[Cite as *Cleveland v. Whitmore*, 2020-Ohio-3670.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

CITY OF CLEVELAND,	:	
Plaintiff-Appellee,	:	No. 108893
v.	:	
ANTHONY I. WHITMORE,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: July 9, 2020

Civil Appeal from the Cleveland Municipal Court
Housing Division
Case No. 19 CVH 002618

Appearances:

Douglass & Associates Co., L.P.A., David M. Douglass, Sean F. Berney, Michael E. Reardon, Daniel J. Wodarczyk, and Sandra A. Prebil, *for appellee*.

Anthony I. Whitmore, *pro se*.

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Defendant-appellant Anthony I. Whitmore ("appellant") brings the instant appeal challenging the trial court's granting of plaintiff-appellee city of Cleveland's ("city") motion for summary judgment and the denial of his own motion

for summary judgment and motion to transfer venue. After a thorough review of the record and law, this court affirms the decision of the trial court.

I. Factual and Procedural History

{¶ 2} Appellant had owned certain real property in the city of Cleveland located at 568 E. 102 Street, Cleveland, Ohio ("property") since October 28, 1999. The Cleveland Department of Building and Housing inspected the property on February 10, 2014, and determined that the condition of the structure on the property constituted a nuisance that created a danger to human life and health under Cleveland Codified Ordinances 3103.09. The city issued a notice of violation of building and housing ordinances on March 4, 2014, via certified mail to (1) the tax mailing address for the property; (2) the address believed to be appellant's residential address; and (3) two additional P.O. boxes. The notice provided appellant thirty days to comply with the city ordinances and notified him that the property would be demolished by the city if the violations remained. In addition, a condemnation notice was posted on the property.

{¶ 3} The violations were still present on July 21, 2016, when the city performed an asbestos survey on the property through a private, independent asbestos survey contractor. The cost of this survey, $600, was absorbed by the city.

{¶ 4} The violations still remained on September 30, 2016, when the city demolished the property through a private, independent demolition contractor. The cost of such demolition was $7,850, which was borne by the city.

{¶ 5} The city sought collection of the above costs and attorney fees and contracted with counsel, who issued a fair debt collection notice to appellant in the amount of $14,579.23. On February 15, 2019, the city commenced an action against appellant for recovery of demolition costs and asbestos abatement costs pursuant to R.C. 715.261 and Cleveland Codified Ordinances 3103.09.

{¶ 6} In turn, appellant filed an amended answer and counterclaim alleging claims for racial discrimination and deprivation of his constitutional rights. Appellant also filed a motion to transfer venue to the Cuyahoga County Court of Common Pleas and request for hearing, asserting that his claims were in excess of $25,000. In its judgment entry of March 28, 2019, the trial court denied appellant's motion to transfer venue, holding that it had jurisdiction over appellant's counterclaims because it has no jurisdictional limit on the amount of damages it can award.

{¶ 7} The city responded to appellant's amended counterclaim and moved to dismiss. The parties subsequently engaged in discovery. Appellant then filed a motion to dismiss, motion for declaratory judgment, and motion for summary judgment. The city filed its own motion for summary judgment, and each side filed briefs in opposition to the respective motions for summary judgment.

{¶ 8} On July 29, 2019, the trial court granted the city's motion for summary judgment, finding that it had met its initial burden in support of its motion for summary judgment and that appellant had not met his reciprocal burden because he failed to identify any evidence demonstrating genuine issues of material fact with

regard to any element of appellant's claims. Specifically, the court noted that appellant failed to identify any evidence rebutting the amount of the city's costs of abatement or any evidence that the city did not conduct a reasonable and diligent search for an address where notice of the violation could be delivered.

{¶ 9} With regard to appellant's counterclaim, the trial court held that the city had met its burden of showing that it did not discriminate against appellant on the basis of his race and that it did not violate his constitutional due process rights. The trial court further found that the city also met its initial burden of demonstrating that the city's counterclaims were barred by the statute of limitations and that the city was entitled to immunity from appellant's claims.

{¶ 10} In analyzing appellant's response to the city's motion for summary judgment on his amended counterclaim, the trial court held that appellant did not meet his reciprocal burden because he failed to identify any evidence that would show that the city discriminated against him on the basis of race, that the city violated his due process rights, that his claims were not time barred, or that there was any exception to the city's immunity from his claims.

{¶ 11} The trial court then analyzed appellant's motion for summary judgment and determined that he had not met his initial burden because the motion did not address any of the elements of his claims or the city's claims.

{¶ 12} As a result of the above findings, the trial court granted summary judgment in favor of the city on its complaint and appellant's amended

counterclaim. On August 14, 2019, appellant filed the instant appeal and appears to raise the following assignments of error for our review:

> I. The trial court erred by denying appellant's motion to transfer venue to the Cuyahoga County Court of Common Pleas and/or appellant's request for a hearing.
>
> II. The trial court erred by finding [appellant] liable when he was not the owner of the property on the date of demolition.
>
> III. The trial court erred by finding that the violation notice was sufficiently served upon [appellant].
>
> IV. The trial court erred by determining that the city did not violate appellant's due process rights and/or that the city did not violate the Fair Debt Collection Practices Act.
>
> V. The trial court erred in failing to address that the demolition constituted a per se taking and by determining that the city was immune under R.C. Chapter 2744.
>
> VI. The trial court erred in not affording [appellant] due process or a hearing on the violation.

II. Law and Analysis

A. Appellant's Motion to Transfer Venue

{¶ 13} In his first assignment of error, appellant contends that the trial court abused its discretion in denying his motion to transfer venue and his request for hearing.

{¶ 14} "A trial court's decision on a motion to change venue is reviewed under an abuse of discretion standard." *UBS Fin. Servs. v. Lacava*, 8th Dist. Cuyahoga No. 106256, 2018-Ohio-3165, ¶ 78, citing *Premier Assocs., Ltd. v. Loper*, 149 Ohio App.3d 660, 2002-Ohio-5538, 778 N.E.2d 630, ¶ 37 (2d Dist.). An abuse of discretion implies that the trial court's decision was unreasonable, arbitrary, or

unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). Trial courts are granted wide discretion in deciding whether to grant a motion for change of venue. *Lacava* at *id*., citing *State v. Coley*, 93 Ohio St.3d 253, 258, 754 N.E.2d 1129 (2001). Civ.R. 3(C)(4) provides that "upon motion of any party or upon its own motion the court may transfer any action to an adjoining county within this state when it appears that a fair and impartial trial cannot be had in the county in which the suit is pending."

{¶ 15} In the instant matter, appellant asserts that he alleged the appearance of bias and requested the matter be transferred to the Cuyahoga County Court of Common Pleas. Appellant's brief does not further explain his assertion of bias, and his motion simply stated that the claims were in excess of $25,000.

{¶ 16} Appellant failed to raise any proper grounds for a motion to transfer venue. R.C. 1901.17 provides that the monetary jurisdictional limit of a municipal court does not apply to the housing division of that court. Moreover, "'Civ.R. 3(C)(4) does not encompass a change of venue based upon the alleged bias or prejudice of a trial judge.'" *Baxter v. Thomas*, 8th Dist. Cuyahoga No. 101186, 2015-Ohio-2148, ¶ 69, quoting *Butler Cty. Joint Vocational School Dist. Bd. of Edn. v. Andrews*, 12th Dist. Butler No. CA200610245, 2007-Ohio-5896, ¶ 17, citing *Williams v. Williams*, 12th Dist. Butler No. CA96-01-015, 1996 Ohio App. LEXIS 5649 (Dec. 16, 1996). The only proper remedy under such circumstances is to file an affidavit of bias and prejudice with the Supreme Court of Ohio pursuant to R.C. 2701.03. *Id*.

{¶ 17} Accordingly, because appellant failed to state any viable grounds for a transfer of venue, we cannot find that the trial court abused its discretion in denying his motion or declining to conduct a hearing on the motion. Appellant's first assignment of error is overruled.

B. Motions for Summary Judgment

1. Standard of Review

{¶ 18} An appeal from summary judgment is analyzed under a de novo standard of review. *Baiko v. Mays*, 140 Ohio App.3d 1, 746 N.E.2d 618 (8th Dist.2000), citing *Smiddy v. The Wedding Party, Inc.*, 30 Ohio St.3d 35, 506 N.E.2d 212 (1987); *N.E. Ohio Apt. Assn. v. Cuyahoga Cty. Bd. of Commrs.*, 121 Ohio App.3d 188, 699 N.E.2d 534 (8th Dist.1997). Accordingly, no deference is afforded to the trial court's decision, and the record is independently reviewed to determine whether summary judgment is proper.

{¶ 19} Summary judgment is appropriate when: (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) after construing the evidence most favorably for the party against whom the motion is made, reasonable minds can reach only a conclusion that is adverse to the nonmoving party. *Cleveland v. Lewis*, 2017-Ohio-7319, 96 N.E.3d 990, ¶ 6 (8th Dist.), citing Civ.R. 56(C).

{¶ 20} The moving party has the initial responsibility of establishing its entitlement to summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996). "[I]f the moving party meets this burden, summary

judgment is appropriate only if the nonmoving party fails to establish the existence of a genuine issue of material fact." *Deutsche Bank Natl. Trust Co. v. Najar*, 8th Dist. Cuyahoga No. 98502, 2013-Ohio-1657, ¶ 16, citing *Dresher* at 293.

{¶ 21} Once a moving party demonstrates no material issue of fact exists for trial and the party is entitled to judgment, it is the nonmoving party's duty to come forth with argument and evidence that demonstrates a material issue of fact does exist that would preclude judgment as a matter of law. *Id*.

2. Appellant's Ownership of the Property

{¶ 22} In his second assignment of error, appellant argues that the trial court erred in holding him liable for the costs of the demolition when he was not the owner of the property at the time of the demolition.

{¶ 23} R.C. 715.261 authorizes a municipality to recover the costs of demolition and provides that it "may collect the total cost of removing, repairing, or securing insecure, unsafe, structurally defective, abandoned, deserted, or open and vacant buildings or other structures, making emergency corrections of hazardous conditions, or of abating any nuisance * * * ." R.C. 715.261(B). The statute further provides that a civil action to recover the costs may be instituted against the person that held title to the parcel at the time the costs were incurred. R.C. 715.261(B)(2).

{¶ 24} Under Cleveland Codified Ordinances 3103.09(k)(1), "[a]ny and all expenses or costs * * * relating to the demolition, repair, alteration, securing or boarding of a building or structure or for abating any other nuisance shall be paid by the owner of such building or structure[.]" Additionally, Cleveland Codified

Ordinances 3103.09(k)(2) permits any and all owners of a building or structure "who appear in the chain of title from the time of receipt of a notice of condemnation until demolition of the building or structure" to be held jointly and severally liable for the costs and expenses incurred by the city relating to the demolition and the prosecution or collection of said costs and expenses.

{¶ 25} In construing the above ordinance, this court has reiterated that a municipality "may recoup its costs related to the abatement of the nuisance or the demolition of the condemned structure from any and all owners of the premises who appear in the chain of title." *Cleveland v. CapitalSource Bank ex rel. AEON Fin. L.L.C.*, 2019-Ohio-1990, 136 N.E.3d 884, ¶ 23 (8th Dist.).

{¶ 26} Appellant argues that he was not the owner of the property at the time of demolition because the property was forfeited to the state of Ohio on August 15, 2016, and the structure on the property was demolished on September 30, 2016. The city maintains that the forfeiture actually did not occur until November 23, 2016, and thus appellant did hold title to the property at the time the costs were incurred. The city further asserts that actual ownership at the time of demolition is irrelevant, though, because appellant does not dispute that he was an owner appearing in the chain of title of the property and therefore can be held liable under Cleveland Codified Ordinances 3103.09(k)(2).

{¶ 27} In his motion for summary judgment, appellant acknowledged that all owners in the chain of title may be held liable under the ordinance. Appellant raised this point in support of his argument that he is not the real party in interest and

claimed that Chui Bishop Mwesi should be held liable as the person who took title to the property after its forfeiture to the state of Ohio. However, Cleveland Codified Ordinances 3103.09(k)(2) limits the owners of property that shall be held liable to those "who appear in the chain of title from the time of receipt of a notice of condemnation *until demolition of the building or structure*[.]" (Emphasis added.) According to the property records, Chui Bishop Mwesi did not take title to the property until after the demolition occurred.

{¶ 28} After reviewing the record, we find that there were no genuine issues of material fact regarding appellant's ownership of the property. Appellant was properly held liable for the city's claims because he was an owner in the chain of title. Moreover, the record reflects that appellant was, in fact, the owner of the property at the time the demolition occurred. Accordingly, the trial court did not err in finding that no genuine issues of material fact existed with regard to appellant's liability. Appellant's second assignment of error is overruled.

3. Due Process and Notice

{¶ 29} In his third assignment of error, appellant argues that his due process rights were violated because notice of the violation was not properly served.

{¶ 30} Cleveland Codified Ordinances 3103.09(e)(1) provides that written notice of violation regarding defects in a building or structure shall be sent via certified mail to the owner of the property. The notice shall require the owner to abate the nuisance within a certain time and must notify the owner that if the nuisance is not abated, action may be taken to remove, repair, or abate the nuisance.

{¶ 31} The ordinance further states that

> [i]f the person to whom the notice and order is addressed is not found after a reasonable and diligent search, then the notice and order shall be sent by certified mail to his or her tax mailing address, if available, as indicated on the County tax duplicate, and a copy of the notice shall be posted in a conspicuous place on the premises to which it relates. The mailing and posting shall be deemed legal service of the notice.

Cleveland Codified Ordinances 3103.09(e)(2).

{¶ 32} The record reflects that the city fulfilled the notice requirement under Cleveland Codified Ordinances 3103.09(e)(1) when it located appellant's tax mailing address and sent the notice by certified mail to that address and also posted the notice on the premises. The ordinance does not require the city to take any further action once the notice is sent by certified mail to the owner and the notice is posted.

{¶ 33} Appellant did not present any evidence to rebut the city's claim that it made a reasonable and diligent search for an address for appellant. The city presented evidence that the notice was served via certified mail to appellant's tax mailing address, the property address, two other P.O. boxes, and an address believed to be appellant's residential address. Appellant failed to demonstrate any genuine issue of material fact regarding whether he was properly provided notice after the city conducted its search.

{¶ 34} Appellant further argues under this assignment of error that he was deprived his right to a hearing on the violation notice and was consequently denied due process. Cleveland Codified Ordinances 3103.09(g) provides for a right to appeal from the notice of violation:

> *Right to Appeal*. The owner, agent or person in control shall have a right to appeal from the notice and decision of the Director as provided in this section and appear before the Board of Building Standards and Building Appeals at a specified time and place to show cause why he or she should not comply with the notice. Any notice served by the Director shall automatically become a final order if a written notice of appeal before the Board is not filed in the office of the Board within the time set forth in the notice from the Director. In the absence of an appeal, all actions taken shall constitute a valid exercise of the police powers of the City of Cleveland.

{¶ 35} The director of building and housing for the city of Cleveland issued a notice of violation of building and housing ordinances regarding the subject property on March 4, 2014. The notice listed 22 code violations in the structure located on the property, declared it to be a public nuisance, and further stated that the city would summarily abate the public nuisance if the enumerated violations were not corrected by April 3, 2014. In addition, the notice stated as follows:

> FAILURE TO COMPLY WITH THIS NOTICE SHALL RESULT IN THE DEMOLITION OF THE BUILDING(S). ANY AND ALL COSTS INCURRED BY THE CITY FOR THE DEMOLITION OF THE BUILDING(S) SHALL BE PAID BY THE OWNER(S) OF RECORD. IF THE OWNER(S) FAILS TO PAY FOR THE COSTS WITHIN THIRTY (30) DAYS, LEGAL ACTIONS SHALL BE INITIATED TO COLLECT THE DEBT.

{¶ 36} The notice further requested that appellant contact the inspector upon receipt of the notice and advised appellant of his right to appeal, stating, "You have the right to appeal this notice. If you wish to appeal, you must file a written appeal within 30 days of the issuance date on this notice * * *."

{¶ 37} Appellant did not present any evidence showing that he ever filed an appeal from the notice of violation. Consequently, there is no evidence that

appellant was deprived his right to a hearing. The notice advised appellant of his rights, and he chose not to exercise them.

{¶ 38} Thus, our review of the record and the pertinent sections of the city's housing and building code reflects that the city supplied appellant with the requisite notice prior to demolishing the condemned structure and that he was not deprived of his due process rights. Appellant's third assignment of error is without merit.

4. Violations of the Fair Debt Collection Practices Act

{¶ 39} In his fourth assignment of error, appellant contends that the city violated the Fair Debt Collection Practices Act by attempting to collect for a debt in excess of the amount that was actually due.

{¶ 40} The trial court noted in its judgment entry that "Defendant's motion asserts and discusses a claim under the Fair Debt Collection Practices Act, but Defendant has not brought such a claim." Judgment Entry p. 5.

{¶ 41} After reviewing the record, we find that appellant did not assert a claim for violations of the Fair Debt Collection Practices Act in his amended counterclaim and simply raised arguments regarding such alleged violations in his motion for summary judgment. Appellant's amended counterclaim solely contained claims regarding racial discrimination and an unconstitutional taking. We therefore will not consider appellant's arguments pertaining to any alleged violations of the Fair Debt Collection Practices Act. Appellant's fourth assignment of error is overruled.

5. Per Se Taking

{¶ 42} In his fifth assignment of error, appellant asserts that the trial court erred by failing to find that the demolition of his property constituted a per se taking.

{¶ 43} "A taking of property by ordering it demolished under the police power is not a taking of property without compensation." *Fifth Urban, Inc. v. Bd. of Bldg. Stds.*, 40 Ohio App.2d 389, 398, 320 N.E.2d 727 (8th Dist.1974), citing *Kroplin v. Truax*, 119 Ohio St. 610, 165 N.E. 498 (1929); *Pritz v. Messer*, 112 Ohio St. 628, 149 N.E. 30 (1925). Police power has been held to include everything essential to public health, safety, and morals, and "it may be used to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance." *Fifth Urban* at 397, citing *Lindsay v. Cincinnati*, 172 Ohio St. 137, 174 N.E.2d 96 (1961).

{¶ 44} In the instant matter, appellant's property was determined to be a nuisance. As analyzed above, appellant was properly notified of this determination and the potential demolition if the nuisance was not abated. Under well-established case law, the demolition of appellant's property did not constitute a per se taking in violation of appellant's Fifth Amendment rights. Appellant's fifth assignment of error is overruled.

6. Due Process and Hearing

{¶ 45} In his sixth assignment of error, appellant argues that he was deprived of his due process rights with regard to the violation notice and ultimate demolition of the property. It is unclear from appellant's arguments regarding this assignment

of error whether he is asserting that he was entitled to a hearing with regard to the violation or on the motions for summary judgment. Regardless, we have already analyzed appellant's due process rights with regard to the notice of violation and determined that he was not deprived of due process because he did *not* request a hearing.

{¶ 46} With regard to the motions for summary judgment, it also does not appear that appellant requested a hearing. Even if he had though, the trial court is not required to hold a hearing on motions for summary judgment. *Greenberg v. Markowitz*, 8th Dist. Cuyahoga No. 93838, 2010-Ohio-2228, ¶ 5, citing *Doe v. Beach House Dev. Co.*, 136 Ohio App.3d 573, 737 N.E.2d 141 (8th Dist.2000). Moreover, if a party requests an oral hearing, the decision whether to grant the request lies within the trial court's discretion. *Greenberg*, citing *Hooten v. Safe Auto Ins. Co.*, 100 Ohio St.3d 8, 2003-Ohio-4829, 795 N.E.2d 648.

{¶ 47} We cannot say that the trial court erred in granting summary judgment in favor of the city without holding a hearing on the motions. Appellant's sixth assignment of error is overruled.

7. Political Subdivision Immunity

{¶ 48} Within the arguments of several of his assignments of error, appellant objects to the city's claimed immunity based upon R.C. Chapter 2744. The city contends that it is immune from liability on appellant's counterclaims under R.C.

2744.02 because the demolition of property under the building codes is a governmental function.

{¶ 49} While appellant does not provide any substantive arguments as to why immunity would not apply, we need not make a determination regarding immunity. Based on our conclusion that summary judgment was properly granted in the city's favor because appellant failed to present any evidence demonstrating the existence of genuine issues of material fact, we need not consider, as an alternative basis for granting summary judgment in favor of the city, whether appellant's claims were also barred under R.C. Chapter 2744.

III. Conclusion

{¶ 50} Appellant failed to demonstrate that the trial court erred in determining that no genuine issues of material fact existed with regard to any of the claims in this matter. Further, the trial court did not abuse its discretion in denying appellant's motion to transfer venue or request for hearing.

{¶ 51} Judgment affirmed.

It is ordered that appellee recover from appellant 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 Cleveland Municipal Court Housing Division 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.

FRANK D. CELEBREZZE, JR., JUDGE

SEAN C. GALLAGHER, P.J., and
MICHELLE J. SHEEHAN, J., CONCUR