[Cite as *Capital City Community Urban Redevelopment Corp. v. Columbus*, 2012-Ohio-6025.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Capital City Community Urban Redevelopment Corporation et al.,

Plaintiffs-Appellants,

v.

City of Columbus,

Defendant-Appellee.

No. 12AP-257
(C.P.C. No. 10CVH-10-15120)

(ACCELERATED CALENDAR)

D E C I S I O N

Rendered on December 20, 2012

Fred J. Milligan, for appellants.

Richard C. Pfeiffer, Jr., City Attorney, and *Paula J. Lloyd*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

SADLER, J.

{¶ 1} Plaintiffs-appellants, Capital City Community Urban Redevelopment Corporation (individually "Capital City") and Charles L. Adrian (collectively "appellants"), appeal from a judgment of the Franklin County Court of Common Pleas granting summary judgment in favor of defendant-appellee, city of Columbus ("city"). For the following reasons, we affirm.

I. BACKGROUND

{¶ 2} Capital City is a non-profit corporation that sold the Lincoln Theater, a building located in Columbus, Ohio, to Columbus Urban Growth Corporation ("CUG") on September 17, 2002. As pertinent here, paragraph 9(a) of the purchase agreement required CUG to provide Saturday movies to children for $1 or less for a double feature

once the theater was operational and for as long as feasible. In April 2004, CUG transferred ownership of the theater to the city by limited warranty deed.

{¶ 3} In 2005, appellants filed an action against the city seeking, inter alia, a declaratory judgment that paragraph 9(a) of the agreement was a restrictive covenant that bound the city and CUG. We addressed the issue in *Capital City Community Urban Redevelopment Corp. v. Columbus*, 10th Dist. No. 08AP-769, 2009-Ohio-6835 ("*Capital City I*"), and held that paragraph 9(a) "was a covenant running with the land by which the city was bound." *Id.* at ¶ 19. We found the phrase "Saturday movies" to be unambiguous, but declined to interpret the phrase "for as long as feasible," stating that "the definition of this phrase is for interpretation by the city. If any party disagrees with the city's definition at some point in the future, appropriate action may be taken to determine the definition of this phrase." *Id.* at ¶ 17.

{¶ 4} On remand, the trial court entered a declaratory judgment determining that paragraph 9(a) was a real covenant running with the land, and that the city was required to perform its obligations under that provision in the manner set forth in *Capital City I*.

{¶ 5} In October 2010, appellants filed a complaint against the city in the present case, alleging that the city had failed to comply with the Saturday double feature requirement of paragraph 9(a). Appellants characterized the complaint as "an application for further relief based on a declaratory judgment previously granted * * * brought pursuant to [R.C.] 2721.09." (Complaint, 1.) Appellants also filed a motion requesting an order for the city to show cause as to why further relief should not be granted.

{¶ 6} The city filed an answer on November 5, 2010 but shortly thereafter amended its answer to include the additional affirmative defense of failure to join a necessary party. According to the city, the right to manage and operate the theater belonged to the Lincoln Theatre Association ("LTA") pursuant to a 99-year renewal forever lease entered into between LTA and the city in 2007, while the underlying declaratory judgment action was pending. The city claimed that the lease left the city without any rights of possession to show movies making it impossible for the city to perform the requested relief.

{¶ 7} Appellants moved for summary judgment on August 15, 2011, which the city opposed. At a pre-trial conference held on October 11, 2011, the trial court granted

appellants 14 days to amend their complaint to add LTA and the Columbus Association for the Performing Arts ("CAPA") as parties to the action. However, on October 19, 2011, appellants filed a notice indicating that they did not intend to join either entity as a party to the action. Appellants asserted that neither LTA nor CAPA were necessary parties because they were not parties to the underlying declaratory judgment and because the joinder of additional parties would cause further delay.

{¶ 8} In light of appellants' decision not to join additional parties, the city obtained leave to file a motion for summary judgment. The city attached the lease agreement entered into with LTA as well as the agreement entered into between LTA and CAPA. In a decision and entry dated March 7, 2012, the trial court entered summary judgment in favor of the city and dismissed appellants' complaint on the ground that appellants failed to join LTA as a necessary party as required by R.C. 2721.12(A). The trial court determined that the failure to join a necessary party was a jurisdictional defect that precluded declaratory relief.

II. ASSIGNMENTS OF ERROR

{¶ 9} In a timely appeal, appellants present the following four assignments of error for our consideration:

> [I.] The Trial Court erred in sustaining defendant's motion for summary judgment and dismissing plaintiff's complaint for failure to join the Lincoln Theatre Association as a party defendant.
>
> [II.] The Trial Court erred by failing to sustain plaintiffs' motion for an order to show cause why further relief should not be granted.
>
> [III.] The Trial Court erred by failing to sustain plaintiffs' motion for summary judgment.
>
> [IV.] The delays and other procedural irregularities reflected in the record raise a reasonable question as to whether the trial judge because of his personal views concerning the case is able to carry out the prior decision of this Court with objectivity and dispatch. The Court should exercise its discretion to enter the judgment that the trial judge should have entered and/or remand the case to the assignment office for random assignment to another judge.

A. First Assignment of Error

{¶ 10} In their first assignment of error, appellants argue that the trial court erred by granting the city's motion for summary judgment and dismissing the complaint for failure to join LTA as a necessary party. We disagree.

{¶ 11} Appellate review of summary judgment is de novo. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, ¶ 8. To obtain summary judgment, the movant must show that (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion when viewing evidence in favor of the nonmoving party and that conclusion is adverse to the nonmoving party. Civ.R. 56(C); *New Destiny Treatment Ctr., Inc. v. Wheeler*, 129 Ohio St.3d 39, 2011-Ohio-2266, ¶ 24. The movant bears the initial burden of informing the trial court of the basis for the motion and of identifying those portions of the record demonstrating the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). Once the moving party meets this initial burden, the nonmoving party has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party. *Id.*

{¶ 12} Here, the trial court granted the city's motion for summary judgment and dismissed appellants' complaint by relying on R.C. 2721.12(A), which provides that "when declaratory relief is sought under this chapter in an action or proceeding, all persons who have or claim any interest that would be affected by the declaration shall be made parties to the action or proceeding." "A party's failure to join an interested and necessary party constitutes a jurisdictional defect that precludes the court from rendering a declaratory judgment." *Portage Cty. Bd. of Commrs. v. Akron*, 109 Ohio St.3d 106, 2006-Ohio-954, ¶ 99, citing *Plumbers & Steamfitters Local Union 83 v. Union Local School Dist. Bd. of Edn.*, 86 Ohio St.3d 318, 323 (1999); *see also Gannon v. Perk*, 46 Ohio St.2d 301 (1976); *see also Mallory v. Cincinnati*, 1st Dist. No. C-110563, 2012-Ohio-2861, ¶ 17. Whether a nonparty is a necessary party in an action for declaratory relief depends on whether that nonparty "has a legally protectable interest in rights that are the subject matter of the

action." *Rumpke Sanitary Landfill, Inc. v. Ohio*, 128 Ohio St.3d 41, 2010-Ohio-6037, ¶ 15.

{¶ 13} The trial court found LTA to be a necessary party based on the affidavit submitted by the city's Development Director Boyce Safford, and the lease agreement executed between LTA and the city. Safford averred that the city had transferred the rights of management, operation, and use of the Lincoln Theater to LTA pursuant to the 99-year renewable lease agreement. According to Safford, the assessment of whether it is feasible to show Saturday double features for $1 or less is within the province of the LTA in connection with its contractual right to manage, operate, and use the theater. The trial court also found Section 5.01(a)(ii) of the lease agreement to be particularly persuasive, as it granted LTA considerable discretion in the management and operation of the theater.

{¶ 14} Appellants argue that their complaint was not subject to the necessary party requirement in R.C. 2721.12(A) because it was filed under R.C. 2721.09, which authorizes a court to "grant further relief based on a declaratory judgment or decree previously granted." However, appellants do not explain how actions under R.C. 2721.09 are exempt from the jurisdictional requirements of R.C. 2721.12(A). To the contrary, R.C. 2721.12(A) expressly states that its requirements apply whenever declaratory relief is sought "under this chapter," which necessarily includes appellant's request for further declaratory relief under R.C. 2721.09. Here, appellants sought declaratory relief beyond that which was granted in the previous declaratory judgment. The previous judgment declared only that paragraph 9(a) of the purchase agreement was a restrictive covenant by which the city was bound; it did not address the language in paragraph 9(a) relieving the city from the duty to show Saturday double features if not feasible. The judgment incorporated our holding in *Capital City I*, wherein we expressly declined to address the "for as long as feasible" language of paragraph 9(a) and stated that any disagreement over this language may be resolved by the filing of an "appropriate action" in the future. *Id.* at ¶ 17. Because appellants' action sought additional declaratory relief under R.C. Chapter 2721, it was subject to jurisdictional requirements of R.C. 2721.12(A).

{¶ 15} Next, appellants claim that principles of waiver and estoppel prevented the city from asserting the defense of failure to join LTA as a party by not raising it in the previous declaratory judgment action. We disagree. "[T]he failure to join a necessary

party in an action for declaratory judgment constitutes a jurisdictional defect that *cannot be waived*." (Emphasis added.) *Plumbers* at 323, citing *Gannon v. Perk*, 46 Ohio St.2d 301 (1976); *see also Bretton Ridge Homeowners Club v. DeAngelis*, 51 Ohio App.3d 183, 185 (8th Dist.1988). Additionally, because the feasibility of the Saturday double feature requirement was not litigated in the prior action, the doctrine of collateral estoppel did not preclude the city from asserting defenses relevant to that issue in the present case. The doctrine of collateral estoppel does not apply unless the asserting party proves that "the identical issue was actually litigated, directly determined, and essential to the judgment in the prior action." *State ex rel. Davis v. Pub. Emps. Retirement Bd.*, 174 Ohio App.3d 135, 2007-Ohio-6594, ¶ 31 (10th Dist.), citing *Goodson v. McDonough Power Equip., Inc.*, 2 Ohio St.3d 193, 201 (1983).

{¶ 16} Upon review of the record, we find that the city presented evidence that LTA was a necessary party for purposes of R.C. 2721.12(A). The supporting affidavit and lease agreement presented by the city established that LTA had a contractual right to manage and operate the theater and would be affected by any further declaration regarding whether the city was obligated to show Saturday double features as provided in paragraph 9(a). Because the evidence established that LTA had a "legally protectable interest in rights that are the subject matter of the action[,]" *Rumpke* at ¶ 15, we find no error in the trial court's determination that LTA was a necessary party to the action. Joinder of LTA in the appropriate action will ensure "that the issues involved will be fully presented, that the uncertainty or controversy will be terminated, and that the public interest will be adequately protected without a multiplicity of suits." *Cincinnati v. Whitman*, 44 Ohio St.2d 58, 61 (1975).

{¶ 17} This conclusion does not, however, end our analysis. Appellants alternatively claim that, even if LTA were a necessary party under R.C. 2721.12(A), the trial court was required to cure the defect by ordering that LTA be joined as a party pursuant to Civ.R. 19(A). Appellants also contend that the trial court erred by refusing to allow them to amend the complaint pursuant to Civ.R. 15.

{¶ 18} In *Copeland v. Tracy*, 111 Ohio App.3d 648 (10th Dist.1997), this court rejected the argument that Civ.R. 19 and 19.1 require a trial court to join absent parties deemed necessary to a declaratory judgment action under R.C. 2721.12(A). We affirmed

the trial court's decision to dismiss the complaint and held that "joining the commissioners as parties, pursuant to Civ.R. 19 and 19.1, was not an option since the declaratory judgment statute is a substantive law which is jurisdictional and cannot be abridged, enlarged or modified by the Civil Rules." *Id.* at 656; *see also Bretton Ridge* at 185.

{¶ 19} The Supreme Court of Ohio discussed *Copeland* in *Plumbers*, a case addressing whether a party can satisfy R.C. 2721.12(A) by moving to amend its pleading pursuant to Civ.R. 15. *Plumbers* at 323. However, because *Copeland* addressed only the applicability of Civ.R. 19 and 19.1, the *Plumbers* court found the case to be inapplicable in the context of Civ.R. 15 and declined to "determine whether a court may order absent but necessary parties joined on its own motion." *Id.* The court concluded, "in an action for declaratory judgment in which it becomes apparent that not all interested persons have been made parties, the party seeking relief may join the absent party by amending its pleading in accordance with Civ.R. 15." *Id.*

{¶ 20} Given that our holding in *Copeland* remains valid in the context of Civ.R. 19 and 19.1, we reject appellants' argument that Civ.R. 19(A) required the trial court to, on its own motion, order that LTA be joined as a necessary party under R.C. 2721.12(A). As for appellants' claim that, under *Plumbers*, the trial court should have granted appellants leave to amend their complaint pursuant to Civ.R. 15, appellants never requested such relief. To the contrary, appellants filed a notice indicating that they did not intend to join LTA as a necessary party. Although their notice was filed before the trial court declared LTA to be a necessary party, it nevertheless confirms that they did not pursue amendment under Civ.R. 15.

{¶ 21} For the reasons discussed above, we find no error in the trial court's decision to dismiss appellants' complaint for lack of jurisdiction based on appellants' failure to join LTA as a necessary party. *See Portage Cty.* at ¶ 100 (affirming dismissal of action for declaratory relief where failure to include necessary party constituted a jurisdictional defect); Civ.R. 41(B)(4)(a) (a dismissal for lack of jurisdiction over the person or the subject matter operates as a failure other than on the merits). Accordingly, appellants' first assignment of error is overruled.

B. Second and Third Assignments of Error

{¶ 22} Our resolution of appellants' first assignment of error is dispositive of appellants' second and third assignments of error, which argue that the trial court erroneously failed to rule on their motion for the city to show cause as to why relief should not be granted and by refusing to sustain appellants' motion for summary judgment. "[T]the absence of a necessary party renders all other issues moot, including the merits." *Copeland* at 656; *see also Bretton Ridge* at 185. Accordingly, appellants' second and third assignments of error are rendered moot.

C. Fourth Assignment of Error

{¶ 23} Appellants' fourth assignment of error challenges the trial court's objectivity concerning the case and asks this court to disqualify the trial court and order that the case be reassigned. "However, '[t]his court lacks authority to consider issues of disqualification.' " *J.V.C.-N. v. M.P.D.*, 10th Dist. No. 11AP-581, 2012-Ohio-1418, ¶ 33, quoting *Herold v. Herold*, 10th Dist. No. 04AP-206, 2004-Ohio-6727, ¶ 20. " 'Pursuant to R.C. 2701.03, the Ohio Supreme Court, not the courts of appeals, has authority to determine a claim that a common pleas court judge is biased or prejudiced.' " *Lakhi v. Healthcare Choices & Consultants*, 10th Dist. No. 07AP-904, 2008-Ohio-1378, ¶ 27, quoting *Wardeh v. Altabchi*, 158 Ohio App.3d 325, 2004-Ohio-4423, ¶ 21 (10th Dist.); *see also Beer v. Griffith*, 54 Ohio St.2d 440, 441 (1978). R.C. 2701.03 provides the exclusive means by which a litigant may claim that a common pleas judge is biased or prejudiced. *Wardeh* at ¶ 21. Accordingly, appellants' fourth assignment of error is overruled.

III. CONCLUSION

{¶ 24} Having overruled appellants' first and fourth assignments of error, and having found appellants' second and third assignments of error to be rendered moot, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN, P.J., and CONNOR, J., concur.