

FILED
COURT OF COMMON PLEAS
2012 FEB 16 A 9 17
CLERK OF COURTS
WILLIAMS COUNTY OHIO

IN THE COURT OF COMMON PLEAS OF WILLIAMS COUNTY, OHIO

State of Ohio, ex rel. Ohio Attorney General,

Case No. 11 CI 179

Plaintiff,

vs.

Springfield Dairy Leasing, LLC

DECISION AND JUDGMENT
ENTRY

Defendant.

This matter came on for hearing on the 15th day of November, 2011 on the Plaintiff's Motion for Default Judgment filed on October 11, 2011 to determine the civil penalties to be imposed against the Defendant. Present in Court representing the Plaintiff were attorney Aaron S. Farmer and L. Scott Helkowski, both assistants to Michael DeWine, the Ohio Attorney General.

BACKGROUND

A Complaint for Injunctive Relief and Civil Penalty was filed on behalf of the State of Ohio on August 31, 2011 against the Defendant, Springfield Dairy Leasing, LLC. Service was appropriately made on the Defendant pursuant to Ohio Rules of Civil Procedure 4, 4.1 and 4.2 by serving the statutory agent, Thomas A. Gibson. Notwithstanding proper service on the named Defendant, the Defendant failed to answer the allegations or to plead or otherwise defend the allegations of Plaintiff's Complaint. On October 25, 2011, this Court issued the following

ORDER:

JOURNAL 566 PAGE 710
JOURNALIZED DATE 2-17-12

1. Springfield Dairy Leasing, LLC is permanently enjoined to comply with Ohio Revised Code Chapter 903, the rules promulgated thereunder and any permits issued pursuant to those laws and rules.
2. Springfield Dairy Leasing, LLC, pursuant to Ohio Revised Code Section 903.16, shall pay civil penalties for each day of each violation set forth in the Complaint in an amount to be determined at the further hearing held on November 15, 2011.
3. Springfield Dairy Leasing, LLC shall pay all costs and fees for this action, including enforcement costs and attorney's fees incurred by the Ohio Attorney General's Office in an amount to be determined at the November 15, 2011 hearing.

Prior to the hearing on November 15, 2011, the State of Ohio filed its brief in support of its request for civil penalties.

DISCUSSION

On November 15, 2011 a hearing was held on Plaintiff's request for civil penalties.

Sworn testimony was taken, exhibits were reviewed, marked and admitted as evidence and arguments of counsel were heard.

After reviewing all evidence presented the Court makes the following findings:

1. On or about May 25, 2006 the Defendant's predecessor in interest (Springfield Dairy, LLC) owned and operated the dairy cow operation housing fewer than 700 dairy cows at 17495 County Road C, Bryan, Ohio.
2. Both Springfield Dairy, LLC (hereinafter referred to as "Springfield Dairy") and the Defendant are required to operate their dairy farms consistent with the provisions of Ohio Revised Code Chapter 903 and all the rules promulgated thereunder, including the Ohio Department of Agriculture's Livestock Environmental Permitting Program ("LEPP")
3. On May 25, 2006, Springfield Dairy, LLC was issued certain permits by the director of LEPP to expand its dairy cow operation capacity to confine a maximum of 2000 dairy cows.
4. From May 25, 2006 to October 2, 2009 Springfield Dairy, LLC was listed on the referenced permits as the "owner/operator" of the dairy farm (located at 17495 County Road C, Bryan, Ohio) as that term is defined by Ohio Administrative Code §901:10-1-01.

5. Defendant acquired the Bryan, Ohio dairy farm property and operation from Springfield Dairy, LLC on September 1, 2006 and owned the operation and facility until August 6, 2010.
6. Springfield Dairy Leasing, LLC (hereinafter referred to as "Defendant") failed to notify the Ohio Department of Agriculture (hereinafter referred to as "ODA") that it had assumed all of the responsibilities for the dairy operation of its predecessor in title, Springfield Dairy LLC which was operating the dairy farm at 17495 County Road C, in Bryan, Ohio.
7. As the new owner of the dairy operation after the transfer of ownership, Defendant failed to secure, transfer or maintain the necessary permits for the ~~operation and/or installation of the facility.~~
8. Defendant's conduct resulted in several violations of Ohio's "concentrated animal feeding facility" laws as set forth in Ohio Revised Code Chapter 903 and all the rules promulgated thereunder.
9. The Defendant violated Ohio Administrative Code Section 901:10-1-08 by failing to notify ODA of the transfer of ownership. Specifically, the Defendant was obligated to notify the director of ODA that it would assume the responsibilities of the Springfield Dairy, LLC. Defendant failed to comply with this requirement.
10. Defendant also violated Ohio Revised Code §903.02 by constructing a concentrated animal feeding facility without a permit to install. After the property and facility was transferred by Springfield Dairy, LLC to the Defendant on September 1, 2006, Defendant maintained ownership of the Bryan, Ohio property facility and operation until on or about August 6, 2010. It was not until October 24, 2007, when Defendant secured approval of all construction and obtained the approval to stock the facility with 700 or more dairy cows.
11. The Defendant, as the successor owner of the original Springfield Dairy property and facility, continued the installation of a "concentrated animal feeding facility" without ODA approval which was secured on October 24, 2007. More than 700 ~~dairy cows were stocked at the Bryan, Ohio facility and the number of cows~~ continued to increase to well beyond the 700 dairy cow limit without prior approval from the Plaintiff. Additionally, construction continued at the Bryan, Ohio site without the Defendant obtaining an appropriate permit from the director of the ODA as required by law.
12. Defendant's conduct constitutes a violation of Ohio Revised Code §903.02 for which the Defendant is subject to injunctive relief and is liable to pay to the State of Ohio mandatory civil penalties pursuant to Ohio Revised Code §903.16.
13. Notwithstanding multiple notices from the Plaintiff of non-compliance during these time periods, Defendant continued in its failures to comply with the requirements of Ohio Revised Code Chapter 903 and all laws and regulations promulgated thereunder. Defendant's continued conduct and disregard of the warnings given by the State of Ohio showed "recalcitrance, defiance or indifference" to the environmental regulations of the State of Ohio which

governed Defendant's conduct in the operation of their dairy farm in Bryan, Ohio. Their ongoing violations even after notice had been given to them must be considered when imposing appropriate civil penalties as required by law.

14. As a result of the Defendant's ongoing violations of its obligations under Ohio Revised Code Chapter 903 and all rules and obligation promulgated thereunder, the Court finds that the Defendant also received an ongoing economic benefit as defined under the statute during the time period in which Defendant was in violation. The Plaintiff incurred extra costs, expenses and legal fees in enforcing the rules governing Defendant's operation of the dairy farm in question.

ANALYSIS

In determining the civil penalties to be imposed, a review of O.R.C. §903.01 at seq. does not provide specific guidance to the Court on how to set an appropriate civil penalty apart from referencing that the maximum penalty for each violation is \$10,000 per day. Other Ohio courts have determined that guidance for an appropriate penalty can be determined by referencing the Environmental Protection Agency Civil Penalty Policy ("Penalty Policy"), which was used by the trial court in the case *State of Ohio ex rel. Brown v. Dayton Malleable* (1982), 1 Ohio St. 3d 151, 438 NE 2d 120. The court stated that the EPA Penalty Policy is acceptable to use as a reference for choosing a penalty amount but it is not binding upon the court.

Although a trial court may look at a penalty policy as a way to insure it fashions a ~~reasonable civil penalty, a trial court has broad discretion to impose appropriate penalties~~ anywhere up to the \$10,000 per day for each of Defendant's violations. A trial court has the discretion to determine the exact amount of penalty to insure that it will be significant enough to affect the violator and deter future violations. *State ex rel. Montgomery v. Mamaginn* (2002), 147 Ohio App. 3d 420. The court, in making the determination of the appropriate civil penalty, should consider evidence relating to the defendant's recalcitrance, defiance or indifference to the law; the financial gain that accrued to defendant; the environmental harm or risk of harm that resulted; and the extraordinary costs incurred in enforcement of the law. *State of Ohio ex rel.*

Ohio Attorney General v. LG Development Corporation, 187 Ohio App. 3d 211 (April 9, 2010).

In addition, this Court has considered the civil penalty guidelines and the penalty matrix set forth in Ohio Administrative Code 901:10-5-04 *et. seq.*, in evaluating potential civil penalties for Defendant's conduct. The Court has also considered the evidence presented by the ODA regarding the following factors:

1. ~~Whether the ODA anticipates a cost to redress the harm or risk of harm to the public health or the environment,~~
2. Whether the Defendant enjoyed an economic benefit during the time period in which it was in violation,
3. What civil penalty is appropriate and should be imposed for the Defendant's degree of recalcitrance, defiance or indifference to the requirements of the law, and
4. What sum is appropriate for the ODA to recover any unusual or extraordinary enforcement costs.

In the present case, the Defendant was cited for two separate violations. The first violation occurred when the Defendant, for a period of 271 days, failed to notify the ODA that the Defendant had acquired the dairy farm operation at 17495 County Road C, Bryan, Ohio from Springfield Dairy, LLC on September 1, 2006. No steps were taken from September 1, 2006 to either notify the ODA of the transfer or to obtain the transfer of the existing licenses for the operation. ~~The Defendant's failure to notify and/or transfer the applicable permits constitutes a~~ violation of O.R.C. §903.01 *et seq.* (and the rules promulgated thereunder) and therefore a civil penalty against the Defendant is mandatory.

The second violation of the Defendant occurred after it had notified the ODA of its acquisition of the dairy farm at the Bryan, Ohio location. The Defendant operated the dairy farm and housed in excess of 700 cows which exceeded the allowable levels, notwithstanding numerous warnings from the Plaintiff. Once the Defendant had satisfactorily completed the expansion of the dairy cow operation and facility consistent with the permits issued by the

Livestock Environmental Permitting Program ("LEPP"), final approval for the facility was granted and approval for the housing of up to 2000 head of cattle was given to Defendant by the ODA on October 24, 2007. As a consequence, the Defendant remained in violation on this issue for a total of an additional 96 days.

(a) Violation 1 – Failure to Notify ODA and
failure to request transfer of permit

Based upon the evidence presented, Springfield Dairy Leasing, LLC acquired the real estate and chattels from Springfield Dairy, LLC on September 1, 2006. Defendant began operating or managing the farm on that date and was obligated to notify the Ohio Department of Agriculture (ODA) of the transfer within thirty (30) days prior to taking possession (or August 2, 2006) as required by Ohio Administrative Rule 901:10-1-08 *et. seq.* Defendant finally notified ODA on May 30, 2007. According to the evidence presented by the Plaintiff, the total number of days elapsing between the date Defendant should have notified the ODA and the date ODA was actually notified was 271 days.

Ohio Administrative Rule 901:10-5-04 *et. seq.* was adopted to provide guidance to the courts, the public and the ODA to determine appropriate civil penalties to be imposed for violations. The Court too has considered the "penalty matrix" contained in Ohio Administrative Rule 901:10-5-04. The Court has considered the "magnitude of the violation" and the "gravity of effect" of Defendant's failure to timely notify the ODA of its purchase of the real estate and chattels of Springfield Dairy, LLC. The Court finds that based upon the evidence presented a per diem penalty of Two Hundred Dollars is appropriate and therefore a civil penalty against Defendant should be imposed for this violation totaling \$54,200.

(b) Violation 2 – Construction and operation of CAFF
(concentrated animal feeding facility) without ODA approval and licensing

Once the ODA was made aware of the transfer of the real estate and chattels of Springfield Dairy, LLC's Bryan, Ohio dairy operation to defendant (on May 30, 2007), the ODA on numerous occasions notified Defendant of the steps it needed to take at the facility before Defendant could begin stocking over six hundred ninety-nine (699) dairy cows. Correspondence and copies of inspection forms were sent to Defendant by ODA on June 5, 2007, August 8, 2007, August 19, 2007, September 27, 2007 and on October 24, 2007. It was not until October 24th, 2007, that the ODA gave final approval to Defendant to begin to stock cattle to the permitted levels (above 699 head of cattle).

The ODA presented evidence of the ongoing violations of ORC § 903 *et. seq.* by Defendant continuing until October 24, 2007. Based upon a review of State's Exhibits 3 through 10, the Defendant was notified of all procedures with which it needed to comply. Further, in those letters, the ODA alerted Defendant that it was in violation of the permits for operation and would remain in violation until certain specific steps toward final compliance were taken by Defendant. Lastly, the ODA also notified Defendant that it had more cattle on the premises than it was allowed under its then existing permits. The ODA specifically instructed Defendant to remove the excess cattle from the premises until such time as Defendant was in "complete and approved" compliance by the ODA.

Specifically, Defendant was notified on the June 11, 2007 inspection there were one thousand fifty-seven (1,057) head of cattle on the permitted premises. On August 8, 2007, the Defendant had nine hundred twenty (920) head of cattle on the permitted premises. On

September 12, 2007, the Defendant was housing one thousand eighty-eight (1,088) head of cattle when they were only approved during those time periods for six hundred ninety-nine (699) head of cattle or less. The ODA cautioned the Defendant on each of those occasions that "you must remove the extra cows from the facility until approval is granted." Housing more than 699 head of cattle in a facility not yet equipped and approved for those numbers created a risk of environmental harm.

As a result, Defendant was in an ongoing and knowing violation of the requirements of ORC §903.01 *et. seq.* until the ODA gave Defendant final approval to house additional cows which approval was granted on October 24, 2007. Therefore, according to the evidence presented by the ODA, the Defendant was in violation for an additional 96 days.

The Court has considered all the factors listed in Ohio Administrative Rule 901:10-5-4, the "magnitude of the violation" and "the gravity of effect." The Court has also considered the facts listed above in arriving at an appropriate mandatory civil penalty to assess against the Defendant for its ongoing and knowing violations. After reviewing the "magnitude of the violation" and the "gravity of effect" of Defendant's continued construction and operation of the CAFF without ODA approval (and at levels exceeding permitted cattle housed) for a period of 96 days, the Court finds that a per diem penalty of five hundred dollars (\$500) per day is appropriate and therefore a civil penalty of \$48,000 should be imposed.

The Court could also consider any "mitigating factors" of the Defendant to potentially reduce the civil penalty to be imposed. However, because this Defendant has failed to appear, defend or file an answer, no potential mitigating factors were presented at hearing.

Lastly, the Plaintiff presented evidence of its enforcement costs (including attorney's fees) incurred in pursuing Defendant for its violations. The Court finds that the Plaintiff has incurred

\$1000.00 in additional enforcement costs and \$1625 in attorneys fees which were reasonable and necessary. The sum of those figures should also be assessed against Defendant as part of its overall civil penalty for its violations of the law.

JUDGMENT

Based upon the foregoing findings, it is therefore the **DECISION, JUDGMENT, ORDER and DECREE** of this Court that the Defendant has committed violations of Ohio Revised Code Chapter 903, Ohio Administrative Code Chapter 901:10, and various permits and orders issued pursuant thereto. As a result, Defendant, Springfield Dairy Leasing, LLC is hereby permanently enjoined and **ORDERED** to immediately comply with the requirements of Ohio Revised Code Chapter 903 and the rules adopted under those laws. Further, Defendant shall comply with the terms and conditions of any and all permits issued to it by the director of the Ohio Department of Agriculture. It is further the **JUDGMENT, ORDER and DECREE** of this Court as follows:

1. Defendant, Springfield Dairy Leasing, LLC is hereby **ORDERED** to pay the State of Ohio the total of \$102,200 as a mandatory civil penalty as a result of Defendant's conduct. The total civil penalty was arrived at consistent with the rules adopted pursuant to Chapter 903 of the Ohio Revised Code, Ohio case law and Ohio Administrative Code 901:10-5-04 *et. seq.*
2. In addition to the civil penalties ordered against the Defendant in paragraph 1 above, Springfield Dairy Leasing, LLC shall pay the enforcement costs (including attorney's fees) of the Ohio Attorney General's Office in the total amount of \$2625.
3. This Court shall retain jurisdiction of this action for purpose of enforcing and administering the Defendant's compliance with this order.
4. Defendant, Springfield Dairy Leasing, LLC is hereby assessed all Court costs of this action.

5. Pursuant to Ohio Civil Rule 58, upon approval of this entry by the Court, the Clerk is directed to serve upon the parties notice of the judgment and its date of entry upon the journal in the manner prescribed by Rule 5(B) of the Ohio Rules of Civil Procedure and note the service in the appearance docket.

IT IS SO ORDERED.



J.T. Stelzer, Judge