

IN THE SUPREME COURT OF OHIO

08-2230

CITY OF CLEVELAND

Appellee,

-v-

DESTINY VENTURES, LLC

Appellant.

) On Appeal from the Cuyahoga County
) Court of Appeals, Eighth Appellate
) District
)
) Court of Appeals
) Case No. CA-08-091018
)
)
)

MEMORANDUM IN SUPPORT OF APPEAL
OF APPELLANT DESTINY VENTURES, LLC

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I. **EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

The United States Constitution provides criminal defendants the right to be represented by counsel, the right to be present at trial, and the right to confront the witnesses against them. The U.S. Supreme Court has held that these rights are equally available to corporate defendants. In this case, the Cleveland Housing Court ignored those rights by conducting a trial of Appellant Destiny Ventures, LLC (hereinafter, "Appellant") in absentia. The Cleveland Housing Court judge has announced his intention to continue holding trials in absentia of corporations that fail to appear at scheduled hearings. The court has misinterpreted and misconstrued a state statute, R.C. 2941.47, to justify conducting such trials in absentia and to justify the resulting deprivation of the basic rights of corporate defendants.

Without benefit of supporting case law, the court of appeals upheld the trial court's interpretation of the statute and, thereby, opened the door to a continuation of this unconscionable policy. In a dissenting opinion, a member of the court wrote that the Housing Court's interpretation of R.C. 2941.47 "goes against well established constitutional principles, rules of criminal procedure, and case law that an accused has the right to be present at all critical stages of a criminal proceeding when the defendant's absence would adversely affect the fairness of the proceeding." (See Court of Appeals opinion at p. 9) Unless this court clarifies the scope of R.C. 2941.47, the Housing Court will continue its unconstitutional erosion of the fundamental rights afforded to corporate defendants.

II. STATEMENT OF THE CASE AND FACTS

This case began with a Notice of Violations of Cleveland's Building Code issued to Destiny Ventures, LLC (hereinafter "Destiny Ventures") by Housing Inspector Nadine Brownlee on August 6, 2007. A hearing was scheduled for December 6, 2007. Destiny Ventures did not appear for the scheduled hearing. On January 2, 2008, Judge Raymond Pianka of the Cleveland Housing Court set the case for trial on January 14, 2008. In its journal entry, the judge cited to R.C. 2941.47 and wrote that "[W]hen an organization, served with notice of the criminal charges, fails to appear to answer the charges, the Clerk of Court is required to enter a plea of "not guilty" on the corporation's behalf." Although the statute makes no reference to trials in absentia, the judge also cited to R.C. 2941.47 for the proposition that "the prosecution may try its case against the defendant in absentia. If the Court concludes that the defendant is guilty, the Court may enter such finding, and proceed to sentencing and execution." (See Housing Court's Journal Entry of January 2, 2008)

On Monday, January 14, 2008, Destiny Ventures' property manager, Richard Jones, appeared at the scheduled hearing and informed the court that Destiny Ventures was in the process of obtaining legal counsel. Mr. Jones' explained to the court that Destiny Ventures believed that counsel representing the company on a prior matter would also be attending the hearing on the company's behalf. Mr. Jones stated that Destiny Ventures only learned the previous Friday that prior counsel would not be representing the company at the Monday morning hearing. The court denied Mr. Jones' request for additional time to obtain legal counsel even after confirming that Destiny Ventures had contacted alternate counsel and was attempting to arrange representation.

The court then proceeded to try Destiny Ventures in absentia. After taking testimony from Inspector Brownlee, the court found Destiny Ventures guilty. Thereafter, the court proceeded immediately to sentencing. Without any evidence as to the statutory sentencing factors, the court assessed a fine of \$140,000.00. The fine was immediately ordered into civil collection and execution.

On January 23, 2008, Destiny Ventures filed a Motion for Relief from Judgment under Civ.R. 60(B) which the court treated as a motion as an "argument in favor of a reduced sentence." In the motion, Destiny Ventures argued, inter alia, that the trial court erred in proceeding to trial in the company's absence. The motion included the affidavit of Destiny Ventures' president, Steve Nodine, confirming that the company was attempting to retain legal counsel. The court denied the motion in a five page decision that made no reference to Destiny Ventures' arguments about its attempts to obtain counsel for the hearing or the court's decision to try Destiny Ventures in absentia.

Destiny Ventures appealed to the Eighth District Court of Appeals, and assigned error in the trial court's decision to treat Destiny Ventures' Motion for Relief from Judgment as a motion to reduce sentence, its decision to proceed with the trial of Destiny Ventures in absentia, and its imposition of a \$140,000.00 fine upon the company without considering the factors set forth in R.C. 2929.22. The court of appeals affirmed the trial court's decision.

III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW NO. 1: The appellate court's interpretation and application of R.C. 2941.47 to authorize trials in absentia of corporations accused of violating the Cleveland Housing Code improperly infringes upon corporate defendants' fundamental Sixth Amendment rights to representation by counsel, to confrontation of witnesses, and to be present at trial.

Faced with what a systemic problem involving poorly maintained houses in Cleveland neighborhoods and property owners that fail to respond to notices of housing code violations, the Cleveland Housing Court has initiated a well-publicized crackdown designed to increase compliance with housing code requirements. A similar crackdown is taking place in New York where prosecutors are threatening lenders with liens in order to force them to properly maintain foreclosed homes until buyers can be found. However, in its zeal to improve the condition of Cleveland's neighborhoods, the Cleveland Housing Court has started to conduct trials in absentia of corporate property owners who fail to appear to answer housing code violations.

To justify its decision, the court has cited R.C. 2941.47 a statute that allows for the clerk of courts to enter a "not guilty" plea on behalf of a corporation that does not appear or answer an indictment issued against it. The statute provides that "upon such appearance being made or plea entered, the corporation is before the court until the case is finally disposed of." The Housing Court has interpreted the statute to authorize conducting trials and sentencings of such defendants in absentia – a process which unconstitutionally infringes upon the corporations' rights. The court's apparent justification for its policy is the statute's language that, once a plea is entered on the corporation's behalf, the corporation is "before the court" for the duration of the proceedings. However, this interpretation directly conflicts with the United States and Ohio Constitutions as well as Crim.R. 43, which require a defendant's presence at every stage of criminal proceedings. See *State v. Moore*, Cuyahoga App. No. 86224, 2006-Ohio-816. Removing any doubt as to what "presence" means, the criminal rules were amended in 2008 to clarify that "the defendant must be physically present at every stage

of the criminal proceeding and trial, including the impaneling of the jury, the return of the verdict, and the imposition of sentence, except as otherwise provided by these rules.”

In upholding the Housing Court’s decision, the Court of Appeals suggested that Destiny Ventures had waived its right to be present at trial by failing to appear after receiving notice that the trial would proceed if the corporation failed to appear. However, Crim.R. 43(A)(3) requires that such a waiver must be made “in writing or on the record.” (Emphasis added.) No express waiver was ever made by Destiny Ventures. The rules do not provide for an implied waiver such as that described by the court.

In New York, another jurisdiction hard hit by decaying neighborhoods, courts have struck a balance and afforded protection for the rights of defendants by holding that “a defendant’s failure to appear for trial does not automatically authorize a trial in absentia. Instead, the court must consider whether a defendant can be located within a reasonable period of time.” *People v. Rosicky* (2008), 19 Misc.3d 557 (Nassau Cty, NY). In New York, the law allows for trials in absentia only under certain circumstances and includes safeguards to protect the rights of corporate defendants. In another New York case, *People v. Parker* (1982), 57 N.Y.2d 136, 454 N.Y.S.2d 967, the court found that even where if a defendant is warned on the record that the trial would proceed if he failed to appear, a trial in absentia is not automatically authorized. The *Parker* court held that, before proceeding with a trial in absentia, the court must consider various factors including the possibility that the defendant could be located within a reasonable period of time, the difficulty of rescheduling the trial, and the possibility that evidence would be lost or that witnesses would disappear. Allowing the court’s decision to stand in this case would uphold a blanket rule authorizing Housing Courts to conduct trials in absentia

without a knowing waiver on the record as contemplated by Crim.R. 43(A)(3) and without exploring less drastic alternatives.

R.C. 2941.47 is unconstitutional as applied to the facts of this case because it improperly infringes upon the fundamental rights of corporate defendants. In this case, the Housing Court refused to reschedule the hearing to allow Appellant to obtain counsel even after confirming that Appellant was in the process of doing so. A brief continuation of the hearing would have served the interest of enforcing the housing code without the improper infringement upon Appellant's rights. Unless this court intervenes, corporate defendants in Housing Court will continue to be subjected to this draconian policy.

If allowed to continue, the Housing Court's policy will further erode the constitutional rights of corporate defendants and will appeal to other housing courts seeking a quick fix to the growing problem of urban decay. While the problem is indeed significant, Ohio's Housing Courts must not be allowed to solve it by infringing upon the rights of corporate property owners.

PROPOSITION OF LAW NO. II: The appellate court's decision authorizes municipal courts to deny the due process rights of corporate defendants under the Fifth and Fourteenth Amendments by imposing fines upon them for Housing Code violations without any consideration of the factors set forth in R.C. 2929.22.

In upholding the fine assessed against Appellant, the Court of Appeals held that the fine was "within the statutory limits for a first degree misdemeanor" and that the court would presume that the trial court considered the factors listed in R.C. 2929.22. (See Court of Appeals opinion at p. 7.) A review of the record makes clear that there was no basis for such a presumption since, after the trial in absentia, the Housing Court immediately proceeded to sentencing without a hearing and without any evidence as to

any of the statutory factors. As a result, there was no evidence in the record as to any of the factors set forth in R.C. 2929.22.

The Housing Court's decision to impose a fine upon Appellant without considering the relevant statutory factors only compounded the deprivation of Appellant's rights. By immediately proceeding to sentencing without hearing any evidence as to the statutory factors, the Housing Court violated the United States and Ohio constitutions which require notice and a meaningful opportunity to be heard before the State deprives a person of his property. (See The Fourteenth Amendment to the United States Constitution and Section 16, Article I, Ohio Constitution.)

Having misinterpreted R.C. 2941.47 to authorize trials in absentia, the housing court went on to use the statute as justification for sentencing Appellant without a hearing and for ordering the sentence into immediate execution. There is nothing in R.C. 2941.47 or in Ohio's case law that supports the Housing Court's action. The court of appeals decision sets a dangerous precedent by tacitly authorizing the Housing Court to deny due process to corporate defendants – a result which flies in the face of the U.S. Constitution and the Ohio Constitution.

IV. CONCLUSION

Accordingly, intervention by this court is necessary to clarify the scope of R.C. 2941.47 and its interaction with the provisions of the U.S and Ohio Constitutions as well the Criminal Rules which provide a criminal defendant the right to be present at trial and at sentencing, and to set forth a proper rule of law with respect to trials in absentia that will govern the state judiciary and protect the rights of corporate criminal defendants.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing was served by U.S. First Class Mail this
November 11, 2008 upon the following:

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*Attorney for Plaintiff-Appellee
City of Cleveland*



Michael A. Poklar

APPENDIX

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91018

CITY OF CLEVELAND

PLAINTIFF-APPELLEE

vs.

DESTINY VENTURES, LLC

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cleveland Municipal Court
Case No. 2007 CRB 42411

BEFORE: Cooney, P.J., Calabrese, J., and Rocco, J.

RELEASED: September 11, 2008

JOURNALIZED: OCT 3 - 2008

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VOL 667 00266

COLLEEN CONWAY COONEY, P.J.:

This case came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1.

Defendant-appellant, Destiny Ventures, LLC ("Destiny"), appeals the judgment of the Cleveland Municipal Housing Court finding it guilty of failing to comply with the City of Cleveland's housing and building code. Finding no merit to the appeal, we affirm.

Destiny, a limited liability company based in Tulsa, Oklahoma, is a company that specializes in buying foreclosed properties and reselling them "as is." In June 2007, a Cleveland housing inspector inspected property owned by Destiny on East 117th Street for alleged building and housing code violations. The inspector found numerous code violations and sent notice to Destiny to repair the violations. In August, the inspector reinspected the property and found that none of the violations had been corrected. The plaintiff-appellee, City of Cleveland ("City"), subsequently filed a summons and complaint in the municipal housing court. The complaint alleged that Destiny had failed to comply with an order to correct code violations on its property. The case was set for arraignment in December 2007. No one appeared on Destiny's behalf at the

arraignment and the court issued a *capias*.¹ The court set the case for trial and sent a notice to Destiny indicating that if a proper representative failed to appear on the scheduled trial date, trial would be held in the company's absence.

Trial was set for January 14, 2008. On that day, an employee of Destiny appeared, stating that the corporation was attempting to obtain counsel. The court, after determining that the employee was neither an officer of Destiny nor an attorney, permitted the case to proceed to trial. The clerk of courts entered a plea of not guilty on behalf of the corporation.

The inspector testified on behalf of the City that she had inspected the East 117th Street property and observed several code violations. She stated that she researched property records and determined that Destiny owned the house. The City entered the deed into evidence, which listed Destiny as the owner of the property. The inspector further testified that none of the violations had been corrected when she reinspected the property in August 2007 as well as on the morning of trial. The court convicted Destiny and ordered a fine of \$140,000.

On January 23, 2008, Destiny, through counsel, filed a motion for relief from judgment pursuant to Civ.R. 60(B), arguing that it no longer owned the subject property. Destiny also argued that it believed that another attorney

¹Destiny does not deny receiving the notice of code violation, the summons and complaint, nor the notice of arraignment date.

would appear on its behalf at the trial and did not discover that the attorney had a conflict of interest and could not represent Destiny until a few days before trial.

The court denied Destiny's motion, finding that a Civ.R. 60(B) motion did not apply to a criminal proceeding. The court, in its lengthy opinion, stated that it decided to treat Destiny's motion as an argument for a more lenient sentence and found no reason to change the fine levied against Destiny.

Destiny appeals, raising three assignments of error for our review.

In the first assignment of error, Destiny argues that the trial court erred and abused its discretion by denying its motion for relief from judgment and by converting the motion into a motion to reduce sentence.

First, Destiny argues that the trial court should have considered its motion for relief from judgment. A motion for relief from judgment pursuant to Civ.R. 60(B), however, is a civil motion. The trial court correctly found that it is not applicable to a criminal trial. Crim.R. 57(B), however, allows a trial court in a criminal case to look to the Rules of Civil Procedure for guidance when no applicable Rule of Criminal Procedure exists. *State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, 882 N.E.2d 431. That being said, we must consider whether Destiny properly resorted to Civ.R. 60(B) in this case. In other words, we must determine whether the absence of an applicable criminal rule justified invoking

a civil rule in its place. *Id.* at 156. The City contends, and we agree, that Crim.R. 33, which sets forth the procedure by which a criminal defendant can move for a new trial, was available to Destiny and serves the same purpose as the Civ.R. 60(B) motion which the corporation filed. Thus, in this case, it is not necessary to look to a civil rule or other applicable law for guidance in the manner which Crim.R. 57(B) intends, because a procedure "specifically prescribed by rule" exists, i.e., a Crim.R. 33 motion for a new trial.

Second, Destiny claims that the trial court's decision to convert its motion into a "motion to reduce sentence" denied the corporation an opportunity to be heard and to obtain legal counsel to represent its interests at trial. Destiny makes the presumptuous argument that the trial court erred because it did not convert its motion into a motion for a new trial. We disagree. Destiny's motion for relief from judgment is a nullity in this matter. The trial court could have summarily dismissed the motion. Even though it is within the lower court's discretion to "recast irregular motions into whatever category necessary to identify the criteria by which the motion should be judged," as the supreme court stated in *Schlee*, the court also retains jurisdiction not to recast the motion. And in this case, the court converted Destiny's motion. We do not agree with Destiny, however, that a trial court errs if it chooses to convert an irregular motion into

a motion different from what the party now believes will best suit the case. We find this especially true when Destiny could have filed a Crim.R. 33 motion.

Thus, we cannot find that the trial court erred because it "failed" to take the corporation's irregular motion and convert it into a motion which would benefit the corporation. It is not incumbent on the trial court to convert an improperly captioned motion into one that will provide relief for a party nor is it the court's duty to make a party's arguments for them.

Therefore, the first assignment of error is overruled.

In the second assignment of error, Destiny argues that the trial court erred in proceeding to trial *in absentia* when the court was told that the corporation was attempting to obtain counsel. Destiny claims that because the trial court went forward with trial without its counsel present, the company was denied its right of confrontation. The record contains no filing by Destiny raising any defenses or seeking a continuance prior to the trial date.

R.C. 2941.47 prescribes the rules for summons on indictments for corporations. The statute provides, in part, that a "corporation shall appear by one of its officers or by counsel on or before the return day of the summons served and answer to the indictment or information by motion, demurrer, or plea, and upon failure to make such appearance and answer, the clerk of the court of common pleas shall enter a plea of 'not guilty.' Upon such appearance

being made or plea entered, the corporation is before the court until the case is finally disposed of.”

In this case, the trial court issued an order that stated that if a representative of Destiny failed to appear on the day of trial, the clerk of courts would enter a not guilty plea on behalf of the defendant and the case would immediately proceed to trial.

We do not agree with Destiny that the trial court’s proceedings violated its right to confrontation. R.C. 2941.47 specifically states that once an appearance is made or a plea is entered, the corporation is before the court until the case is disposed of. The trial court issued an order informing Destiny that if a representative of the company failed to appear, the matter would proceed immediately to trial. Even though Destiny had notice of the hearing, no officer or attorney from Destiny appeared nor did any attorney file a notice of appearance in the case. Moreover, the company never filed a motion for continuance nor otherwise informed the court, prior to the trial date, that it was attempting to obtain counsel.

Therefore, we find no error in the court’s decision to proceed to trial without a representative of Destiny present. The second assignment of error is overruled.

In the third assignment of error, Destiny argues that the trial court erred in imposing a fine upon the company without first considering the factors set forth in R.C. 2929.22.

Failure to consider the sentencing criteria set forth in R.C. 2929.22 constitutes an abuse of discretion. *Richmond Heights v. Uy* (Oct. 19, 2000), Cuyahoga App. No. 77117, citing *Strongsville v. Cheriki* (March 4, 1999), Cuyahoga App. No. 73800. However, "when determining a misdemeanor sentence, R.C. 2929.22 does not mandate that the record reveal the trial court's consideration of the statutory sentencing factors. Rather, appellate courts will presume that the trial court considered the factors set forth in R.C. 2929.22 when the sentence is within the statutory limits, absent an affirmative showing to the contrary." *State v. Nelson*, 172 Ohio App.3d 419, 2007-Ohio-3459, 875 N.E.2d 137, citing *State v. Kelly*, Greene App. No. 2004CA122, 2005-Ohio-3058; see, also, *Uy*.

Cleveland Codified Ordinance 3103.99(a) and (c) allow the court to sentence a corporation to a fine of up to \$5,000 each day that a property is not in compliance. The court in this case computed the time not in compliance to be fifty-six days. Then the court elected to impose only one-half of the maximum fine, or \$140,000. Thus, the sentence imposed in this case is within the statutory limits for a first degree misdemeanor. See R.C. 2929.24(A)(1).

To support its argument that the court did not follow the mandate of R.C. 2929.22, Destiny cites our decision in *Cleveland v. Cuyahoga Lorain Corp.*, Cuyahoga App. No. 82823, 2004-Ohio-2563. That case is easily distinguishable. In that case, the trial court asked the corporation about its ability to pay. Despite being told that there were few assets, the court ordered a fine of \$75,000 due in one month's time. We found an abuse of discretion based on the circumstances of that case. *Id.* Because there was clear factual evidence that the corporation would have difficulty paying the fine, we found that the failure to take into consideration the corporation's ability to pay was an abuse of discretion.

There is no evidence in the instant case, however, that the trial court failed to consider the appropriate factors. Moreover, Destiny has failed to bring forth any evidence to rebut the presumption that the trial court considered all the factors in R.C. 2929.22.

Therefore, the third assignment of error is overruled.

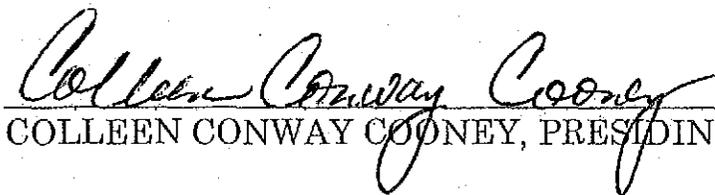
Accordingly, judgment is affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the municipal court to carry this judgment into execution. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.


COLLEEN CONWAY COONEY, PRESIDING JUDGE

KENNETH A. ROCCO, J., CONCURS;
ANTHONY O. CALABRESE, JR., J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE OPINION.

ANTHONY O. CALABRESE, JR., J., CONCURRING IN PART AND DISSENTING IN PART:

I concur with the majority's disposition of the first and third assignments of error, but respectfully dissent with the resolution of the second assignment of error. Here, without the benefit of supporting authority, the Housing Court interpreted R.C. 2941.47 to authorize trials *in absentia*. However, I believe such interpretation goes against well established constitutional principles, rules of criminal procedure, and case law that an accused has the right to be present at all critical stages of a criminal proceeding when the defendant's absence would adversely affect the fairness of the proceeding. See *Kentucky v. Stincer* (1987),

482 U.S. 730, 745; *State v. Davis*, 116 Ohio St.3d 404, 417, 2008-Ohio-2; Section 10, Article I, Ohio Constitution. Accordingly, I would have sustained appellant's second assignment of error.

CLEVELAND MUNICIPAL COURT
HOUSING DIVISION
CUYAHOGA COUNTY, OHIO
Judge Raymond L. Pianka

City of Cleveland

DATE: February 5, 2008

Plaintiff

-vs-

CASE NO.: 2007 CRB 42411

Destiny Ventures, LLC

Defendant

JUDGMENT ENTRY

Defendant was convicted on January 14, 2008 of failing to comply with a *Notice of Violations* that required Defendant to make repairs to correct Building Code violations at 3677 E. 117th St., Cleveland, Ohio. The Court sentenced Defendant to pay a fine of \$140,000 and costs and ordered the sentence into execution. This conviction was Defendant's second conviction in four months for failing to correct code violations.¹

Defendant now asks the Court to vacate its sentence. For the following reasons, defendant's request is denied.

Defendant relies upon Civil Rule 60(B) as the basis for its motion, engaging in an extensive analysis of the application of the rule to the facts in this case. However, Civil Rule 60(B) does not apply in this, a criminal proceeding. A criminal defendant must proceed under the Ohio Rules of Criminal Procedure, which allow a defendant to seek a new trial on the grounds stated in Criminal Rule 33(A) but not based on the "excusable neglect" standard in Civil Rule 60(B). The Court therefore denies Defendant's motion for relief.

Defendant also is free to ask the Court to reconsider its sentence. The Court shall therefore treat Defendant's motion as an argument in favor of a more lenient sentence. After review, the Court finds that the motion contains nothing that persuades it to modify or suspend any portion of the \$140,000.00 fine.

Defendant is a limited liability company based in Tulsa, Oklahoma, whose business activity consists of buying and reselling properties without making repairs to them. Defendant describes itself as a "conduit to purchase foreclosed properties" so that it can "sell them, usually in groups" to other investors.² Defendant asks the Court to be lenient because Defendant is not "a lender, mortgagee, rehab company, or long term

JUDGMENT ENTRY RECEIVED
FOR JUDGMENT ENTRY

¹ The first was *City v. Destiny Ventures, LLC*, 2007 CRB 11396.

² Motion at 2.

FEB 05 2008

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FROM

owner or landlord."³ Defendant would have the Court excuse it from its obligations under the City's codes, or be lenient in sentencing because Defendant limits itself to the role of "conduit," quickly buying and selling properties "as is."

The Cleveland Codified Ordinances do not include any provision excusing a "conduit" from complying with its codes. Nor is the Court persuaded that Defendant's business practice of quickly buying and selling properties without repairing them is grounds for lenient sentencing. To the contrary, the Court considers quick "as is" sales to be an aggravating factor in sentencing.

The Cleveland Codified Ordinances do not include any provision excusing any owner from complying with the City's codes. The City's Housing Code sets forth maintenance standards for residential structures in the City of Cleveland. In general, structures must be maintained in good repair.⁴ The foundation must be maintained structurally sound.⁵ Exterior walls must be maintained weathertight and painted periodically,⁶ and roofs must be devoid of leaks and equipped with gutters and downspouts.⁷ The exterior of the premises must be kept free of wrecked, dismantled, inoperative, or unlicensed motor vehicles, as well as debris that may cause a health, accident or fire hazard.⁸

The Housing Code also sets forth standards for the interior of residential structures. For example, all interior walls must be maintained free of holes, large cracks, and loose or deteriorated material.⁹ Residential premises must have required sanitary facilities¹⁰ and must be supplied with running water from the Municipal water supply system.¹¹

Property owners in the City of Cleveland are responsible for maintaining the structures they own in compliance with these standards.¹² Owners are responsible for the elimination of any code violations on the premises.¹³

The Codified Ordinances anticipate that purchasers of properties will act quickly to address substandard conditions. Purchasers of properties with open code violations must begin at the date of transfer to comply with any notices of violation.¹⁴ Within ten days of the date of transfer, the buyer must notify the Commissioner of Building and Housing, in writing, of the actions that the buyer will take to comply with the notice.¹⁵

³ *Id.*
⁴ CCO 3101.10(a).
⁵ CCO 3101.10(b).
⁶ CCO 3101.10(c).
⁷ *Id.*
⁸ CCO 3101.10(e).
⁹ CCO 3101.10(d).
¹⁰ CCO 369.06.
¹¹ CCO 369.07.
¹² CCO 3101.09(a).
¹³ CCO 3101.09(a).
¹⁴ CCO 367.04(4).
¹⁵ *Id.*

The Commissioner then may establish a reasonable time for the new owner to comply with the notice.¹⁶

The definition of "owner" in the Cleveland Codified Ordinances is broad and makes no exception for owners who quickly buy and sell properties. The ordinances define "Owner" to mean the owner or owners of the premises, a vendee in possession, a mortgagee or receiver in possession, a lessee or joint lessees of the whole thereof, or an agent or any other person, firm, or corporation directly in control of the premises or having a legal or equitable interest in the property.¹⁷ The term "owner," and the obligations that go with it, thus apply to Defendant even if the Defendant's intention was not to assume responsibility for the property, and to act only as a "conduit."

The Codified Ordinances do not exempt Defendant, or other companies like it, from the duty to maintain property in compliance with City code. Accordingly, the Court will not grant Defendant's motion on this basis.

The Court is also unconvinced that it should be lenient in sentencing Defendant because Defendant's business is to buy and sell properties quickly without repairing them. Defendant is one of many business entities in the Cleveland market that seeks to portray the business of buying and reselling properties without making repairs as leading to rehabilitation and investment. This Court's experience has been the opposite. Rather than leading to rehabilitation and investment, quick "as is" sales generally leave a Cleveland home vacant and unrepaired, and contribute to the overall decline of the City's housing stock. Thus, rather than constituting grounds for leniency, the Court considers quick "as is" sales to be an aggravating factor in sentencing.

Quick "as is" sales of substandard property are an aggravating factor because of the current condition of housing in Cleveland, Ohio. If there were buyers ready to invest in Cleveland properties if only they could find properties to buy, then companies that serve as "conduits" might be able to show that they serve a useful function. But Cleveland does not have too few houses; with a declining population and an aging housing stock, it has too many. In recent years the City's Department of Building and Housing has tripled its budget for demolishing condemned houses. The record in this case bears this out. The property that Defendant purchased and then quickly sold has not been repaired. Defendant also admits that it does not attempt to sell individual properties to owners who will repair them. Instead Defendant sells properties "in groups" to investors who also resell them. Defendant thus makes a profit for itself but does nothing to improve the condition of properties in Cleveland.

Defendant's "as is" sales of substandard property also fuel a vicious cycle of subprime lending, default and neglect. The same economic conditions that make it unlikely that an investor will buy and rehabilitate a substandard Cleveland property have led to a record number of foreclosures in Cleveland, with lenders who purchased mortgage-backed securities with liens on homes in Cleveland filing against homeowners

¹⁶ *Id.*
¹⁷ CCO 3101.05G)

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who have defaulted on their mortgages. The lenders hope that the foreclosures will end with buyers taking the properties at Sheriff sale. However, because the lending industry so often made loans in excess of the value of homes in Cleveland, lenders often find that vacant properties go to sale without anyone making the minimum bid. If a lender then concludes that the property has no significant value, it may dismiss the foreclosure action, leaving the City's inspectors to pursue owners who thought that the lender had "taken back" the house. On its face, this may seem like a negative outcome. However, this Court has had some success finding solutions for such homeowners who may be able to obtain the release of their mortgage so that they can keep and repair their property or deed the property to a non-profit community development corporation who will work to rehabilitate the house and transfer it to a beneficial owner.

If a lender concludes that a property has some value, the lender may take title to the property at the sheriff's sale, intending to market it for sale. In such cases, if the property is listed for sale but finds no buyer, the lender may group it with other similar properties and sell the group of properties to Defendant. Defendant, in turn, sells the group of properties without making any repairs. Defendant thus relieves the lender of any ongoing obligation to repair the property, allowing the lender to cash out an improvident loan for pennies on the dollar. Defendant's bulk purchase denies the homeowner any chance to keep title to the property and negotiate for the release of the lien and ensures that the lender will not sell individual properties at a discount to actual homeowners who might live in them.

At each phase of this cycle, the lender, the "conduit" purchaser or subsequent bulk purchaser fails to make repairs and usually seeks to ensure that the property will become or remain vacant, even to the point of evicting tenants or former owners. Making or leaving the properties vacant only makes the situation worse. The City of Cleveland has long recognized that vacant houses are unsafe, are a public nuisance and contribute to neighborhood decline. C.C.O. §3103.09. The City's taxpayers bear the cost of the City's boarding and re-boarding these properties to keep them secure from entry, and an increased cost for police officers and firefighters who must respond to criminal activity or fire at these properties. Vacant houses also cause adjoining property owners to suffer decreased property values, to fear for their own safety, and to face the possible loss of their homeowners insurance. The longer the house sits vacant, the more likely it is that it will be broken into and stripped of copper pipe and other valuables, making it even less likely that anyone will ever invest in rehabilitating it.

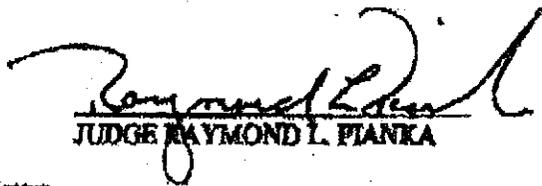
Defendant's motion is stunning in its refusal to take any responsibility for Defendant's failure to make repairs required under Cleveland's laws. Cleveland's laws requiring property owners to make repairs to substandard property are not optional. The Codified Ordinances of the City of Cleveland do not permit Defendant Destiny Ventures, LLC, or any other entity, to own properties in Cleveland, however briefly, without taking action to repair them. Nor is it good public policy to be lenient with owners who engage in "flipping," quickly buying and selling substandard properties without repairing them. Defendant and other entities like it are only hastening and intensifying the decline of

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Cleveland's neighborhoods. The Court will not endorse or condone Defendant's business plan when it is clearly contrary to City ordinances and against the public's interest.

The Court is not persuaded that it will have a negative effect on the housing market if the Court holds "investor-owners," who buy and then sell property, to the same standards that apply to landlords and owner-occupants, who buy and retain property. To the contrary, holding all owners to the same standards produces an equitable result, and encourages responsible property ownership. The Court hopes that the outcome of this case will give pause to unscrupulous property "investors" who are intent upon exploiting Cleveland's neighborhoods, securing their profits at significant cost to both City residents and responsible investors.

Finally, Defendant argues that the sentence in this case is "disproportionate to the facts." The offense of which the defendant was convicted is a first-degree misdemeanor offense, punishable by \$5000.00 per day for each day the property is found to be out of compliance with the City code. The potential penalty in this case was \$280,000 (\$5000 x 56 days); the Court fined Defendant only \$140,000.00, one half of the potential sentence it could have imposed. It has long been this Court's policy to encourage eventual compliance by lessening its sentences against defendants who do ultimately comply with city codes. But Defendant Destiny Ventures, LLC admits that it did not repair the defect home at issue in this case and that it routinely buys and sells homes without repairing them. Accordingly, the Court will not suspend any part of its \$140,000 sentence. Defendant's motion is denied.


JUDGE RAYMOND L. PLANKA

SERVICE

A copy of this judgment entry was sent regular mail on _____ to the following: _____

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CLEVELAND MUNICIPAL COURT
HOUSING DIVISION
CUYAHOGA COUNTY, OHIO

CITY OF CLEVELAND
Plaintiff(s)

DATE: January 2, 2008

-VS-

*Rec'd
1-14-08*

CASE NO.: 07-CRB-42411

DESTINY VENTURES,
Defendant(s)

JUDGMENT ENTRY

This case is before the Court on the City's criminal complaint alleging violations of the City's Building Code, regarding the property located at 3677 East 117th St., Cleveland, Ohio. The notice of violation was issued by Inspector Brownlee on August 6, 2007. A review of the record reveals that the complaint was served upon the defendant. The case initially was set for hearing on December 6, 2007; however the defendant failed to appear at that hearing, and since that time, has not appeared in Court to answer the charges against it.

When an organization, served with notice of the criminal charges, fails to appear to answer the charges, the Clerk of Court is required to enter a plea of "not guilty" on the corporation's behalf. R.C. 2941.47. Accordingly, the prosecution may try its case against the defendant in absentia. If the Court concludes that the defendant is guilty, the Court may enter such a finding, and proceed to sentencing and execution. *Id.*

In this case, the defendant has been served, and has failed to appear and plead. Therefore, the Clerk is required to enter a not guilty plea on the defendant's behalf.

This case is set for trial on **January 14, 2008**, at **1:00 p.m.** on the **13th floor**. A representative of the Clerk of Court shall be present on that date. Should the defendant fail to appear, the Clerk shall enter a not guilty plea on behalf of the defendant, and this case shall proceed to trial immediately. Should the defendant appear and plead not guilty, the Court will either proceed to trial on that date, or, in the alternative, conduct an immediate pretrial.

JUDGE RAYMOND L. PIANKA