

CLEVELAND MUNICIPAL COURT  
HOUSING DIVISION  
CUYAHOGA COUNTY, OHIO

NORTHEAST SHORES  
DEVELOPMENT CORPORATION,

DATE: MARCH 25, 2005

v.

CASE NO.: 05-CVH-03844

EUCLID BEACH L.P. et al.,

JUDGMENT ENTRY

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Walter & Haverfield, L.L.P., John W. Monroe, and William R. Hanna, for  
plaintiff.

Berns, Ockner & Greenberger, L.L.C., and Paul M. Greenberger, for  
defendant.

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RAYMOND L. PIANKA, Judge.

{¶1} This case is before the court on the motion of defendant Euclid Beach L.P. to dismiss, to cancel a hearing, and to order sanctions for frivolous conduct. For the following reasons, Euclid Beach's motion is granted in part and denied in part.

{¶2} Euclid Beach argues that it is entitled to have the cause dismissed because the structure at issue, referred to by the parties as the Humphrey Mansion, is neither used nor intended for use for residential purposes, and so it is not subject to an action for nuisance abatement under R.C. 3767.41(A)(2).

{¶3} While not specifically stated in defendant's motion, it appears that Euclid Beach makes its motion to dismiss under Civ.R. 12(B)(6).

{¶4} The Eighth District Court of Appeals set forth the standard to be applied in a motion to dismiss under Civ.R. 12(B)(6) in *Sinoff v. Ohio Permanente Med. Group, Inc.* (2002), 146 Ohio App.3d 732, 767 N.E.2d 1251:

{¶5} “The Ohio Supreme Court has noted the necessity of construing, under Civ.R. 12(B)(6), all inferences in the plaintiff's favor. See *Wampler v. Higgins* (2001), 93 Ohio St.3d 111, 752 N.E.2d 962, citing *Vail v. Plain Dealer Publishing Co.* (1995), 72 Ohio St.3d 279, 649 N.E.2d 182. When reviewing a motion to dismiss pursuant to Civ.R. 12(B)(6), the court is required to view all of the allegations of the complaint as true. *Butler v. Cuyahoga Cty. Dept. of Human Serv.* (2001), 92 Ohio St.3d 354, 750 N.E.2d 554. \* \* \* Further, in *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 71 O.O.2d 223, 327 N.E.2d 753, the Ohio Supreme Court found that it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery. The plaintiff must be afforded all reasonable inferences possibly derived from the allegations in the complaint. *Desenco Inc. v. Akron* (1999), 84 Ohio St.3d 535, 706 N.E.2d 323.”

{¶6} Therefore, as long as there is a set of facts, consistent with the plaintiff's complaint, that would allow the plaintiff to recover, the court may not grant defendant's motion to dismiss. *York v. Ohio State Hwy. Patrol* (1991), 60 Ohio St.3d 143, 573 N.E.2d 1063.

{¶7} A building may be the subject of a nuisance-abatement action under R.C. 3767.41 if it is a building or structure that is used or intended to be

used for residential purposes. R.C. 3767.41(A)(1). "Building" includes, but is not limited to, a building or structure in which any floor is used for retail stores, shops, salesrooms, markets, or similar commercial uses, or for offices, banks, civic administration activities, professional services, or similar business or civic uses, and in which the other floors are used, or designed and intended to be used, for residential purposes. Id.

{¶8} Northeast Shores Development Corporation ("Northeast Shores"), plaintiff, and Euclid Beach agree that the Humphrey Mansion currently is not used for residential purposes. Therefore, to be a building subject to R.C. 3767.41, the structure must be a building "intended to be used for residential purposes."

{¶9} Euclid Beach asserts that it intends to demolish the mansion and convert the land on which it stands into additional manufactured-home lots. Therefore, Euclid Beach argues, the mansion cannot be said to be a building "used or intended to be used for residential purposes" under R.C. 3767.41. Northeast Shores, conversely, argues that the definition in the statute is intended merely to describe the type of structure to which the statute applies, that is, whether the building or structure is currently used or originally was built for use as a residential building.

{¶10} The issue to be determined, then, is whether the phrase "intended to be used" refers to the subjective intention of the owner of the building or the objective design or construction of the building itself. That the phrase reasonably may be interpreted in two ways leads this court to conclude that the phrase is ambiguous.

{¶11} If a statute is ambiguous, the court, in determining the intention of the legislature, may consider, among other matters, the object sought to be attained, the consequences of a particular construction, and the administrative construction of the statute. R.C. 1.49.

{¶12} The object to be attained through the procedure of R.C. 3767.41 is the abatement of a public nuisance. The statute permits the initiation of an action by a municipal corporation, a neighbor within 500 feet of the property, a tenant of the property, or other interested party, including a nonprofit corporation that has as one of its goals the improvement of housing conditions in the county or municipal corporation in which the building involved is located. A property may be the subject of the action if it poses a threat to public health, welfare, or safety. The statute then provides for the elimination of any existing hazards and the abatement of the nuisance by the owner, lienholder, or other interested party.

{¶13} The statute's reach, by its own language, extends beyond the safety of the occupants of the given building. It extends to the safety of other residents of the neighborhood. That the party initiating the action may be a nonprofit corporation with the goal of improving housing conditions also indicates that the concern is for neighborhoods, the conditions within them, and the potential impact of nuisance structures on neighboring residences. This supports plaintiff's reading of the statute, i.e., that the statute is intended to apply to buildings constructed to be residences, within residential areas. Analyzed in light of the objective of the statute, then, this court concludes that the phrase "intended to be used" refers to the construction and location of the building and not the subjective intention of the owner.

{¶14} An examination of the potential consequences of the construction urged by Euclid Beach leads to the same conclusion. Reading the statute as suggested by Euclid Beach would permit owners of residential structures to avoid application of the statute and escape responsibility for those structures by walking away, expressing an intention to abandon the property. This would increase, not decrease, the risk of nuisance properties to neighborhoods.

{¶15} Finally, the construction of the statute itself encourages the court to adopt plaintiff's interpretation. The definition of buildings includes commercial structures if the structure has residential suites: " 'Building' includes, but is not limited to, a building or structure in which any floor is used for retail stores, shops, salesrooms, markets, or similar commercial uses, or for offices \* \* \* and in which the other floors are used, or designed and intended to be used, for residential purposes." R.C. 3767.41(A)(1). The statute attempts to include structures that, by virtue of their construction, legally may be used for residential purposes. In addition, the statute, in its definition of "public nuisance," anticipates that some of the buildings subject to the statute will be abandoned. R.C. 3767.41(A)(2). Abandoned buildings fall within the statute, then, but cannot be said to be in use as residential premises, or evidently intended by the owner to be used as residential premises.

{¶16} Further, omissions from the statute also argue in favor of Northeast Shores's recommended construction. This statute is very detailed and specific in the procedure to be followed for the declaration and abatement of the public nuisance. The statute, however, requires no proof of intention on the part of the

owner to use the premises for residential purposes and does not specify a point at which the owner may raise subjective intentions as a defense.

{¶17} In summary, this court concludes that the phrase “used or intended to be used for residential purposes” is ambiguous and therefore in need of interpretation by the court. Examining the purpose of the statute, as well as its language and the likely consequences of the suggested constructions, this court concludes that the phrase means “occupied by residents or suitable for residential purposes based upon the property’s design, construction, and location,” and adopts this more objective standard, as opposed to the subjective standard urged by Euclid Beach.

{¶18} Examining the undisputed facts and the correct interpretation of the statute as determined by this court, the court concludes that Euclid Beach has failed to show that there is no set of facts upon which Northeast Shores can recover. Accordingly, the motion of Euclid Beach to dismiss is denied.

{¶19} In its motion, Euclid Beach also seeks sanctions against Northeast Shores for filing this action. Euclid Beach, having failed in its motion to dismiss, must fail as to the request for sanctions as well. The motion for sanctions is denied.

{¶20} Finally, Euclid Beach seeks, and Northeast Shores does not oppose, a continuance of the hearing set for April 4, 2005.

{¶21} A hearing on an action commenced under R.C. Chapter 3767 may be conducted no earlier than 28 days after the owner of the building and other interested parties have been served with a copy of the complaint and the notice of the date and time of the hearing. R.C. 3767.41(B)(2)(b). A review of the docket

in this case reveals that service has not yet been perfected on California Federal Bank. Accordingly, the hearing in this case set for April 4, 2005, is continued until May 2, 2005, at 9:30 a.m. on the 13th floor. If service has not been perfected upon California Federal Bank by that date, the court still will meet with the parties on that date and time, converting the hearing on that date to a status/settlement conference, to be attended by all parties who have been served.

Motion granted in part  
and denied in part.