[Cite as *Captain Buffalo Foods, Inc. v. Cleveland*, 2009-Ohio-5383.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92899

CAPTAIN BUFFALO FOODS, INC., ET AL.

PLAINTIFFS-APPELLANTS

vs.

CITY OF CLEVELAND, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
REVERSED AND REMANDED

Civil appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-659367

BEFORE: Blackmon, J., Rocco, P.J., and Stewart, J.

RELEASED: October 8, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) 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(C) 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(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Captain Buffalo Foods, Inc., et al. ("Captain Buffalo") appeals the trial court's decision affirming the City of Cleveland Board of Zoning Appeals' ("BZA") denial of his request for a variance. Captain Buffalo assigns the following error for our review:

> **"I. Whether the Doctrine of Res Judicata does not apply to the present case and the trial court abused its discretion when it found that the conduct of the Board of Zoning Appeals was not unconstitutional, illegal, arbitrary, capricious, unreasonable or unsupportable by the evidence."**

{¶ 2} Having reviewed the record and pertinent law, we reverse the trial court's decision and remand for proceedings consistent with this opinion. The apposite facts follow.

{¶ 3} On February 7, 2007, John Barnes, Jr. ("Barnes") applied for a building permit from the City of Cleveland ("the City"). Barnes wanted to construct a second and third floor addition to a building located at 3902 Lee Road in the City. On April 16, 2007, the City's Zoning Division of Building and Housing denied Barnes's application.

{¶ 4} The City denied the application on the grounds that (1) pursuant to Cleveland Codified Ordinance §357.07(a), a 10 foot setback is required and none is proposed; (2) pursuant to Cleveland Codified Ordinance §359.01, a nonconforming use exists, which requires the BZA's approval; and (3) pursuant to Cleveland Codified Ordinance §359.01 the building height limitation in a "1" District is limited to 35 feet.

{¶ 5} Barnes appealed the denial of the permit to the BZA. On October 29, 2007, the BZA conducted a public hearing on Barnes's application. At the hearing, it was established that the City had condemned the subject property due to numerous violations, and that Barnes began construction of the proposed second floor addition without the proper permit. The City halted construction after someone reported that Barnes was building without a permit.

{¶ 6} Additionally, it was established that the illegally constructed second floor encroached upon the required 10 feet setback from the street. Further, the entire proposed addition would encroach upon the required 10 feet setback from the street. Finally, it was established that the proposed construction of a second and third floor on the subject property would exceed the City's height limitation of 35 feet.

{¶ 7} At the conclusion of the hearing, in a unanimous decision, the BZA denied Barnes's appeal. Thereafter, under the auspices of its corporate entity Captain Buffalo, Barnes filed an appeal of the BZA's ruling to the Cuyahoga County Common Pleas Court pursuant to R.C. 2506. The trial court affirmed the BZA's decision denying Barnes's application. Barnes did not file a direct appeal of the trial court's decision to this court.

{¶ 8} Subsequently, Captain Buffalo applied for another permit, which only proposed the construction of a loft to the subject property. The City's Zoning Division of Building and Housing denied the second application for the same

reasons they denied the first application. Captain Buffalo appealed the denial to the BZA, who decided not to conduct a public hearing based on the doctrine of res judicata.

{¶ 9} On May 3, 2008, Captain Buffalo filed a second appeal of the BZA's ruling to the Cuyahoga County Common Pleas Court pursuant to R.C. 2506. The trial court affirmed the BZA's decision, which is the subject of this appeal to this court.

Zoning Appeals

{¶ 10} In the sole assigned error, Captain Buffalo argues the trial court erred in affirming the BZA's denial of his application for a zoning variance based on the doctrine of res judicata. We agree.

{¶ 11} Initially, we note that the court of common pleas may affirm an administrative agency's determination if it is supported by reliable, probative, and substantial evidence and is in accordance with law.[1] This court's review is more limited, determining only whether the court of common pleas abused its discretion in finding that the decision of the administrative agency was supported by reliable, probative, and substantial evidence.[2]

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[1]R.C. 119.12.

[2]*Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621, 1993-Ohio-122; *Albert v. Ohio Dep't. of Human Servs.* (2000), 138 Ohio App.3d 31.

{¶ 12} An abuse of discretion involves more than an error of law or judgment, it implies that the decision was unreasonable, arbitrary or unconscionable.[3] So long as the decision of the trial court is supported by some competent, credible evidence going to all the essential elements of the case, we will not disturb it.[4]

{¶ 13} Further, a board of zoning appeals is given wide latitude in deciding whether to grant or deny an area variance.[5] Further, its decision to deny a variance is to be accorded a presumption of validity.[6] A trial court must presume that the board's determination is valid unless the party opposing the determination can demonstrate that the determination is invalid.[7]

{¶ 14} In *Grava v. Parkman Twp.*,[8] the Supreme Court held that res judicata applies to a zoning board's denial of a request for a variance.[9] The

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[3]*Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

[4]*Masitto v. Masitto* (1986), 22 Ohio St.3d 63, 66.

[5]See *Schomaeker v. First Natl. Bank* (1981), 66 Ohio St. 2d 304, 309; *Kisil v. Sandusky* (1984), 12 Ohio St.3d 30, 35.

[6]See *Consol. Mgmt., Inc. v. Cleveland* (1983), 6 Ohio St.3d 238, 240; *C. Miller Chevrolet, Inc. v. Willoughby Hills* (1974), 38 Ohio St.2d 298, paragraph two of the syllabus.

[7]*Rotellini v. West Carrollton Bd. of Zoning Appeals* (1989), 64 Ohio App.3d 17, 21.

[8](1995), 73 Ohio St.3d 379.

[9]*Murray Energy Corp. v. Pepper Pike*, Cuyahoga App. No. 90420, 2008-Ohio-2818.

Court, quoting its decision in *Set Products, Inc. v. Bainbridge Twp. Bd of Zoning Appeals*,[10] stated:

> **"In *Set Products, Inc. v. Bainbridge Twp. Bd. of Zoning Appeals* (1987), 31 Ohio St.3d 260, 31 OBR 463, 510 N.E.2d 373, paragraph one of the syllabus, this court held that 'the doctrine of res judicata applies to the decisions of a township board of zoning appeals relating to the grant or denial of variances * * *.' We explained that res judicata, whether claim preclusion or issue preclusion, applies to administrative proceedings that are 'of a judicial nature and where the parties have had an ample opportunity to litigate the issues involved in the proceeding.' Id. at 263, 31 OBR at 465, 510 N.E.2d at 376 (quoting *Superior's Brand v. Lindley* [1980], 62 Ohio St.2d 133, 16 O.O.3d 150, 403 N.E.2d 996, syllabus). See, also, *Consumers' Counsel v. Pub. Util. Comm*. (1985), 16 Ohio St.3d 9, 16 OBR 361, 475 N.E.2d 782."**

{¶ 15} The Court went on to explain:

> **"[B]y providing parties with an incentive to resolve conclusively an entire controversy involving the same core of facts, such refusal establishes certainty in legal relations and individual rights, accords stability to judgments, and promotes the efficient use of limited judicial or quasi-judicial time and resources. The instability that would follow the establishment of a precedent for disregarding the doctrine of res judicata for 'equitable' reasons would be greater than the benefit that might result from relieving some cases of individual hardship."[11]**

{¶ 16} Section XIII of the Rules and Regulations of the BZA states in pertinent part as follows:

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[10](1987), 31 Ohio St.3d 260.

[11]Id. at 383-384.

> **"The filing of an appeal for a variance that is identical or substantially similar to a previously filed appeal that was denied covering the same property, shall be dismissed by the Board as *res judicata* unless the Board finds that appellant has satisfactorily demonstrated changed circumstances, or that substantial new evidence exists and will be presented to the Board that was not available at the hearing on the prior appeal, or that another basis applies that would prevent the application of *res judicata*."**

{¶ 17} Here, the record indicates that on October 29, 2007, when the BZA conducted the hearing on the first application for the variance, Barnes was present with his father, Barnes Sr., and his architect, James Whitley. Significant discussions took place regarding the proposed addition of the two stories to the existing structure. The discussion established that the proposed addition would encroach upon the required 10 feet setback from the street. The discussions also established that all the structures within 500 to 1,000 feet of the subject property are one story buildings with a height limitation of 35 feet.

{¶ 18} Thus, the BZA denied the request because the proposed addition would encroach upon the required 10 feet setback from the street and because Barnes wanted to build on top of the existing structure, which would exceed the 35 feet height limitation.

{¶ 19} The record indicates that in a second application for a variance, Captain Buffalo deleted the proposed second and third floor addition, and opted to build a loft on the existing structure. We conclude the deletion of the

proposed second and third floor addition in favor of a loft represents a substantial departure from the previous application.

{¶ 20} In the instant case, as proposed in the second application, the addition of a loft would not exceed the 35 feet height limitation for structures in that area of the city. Since the second application represented a substantial departure, the BZA is allowed to hear the appeal. As such, res judicata does not apply to bar the second appeal. Accordingly, we sustain Captain Buffalo's sole assigned error.

Judgment reversed and remanded.

It is, therefore, considered that said appellant recover of said appellees its costs herein.

It is ordered that a special mandate be sent to said 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.

PATRICIA ANN BLACKMON, JUDGE

KENNETH A. ROCCO, P.J., and
MELODY J. SEWART, J., CONCUR