[Cite as *Toledo v. AH & TQ, Inc.*, 2023-Ohio-2790.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

City of Toledo — Court of Appeals No. L-22-1280

Appellee — Trial Court No. CVH-22-14082

v.

AH & TQ, Inc, et al. — **DECISION AND JUDGMENT**

Appellant — Decided: August 11, 2023

* * * * *

Dale R. Emch, City of Toledo Director of Law,
Jeffrey B. Charles, Chief Litigation Attorney, and
John T. Madigan, Senior Attorney, for appellee,

Hassanayn Joseph for appellant.

* * * * *

ZMUDA, J.

I. Introduction

{¶ 1} Appellant, AH & TQ, Inc., appeals the judgment of the Toledo Municipal Court, Housing Division, finding that appellant's premises at 3100/3108 N. Detroit Avenue, Toledo, Ohio, was being used for drug abuse and constituted a public nuisance. As a result, the trial court granted appellee, the city of Toledo, a permanent injunction to

enjoin appellant from maintaining said nuisance at its premises. Because we find that the trial court prematurely issued its permanent injunction prior to the expiration of the time period for appellant's filing of an answer, we reverse and remand this matter to the trial court for further proceedings.

A. Facts and Procedural Background

{¶ 2} This action originated on October 28, 2022, when the city filed a complaint seeking injunctive relief against appellant, the owner of the gas station and convenience store situated at 3100 N. Detroit (hereinafter referred to as the "gas station"), and the Aouichi Corporation, the company that held a license to sell liquor at the gas station. In its complaint, the city used the gas station's address for both appellant and the Aouichi Corporation.

{¶ 3} Beginning in June 2021, several incidents involving criminal activity at the gas station took place. These incidents formed the basis for the city's nuisance action and were referenced by the city in its complaint along with supporting documentation that was attached thereto.[1] Due to the ongoing criminal activity occurring at the gas station, the chief of the Toledo Police Department, George Kral, issued a nuisance notice to Imed Aouichi on July 18, 2022. In his letter, Kral acknowledged Aouichi as the holder of a liquor permit for the gas station, and advised Aouichi that the criminal activities taking

[1] Because our analysis in this appeal is focused entirely upon procedural issues, we need not articulate the details of these incidents.

place on the premises constituted a public nuisance under the Toledo Municipal Code. Consequently, Kral ordered Aouichi to "immediately cease and desist from maintaining your property as a public nuisance."

{¶ 4} Approximately three months later, on October 12, 2022, police responded to the gas station after receiving reports of a shooting, the victim of which was the gas station's manager, Ali Fraiz. In response to this further criminal activity at the gas station, the city filed its October 28, 2022 complaint for injunctive relief.

{¶ 5} In its complaint, the city alleged that police were called out to the gas station on "numerous occasions for criminal complaints ranging from drug trafficking, assaults, aggravated menacing, gunshots fired, disorderly conduct, drug abuse, theft and criminal damaging." The city asserted that the defendants and their employees participated in a pattern of criminal activity by allowing criminal acts to take place without appropriate intervention. Moreover, the city alleged that the defendants "did knowingly establish or permit a nuisance to exist at 3100/3108 N. Detroit Ave. in violation of Toledo Municipal Code §§ 1726.01, 533.19 and 507.04." Consequently, the city asked the trial court to (1) permanently enjoin the defendants from maintaining the nuisance, (2) padlock the gas station and prevent it from reopening for a period of one year, (3) immediately close the premises to the public, (4) require the defendants to post a cash bond to cover the expenses of abating the nuisance in the event defendants failed to do so, and (5) award the city other relief including attorney fees and costs.

{¶ 6} On November 2, 2022, a hearing was held on the city's request for a temporary restraining order. Attorney Kenneth Wenninger was present on behalf of Aouichi Corporation.

{¶ 7} At the outset of the hearing, the city informed the court that "the owner of [appellant] is represented by nobody at this point" and was not present. The city went on to inform the court that appellant was "the actual current operator of the premises." Wenninger responded that appellant is "actually the titled owner," and explained that "the operator is a different company by the name of NALA, Inc. It's in – there's a liquor permit transfer pending. So they are operating under a management agreement. * * * I think technically the business is owned by Aouichi Corporation with NALA, Inc. operating under the management agreement while the liquor permit is transferring." Thereafter, Wenninger informed the court that he had "spoken to [attorney] Scott Ciolek in the hallway and asked him if he would be interested in being involved. He said he would. So I said that I would give * * * the owner of AH & TQ Scott's information so that Scott could represent them."

{¶ 8} Subsequently, Wenninger requested a continuance to allow AH & TQ, Inc. additional time to hire Ciolek. The court denied the continuance request and proceeded with the hearing. At the conclusion of the hearing, the trial court found that the city presented sufficient evidence to warrant a temporary restraining order, verbally granted the city's motion, and asked the city to prepare an order to reflect the same. Thereafter, the court set the matter for a hearing on the city's request for a permanent injunction.

{¶ 9} On November 10, 2022, the trial court held a consolidated hearing on the city's motion for a preliminary injunction and request for a permanent injunction. Appellant's attorney, Hassanyn Joseph, was present at the hearing. On appeal, appellant concedes that counsel "attended the hearing and raised several preliminary issues showing several violations by [the city] which infringed on appellant's constitutional rights and requested dismissal."

{¶ 10} At the beginning of the hearing, Joseph raised "some procedural matters." First, Joseph argued that the city's complaint should be dismissed because it was not verified. Second, Joseph argued that the complaint was subject to dismissal because the city did not comply with Toledo Municipal Code 1726.02.

{¶ 11} Specifically, Joseph contended that the city sent written notice of the public nuisance in July 2022 to the former property owner, not to appellant, which became the owner of the gas station in January 2022. Concerning this argument, the city responded that it was "proceeding not just under 1726.02, but also under 533.19 of the Municipal Code. Which does not require notice to be sent to anybody."

{¶ 12} Without addressing Joseph's second argument, the court observed that the city's initial complaint was supported by an affidavit from lieutenant Richard Trevino of the Toledo Police Department and the voluminous police reports attached thereto and authenticated by Trevino. Thus, the trial court decided to proceed with the hearing "on the initial verified complaint." Thereafter, the city called several witnesses including Trevino and three other police officers from the Toledo Police Department, Kenneth

Krabill, Mark Harger, and Carl Grady. For its part, appellant called two witnesses; Imad Aouichi and Ahmed Salem.

{¶ 13} At the close of the evidence, the trial court heard oral arguments from the parties as to the city's request for a preliminary and permanent injunction. Subsequently, on November 14, 2022, the trial court issued its judgment entry granting the city's request for a preliminary and permanent injunction, ordering the gas station padlocked for one year, and barring the defendants from occupying the premises or permitting anyone else to occupy the premises during the duration of the padlock order.

{¶ 14} In its entry, the trial court found that the appellant permitted criminal activity to persist at the gas station despite repeated warnings that such conditions constituted a nuisance, and further found that the criminal activity did, in fact, meet the definition of a public nuisance under Toledo Municipal Code 1726.01(1) and (6), and was further subject to abatement as a premises used for drug abuse under Toledo Municipal Code 533.21.

{¶ 15} On November 22, 2022, appellant filed its timely notice of appeal, as well as a motion to stay pending appeal with the trial court. On December 1, 2022, the trial court denied appellant's motion to stay after finding that the continued operation of the gas station was a threat to public safety. Two weeks later, appellant filed "notice to clarify representation and request to correct case caption" with this court, asserting that Hassanayn Joseph only represents appellant and that Aouichi Corporation was represented by Kenneth Wenninger in the trial court.

{¶ 16} Thereafter, on December 28, 2022, appellant filed motion for stay with this court, which we denied on January 30, 2023. In our order denying the motion to stay, we sua sponte placed the matter on the accelerated calendar pursuant to App.R. 11.1 and 6th Dist.Loc.R. 12. The matter is now decisional.

B. Assignments of Error

{¶ 17} On appeal, appellant assigns the following errors for our review:

> Assignment of Error #1 – Appellee's complaint should be dismissed because appellee never perfected service of process nor was appellant able to raise an insufficient service defense in a responsive pleading as the trial court immediately issued its judgment, which was a final appealable order, and rendered all subsequent pleadings moot, preventing appellant [from answering] the complaint or raising the insufficient service of process defense.
>
> Assignment of Error #2 – There was insufficient evidence for the trial court to determine that appellant maintained a nuisance and the trial court's decision was against the manifest weight of the evidence.
>
> Assignment of Error #3 – The trial court erred by its decision to padlock Appellant's property without making a separate determination, as required by the Supreme Court decision in *Rezcallah*, on whether appellee proved by clear and convincing evidence appellant had knowledge of and either acquiesced, participate, and/or perpetuated the nuisance; in violation

of the Fourteenth Amendment Due Process Clause and the Fifth Amendment Takings Clause of the United States Constitution, and Section 19, Article I of the Ohio Constitution and the Supreme Court case of *Rezcallah*.

Assignment of Error #4 – Toledo Municipal Code 533.19/533.21 violates the Ohio Constitution as applied to appellant.

Assignment of Error #5 – The trial court erred by disregarding appellant's right to written notice which he was entitled to as the "owner" as defined in [Toledo Municipal Code] 1726, violating appellant's due process rights guaranteed by the Fourteenth Amendment of the US Constitution and Section 10, Article I of the Ohio Constitution.

Assignment of Error #6 – Due process requires that the defendant in a preliminary injunction, permanent injunction, and civil trial be given an opportunity to present a defense.

Assignment of Error #7 – The trial court erred by summarily dismissing appellee's amended verified complaint, filed the day before the hearing, and declaring that (sic) the initial verified complaint operative.

Assignment of Error #8 – The trial court erred by issuing appellee a temporary restraining order/preliminary injunction without specifically in terms setting forth the reason for its issuance or describing in reasonable detail the acts sought to be restrained, and without ensuring appellee

provided prior reasonable notice to appellant and without specifying immediate and irreparable injury, loss or damage that would result before appellant could be heard and without appellee certifying in writing efforts made to give notice and the reasons supporting that notice is not required.

Assignment of Error #9 – Chapter 533.19/1726.01 is void for vagueness as applied.

{¶ 18} For reasons more fully explained below, we find that the city's action was not subject to dismissal as appellant argues in its first assignment of error. However, we agree with appellant's contention in its sixth assignment of error that the trial court committed reversible error in issuing a permanent injunction prior to appellant's filing of its answer or the expiration of the time to file such an answer. Based upon this determination, this matter must be reversed and remanded to the trial court for further proceedings, and thus we do not reach the merits of appellant's second, third, fourth, fifth, seventh, eighth, and ninth assignments of error as the arguments raised therein are moot.

II. Standard of Review

{¶ 19} This appeal arises out of the trial court's issuance of a permanent injunction. "An injunction is an extraordinary remedy in equity where there is no adequate remedy available at law. It is not available as a right but may be granted by a court if it is necessary to prevent a future wrong that the law cannot." *Garono v. State*, 37 Ohio St.3d 171, 173, 524 N.E.2d 496 (1988). "A permanent injunction is not

considered an interim remedy. It is issued after a hearing on the merits in which a party has demonstrated a right to relief under the applicable substantive law." *Procter & Gamble Co. v. Stoneham*, 140 Ohio App.3d 260, 267-268, 747 N.E.2d 268 (1st Dist.2000). A party must prove that entitlement to the requested relief by clear and convincing evidence. *Id*. at 268. "Clear and convincing evidence is that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established." *Cross v. Ledford*, 161 Ohio St. 469, 477, 120 N.E.2d 118 (1954).

{¶ 20} We review the grant or denial of a permanent injunction for an abuse of discretion. *Danis Clarkco Landfill Co. v. Clark Cty. Solid Waste Mgt. Dist.*, 73 Ohio St.3d 590, 604, 653 N.E.2d 646 (1995). "We also review legal issues decided within the injunction framework under a de novo standard." *State v. City of Cincinnati Citizen Complaint Authority*, 2019-Ohio-5349, 139 N.E.3d 947, ¶ 21 (1st Dist.), citing *Vontz v. Miller*, 2016-Ohio-8477, 111 N.E.3d 452, ¶ 26 (1st Dist.) and *City of Cleveland v. State*, 157 Ohio St.3d 330, 2019-Ohio-3820, 136 N.E.3d 466, ¶ 15.

III. Analysis

A. Service of Process

{¶ 21} In its first assignment of error, appellant argues that the trial court should have dismissed the city's complaint based upon improper service of process and lack of personal jurisdiction, and should have granted appellant an opportunity to file a responsive pleading to raise improper service of process as an affirmative defense.

{¶ 22} In order to frame our analysis, it is helpful at the outset to distinguish the various forms of relief the city requested and the trial court granted in this case. To that end, the Tenth District has helpfully stated:

> In general, injunctions are separated into three categories: (1) temporary restraining orders, which may be issued ex parte without notice in an emergency situation "to last only long enough for a hearing"; (2) preliminary injunctions, issued "with notice and hearing to maintain the status quo until there can be a fair trial on the merits"; and (3) permanent injunctions, "issued after a trial on the merits."

City of Bexley v. Duckworth, 10th Dist. Franklin No. 99AP-414, 2000 WL 249121, *4 (Mar. 7, 2000), quoting McCormac, Ohio Civil Rules Practice (2 Ed.1992) 403, § 14.08. With this in mind, we note that the trial court's November 2, 2022 hearing on the city's motion for a temporary restraining order did not require notice to appellant. However, the subsequent hearing on the city's motion for a permanent injunction did require such notice.

{¶ 23} "It is rudimentary that in order to render a valid judgment, the court must have personal jurisdiction over the defendant." *Maryhew v. Yova*, 11 Ohio St.3d 154, 156, 464 N.E.2d 538 (1984). "'Proper service of process is a prerequisite for personal jurisdiction.'" *Fifth Third Bank v. Bolera*, 12th Dist. Butler No. CA2017-03-039, 2017-Ohio-9091, ¶ 15, quoting *Williams v. Gray Guy Group.*, 10th Dist. Franklin, 2016-Ohio-8499, 79 N.E.3d 1146, ¶ 18.

{¶ 24} On appeal, appellant insists that "[t]he record is replete that appellee did not provide appellant with service of process." While appellant points to no such evidence of a lack of notice, the state nonetheless concedes in its appellate brief that service was not perfected, stating: "Due to the fact that the [city's] motion for preliminary and permanent injunctions was set for hearing thirteen days after the complaint was filed and eight days after the temporary restraining order hearing, there was not sufficient time to perfect service."[2]

{¶ 25} Notwithstanding its concession, the city argues that appellant waived any argument concerning improper service of the complaint by participating at the permanent injunction hearing without asserting any arguments regarding improper service. We agree.

{¶ 26} "In the absence of service of process or the waiver of service by the defendant [under Civ.R. 4.7], a court ordinarily may not exercise jurisdiction over a party the complaint names as a defendant." *Williams* at ¶ 18, citing *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350, 119 S.Ct. 1322, 143 L.Ed.2d 448 (1999). However, if a defendant voluntarily appears at a hearing and participates without

[2] Although the city concedes that service was not perfected prior to the permanent injunction hearing, we note that the city certified in its original complaint and amended complaint that those documents were delivered to Salem on October 28, 2022, and November 10, 2022, respectively. Moreover, appellant's counsel admitted at the permanent injunction hearing that he received a copy of the amended complaint on November 9, 2022.

moving to dismiss the action for lack of proper service, the defendant waives any defects in service and the trial court has personal jurisdiction over the defendant. *McLemore v. Clinton County Sheriff's Office*, 2023-Ohio-1604, --- N.E.3d ----, ¶ 49 (12th Dist.), citing *Williams* at ¶ 19 (holding that a plaintiff's failure to perfect service of its original complaint is waived when the defendant appears for any other purpose than to object to jurisdiction) and *Maryhew* at 156 (personal jurisdiction may be obtained by service of process, voluntary appearance, or waiver). This is precisely what occurred here.

{¶ 27} Appellant's counsel appeared at the permanent injunction hearing on November 10, 2022. At the outset of the hearing, appellant's counsel acknowledged receipt of the city's amended complaint, raised several arguments unrelated to service of process, cross examined the city's witnesses, and called two witnesses on behalf of appellant. Despite this extensive participation, appellant's counsel never asserted improper service of the city's complaint as an argument, nor did he request dismissal of the action on that basis.

{¶ 28} If a party "appears and participates in the case without objection, he waives the defense of lack of personal jurisdiction due to failure of service." *Harris v. Mapp,* 10th Dist. Franklin No. 05AP–1347, 2006–Ohio–5515, ¶ 11. Thus, even with the city's concession that it did not perfect service of process of its complaint upon appellant prior to the permanent injunction hearing, appellant's argument nonetheless fails because it waived the affirmative defenses relating to lack of service and personal jurisdiction when

its counsel appeared and participated at the permanent injunction hearing without challenging service or personal jurisdiction.

{¶ 29} Here, because appellant did not assert improper service or lack of personal jurisdiction in its first appearance before the court at the permanent injunction hearing, it waived that argument and voluntarily submitted itself to the trial court's jurisdiction. Accordingly, the trial court did not lack personal jurisdiction over appellant when it conducted the permanent injunction hearing. Accordingly, appellant's first assignment of error is not well-taken.

B. Due Process Issue

{¶ 30} In its sixth assignment of error, appellant argues, inter alia, that its due process rights were violated when the trial court issued its order granting the city a permanent injunction before it "had an opportunity to file an answer to the initial verified complaint and/or the amended verified complaint."

{¶ 31} Regarding appellant's due process argument, at least three courts, including this court, have previously held that a trial court commits reversible error when it issues a permanent injunction prior to the expiration of the 28-day time period for filing an answer under Civ.R. 12(A).

{¶ 32} The Tenth District was the first court to pass upon this issue. In *Hershhorn v. Viereck*, 27 Ohio App.3d 242, 500 N.E.2d 379 (10th Dist.1985), the court examined the propriety of a trial court's consolidation of a hearing on plaintiffs' motion for a preliminary injunction and a trial on plaintiffs' request for a permanent injunction. Prior

to appeal, the trial court issued its order granting the plaintiffs' request for a permanent injunction immediately following the trial, which occurred only 12 days after the plaintiffs filed their complaint. *Id.* at 242-243. Upon review, the Tenth District reversed the trial court's issuance of a permanent injunction in this manner for two reasons. First, the court found that the issues raised by the plaintiffs in their motion for a preliminary injunction were distinct from the issues raised in support of the permanent injunction. Second, and more germane to the present action, the court held: "Even where the sole, ultimate issue is entitlement to a permanent injunction, it is improper to enter judgment on the merits immediately following a consolidated hearing if the time has not yet expired for the defendant to answer." *Id.* at paragraph two of the syllabus.

{¶ 33} Eight years after *Hershhorn* was decided, the Fourth District issued its decision in *Bd. of Educ. Ironton City Schools v. Ohio Dept. of Educ.*, 4th Dist. Lawrence No. CA92-39, 1993 WL 256320 (June 29, 1993). There, the court reversed the judgment of the trial court issuing a permanent injunction only five days after the plaintiff filed its complaint. In support of its decision, the Fourth District observed that the parties were unaware that the hearing conducted prior to the trial court's issuance of the permanent injunction was "anything other than a hearing on a motion for temporary restraining order." *Id.* at *4. The court went on to explain that "appellant had only two days notice of the hearing and no notice of any trial on the merits." *Id*. Thus, the court found that the trial court deprived the defendant of its due process rights by failing to notify the parties of its intention to consolidate the preliminary injunction hearing and trial on the

permanent injunction request as required under Civ.R. 65(B)(2).[3] *Id.* Moreover, the court cited *Hershhorn* and held that the trial court erred in granting permanent injunctive relief in favor of the plaintiff only five days after plaintiff's complaint was filed and prior to any answer being filed. *Id*.

{¶ 34} More recently, we too have issued a decision following the reasoning of the *Hershhorn* court. In *Village of Ottawa Hills v. Boice*, 6th Dist. Lucas No. L-12-1301, 2014-Ohio-1992, we agreed with the defendant that the trial court violated her due process rights when it issued a preliminary and permanent injunction three days before the defendant's answer was due to be filed. We reached our conclusion for several reasons, one of which was the fact that

> [a]t least two appellate districts have held that where the sole, ultimate issue is the plaintiff's entitlement to a permanent injunction, which is clearly what appellee was seeking in this case, it is improper for a court to enter a judgment on the merits immediately following a consolidated hearing if the time has not yet expired for the defendant to answer.

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[3] Civ.R. 65(B)(2) governs the consolidation of a preliminary injunction hearing with a trial on the merits, and provides, in relevant part:

> Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial.

Id. at ¶ 15.[4] As a result of our determination that the trial court erred by prematurely issuing a permanent injunction against the defendant, we reversed the matter and remanded it to the trial court without addressing the "underlying grounds for the trial court's judgment." *Id.* at ¶ 16.

{¶ 35} In its brief to this court, the city does not respond directly to appellant's argument concerning the timing of the trial court's issuance of the permanent injunction against appellant. Nor does the city address the caselaw cited by appellant in support of its argument, including *Bd. of Educ. Ironton City Schools* and *Boice*. Rather, the city insists that appellant's due process rights were protected since appellant's counsel appeared at the permanent injunction hearing and participated therein. In so arguing, the city fails to confront the salient issue presented in this appeal, namely whether the trial court violated appellant's due process rights by issuing its judgment granting the city's request for a permanent injunction prior to the time period provided under the Civil Rules for appellant to file an answer and assert the affirmative defenses it wishes to raise.

{¶ 36} Upon review, it is clear that the trial court's issuance of the permanent injunction was premature and constituted a violation of appellant's due process rights. Here, the city filed its initial complaint on October 28, 2022. The city then filed an

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[4] In *Boice*, we also found that the trial court violated the defendant's due process rights by not affording her the right to present a defense at the consolidated hearing, where the trial court took the matter under advisement at the close of the village's case-in-chief, and then rendered its decision without allowing the defendant to present witnesses.

amended complaint, and appellant's counsel acknowledged that he received that amended complaint on November 9, 2022. Thus, under Civ.R. 12(A), appellant's answer to the amended complaint was not due until December 7, 2022. However, the trial court journalized its decision granting the city's request for a permanent injunction on November 14, 2022, only five days after appellant received the city's amended complaint and 23 days prior to the expiration of the 28-day period to file an answer.

{¶ 37} The ultimate issue in this case is whether the city is entitled to a permanent injunction to prevent appellant from continuing to operate its gas station and convenience store. With that context in mind, *Hershhorn*, *Bd. of Educ. Ironton City Schools*, and *Boice* compel us to find that it was improper for the trial court to enter its judgment on the merits only four days after the November 10, 2022 consolidated hearing since the time had not yet expired for appellant to file its answer to the city's amended complaint. Accordingly, we find appellant's sixth assignment of error well-taken.

{¶ 38} In light of our resolution of appellant's sixth assignment of error in appellant's favor, this matter must be reversed and the matter remanded to the trial court. On remand, the trial court is instructed to provide appellant with the opportunity to file an answer within the time period that remained available to appellant on the day the court issued its judgment, namely 23 days. If appellant elects to file an answer within that time period, the trial court must determine whether the answer raises any issues not fully addressed by the parties at the November 10, 2022 hearing. If so, the court must provide the parties with an opportunity to litigate those issues. Otherwise, the trial court may

proceed to issue its order based upon the evidence already presented at the November 10, 2022 hearing.

III. Conclusion

{¶ 39} For the foregoing reasons, the judgment of the Toledo Municipal Court, Housing Division, is reversed. This matter is remanded to the trial court for further proceedings consistent with the instructions provided above. The city is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment reversed
and remanded.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Christine E. Mayle, J. _____
JUDGE

Gene A. Zmuda, J. _____
JUDGE

Myron C. Duhart, P.J. _____
CONCUR.
JUDGE