IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE JUDICIAL DISTRICT
FRANKLIN COUNTY, OHIO

Veronica Wagner Covatch, *et al.*,	:	
Plaintiffs	:	CASE NO.: 15AP000699
-vs.-	:	
Central Ohio Sheltie Rescue, Inc., *et al.*,	:	
Defendants	:	

APPELLANTS' REPLY MEMORANDUM IN FURTHER SUPPORT OF MOTION FOR STAY

Now come the Appellants in the above-captioned action, Central Ohio Sheltie Rescue, Inc., hereinafter referred to individually as, "COSR," and Penny Sanderbeck, hereinafter referred to individually as, "Sanderbeck," and by and through their undersigned attorney, they offer the following Reply Memorandum in Further Support of the Motion for Stay, filed with this Honorable Court along with the Notice of Appeal in this action on July 23, 2015. For the reasons and authorities contained in the following Memorandum, the Court should GRANT the instant Motion to Stay.

Respectfully submitted,

/s/John A. Bell Attorney *[electronic signature July 31, 2015]*

John A. Bell, Esq. 0025853
Counsel for the Defendants-Appellants
2700 East Main Street - Suite 207
P. O. Box 091022
Bexley, Ohio 43209-1022
Telephone: (614)-266-2961
Facsimile: (614)-239-0543
E-mail: JohnLegal@aol.com

REPLY MEMORANDUM

On July 29, 2015, the Plaintiffs-Appellees in this action filed a Memorandum Contra Appellants' Motion for Stay, consisting of forty-three (43) pages, including attachments, which will hereinafter be referred to as "Appellees' Memorandum Contra" for the sake of brevity.

The Appellees' Memorandum Contra does not dispute the principal allegations made in the very basic Motion for Stay which was filed with the Notice of Appeal in this action on July 23, 2015. Specifically, it is undisputed that these Appellants have already posted a Bond in the principal sum of Ten-Thousand Dollars ($10,000.00), in this action. That Bond was posted in compliance with the Ohio pre-judgment replevin statute, since despite being well-aware that the Defendants-Appellants were represented by undersigned counsel, the Plaintiffs-Appellees obtained an *ex parte* order of pre-judgment replevin from Judge Tyack. The Bond was necessary to stay the *ex parte* order so that the Appellants would be able to be heard on the question of ownership and right of possession before a decision was made.[1]

---

[1] Ohio Revised Code section 2737.11, entitled, "Recovery of property by filing bond or cash deposit," states as follows:

The respondent may recover property taken pursuant to an order of possession of which the property is the subject by filing with the court a bond to the movant, executed by the respondent's surety in the same amount as the bond filed by the movant pursuant to section 2737.10 of the Revised Code, to the effect that, if judgment is issued against the respondent, the respondent will return the property detained or pay the value assessed, at the election of the movant, and will also pay the damages suffered by the movant as a result of the detention of and any injury to the property, and the costs of the action. If the movant has not filed a bond, the amount of the respondent's bond shall be twice the approximate value of the property as stated in the affidavit filed pursuant to section 2737.03 of the Revised Code. If an order of possession has been issued by the court, the respondent also shall provide the levying officer with a copy of the bond.

In lieu of the bond, the respondent may deposit with the clerk of the court cash in an amount equal to the approximate value of the property.

Despite the fact that the Defendants-Appellants were carefully following the Ohio Revised Code, the Appellees' Memorandum Contra implies that Defendants-Appellants were not obeying an order of the Municipal Court. [Appellees' Memorandum Contra at p. 2, ¶ d.]

There are many other factual assertions in the Appellees' Memorandum Contra which are false or misleading, but this Memorandum will only address those which directly bear on the issue before this Honorable Court. For example, the Motion for Discovery Sanctions, filed June 18, 2015, was not filed "in response" to the Trial Court's order scheduling an evidentiary hearing. It was filed in response to the Plaintiffs-Appellees complete refusal to provide discovery responses to which the Defendants-Appellants are entitled. Likewise, the pleadings filed on July 21, 2015, filed in response to items that the Plaintiffs-Appellees served by mail on Friday, July 17, 2015, were also served by mail (and nothing to the contrary was contained in the Certificates of Service). Nevertheless, Plaintiffs-Appellees assert that undersigned counsel served the documents by mail "presumably so that they would not be received in time for the hearing" (on July 23). Apparently, only the Plaintiffs-Appellees are allowed to serve things by mail, irrespective of Civil Rule 5.

The Defendants-Appellants do strongly object to the attempted injection of inappropriate materials *dehors* the record in this action. The paragraphs in the Appellees' Memorandum Contra numbered 2, are wholly improper. **The Appellants in this action have ordered the complete transcript of the proceedings in the Trial Court**, and when that transcript is filed, the Appellants will be prepared to proceed based upon the actual record of the Trial Court. It should not be necessary to respond to extraneous and incorrect assertions about matters outside of the record.

If the respondent is indigent, the court may, on motion of the respondent or on its own motion, waive the bond required by this section or set the bond in a lower amount, as fairness requires.

The Affidavits of Disqualification filed by the Appellants were not filed "in order to avoid an evidentiary hearing and an adverse ruling" as alleged in the Appellees' Memorandum Contra. Those Affidavits were filed because the Affiants observed actions which they believed demonstrated an improper bias against them, and it should be noted that at no point did the Appellees nor the first Trial Judge contest the allegations in those Affidavits. Rather, the original Judge recused himself.

The most important fact for the present purpose is that while the Trial Court did take evidence on July 23, 2015, it only heard the Plaintiffs-Appellees' evidence and a part of the testimony of one witness for the Defendants-Appellants (Deb Finelli). The Trial Court refused to allow the Defendants-Appellants to present any other witnesses or evidence, and this is a gross injustice.

The Defendants-Appellants have always believed, and stipulated at hearing, that the dog in question had belonged to the Plaintiffs-Appellees at some time in the past (prior to 2013). The Plaintiffs-Appellants (and the Trial Court) apparently believe that if they ever owned the dog, then they necessarily always owned the dog. Even the limited evidence before the Trial Court established that the dog had been picked up as an unlicensed stray by Franklin County Animal Care and Control, and then held for a day longer than required by the Franklin County Animal Shelter before being turned over to the Defendants-Appellants.

By operation of Ohio law, ***the Plaintiffs-Appellees are not "rightful owners" of the dog***. They may have once owned this dog, but they did not license it nor redeem it from the Shelter and the Shelter followed the Ohio Revised Code in turning the dog over to the Defendants-Appellants.[2]

---

[2] Ohio Revised Code section 955.16, entitled "Disposing of impounded dogs," states:

(A) Dogs that have been seized by the county dog warden and impounded shall be kept, housed, and fed for three days for the purpose of redemption, as provided by section 955.18 of the Revised Code, unless any of the following applies:

(1) Immediate humane destruction of the dog is necessary because of obvious disease or injury. If the diseased or injured dog is registered, as determined from the current year's registration list maintained by the warden and the county auditor of the county where the dog is registered, the necessity of destroying the dog shall be certified by a licensed veterinarian or a registered veterinary technician. If the dog is not registered, the decision to destroy it shall be made by the warden.

(2) The dog is currently registered on the registration list maintained by the warden and the auditor of the county where the dog is registered and the attempts to notify the owner, keeper, or harborer under section 955.12 of the Revised Code have failed, in which case the dog shall be kept, housed, and fed for fourteen days for the purpose of redemption.

(3) The warden has contacted the owner, keeper, or harborer under section 955.12 of the Revised Code, and the owner, keeper, or harborer has requested that the dog remain in the pound or animal shelter until the owner, harborer, or keeper redeems the dog. The time for such redemption shall be not more than forty-eight hours following the end of the appropriate redemption period.

At any time after such periods of redemption, any dog not redeemed shall be donated to any nonprofit special agency that is engaged in the training of any type of assistance dogs and that requests that the dog be donated to it. *Any dog not redeemed that is not requested by such an agency may be sold,* except that no dog sold to a person other than a nonprofit teaching or research institution or organization of the type described in division (B) of this section shall be discharged from the pound or animal shelter until the animal has been registered and furnished with a valid registration tag.

(B) Any dog that is not redeemed within the applicable period as specified in this section or section 955.12 of the Revised Code from the time notice is mailed to its owner, keeper, or harborer or is posted at the pound or animal shelter, as required by section 955.12 of the Revised Code, and that is not required to be donated to a nonprofit special agency engaged in the training of any type of assistance dogs may, upon payment to the dog warden or poundkeeper of the sum of three dollars, be sold to any nonprofit Ohio institution or organization that is certified by the director of health as being engaged in teaching or research concerning the prevention and treatment of diseases of human beings or animals. Any dog that is donated to a nonprofit special agency engaged in the training of any type of assistance dogs in accordance with division (A) of this section and any dog that is sold to any nonprofit teaching or research institution or organization shall be discharged from the pound or animal shelter without registration and may be kept by the agency or by the institution or organization without registration so long as the dog is being trained, or is being used for teaching and research purposes.

Any institution or organization certified by the director that obtains dogs for teaching and research purposes pursuant to this section shall, at all reasonable times, make the dogs available for inspection by agents of the Ohio humane society, appointed pursuant to section 1717.04 of the Revised Code, and agents of county humane societies, appointed pursuant to section 1717.06 of the Revised Code, in order that the agents may prevent the perpetration of any act of cruelty, as defined in section

At that time, the Defendants-Appellants became the owners of the dog. If the Plaintiffs-Appellees can retake possession of this dog under the undisputed facts of this case, then every pet that is 'adopted' from an Ohio shelter can be yanked away from a loving home by a breeder or seller who has some personal grievance against the 'adopting' family.

Also, the testimony of the only witness that the Defendant-Appellants were permitted to call, Shelter Director Finelli, did not confirm the evidence presented by the Plaintiffs. To the contrary, her testimony established the Shelter's compliance with section 955.16 of the Ohio Revised Code. **The Appellees' Memorandum Contra admits that the Defendants-Appellants were not permitted to present their evidence and witnesses.** Following the testimony of Ms. Finelli, the Trial Court ruled, refusing to allow the Defendants-Appellants to present any more of their evidence.

1717.01 of the Revised Code, to the dogs.

(C) Any dog that the dog warden or poundkeeper is unable to dispose of, in the manner provided by this section and section 955.18 of the Revised Code, may be humanely destroyed, except that no dog shall be destroyed until twenty-four hours after it has been offered to a nonprofit teaching or research institution or organization, as provided in this section, that has made a request for dogs to the dog warden or poundkeeper.

(D) An owner of a dog that is wearing a valid registration tag who presents the dog to the dog warden or poundkeeper may specify in writing that the dog shall not be offered to a nonprofit teaching or research institution or organization, as provided in this section.

(E) A record of all dogs impounded, the disposition of the same, the owner's name and address, if known, and a statement of costs assessed against the dogs shall be kept by the poundkeeper, and the poundkeeper shall furnish a transcript thereof to the county treasurer quarterly.

A record of all dogs received and the source that supplied them shall be kept, for a period of three years from the date of acquiring the dogs, by all institutions or organizations engaged in teaching or research concerning the prevention and treatment of diseases of human beings or animals.

(F) No person shall destroy any dog by the use of a high altitude decompression chamber or by any method other than a method that immediately and painlessly renders the dog initially unconscious and subsequently dead.

Had they been permitted to present their evidence and witnesses, the Defendants-Appellants would have established that the Plaintiffs-Appellees either sold or gifted the dog in question to a third party in 2013, and they openly acknowledged that transfer on the internet, even thanking others who helped arrange the transfer. Further, prior to the dog escaping from a yard in April 2014, neither of the Plaintiffs-Appellees had ever sought return of the dog from the people in whose possession the dog had been left, had not registered nor licensed the dog in several years, had not provided any veterinary care for the dog since 2013, and had not registered the microchip until they learned that the dog was released from the Franklin County Animal Shelter to the Defendants-Appellants. Of course, none of that proof is in the record because the Defendants-Appellants were not permitted to present their evidence or witnesses. That was prejudicial error on the part of the Trial Court, and the full transcript of the July 23, 2015, hearing, which has been ordered and purchased by the Defendants-Appellants will evidence the error. The Trial Judge not only erred to the prejudice of the Defendants-Appellants by refusing to even allow them to present their case, he erred in ruling that the Plaintiffs-Appellees are the "owners" of the dog, since his reasoning (apparently 'once the owner, forever the owner') is contrary to Ohio law.

The Appellees' Memorandum Contra first argues that this matter is not properly before this Honorable Court, despite the Trial Court's inclusion of the necessary language from Civil Rule 54(B) in its Entry. There is no dispute that some claims remain pending before the Trial Court at this time, and it is true that simple inclusion of the language from Rule 54(B) does not convert a non-final order into a final order.

However, the Final Order of Possession clearly falls within the plain language of section 2505.02 of the Ohio Revised Code since it is "An order that grants or denies a provisional remedy and to which both of the following apply:

> (a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy; and,
>
> (b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

The Appellees Memorandum Contra argues that since the Defendants-Appellants can obtain money damages and injunctive relief on their counterclaims, therefore they have a "meaningful or effective remedy" and the July 23, 2015, Final Order of Possession is not a final appealable order. This does not follow. First, the Order prevents a judgment in favor of the appealing party on the provisional remedy (possession). The damages and injunctive relief sought in the counterclaim are unrelated to possession of the dog.

Further, while replevin existed at common law, and therefore could not be characterized as a "special proceeding" under section 2505.02, the statutory procedure for pre-judgment replevin or a pre-judgment "order of possession" provided in Revised Code section 2737.11 did not exist at common law, and is, therefore, a "special proceeding." Thus, the Order of July 23, 2015, is "an order that affects a substantial right made in a special proceeding," and is a final appealable order.

The Appellees' Memorandum Contra argues, without any citation of authority, and without any reasoning or common sense, that "the issue of ownership or possession of a dog is not a substantial right." It is incredible that the Plaintiffs-Appellees would argue straight-faced that the right that is at the core of this action, the right that they seek to enforce, is not a "substantial right."[3]

The Appellees' Memorandum Contra argues that the original Motion for Stay was not served to their counsel. Again, interjecting materials outside of the record, many spurious allegations and insinuations are made, none of which have merit.

---

[3] Ohio Revised Code Section 2505.02(A): "Substantial right" means a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.

If this is a place to argue facts outside the record, then it should be noted that the Trial Court's decision was made late in the afternoon of July 23, and by the time a Notice of Appeal and *pro forma* Motion for Stay could be prepared and carried to the Court of Appeals, Appellees' counsel had left the Courthouse. The documents were transmitted via facsimile that afternoon, although not sent from the office of undersigned Counsel, so the fact that their facsimile logs do not contain the office numbers of undersigned Counsel is not only outside the record and not appropriately before this Honorable Court, it is also immaterial. When Appellees' counsel claimed that they had not received them, and called attention to the fact that the Certificate of Service inadvertently mentioned only mail service, an Amended Motion for Stay was filed and served via facsimile before noon the following day (July 24th). It is impossible to fathom how Appellees or their counsel were prejudiced by the clerical error in the first Certificate of Service.[4]

The Plaintiffs-Appellees were given notice of the request for stay, no later than the morning of July 24, 2015, and were given until July 29, 2015, to respond. They have responded at length. Thus, they clearly had notice of the application. Further, the Appellees' Memorandum Contra admits that the Trial Court was approached with the request to stay its July 23, 2015, Order, and denied that request. [*See,* Appellees' Memorandum Contra at the top of page 13.]

The Trial Court stated that it would file an Entry to embody that decision and its other rulings, and the fact that it has not yet done so, does not render this Honorable Court without jurisdiction.

---

[4] While they impugn the integrity of undersigned counsel, the Plaintiffs-Appellees and their counsel presented a fabricated exhibit to the Trial Court (a letter dated June 15, 2015, purporting to have been sent to counsel regarding overdue discovery responses) which did not exist prior to July 17, 2015, and was never sent to counsel until it was attached to a Memorandum filed July 17, 2015, attempting to justify their intransigence in discovery.

Next, the Appellees' Memorandum Contra asserts that the requested Stay is moot because the Defendants-Appellants returned the dog to them. They conveniently omit mention that the Trial Court improperly threatened Defendant-Appellant Sanderbeck with incarceration if she did not obey the order by 4:30 p.m. on July 23. That threat was clearly crafted with the design to prevent the Defendants-Appellants from being able to obtain review of the Order in this Honorable Court. These Defendants-Appellants should not have to choose between their freedom and their appellate rights, and the Trial Court's threats forced that choice upon them.

The Appellees' Memorandum Contra also argues that the Bond posted by the Defendants-Appellants in the trial court is not the correct type of bond. There remains a Ten-Thousand Dollar ($10,000.00) Bond posted, which remains active. If this Honorable Court wishes a different bond to be posted to secure the Stay, the Defendants-Appellants are ready, willing and able to do so.

The Appellees Memorandum Contra alleges that the Defendants-Appellants and their undersigned Counsel acted for purposes of delay, harassment, or oppression. Every extension of time that was granted by the Trial Court was granted to the Plaintiffs-Appellees.

The Defendants-Appellants are a non-profit charitable companion animal rescue organization that has sought only to protect its members and supporters, and to ensure that the dog in question would be returned to its true owners as of April 2014.The Plaintiffs-Appellees have engaged in a campaign of harassment and bullying against the Defendants-Appellants.

For the reasons and upon the authorities stated herein, this Honorable Court should stay the Municipal Court's Order of July 23, 2015, (and all further proceedings in Municipal Court) until such time as this Honorable Court can see from the record (which has been ordered and paid for) that the Defendants-Appellants were substantially prejudiced by the Trial Court's refusal to allow them to present evidence and its erroneous "once-an-owner-forever-the-owner" reasoning.

Respectfully submitted,

/s/John A. Bell, Attorney [electronic signature July 31, 2015]
John A. Bell, Esq. 0025853
Counsel for the Defendants-Appellants
2700 East Main Street - Suite 207
P. O. Box 091022
Bexley, Ohio 43209-1022
Telephone: (614)-266-2961
Facsimile: (614)-239-0543
E-mail: JohnLegal@aol.com

CERTIFICATE OF SERVICE

I hereby certify that on this thirty-first (31st) day of July 2015, I have served a true copy of the foregoing APPELLANTS' REPLY MEMORANDUM IN FURTHER SUPPORT OF MOTION FOR STAY upon all parties or counsel entitled to such service, through the Clerk of Courts' "E-Flex" filing system, or by hand delivery, or by placing it in regular U.S. Mail, first class postage fully prepaid, addressed to:

Mr. James H. Banks, Esq., and
Ms. Nina M. Najjar, Esq,
P. O. Box 40
Dublin, Ohio 43017-0040

Mr. Scott Sheets, Esq.
Assistant Franklin County Prosecuting Attorney
373 South High Street
Fourteenth Floor
Columbus, Ohio 43215-4591

Respectfully submitted,

/s/John A. Bell, Attorney [electronic signature July 31, 2015]
John A. Bell, Esq. 0025853
Counsel for the Defendants-Appellants
2700 East Main Street - Suite 207
P. O. Box 091022
Bexley, Ohio 43209-1022
Telephone: (614)-266-2961
Facsimile: (614)-239-0543
E-mail: JohnLegal@aol.com