

IN THE COURT OF APPEALS OF OHIO  
FOURTH APPELLATE DISTRICT  
GALLIA COUNTY

State of Ohio, ex rel  
Anthony J. Celebrezze, Jr.,  
Attorney General of Ohio,

Plaintiff-Appellant,

No. 88 CA 20

vs.

Board of ~~County Commissioners~~  
of Gallia County, Ohio,

DECISION & JUDGMENT ENTRY

Defendant-Appellee

COUNSEL FOR APPELLANT: Anthony J. Celebrezze, Jr., Attorney General; Karen S. Cleveland and Retanio Aj Rucker, Assistants, 30 East Broad Street, Columbus, Ohio 43266-0410

COUNSEL FOR APPELLEE: Brent A. Saunders, Prosecuting Attorney; C. Jeffrey Adkins, Assistant, Gallia County Courthouse, Gallipolis, Ohio 45631

GREY, J.:

This is an appeal from the Gallia County Common Pleas Court. We reverse.

The facts in this case are quite simple. The Ohio EPA brought this action against the Gallia County Commissioners alleging that the Meadowbrook wastewater treatment plant operated by them was not in compliance with the regulations, specifically claiming that it was discharging waste in excess of what was permitted. The commissioners filed a motion to dismiss to which was attached an affidavit of the Gallia County Engineer stating that the plant was in compliance.

Appellee never filed an answer, and the trial court never formally converted the motion to dismiss into a motion for summary judgment, but it did set the case down for a hearing on the motion. Appellant filed a memorandum contra, and attached affi-

davits from EPA employees averring that the plant was not in compliance. At the close of the hearing, the trial court ruled as follows:

"Now since the basic thrust of that chapter is to secure compliance, the Court believes that the State has secured compliance and that their only purpose in being here is to try to harass the County into paying some penalty. The Court's going to dismiss this case as moot."

From a judgment entry based on that ruling, the EPA appeals, designating two assignments of error which shall be treated jointly.

"I. The Gallia County Court of Common Pleas erred in granting Gallia County's motion in dismissing the state's complaint because a genuine issue of material fact existed which precluded summary judgment.

"II The Gallia County Court of Common Pleas erred in dismissing the state's complaint as moot because Chapter 6111 of the Revised Code authorizes the Attorney General to sue for past violations even in the absence of violations."

We find both assignments of error to be well taken. While it is difficult to tell whether the trial court treated this matter as a Civil Rule 12 motion to dismiss or a Civil Rule 56 motion for summary judgment, it is clear that neither one was proper.

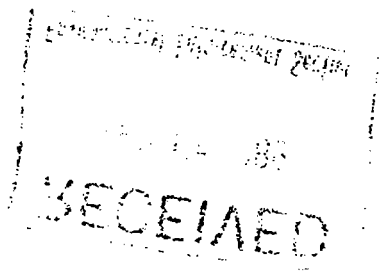
In deciding a Civil Rule 12 motion to dismiss, a trial court does not look at the facts at all, but merely looks at the pleadings and the allegations, assumes them to be true, and then decides whether the plaintiff can prove any set of facts which would entitle him to relief. Steffen v. Telephone Co. (1978), 60 Ohio App. 2d 144. Here, the EPA would be entitled to relief, if they could prove the plant was not in compliance, so a Civil Rule

12 motion to dismiss was improper.

A court may grant a party summary judgment when there is no genuine issue of law or fact, but in this case there is both an issue of law and an issue of fact. The issue of fact is whether or not the plant was in compliance, and this is clearly contested by the absolutely contradictory affidavits of the engineer and the EPA employees. Reasonable minds could reach different conclusions on this issue, so summary judgment was improper. Williams v. Church (1974), 37 Ohio St. 2d 150. There is also the issue of law as to whether the EPA can order a permit holder to bring a plant into compliance, and then when the plant is brought into compliance, seek penalties for the past deficiencies which have now been corrected.

We would note, parenthetically, as the trial court noted, that it seems particularly unfair for the EPA to assert that certain procedures or equipment are not adequate, insist that they be replaced, and then once they have been replaced and the permit holder no longer has any proof of their adequacy, to assess damages for violations which cannot be disproved. However, the inequity of this should be decided with the merits of the case and not on a motion to dismiss or for summary judgment.

Assignments of error one and two are well taken. The judgment of the trial court is reversed, and this case is remanded to the trial court for further proceedings.



It is ordered that (~~appellant~~~~appellee~~) recover of (~~appellant~~~~appellee~~) its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

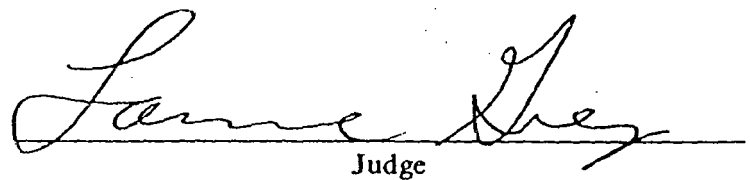
It is ordered that a special mandate issue out of this Court directing the Gallia County Common Pleas Court to carry this judgment into execution.

Any Stay previously granted by this Court is hereby terminated as of the date of filing of this Entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Abele, P.J. & Stephenson, J. Concur  
In Judgment and Opinion

JUDGMENT REVERSED

  
Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 9, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.