NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION II

ROBERT LONG,

Plaintiff/Appellant,

vs.

THE CITY OF PERRY,

Defendant/Appellee.



Case No. 120,063



APPEAL FROM THE DISTRICT COURT OF
NOBLE COUNTY, OKLAHOMA

HONORABLE NIKKI G. LEACH, TRIAL JUDGE

**AFFIRMED**

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For Plaintiff/Appellant

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For Defendant/Appellee

OPINION BY GREGORY C. BLACKWELL, JUDGE:

The plaintiff, Robert Long, appeals the trial court's denial of his motion to vacate a journal entry dismissing, with leave to amend, his breach of contract claim against the City of Perry. He also appeals a later order dismissing his action, with prejudice, for failing to amend within the time allowed for amendment. Upon review, we affirm both orders.

## BACKGROUND

Robert Long is the owner of real estate in Perry, Oklahoma. On this property sits a house built in 1905. In early 2020, Long wished to renovate the home and sought a permit from the city to do so. Long and the city disagreed regarding the extent of work that the applicable codes required as part of the permitting process. Long and the city's inspector had a contentious relationship, so they agreed that Long could hire a third-party inspector to examine the property, and this inspector would determine whether Long needed to make certain improvements before the city could approve Long's requested permit. According to the city, this inspector was required to have certain statutory qualifications, which the inspector Long hired did not have. Thus, notwithstanding the inspector's favorable report, the city refused to issue Long's requested permit.

Rather than filing an appeal to the city's Board of Appeals, Long filed a petition in district court alleging breach of contract against the city in December 2020. The city responded with a motion to dismiss arguing, among other things, that Long's petition was an impermissible "collateral attack" on an order that should have been filed with the city's Board of Appeals.

On the day of hearing of the motion in April 2021, the trial court dismissed Long's action without prejudice and, pursuant to 12 O.S. § 2012(G), granted Long leave to file an amended petition within twenty days. The court ordered the city to prepare a journal entry. The city emailed a proposed journal entry that day but never heard back from plaintiff's counsel. The city then submitted a

proposed journal entry to the court without signatures of any counsel. The court entered this journal entry on May 21, 2021.

In August 2021, the city filed a motion to "enter final judgment," which asked the court to enter a final order dismissing Long's claim with prejudice, as Long had not filed an amended petition within the allowed 20-day period. Long objected, and later filed a motion to vacate the May 21 journal entry, arguing that because of "a mix-up" in his counsel's office, the May 21 journal entry was not received until late July at the earliest. Long argued that the entry of the May 21 journal entry was therefore irregular and inconsistent with the district court rules and must be vacated under 12 O.S. § 1032 and § 1038.

The trial court heard the motion to vacate on November 8, 2021. At that hearing, Long requested that the trial judge recuse himself on the basis of a previous professional relationship with the city. The trial court denied Long's recusal request, denied Long's motion to vacate the May 21 journal entry, and granted the city's motion to enter final judgment. Long appeals each of these rulings.

**STANDARD OF REVIEW**

"The standard of review of a trial court's ruling either vacating or refusing to vacate a judgment is abuse of discretion." *Ferguson Enterprises v. Webb Enterprises*, 2000 OK 78, ¶ 5, 13 P.3d 480, 482. And, generally, "the ruling of a judge in a civil cause on his own disqualification will not be reversed, except for a clear abuse of discretion." *Merritt v. Hunter*, 1978 OK 18, ¶ 2, 575 P.2d 623,

624. However, whether Long preserved the question of the trial judge's failure to disqualify for appeal is a question of law we will review *de novo*.

## ANALYSIS

### *The Motion to Vacate*

Long argues that the trial court abused its discretion in denying his motion to vacate the May 21st journal entry granting dismissal without prejudice because the order was made, he maintains, in violation of local rules. In Long's view, the court could not enter a journal entry without his approval under Rule 2.1(A) of the Eighth District Court Judicial Rules. The rule in question reads:

> No order or journal entry shall be presented to a judge for signature unless that order or judgment has been approved by the attorney or attorneys of record affected by said judgment or order except where the order or judgment resolves a motion to settle the journal entry of a prior hearing.

Long argues that the journal entry here was void under Rule 2.1(A) because his counsel never signed it and hence the dismissal with leave to amend was improperly entered as an initial matter.

Even presuming that the local rule was violated here,[1] the operative question on appeal is whether a violation of a local rule renders the dismissal with leave to amend void. We find that it does not.

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[1] Rule 2.1(A), which requires the presentation of an "approved" journal entry is accompanied by Rule 2.1(D), which states:

> Unless the Court orders otherwise, the prevailing party shall draft the journal entry and forward it to opposing counsel within ten (10) days of the judge's ruling. Opposing counsel shall have ten (10) days from receipt to review, approve and submit the journal entry to the Court unless a dispute exists. In the event of a dispute, a motion to settle journal entry shall be filed within ten (10) days of receipt of the disputed journal entry.

Long cites no authority for the proposition that violating the local rules makes the journal entry "void on its face." This Court has previously held that a lack of counsel's signature in conflict with local rules does not render a decision void, and we agree with that holding. *See Woods v. Computer Sciences Corp.*, 2011 OK CIV APP 17, ¶ 23, 247 P.3d 1201(holding that a trial court may waive a local rule requiring that a proposed journal entry be submitted with the signatures of record counsel "without invalidating the orders"). This makes perfect sense, as local rules such as this exist for the benefit of the trial court, not counsel. The question on appeal becomes whether the trial court's decision to enter the order in question was an abuse of discretion.

Here, we find that the court's acceptance and entry of the "disputed" order without counsel approval was reasonable. The court simply requested that counsel reduce an unambiguous docket entry to writing, and there is no evidence whatsoever that the journal entry entered does not accurately reflect the court's ruling. We hold that it was within the trial court's discretion to enter the May 21st journal entry without Long's counsel's signature.[2]

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Rule 2.1(D) is clear that opposing counsel has only ten days to approve or dispute the proposed journal entry, and "in the event of a dispute" the parties should file a motion to settle. The rule is not specific, however, as to what should happen if opposing counsel simply ignores the proposed order. For purposes of appeal, however, we will presume that the city's counsel violated the rule by submitting the unapproved order to the trial court.

[2] Long also argues that he did not timely amend his petition because of some form of unavoidable casualty. Long's counsel states that the failure to amend was due to an "office mix up." We have no further information as to how this mix up was "unavoidable," *i.e.*, "an event which human prudence, foresight and sagacity could not prevent." *Tedford v. Divine*, 1987 OK 18, ¶ 6, 734 P.2d 283, 285. As such, we find no error in denial of the petition to vacate on this basis.

*Dismissal of the Petition*

Next, we will address whether the court erred in dismissing Long's petition. Long's sole cause of action was for breach of contract. He argued that the city violated the "implied covenant of good faith and fair dealing," by "arbitrarily changing the terms of the parties' agreement" in refusing to accept Long's inspector's report. In its motion to dismiss the city argued, among other things, that the petition was an improper "collateral attack" that should have been appealed to the city's Board of Appeals, and that the trial court was, therefore, without jurisdiction to hear the dispute. For the following reasons, we agree.

The city's "collateral attack" argument here is more aptly described as failure to exhaust administrative remedies. Under this view, Long was required, before filing in district court, to appeal the denial of his requested permit to the city's Board of Appeals. Only from the board's denial of Long's request could he then seek relief from the district court.[3] The procedure is mandatory. *Osage Nation v. Bd. of Commissioners of Osage Cnty.*, 2017 OK 34, ¶ 10, 394 P.3d 1224, 1230–31 ("[T]he statutory requirements for perfecting an appeal from a municipal board of adjustment are mandatory.").

Contrary to Long's arguments, any agreement here was contained within and part of the administrative process, not outside of it. The "agreement"

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[3] The city's Board of Appeals derives from 11 O.S. § 44-101-110, which allows municipalities to establish boards of adjustment to determine, among other things, whether municipal officials err in enforcement of zoning ordinances. *See* 11 O.S.2011, § 44-104. The city's board of adjustment, the Board of Appeals, is governed by the city's ordinances Section 5-113. The board "has the duty and the power to hear and decide appeals of orders, decisions or determinations made by the Building Official." Section 5-113-1.

referenced by the parties is a paragraph contained in a notice that the city sent to Long, dated February 27, 2020. That notice, in part, reads:

> Mr. Long also stated that he could not allow Craig Higley [a city building inspector] back onto his property, but would hire (at his own cost) a third party inspector. This was agreed to so long as his inspector is licensed, qualified and in good standing with the CIB. This inspector will need to provide signed documentation on his own letterhead stating that each portion of this notice has been satisfied and how the repairs were made. NO OTHER METHOD WILL BE ACCEPTED. IRC 101.4, 104.11 & 104.11.1 states that the Building Official can accept alternative methods and also the option to reject these methods based on reliability.[4]

On the face of the residential code, which both parties agree is controlling in this case, the building official had the administrative power, pursuant to municipal ordinance and statute, to approve of an alternative inspector, and alternative methods of design and construction approved by that inspector, so long as that design was consistent with the IRC.

As both parties agree that the building official, in this case the city building inspector, had the administrative power to allow Long to use an independent, third-party inspector pursuant to statute and ordinance and to approve the inspector's report or methods, this matter remains administrative. Hence, Long was required to submit his objections to the rejection of his inspector's findings to the Board of Appeals prior to seeking relief in the district court. Long may

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[4] The IRC refers to the International Residential Code, which the parties agree is the uniform standard for inspections of this kind in Oklahoma. IRC rule 104 lists the duties and powers of the building official, in this case the building inspectors from the city with whom Long negotiated. IRC rule 104.4 gives the building official the power to make required inspections, and to accept reports of inspectors by approved agencies and or individuals. Further, IRC Rule 104.11 and Rule 104.11.1 give the building official the power to approve an alternative "material, design, or method ... upon application of the owner."

have plead sufficient facts to raise a claim that the city abused its discretion by refusing to accept his inspector's report, but that is not a question over which the trial court had initial jurisdiction. As such, the trial court was correct to dismiss Long's petition for lack of subject matter jurisdiction.[5]

*Rule 15 Recusal*

Long lastly argues on appeal that the trial judge should have recused from hearing the petition "due to the Plaintiff being a former client of the Judge." The trial judge, who had no recollection of any such representation, and who, upon review of his files determined that Long had consulted with the judge in 2013 but had never been billed, denied the request. Similar to his failure to follow the administrative process above, the record lacks any indication that Long followed *any* the steps outlined in Rule 15 of the Rules for District Courts of Oklahoma. As such, the issue was not preserved for appeal. *Ward v. Ward*, 1995 OK CIV APP 51, ¶ 7, 895 P.2d 749, 751; *Harmon v. Damet*, 2012 OK CIV APP 25, ¶ 23, 274 P.3d 810, 814.

**AFFIRMED.**

FISCHER, C.J. (sitting by designation), concurs and WISEMAN, P.J., concurs in result.

August 31, 2022

[5] Because we agree that the trial court lacked subject matter jurisdiction, we have no reason to address the city's other arguments for dismissal.