IN THE SUPREME COURT OF OHIO

CITY OF CLEVELAND	) **Case No. 2008-2230**
	)
Appellee,	) **On Appeal from the**
	) **Cuyahoga County Court of Appeals**
	) **Eighth Appellate District**
-v-	)
	)
	)
DESTINY VENTURES, LLC	)
	)
Appellant.	)
	)

APPELLEE'S MEMORANDUM IN RESPONSE TO APPELLANT'S MEMORANDUM IN SUPPORT OF APPEAL

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FILED
DEC 16 2008
CLERK OF COURT
SUPREME COURT OF OHIO

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Why This Is Not A Case Involving A Substantial Constitutional Question Or One Of Public Or Great General Interest.

It is well established that a defendant has a right to be present during every critical phase of a criminal trial. *State v. Conway,* (2006) 108 Ohio St.3d 214, 222, 842 N.E.2d 996, 1013, *State v. Frazier,* (2007) 115 Ohio St.3d 139, 159, 873 N.E.2d 1263, 1288-1289. It is also very well settled that the right to be present may be waived if the situation warrants it. *State v. White,* (1998) 82 Ohio St.3d 16, 26, 695 N.E.2d 772; *Illinois v. Allen,* (1970) 397 U.S. 337, 343, 90 S.Ct. 1057, 25 L.Ed.2d 353. In this case, Appellant Destiny Ventures was scheduled and notified of arraignment before the Cleveland Municipal Housing Court (hereinafter, "Housing Court") on December 6, 2007. Appellant failed to appear and a capias was issued with a $10,000 bond. On January 2, 2008, the Housing Court issued two entries, one placing the case on the Corporate In Absentia docket, the second detailing the date, time and place of the trial and the fact that, should Appellant fail to appear, a trial would be held in their absence. This second entry was served to both Appellant and Appellee City of Cleveland. On the January 14, 2008 trial date, Destiny Ventures failed to have an appropriate representative[1] present.

As both the 6th Amendment right to confrontation and the ability to waive that right are well established principles in the canons of jurisprudence, the only question before this Court is whether Housing Court and subsequently, the 8th District Court of Appeals were correct in determining that Appellant effectively waived its right to be present. This is not a constitutional issue but a factual one based on whether it can be

[1] O.R.C. §2941.47 indicates a corporation appears when an officer or attorney representing the corporation is present.

reasonably argued after the Appellant was deemed to be before the court by virtue of O.R.C. §2941.47, whether they subsequently waived their presence at trial by failing to appear after notice.

Appellant's Memorandum in Support of Jurisdiction supports this view, as they clearly believe that the issue is whether or not the Housing Court appropriately applied O.R.C. §2941.47. In essence, they are asking whether the Housing Court abused its discretion with its interpretation of O.R.C. §2941.47 and in the subsequent trial.

Additionally, this is not a case of public or great general interest. In Black's Law Dictionary, public interest is defined as follows:

> Something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as mere curiosity, or as the interests of the particular localities, which may be affected by the matters in question. Interest shared by citizens generally in affairs of local, state or national government. Russell v. Wheeler, 165 Colo. 296, 439 P.2d 43, 46.

Crim.R. 43 clearly indicates that a defendant may waive their presence during a trial.[2] The narrow issue here is whether a) O.R.C. 2941.47 was appropriately applied and b) whether after that application, the defendant waived their right to be present by failing to appear before the Housing Court when notified of the consequences of such action. This is an issue that is specifically in the narrow interest of corporate defendants and does not affect the legal rights or liabilities of the public at large. The Housing Court has not

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[2] Crim.R. 43(A)(1) Except as provided in Rule 10 of these rules and division (A)(2) of this rule, 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 all prosecutions, the defendant's voluntary absence after the trial has been commenced in the defendant's presence shall not prevent continuing the trial to and including the verdict. A corporation may appear by counsel for all purposes.

tried to utilize this method with its non-corporate defendants. They have stuck to the traditional methods of issuing warrants and requiring bonds when a defendant has failed to appear.

With respect to Appellant's second proposition of law, Appellant never raised any constitutional issues before the Housing Court or the 8th District Court of Appeals, therefore the issue is not properly before this Court and should not be heard. *State v. Thrower* (1989), 62 Ohio App.3d 359, 366-367, *Shover v. Cordis Corp.* (1991), 61 Ohio St.3d 213, 220, 574 N.E.2d 457, 463.

Statement of the Facts and Case

On June 6, 2007, a certified City of Cleveland Housing Inspector, Nadine Brownlee, inspected the property located at 3677 East 117th Street, Cleveland, Ohio for Building and Housing Code violations. At that time, she noted numerous code violations. As a result, she returned to the office and researched the property to determine who the owner was. After checking the official records, she determined that the owner of the property was Destiny Ventures, LLC. She created a violation notice, which was subsequently sent to Destiny Ventures, LLC by certified mail. Inspector Brownlee had copies of the notice sent to two addresses, one in Tulsa, Oklahoma, the other in Columbia, South Carolina. She received signed return receipts indicating that the notices were received at both addresses. The notice gave Destiny Ventures, LLC until June 11, June 15 and July 8th, 2007 respectively to correct the violations noted. Inspector Brownlee re-inspected the property on August 6, 2007. On that date she found that none of the violations had been corrected.

As a result of the August 6, 2007 inspection, the City of Cleveland filed a summons and complaint in the Cleveland Municipal Housing Court against Destiny Ventures, LLC for property located at 3677 East 117th Street, Cleveland, Ohio. The summons and complaint alleged that the Defendant had failed to comply with an order of the Director of Building and Housing by failing to correct the code violations at the property. The case was set for arraignment on December 6, 2007. Defendant Destiny Ventures, LLC failed to appear and a capias was issued with a $10,000 bond. On January 2, 2008, the Court issued two entries, one putting the case on the Corporate Trial In Absentia Docket and the other, served to both the defense and the City, detailing the date, time and place of the trial and the fact that, should the Defendant fail to appear, a trial would be held in their absence. On the trial date, January 14, 2008, the City and its witness were present. Rick Jones appeared before the Court on behalf of Destiny Ventures. After having the clerk review the record and determine that no Notice of Appearance had been filed and finding that Mr. Jones was not an officer of the corporation or an attorney, the Court permitted the case to go to trial. The Clerk of Courts entered a plea on behalf of the defendant and the case proceeded to trial in the defendant's absence. After the presentation of evidence, the Court found the defendant guilty as charged. The Court then proceeded to consider the number of days out of compliance and ordered a fine of $140,000.

Appellee's Response to Appellant's Propositions of Law

1. O.R.C. §§2901.04 and 2941.47 considered in pari materia can reasonably be construed to allow the Housing Court's use of trials in absentia to ensure that corporate defendants answer for failure to comply with the Ohio Building Code and the Cleveland Codified Ordinances.

The City of Cleveland has seen massive losses in population over the last several decades and has, over time, accumulated numerous vacant houses. Most recently, due to the foreclosure crisis, the City has seen numerous homes that have been seized due to foreclosure and have come into the hands of banks, mortgage companies and investment companies. Some of these companies use these properties as nothing more than a brief investment to be transferred quickly and at a profit to the next person/organization looking to make money on the once booming housing market. The problem is that few, if any, of these corporations are aware of how the selling of these properties to various investor owners affects the housing stock in a region or how it affects neighborhoods and residents when these often vacant and stripped homes are sold repeatedly with no efforts made to correct code violations that exist there.

The Housing Court deals with numerous criminal defendants who are being prosecuted for code violations. By and large, the majority of these defendants have been individuals who own, occupy or let out for rent property in the City of Cleveland. Over time, the Housing Court has seen more and more corporate owners coming before the Housing Court with unaddressed code violations. The Housing Court has also seen numerous cases where corporate defendants have failed to appear before the court when ordered. The traditional remedies that are available to the Housing Court when dealing with an individual, are of no use when the defendant is a corporation. There is no way to

issue a warrant for the arrest of a corporation, nor is there a way to hold a corporation in jail until they post a bond to secure their future appearance.

Looking for a way to address the failure of corporate defendants to appear before the court and answer for code violations on their property, the Housing Court found O.R.C. § 2941.47 and used it as a basis for holding trials in absentia for corporate defendants who failed to appear when initially summoned before the Housing Court.

O.R.C. § 2941.47 states:

> When an indictment is returned or information filed against a corporation, a summons commanding the sheriff to notify the accused thereof, returnable on the seventh day after its date, shall issue on praecipe of the prosecuting attorney. Such summons with a copy of the indictment shall be served and returned in the manner provided for service of summons upon corporations in civil actions. If the service cannot be made in the county where the prosecution began, the sheriff may make service in any other county of the state, upon the president, secretary, superintendent, clerk, treasurer, cashier, managing agent, or other chief officer thereof, or by leaving a copy at a general or branch office or usual place of doing business of such corporation, with the person having charge thereof. Such 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.** On said indictment or information no warrant of arrest may issue except for individuals who may be included in such indictment or information.

By its unambiguous and clear language, O.R.C. §2941.47 gives a court the authority to enter a not guilty plea on behalf of a corporate defendant that has failed to appear. Whether that plea is entered by the clerk of courts or an officer or attorney representing the corporation, once that plea is entered, the corporation is before the court until the case is concluded. Pursuant to O.R.C. §2941.47, the Housing Court was authorized to enter a plea of not guilty on behalf of Appellant.

By its January 2, 2008 entry, the Housing Court apprized defendant of the trial date and time and the consequences of failing to appear. By failing to appear on January 14, 2008, Appellant waived its right to be present at trial. There are courts that have found a waiver to exist in these circumstances.

In *Cuoco v. U.S.*, (C.A.2 2000) 208 F.3d 27 the Court reasoned that, "no constitutional error results if a defendant knowingly and voluntarily waives his right to be present at trial. When a defendant "kn[ows] the precise time and place he [is] to appear for trial, and that the consequence of his failure to appear [will] be a trial in absentia" and then fails to appear on the scheduled date, he waives his Sixth Amendment right to attend the trial."[3] This decision followed the same court's reasoning in *Smith v. Mann*, (C.A.2 1999) 173 F.3d 73. In both cases, the trial court explicitly told the defendant the date and time of trial, and the place to appear, and also told him that if he failed to appear, the case would be tried in his absence.

Ohio courts have not had to address these issues until recently. The City believes support for the Housing Court's procedure can be found however. O.R.C. §2901.04(B) provides that "rules of criminal procedure and sections of the Revised Code providing for criminal procedure shall be construed so as to effect the fair, impartial, speedy, and sure administration of justice." As noted above, a trial court has limited ability to force a corporation to appear when it refused to do so. The corporation cannot be arrested and a warrant has no effect. When a corporation fails to appear in response to a summons, §2941.47 gives the court the ability to create a situation whereby the corporation either appears before the court or pays the consequence. In Housing Court, where the fines can

[3] *Cuoco, supra,* at 29. (Citations omitted)

be as high as $5000 for each day the property is out of compliance with the code, there is significant leverage to force a corporation to at least appear when failure can lead to a significant fine. When faced with the choice of appearing in court or facing a rather significant fine, most corporations have responded to the in absentia docket by appearing in court.

The Housing Court's corporate in absentia docket is reasonably calculated to ensure the appearance of corporate defendants before the court. As there is really no other remedy for a court to ensure the appearance of a corporate defendant, the procedure creates an incentive for corporate defendants to appear. Appellant's argument fails to even consider the massive differences between an individual versus a corporate defendant and the differences in the remedies available to the Court when these different types of defendant fail to appear.

The Housing Court's trial in absentia docket is designed to ensure the fair, impartial, speedy and sure administration of justice and therefore, the procedure should be upheld.

2. The Appellant failed to raise any constitutional issues before the Housing Court or the 8th District Court of Appeals with respect to the sentencing in this matter. Consequently this issue has not been perfected for appeal and therefore should not be considered by this Court.

In its argument before the Housing Court, Appellant never raised a constitutional challenge to the sentencing. Further, in the 8th District Court of Appeals, Appellant strictly limited its argument to whether the Housing Court appropriately applied the factors required in O.R.C. §2929.22. At no time did they raise any Fifth or Fourteenth Amendment deprivations. "It is axiomatic that a litigant's failure to raise an issue in the trial court waives the litigant's right to raise that issue on appeal." *State v. Thrower*

(1989), 62 Ohio App.3d 359, 366-367, see also, *Shover v. Cordis Corp.* (1991), 61 Ohio St.3d 213, 220, 574 N.E.2d 457, 463.

In this case, where the Appellant failed to raise the issue before the trial court and the appellate court, it is clear that the issue has been waived and should not be considered for the first time by the Supreme Court.

Conclusion

Appellant has failed to submit any grounds upon which this Honorable Court could base jurisdiction. There is no substantial constitutional question nor is an issue of public or great general interested presented. Further, a portion of the argument is not even properly before the Court as it was never raised in the courts below. For these reasons, and those more fully stated in this memorandum, the City of Cleveland respectfully asks this Court to deny jurisdiction in this matter.

Respectfully submitted,
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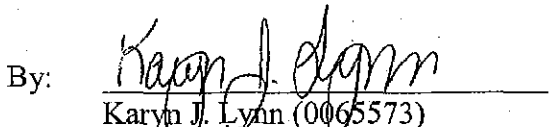
By: 

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Certificate of Service

It is hereby certified that a copy of the foregoing was sent to the following by regular mail on the 15th day of December, 2008:

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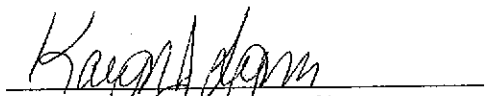

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