

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

CARL O. WUESTEHUBE,

CASE NO. 14CVF-07-7589

APPELLANTS,

JUDGE HORTON

VS.

OHIO REAL ESTATE COMMISSION,

APPELLEE.

DECISION AND ENTRY

**GRANTING IN PART AND DENYING IN PART THE MOTION TO DISMISS AS
FILED ON AUGUST 27, 2014**

AND

**SHOW CAUSE ORDER ON FAILURE TO TIMELY FILE APPELLANT
WUESTEHUBE'S BRIEF**

HORTON, J.

The matter before the Court is the pending Motion to Dismiss as filed by the Ohio Real Estate Commission (Commission) on August 27, 2014. Carl Wuestehube and Tri-Star Realty, Inc., (Tri-Star) filed a Memorandum in Opposition on September 2, 2014. The Commission did not file a Reply. For the reasons that follow, this Court **GRANTS** in part and **DENIES** in part Commission's Motion.

Furthermore, this Court *sua sponte* **ORDERS** the Appellant Wuestehube to show cause why his appeal should not be dismissed for his lack of filing the required Brief.

I. Procedural History:

The Appellants filed a Notice of Appeal with this Court on July 22, 2014. The Appellants are an individual; i.e., Mr. Wuestehube and a corporation; i.e., Tri-Star. Mr. Wuestehube is not an attorney. Those matters are not in dispute.

The Commission moved to have the appeal dismissed because Mr. Wuestehube is not an attorney and the filing of the notice of appeal was/is a nullity. Hence, the Commission asserted that the Appellants have never commenced their appeal. Having not timely commenced their appeal, the Commission asserted that the entire case should be dismissed.

In response Appellant Wuestehube asserted that – at a minimum – his appeal is timely. He is allowed to represent himself. Appellant Wuestehube also felt that he could file the Notice on behalf of the corporate Appellant because he holds an interest in the corporation and therefore, he was harmed by the decision. Mr. Wuestehube claimed that because he is the President of the corporate appellant, he was also adversely affected and therefore, he had the right to file the notice. In the alternative, the Appellants wished to have the right/opportunity to file an Amended Notice.

This Court has reviewed the Motion and the Memorandum Contra, the matter is ready for determination.

II. STANDARD OF REVIEW

The Commission has asserted that this Court does not have jurisdiction because the filing is untimely. What makes the filing untimely is the Commission's argument that the Notice filed by the Appellants was a nullity.

Though the Commission has not referenced a civil rule, it is apparent that the motion is a Civ.R. 12(B)(1) motion to dismiss. Appellee has asserted that his Court does not have subject matter jurisdiction. Please note the following:

The standard of review for a Civ.R. 12(B)(1) motion to dismiss is "whether any cause of action cognizable by the forum has been raised in the complaint." State ex rel. Bush v. Spurlock (1989), 42 Ohio St.3d 77, 80. When making this determination, the trial court is not confined to the allegations of the complaint, but may consider material pertinent to that inquiry without converting the motion into one for summary judgment. Southgate Development Corp. v. Columbia Gas Transmission Corp.

(1976), 48 Ohio St.2d 211, paragraph one of the syllabus. If the trial court only considers the complaint and undisputed facts when ruling on the motion, then appellate review is limited to a determination of whether the facts are indeed undisputed and whether the trial court correctly applied the law. *Wilkerson v. Howell Contrs., Inc.*, 163 Ohio App.3d 38, 43, 2005-Ohio-4418.

From within this legal framework this Court will now review the arguments of counsel.

III. ANALYSIS

1) Pending Motion:

The Commission has moved to have the appeal dismissed. The Commission claims that the filing of the Notice is a nullity and it should be dismissed.

The Commission's is not entitled to dismiss the appeal of Mr. Wuestehuebe. He has the right to present his own appeal *pro se*. From the information that is undisputed, he timely filed his appeal. However the issue concerning Tri-Star has merit.

The Commission asserted that only a lawyer can file a Notice of Appeal for a corporate entity. The Commission relied upon *Williams v. Global Constr. Co.*, 26 Ohio App.3d 119 at

121. Please note the following:

Under Ohio law, a corporation can maintain litigation or appear in court only through an attorney admitted to the practice of law and may not do so through an officer of the corporation or some other appointed agent. 1 *Union Savings Assn. v. Home Owners Aid* (1970), 23 Ohio St.2d 60, 52 O.O.2d 329, 262 N.E.2d 558; *Bd. of Trustees for the Memorial Civic Center v. Carpenter Co.* (Aug. 9, 1982), Allen App. No. 1-81-38, unreported, 1982 WL 4618. In *Williams v. Global Construction Co. Ltd.* (1985), 26 Ohio App.3d 119, 26 OBR 330, 498 N.E.2d 500, paragraph two of the syllabus, the court stated:

"When a non-attorney files a complaint in a court in violation of R.C. 4705.01, the court should dismiss the complaint without prejudice."

See, also, *Micchia, D.D.S. v. Matchak* (Dec. 5, 1986), Lake App. No. 11-217, unreported, 1986 WL 14348; and *Clark v. Summers* (May 21, 1988), Hocking App. No. 87-CA-2, unreported, 1988 WL 65610. *Sheridan Mobile Village, Inc. v. Larsen*, 78 Ohio App.3d 203 at 205 (4th Dist.)

There are exceptions to this rule, but none of the exceptions relate to this appeal. Hence, the above case law supports a dismissal without prejudice of Tri-Star's appeal.

Normally, a without prejudice dismissal would allow a litigant to re-file. However, this is an administrative appeal. The Commission correctly pointed out that R.C. §119 *et seq.* controls the method and timing of an appeal. The code requires a litigant to strictly follow the procedures for filing an appeal. Having determined that the Notice filed on behalf of the corporation is a nullity, it is impossible for Tri-Star to now timely file its appeal. Hence, the dismissal should be with prejudice because any new filing will be after the jurisdictional deadline contained in the code. There is merit to that argument.

The Appellants requested the right to amend. However that would not solve the error. One cannot amend a nullity. Therefore the Commission's Motion is **GRANTED** in regard to Tri-Star and **DENIED** in regard to Mr. Wuestehube.

2) Lack of Appellant's Brief:

When this litigation was filed, the Clerk issued the scheduling order. It required that the Appellant file its Brief on or before September 30, 2014. No Brief has been filed. Therefore this Court **ORDERS** that the Appellant Wuestehube show cause why his appeal should not be dismissed pursuant to the local rules of this Court. The Commission's brief **will not be required to be filed until 14 days after the Appellant** Wuestehube has filed his Brief.

IV. DECISION

The Motion to Dismiss as filed by the Appellee on August 27, 2014 is **GRANTED** in part and the appeal of Tri-Star Realty, Inc. is **DISMISSED WITH**

PREJUDICE. The Motion to Dismiss as filed on August 27, 2014 is **DENIED** as to Mr. Wuestehube's appeal.

Pursuant to the requirements of Loc.R. 39.05(C)(ii) and Loc.R. 59 of this Court, unless the Appellant Wuestehube shows good cause why he has failed to file his Brief the Court will be forced to **DISMISS** this case for want of prosecution. Mr. Wuestehube can avoid the dismissal by filing his Brief within 14 days after the date of the filing of this Decision and Entry.

It is so **ORDERED.**

Judge Timothy Horton

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Franklin County Court of Common Pleas

Date: 10-07-2014
Case Title: CARL O WUESTEHUBE ET AL -VS- OHIO REAL ESTATE
COMMISSION
Case Number: 14CV007589
Type: DECISION/ENTRY

It Is So Ordered.

A blue circular seal of the Franklin County Court of Common Pleas is centered. The seal contains the text "FRANKLIN COUNTY OHIO" around the top and "ALL THINGS ARE POSSIBLE" around the bottom. Overlaid on the seal is a handwritten signature in black ink that reads "Timothy S. Horton".

/s/ Judge Timothy S. Horton

Court Disposition

Case Number: 14CV007589

Case Style: CARL O WUESTEHUBE ET AL -VS- OHIO REAL
ESTATE COMMISSION

Motion Tie Off Information:

1. Motion CMS Document Id: 14CV0075892014-08-2799970000

Document Title: 08-27-2014-MOTION TO DISMISS

Disposition: MOTION GRANTED IN PART