[Cite as *Lavery v. Akron Hous. Appeals Bd., Dept. of Pub. Serv.*, 2015-Ohio-1277.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

THOMAS LAVERY Appellant v. AKRON HOUSING APPEALS BOARD, DEPT. OF PUBLIC SERVICE Appellee	C.A. No. 27383 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2011 07 3978

DECISION AND JOURNAL ENTRY

Dated: April 1, 2015

HENSAL, Presiding Judge.

{¶1} Thomas Lavery appeals the dismissal of his administrative appeal by the Summit County Court of Common Pleas. For the reasons set forth below, we affirm.

I.

{¶2} We previously recounted the procedural history in Mr. Lavery's first appeal:

> In 2011, the Akron Department of Public Service, Housing Division ("Housing Division") received a complaint regarding the condition of Mr. Lavery's residential property located on Portage Path in Akron, Ohio. After inspecting the property, the Housing Division issued a repair order directing Mr. Lavery to keep the dwelling unit vacant until he had resolved several Akron Environmental Health Housing Code violations to the Housing Division's satisfaction.
>
> Mr. Lavery appealed the repair order to the Akron Housing Appeals Board ("the Board"), which denied his appeal. He then filed an administrative appeal of the Board's decision to the common pleas court. On September 2, 2011, the Board filed a notice that it had filed the administrative record on September 6, 2011, four days after the notice of filing.
>
> On September 14, 2011, the administrative judge of the common pleas court approved a transfer of the case from the judge to whom the case had been originally assigned to another judge for the reason that the case was a refiled case.

> There is nothing on the transfer approval form indicating that a copy was sent to either party or directing the clerk to notify the parties of the transfer.
>
> On October 11, 2011, the Board filed a motion to dismiss the appeal for failure to prosecute. The Board argued that Mr. Lavery had failed to timely file a brief as required by Summit County Court of Common Pleas Local Rule ("Loc.R.") 19.03. Mr. Lavery opposed the motion for dismissal and further moved for an extension of time to file his brief and for clarification from "either Judge" regarding the filing of his brief and supplementing the record with missing evidence. In support, Mr. Lavery argued that the time limit for filing a brief set out in Loc.R. 19.03 is not mandatory and does not require dismissal of his appeal. The Board replied and reiterated its motion for dismissal, or in the alternative, that the trial court consider the merits of the appeal without allowing Mr. Lavery to submit additional evidence. The trial court, strictly construing Loc.R. 19.03(a), granted the Board's motion and dismissed Mr. Lavery's appeal for failure to file a brief within thirty days of the filing of the record.

Lavery v. Akron Dept. of Pub. Serv., 9th Dist. Summit No. 26369, 2013-Ohio-918, ¶ 2-5. Noting that Mr. Lavery had informed the lower court that evidence was potentially missing from the record and that the case had been transferred from one judge's docket to another, this Court concluded that the dismissal of the administrative appeal was unreasonable under the circumstances. *Id*. at ¶ 9-10. This Court reversed the dismissal and "remanded for further proceedings consistent with [the] opinion." *Id*. at ¶ 12.

{¶3} On remand, the judge who had previously dismissed the case ordered that the case be transferred back to the original judge. That journal entry was entered on May 13, 2013. No further action was taken in the case until February 7, 2014, when the Board requested that a briefing schedule be set. The lower court set the briefing schedule in a February 28, 2014 order, which required Mr. Lavery to file his brief by March 31, 2014, and which warned that "[f]ailure to adhere to this schedule may result in dismissal of the appeal pursuant to Loc.R. 19." Mr. Lavery, however, did not file a brief, and, on April 8, 2014, the Board moved to dismiss the administrative appeal. Mr. Lavery did not file a response, and the lower court dismissed his

administrative appeal for his failing to comply with its February 28, 2014 order establishing a briefing schedule.

{¶4} Mr. Lavery has appealed, raising three assignments of error for our review. To facilitate our review, we address his assignments of error out of order.

II.

{¶5} Before addressing, the assignments of error, we initially note that Mr. Lavery has been acting pro se throughout these proceedings. It is well established that pro se litigants should be granted reasonable leeway, and their motions and pleadings should be construed liberally so as to decide the issues on the merits as opposed to technicalities. *See, e.g., Pascual v. Pascual*, 9th Dist. Medina No. 12CA0036-M, 2012-Ohio-5819, ¶ 5. "However, a pro se litigant is presumed to have knowledge of the law and correct legal procedures so that he remains subject to the same rules and procedures to which represented litigants are bound. He is not given greater rights than represented parties, and must bear the consequences of his mistakes." (Internal quotations and citations omitted.) *Id.* It is not this Court's duty to create an appellant's argument for him. *See Cardone v. Cardone*, 9th Dist. Summit No. 18349, 1998 WL 224934, *8 (May 6, 1998); App.R. 16(A)(7).

ASSIGNMENT OF ERROR II

> APPELLANT'S ADMINISTRATIVE APPEAL TO SUMMIT COUNTY COMMON PLEAS COURT WAS UNREASONABLY DISMISSED – LACK OF DUE PROCESS – FOR "FAILING TO FILE A TIMELY BRIEF, REQUEST AN EXTENSION, OR PROVIDE THE COURT ANY REASON THAT THE APPEAL SHOULD NOT BE DISMISSED." MR. LAVERY DID NOT AT ANY TIME RECEIVE A "BRIEFING SCHEDULE[,"] NOR DID HE RECEIVE A COPY OF THE CITY'S "MOTION TO DISMISS APPEAL[."] HE CAN'T VERY WELL ANSWER OR CONTEND WITH THINGS HE DOESN'T EVEN KNOW ABOUT. HE FIRST SAW COPIES OF THE TWO ITEMS NOTED WHEN HE WAS ABLE TO GO THROUGH THE RECORD.

{¶6} Mr. Lavery argues on appeal that the lower court should not have dismissed his administrative appeal because he had never been notified of the briefing schedule established by the February 28, 2014 order. Mr. Lavery also claims to have not received the Board's April 8, 2014 motion to dismiss.

{¶7} The lower court dismissed Mr. Lavery's appeal pursuant to Local Rule 19 due to his failure to comply with the briefing schedule it had set in its February 28, 2014 order. "'[T]his Court reviews the trial court's interpretation or application of its local rules for an abuse of discretion.'" *Lavery*, 2013-Ohio-918, at ¶ 7, quoting *Michaels v. Michaels*, 9th Dist. Medina No. 07CA0058-M, 2008-Ohio-2251, ¶ 13. An abuse of discretion means the court's decision is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶8} As recounted above, after this Court remanded the case, the case was transferred back to the original judge on May 13, 2013. Nothing further occurred in this case until February 8, 2014, when the Board moved to establish a briefing schedule. The lower court granted the motion and established a briefing schedule on February 28, 2014, that required Mr. Lavery to file his brief by March 31, 2014. In that order, the lower court warned that the failure to comply with the briefing schedule could result in dismissal pursuant to Summit County Court of Common Pleas Local Rule 19. When no brief was filed, the Board moved to dismiss the appeal on April 8, 2014. In that motion, the Board referred to the court's February 28, 2014 order establishing a briefing schedule. Mr. Lavery did not file a response to the Housing Division's motion, and the lower court dismissed the appeal on April 29, 2014.

{¶9} Mr. Lavery argues that the lower court abused its discretion in dismissing his appeal because he never received notice of the briefing schedule or the motion to dismiss.

However, while the record is silent as to whether the February 28, 2014 briefing schedule order was sent to Mr. Lavery, the Board's April 8, 2014 motion to dismiss contains a certification of service indicating that a copy of the motion had been sent to Mr. Lavery at the property at issue in this case, which is where Mr. Lavery has been receiving the mail throughout these proceedings.[1] Although Mr. Lavery claims on appeal that he never received a copy of the motion to dismiss, nothing in the lower court record supports that claim, and our review is limited to the information that was before the court at the time it made its decision. *See State v. Ishmail*, 54 Ohio St.2d 402 (1978), paragraph one of the syllabus.

{¶10} Accordingly, under the specific facts of this case, we cannot conclude that the lower court abused its discretion in dismissing Mr. Lavery's administrative appeal. Even assuming that Mr. Lavery did not receive a copy of the February 28, 2014 briefing schedule, the record before the lower court indicates that he did receive the Board's motion to dismiss the appeal for failing to comply with that briefing schedule. The lower court did not rule on this motion for 21 days, giving Mr. Lavery an opportunity to explain that he had not received the order or to otherwise attempt to file a brief. However, Mr. Lavery did not file any response. While the lower court, just as this Court, must give pro se litigants reasonable leeway, pro se litigants must still abide by court rules and procedure. Based on the evidence before it, the lower court was not unreasonable in deciding to dismiss Mr. Lavery's administrative appeal pursuant to Local Rule 19 for failing to file a brief.

{¶11} Mr. Lavery's second assignment of error is overruled.

[1] Mr. Lavery concedes on appeal that he received other documents sent to that address during this case.

ASSIGNMENT OF ERROR I

APPELLANT'S APPEAL TO AKRON HOUSING APPEALS BOARD WAS PERFUNCTORILY AND UNREASONABLY DENIED AGAINST THE WEIGHT OF THE EVIDENCE AND WITH NO JUST CAUSE FOR THE ORIGINAL COMPLAINT AND NO STANDING FOR THE ORIGINAL COMPLAINANT.

ASSIGNMENT OF ERROR III

IT APPEARS THAT THE WHOLE CASE IS ILLEGAL, AS THE AKRON DEPARTMENT OF PUBLIC SERVICE DOESN'T EVEN HAVE THE LEGAL AUTHORITY TO ISSUE HOUSING ORDERS OR ENFORCE A HOUSING CODE. ONLY THE PREVIOUSLY EXISTING AND NOW DEFUNCT AKRON HEALTH DEPARTMENT HAD SUCH AUTHORITY.

{¶12} Mr. Lavery's first and third assignments of error go to the merits of his administrative appeal. However, the lower court never reached the merits of his appeal, and this Court will generally not address issues in the first instance. *See Schaefer v. Musil*, 9th Dist. Summit No. 27109, 2014-Ohio-1504, ¶ 17. In any case, these assignments of error are moot in light of our resolution of the second assignment of error as the lower court's dismissal of the administrative appeal is affirmed. *See* App.R. 12(A)(1)(c).

III.

{¶13} Mr. Lavery's second assignment of error is overruled, and his remaining assignments of error are moot. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

JENNIFER HENSAL
FOR THE COURT

SCHAFER, J.
CONCURS.

CARR, J.
DISSENTING.

{¶14} I respectfully dissent. As there is no record of the briefing schedule being sent to Mr. Lavery, I would reverse and remand.

APPEARANCES:

THOMAS LAVERY, pro se, Appellant.

CHERI B. CUNNINGHAM, Director of Law, and JOHN R. YORK and SEAN W. VOLLMAN, Assistant Directors of Law, for Appellee.