

In the Supreme Court of Ohio

NEW DESTINY TREATMENT CENTER, INC., et al.,

Plaintiff-Appellee,

v.

E. MARIE WHEELER, et al.,

Defendants-Appellants.

DISCRETIONARY APPEAL FROM THE COURT OF APPEALS
NINTH APPELLATE DISTRICT
SUMMIT COUNTY, OHIO
CASE No 24404

FILED
FEB 18 2010
CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF APPEAL OF DEFENDANT-APPELLANT
RODERICK LINTON, LLP

MICHAEL J. MORAN (#0018869)
KENNETH L. GIBSON (#0018885)
GIBSON & LOWRY
234 Portage Trail
P.O. Box 535
Cuyahoga Falls, OH 44221
Tel: (330) 929-0507
Fax: (330) 929-6605
E-mail: moranecf@yahoo.com
Counsel for Plaintiffs-Appellees,
New Destiny Treatment Center,
Inc., et al.

ALAN M. PETROV* (#0020283)
*Counsel of Record
JAY CLINTON RICE (#0000349)
THERESA A. RICHTHAMMER (#0068778)
GALLAGHER SHARP
Bulkley Building, Sixth Floor
1501 Euclid Avenue
Cleveland, OH 44115-2108
Tel: (216) 241-5310
Fax: (216) 241-1608
E-mail: apetrov@gallaghersharp.com
jrice@gallaghersharp.com
trichthammer@gallaghersharp.com

RECEIVED
FEB 16 2010
CLERK OF COURT
SUPREME COURT OF OHIO

Counsel for Defendant-Appellant,
Roderick Linton, LLP

BRIAN D. SULLIVAN (#0063536)
JOHN P. O'NEIL (#0067893)
REMINGER CO., L.P.A.
1400 Midland Building
101 Prospect Avenue West
Cleveland, OH 44115-1093
Tel: (216) 687-1311
Fax: (216) 687-1841
E-mail: bsullivan@reminger.com
joneil@reminger.com

*Counsel for Defendant-Appellant,
E. Marie Wheller*

Notice of Appeal of Appellant Roderick Linton, LLP

Appellant Roderick Linton, LLP hereby gives notice of its appeal to the Supreme Court of Ohio from the Judgment of the Summit County Court of Appeals, Ninth Appellate District, in *New Destiny Treatment Center, Inc. et al. v. E. Marie Wheeler, et al.*, Summit App. No. 24404 journalized on December 30, 2009.

This case is one of public or great general interest.

Respectfully submitted,



ALAN M. PETROV (#0020283)
[COUNSEL OF RECORD]
JAY CLINTON RICE (#0000349)
THERESA A. RICHTHAMMER (#0068778)
GALLAGHER SHARP
Bulkley Building - Sixth Floor
1501 Euclid Avenue
Cleveland, OH 44115-2108
Tel: (216) 241-5310
Fax: (216) 241-1608
E-mail: apetrov@gallaghersharp.com
jrice@gallaghersharp.com
trichthammer@gallaghersharp.com

*Counsel for Defendant-Appellant,
Roderick Linton, LLP*

PROOF OF SERVICE

A copy of the foregoing *Notice of Appeal of Defendant-Appellant Roderick Linton, LLP* was sent by regular U.S. Mail, postage pre-paid, this 15th day of February, 2010 to the following:

Michael J. Moran, Esq.
Kenneth L. Gibson, Esq.
Weick, Gibson & Lowry
234 Portage Trail
P.O. Box 535
Cuyahoga Falls, OH 44221

*Counsel for Plaintiffs-Appellees,
New Destiny Treatment Center,
Inc., et al.*

Brian D. Sullivan, Esq.
John P. O'Neil, Esq.
Reminger Co., L.P.A.
1400 Midland Building
101 Prospect Avenue West
Cleveland, OH 44115-1093

*Counsel for Defendant-Appellant,
E. Marie Wheller*



ALAN M. PETROV (#0020283)
JAY CLINTON RICE (#0000349)
THERESA A. RICHTHAMMER (#0068778)



Case: 2009 2294
Docket: 658408
Date Filed: 01/15/10
Description: Memorandum in response

**Clerk's Office
Scanning Cover Sheet**

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio, : S.Ct. Case No.09-2294
 Appellee : C.A. Case No. E-09-047
 v. : C.P. Case No. 09-CV-268
 Demetrick Clinton :
 Appellant :

--oooOooo--

APPEAL FROM THE SIXTH APPELLATE DISTRICT
 ERIE COUNTY, OHIO

MEMORANDUM IN OPPOSITION OF JURISDICTION

Counsel for Appellee:

KEVIN J. BAXTER (0015782)
 ERIE COUNTY PROSECUTOR
 Mary Ann Barylski (0038856)
 Assistant Prosecutor
 247 Columbus Avenue
 Sandusky, Ohio 44870
 (419) 627-7697

Counsel for Appellant:

Beverly Newell Hancock
 1632 Sycamore Line
 Sandusky, Ohio 44870
 (419) 625-5801

RECEIVED
 JAN 15 2010
 CLERK OF COURT
 SUPREME COURT OF OHIO

FILED
 JAN 15 2010
 CLERK OF COURT
 SUPREME COURT OF OHIO

TABLE OF CONTENTS

Why Leave to Appeal Should be Denied 1
Statement of the Case and Facts 2

ARGUMENT:

PROPOSITION OF LAW NO. ONE: AN INVOLUNTARY DISMISSAL
BY THE TRIAL COURT WITHOUT PREJUDICE AND WITHOUT
NOTICE IS NOT A FINAL APPEALABLE ORDER WHEN
SUBSTANTIAL RIGHTS ARE NOT AFFECTED AND THE MOVANT HAS
NOT LOST THE RIGHT TO ADJUDICATE THE CASE. 3

Authorities Cited in Support of Proposition of Law No. 1

Johnson v. H&M Auto Serv.,
2007 WL 3148981, 2007-Ohio-5794,
(Ohio App. 10 Dist.)..... 3,4

Thomas v. Freeman (1997), 79 Ohio St.3d 221..... 3

Selmon vs. Crestview
Nursing & Rehabilitation,
2009 WL 3068767, 2009-Ohio-5078,
(Ohio App. 7 Dist.)..... 3

Arner v. Andover Bank, 2008 WL 4880882,
2008-Ohio-5857 (Ohio App. 11 Dist.)..... 3,4

Canady v. Taylor, 2008 WL 2350645,
2008-Ohio-2801 (Ohio App. 10 Dist.)..... 4

Conclusion..... 5

Certification..... 6

WHY LEAVE TO APPEAL SHOULD BE DENIED

Appellant has failed to demonstrate in his Memorandum in Support of Jurisdiction that this case involves a substantial constitutional question or that this case is one of public or great general interest. The Sixth District Court of Appeals correctly held that the trial court's dismissal without notice was not a final appealable order and, therefore, the dismissal of appellant's appeal was proper.

The Sixth District Court of Appeals found that there is a remedy available to appellant, and he has not lost his right to adjudicate his case. Thus, appellant has failed to demonstrate that this case involves a substantial constitutional question or that this case is one of public or great general interest.

STATEMENT OF THE CASE AND FACTS

Sandusky Police Department seized \$4957.00 from appellant in connection with an investigation. On March 27, 2009, appellant filed a Motion for Return of Funds under Ohio Rev. Code Ann. §§2981.04 and 03 (hereinafter "O.R.C."). A criminal case was not pending with regards to the seizure; therefore, the Clerk of Courts assigned Case No. 2009-CV-268 to appellant's motion for return of funds. **Said motion was not served on appellee at the time of filing.**

On April 24, 2009, appellee commenced a forfeiture proceedings under Case No. 2009-CV-364 pursuant to O.R.C

§§2981.01, 02, and 03. According to the judgment entry filed July 14, 2009, the trial court, on May 12, 2009, was advised that appellant would be "dismissing" Case No. 2009-CV-0268. Instead, appellant, on July 10, 2009, filed a motion for indigency in Case No. 2009-CV-0268 as evidenced by the docket. Appellee was never served with this motion.

On May 28, 2009, appellant filed an answer to appellee's petition for forfeiture in Case No. 2009-CV-364. On June 9, 2009, along with the answer to the petition under Case No. 2009-CV-364, appellee was then served with appellant's motion to return funds. However, the motion did not refer to any case number.

According to the judgment entry filed July, 14, 2009, the trial court again, on July 13, 2009, was advised that appellant would be filing for a dismissal in Case No. 2009-CV-268 when appellant's counsel returned from vacation in two weeks. On July 14, 2009, the trial court dismissed Case No. 2009-CV-268 without prejudice.

On August 13, 2009, appellant filed a notice of appeal in the Sixth District Court of Appeals on the judgment entry filed July 14, 2009. On September 9, 2009, the Sixth District Court of Appeals ordered appellant and appellee to brief the issue of whether the July 14, 2009, entry was a final appealable order. As evidenced by entry filed November 5, 2009, the appellate

court held that the trial court's dismissal was not a final appealable order because appellant did not lose the right to adjudicate the case.

Appellant filed a memorandum in support of jurisdiction and notice of appeal in the Ohio Supreme Court on the decision of the Sixth District Court of appeals filed November 5, 2009.

ARGUMENT

PROPOSITION OF LAW NO. ONE: AN INVOLUNTARY DISMISSAL BY THE TRIAL COURT WITHOUT PREJUDICE AND WITHOUT NOTICE IS NOT A FINAL APPEALABLE ORDER WHEN SUBSTANTIAL RIGHTS ARE NOT AFFECTED AND THE MOVANT HAS NOT LOST THE RIGHT TO ADJUDICATE THE CASE.
Johnson v. H&M Auto Serv., 2007 WL 3148981, 2007-Ohio-5794, (Ohio App. 10 Dist.)

The Sixth District Court of Appeals correctly found that the trial courts dismissal of Case No. 2009-CV-268 without notice was not a final appealable order. Therefore, appellant has failed to demonstrate a substantial constitutional question or that this case is one of public or great general interest.

"Generally, a dismissal without prejudice constitutes 'an adjudication otherwise than on the merits' with no res judicata bar to refiling the suit. Thomas v. Freeman (1997), 79 Ohio St.3d 221, 225, fn. 2." Johnson, 2007 WL 3148981 at 2. The dismissal places the "parties in the same position they were in before they filed the action." Id. See, also Selmon vs. Crestview Nursing & Rehabilitation, 2009 WL 3068767, 2009-Ohio-5078, (Ohio App. 7 Dist.); Arner v. Andover Bank, 2008 WL

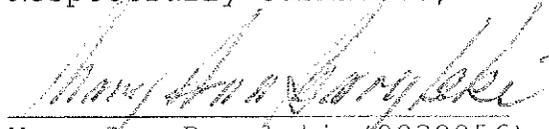
4880882, 2008-Ohio-5857 (Ohio App. 11 Dist.); Canady v. Taylor, 2008 WL 2350645, 2008-Ohio-2801 (Ohio App. 10 Dist.).

In the case at bar, the trial court's dismissal of Case No. 2009-CV-268 is not a final appealable order because appellant may refile his motion to return funds under the *still pending* forfeiture in Case No. 2009-CV-364. See Johnson v. H&M Auto Serv., 2007 WL 3148981, 2007-Ohio-5794, *2 (Ohio App. 10 Dist.). The trial court did not deny appellant's motion without a hearing because appellant's right to adjudicate is still active under Case No. 2009-CV-0364. As evidenced by the judgment entry filed July 14, 2009, the court was "left with duplicative filings regarding the same parties, same issue, and same matter." Contrary to appellant's assertions, appellee and the trial court are well aware that appellant is entitled to a hearing on his replevin issues. Thus, appellant has a remedy available under Case No. 2009-CV-0364. In fact, said motion should have been filed when appellant filed his answer to the petition in the forfeiture case. The trial court's judgment entry specifically states that the proper filing is under Case No. 2009-CV-364. Had appellant re-filed his motion to return funds under Case No. 2009-CV-364, appellant may very well have had a hearing on the issue by now.

CONCLUSION

This case is not properly before this Honorable Court because there is no final appealable order to be brought before the Sixth District Court of Appeals or this Court. Because appellant has failed to demonstrate that this Court has original or appellate jurisdiction or why this case involves a substantial constitutional question or that this case is one of public or great general interest, appellee respectfully requests that appellant's memorandum in support of jurisdiction be dismissed.

Respectfully submitted,



Mary Ann Barylski (0038856)
Assistant Prosecuting Attorney

CERTIFICATION

This is to certify that a copy of appellee's Motion to Dismiss Appeal has been sent to Beverly Newell Hancock, Attorney for Appellant, 1632 Sycamore Line, Sandusky, Ohio 44870, this 12th day of January, 2010 by regular U.S. Mail.


Mary Ann Barylski #0038856
Assistant Prosecutor