

COMMON PLEAS COURT  
MARION COUNTY, OHIO

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IN THE COURT OF COMMON PLEAS OF MARION COUNTY, OHIO

JULIE M. KAYE  
CLERK OF COURTS  
GENERAL DIVISION

STATE OF OHIO, *ex rel.*, : Case No. 13-CV-0453  
Plaintiff, :  
-vs- : JUDGE JIM SLAGLE  
333 JOSEPH, LLC, et al., :  
Defendants. : **JUDGMENT ENTRY  
(RULING ON SUMMARY  
JUDGMENT MOTION)**

This matter comes before the Court on the Motion for Partial Summary Judgment filed on August 8, 2014 by Defendants Stanley Rosenfeld, 333 Joseph, LLC, and Robert Cendol. For the reasons set forth herein, the Court hereby denies said motion.

**Summary Judgment Standard**

Pursuant to Civ. R. 56, summary judgment is appropriate when: (1) there is no genuine issue of any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the non-moving party, said party being entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64.

Summary judgment should be granted with caution, resolving all doubts in

favor of the nonmoving party. *Perez v. Scripps-Howard Broadcasting Co.* (1988), 35 Ohio St.3d 215, 218, 520 N.E.2d 198. The purpose of summary judgment is not to try issues of fact, but is rather to determine whether triable issues of fact exist. *Iams v. Daimler Chrysler Corp.* (3<sup>rd</sup> Dist. 2007), 174 Ohio App.3d 537, at ¶11.

### **Factual Background**

Defendants' Motion for Partial Summary Judgment seeks a dismissal of Count 8 of Plaintiff's Complaint and also vacation of the preliminary injunction previously issued herein. Count 8 of Plaintiff's Complaint seeks injunctive relief and civil penalties pursuant to R.C. 3704.06(B) based on the Defendants' failure to comply with the Final Findings and Orders issued by the Director of the Ohio Environmental Protection Agency on October 31, 2012. Among other things, that order required the Defendants remove all regulated asbestos-containing materials from the 333 Joseph Street property no later than December 31, 2012.

Defendants' Motion asserts that the EPA Director had no statutory administrative authority to issue that October 31, 2012 order without first conducting an administrative proceeding and issuing a proposed action. Defendants further assert that they were not afforded the procedural protections of this administrative proceeding; thus, their due process rights were violated.

### Evidence on Summary Judgment

The Defendants have presented no evidence in support of their Motion for Partial Summary Judgment. The only portion of the record that Defendants pointed to is Plaintiff's Ex. 6, which is a copy of the Director's Final Findings and Orders issued on October 31, 2012, and which was introduced into evidence at the hearing on the Motion for Preliminary Injunction. The Motion for Partial Summary Judgment makes a number of assertions that there was no proposed action issued by the Director, no administrative hearing, and no opportunity for Defendants to have a hearing. These assertions cannot be determined from the evidence in the record.

The Ohio Supreme Court held in *Dresher v. Burt* (1996), 75 Ohio St.3d 280:

A party seeking summary judgment, on the ground that the non-moving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and indentifying those portions of the record that demonstrate the absence of the genuine issue of material fact on the essential element(s) of the non-moving parties' claims. \*\*\* [T]he moving party must be able to specifically point to some evidence of the type listed in Civ. R. 56(C) which affirmatively demonstrates that the non-moving party has no evidence to support the non-moving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied.

Id. at 293

Simply pointing to Plaintiff's Ex. 6 does not satisfy the Defendants' burden.

The Court cannot determine from reviewing Plaintiff's Ex. 6 what process was followed before the Final Findings and Orders were issued and what notifications

were provided to Defendants. Since the Defendants have failed to meet their initial burden, the Motion for Partial Summary Judgment must be denied without any requirement for a response by the Plaintiff.

### Plaintiff's Surreply

The Court is in receipt of Plaintiff's Surreply which was filed on Sept. 10, 2014 and Defendants' Response to the Surreply filed on Sept. 17, 2014, and hereby grants leave to both parties to make said filings. In Plaintiff's Surreply, Plaintiff expresses an intention to dismiss Count 8 of its complaint because the cover letter sent to the Defendants with the Director's Orders did not include standard language regarding the right to appeal. This cover letter is not part of the record. Further, Plaintiff has not taken any action to dismiss Count 8.

Therefore, neither the possible future dismissal of Count 8 nor the apparently defective cover letter, are currently before the Court. The Court expresses no view as to legal significance of the lack of appeal language and how that affects the validity of the Director's Orders. However, generally any defects in the Director's Order, or the procedure to obtain the order could only be challenged through appeal to the Environmental Review Appeals Commission.

R.C. 3745.04(B) provides:

Any person who was a party to a proceeding before the director of environmental protection may participate in an appeal to the

environmental review appeals commission for an order vacating or modifying the action of the director or a local board of health, or ordering the director or board of health to perform an act. The environment review appeals commission has exclusive original jurisdiction over any matter that may, under this section, be brought before it.

The Ohio Supreme Court has affirmed the exclusive jurisdiction of the appeal process set forth in R.C. 3745.06. *State, ex rel. Williams v. Bozarth* (1978) 55 Ohio St.2d 34. In that case, the Supreme Court held that the Common Pleas Court had no jurisdiction to hear an action for declaratory relief brought by a party who wished to challenge an order issued by the Director of Environmental Protection Agency.

In the instant case, if the Defendants objected to the Director's Final Findings and Orders, their remedy was to pursue an appeal pursuant to R.C. 3745.04(B). If there was a defect in notifying the Defendants of their appeal rights, perhaps this provides grounds for a delayed appeal. However, that is an issue for the Environmental Review Appeals Commission to determine.

R.C. 3704.05(G) prohibits any person from violating any order, rule, or determination of the EPA Director. R.C. 3704.06(B) authorizes the Attorney General to bring an action for injunctive relief and/or civil penalties for any person violating R.C. 3704.05. The parties have not presented this Court with any authority that would permit the Defendants to collaterally attack the procedural basis for the issuance of the EPA Director's Final Findings and Orders in this action.

If the Plaintiff dismisses Count 8, then this entire issue will be moot. If the Defendant does not dismiss Count 8, the Defendant could still file an additional motion for summary judgment by October 17, 2014 in accordance with the Second Revised Trial Preparation Order filed on Aug. 18, 2014. The cover letter and any other necessary documents could be made part of the record and the parties could brief whether the failure to provide the appeal notice is a defense in this action.

#### **Effect on Preliminary Injunction**

The sole basis for the preliminary judgment was the Defendants' violation of the orders of the EPA Director as pled in Count 8. Thus, if Count 8 is dismissed, then there is no basis for the preliminary injunction. The Court is aware that Plaintiff's Complaint alleges other grounds for injunctive relief. The Court has not expressed any determination as to whether the Plaintiff will prevail on these other grounds at trial. However, at the hearing on the motion for preliminary injunction, the State presented insufficient evidence to obtain injunctive relief on grounds other than those alleged in Count 8.

If Count 8 is dismissed either voluntarily by Plaintiff or following a dispositive motion, Defendants will still need to establish that this Court has jurisdiction to vacate the preliminary injunction, since that order is currently on appeal. The authority cited by Defendants in their response to Plaintiff's surreply is not

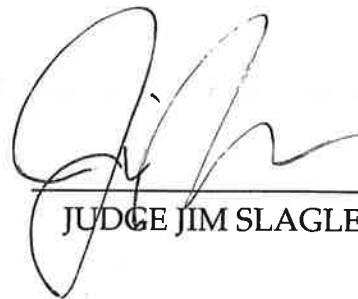
necessarily conclusive on this issue.

The Ohio Supreme Court has consistently held that once an appeal is perfected, "the trial court is divested of jurisdiction over matters that are inconsistent with the reviewing court's jurisdiction to reverse, modify, or affirm the judgment". *State, ex rel. Electronic Classroom of Tomorrow v. Cuyahoga Cty. Court of Common Pleas* (2011), 129 Ohio St.3d 30 at ¶13. The Supreme Court has also held that the filing of a notice of appeal from an order does not divest the Court of jurisdiction to enforce an interlocutory order pending appeal unless the party is granted a stay of execution of the order. *State, ex rel. State Fire Marshall v. Curl* (2000), 87 Ohio St.3d 568 at 570.

#### Conclusion

For all of these reasons, Defendants' Motion for Partial Summary Judgment is denied.

It is so ORDERED.



JUDGE JIM SLAGLE

cc: Clint White, Attorney for Plaintiff  
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