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NO. COA12-219
NORTH CAROLINA COURT OF APPEALS

Filed: 2 October 2012

JAMES MCCOY d/b/a JMJ
PROPERTIES AND ASSOCIATES,
II, LLC,
Plaintiff

v.

Mecklenburg County
No. 11 CVS 10836

CITY OF CHARLOTTE,
Defendant

Appeal by plaintiff from order entered 17 October 2011 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 29 August 2012.

Pamela A. Hunter, for plaintiff-appellant.

Thomas E. Powers III and Anna Schleunes, for defendant-appellee.

CALABRIA, Judge.

James McCoy d/b/a JMJ Properties and Associates, II, LLC ("plaintiff") appeals from the trial court's order granting the City of Charlotte's ("defendant") motion to dismiss for lack of subject matter jurisdiction. We affirm.

I. Background

Plaintiff is the owner of real property located at 200 Mill Road in Charlotte, North Carolina ("the property"). On 26 April 2010, Michael Johnson ("Johnson"), a Code Enforcement Inspector for defendant, sent plaintiff a Complaint and Notice of Hearing regarding several violations of defendant's Housing Code which Johnson had witnessed. According to the notice, a hearing on the violations was scheduled for 24 May 2010.

Plaintiff did not attend the hearing. As a result, on 27 May 2010, Johnson entered an order requiring plaintiff to demolish the property on or before 30 June 2010. The order stated that plaintiff could send Johnson a written notice of his intent to repair the property or appeal Johnson's order to the Charlotte Housing Appeals Board within 10 days.

Plaintiff hired a repair contractor, Robert McCloud ("McCloud"), to repair the property. McCloud obtained a building permit to repair the property on 20 July 2010. However, Johnson was unaware that plaintiff had made attempts to repair the property, because plaintiff neither sent Johnson a written notice informing him that he had hired McCloud to repair the property nor appealed Johnson's order.

On 13 September 2010, the Charlotte City Council enacted an ordinance authorizing an *in rem* demolition of the property ("the

demolition ordinance"). The property was demolished in early October 2010.

After the property had been demolished, plaintiff filed a petition for writ of *certiorari* ("the petition") in Mecklenburg County Superior Court, seeking judicial review of defendant's demolition of the property. The petition alleged that the demolition violated N.C. Gen. Stat. § 160-393, *et. seq.* and also violated plaintiff's due process rights. In response, defendant filed a motion to dismiss plaintiff's petition pursuant to Rule 12(b)(1). On 6 January 2011, the Honorable Richard D. Boner ("Judge Boner") entered an order denying defendant's motion to dismiss. However, on 16 March 2011, plaintiff voluntarily dismissed his petition without prejudice.

On 2 June 2011, plaintiff filed a new complaint against defendant regarding the demolition ordinance, which contained several new causes of action. In response, defendant again filed a motion to dismiss pursuant to Rule 12(b)(1). On 17 October 2011, the Honorable Hugh B. Lewis ("Judge Lewis") granted defendant's motion to dismiss. Plaintiff appeals.

II. Subject Matter Jurisdiction

Plaintiff argues that the trial court erred in granting defendant's motion to dismiss for lack of subject matter

jurisdiction because Judge Lewis was bound by Judge Boner's prior denial of defendant's motion to dismiss the petition in his previously filed case. We disagree.

"Subject-matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it." *Haker-Volkening v. Haker*, 143 N.C. App. 688, 693, 547 S.E.2d 127, 130 (2001).

A universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity. If a court finds at any stage of the proceedings it is without jurisdiction, it is its duty to take notice of the defect and stay, quash or dismiss the suit. This is necessary, to prevent the court from being forced into an act of usurpation, and compelled to give a void judgment. * * * So, *ex necessitate*, the court may, on plea, suggestion, motion, or *ex mero motu*, where the defect of jurisdiction is apparent, stop the proceeding.

Burgess v. Gibbs, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964) (internal quotations and citations omitted); *see also* N.C. Gen. Stat. § 1A-1, Rule 12(h)(3) (2011) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."). Consequently, "[t]he question of subject matter jurisdiction may be raised at any time, even in the Supreme Court." *Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580,

350 S.E.2d 83, 85 (1986) (emphasis added).

Based upon these principles, Judge Lewis was permitted to independently consider defendant's motion to dismiss for lack of subject matter jurisdiction, regardless of Judge Boner's order in plaintiff's previous case. Judge Lewis, as the trial court judge in the instant case, possessed the "inherent judicial power to inquire into, hear and determine questions of its own jurisdiction, whether of law or fact, the decision of which is necessary to determine the questions of its jurisdiction." *Id.* at 580, 350 S.E.2d at 86. Accordingly, the trial court properly considered and ruled upon defendant's motion to dismiss for lack of subject matter jurisdiction. This argument is overruled.

III. The Demolition Ordinance

Plaintiff argues that the trial court erred by granting defendant's motion to dismiss because plaintiff's claim in superior court was the proper method of challenging the demolition ordinance. We disagree.

"Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010). "Where a plaintiff has failed to exhaust its administrative remedies, its action brought in the trial court may be dismissed for lack of

subject matter jurisdiction." *Vanwijk v. Prof'l Nursing Servs.*, ___ N.C. App. ___, ___, 713 S.E.2d 766, 768 (2011).

Plaintiff contends that he was entitled to judicial review of the demolition ordinance under N.C. Gen. Stat. § 160A-393 and N.C. Gen. Stat. § 63-34. However, neither of these statutes are applicable to the instant case. N.C. Gen. Stat. § 160A-393 governs the procedure for "Appeals in the Nature of Certiorari" in city and town zoning cases. Under N.C. Gen. Stat. § 63-34, N.C. Gen. Stat. § 160A-393 also governs the procedure for judicial review of airport zoning regulations. N.C. Gen. Stat. § 63-34 (2011) (A petition for judicial review under the Model Airport Zoning Act shall be filed "within 30 days after the decision is filed in the office of the board. Such petition shall comply with the provisions of G.S. 160A-393."). Since the instant case involves minimum housing standards, rather than zoning regulations, the statutory provisions cited by plaintiff do not apply to plaintiff's challenge to the demolition ordinance.

Instead, the instant case is governed by N.C. Gen. Stat. § 160A-446 (2011), which "delineates the administrative remedies which are available to a property owner who is aggrieved by an order of a public officer" regarding minimum housing standards.

Harrell v. City of Winston-Salem, 22 N.C. App. 386, 391, 206 S.E.2d 802, 806 (1974). Under this statute,

[a]n appeal from any decision or order of the public officer may be taken by any person aggrieved thereby or by any officer, board or commission of the city. Any appeal from the public officer shall be taken within 10 days from the rendering of the decision or service of the order by filing with the public officer and with the board a notice of appeal which shall specify the grounds upon which the appeal is based.

N.C. Gen. Stat. § 160A-446(c) (2011). If that appeal is unsuccessful, the "decision of the board shall be subject to review by proceedings in the nature of certiorari instituted within 15 days of the decision of the board, but not otherwise."

Id. (e) (2011). In addition,

[a]ny person aggrieved by an order issued by the public officer or a decision rendered by the board may petition the superior court for an injunction restraining the public officer from carrying out the order or decision and the court may, upon such petition, issue a temporary injunction restraining the public officer pending a final disposition of the cause. The petition shall be filed within 30 days after issuance of the order or rendering of the decision.

Id. (f) (2011).

In the instant case, Johnson entered his findings and order to demolish the property on 27 May 2010. The order notified plaintiff that he could submit to Johnson written notice of his

intent to repair the property in order to bring it into compliance with defendant's Housing Code. In addition, plaintiff was specifically notified that he had 10 days to appeal Johnson's order to the Charlotte Housing Appeals Board. However, plaintiff failed to avail himself of this right to appeal. Moreover, plaintiff did not petition the superior court to enjoin Johnson's order. Thus, plaintiff failed to utilize the administrative remedies contained in N.C. Gen. Stat. § 160A-446.

Instead, plaintiff filed a petition for judicial review of the demolition ordinance on 8 October 2010, more than four months after Johnson had entered his order. Plaintiff's actions are similar to those of the plaintiffs in *Harrell*, where this Court held that

the record on its face reveals that the plaintiffs have not followed the proper review procedure as set forth in G.S. § 160A-446, but rather have attempted to circumvent the established procedure by filing the cause of action now being considered. Plaintiffs must exhaust the administrative remedies available to them, and they cannot be allowed to undermine the prescribed statutory procedure set forth in G.S. § 160A-446.

22 N.C. App. at 391-92, 206 S.E.2d at 806. Since plaintiff in the instant case also failed to follow the review procedure

established in N.C. Gen. Stat. § 160A-446 to appeal Johnson's order, he likewise has failed to exhaust his administrative remedies. Accordingly, the trial court properly dismissed plaintiff's complaint for lack of subject matter jurisdiction. See *Vanwijk*, ___ N.C. App. at ___, 713 S.E.2d at 768. This argument is overruled.

IV. Conclusion

Since subject matter jurisdiction may be raised at any time, the trial court properly considered and ruled upon defendant's motion to dismiss for lack of subject matter jurisdiction. Plaintiff failed to exhaust his administrative remedies under N.C. Gen. Stat. § 160A-446. Accordingly, the trial court properly granted defendant's motion to dismiss. The trial court's order is affirmed.

Affirmed.

Judges ELMORE and STEPHENS concur.

Report per Rule 30(e).