

Lakewood Municipal Court
Cuyahoga County, Ohio

Jennifer Scott,)	
Plaintff)	Case No. 2017 CVE 1691
)	
v.)	<u>Decision and order</u>
)	
City of Lakewood,)	Judge Patrick Carroll
Defendant)	

This case is before the court on the motion of the defendant, City of Lakewood, to dismiss the plaintiff's complaint. The plaintiff filed a complaint on September 13, 2017 seeking a declaratory judgment. This case arises out of an administrative hearing by the City of Lakewood regarding the plaintiff's dog and an order for the dog to be removed from the city.

The claims asserted by the plaintiff in the complaint are as follows:

- 1) Declaratory judgment claim that Lakewood Codified Ordinance 506.03 conflicts with R.C. 955.11 & R.C. 955.22 in violation of the Home Rule Amendment to the Ohio Constitution (Secs. 3 & 7, Art. XVIII),
- 2) A claim that the plaintiff's dog was not a dangerous dog.
- 3) Declaratory judgment claim that the administrative procedure was closed to the public,
- 4) Declaratory judgment claim of violation of due process by requiring an administrative hearing before seeking court review, and
- 5) Declaratory judgment claim of estoppel based upon prior statement by the animal warden.

The complaint sought to have the Lakewood Codified Ordinance declared invalid and otherwise enjoin the Defendant City of Lakewood from enforcing its prior order for the dog to be classified as a dangerous dog and removed from the city.

Procedural statement of the case.

Service of the complaint was made on the Defendant City of Lakewood through the mayor and law director. Service was also made on the Ohio Attorney General. On October 11, 2017 the law director filed a request for additional time to respond to the plaintiff's complaint in order to confer with outside counsel. The motion was granted and the defendant was given until November 13, 2017 to respond to the plaintiff's complaint.

On November 13, 2017 the defendant filed a motion to dismiss the plaintiff's complaint. The plaintiff was given until December 18, 2017 to file a response to the motion. Upon request of the plaintiff and consent of the defendant, the time for the plaintiff to respond to the defendant's motion to dismiss was extended to January 4, 2018.

On January 4, 2018 the plaintiff filed a consolidated motion for summary judgment and brief in opposition to the motion to dismiss. Also on January 4, 2018 motions were filed for leave to file amicus curiae briefs on behalf of the plaintiff by the American Society for the Prevention of Cruelty to Animals and Best Friends Animal Society. An order was issued on January 5, 2018 giving the defendant until February 9, 2018 to file any written response to the plaintiff's motion for summary judgment. The parties were also given until January 22, 2018 to file any objections to the pending motions for leave to file the amicus curiae briefs. To date, no objections have been filed to the court's consideration of the amicus curiae brief and therefore, they will be deemed filed with the court. On February 9, 2018, the defendant filed its response to the plaintiff's motion for summary judgment.

This order is limited to the review of the legal issues raised by the defendant's motion to dismiss. While the amicus briefs relate to the merits of the classification of the dog at issue, the court does not reach that issue due to the disposition of the procedural issues. The defendant's response to the plaintiff motion for summary judgment, by its own statements, raises issues based on speculation and inference with no factual basis. Moreover, the brief merely reiterates its prior statements and does not add anything to the legal issues that have been previously raised and briefed by the parties.

Pleading issues and motion to dismiss. Civil Rule 12(B) (6).

Prior to addressing the issues directly raised by the parties by the motion to dismiss, the record reflects procedural issues that the court must address, including a threshold issue of what documents are properly before the court for consideration.

The defendant moved to dismiss the case for lack of jurisdiction and failure to state a claim upon which relief could be granted. Ohio R. Civ. P. 12(B) (1) & (6). A motion to dismiss for failure to state a claim upon which relief can be granted tests the sufficiency of the complaint. The factual allegations of the complaint and items properly incorporated therein must be accepted as true and the plaintiff must be afforded all reasonable inferences possibly derived therefrom. It must appear beyond doubt that

plaintiff can prove no set of facts entitling her to relief. *O'Brien v. Univ. Community Tenants Union, Inc.* 42 Ohio St.2d. 242 (1975).

The plaintiff's complaint set out a seventeen (17) page factual narrative with over one hundred (100) pages of statutes, legislative notes, correspondence, photographs and other evidentiary materials attached as exhibits. Although the plaintiff's complaint exceeds the Civil Rule 8(A) requirement that a complaint contain a short and plain statement of the claim showing that the party is entitled to relief, the defendant did not object to the plaintiff's complaint on this ground. Similarly, attachments to pleadings are limited by Civil Rule 10(C) & (D) to written instruments or affidavits of merit, neither of which apply in this case. The defendant did not object to the attachments and waived any objections by including many of the same documents with the motion to dismiss. The factual allegations raised in both the complaint and the motion to dismiss fail to comply with the rules of civil procedure.

When the pleadings include additional materials the court may:

- 1) Exclude outside matters, or
- 2) Treat motion as motion for summary judgment after notice to parties.

See, Petrey v. Simon, 4 Ohio St.3d 154 (1983), requiring a court to give notice to the parties when the court includes consideration of exhibits that the motion to dismiss is being treated as a motion for summary judgment. *See also, State ex. Rel. Baran v. Fuerst*, 55 Ohio St.3d 94 (1990). (Notice to parties is required for a court to consider matters outside of the complaint.)

In the present case, this order is limited to the procedural issues raised by the plaintiff's complaint and the defendant's motion to dismiss. The other materials included and/or attached to the complaint and motion to dismiss include evidentiary materials that should be reserved for a trial on the merits, not a procedural motion. As such, additional evidentiary materials attached to the pleadings are not considered for the disposition of the motion to dismiss.¹

In the motion to dismiss the defendant goes beyond the language contained in the complaint, making such assertions that the plaintiff attempted to cover up her actions and was negligent in allowing her dog to run at large. Not only are these characterizations based upon factual assertions by the defendant that are not contained in the plaintiff's complaint, but also require a factual determination based upon evidence presented, which is beyond the scope of a motion to dismiss. Other, similar assertions are made by the defendant in support of the motion to dismiss including what the animal control officer may have said to the plaintiff or her spouse.

¹ Due to the confusion in the record of what may be properly considered by the court, this order is limited to the issues raised by the defendant's motion to dismiss without consideration at this time of the motion for summary judgment.

The defendant also makes numerous statements throughout the motion to dismiss of what the plaintiff did not specifically assert or allege in her complaint. This argument ignores, however, the pleading requirements as set out in Civil Rule 8(A), which require only a short and plain statement of the claim. The claims raised by the plaintiff in her complaint are not special matters that must be plead with particularity. Ohio R. Civ. P. 9.

A motion to dismiss is limited to the sufficiency of the pleadings. Although the defendant may ultimately prevail on the claims raised by the plaintiff, the validity of the claims should be determined only after discovery and the opportunity of the plaintiff to present evidence on those claims. Upon review of the record, the court cannot state as a matter of law that the allegations contained in the plaintiff's complaint fail to state claims for violations of the plaintiff's constitutional rights. Accordingly, the defendant's motion for failure to state a claim under Civil Rule 12(B) (6) is overruled.

Declaratory judgment issues. Civil Rule 12(B) (1)

The defendant also seeks dismissal of the plaintiff's first, third, fourth and fifth claims on the grounds of lack of subject matter jurisdiction. Ohio R. 12 (B) (1). Although each claim raises different issues, all seek declaratory judgment in this court. As such, all four of these claims raise a common jurisdictional issue.

The plaintiff seeks to have the ordinances involved in this case to be declared either invalid or unconstitutional. The primary way to contest the validity of an ordinance or statute is by an action for declaratory judgment. Declaratory judgment actions are governed by R.C. Chapter 2721. R.C. 2721.02 provides:

"Courts of record may declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding is open to objection on the ground that a declaratory judgment or decree is prayed for under this chapter. The declaration may be either affirmative or negative in form and effect. The declaration has the effect of a final judgment or decree."

A municipal court is a court of record. R.C. 1901.02. R.C. Chapter 2721 does not extend a court's jurisdiction, however, but merely permits declaratory judgment as an available remedy when the court has separate subject matter jurisdiction. *State ex. Rel. Foreman v. Bellefontaine Mun. Ct.* 12 Ohio St.2d 26 (1967). As such, a municipal court may hear and determine a claim for declaratory judgment if the court otherwise has subject matter jurisdiction. *Urbana ex. rel. Newlin v. Downing*, 43 Ohio St.3d 109 (1989). A municipal court's civil subject matter jurisdiction is set out in R.C. 1901.18.

With the courts' monetary limitation, a claim for declaratory judgment is limited to a case involving a claim up to \$15,000. A municipal court has specific declaratory judgment jurisdiction in contract cases within the court's monetary limit.

"In any action at law based on contract, to determine, preserve, and enforce all legal and equitable rights involved in the contract, to decree an

accounting, reformation, or cancellation of the contract, and to hear and determine all legal and equitable remedies necessary or proper for a complete determination of the rights of the parties to the contract.” R.C. 1901.18 (A) (3).

The municipal court’s jurisdiction to hear a declaratory judgment action does not extend to a challenge of the validity of an ordinance or statute. *State ex. Rel. Foreman v. Bellefontaine Mun. Ct.* In *Foreman*, held that a municipal court is not a court of general jurisdiction, as is a common pleas court, and therefore was limited to the specific jurisdiction authorized by statute. *See also, Holt v. Cuyahoga County*, 8th. Dist. Cuyahoga, No.104732, 2017-Ohio-748. A declaratory judgment action to determine the validity of an ordinance was outside the subject matter jurisdiction area of a municipal court.

Although a municipal court does not have general civil jurisdiction to declare an ordinance invalid or unconstitutional, a municipal court may do so when there is a specific statutory grant of jurisdiction for a municipal court to hear and determine the declaratory judgment action. Thus, in *Urbana ex. rel. Newlin v. Downing*, the law director brought a declaratory judgment action in municipal court seeking a determination that magazines were obscene. Addressing the jurisdictional issue, the court held because R.C. 2907.36 provided for a declaratory judgment action to determine obscenity which would include misdemeanor offenses, the municipal court had jurisdiction by R.C. 1901.20. As such, there was a limited, specific statutory grant of jurisdiction for a municipal court to hear and determine the declaratory judgment action.

The plaintiff relies on *Russ v. Reynoldsburg*, 5th. Dist. Licking, No. 16-CA-58, 2017-Ohio-1471, which involved an appeal from a declaratory judgment action in the municipal court involving the validity of an ordinance to control dogs. Although the appellate court addressed the merits of the case, it did not address the issue of the trial court’s jurisdiction to hear the declaratory judgment action. Nor does the record in that case indicate that it was raised in the trial court other than a cursory jurisdictional statement.

The plaintiff also relies on *Wright v. Ohio Bureau of Motor Vehicles*, 67 Ohio Misc. 2d 29 (Mun. Ct. 1994), in which the court held it had jurisdiction to issue a declaratory judgment finding a state statute unconstitutional regarding out-of-state OVI convictions not being entitled to seek limited driving privileges. The court in *Wright*, held that because no monetary amount was sought, the complaint for declaratory judgment was within the municipal court’s jurisdiction. The decision in *Wright*, passed over the issue that a monetary amount is required to establish a municipal court’s subject matter jurisdiction. In light of the Supreme Court’s holding in *Foreman*, the decision in *Wright* is questionable.

In the present case there is no statutory grant of jurisdiction to permit this court to exercise declaratory judgment jurisdiction over the claims raised by the plaintiff’s first, third, fourth and fifth claims for relief. Based upon the court’s holding in *Foreman*, these claims are dismissed without prejudice for lack of subject matter jurisdiction.

Determination of dangerous dog.

The final issue is the plaintiff's second claim for relief regarding the classification of her dog as a dangerous dog. The defendant contends that because the plaintiff's dog was classified to be a dangerous dog because of its specific breed as a pit bull under the Lakewood Codified Ordinance 506.03, this court does not have jurisdiction to review that determination. This contention is without merit.

A municipal court has jurisdiction to hear an appeal by the owner of a dog "that has been designated as a nuisance dog, dangerous dog, or vicious dog". R.C. 1901.18(A) (13). (Emphasis added.). Similarly, R.C. 955.222(A) provides that a municipal court that has territorial jurisdiction over the residence of the owner, keeper or harbinger of a dog shall conduct any hearing concerning the designation of the dog as a nuisance dog, dangerous dog, or vicious dog. The jurisdictional legislation is not qualified on the basis of how the dog was determined to be a nuisance dog, dangerous dog, or vicious dog.

The defendant asserts in the response to the plaintiff's motion for summary judgment that based on R.C. 1901.19, municipal courts "do not have appellate jurisdiction over final decisions, orders, or adjudications of municipalities." (Defendant's Brief at 19.) R.C. 1901.19, however, does not contain any such prohibition. Rather, R.C. 1901.19 is one of many state statutes of jurisdictional authority for municipal courts. The defendant's assertion is also contrary to the General Assembly's express intent of the municipal court's jurisdiction regarding review of a finding of a nuisance dog, dangerous dog, or vicious dog as shown by two (2) separate statutory grants of jurisdiction; R.C. 1901.18 and R.C. 955.222.

The defendant cannot evade the court's statutory jurisdiction through enactment of a local ordinance. Whether based on conduct, breed specificity or any other definition, the defendant made a determination that the dog in this case was a dangerous dog, and therefore came within the confines of both R.C. 1901.18 and R.C. 955.222.

As the Court noted in *Foster v. Walsh*, 864 F. 2d. 416, 418-19 (6th Cir, 1988):

It cannot seriously be argued that an Ohio municipal court is indistinguishable from the municipal corporation in which it sits. The Akron Municipal Court is part of the Ohio State court system, established by the Ohio State legislature. R.C. Sec. 1901.01. It is subject to the supervision of the Ohio Supreme Court. Ohio Const., Art. 14, § 5. The municipal court may not be abolished by the city council, nor may the council expand or restrict the court's jurisdiction. See State ex rel. Cherrington v. Hutsinpillar, 112 Ohio St. 468, 147 N.E. 647 (1925).

See also, *Ward v. City of Norwalk*, 640 Fed. Appx. (6th Cir. 2016), finding that municipal courts are an arm of the state, not the city or county where the court is located.

In *Cupps v. Toledo*, 170 Ohio St. 144 (1959), the court found that the authority granted to municipalities by home rule does not include the power to regulate the jurisdiction of courts established by the Constitution or the General Assembly and cannot be impaired or restricted by a provision of a municipal charter or ordinance. The issue in *Cupps*, similar to the present case, was an attempt to limit an administrative appeal by a local ordinance to restrict the court's jurisdiction. See also, *State v. Homesales, Inc.* 190 Ohio App.3d 385, 1st. Dist. 2010-Ohio-5572, finding that an ordinance to enlarge a municipal court's jurisdiction was in conflict with both the Ohio Revised Code and the Ohio Rules of Criminal Procedure and therefore, invalid.

The defendant's position is also in direct conflict with *Mullins v. St. Marys*, 3rd. Dist. Auglaize, No.2-17-17, 2017-Ohio-8934. In that case, similar to the present case, the dog owner appealed the city's determination of a dangerous dog. The municipal court reversed the decision on the grounds that the city's ordinances, which were the basis of the dangerous dog determination, were invalid as in conflict with state law. The decision that the local ordinance was invalid was affirmed on appeal. As such, the scope of the inquiry before the municipal court was not limited to the facts regarding the dog, but also the validity of the ordinance.

As is shown by the decision in *Mullins*, although a municipal court does not have general jurisdiction in a declaratory judgment action, a municipal court has jurisdiction to determine the validity of an ordinance when the validity is raised as an issue in a case that is properly before the court. A municipal court may be required to determine the validity of an ordinance or statute when raised in a motion to suppress or as a defense to a criminal charge. See, *Lima v. Stapleton*, 3rd. Dist. Allen, No. 1-13-28, 2013-Ohio-5655, regarding the validity of dangerous dog ordinance.

In addition to general subject matter jurisdiction for a municipal court to hear a case regarding the determination of a dangerous dog, R.C. 1901.13(B) (4) further provides:

Whenever an action or proceeding is properly brought in a municipal court within Cuyahoga County, the court has jurisdiction to determine, preserve, and enforce all rights involved in the action or proceeding, and to hear and determine all legal and equitable remedies necessary or proper for a complete determination of the rights of the parties. (emphasis added).

In *Dayton v. Stearns*, 26 Ohio Misc. 115 (Mun. Ct. 1971), the court held that the question of the constitutionality of an ordinance, going as it does to the matter of the court's jurisdiction, may be raised at any time and that a prosecution cannot proceed upon an invalid ordinance. See also, *Columbus v. Miller*, 10th Dist. Franklin, No. 09AP-770, 2010-Ohio-1384, (regarding validity of misconduct involving public transportation ordinance), *Maple Heights v. Ephraim*, 178 Ohio App.3d 439, 8th. Dist. 2008-Ohio-4576, (regarding validity of criminal liability of a parent for acts of their child), *State v. Creamer*, 1st. Dist. Hamilton, No. C-060568, 2007-Ohio-5125 (regarding validity of

marijuana ordinance), *Tipp City v. Peachey*, 2nd. Dist. Miami, No. 99-CA-27 (2000), (regarding validity of building code), *Cincinnati v. Thompson*, 96 Ohio App.3d 7, (1st. Dist. 1994), (regarding validity of trespass ordinance), *Pickerington v. Scott*, 5th. Dist. Fairfield, No. 3-CA-90 (1990), (regarding validity of income tax ordinance), *Cincinnati v. Thompson*, 1st. Dist. Hamilton, No. C-790090 (1980) (regarding validity of parking ordinance), *Cincinnati v. Coy*, 115 Ohio App. 478 (1st. Dist. 1962) (regarding validity of ordinance for the sale of obscene materials).

The City of Lakewood has acknowledged that the validity of an ordinance can be raised as a defense to a criminal charge in *Lakewood v. Slinghuff*, Case No. 2017 B 386, in which the City of Lakewood moved to dismiss a misdemeanor charge on the grounds that the charging ordinance was invalid. As such, when the court's jurisdiction is properly invoked, a municipal court is not limited to the facts of a particular case or motion, but may also review the validity of the statute or ordinance upon which the claim or defense is based.

Based upon the foregoing, the defendant's motion to dismiss the plaintiff's second claim for relief on the basis of lack of subject matter jurisdiction is overruled.

Dual litigation of identical issue.

The record shows that in addition to the plaintiff's complaint in this case, the plaintiff also filed an administrative appeal to the Cuyahoga County Common Pleas Court in accordance with R.C. Chap. 2506. *Scott v. Lakewood*, Case No. CV-17-885796. The appeal is currently pending before Judge Brendan Sheehan. Although the primary issue, the determination of the plaintiff's dog as dangerous, was raised in both courts, the plaintiff invoked appellate review of the administrative order, which may include the validity of the ordinance, in the common pleas court. Under the doctrine of judicial priority, a court that would otherwise have valid jurisdiction to decide the issues raised is preempted due to the earlier filed case in another court of concurrent and co-extensive jurisdiction. *State ex. Rel. Dunlap v. Sarko*, 135 Ohio St.3d 171, 2013-Ohio-67. *See also*, *Meyers v. Chiaverini*, 3rd. Dist. Henry, No. 7-16-01, 2016-Ohio-3498. (Municipal court did not have jurisdiction to proceed on eviction claim due to pending eviction claim for the same property in the common pleas court.) The jurisdictional priority rule exists to promote judicial economy and avoid inconsistent results. *Sarko* at ¶. 12.

Both the municipal and common pleas courts have concurrent jurisdiction over an appeal by a dog owner of a determination of dangerous dog. While the plaintiff could have appealed the decision to either court, appellate review was sought in the common pleas court. While both cases were filed the same day, the appellate jurisdiction was invoked in the common pleas court. Based upon the foregoing, the plaintiff's second claim for relief should be dismissed on the grounds of jurisdictional priority.

Conclusion

In reviewing the number of court decisions involved in this case, I am awed by the staggering amount of public funds spent on attorney's fees to dispute conflicts between a state statute and a municipal ordinance that covers the same area and with the same goal of public safety. Clearly, with all of the serious crimes of violence and drug abuse issues facing this community, these funds could be better well spent for the community in other ways. In addition to the monetary costs, there are the long term costs to the community by continuing to maintain divisive policies, regardless of the validity of an ordinance, which pit neighbor against neighbor and fosters greater division in this community.

The court is aware that since this case was filed, an amendment to the city's dangerous dog ordinance has been presented and is currently pending before the Lakewood City Council. In addition, House Bill 352 and Senate Bill 195 were recently introduced in the Ohio General Assembly regarding the control and definition of a nuisance dog, dangerous dog, or vicious dog and may ultimately have an impact on the issue. As such, further litigation on this issue may be legislatively preempted by local ordinance or state statute.

For the reasons set forth in this decision, the claims for relief raised in the plaintiff's complaint are dismissed without prejudice at the plaintiff's costs.

February 12, 2018

Date



Judge Patrick Carroll

