[Cite as *Cleveland v. Martin*, 2005-Ohio-6482.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

No. 85374

CITY OF CLEVELAND	:	
	:	JOURNAL ENTRY
Plaintiff-Appellee	:	
	:	AND
vs.	:	
	:	OPINION
ANGELO MARTIN, ET AL.	:	
	:	
Defendants-Appellants	:	
	:	
	:	
DATE OF ANNOUNCEMENT	:	
OF DECISION	:	December 8, 2005
	:	
CHARACTER OF PROCEEDINGS	:	Civil appeal from
	:	Common Pleas Court
	:	Case No. CV-461721
	:	
	:	
JUDGMENT	:	AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.
	:	
DATE OF JOURNALIZATION	:	

APPEARANCES:

For plaintiff-appellee

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SEAN C. GALLAGHER, J.:

{¶ 1} Defendants-appellants, Angelo Martin and Martin Enterprises, appeal the decision of the Cuyahoga County Court of Common Pleas that granted the city of Cleveland's motion for reconsideration and motion for summary judgment and disposed of all of appellants' claims. Plaintiff-appellee, the city of Cleveland, has filed a cross-appeal from the court's decision that denied the city's motion for summary judgment. For the reasons stated below, we affirm in part, reverse in part, and remand the matter for further proceedings.

{¶ 2} The city brought this action to enjoin appellants from the alleged operation of a rock crushing facility at 3926 Valley Road, Cleveland, Ohio. The city claimed this use of the property was in violation of city ordinances that prohibited rock crushing without a special permit from the board of zoning appeals ("BZA"). Appellants filed a counterclaim against the city and a third-party complaint against the City of Cleveland Division of Air Pollution and Control ("DAPC") and the Ohio Environmental Protection Agency ("OEPA"), raising claims of malicious prosecution, a "taking" without just compensation, and due process and civil rights violations.

{¶ 3} The trial court ultimately determined that appellants were not, by conducting concrete recycling, engaged in rock crushing, and therefore appellants were not violating the city ordinances. The trial court also found that the city could not

establish its right to an injunction by clear and convincing evidence. Finally, the court determined that the city failed to join the proper defendants (the owners of the property and equipment) and that the court could not enjoin the nonparties.

{¶ 4} With respect to appellants' claims, the court determined that appellants lacked standing to bring the claims because they were not the real parties at interest. Alternatively, the court found that appellants' "takings" claim failed because a mandamus action should have been brought. The court ruled the due process claims failed because the DAPC's failure to process Granger Materials' relocation request for their recycling machine was never appealed to the Environmental Appeals Review Board. Last, the court found the city was immune from the malicious prosecution claims.

{¶ 5} The parties have appealed the decision of the trial court. The underlying facts of the case will be discussed, as necessary, as they pertain to the respective assignments of error.

{¶ 6} We review an appeal from summary judgment under a de novo standard of review. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate. *Brown v. Scioto Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. Under Civ.R. 56, summary judgment is appropriate when (1) no genuine issue as to any material fact exists, (2) the party moving for

summary judgment is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can reach only one conclusion, which is adverse to the nonmoving party. *Temple v. Wean United, Inc.* (1997), 50 Ohio St.2d 317, 327.

{¶ 7} We begin our analysis by reviewing appellants' assignments of error. Appellants' first assignment of error provides:

{¶ 8} "A. The trial court erred in granting plaintiff/counter-claim defendant's motion for summary judgment based on an affirmative defense waived by the plaintiff/counter-claim defendant."

{¶ 9} The real property at issue in this case is owned by Valley Road Properties ("Valley Road"). The portable crusher at issue is owned by Granger Materials, Inc. ("Granger"). Neither of these entities is a party to this action. Appellant Angelo Martin is a partner in Valley Road and an officer of both Granger and Martin Enterprises. By agreement, appellant Martin Enterprises operates a concrete recycling plant and has the right to use the portable recycling machine on the property. There is no dispute that appellants own neither the real property nor the portable crusher machine.

{¶ 10} Appellants argue that the city did not raise the defense that appellants were not the real parties in interest in its responsive pleading and failed to raise the issue until filing its

motion for reconsideration and motion for summary judgment more than two years after the counterclaim was filed. Appellants claim that as a result, the issue was waived. Appellants also argue that they have standing to assert their claims because Martin Enterprises, while not the owner of the property, has a legal right to the use of the real property and the portable crusher machine for its business purposes.

{¶ 11} It is well recognized that if a claim is asserted by one who is not the real party in interest, then the party lacks standing to prosecute the action. *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 77, 1998-Ohio-275. However, the defenses of standing and real party in interest are waived if not timely raised. See Id. at 78; *Hang-Fu v. Halle Homes, Inc.* (Aug. 10, 2000), Cuyahoga App. No. 76589; *Mikolay v. Transcon Builders, Inc.* (Jan. 22, 1981), Cuyahoga App. No. 42047.

{¶ 12} We find that the city's real-party-in-interest argument was waived. Appellants filed their counterclaim on May 17, 2002, asserting the city was depriving Angelo Martin and Martin Enterprises of their rights to use the subject property and equipment. The city never raised a real-party-in-interest defense in its answer or in any other pleading, including the city's first motion for summary judgment. In fact, the city did not raise the issue until it filed its motion for reconsideration and motion for summary judgment, which was more than two years after it responded to the counterclaim. We find that the city failed to raise its

real-party-in-interest argument in a timely fashion and waived the defense. Appellants' first assignment of error is sustained.

{¶ 13} Appellants' second and third assignments of error provide:

{¶ 14} "B. The trial court erred in finding that the existence of an appeal right precludes, as a matter of law, a claim for denial of procedural and substantive due process."

{¶ 15} "C. The trial court erred in finding that mandamus was the exclusive means for appellants to pursue their claim for a regulatory taking."

{¶ 16} Valley Road and Granger originally applied for a use permit to operate the recycling machine at the premises. The permit was denied twice by the BZA, and an appeal from the BZA ruling to common pleas court was voluntarily dismissed. Granger also applied to the DAPC for a permit to relocate the machine to a different site. The DAPC refused to process the relocation request on two occasions because Granger had not resolved the zoning issues. Granger never filed an appeal.

{¶ 17} The trial court found that appellants' due process claims failed because the DAPC's failure to process Granger's relocation request was never appealed to the Environmental Appeals Review Board. In reaching this determination, the trial court relied on the case of *Cain Park Apartments v. Nied* (June 25, 1981), Franklin App. No. 80AP-817. In *Cain Park*, the court held that the return of an application for registration status by the

OEPA for the reason that the application was incomplete or defective constituted an "action" that could serve as a basis for an appeal. Because the application had been returned as defective, the court found this action had the same legal significance as a denial and could be appealed. Id. We find that the holding of *Cain Park* is not applicable to this case.

{¶ 18} In this case, the application was not returned as defective. Rather, the DAPC issued letters to the appellants indicating that they could not process the relocation request until evidence of compliance with the city's zoning regulation was provided. No final determination was made; rather, it was delayed pending a resolution of the zoning issue. Thus, there was never a determination that could be appealed.

{¶ 19} Further, appellants refer to evidence in support of their due process claims. Roland Lacy, an environmental compliance specialist for the DAPC, testified that he did not believe there was anything that permits the refusal of a permit to relocate based on local zoning. Mark Vilem, the former commissioner of the DAPC, testified that the DAPC has no authority to enforce the zoning code. Nevertheless, Vilem acknowledged that the application was being held for processing because of the local zoning issue. He further stated that theoretically, there was nothing else in the application to relocate that would have prohibited him from processing it.

{¶ 20} Appellants argue that the DAPC purposely refused to process the request to prevent appellants from exercising their right to appeal an adverse decision. Appellants refer to the testimony of Vilem, who stated that until a ruling was made on the application, the permit holder has no channel of appeal. They further claim that they were deprived of their statutory right to a determination of the application.

{¶ 21} It is well recognized that "'[i]n procedural due process claims, the deprivation by state action of a constitutionally protected interest in "life, liberty, or property" is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law.'" *Shirokey v. Marth* (1992), 63 Ohio St.3d 113, 119, quoting *Zinermon v. Burch* (1990), 494 U.S. 113, 125. Unlike *Cain Park,* in the instant case, there was never a determination or action that could serve as a basis for an appeal. Rather, the evidence reflects that the DAPC failed to process an application pending resolution of a zoning issue. We find that this presents a genuine issue of material fact as to whether there was an undue delay or failure to process the application that deprived appellants of their due process rights.

{¶ 22} With respect to the regulatory "takings" claims, appellants claim the city has interfered with their use of the property without just compensation. The trial court ruled that mandamus is the appropriate action to compel the city to institute

appropriation proceedings in probate court when a regulatory "taking" is claimed. Appellants argue that a private right of action for damages exists separate and distinct from a mandamus action. We disagree.

{¶ 23} "It is well settled in Ohio that a property owner's remedy for an alleged 'taking' of private property by a public authority is to bring a mandamus action to compel the authority to institute appropriation proceedings." *Consolidated Rail Corp. v. Gahanna* (May 16, 1996), Franklin App. No. 95APE12-1578. As the Supreme Court of Ohio recently recognized: "'The United States and Ohio Constitutions guarantee that private property shall not be taken for public use without just compensation.' *State ex rel. Shemo v. Mayfield Hts.* (2002), 95 Ohio St.3d 59, 63, 2002-Ohio-1627, 765 N.E.2d 345; Fifth and Fourteenth Amendments to the United States Constitution; Section 19, Article I, Ohio Constitution. 'Mandamus is the appropriate action to compel public authorities to institute appropriation proceedings where an involuntary taking of private property is alleged.' *Shemo*, 95 Ohio St.3d at 63, 765 N.E.2d 345." *State ex rel. Duncan v. City of Mentor City Council*, 105 Ohio St.3d 372, 374, 2005-Ohio-2163; see, also, *Buckles v. Columbus Mun. Airport Auth.* (6th Cir. 2004), 90 Fed. Appx. 927, 930. Upon this authority, we find that appellants have not pursued the proper legal remedy for their "takings" claims.

{¶ 24} Appellants' second assignment of error is sustained. The third assignment of error is overruled.

{¶ 25} We next address the assignments of error raised in the city's cross-appeal. We shall address the city's first and fourth assignments of error only, as they are dispositive of the cross-appeal. These assignments of error provide:

{¶ 26} "I. Whether the trial court erred in denying summary judgment to the City on its complaint."

{¶ 27} "IV. Whether the trial court erred in denying the City's motion for a directed verdict."

{¶ 28} In its first assignment of error, the city argues that it was entitled to summary judgment because there was no genuine issue of fact as to the appellants' violation of Cleveland Codified Ordinance ("C.C.O.") 345.04(b), which prohibits "rock crushing" without a special permit approved by the BZA. Under its fourth assignment of error, the city argues it was entitled to a directed verdict because clear and convincing evidence was shown that the appellants engaged in rock crushing in violation of the city's ordinance. The trial court ultimately found that appellants were not, by conducting concrete recycling, engaged in crushing rock and were not violating the ordinances.

{¶ 29} The city initially claims that res judicata applies as a bar to relitigation of the issue of whether appellants can lawfully operate the portable crusher at the property. Valley Road and Granger applied for a change of use permit to operate the

portable crusher at the property. The city denied the permit, and the BZA denied the requested permit twice. Further, an appeal from the BZA's decision was voluntarily dismissed.

{¶ 30} This argument is without merit. The decision of the BZA involved the issue of whether the applicants were entitled to a variance; it did not involve the issue of whether the current use of the property for concrete recycling was in violation of C.C.O. 345.04(b).

{¶ 31} The city argues that the activity at the property is rock crushing, which is prohibited without a special permit. C.C.O. 345.04(b) provides in relevant part:

> "*Accessory Uses by Special Permit.* The following uses are prohibited as the main or primary use of the premises; they are permitted only as uses accessory or incidental to a permitted use and only on special permit from the Board of Zoning Appeals: * * * (15) Rock crushing."

{¶ 32} The trial court indicated that no evidence was presented in this case that concrete recycling was a known technology at the time the original rock crushing ordinance was enacted in 1976. As the court referenced, testimony was introduced that rock crushing machines were found at quarries, that there was a significant difference between rock crushing and concrete recycling equipment, and that crushing rock with a concrete recycling machine would destroy the machine. The court found that under the plain reading

of the ordinance, rock crushing is prohibited, not concrete recycling. As a result, the trial court found no special permit was required.

{¶ 33} On appeal, the city argues that rock is a component of concrete and that in the process of crushing concrete, the appellants are crushing rock. Appellants, on the other hand, claim that the ordinance must be construed strictly and that concrete recycling is not prohibited under the plain language of the ordinance. Appellants also refer to testimony of the city's own witness, Chief Inspector Franklin, who acknowledged that concrete recycling was not prohibited by the original ordinance and that he never observed any rock being crushed at the property.

{¶ 34} The Supreme Court of Ohio has set forth certain principles to be considered when reviewing a zoning ordinance. "All zoning decisions, whether on an administrative or judicial level, should be based on the following elementary principles which underlie real property law. Zoning resolutions are in derogation of the common law and deprive a property owner of certain uses of his land to which he would otherwise be lawfully entitled. Therefore, such resolutions are ordinarily construed in favor of the property owner. [Citations omitted.] Restrictions on the use of real property by ordinance, resolution or statute must be strictly construed, and the scope of the restrictions cannot be extended to include limitations not clearly prescribed. [Citations omitted.]" *Saunders v. Clark County Zoning Dep't*

(1981), 66 Ohio St.2d 259, 261. Thus, we must strictly construe the ordinance at issue and limit the scope to only those limitations that are clearly prescribed. As the Supreme Court of Ohio has also recognized, "[b]ecause zoning ordinances deprive property owners of certain uses of their property, however, they will not be extended to include limitations by implication." *Henley v. City of Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142 , 152, 2000-Ohio-493.

{¶ 35} In this case, it appears that concrete recycling was not even contemplated at the time the ordinance was enacted. A strict reading of the ordinance indicates that it proscribed only "rock crushing." Although concrete may contain particles of rock and have some similarities to rock, it is not the same substance. Concrete is an aggregate of different materials, which is unlike a solid rock formation. A plain reading of the ordinance requires a permit for rock crushing; no mention is made of concrete.

{¶ 36} Upon our review of the record, we find the trial court did not err in denying the city's motion for summary judgment or in finding the concrete recycling activity engaged in by appellants was a permitted use.

{¶ 37} The city's first and fourth assignments of error are overruled. The remaining assignments of error are moot.[1]

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[1] The remaining assignments of error provide:

"II. Whether the trial court abused its discretion in denying the City's motion for leave to amend its complaint to add Valley Road Properties and Granger Materials as defendants."

Judgment affirmed in part, reversed in part, and remanded.

This cause is affirmed in part, reversed in part and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellants and appellee share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

COLLEEN CONWAY COONEY, J., CONCURS;

ANN DYKE, P.J., DISSENTS (SEE SEPARATE DISSENTING OPINION).

SEAN C. GALLAGHER

"III. Whether the trial court erred in denying the City's request for preliminary and permanent injunctive relief."

"V. Whether the trial court erred in denying the City's motion to compel depositions of Angelo Martin and representatives of Martin Enterprises and in granting the Martin Defendants' motion for protective order."

"VI. Whether the trial court erred in denying the City's motion in limine to prohibit the introduction of evidence that the trial court prohibited the City from obtaining in discovery."

JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also S.Ct.Prac.R. II, Section 2(A)(1).

COURT OF APPEALS OF OHIO EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 85374

CITY OF CLEVELAND	:	
	:	
Plaintiff-Appellee	:	
	:	D I S S E N T I N G
-vs-	:	O P I N I O N
	:	
ANGELO MARTIN, ET AL.	:	
	:	
Defendants-Appellants	:	

DATE OF ANNOUNCEMENT
OF DECISION: December 8, 2005

DYKE, P.J., DISSENTING:

{¶ 38} I respectfully dissent.

{¶ 39} Because defendant Angelo Martin is a general partner in Valley Road Properties, the partnership that owns the property which was the subject of the prior zoning proceedings, I would

find him to be in privity with that partnership. I would therefore find that Valley Road Property's prior abandoned appeal from the BZA determination that it was engaged in "rock crushing" is res judicata as to the Martin defendants. I would reverse the order of the trial court that denied summary judgment to the City on its complaint.

{¶ 40} I would also conclude that defendants' concrete recycling operation does in fact involve the crushing of rock, and therefore properly subjects defendants to the requirements of C.C.O. Section 345.04. There is no basis for concluding that the ordinance applies only to quarry rock crushing or natural rock crushing.

{¶ 41} I would affirm the order of the trial court that granted summary judgment to the City on the Martin defendants' counterclaim.