

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
VOLUSIA COUNTY, FLORIDA

CASE NO.: 2023 30711 CICI
DIVISION: 32-Mary G. Jolley

MICHAEL HENRY AND KATHERINE
HENRY,

Appellants,

v.

CITY OF ORMOND BEACH,
FLORIDA

Appellee.

CITY OF ORMOND BEACH'S RESPONSE TO APPELLANTS' EMERGENCY MOTION
FOR STAY AND MOTION TO STRIKE APPELLANTS' NOTICE OF JOINDER OF
CLAIMS AND PARTIES

COMES NOW the Appellee, City of Ormond Beach, Florida ("City"), and files its response to the Appellants, Michael Henry and Katherine Henry's Emergency Motion for Relief from Order and Motion for Stay and moves the Court pursuant to Rule 9.300, of the Rules of Appellate Procedure, to Strike Appellants' Notice of Joinder of Claims and Parties, and in support thereof states:

Appellants' appeal arises from the entry of three (3) Orders, entered March 1, 2023, finding violations against the Appellants in Case Nos: 22-112246, 22-112237 and 22-112247, by the Special Magistrate for the City of Ormond Beach which determined the Appellants were in violation of the City of Ormond Beach Land Development Code for having constructed, erected and maintained on their residence a fence, a paver driveway and accessory structures consisting of

two (2) 8' x 20' (160 sq. ft.) steel shipping containers without a having obtained required permits and inspections thereof.

Collectively, the Orders contain monetary fines against the Appellants of \$100.00 and awards costs to the City in the amount of \$70.68 (\$23.56 for each case). Additionally, the Orders provide that should the Appellants not bring the property into compliance, then a fine of \$25 a day for each violation shall accrue beginning on March 28, 2023. The Orders further authorize the City to take steps necessary to bring the violations into compliance; specifically, to remove and dispose of the unpermitted fence, paver driveway and steel shipping containers pursuant to Chapter 162.08(5), Florida Statutes.

On March 24, 2023, Appellants filed a “Notice of Administrative Appeal” evoking the Court’s appellate jurisdiction as provided under Rule 9.110, of the Rules of Appellate Procedure. Appellants included therewith a section titled “Notice of Joinder of Claims and Parties” purporting to join with the appeal counterclaims of Mandamus, Prohibition and “Civil Complaint” against the City and several nonparty employees of the City.

Argument:

I. Appellants are not entitled to a stay pending review of the Orders in the absence of a ruling by the lower tribunal and the posting of a sufficient bond.

Appellants claim that they petitioned the Special Magistrate for relief from the Orders or, alternatively, to stay all portions of the Orders pending the outcome of their appeal, however, their request has not been granted.

Stay of lower tribunal decisions during the pendency of an appeal is governed under Rule 9.310, of the Rules of Appellate Procedure, which provides:

Stay Pending Review

(a) Application in Lower Tribunal. Except as provided by general law and in subdivision (b) of this rule, a party seeking to stay a final or nonfinal order pending review first shall file a motion in the lower tribunal, which shall have continuing jurisdiction, in its discretion, to grant, modify, or deny such relief. A stay pending review may be conditioned on the posting of a good and sufficient bond, other conditions, or both.

(c) Bond.

(1) Defined. A good and sufficient bond is a bond with a principal and a surety company authorized to do business in the State of Florida, or cash deposited in the circuit court clerk's office. The lower tribunal shall have continuing jurisdiction to determine the actual sufficiency of any such bond.

(2) Conditions. The conditions of a bond shall include a condition to pay or comply with the order in full, including costs; interest; fees; and damages for delay, use, detention, and depreciation of property, if the review is dismissed or order affirmed; and may include such other conditions as may be required by the lower tribunal.

The language of Rule 9.310, therefore, indicates that it is the lower tribunal's discretion whether to grant the Appellants' requested stay which has not occurred.

To the extent that the Court is inclined to enter a stay pending review in the absence of a ruling by the lower tribunal, the City would request that such stay be conditioned upon the Appellants posting of a good and sufficient bond, which includes a condition to pay the Orders in full, including costs; interest; fees; and damages for delay if the review is dismissed or order affirmed as provided under Rule 9.310. Applying the most ambitious estimate for the duration of the appeal of 180 days, the total amount of fines and costs due the City under the Orders would therefore be \$13,670.68 exclusive of clerk and other court costs.

II. Appellants are prohibited from joining counterclaims and nonparties in their appeal.

As the basis for the attempted joinder of counterclaims and nonparty City employees, Appellants rely on Rules 1.110, 1.140 and 1.170, of the Florida Rules of Civil Procedure. Those Rules, however, are inapplicable to Appellants' appeal. Instead, joinder of parties in an appeal is

governed under Rule 9.360, of the Rules of Appellate Procedure, and is limited to the realignment of the parties as an appellant or petitioner. Additionally, in the Court's appellant capacity under Rule 9.110, the Court lacks jurisdiction to join an original civil action and unnamed parties not included within the lower tribunal ruling.

WHEREFORE, the Appellee, City of Ormond Beach, Florida, requests the honorable court to:

A. Deny the Appellants', MICHAEL HENRY and KATHERINE HENRY, Emergency Motion for Relief from Order and Motion for Stay or, alternatively, condition such stay upon the Appellants posting of a bond in the amount \$13,670.68, exclusive of clerk and other court costs, in the event the review is dismissed or Orders affirmed; and

B. Strike the Appellants', MICHAEL HENRY and KATHERINE HENRY, Notice of Joinder of Claims and Parties.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 20, 2023, I electronically filed the foregoing with the Clerk of the Court by using the E-portal system which will send a notice of electronic filing to Michael and Katherine Henry at katherine@restorefreedomkh.com and mike@restorefreedomkh.com.

/s/ Abraham C. McKinnon

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