COURT OF APPEALS

ELEVENTH DISTRICT

LAKE COUNTY, OHIO

J U D G E S
HON. DONALD R. FORD, P.J.
HON. ROBERT E. COOK, J.
HON. JUDITH A. CHRISTLEY, J.

STATE OF OHIO, ex rel.
ANTHONY J. CELEBREZZE, JR.
ATTORNEY GENERAL OF OHIO,

Plaintiff-Appellee

- vs -

ROBERT E. GIBBS, et al.,

Defendants-Appellants

CASE NO. 12-178

O P I N I O N

CHARACTER OF PROCEEDINGS: Civil Appeal from Lake County Common Pleas Court
Case No. 85 CIV 0815

JUDGMENT: Affirmed with exception that that portion of the judgment entry appointing a receiver for the collection of rents is modified.

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FORD, P.J.,

On July 2, 1985, in the Lake County Court of Common Pleas, the State of Ohio, through the Attorney General, filed a complaint for injunctive relief and civil penalties against appellants Robert E. Gibbs and Gibbs Industrials, Inc. The complaint alleged that since 1979, appellant Gibbs, as operator of the Gibbs Industrial Park, discharged sewage into tributaries of the Grand River without a permit, in violation of R.C. 6111.04, .07 and .44. The complaint also alleged that the discharged sewage created a public nuisance.

On September 10, 1985, both the appellants and appellee State of Ohio filed a joint motion for preliminary injunctive relief. Approved by the court, this order enjoined appellants from allowing any discharge of sewage off the premises. Gibbs agreed to seal and cap various septic tanks and to supply the Ohio E.P.A., within thirty days, with a plan for a sewer tie-in with the City of Painesville's present sewer system. The plan was to include service agreements with the local governmental officials. Upon approval, the sewer tie-in was to be constructed within forty-five days.

Appellee filed a contempt action on October 1, 1985, because appellants were allegedly shipping the sewage to an offsite disposal location. By an agreed entry of October 3, 1985, Gibbs was given twenty-four hours to seal and cap the

septic tanks and to begin on-site storage of sewage. He was to drain all sewage and industrial waste from the unauthorized locations and he agreed to ship the sewage to sites approved by the Ohio E.P.A. The entry of October 3, 1985 stated that the park was to be closed if that entry was not complied with by October 7, 1985. On October 24, 1985, the trial court granted Gibbs a twenty-one day extension of time within which to file plans with the Ohio E.P.A. for a sanitary sewer and pump station.

Appellee filed a second action for contempt against appellants on November 12, 1985, for the failure to comply with the court orders of September 10, October 3 and October 24, 1985. Gibbs was found in contempt of each of the three court orders on November 29, 1985. He was sentenced to six days in jail and fined $20,000. The fine was suspended on the condition that he begin shipping sewage and other wastes to an E.P.A.-approved site by an E.P.A.-approved shipper and that, by December 9, he submit to the E.P.A. all documentation as set forth in the court's order of September 10, 1985.

On August 6, 1986, the appellee filed a third contempt action in the Lake County Court of Common Pleas along with a motion to remove the suspension of the $20,000 fine. Another contempt action was filed by appellee on August 25, 1986, for appellants' failure to respond to discovery.

On September 17, 1986, by stipulation and agreement of both parties, the court rendered judgment in favor of appellee and against appellants in the sum of $200,000 with the understanding that an additional $200,000 was to be imposed if any installment payment was not timely made. Appellants were ordered to bring the industrial park into compliance with all state and local regulations within ninety days and if such was not done, appellant Gibbs would be immediately ordered to serve thirty days in jail and to pay $100,000 for the failure to comply with the court order of September 17, 1986. The court gave appellants six options which the court would consider as being in compliance of the regulations. The court also permanently enjoined appellants from causing or allowing the sewage or any other waste from the industrial park to enter any adjoining, adjacent or abutting property. Appellants were also permanently enjoined from the open burning of any materials.

During the ninety day period within which Gibbs was to bring the park into compliance, Gibbs gave all tenants who were not in the "dry storage" business a thirty day notice of termination of their oral leases. While the tenants had until December 1, 1986 to vacate, appellant Gibbs still had to serve several tenants with three day eviction notices and filed fifteen forcible entry and detainer actions against them in the Painesville Municipal Court.

On December 17, 1986, the Ohio E.P.A. and the Lake County Health Department visited the park and discovered the presence of portable toilets as well as the "dry storage" operations.

The appellee, on January 23, 1987, filed an application for imposition of jail sentence and penalty. Appellee claimed that appellants had violated the judgment entry by not bringing the industrial park into compliance within the alotted time. After a hearing was held, appellants filed a brief in opposition to appellee's application for imposition of the jail sentence and penalty.

In the brief, appellant Gibbs requested that if the court were to overrule the state's application for imposition of jail and penalty, the court should, if necessary, appoint a trustee to oversee and enforce the removal of any and all remaining non-complying business from the park.

On April 3, 1987, the court found Gibbs in contempt of its judgment entry of September 17, 1986. The court imposed the stipulated jail sentence; enjoined any activity at the park which would require water use; appointed a special receiver to implement, on behalf of the court, the order of September 17, 1986 as well as the present order; and rendered judgment against appellants in the amount of $500,000 plus ten percent interest from September 17, 1986. This $500,000 represented $200,000 as a civil penalty agreed to by the

parties in the September 17 order, $200,000 for failing to make timely installment payments, and $100,000 as a contempt penalty for failure to bring the park into compliance. Appellant filed a notice of appeal on April 6 and on April 10, this court stayed the imposition of the jail sentence and the $500,000 judgment.

On April 20, 1987, appellee filed with this court a motion for modification of our April 10 order. Appellee claimed that $400,000 of the $500,000 penalty imposed against appellants in the April 3 judgment entry was not at issue. The appellee's application to the trial court for imposition of the September 17, 1986 order asked for imposition of the $100,000 penalty and thirty day jail sentence only, due to appellants' failure to comply with the September 17 order of the court. The judgment entry of April 3 states that the $400,000 is not at issue. Additionally, appellants have never appealed the September 17 order. Appellee's motion for modification was granted by this court on June 5, 1987. Thus, the issues properly before this court concern the determination by the trial court that appellant Gibbs was in contempt of its September 17, 1986 order and the propriety of appointing a receiver.

Appellants raise two assignments of error in this appeal:

> *1. The trial court erred in granting appellee's application and finding appellant in contempt of the consent judgment of September 8 [sic] , 1986.*
>
> *2. The trial court erred in appointing a receiver for the Industrial Park as said appointment was not within the court's jurisdiction based upon the status of the pleadings.*

Appellants' initial assignment of error is that the trial court erred in finding them in contempt of the order of September 17, 1986. Appellants argue that they substantially complied with the court order and this substantial compliance was a complete defense to a finding of contempt. They also raise the doctrine of waiver and estoppel.

Appellants state that they approached appellee and indicated that they would ask the trial court for permission to name the holdover tenants as party defendants and lock the non-complying tenants out of the industrial park. According to appellants, the appellee's response was to "decline to either proceed in that manner or have Appellant proceed in that manner." Appellants also state that the appellee "declined to take other actions" to see to it that the park was brought into compliance. Furthermore, appellants argue that the actions of the appellee created a waiver and estoppel which should now prohibit the appellee from complaining about the non-compliance of the industrial park since appellee was aware of the method by which the appellants attempted to

comply with the court order but refused to participate in the process of bringing the park into compliance.

The doctrine of waiver and estoppel is wholly inapplicable here. The Office of the Attorney General simply has no duty under law to assist appellants in the task of complying with the trial court's order. The Attorney General is not a co-defendant here, it is the plaintiff. It is axiomatic that the party against whom a judgment has been rendered has the burden of complying with the terms of the pertinent judgment, whether that involves the payment of a fine, or the doing or forbearance from doing of a certain act. Appellee's refusal to take part in the means by which appellants chose to bring the park into compliance with the court order was entirely proper. It was the appellants, and the appellants alone, who had the responsibility to comply with the court order.

Turning now to appellants' contention that they substantially complied with the court order, appellants argue that they had done everything within their power to effectuate the removal of the non-complying tenants. Appellants also seem to raise as a defense the fact that the eviction actions pending in the Painesville Municipal Court could not have been completed by the end of the ninety day period following the court order.

The party raising the defense of substantial compliance must take all reasonable steps to comply with the court order and commit only technical or inadvertent violations of that order. General Signal v. Donallco (1986), 787 F.2d 1376, 1379. Substantiality depends on the circumstances of each case, including the nature of the interest involved and the degree to which non-compliance affects that interest. Fortin v. Commissioner of Massachusetts Dept. of Public Welfare (1982), 692 F.2d 790, 795.

At the expiration of the ninety day period here, about one-third of the park's tenants were unlawfully operating. About five portable toilets were still at the park in violation of the order. Although it very well may have been Gibbs' intention to comply with the order, the fact remains that appellants did not substantially comply with the order since the park was still being used in derogation of the court's order. Thus, the assignment is without merit.

Appellants maintain in their second assignment of error that the appointment of a receiver was erroneous because the appointment was beyond the trial court's subject matter jurisdiction.

R.C. 2735.01 states that a court of common pleas or a judge thereof in his county may appoint a receiver, inter alia, after judgment, to carry the judgment into effect. The appointment of a receiver is statutory in Ohio and one can be

appointed a receiver only where the statutes authorize it. 80 Ohio Jurisprudence 3d (1988) 334-335, Receivers, Section 8. Additionally, R.C. 2735.01 is a procedural statute and should be liberally construed. Stark County Agricultural Society v. Walker (1929), 34 Ohio App. 558. Consent of the party for whom the receivership is sought will, of course, not confer jurisdiction on the court where a proper case for the appointment of a receiver has not been made, but, if the appointment of a receiver is proper, consent to the appointment will not deprive the court of judgment or warrant the denial of the appointment. 80 Ohio Jurisprudence 3d (1988) 380-381, Receivers, Section 59.

After the hearing for the imposition of jail sentence and penalty, appellants filed a brief in opposition to the appellee's application for imposition of jail sentence and penalty which concluded as follows:

> "For the foregoing reasons, and based upon the evidence adduced at hearing, the defendant would respectfully request this Honorable Court to overrule the State's application, and, in the alternative, if necessary, to appoint a Trustee to oversee and enforce the removal of any and all remaining non-complying businesses from the Industrial Park."

Here, we have the situation where the appellants' counsel requested the trial court to appoint a trustee to remove all non-complying businesses from the park. The

functions of a state receiver would be substantially similar to that of a court appointed trustee under the circumstances involved here. Appellants contend that the appointment was defective because the case was not one of the enumerated cases of R.C. 2735.01 to which an appointment could be made. This assertion obviously ignores R.C. 2735.01(C), which authorizes the appointment of a receiver after a judgment, to carry it into effect. Nevertheless, the above quoted language of appellants' brief in opposition to the appellee's application for imposition of jail sentence and penalty is not tantamount to an actual consent to a receiver. Appellants stipulated to various penalties, not the appointment of a receiver.

Appellants also argue that even if the appointment was proper, the court went beyond its authority by authorizing the receiver to collect rents from both complying and non-complying business. We agree. The exercise in collecting rents is completely unrelated to the issues of whether the court order of September 17, 1986, has been violated. The receiver's function was to collect rents from both complying and non-complying tenants. Under the circumstances, sufficient justification for the appointment of a receiver for this purpose did not exist here. While appellants' second assignment of error is well taken, the order of the trial court on this point is not a sufficient basis for reversal.

However, this court is of the opinion that that portion of the trial court's judgment should be modified.

For the foregoing reasons, the decision of the trial court is affirmed with the exception that that portion of the judgment entry appointing a receiver for the collection of rents is modified to permit the appointment of a trustee or receiver by the trial court to pursue the removal of all non-complying tenants from the park without any involvement in the rental process.

Donald R. Ford

DONALD R. FORD, PRESIDING JUDGE

COOK, J.,

CHRISTLEY, J., concur.

STATE OF OHIO)
)SS.
COUNTY OF LAKE)

IN THE COURT OF APPEALS

ELEVENTH DISTRICT

STATE OF OHIO, ex rel.
ANTHONY J. CELEBREZZE, JR.,
ATTORNEY GENERAL OF OHIO,

CASE NO. 12-178

- vs -

JUDGMENT ENTRY

ROBERT E. GIBBS, et al.,

Defendants-Appellants

For the reasons stated in the opinion of this court, the judgment of the trial court is affirmed with the exception that that portion of the judgment entry appointing a receiver for the collection of rents is modified.

Donald R. Ford

DONALD R. FORD, PRESIDING JUDGE