacobs's delivery of the notice of appeal to the CMHA by regular U.S. mail was sufficient to invoke the subject matter jurisdiction of the common pleas court under R.C. 2505.04, Jacobs was nonetheless required to serve CMHA a second time

through the clerk of courts to effectuate proper service of process. We find CMHA's argument, however, to lack merit.

{¶24} The Rules of Civil Procedure prescribe the procedure to be followed in all courts of this state in the exercise of civil jurisdiction at law or in equity, subject to certain exceptions. Civ.R. 1(A). Civ.R. 1(C) sets forth the exceptions and provides that these rules, "to the extent that they would by their nature be clearly inapplicable, shall not apply to procedure (1) upon appeal to review any judgment, order or ruling [and] (7) in * * * special statutory proceedings." As observed by the Ohio Supreme Court, "the rules are not categorically inapplicable to appeals from administrative orders." *Ramsdell v. Ohio Civ. Rights Comm.*, 56 Ohio St.3d 24, 27, 563 N.E.2d 285 (1990). The question of the applicability of the Civil Rules "must be decided on a case-by-case basis, depending on the statute involved." *Id.*

{¶25} Civ.R. 4.1 sets forth the methods for service of process. The rule compliments Civ.R. 4(A), which requires the clerk of court, upon the filing of a complaint, to "forthwith issue a summons for service upon each defendant listed in the caption." Civ.R. 4(B) sets forth the requirement of the summons, including that a "copy of the complaint shall be attached to each summons." Under Civ.R. 3(A), a "civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing upon a named defendant."

{¶26} In this appeal, the application of Civ.R. 4 and 4.1 are clearly inapplicable. The clerk's duty under Civ.R. 4(A) and methods of service under Civ.R. 4.1 arise only

upon the filing of a complaint. But there is no requirement for filing a complaint in a R.C. Chapter 2506 administrative appeal. Indeed, when a common pleas court adjudicates an R.C. 2506.01 appeal, it "'performs an appellate function.'" *Lynch*, 132 Ohio St.3d 92, 2012-Ohio-1975, 969 N.E.2d 1166, at ¶ 15, quoting *Dvorak v. Athens Mun. Civ. Serv. Comm.*, 46 Ohio St.2d 99, 103, 346 N.E.2d 157 (1976). Thus, this type of administrative appeal is simply incompatible with rules governing the "commencement of a civil action."

{¶27} Further, the Ohio Supreme Court as well as this court has consistently recognized that a notice of appeal in an R.C. Chapter 2506 appeal may be served by hand-delivery, certified mail, regular U.S. mail, facsimile, or by the clerk of courts. *Dudukovich*, 58 Ohio St.2d at 204, 389 N.E.2d 1113 (no particular method of delivery is prescribed by the statute and therefore "any method productive of certainty of accomplishment" is acceptable, including certified mail); *In re Jones-Smith*, 8th Dist. Cuyahoga No. 93276, 2009-Ohio-6470, at ¶ 12, 14 (service via regular U.S. mail); *Berea Music v. Berea*, 8th Dist. Cuyahoga No. 80897, 2002-Ohio-6639, ¶ 14 (service via hand-delivery of copy with the administrative agency); *Hanson v. Shaker Heights*, 152 Ohio App.3d 1, 2003-Ohio-749, 786 N.E.2d 487, ¶ 12 (8th Dist.) (service via facsimile). Again, the Ohio Supreme Court expressly recognized that service through the clerk of court is not required; instead, it is simply one method to accomplish the filing requirement of R.C. 2505.04 (provided that the notice is received within 30 days after the

administrative order). *Welsh Dev. Co. Inc.*, 128 Ohio St.3d 471, 2011-Ohio-1604, 946 N.E.2d 215, at ¶ 40.

{¶28} CMHA fails to cite a single case where a court has held that the Ohio Civil Rules of Procedure governing service of process apply in an administrative appeal pursuant to R.C. 2506.01. As for CMHA's reliance on the Ohio Supreme Court's recent decision in *Hambuechen v. 221 Mkt. North, Inc.*, Slip Opinion No. 2015-Ohio-756, we find this case distinguishable. In *Hambuechen*, the court held that

> Rules of Civil Procedure apply to proceedings initiated pursuant to R.C. 4112.06; therefore, the petition for review of an order of the Civil Rights Commission must be served by a clerk of courts on all parties who appeared before the commission and on the commission itself within one year of the date that the petition was filed, as required by Civ.R. 3(A).

This holding, however, relates specifically to proceedings initiated under R.C. 4112.06. In at least one other type of administrative appeal, namely, workers' compensation appeal proceedings, the Ohio Supreme Court has stated that "the service of process provisions, e.g., of Civ.R. 4 to Civ.R. 4.6 would be 'clearly inapplicable'" to the appeal brought in common pleas court. *Price v. Westinghouse Elec. Corp.*, 70 Ohio St.2d 131, 132, 435 N.E.2d 1114 (1982). We therefore decline to broadly apply the *Hambuechen* holding to the instant case, which does not involve proceedings initiated under R.C. 4112.06.

{¶29} Jacobs's second assignment of error is sustained.

{¶30} Judgment reversed, and case remanded for further proceedings consistent with this opinion.

It is ordered that appellant recover from appellee the 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 common pleas 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.

MARY J. BOYLE, PRESIDING JUDGE

ANITA LASTER MAYS, J., CONCURS;
SEAN C. GALLAGHER, J., CONCURS IN JUDGMENT ONLY
(WITH SEPARATE OPINION)

SEAN C. GALLAGHER, J., CONCURRING IN JUDGMENT ONLY:

{¶31} I respectfully concur in judgment only with the majority's decision. Although R.C. 2505.04 is silent with respect to the method of delivery, R.C. 2505.07 mandates that the notice of appeal must be filed with the administrative agency within the required 30 days. The trial court determined without a hearing that CMHA never received the filing. Although sending the notice of appeal by regular mail two days before the expiration of the jurisdictional period is objectively questionable, at the least the trial court must determine whether CMHA actually received the notice of appeal before the 30th day waned. For this reason, I would reverse the trial court's decision and remand for further hearing on the matter.

{¶32} It must be noted with regard to the second part of the majority decision, regarding the applicability of the civil rules and commencing an action, that although the majority's rationale is thoroughly reasoned, it is outside of the scope of the current appeal. It must be remembered that the trial court dismissed the action on jurisdictional grounds because Jacobs had not proven that CMHA received the notice of appeal within the 30-day time frame. As such, any discussion and resolution of the applicability of Civ.R. 4 and 4.1 is premature and purely advisory at this stage of the proceedings.