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IN THE SUPREME COURT OF OHIO

CITY OF MAYFIELD HEIGHTS	)	CASE NO.: 2011-1277
	)	
Plaintiff-Plaintiff	)	
	)	
vs.	)	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District, Case No. CA-10-095771
	)	
DENVER BARRY	)	
	)	
Defendant-Plaintiff	)	

APPELLEE'S MOTION TO DISMISS APPEAL

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FILED
OCT 07 2011
CLERK OF COURT
SUPREME COURT OF OHIO

RECEIVED
OCT 07 2011
CLERK OF COURT
SUPREME COURT OF OHIO

Appellant, the City of Mayfield Heights, through undersigned counsel, hereby respectfully moves this Court to dismiss the within appeal. The grounds in support of this motion is that this Court does not have jurisdiction, since Appellant failed to timely file a notice of appeal. The supporting grounds for this motion are set forth more thoroughly below.

FACTS

As indicated in his Notice of Appeal, Appellant is submitting an appeal to this Court from the judgment of the Eighth District Court of Appeals, in Case No. CA-10-095771.

On June 2, 2011, in Case No. CA-10-095771, the Eighth District Court of Appeals unanimously affirmed Appellant's jury trial convictions for two misdemeanor offenses, after individually considering and addressing all fifteen assignments of error that were raised by Appellant. The two misdemeanor charges for which Appellant was ultimately convicted related to charges that were brought by officials of Appellee's building department. See, certified copy of docket of Case No. CA-10-095771, attached hereto; and opinion in Case No. CA-10-095771, attached to Appellant's motion for stay of the court of appeals judgment that was filed in this Court.

On June 2, 2011, the Eighth District Court of Appeals issued a notice of its decision in Case No. CA-10-095771, to each party, as reflected on the docket of the Eighth District Court of Appeals. See, certified copy of docket of Case No. CA-10-095771, attached hereto.

On June 13, 2011, Appellant filed an application for reconsideration in the Eighth District Court of Appeals, in Case No. CA-10-095771. See, certified copy of docket of Case No. CA-10-095771, attached hereto.

On July 5, 2011, the Eighth District Court of Appeals denied Appellant's application for reconsideration in Case No. CA-10-095771. See, certified copy of docket of Case No. CA-10-095771, attached hereto.

On July 28, 2011, Appellant filed a notice of appeal in this Court, and at the same time filed a motion for stay of the court of appeals judgment in this Court.

On September 21, 2011, this Court denied Appellant's motion for stay of the court of appeals judgment that was filed in this Court.

On August 16, 2011, Appellant filed a memorandum in support of jurisdiction in this Court.

Pending still before the Court is Appellant's request for the Court accept his discretionary appeal and claimed appeal of right.

APPLICABLE RULES

App.R. 26(A)(1)(a) provides as follows:

> Application for reconsideration of any cause or motion submitted on appeal shall be made in writing no later than ten days after the clerk has both mailed to the parties the judgment or order in question and made a note on the docket of the mailing as required by App. R. 30(A).

App.R. 30(A) provides as follows:

> Immediately upon the entry of an order or judgment, the clerk shall serve by mail a notice of entry upon each party to the proceeding and shall make a note in the docket of the mailing. Service on a party represented by counsel shall be made on counsel.

S.Ct. Prac. R. 2.2.(A)(1) provides as follows:

> (a) To perfect an appeal from a court of appeals to the Supreme Court, other than in a certified conflict case, which is addressed in S.Ct. Prac. R. 4.1, the appellant shall file a notice of appeal in the Supreme Court within forty-five days from the entry of the judgment being appealed. The date the court of appeals filed its

judgment entry for journalization with its clerk, in accordance with App. R. 22, shall be considered the date of entry of the judgment being appealed. If the appeal is a claimed appeal of right or a discretionary appeal, the appellant shall also file a memorandum in support of jurisdiction, in accordance with S.Ct. Prac. R. 3.1, at the time the notice of appeal is filed.

(b) Except as provided in divisions (A)(2), (3), (4), (5), and (6) of this rule, the time period designated in this rule for filing a notice of appeal and memorandum in support of jurisdiction is mandatory, and the appellant's failure to file within this time period shall divest the Supreme Court of jurisdiction to hear the appeal. The Clerk of the Supreme Court shall refuse to file a notice of appeal or a memorandum in support of jurisdiction that is received for filing after this time period has passed.

S.Ct. Prac. R. 2.2.(A)(3) provides as follows:

(a) In a claimed appeal of right or a discretionary appeal, if the appellant intends to seek from the Supreme Court an immediate stay of the court of appeals judgment that is being appealed, the appellant may file a notice of appeal in the Supreme Court without an accompanying memorandum in support of jurisdiction, provided both of the following conditions are satisfied:

(i) A motion for stay of the court of appeals judgment shall accompany the notice of appeal.

(ii) A copy of the court of appeals opinion and judgment entry being appealed shall be attached to the motion for stay.

(b) A memorandum in support of jurisdiction shall be filed no later than forty-five days from the entry of the court of appeals judgment being appealed. The Supreme Court will dismiss the appeal if the memorandum in support of jurisdiction is not timely filed pursuant to this provision.

S.Ct. Prac. R. 2.2. (A)(5)(a) and (b) provides as follows:

(a) When a party timely files an application for reconsideration in the court of appeals pursuant to App. R. 26(A)(1), the time for filing a notice of appeal from the court of appeals entry of judgment shall be tolled.

(b) If a timely application for reconsideration is filed in the court of appeals, and the appellant seeks to appeal from the court of appeals

> entry of judgment, the appellant shall file a notice of appeal within forty-five days of the court of appeals decision denying the application for reconsideration, or if reconsideration is granted, from the subsequent entry of judgment.

ARGUMENT

Appellant has failed to perfect this appeal as required by the applicable rules. Therefore, this Court does not have jurisdiction to hear the appeal. Therefore, the appeal must be dismissed.

According to S.Ct. Prac. R. 2.2. (A)(1)(a), Appellant must file his notice of appeal within 45 days from the entry of the judgment being appealed. As set forth above, the relevant judgment was entered on June 2, 2011. 45 days from June 2 is July 17, 2011. Appellant did not file his notice of appeal until July 28, 2011. Therefore, Appellant's notice of appeal is not timely, as it was filed 11 days past the deadline. According to S.Ct. Prac. R. 2.2. (A)(1)(b), with certain noted exceptions, "appellant's failure to file within this time period ***shall divest the Supreme Court of jurisdiction to hear the appeal***." [Emphasis Supplied].

The only tolling exception that Appellant could claim is in connection with the filing of an application for reconsideration in the court of appeals. According to S.Ct. Prac. R. 2.2. (A)(5)(a), "[w]hen a party timely files an application for reconsideration in the court of appeals pursuant to App. R. 26(A)(1)(a), the time for filing a notice of appeal from the court of appeals entry of judgment shall be tolled." However, Appellant did not timely file an application for reconsideration in the court of appeals. As set forth above, the relevant judgment was entered by the court of appeals on June 2, 2011. App. R. 26(A)(1)(a) provides that an application for reconsideration "shall be made in writing no later than ten days after the clerk has both mailed to the parties the judgment or order in question and made a note on the docket of the mailing as required by App. R. 30(A)." As set forth above, both of these triggering events occurred on June 2, 2011 (see, certified copy of docket of Case No. CA-10-095771, attached hereto). With the addition of ten

days, it is clear that Appellant's application for reconsideration was due to be filed on or before June 12, 2011. Appellant did not file his application for reconsideration until June 13, 2011. Therefore, Appellant's application for reconsideration was not "timely filed." Therefore, by definition, the tolling provisions of S.Ct. Prac. R. 2.2. (A)(5)(a) do not apply. Therefore, according to S.Ct. Prac. R. 2.2. (A)(1)(b), this Court does not have jurisdiction to hear the appeal. Hence, the appeal must be dismissed.

CONCLUSION

Based upon all of the foregoing, it is clear (1) that Appellant's notice of appeal was not timely filed; (2) that Appellant cannot avail himself of the tolling provision of S.Ct. Prac. R. 2.2. (A)(5)(a), since his application for reconsideration was not "timely filed" in the court of appeals, pursuant to the time parameters of App. R. 26(A)(1)(a); that, according to S.Ct. Prac. R. 2.2. (A)(1)(b), this Court does not have jurisdiction to hear the appeal, as a result of Appellant's failure to timely file a notice of appeal.

WHEREFORE, Appellant respectfully requests this Court to dismiss the within appeal.

Respectfully Submitted,

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City of Mayfield Heights

CERTIFICATE OF SERVICE

A copy of the foregoing *Appellee's Motion to Dismiss Appeal* has been sent this 3rd day of October, 2011 to the following:

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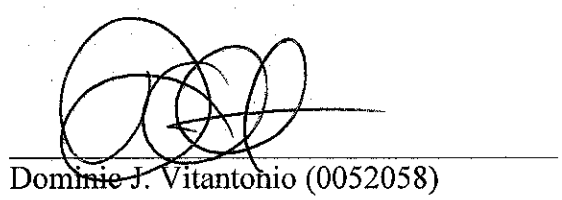


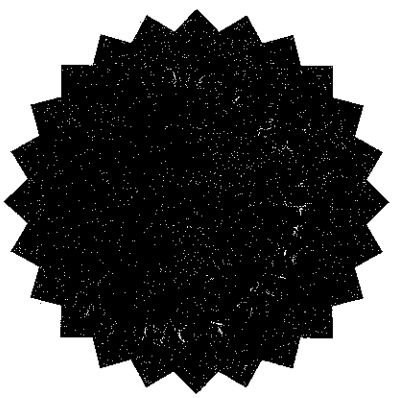
Dominic J. Vitantonio (0052058)

Attorney for Plaintiff-Appellee
City of Mayfield Heights

CC 97 / 2783

The State of Ohio, Cuyahoga County. } ss.

I, GERALD E. FUERST, Clerk of the Court of Appeals within and for said County, and in whose custody the files, Journals and records of said Court are required by the laws of the State of Ohio, to be, kept, hereby certify that the foregoing is taken and copied from the ~~Journal~~ DOCKET SHEET IN CA 95771 of the proceedings of the Court of Appeals within and for said Cuyahoga County, and that the said foregoing copy has been compared by me with the original entry on said ~~Journal~~ DOCKET SHEET IN CA95771 and that the same is correct transcript thereof.



In Testimony Whereof, I do hereunto subscribe my name officially, and affix the seal of said court, at the Court House in the City of Cleveland, in said County, this 3 day of October A.D. 20 11

GERALD E. FUERST, Clerk of Courts

By _____ Deputy Clerk

EIGHTH DISTRICT COURT OF APPEALS

DATE: 10/03/2011
TIME: 1:53 PM

APPEARANCE DOCKET

Case No: CA-10-095771
Filing Date: 09/24/2010

CITY OF MAYFIELD HTS.
VS
DENVER BARRY

Filing Cd:27 OTHER
Judge:N/A
Prior Judge:N/A
Magistrate:N/A
Panel Chair:N/A

Status:A
Jury Req:N/A
Class:
Prayer Amt:N/A

[ ] **Arbitration**
[ ] **Mediation**
[ ] **Settlement**
[X] **Notes**
[X] **Appealed**

Disposition:	Date:
NEWLY FILED	09/24/2010
RECORD FILED	10/25/2010
APPELLANT BRIEF FILED	11/12/2010
APPELLEE BRIEF FILED	12/27/2010
DECISION RELEASED	06/03/2011
APPEALED TO OHIO SUPREME COURT	08/01/2011

Next Action:
Date/Time:

----------**File Location** ---------
Name: DF-ROOM 45
Date: 08/01/2011

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Service:

Type	- Docket - Code	Party	Date	Description	Cost Amount
EV	121	A 1	9/24/2010	NOTICE OF APPEAL FILED FROM LYNDHURST MUNICIPAL COURT , CASE # 09 CRB 00397 WITH JOURNAL ENTRY, PRAECIPE, DOCKETING STATEMENT	
SF	INIT		9/24/2010	CASE INITIATED	
SF	RECT	A 1	9/24/2010	DEPOSIT AMOUNT PAID NICHOLAS J SCHEPIS	125.00

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SF	CM	A 1	9/24/2010	COMPUTER FEE	10.00
SF	LN	A 1	9/24/2010	LEGAL NEWS	10.00
SF	LR	A 1	9/24/2010	LEGAL RESEARCH	3.00
SF	CF	A 1	9/24/2010	CLERK'S FEE	25.00
SF	CASP	A 1	9/24/2010	COURT OF APPEALS SPECIAL PROJECTS	25.00
EV	104	A 1	10/25/2010	TRANSCRIPT OF PROCEEDINGS FILED BY APPELLANT 6 VOLS AND 1 ENV OF EXHIBITS.	
NT	401	A 1	10/25/2010	RECORD ON APPEAL FILED AND NOTICE ISSUED TO ALL PARTIES.	
EV	101	A 1	10/25/2010	ORIGINAL PAPERS FILED BY TRIAL COURT.	
EV	102	A 1	11/12/2010	APPELLANT'S BRIEF FILED.	
MO	301		12/06/2010	MOTION BY APPELLEE TO EXTEND TIME TO FILE ANSWER BRIEF	
JE	201		12/07/2010	MOTION BY APPELLEE TO EXTEND TIME TO FILE ANSWER BRIEF IS GRANTED TO DECEMBER 24, 2010. NO FURTHER EXTENSION WILL BE CONSIDERED. VOL. 718 PG. 725. NOTICE ISSUED.	6.00
EV	103	E 1	12/23/2010	APPELLEE'S BRIEF FILED.	
JE	201		12/29/2010	MOTION BY APPELLEE TO EXTEND TIME TO FILE REPLACEMENT BRIEF, INSTANTER IS GRANTED. VOL. 720 PG. 84. NOTICE ISSUED.	6.00
MO	301		12/29/2010	MOTION BY APPELLEE TO EXTEND TIME TO FILE REPLACEMENT BRIEF, INSTANTER	
EV	203	A 1	1/03/2011	REPLY BRIEF OF APPELLANT FILED	
MO	302		3/24/2011	MOTION BY APPELLEE TO CONTINUE ORAL ARGUMENT	
JE	201		3/28/2011	MOTION BY APPELLEE TO CONTINUE ORAL ARGUMENT SCHEDULED ON MAY 4, 2011 IS DENIED. SEE LOC.APP.R. 21(D). VOL. 726 PG. 829. NOTICE ISSUED.	6.00
BL	A		6/02/2011	AFFIRMED. VOL. 731 PG. 593. NOTICE ISSUED.	
JE	JE		6/02/2011	AFFIRMED. VOL. 731 PG. 593. NOTICE ISSUED.	74.00
SF	502		6/03/2011	CERTIFIED COPY OF JOURNAL ENTRY BOOK 731 PAGE 593 ISSUED TO LYNDHURST MUNICIPAL COURT.	
MO	302		6/13/2011	MOTION BY APPELLANT FOR STAY DECISION AND MAINTAIN THE TRIAL COURT'S STAY OF SENTENCE	
MO	302		6/13/2011	APPLICATION BY APPELLANT FOR RECONSIDERATION	
JE	201		7/05/2011	MOTION BY APPELLANT TO STAY DECISION AND MAINTAIN THE TRIAL COURT'S STAY OF SENTENCE IS DENIED. VOL. 733 PG. 762. NOTICE ISSUED.	6.00
JE	201		7/05/2011	APPLICATION BY APPELLANT FOR RECONSIDERATION IS DENIED. VOL. 733 PG. 761. NOTICE ISSUED.	6.00
EV	128		8/01/2011	OHIO SUPREME COURT CASE NO. 11-1277--NOTICE OF APPEAL TO THE SUPREME COURT OF OHIO FILED BY APPELLANT IN THE OSC ON JULY 28, 2011.	

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EV	116	A 1	8/01/2011	ORIGINAL PAPERS RETURNED TO TRIAL COURT PER ORDER OF LYNDHURST MUNI COURT.

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