

IN THE COURT OF APPEALS OF OHIO  
THIRD APPELLATE DISTRICT  
MARION COUNTY

FILED  
COURT OF APPEALS

FEB 14 2014

MARION COUNTY OHIO  
JULIE M. KAGEL, CLERK

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STATE OF OHIO EX REL.,  
MICHAEL DEWINE,  
OHIO ATTORNEY GENERAL,

CASE NO. 9-13-71

PLAINTIFF-APPELLEE,

v.

333, JOSEPH, LLC, ET AL.,

DEFENDANTS-APPELLANTS,

And

J U D G M E N T  
E N T R Y

ROBERT CENDOL, ET AL.,

DEFENDANTS-APPELLEES.

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This cause comes on for determination of Appellee's motion to dismiss the appeal for lack of a final order and Appellants' brief in opposition to the motion to dismiss; and Appellants' motion for stay of execution pending appeal and Appellee's brief in opposition to the motion to stay.

The instant action commenced with Plaintiff-Appellee's complaint for injunctive relief, nuisance, civil penalties, and motion for preliminary injunction, based on allegations that Appellants violated multiple provisions of Ohio's asbestos demolition laws, regulations, and orders from the Ohio EPA. The violations were related to Appellants' demolition activities at a former commercial

manufacturing site. Appellants' filed an answer denying liability on all counts, cross-claims, and a third party defense under CERCLA.

The judgment on appeal granted the motion of Appellee for preliminary injunction for Appellants' failure to comply with orders issued by the EPA Director. As a result, the preliminary injunction ordered Appellants to begin the process of removing asbestos-containing materials from the property; insure the materials are disposed of in a properly licensed landfill; ensure that public access to the property is precluded through the use of temporary fencing; ensure the clean-up and removal activities are conducted in full compliance with applicable asbestos regulations and laws; and complete the removal of all regulated asbestos containing materials from the property no later than March 1, 2014. Thereafter, Appellants filed the instant appeal.

The question presented is whether the trial court's judgment is a "final order" subject to immediate appeal. R.C. 2505.02(B)(4), the only applicable provision in this instance, requires that three prongs be met for finding the judgment to be a "final order." The first two prongs are not at issue, as the parties agree that a preliminary injunction is a provisional remedy [R.C. 2505.02(B)(4)] and that the grant of same in effect determines the action and prevents a judgment in Appellants favor on the preliminary injunction action [R.C. 2505.02(B)(4)(a)]. The third and contested prong is whether Appellants are afforded a meaningful or

effective remedy by an appeal following final judgment as to all issues, claims and parties [R.C. 2505.02(B)(4)(b)].

Upon consideration of same, the Court finds that Appellants are not afforded a meaningful or effective remedy by an appeal following determination of the entire action and, thus, the trial court's judgment is a "final order" subject to immediate appeal. The judgment in this case goes significantly beyond the traditional notion of preliminarily enjoining the actions of a party to preserve the status quo pending determination of the request for permanent injunction. Rather, in this instance, the breadth of the orders included in the preliminary injunction essentially leave resolution of the claim for permanent injunction as a perfunctory act, leaving only Appellee's claim for civil penalties and Appellants' claims against third parties. It is obviously impossible to un-demolish the structure. Thus, the "status quo" by necessity is the character of the property at this point, not after execution of the preliminary injunction in Appellee's favor with appellate review years later.

*Obringer v. Wheeling & Lake Erie RR. Co.*, 3<sup>rd</sup> Dist.No. 3-09-08, 2010-Ohio-601, upon which Appellee relies, also supports finding the instant judgment subject to immediate appeal. In *Obringer*, the preliminary injunction entered by the trial court was found not to be a "final order" under R.C. 2505.02(B)(4)(b). The preliminary injunction required the removal of a concrete barrier for the purpose of allowing ingress and egress along a crossing that existed for

approximately 120 years. The Court found that the party could be required to comply with the preliminary injunction, remove the barrier and still be afforded an effective and meaningful remedy following resolution of all claims, as the barrier could be returned with compensation for same calculated as damages. Such alternative and later remedy does not exist in the instant case, as removal of the asbestos-containing waste material is permanent.



In sum, we find no meaningful or effective remedy available to Appellants if they are precluded from seeking review of the trial court's comprehensive preliminary injunction until after all claims in the action are resolved.

The Court further finds that Appellants' motion to stay execution of the preliminary injunction to be not well taken, as the proceedings before the trial court to determine the appropriate amount of supersedeas bond have not concluded. The trial court granted Appellants' motion to stay upon condition that a supersedeas bond be filed, and required Appellants to file a cost estimate, along with satisfactory evidence, of the cost of compliance. Additionally, if the cost estimate was in dispute, the trial court gave indication that a hearing may be conducted to determine the appropriate amount of the supersedeas bond.

Accordingly, the motion to dismiss and the motion to stay execution are not well taken.

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It is therefore **ORDERED** that Appellee's motion to dismiss the appeal and Appellant's motion to stay execution be, and the same hereby are, denied.

  
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JUDGES

DATED: FEBRUARY 14, 2014  
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