[Cite as *State ex rel. Consortium For Economic & Community Dev. For Hough Ward 7 v. McMonagle*, 2016-Ohio-4704.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103657

STATE OF OHIO, EX REL. CONSORTIUM FOR ECONOMIC AND COMMUNITY DEVELOPMENT FOR HOUGH WARD 7

RELATOR

vs.

RICHARD J. MCMONAGLE, JUDGE

RESPONDENT

JUDGMENT:
WRIT DENIED

Writ of Prohibition
Motion Nos. 492689 and 491603
Order No. 496726

RELEASE DATE: June 28, 2016

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LARRY A. JONES, SR., A.J.:

{¶1} On October 23, 2015, the relator, Consortium for Economic and Community Development for Hough Ward 7 (the "Consortium'), commenced this writ of prohibition action against the respondent, Judge Richard McMonagle, to prevent the judge from exercising jurisdiction over *Oak Leadership Inst. v. Dow*, Cuyahoga C.P. No. CV-13-813027 ("the Quiet Title Case"). Consortium argues that because service on all the parties was completed first in *Treasurer of Cuyahoga Cty. v. 12528 Forest Ave.*, Cuyahoga C.P. No. CV-13-818759 ("the Foreclosure Case"), the jurisdictional priority rule vested exclusive jurisdiction in the Foreclosure Case and thus deprives the respondent judge from proceeding with the Quiet Title Case. On December 8, 2016, the judge moved for summary judgment. On January 15, 2016, Consortium filed its brief in opposition to the judge's dispositive motion as well as its cross-motion for summary judgment. The judge has not filed an opposition to the relator's cross-motion. Moreover, on May 4, 2016, this court granted A New Day In Hough Foundation, Inc.'s ("A New Day") motion to intervene. On May 26, 2016, A New Day filed a cross-claim that is nearly identical to the Consortium's complaint. A New Day also moved for summary judgment on the same grounds as Consortium. For the following reasons, this court grants the judge's dispositive motion, denies the relator's and A New Day's cross-motions for summary judgment and denies the application for a writ of prohibition.

Factual and Procedural Background

{¶2} The court has reviewed the pleadings, the dispositive motions, the attachments thereto, the other filings in this case, and the dockets from the Quiet Title Case and the Foreclosure Case. Oak Leadership Institute ("Oak Leadership") operates an elementary and middle school in a building that occupies Permanent Parcel Numbers ("PPN") 119-05-007 ("007") and 119-05-006 ("006"). Both parcels are commonly known as 8610 Hough Avenue, Cleveland, Ohio. PPN 007 holds most of the school, and PPN 006 holds a portion of the school building and a parking lot.

{¶3} From June 1994 until July 2003, Hough Area Partners in Progress, Inc. ("Hough Partners") owned both parcels. In the summer of 2003, the state of Ohio canceled Hough Partners' articles of incorporation. In July 2003, East Erie, acting as agent for James Williams, alleged "trustee" for Hough Partners, executed a deed transferring 006 to Consortium. Nevertheless, 006 had significant tax delinquencies and liens. Parcel 007 was forfeited to the state of Ohio at approximately the same time and, in early June 2011, was acquired by the Cuyahoga County Land Reutilization Corporation ("Land Bank") pursuant to statutory authority.

{¶4} By that time, Oak Leadership had been chartered as a community school, and Tijuan Dow served as its superintendent. Shortly after acquiring 007, the Land Bank transferred that parcel to Oak Leadership; Dow was instrumental in effecting this transaction. Oak Leadership occupied the premises and started its school.

{¶5} Parcel 006 appeared to be abandoned, and the Land Bank promised to acquire that land and transfer it to Oak Leadership. The parties entered into a

Pass-Through Sale-Purchase Development Agreement in December 2012. Again, Dow was instrumental in effecting this transaction.

{¶6} However, in June 2013, Oak Leadership suspended Dow as an employee and shortly thereafter allowed his employment contract to lapse. In July 2013, Dow and other individuals tried to shut down the school by changing the locks and announcing that the building was closed until further notice due to a property dispute. Subsequently, the Land Bank informed Oak Leadership that it would not obtain and transfer 006 to it.

{¶7} In September 2011, the state of Ohio cancelled Consortium's articles of incorporation. Nevertheless, in July 2013, Consortium purportedly transferred title from 006 to 12528 Forest Avenue, Ltd. ("Forest Avenue"). In February 2014, Forest Avenue purportedly transferred 006 back to Consortium, which had its corporate charter re-instated in April 2014.

{¶8} On August 30, 2013, Oak Leadership commenced the Quiet Title Case in the Cuyahoga County Court of Common Pleas. The docket indicates that service was completed on defendants Land Bank, the city of Cleveland, Hough Area Development Corporation, and East Erie Enterprise, L.L.C., by September 10, 2013. East Erie filed its answer on October 2, 2013.

{¶9} This complaint contains multiple claims: (1) quiet title to 006 by seeking a declaration that East Erie's transfer of 006 to Consortium was invalid and, thus, invalidating all the subsequent transfers of 006; (2) breach of contract against the Land Bank for not fulfilling its contract to acquire and transfer 006 to Oak Leadership; (3)

promissory estoppel against the Land Bank for breaching its promise to acquire and transfer 006 to Oak Leadership, which seeks specific performance against the Land Bank for these two counts; (4) a declaration that Oak Leadership has an implied easement on 006 by prior use and/or by necessity; (5) tortious interference with contract against Dow for causing the Land Bank to terminate its contract with Oak Leadership to obtain 006; (6) trespass against the individuals who tried to close the school; and (7) civil conspiracy against Dow, the Land Bank, and other individuals to terminate the contract to obtain 006 and otherwise hinder the school. Oak Leadership also sought a writ of mandamus to compel the Ohio Attorney General to transfer 006 to Oak Leadership pursuant to R.C. 1702.49 and 109.24; however, Oak Leadership has dismissed this claim without prejudice.

{¶10} Since August 30, 2013, Oak Leadership has amended its complaint three times to add interested and/or necessary parties. These include the state of Ohio, Bureau of Workers' Compensation that purportedly has a lien on 006; the Illuminating Company; Charter One Bank; and the treasurer of Cuyahoga County. Consortium states that service on the last of the defendants was completed on August 29, 2015.

{¶11} On December 12, 2013, the treasurer of Cuyahoga County commenced the Foreclosure Case for 006. Consortium asserts that service on all the parties was completed on September 24, 2014, when Consortium intervened into the Foreclosure Case. The trial court ordered the property foreclosed on April 28, 2015, but the property has not been sold. Instead the parties sought to amend the foreclosure decree to allow

one of the parties, A New Day, to foreclose on its mortgage on 006. While this litigation was in progress, the trial court on February 29, 2016, ordered that its ruling would be held in abeyance pending the court's ruling in the Quiet Title Case.

Analysis of Law

{¶12} The principles governing prohibition are well established. Its requisites are (1) the respondent against whom it is sought is about to exercise judicial power, (2) the exercise of such power is unauthorized by law, and (3) there is no adequate remedy at law. *State ex rel. Largent v. Fisher*, 43 Ohio St.3d 160, 540 N.E.2d 239 (1989). Prohibition will not lie unless it clearly appears that the court has no jurisdiction of the cause that it is attempting to adjudicate or the court is about to exceed its jurisdiction. *State ex rel. Ellis v. McCabe*, 138 Ohio St. 417, 35 N.E.2d 571 (1941), paragraph three of the syllabus. "The writ will not issue to prevent an erroneous judgment, or to serve the purpose of appeal, or to correct mistakes of the lower court in deciding questions within its jurisdiction." *State ex rel. Sparto v. Juvenile Court of Darke Cty.*, 153 Ohio St. 64, 65, 90 N.E.2d 598 (1950). Furthermore, it should be used with great caution and not issue in a doubtful case. *State ex rel. Merion v. Tuscarawas Cty. Court of Common Pleas*, 137 Ohio St. 273, 28 N.E.2d 641 (1940); and *Reiss v. Columbus Mun. Court*, 76 Ohio Law Abs. 141, 145 N.E.2d 447 (10th Dist.1956). Nevertheless, when a court is patently and unambiguously without jurisdiction to act whatsoever, the availability or adequacy of a remedy is immaterial to the issuance of a writ of prohibition. *State ex rel. Tilford v. Crush*, 39 Ohio St.3d 174, 529 N.E.2d 1245 (1988); and *State ex rel. Csank v.*

Jaffe, 107 Ohio App.3d 387, 668 N.E.2d 996 (8th Dist.1995). However, absent such a patent and unambiguous lack of jurisdiction, a court having general jurisdiction of the subject matter of an action has authority to determine its own jurisdiction. A party challenging the court's jurisdiction has an adequate remedy at law via an appeal from the court's holding that it has jurisdiction. *State ex rel. Rootstown Local School Dist. Bd. of Edn. v. Portage Cty. Court of Common Pleas*, 78 Ohio St.3d 489, 678 N.E.2d 1365 (1997). Moreover, this court has discretion in issuing the writ of prohibition. *State ex rel. Gilligan v. Hoddinott*, 36 Ohio St.2d 127, 304 N.E.2d 382 (1973).

{¶13} Similarly, the principles of the jurisdictional priority rule are also well established. This rule provides that "'as between [state] courts of concurrent jurisdiction, the tribunal whose power is first invoked by the institution of proper proceedings acquires jurisdiction, to the exclusion of all tribunals, to adjudicate upon the whole issue and to settle the rights of the parties.'" *State ex rel. Dannaher v. Crawford*, 78 Ohio St.3d 391, 393, 678 N.E.2d 549 (1997), quoting *State ex rel. Racing Guild of Ohio v. Morgan* 17 Ohio St.3d 54, 56, 476 N.E.2d 1060 (1985); and *State ex rel. Phillips v. Polcar*, 50 Ohio St.2d 279, 364 N.E.2d 33 (1977), syllabus. Furthermore, "it is a condition of the operation of the state jurisdictional priority rule that the claims or causes of action be the same in both cases, and '[i]f the second case is not for the same cause of action, nor between the same parties, the former suit will not prevent the latter.'" *Crawford* at 393, quoting *State ex rel. Sellers v. Gerken*, 72 Ohio St.3d 115, 117,

1995-Ohio-247, 647 N.E.2d 807, and *State ex rel. Judson v. Spahr*, 33 Ohio St.3d 111, 113, 515 N.E.2d 911 (1987).

{¶14} Nonetheless, the rule may apply even if the causes of action and requested relief are not identical. *Sellers* and *State ex rel. Otten v. Henderson*, 129 Ohio St.3d 453, 2011-Ohio-4082, 953 N.E.2d 809. That is, if the claims in both cases are such that each of the actions comprise part of the "whole issue" that is within the exclusive jurisdiction of the court whose power is legally first invoked, the jurisdictional priority rule may be applicable. The determination of whether the two cases involve the "whole issue" or matter requires a two-step analysis: "First, there must be cases pending in two different courts of concurrent jurisdiction involving substantially the same parties. Second, the ruling of the court subsequently acquiring jurisdiction may affect or interfere with the resolution of the issues before the court where suit was originally commenced." *Michaels Bldg. Co. v. Cardinal Fed. S. & L. Bank*, 54 Ohio App.3d 180, 183, 561 N.E.2d 1015 (8th Dist.1988); and *Tri State Group, Inc. v. Metcalf & Eddy of Ohio, Inc.*, 8th Dist. Cuyahoga No. 92660, 2009-Ohio-3902.

{¶15} Finally, "institution of proper proceedings" is filing the lawsuit and obtaining service. In *Gehelo v. Gehelo*, 160 Ohio St. 243, 116 N.E.2d 7 (1953), the husband filed for divorce in Ashtabula County on October 30, 1951, but personal service was not made and service by publication was not completed until February 8, 1952. The wife filed for divorce in Cuyahoga County on January 18, 1952, and obtained service on

the husband on January 23, 1952. On these facts, the courts ruled the Cuyahoga County case obtained jurisdiction of the divorce first, to the exclusion of Ashtabula County.

{¶16} In the present matter, Oak Leadership began the Quiet Title Case on August 30, 2013, and obtained service on some of the defendants by September 10, 2013. In contrast, the treasurer filed the Foreclosure Case on December 12, 2013, and obtained service on a defendant on December 27, 2013. Thus, it appears that the Quiet Title Case would have jurisdictional priority over the Foreclosure Case.

{¶17} To circumvent this obstacle, Consortium invokes the principle that "a party's failure to join an interested and necessary party constitutes a jurisdictional defect that precludes the court for rendering a judgment in the case." *State ex rel. N.G. v. Cuyahoga Cty. Court of Common Pleas, Juvenile Div.*, Slip Opinion No. 2016-Ohio-1519, ¶ 27. It then seizes the language of the jurisdictional priority rule that "[w]hen a court of competent jurisdiction acquires jurisdiction of the subject matter of an action, its authority continues until the matter is completely and finally disposed of, and no court of co-ordinate jurisdiction is at liberty to interfere with its proceedings." (Quoting *The John Weenik & Sons Co. v. Court of Common Pleas of Cuyahoga Cty.*, 150 Ohio St. 349, 82 N.E.2d 730 (1948), paragraph three of the syllabus.) Thus, Consortium concludes that a case is not commenced until the last interested and necessary party has been served. Pursuant to this reasoning, the Foreclosure Case was "commenced" on September 24, 2014, when the final party, Consortium, was allowed intervention in that case. In contrast, Oak Leadership after repeated amended complaints to add parties did

not commence the Quiet Title Case until August 27, 2015, when service was obtained on VFC Partners 18, L.L.C., a predecessor in interests to A New Day. In summary, Consortium argues that the Foreclosure Case has jurisdictional priority over the Quiet Title Case, both of which are in the general division of the Cuyahoga County Common Pleas Court.

{¶18} This argument is unpersuasive because the jurisdictional priority rule does not apply to cases filed in the same court in the same division. This court in *Third Fed. Sav. Bank v. Cox,* 8th Dist. Cuyahoga No. 93950, 2010-Ohio-4133, ¶ 11, ruled that the jurisdictional priority rule does not apply, because the "rule contemplates cases pending in two different courts of concurrent jurisdiction — not two cases filed in the same court." Similarly, this court held that the jurisdictional priority rule applies between "*two courts* of concurrent jurisdiction involving substantially the same parties * * * " (Emphasis sic.) *Nick Mayer Lincoln Mercury v. Ohio Bureau of Workers' Comp.,* 8th Dist. Cuyahoga No. 93752, 2010-Ohio-2782, ¶ 9. This court concluded that because the two subject cases were pending in the same court before the same judge, the jurisdictional priority rule did not apply. *Republic Bank v. Flynn Props., L.L.C.,* 8th Dist. Cuyahoga No. 91573, 2009-Ohio-5552.

{¶19} The Fifth District, in *State ex rel. Republic Services of Ohio II, L.L.C. v. Bd. of Township Trustees*, 5th Dist. Stark Nos. 2006 CA 00152 and 2006 CA 00172, ¶ 47, refused to apply the jurisdictional priority rule because the two cases were filed in the same court; "the jurisdictional priority rule contemplates cases pending in two different

courts of concurrent jurisdiction — not two cases filed in the same court." The Tenth District affirmed this principle in *Fenner v. Kinney*, 10th Dist. Franklin No. 02AP-749, 2003-Ohio-989, and *Bright v. Family Med. Found.*, 10th Dist. Franklin No. 02AP-1443, 2003-Ohio-6652.

{¶20} Moreover, Consortium's argument that a case is not commenced, including for purposes of the jurisdictional priority rule, until all interested and necessary parties are served is not persuasive. Civ.R. 3(A) provides in pertinent part as follows: "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 * * *." The use of the article a indicates a case is commenced upon service of just one defendant out of all of the defendants. This contradicts the position that a case is not commenced until all of the defendants have been served. Furthermore, the rule provides clarity for purposes of the jurisdictional priority rule in establishing clear, recognized events to determine when the rule would apply, as compared to an uncertain and arguably changing result as new parties are discovered.

{¶21} This court indicated the correctness of this position in *CWP Limited Partnership v. Vitrano*, 8th Dist. Cuyahoga No. 71314, 1997 Ohio App. LEXIS 2116 (May 15, 1997). In that case, CWP leased commercial property and entered into a lease with the Vitranos and the Kolinoffs, both of whom executed a cognovit note in favor of CWP. On April 26, 1995, the Vitranos, but not the Kolinoffs, commenced litigation in the Summit County Court of Common Pleas, inter alia, to rescind the cognovit note

because of fraud. On May 31, 1995, CWP commenced its cognovit note case against both the Vitranos and Kolinoffs in the Cuyahoga County Common Pleas Court and obtained judgment after the Summit County complaint was served upon CWP. Upon these facts, this court ruled that the Summit County case had jurisdictional priority over the Cuyahoga County cognovit note case, even though an apparent necessary party seemed to be missing from the Summit County case. In fact, this court noted that "it may be improper to proceed with the Summit County litigation without adding the Kolinoffs." (*Id.* at 7.) Thus, the proper synthesis of the jurisdictional priority rule, Civ.R. 3(A) defining commencement of the case, and the requisite of having all necessary parties before the court to render a judgment, is that the jurisdictional priority vests with the case first filed and obtaining service on a party, but the trial court must still obtain jurisdiction over all the parties before rendering judgment.

{¶22} Alternatively, there is no doubt that the respondent has basic statutory jurisdiction to hear the Quiet Title Case. Any uncertainty concerning the jurisdictional priority rule, the commencement of the cases, the similarity of the claims before the court, the affect or interference of one case upon the other, and the jurisdictional need to have all necessary parties before the court vests the respondent judge with sufficient jurisdiction to determine his own jurisdiction. Such a procedural posture precludes the writ of prohibition. The ruling may then be reviewed on a fuller record on appeal, such as *Vitrano*, *Republic Services*, *Gehelo*, *Fenner*, and *Bright.*

{¶23} Accordingly, this court grants the respondent judge's motion for summary judgment, denies the Consortium's and A New Day's motions for summary judgment, and denies the application for a writ of prohibition. Relator to pay costs. This court directs the clerk of courts to serve all parties notice of this judgment and its date of entry upon the journal as required by Civ.R. 58(B).

{¶24} Writ denied.

LARRY A. JONES, SR., ADMINISTRATIVE JUDGE

EILEEN A. GALLAGHER, J., and
SEAN C. GALLALGHER, J., CONCUR