

IN THE SUPREME COURT OF OHIO

15-1287

PERCY SQUIRE,

APPELLANT

VS.

THE FAHEY BANKING COMPANY,

APPELLEE.

ON APPEAL FROM THE MAHONING
COUNTY COURT OF APPEALS
SEVENTH APPELLATE DISTRICT

COURT OF APPEALS
CASE NO. 15-MA-105

MOTION OF PERCY SQUIRE TO STAY

Percy Squire
341 S. Third St., Suite 101
Columbus, Ohio 43215
614-224-6528 Telephone
614-224-6529 Facsimile
percysquire@gmail.com
Pro Se

Michael N. Schaeffer
Richard G. Murray
Scott N. Schaeffer
88 W. Mound St.
Columbus, Ohio 43215
michael@ksrlegal.com
Richard@ksrlegal.com
scott@ksrlegal.com
Attorneys for The Fahey Banking
Company

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SUPREME COURT OF OHIO

MEMORANDUM

I. INTRODUCTION

In order to avoid irreparable harm, Appellant, Percy Squire moves for an immediate order staying the dismissal of the appeal in the Mahoning County Appellate Case No. 15 MA 105, pending further appellate review by this Court.

An appeal was filed in this matter on June 29, 2015, from an order of the Mahoning County Court of Common Pleas scheduling various motions for hearing. The order from which this appeal was taken, scheduled a hearing on June 30, 2015 before a magistrate. The hearing was scheduled to adjudicate a motion filed by the undersigned, among other matters, to set aside an order issued by the Magistrate on September 15, 2014. The Magistrate who issued the September 15, 2014 Order that the undersigned sought to set aside, was also scheduled to decide the motion to set aside. In effect, the magistrate scheduled a hearing to resolve a motion to set aside his own order. The undersigned's notice of appeal followed. On July 21, 2015, this appellate court sua sponte dismissed the appeal on grounds that "an order scheduling a motions hearing is not a final order as defined by R.C. 2505.02." The undersigned moved for reconsideration of July 24, 2015. Reconsideration was denied on August 5, 2015. The undersigned respectfully disagrees with the lack of a final appealable order determination of the appellate Court and requests a stay pending appeal. The appellate denied a stay along with denial of reconsideration.

A stay is requested here for the reason an order scheduling a motions hearing before a magistrate to hear a motion to set aside the Magistrate's own order is a final appealable order.

Ohio law provides under R.C. 2505.02 that a final appealable order is:

- (1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

- (2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;
- (3) An order that vacates or sets aside a judgment or grants a new trial;
- (4) An order that grants or denies a provisional remedy and to which both of the following apply:
 - (a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.
 - (b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.
- (5) An order that determines that an action may or may not be maintained as a class action;
- (6) An order determining the constitutionality of any changes to the Revised Code made by Am. Sub. S.B. 281 of the 124th general assembly, including the amendment of sections 1751.67, 2117.06, 2305.11, 2305.15, 2305.234, 2317.02, 2317.54, 2323.56, 2711.21, 2711.22, 2711.23, 2711.24, 2743.02, 2743.43, 2919.16, 3923.63, 3923.64, 4705.15, and 5111.018 (renumbered as 5164.07 by H.B. 59 of the 130th general assembly), and the enactment of sections 2305.113, 2323.41, 2323.43, and 2323.55 of the Revised Code or any changes made by Sub. S.B. 80 of the 125th general assembly, including the amendment of sections 2125.02, 2305.10, 2305.131, 2315.18, 2315.19, and 2315.21 of the Revised Code;
- (7) An order in an appropriation proceeding that may be appealed pursuant to division (B)(3) of section 163.09 of the Revised Code.

R.C. 2505.02 defines three types of final orders: (1) an order affecting a substantial right in an action which in effect determines the action and prevents a judgment; (2) an order affecting a substantial right made in a special proceeding or made upon summary application after judgment; or (3) an order vacating or setting aside a judgment or granting a new trial. Chef Italiano, 44 Ohio St.3d at 88, 541 N.E.2d 64. The order at Exhibit B scheduling a non oral hearing before the magistrate effects a substantial right and is therefore final. A substantial right has been defined as a “***]legal right entitled to enforcement and protection by law[.]” In re. Estate of Wyckoff, 166 Ohio St. 354, 358, 260, 142 N.E.2d 660, 664 (1957). A court order

which deprives a person of a remedy which he or she would otherwise possess deprives that person of a substantial right. Chef Italiano at 67. In other words, “[t]o be final, an order must also determine an action and prevent a judgment.” (Emphasis added). Id citing, General Electric Supply Co. v. Warden Electric, Inc., 38 Ohio St.3d 378, 528 N.E.2d 195 (1988), syllabus.

The order in this matter is final for the reason it deprives the undersigned of a remedy. The undersigned has a right under Ohio R. Civ. P. 53 to have his motion to set aside the September 15, 2014 Order to be heard by a common pleas judge, not the same magistrate who issued the underlying order.

For the above reason stay is respectfully requested and pending reconsideration it is requested that the dismissal be stayed.

II. STAY

In determining whether to grant a stay, a court usually considers and balances the following factors to determine whether to issue a stay:

- (1) Whether movant will suffer irreparable injury if the preliminary relief is not granted;
- (2) Whether movant has a substantial likelihood or probability of success on the merits;
- (3) Whether the preliminary injunction would unjustifiably harm third parties; and
- (4) Whether the public interest would be served by issuing the preliminary injunction.

Vanguard Transp. Sys., Inc. v. Edwards Transfer & Storage Co., Franklin County 1996, 109 Ohio App. 3d 786, 790, 673 N.E. 2d 182; citing Valvo Cincinnati, Inc. v. N& D. Machining Serv., Inc. (1986), 24 Ohio St.3d 41, 492 N.E. 2d 814.

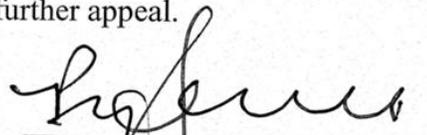
When deciding whether to grant a motion for a [stay], “a*** court is to review facts such as the party’s [substantial] likelihood of success on the merits and the threat of irreparable injury.” Imperial Home Décor group (US) LLSC v. Murray, 75 F. Supp.2d 753, 755 (N.d. Ohio, 1999), citing Proctor & Gamble Co. v. Banker’s Trust Co., 78 F.3d 219, 226-277 (6th Cir., 1996). The court should also consider whether third parties will be unjustifiably harmed if the injunction

is granted and if the public interest will be served by the issuance of injunctive relief. Mike McGarry & Sons, Inc. v. Gross, (April 6, 2006), 8th Dist. No. 86603, 2006-Ohio-1759, at ¶10, citing Proctor & Gamble Co. v. Stoneham, 140 Ohio App.3d 260, 267, 747 N.E. 2d 268 (Ohio App. 1st Dist., 2000). The proponent of the motion must establish these elements by clear and convincing evidence. Imperial Home, supra, 75 F.Supp.2d at 755, citing Ohio Urology, Inc. v. Poll, 72 Ohio App.3d 446, 594 N.E.2d 1027 (Ohio App. 10th Dist., 1991). See also, Gross, supra, at ¶ 11, citing Stoneham, supra "Clear and convincing evidence is the measure or degree of proof more than a mere 'preponderance of the evidence,' but less than 'beyond a reasonable doubt' required in criminal cases, and which will provide in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." Gross, supra, at ¶ 11, citing Cincinnati Bar Assn. v. Massengale (1991), 58 Ohio St.3d 121, 122, 568 N.E. 2d 1222.

"An injunction is an extraordinary remedy in equity that is available only where there is no adequate remedy available at law. Brentlinger Enterprises v. Curran, 141 Ohio App.3d 640, 752 N.E.2d 994, 999 (Ohio App. 10th Dist., 2001), citing Garono v. State (1988), 37 Ohio St.3d 171, 173, 524 N.E.2d 496, 498-499. "Injunctive relief is not available as a right but may be granted by a court if it is necessary to prevent a future wrong that the law cannot." Id.

In this case all factors militate in the undersigned's favor.

For the above reasons a stay is requested pending further appeal.



Percy Squire
341 S. Third St., Suite 101
Columbus, Ohio 43215
614-224-6528 Telephone
614-224-6529 Facsimile
percysquire@gmail.com
Pro Se

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent August 6, 2015, via electronic mail, facsimile or U.S. Postal Service upon the following:

Michael N. Schaeffer
Scott Schaeffer
88 W. Mound St.
Columbus, Ohio 43215
michael@ksrlegal.com
scott@ksrlegal.com
Attorney for Fahey Banking Company

Leo P. Ross
915 S. High Street
Columbus, OH 43206
Leoross1@sbcglobal.net

Judge Durkin
330-742-5898 (FAX)

Robert Budinsky, Court Administrator
330-740-2182 (FAX)


Percy Squitt
Pro Se

CLERK OF COURTS
MAHONING COUNTY, OHIO
AUG -5 2015
FILED
ANTHONY VIVO, CLERK

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STATE OF OHIO)
MAHONING COUNTY)

IN THE COURT OF APPEALS OF OHIO

SS: SEVENTH DISTRICT

FAHEY BANKING CO.)
PLAINTIFF-APPELLEE)

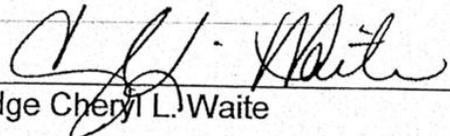
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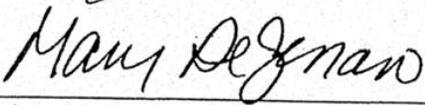
VS.)

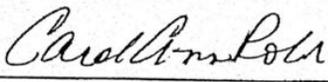
JUDGMENT ENTRY

PERCY SQUIRE, et al.)
DEFENDANTS-APPELLANT)

Motion of Appellant for Reconsideration of the Court's dismissal order and to Stay this Court's dismissal order pending appeal to the Ohio Supreme Court is denied.


Judge Cheryl L. Waite


Judge Mary DeGenaro


Judge Carol Ann Robb



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