

IN THE CHANCERY COURT FOR LOUDON COUNTY, TENNESSEE

LANDMARK AMERICA II, INC. )  
through its servicing agent )  
LMS SERVICES, INC. )

Plaintiff, )

v. )

Case No: 11045

CITY OF LENOIR CITY; LENOIR CITY )  
BOARD OF HOUSING APPEALS; and )  
DEANN BOGUS, in her capacity )  
as Codes Enforcement Officer, )

Defendants. )

FILED 25 DAY OF April 2007  
AT 11:30 A M  
Fred Chaney  
LOUDON CO. CLERK & MASTER  
CB

FIRST AMENDED COMPLAINT

Comes now the Plaintiff, Landmark America II, Inc., ("Landmark"), by and through counsel Husch & Eppenberger, LLC, pursuant to Rule 15.01 of the *Tenn.R.Civ.Pro* and for its First Amended Complaint against the Defendants would show unto the Court as follows:

Parties

1. Landmark is a corporation organized under the laws of the State of Ohio. It maintains its principal place of business at 1268 North River Road, Suite 1, Warren, Ohio 44483.

2. LMS Services, Inc. ("LMS") is a corporation organized under the laws of the State of Ohio. It is registered as a foreign corporation with the Tennessee Secretary of State's Office and maintains its principal place of business at 1268 North River Road, Suite 1, Warren, Ohio 44483. LMS is engaged in the business of servicing mortgages and has been vested with the right, title, and authority to act on behalf of Landmark with

respect to this matter. (Landmark and LMS shall collectively be referred to herein as Landmark.)

3. The City of Lenoir City (the "City") is an incorporated municipality and may be served through the City Attorney's office located at 200 Depot Street, P.O. Box 449, Lenoir City, Tennessee 37771-0449 c/o Shannon M. Littleton.

4. The Board of Housing Appeals of Lenoir City (the "Board") is a governmental or quasi-governmental entity and may be served through Daryl Malin, its officer or managing agent, at 407 W. 4th Avenue, Lenoir City, Tennessee 37771-2327.

5. DeAnn Bogus serves as the Codes Enforcement Officer for the City of Lenoir City (the "Officer") and may be served at 600 E. Broadway, P.O. Box 445, Lenoir City, Tennessee 37771-0445.

6. The subject of this action is an order issued by the Officer and upheld by the Board of Housing Appeals of Lenoir City (the "Board") regarding certain real property located at 302 and 304 A Street in Lenoir City, within Loudon County, Tennessee (the "Property").

#### **Jurisdiction and Venue**

7. This Court has subject matter jurisdiction over this action pursuant to Tennessee Code Annotated § 16-11-102.

8. Venue is proper in this Court pursuant to Tennessee Code Annotated § 16-11-102.

#### **Facts**

9. David W. Irwin, now deceased, was, in and around March, 2004, the owner of the Property.

10. On or about March 25, 2004, AmSouth Bank (“AmSouth”) made a loan to David W. Irwin as evidenced by a Note executed by the deceased and secured by an interest in the Property as evidenced by that Deed of Trust recorded in Book 719, Page 592, in the Register’s Office of Loudon County, Tennessee, a copy of which is attached hereto as Exhibit A.

11. Upon information and belief, the Officer, by order (the “Order”) “condemned” the Property in August, 2005, requiring that it be demolished, purportedly under Title 13, Chapter 2 of the Lenoir City Code of Ordinances (the “Code”).

12. Under the Code, the Officer is required to “issue and cause to be served upon the owner of . . . such structure a complaint stating the charges in that respect and containing a notice that a hearing will be held before the public officer . . . at a place therein fixed.” Code §§ 13-204. A complaint is to be “served upon persons, either personally or by registered mail,” unless “the whereabouts of such person is unknown and the same cannot be ascertained with reasonable diligence, and the public officer shall make an affidavit to that effect.” Code § 13-211. In that case, service may be by publication. Id.

13. The “owner” of a structure is defined to include every mortgagee of record. Code § 13-202(5). The owner of a structure has the right to file an answer to the complaint and the right to appear and testify at the hearing. Code § 13-204.

14. AmSouth, a mortgagee of record, was not served with any complaint as relates to the Property as required by the Code. AmSouth was therefore unable to ascertain whether the complaint satisfied the requirements of the Code. Further, AmSouth was deprived of its right to answer the complaint, appear at the hearing, offer

testimony, contest the position or positions of the Officer and the same violated the rights of AmSouth by depriving it of notice and due process.

15. In addition to the filing and serving of a compliant, the Officer must conduct a hearing. Code § 13-204. If the Officer makes a decision adverse to the Property, the Officer must state, in writing, the findings of fact supporting the decision. Code § 13-205. A demolition order is only permissible if necessary repairs will exceed fifty percent (50%) of the value of the premises. Code § 13-205(2). The Officer must serve the order on the owner in the same manner as required for the Complaint. Code §§ 13-205, -211.

16. AmSouth, a mortgagee of record, was not served with any notice of hearing, the Order, nor any written findings of fact supporting the Order, as required by the Code. Again, AmSouth's rights were violated by depriving it of notice and due process.

17. Further, Code §13-211 states that any complaint or order shall be filed for record in the Register's Office of Loudon County, Tennessee. As of April 11, 2007, as evidenced by a title report conducted on the Property, no complaint or order with respect to the Property has been filed with the Register's Office.

18. Upon information and belief, an appeal from the Order was taken by the Estate of David W. Irwin, and such appeal was heard by the Board of Housing Appeals for the City of Lenoir City on December 27, 2005.

19. At the December 27, 2005 hearing, the Board affirmed the Order as is evidenced by the January 24, 2006 order, a copy of which is attached hereto as Exhibit B.

The January 24, 2006 order does not appear to set forth the findings that necessary repairs to the Property would exceed fifty percent (50%) of the value of the Property.

20. The Lenoir City Code of Ordinances allows any person aggrieved by a decision of the Board to seek relief in any court of competent jurisdiction as provided by state law. Code § 12-502(6).

21. On or about September 20, 2006, Landmark purchased AmSouth's interest in the Note and the Deed of Trust on the Property and is, therefore, AmSouth's successor in interest as to its interest in the Property.

22. On or about October 28, 2006, the Estate of David W. Erwin deeded the Property to AmSouth in lieu of foreclosure in accordance with Probate Judge Russell's order dated October 24, 2006. AmSouth has assigned all of its rights in the Property to Landmark.

23. AmSouth and Landmark have both attempted to persuade the City to allow one of several prospective purchasers to purchase the Property and make the necessary repairs to the structure to bring the Property "up to Code." While AmSouth and Landmark have repeatedly indicated that it is their position that the Order was obtained in violation of the procedural requirements of the Code and is not valid as against the Property, they have requested the City to "suspend" the Order for a reasonable amount of time to allow a prospective purchaser to make such necessary repairs. Such requests have been made as the Order, whether valid or not, constitutes a real cloud on the title to the property and poses potential purchasers with an unwanted encumbrance thereon.

24. Because the City failed to agree to suspend the Order to allow prospective purchasers to purchase and repair the Property, and because the City indicated its own interest in purchasing the Property, including making a contingent offer of sale on December 6, 2006, Landmark has not consummated a sale to any other prospective purchaser and has lost prospective purchasers.

25. As a result of discussions between counsel for the City and Landmark and steps being taken to file suit against the City to restrain the City from taking any further action as relates to the Property and the Order, on November 15, 2006, Shannon Littleton, counsel for the City sent a letter to counsel for Landmark stating that no further action would be taken by the City with respect to the Property without notification being given to Landmark. A copy of that correspondence is attached hereto as Exhibit B.

26. In addition, the City's repeated insinuations as well as direct statements concerning the City's interest in purchasing the property, led Landmark to believe that the City would in fact purchase the Property, and has therefore induced Landmark not to pursue legal remedies against the City prior to this point in time.

27. Upon information and belief, on or about March 12, 2007 the City trespassed upon the Property and caused the buildings on the Property to be demolished.

28. The City failed to give Landmark and prior notice of the City's intent to demolish the structures in direct contravention of the assurances given on November 15, 2006. See Exhibit B.

**LENOIR CITY CODE OF ORDINANCES TITLE 13, CHAPTER 2**

29. Pursuant to Tennessee Rule of Civil Procedure 10.04, the Plaintiff realleges and incorporates the factual and jurisdictional allegations set forth in Paragraphs 1 through 26 as if set forth verbatim.

30. The Order issued by the Officer, and affirmed by the Board, is invalid and unenforceable for failure of the Defendants to comply with the procedural requirements of the Lenoir City Code of Ordinances. Specifically:

(a) The Officer failed to issue and serve on the owner (which includes all mortgagees of record at that time) a complaint specifically stating the charges against the structure and providing notice of the date and place of hearing on the charges.

(b) The Officer failed to conduct a hearing at which the finding was made and recorded in writing that the necessary repairs to the structure would exceed fifty percent (50%) of the value of the premises, and at which the mortgagee of record was able to appear and testify.

(c) The Officer failed to serve the Order on the owner.

(d) The Board failed to make the necessary finding that the necessary repairs to the structure would exceed fifty percent (50%) of the value of the premises.

31. As a result of the Officer's and Board's failure to comply with the Code, the Order is invalid and unenforceable.

32. As a direct and proximate result of the City's reliance on the invalid and unenforceable order, Landmark has suffered damage, including loss of the Property and the buildings located on the Property, to which it is entitled to seek relief.

33. The City's reliance on Order was either negligent or intentionally wanton, reckless, oppressive or accompanied by outrage or other aggravating circumstances so as to allow for an award of punitive damages.

**COUNT II**  
**DECLARATORY JUDGMENT**

34. Pursuant to Tennessee Rule of Civil Procedure 10.04, the Plaintiff realleges and incorporates the factual and jurisdictional allegations set forth in Paragraphs 1 through 31 as if set forth verbatim.

35. Landmark requests that the Court determine and declare that the Order is invalid and unenforceable as a result of the procedural deficiencies, and that the Defendants are estopped from enforcing the Order.

36. By granting the declaratory relief sought by Landmark, this Court will clarify an ongoing dispute as to the parties' rights, obligations, and liabilities to each other.

37. Landmark has incurred costs and reasonable and necessary attorneys' fees in seeking this declaratory judgment.

**COUNT III**  
**ESTOPPEL/DETRIMENTAL RELIANCE**

38. Pursuant to Tennessee Rule of Civil Procedure 10.04, the Plaintiff realleges and incorporates the factual and jurisdictional allegations set forth in Paragraphs 1 through 35 as if set forth verbatim.



39. The Defendants' acts and statements misled Landmark.

40. Landmark was entitled in good faith to rely on the acts and statements of the Defendants.

41. The City agreed not to take any action with respect to the Property, including, but not limited to, demolition of the Property without prior notification to Landmark.

42. As a result, Landmark changed its position in reliance on the Defendants' acts and statements, to the detriment of Landmark.

43. The City did in-fact demolish the Property without prior notification to Landmark.

44. As a result of Landmark's reliance on the statements and agreements of the City and the City's subsequent demolition of the Property, Landmark has incurred substantial damages to which it is entitled to seek relief.

**COUNT IV**  
**TRESPASS**

45. Pursuant to Tennessee Rule of Civil Procedure 10.04, the Plaintiff realleges and incorporates the factual and jurisdictional allegations set forth in Paragraphs 1 through 42 as if set forth verbatim.

46. The City, through its demolition of the Property under the authority of the Order, which was wrongfully obtained, has made an unlawful entry upon the Property, which constitutes a trespass.

47. As a proximate and direct result of the City's trespass upon the Property, Landmark has suffered damages to which it is entitled to seek relief.

48. The City's trespass upon the Property was wanton, reckless, oppressive or accompanied by outrage or other aggravating circumstances so as to allow for an award of punitive damages.

**COUNT V**  
**CONVERSION**

49. Pursuant to Tennessee Rule of Civil Procedure 10.04, the Plaintiff realleges and incorporates the factual and jurisdictional allegations set forth in Paragraphs 1 through 46 as if set forth verbatim.

50. The City, through its demolition of the Property under the authority of the Order, which was wrongfully obtained, has made an unlawful conversion of the Property.

51. As a proximate and direct result of the City's conversion of the Property, Landmark has suffered damages to which it is entitled to seek relief.

52. The City's conversion of the Property was wanton, reckless, oppressive or accompanied by outrage or other aggravating circumstances so as to allow for an award of punitive damages.

**COUNT VI**  
**INTENTIONAL INTERFERENCE WITH PROSPECTIVE**  
**BUSINESS RELATIONSHIPS**

53. Pursuant to Tennessee Rule of Civil Procedure 10.04, the Plaintiff realleges and incorporates the factual and jurisdictional allegations set forth in Paragraphs 1 through 51 as if set forth verbatim.

54. The City, through its intentional acts, including but not limited to the wrongful entry of the Order and the subsequent demolition of the Property under the authority of the Order, has caused Landmark not be able to sell the Property or enter into any agreement with any third party for the rehabilitation of the Property.

55. Further, the City's intentional acts have caused certain potential purchasers of the Property to withdraw bids for the Property or not to make offers for sale.

56. The City at all times relevant hereto were aware that Landmark was negotiating with potential third party purchasers of the Property.

57. The City, through its reliance upon the Order, utilized improper means to facilitate the demolition of the Property, which thereby has resulted in Landmark's failure to procure a purchaser of the Property and has caused the interference with Landmark's prospective business relationships.

58. As a direct and proximate result of the City's intended acts, Landmark has suffered damages to which it is entitled to seek relief.

59. The City's intentional interference with Landmark's prospective business relationships was wanton, reckless, oppressive or accompanied by outrage or other aggravating circumstances so as to allow for an award of punitive damages.

**COUNT VII**  
**INVERSE CONDEMNATION**

60. Pursuant to Tennessee Rule of Civil Procedure 10.04, the Plaintiff realleges and incorporates the factual and jurisdictional allegations set forth in Paragraphs 1 through 57 as if set forth verbatim.

61. The City's actions, including but not limited to the demolishing of the Property, constitute an unlawful taking of the property of Landmark.

62. As a result of the City's unlawful taking of the property of Landmark, Landmark is entitled to seek damages for such taking in accordance with T.C.A. §29-16-101 *et. seq.*

## RELIEF REQUESTED

WHEREFORE, Landmark respectfully prays for the following:

(a) That a Temporary Restraining Order be issued restraining the Defendants from demolishing the Property or otherwise enforcing the Order in any way, and that a hearing be held within fifteen days regarding the entry of a Temporary Injunction to the same effect.

(b) That proper process be issued and served upon the Defendants requiring them to appear or otherwise answer in the time and manner prescribed by applicable law.

(c) That a hearing be held in this matter.

(d) That the Court declare that the Defendants have failed to comply with the Lenoir City Code of Ordinances, Title 13, Chapter 2 and therefore that the Order is invalid and unenforceable and that the Court specifically set aside the Order.

(e) In the alternative, that the Court declare that the Defendants are estopped from enforcing the Order.

(f) That Landmark be awarded a judgment of compensatory damages in an amount of not less than the value of the damage caused to the Property as a result of the wrongful actions of the Defendants in its enforcement of the Order, plus any and all other reasonable damages to which the Plaintiff may be entitled under applicable law.

(g) That Landmark be awarded a judgment of compensatory damages in an amount of not less than the value of the damage caused to the Property as a result of the wrongful trespass of the Defendants upon the Property, plus any and all other reasonable damages to which the Plaintiff may be entitled under applicable law.

(h) That Landmark be awarded a judgment of compensatory damages in an amount of not less than the value of the damage caused to the Property as a result of the wrongful conversion of the Property by the Defendants, plus any and all other reasonable damages to which the Plaintiff may be entitled under applicable law.

(i) That Landmark be awarded a judgment of compensatory damages in an amount of not less than the value of the business opportunity or expectancy that was lost as a result of the Defendants tortuous and improper interference with Landmark's business advantage through its wrongful actions with respect to the Property, plus any and all other reasonable damages to which the Plaintiff may be entitled under applicable law.

(j) That Landmark be awarded a judgment of compensatory damages in an amount of not less than the value of the Property as a result of the inverse condemnation of the Property through the wrongful actions of the Defendants in its enforcement of the Order and other actions with respect to the Property, plus any and all other reasonable damages to which the Plaintiff may be entitled under applicable law, including attorneys fees.

(k) That Landmark be granted a judgment of punitive damages in an amount of not less than the compensatory damages awarded in this cause for the wanton, reckless and oppressive actions of the Defendants with respect to the Property and Landmarks rights therein.

(l) That all costs incurred as a result of the filing of this action, including reasonable attorney's fees, be charged against the Defendants.

(m) For such other relief, general or specific as the Court deems appropriate.

Respectfully submitted,

HUSCH & EPPENBERGER, L.L.C.

By: 

C. Ballard Scarce, Jr. (BPR No. 01  
736 Georgia Avenue, Suite 300  
Chattanooga, Tennessee 37402  
(423) 266-5500 - telephone  
(423) 266-5499 - facsimile

*Attorneys for Landmark America II,*