[Cite as *Univ. of Akron v. Nemer*, 2009-Ohio-2681.]

STATE OF OHIO))ss: COUNTY OF SUMMIT)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
THE UNIVERSITY OF AKRON Appellee v. JOSEPH NEMER, et al. Appellees and RICHARD SWOGGER Appellant	C. A. No. 24494 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. 2007 CV 165

DECISION AND JOURNAL ENTRY

Dated: June 10, 2009

WHITMORE, Judge.

{¶1} Appellant, Richard Swogger, appeals from the decision of the Summit County Court of Common Pleas, Probate Division, denying his motion to intervene. This Court affirms.

I

{¶2} In early 2008, the University of Akron and the State of Ohio, Department of Administrative Services (collectively, "the University") filed a petition for appropriation seeking to appropriate property at the corner of Spicer St. and Exchange St. for the construction of university housing. The issue of compensation was tried to a jury. The probate court entered judgment on July 2, 2008 and the University appealed. On September 8, 2008, the parties entered into a settlement with the property owners resolving the appeal. As a result of that

settlement, the University was awarded fee simple title to the property and any tenants remaining on the property were required to vacate the premises by late September 2008.

{¶3} Because some tenants remained on the property, on October 30, 2008, the University filed a motion for writ of possession requesting the tenants of the property be ejected. On November 10, 2008, Swogger filed a motion to intervene and a motion for a temporary restraining order in which he asserted that he had a valid month-to-month tenancy which the University had violated by failing to give him proper notice to vacate the property and by failing to file an eviction action against him. On that same day, the probate court held a hearing on the University's writ and Swogger's motions. The probate court concluded that Swogger had been appropriately served with notice of the appropriation action, had failed to file an answer, and as a part of the parties' settlement agreement, was dismissed from the action as having no interest in the property. Accordingly, the court denied Swogger's motions, granted the University's writ of possession, and ordered Swogger be removed from the property immediately.

{¶4} Swogger now appeals to this Court, asserting one assignment of error for our review.

II

Assignment of Error

> "THE PROBATE COURT COMMITTED ERROR IN GRANTING ITS WRIT OF POSSESSION OF NOVEMBER 17, 2008 WITHOUT DEFENDANT RICHARD SWOGGER BEING SERVED WITH A COPY OF THE COMPLAINT OR AMENDED COMPLAINT."

{¶5} In his sole assignment of error, Swogger argues that he was not properly served with the complaint in the appropriation proceeding which served as the basis for the University's motion for writ of possession. Based on that alleged failure of service, he asserts that he is not bound by the probate court's order to vacate the premises. We disagree.

{¶6} The decision to grant or deny a motion to intervene is within the sound discretion of the trial court and will not disturbed on appeal absent an abuse of discretion. *Kayatin v. Petro*, 9th Dist. No. 06CA008934, 2007-Ohio-334, at ¶9. Civ.R. 24 provides for both intervention as of right and permissive intervention. Civ.R. 24(A), (B). Irrespective of the basis upon which a party seeks to intervene, the party must comply with the procedural requirements set forth in Civ.R. 24(C), which require that:

> "A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Civ.R. 5. The motion and any supporting memorandum shall state the grounds for intervention *and shall be accompanied by a pleading, as defined in Civ.R. 7(A), setting forth the claim or defense for which intervention is sought*. The same procedure shall be followed when a statute of this state gives a right to intervene." (Emphasis added.)

Civ.R. 7(A) defines a pleading as "a complaint and an answer" and specifically states that "[n]o other pleading shall be allowed[.]" The Supreme Court previously concluded that the failure to comply with Civ.R. 24(C) is fatal to a party's motion to intervene. *State ex rel. Polo v. Cuyahoga Cty. Bd. of Elections* (1995), 74 Ohio St.3d 143, 144. This Court recently reaffirmed our position on the same. *Summit Cty. Fiscal Officer v. Estate of Barnett*, 9th Dist. No. 24456, 2009-Ohio-2456, at ¶14; see, also, *State ex rel. Boston Hills Property Invests., LLC v. Boston Hts.*, 9th Dist. No. 24205, 2008-Ohio-5329, at ¶6.

{¶7} Our review of the record reveals that Swogger's motion to intervene was accompanied only by his affidavit, not a pleading, as required by Civ.R. 24. Interestingly, his affidavit dealt exclusively with the assertion that he did not receive proper notice to vacate the property. He did not attest to any deficiencies in service related to the underlying appropriation action which he now raises on appeal. We also note that Swogger failed to identify what portion of Civ.R. 24 he sought to act upon and likewise failed to address the timeliness of his post-judgment motion to intervene. Civ.R. 24(A), (B) (requiring that intervention under either

subsection of the rule be made "upon timely application"); see, also, *Norton v. Sanders* (1989), 62 Ohio App.3d 39, 42. Regardless, the trial court should have denied his motion based solely on the omission of a pleading. Moreover, without some sort of new pleading being filed in this case, there were no remaining claims upon which Swogger could proceed, as the University's complaint had already been decided, appealed, and then resolved by way of a settlement agreement – an agreement which dismissed Swogger and determined him to have "no interest in the property." See *Concord Township Trustees v. Hazelwood Builders, Inc.* (Feb. 9, 2001), 11th Dist. Nos. 2000-L-066 & 99-L-167, at *3 (noting that the plaintiff's complaints had already been dismissed or denied, so without a pleading lodging any new claims, there was no basis upon which the intervenors could proceed).

{¶8} Although the probate court held a hearing on Swogger's motion and detailed in its opinion that Swogger did, in fact, have proper notice of the appropriation action, it need not have done so given the shortcomings contained in his motion for intervention. This Court, however, may affirm the decision of the probate court on alternative grounds if it was legally sound. *Padrutt v. Peninsula*, 9th Dist. No. 24272, 2009-Ohio-843, at ¶27, quoting *In re Estate of Baker*, 9th Dist. No. 07CA009113, 2007-Ohio-6549, at ¶15 (noting that "[a]n appellate court shall affirm a trial court's judgment that is legally correct on other grounds, that is, one that achieves the right result for the wrong reason, because such an error is not prejudicial"). Thus, we conclude, on alternate grounds, that the probate court did not abuse its discretion in denying Swogger's motion to intervene. Accordingly, Swogger's assignment of error lacks merit.

III

{¶9} Swogger's sole assignment of error is overruled. The judgment of the Summit

County Court of Common Pleas, Probate Division, is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETH WHITMORE
FOR THE COURT

MOORE, P. J.
CONCURS

DICKINSON, J.
CONCURS, SAYING:

{¶10} I concur with the majority's judgment and most of its opinion. I write separately to note my continuing conviction that the applicable standard of review for intervention as of right is de novo. See *In re M.N.*, 9th Dist. No. 07CA0088, 2008-Ohio-3049, at ¶5.

APPEARANCES:

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