

IN THE COMMON PLEAS COURT
MONTGOMERY COUNTY, OHIO

MIAMI TOWNSHIP BOARD OF TRUSTEES,	:	CASE NO. 2019 CV 05444
	:	Judge Richard Skelton
Plaintiff,	:	
	:	
v.	:	
	:	<u>PLAINTIFF, MIAMI TOWNSHIP</u>
DARREN POWLETTE <i>et al.</i> ,	:	<u>BOARD OF TRUSTEES' RESPONSE</u>
	:	<u>IN OPPOSITION TO DEFENDANTS'</u>
Defendants.	:	<u>MOTION TO STAY ENFORCEMENT</u>
	:	<u>OF JUDGMENT PENDING APPEAL</u>

Now comes Plaintiff, Miami Township Board of Trustees ("Plaintiff"), by and through counsel, and hereby submits its response in opposition to Defendants' Motion to Stay Enforcement of Judgment Pending Appeal ("Motion"). This Court should deny Defendants' Motion because, on balance, the four traditional factors that govern the granting *vel non* of a stay of judgment pending appeal favor the Plaintiff. In the alternative, this Court should order Defendants to post an adequate supersedeas bond in the amount of the total contract prices for the 21 events Defendants scheduled for the calendar year 2022 in violation of Article 8 of Plaintiff's Zoning Resolution.

I. ARGUMENT

Although there is little direct precedent in Ohio concerning the issuance *vel non* of a stay pending appeal, the Ohio Supreme Court has expressly recognized that "the Ohio Rules of Civil Procedure, including Civ. R. 62, were patterned after the Federal Rules of Civil Procedure." *State ex rel. State Fire Marshal v. Curl*, 87 Ohio St.3d 568, 571, 2000-Ohio-248, 722 N.E.2d 73. Thus,

this Court is guided by federal precedent in considering the Motion. See *WBCMT 2007-C33 Office 7870, LLC v. Bar J Ranch-Kemper Pointe LLC*, 108 N.E.3d 772, 779 (Ohio Com. Pleas 2018).

“A stay is not a matter of right.... It is instead ‘an exercise of judicial discretion’ ... [that] is dependent upon the circumstances of the particular case.” *Id.*, citing *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir.2012); see *Ohio Carpenter’s Pension Fund v. Ls Ctr., LLC.*, 2006-Ohio-2214, 2006 WL 1174492 ¶ 31 (8th Dist.)(“[a]n appellate court applies an abuse of discretion standard when reviewing a trial court’s denial of a motion for a stay of execution of judgment and request for bond”). “The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that [judicial] discretion.” *WBCMT* at 779, citing *Nken v. Holder*, 556 U.S. 418, 433–434, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009).

Four “traditional stay factors” govern the granting *vel non* of a stay pending appeal. See *Nken*, 556 U.S. at 422 & 426, 129 S.Ct. 1749 (2009). These factors are “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injury the other parties interested in the proceeding; and (4) where the public interest lies.” *Id.* at 426, 129 S.Ct. 1749 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987)); accord *Chafin v. Chafin*, 568 U.S. 165, 179, 133 S.Ct. 1017, 185 L.Ed.2d 1 (2013)(applying the standard articulated in *Hilton*). “[Because] the traditional stay factors contemplate individualized judgments in each case, the formula cannot be reduced to a set of rigid rules.” *Hilton*, 481 U.S. at 777, 107 S.Ct. 2113.

“Each factor, however, need not be given equal weight.” *Standard Havens Prods., Inc. v. Gencor Indus., Inc.*, 897 F.2d 511, 512 (Fed. Cir.1990). In fact, “[t]he first two factors of the traditional standard are the most critical.” *Nken*, 556 U.S. at 434, 129 S.Ct. 1749. But, ultimately, the court “assesses [the] movant’s chances for success on appeal and weighs the equities as they affect the parties and the public.” *Standard Havens Prods., Inc. v. Gencor Indus., Inc.*, 897 F.2d 511, 513 (Fed. Cir.1990)(quoting *E.I. Dupont de Nemours & Co. v. Phillips Petroleum*, 835 F.2d 277, 278 (Fed. Cir.1987)).

In considering the likelihood of success on appeal, this Court need not express a lack of confidence in its earlier ruling in order to stay its judgment. See *United States v. Fourteen Various Firearms*, 897 F.Supp. 271, 273 (E.D. Va.1995)(reasoning that, to grant a stay of its earlier judgment, a trial court need

not “‘change its mind or conclude that its determination on the merits was erroneous.’ Rather, the court must determine whether there is a strong likelihood that the issues presented on appeal could be rationally resolved in favor of the party seeking the stay” (quoting *St. Agnes Hosp. v. Riddick*, 751 F.Supp. 75, 76 (D. Md.1990))). This standard is met when an appeal raises a “substantial case on the merits”, *Hilton*, 481 U.S. at 778, 107 S.Ct. 2113, or “serious questions going to the merits”. *Michigan Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir.1991). “The standard does not require the petitioners to show that ‘it is more likely than not that they will win on the merits.’” *Lair*, 697 F.3d at 1204 (quoting *Leiva–Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011)).

(Bold added.) (Footnote omitted.) *Id.* at 779-80.

Turning to the four stay factors, this Court must conclude that Defendants have not met their burden; therefore, this Court must deny their Motion.

A. Defendants have not made a strong showing that they are likely to succeed on the merits.

Defendants’ Motion does not address whether they are likely to succeed on the merits in their appeal. Instead, their Motion makes a rote recitation of the first two paragraphs of Civ.R. 62, and pivots toward their undefined “significant financial harm,” and potential harm to their “customers” who signed contracts and paid deposits to rent the wedding barn for weddings and other celebratory events. (Motion, p. 2.) Defendants further assert that their customers will “in all likelihood have an extremely difficult time rescheduling the event at this late hour.” (*Id.* at p. 3.) Defendants do not identify the dates of the scheduled events, thereby leaving this Court to speculate whether there may be immediate harm to these customers, *who are not even a party to this litigation*. To be certain, there is no immediate harm to Defendants because they have already collected the security deposits from their customers. Indeed, Defendants have known since November 18, 2019, when Plaintiff filed its Complaint for Preliminary and Permanent Injunction, that it would be risky to continue to schedule celebratory events at the wedding barn that could be enjoined and prohibited by this Court. Two years later, that is exactly what happened.

This Court granted Plaintiff's Motion for Summary Judgment, finding that Defendants' activities in using the wedding barn for celebratory events such as weddings violated Plaintiff's Zoning Resolution because such events do not constitute "agritourism." (Final Judgment Entry; Injunction, p. 1.) Further, Defendants' activities are for business purposes that violated the Zoning Resolution because they are not incident to agricultural activities. (Id.) Defendants have wholly failed to show how they are likely to succeed at overturning this Court's decision in the Second District Court of Appeals. Accordingly, this most critical of the four factors weighs against Defendants and favors denial of their Motion.

B. Defendants will not be irreparably injured if this Court denies their Motion.

This Court's Final Judgment Entry; Injunction does not prohibit Defendants from using the rest of their property in accordance with Plaintiff's Zoning Resolution. They can continue to use it for the myriad uses identified in their summary judgment briefing. Indeed, the day may come when circumstances have changed and Defendants may be able to use the wedding barn to host celebratory events that comply with or are exempt from the Zoning Resolution. That day, however, has not come. Warning signs are prevalent in everyday life. "Swim at your own risk." "No lifeguard on duty." "Private property no trespassing." "Warning violators will be prosecuted to the fullest extent of the law."

All of the consequences and warning signs related to Defendants' unlawful use of the wedding barn were clear and obvious, and the negative outcomes foreseeable when Miami Township Zoning Inspector, Alex Carlson issued Defendants a Notice of Violation on May 8, 2018 for operating a wedding venue. The risk that this Court would grant Plaintiff a preliminary or permanent injunction became manifest on November 18, 2019 when Plaintiff filed its Complaint.

Further, Defendants have not demonstrated how they would be irreparably injured during the time within which the appeal is pending. They have already received security deposits from their customers, and have further indicated, “additional events will not be scheduled.” (Motion, p. 2.) To the extent Defendants may have to return security deposits, they have not identified the amounts or time frame for such a return, thus they have not demonstrated irreparable injury if this Court denies their Motion. Most importantly, Defendants cannot deny that *their claimed irreparable injury is self-inflicted because they chose to ignore the Notice of Violation for over three and one-half years until this Court ruled that they were in violation of the Zoning Resolution*. This Court should not reward Defendants’ illegal behavior that resulted in their ill-gotten financial gains. Again, this second of the two most critical of the four factors weighs against Defendants and favors denial of their Motion.

C. Issuance of the stay will substantially injure Plaintiff.

There are only three parties in this matter – Plaintiff and the two Defendants. Defendants’ customers, although arguably interested in the proceeding, are not parties to this proceeding. Therefore, whatever injury may befall them because of Defendants’ failure to abide by Plaintiff’s Zoning Resolution is an ancillary contract issue between Defendants and their customers, and Plaintiff should not bear the burden of those issues.¹ Nevertheless, Defendants’ continued use of the wedding barn in contravention of the Zoning Resolution sets a dangerous precedent for other landowners in Miami Township that it is acceptable to disregard the Zoning Resolution’s prohibitions. Defendants should not be rewarded for disregarding the Zoning Resolution, and this case establishes a precedent and serves as a warning to other landowners in the Township that they do not have unrestricted use of their land, but must use it in accordance with the Zoning Resolution.

¹ Defendants’ unlawful acts certainly raise the question whether they informed their customers of this pending litigation and the possibility that Defendants may not be able to host their celebratory events in the wedding barn.

D. The public interest favors denying Defendants' Motion.

Here, the public interest lies in the enforcement of zoning rules and regulations and prosecuting those who purposely flout and disobey them. Our local, state, and national governments are based upon laws, statutes, rules, and regulations, which all serve the betterment of our communities. Defendants purposely chose to continue to host celebratory events at their wedding barn in contravention of the Zoning Resolution. Despite Defendants' choice, Plaintiff has steadfastly sought to enforce its lawful Zoning Resolution against Defendants' unlawful use of their property, and, unless circumstances change, the continued use of the wedding barn for celebratory events violates the Zoning Resolution. Accordingly, the public interest favors upholding this Court's Final Judgment Entry; Injunction during the pendency of Defendants' appeal.

II. CONCLUSION

For the foregoing reasons, Plaintiff, Miami Township Board of Trustees respectfully requests that the Court deny Defendants' Motion to Stay Enforcement of Judgment Pending Appeal. Alternatively, if this Court grants the Motion, then Plaintiff requests this Court order Defendants to post an adequate supersedeas bond in the amount of the total contract prices for the 21 events Defendants scheduled for the calendar year 2022 in violation of Article 8 of Plaintiff's Zoning Resolution.

Respectfully submitted,

SURDYK, DOWD & TURNER CO., L.P.A.

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CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2022, I electronically filed the foregoing with the Montgomery County Clerk of Courts, which will send notification of such filing to all counsel of record, and that I mailed and emailed a copy of the foregoing to the following counsel of record:

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