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LUCAS COUNTY

2015 MAY 26 P 3:40

COMMON PLEAS COURT
BERNIE QUILTER
~~IN THE COURT OF~~ COMMON PLEAS, LUCAS COUNTY, OHIO

Brooke T. Smith,

*

Case No.: CI 13-2920

Plaintiff,

*

Honorable Gene A. Zmuda

vs.

*

OPINION AND JUDGMENT ENTRY

Ohio Department of Job and Family
Services, et al.,

*

*

Defendants.

*

This matter comes before this Court on Defendants-Appellees Ohio Department of Job and Family Services ("ODJFS") and Michael B. Colbert, Director of Ohio Department of Job and Family Services' ("Director") (collectively referred to as "defendants ODJFS") Motion to Dismiss First Amended Notice of Appeal and Complaint and Defendants-Appellees Lucas County Department of Job and Family Services and Deb Ortiz-Florez, Director of Lucas County Department of Job and Family Services' (collectively referred to as "LCDJFS") Motion to Dismiss First Amended Notice of Appeal and Complaint.

Pro-se Plaintiff Brooke T. Smith ("plaintiff") filed a response to defendants ODJFS' motion to dismiss and a response ro LCDJFS's motion to dismiss. Defendants ODJFS filed a reply brief in support. LCDJFS failed to file a reply brief in support. These matters have been fully briefed and are now decisional.

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A brief summary of the proceedings in this matter are as follows.

This action is based on the Ohio Department of Job and Family Services' alleged intentional miscalculation of food assistance benefits to the plaintiff. Plaintiff filed this action both as an appeal arising under R.C. 119.12 and 5105.35(E) and as an original action for declaratory relief, injunctive relief and equitable restitution based on defendants' failure to comply with and implement their own hearing decision.¹ (Plaintiff's Complaint, ¶1).

Plaintiff is an individual and a resident of Lucas County, Ohio. (Plaintiff's Complaint, ¶2). Defendant ODJFS is an agency of the State of Ohio. (Plaintiff's Complaint, ¶3). Defendant Director is being sued in his official capacity with ODJFS. (Plaintiff's Complaint, ¶4). Defendant LCDJFS is a county agency designated to manage Ohio's food assistance program. (Plaintiff's Complaint, ¶5). Defendant Deb Ortiz-Flores, Director of the LCDJFS ("LCDJFS Director") is also being sued in her official capacity with LCDJFS. (Plaintiff's Complaint, ¶6).

Plaintiff suffers from serious and chronic medical problems and receives Social Security Disability benefits and food assistance. (Plaintiff's Complaint, ¶¶11 and 12). The ODJFS administers Ohio's food assistance program and contracts with LCDJFS to administer the program in Lucas County, Ohio. (Plaintiff's Complaint, ¶13). By regulation, when a recipient is disabled, her medical bills are deducted from her income to determine food assistance eligibility. (Plaintiff's Complaint, ¶14). Plaintiff submitted seven months of her medical bills from 2012 to comply with ODJFS' yearly re-certification process in July 2012. (Plaintiff's Complaint, ¶15). After defendants' communicated

¹As alleged in plaintiff's Complaint, this action is an administrative appeal and enforcement of the decision rendered by the administrative agency. Plaintiff's original action for declaratory relief, injunctive relief, and equitable restitution all arise out of her administrative appeal which shall be discussed later in this Opinion and Judgment Entry.

to plaintiff a preliminary 2012-2013 award that was adequate, LCDJFS' newly assigned caseworker applied a new and incorrect method of calculating plaintiff's food assistance award as part of the July 2012 re-certification. (Plaintiff's Complaint, ¶16). LCDJFS miscalculated plaintiff's deductible medical expenses by disregarding bills that were older than 30 days; treating non-reimbursable medical expenses as reimbursable medical expenses; failing to make any attempt to estimate or anticipate plaintiff's future medical expenses; failing to properly justify its decision to reduce the deductible medical expenses; treating certain charitable prescription cost assistance she received as reducing her costs instead of figuring the amount she must pay before seeking charity; and refusing to consider certain laxatives and nutritional supplements as medically necessary in contradiction to medical evidence provided. (Plaintiff's Complaint, ¶¶17, 18, and 19). LCDJFS also miscalculated plaintiff's food assistance award by reducing her award, without proper notice or hearing, to recover a previous overpayment based entirely on its own miscalculation. (Plaintiff's Complaint, ¶20).

On September 18, 2012, plaintiff requested an agency hearing to dispute the award miscalculation which was assigned Appeal No. 1834258. (Plaintiff's Complaint, ¶21; Certification of Record dated May 29, 2013, State Hearing Decision of October 16, 2012, p.1). On October 16, 2012, a State Hearing Decision was rendered which sustained plaintiff's appeal finding that the Agency shall contact plaintiff to go over the budget, and if needed, re-explore the food assistance calculation beginning with the date of the re-certification application. (Certification of Record dated May 29, 2013, State Hearing Decision of October 16, 2012, p.2). On December 10, 2012, plaintiff requested an administrative appeal of the state hearing decision rendered October 16, 2012, not to overturn the decision, but to compel agency compliance. (Plaintiff's Complaint, ¶23; Certification of Record dated May 29, 2013, Administrative Appeal Decision of December 18, 2012, p.1). Due

to the untimeliness of plaintiff's appeal, the Administrative Appeal Officer dismissed plaintiff's request on December 18, 2012. (Plaintiff's Complaint, ¶23; Certification of Record dated May 29, 2013, Administrative Appeal Decision of December 18, 2012, p.2).

Plaintiff filed another request for an agency hearing to compel compliance with the prior hearing decision on January 2, 2013 which was assigned Appeal No. 1872662. (Plaintiff's Complaint, ¶24; Certification of Record dated May 29, 2013, State Hearing Decision of January 30, 2013, p.1). On January 30, 2013, a State Hearing Decision was rendered which sustained plaintiff's appeal finding that the Agency shall review food assistance budgeting from August, 2012 to current, ensuring that plaintiff has received all allowable deductions in the computation of food assistance and shall issue any food assistance benefits owed to plaintiff, if applicable. (Plaintiff's Complaint, ¶24; Certification of Record dated May 29, 2013, State Hearing Decision of January 30, 2013, p.5-6). On April 18, 2013, plaintiff requested an administrative appeal of the State Hearing Decision rendered January 30, 2013 regarding the Hearing Officer's misstatement of the law and proper method of calculating anticipated medical expenses. (Plaintiff's Complaint, ¶¶24 and 25; Certification of Record dated May 29, 2013, Administrative Appeal Decision of April 22, 2013, p.1). Due to the untimeliness of plaintiff's appeal, the Administrative Appeal Officer again dismissed plaintiff's request on April 22, 2013. (Plaintiff's Complaint, ¶25; Certification of Record dated May 29, 2013, Administrative Appeal Decision of April 22, 2013, p.2).

On May 17, 2013, plaintiff commenced her administrative appeal with the filing of her Notice of Appeal and Complaint with the Lucas County Common Pleas Court. On June 24, 2013, plaintiff filed her First Amended Notice of Appeal and Complaint. Plaintiff alleges that defendants intentionally disregarded the binding decision and only re-calculated her food assistance award in

a minor and perfunctory manner. (Plaintiff's Complaint, ¶¶30, 37, and 42). As a result, plaintiff has asserted claims against defendants ODJFS, LCDJFS, and the LCDJFS Director for declaratory judgment, injunctive/mandamus relief, equitable restitution, and attorney's fees. (Plaintiff's Complaint, ¶¶33, 40, 45, and 65). Plaintiff has also asserted two claims against ODJFS for appeals from Agency decisions in Appeal Numbers 1834258 and 1872662 for being untimely filed. Instead of filing answers to Plaintiff's First Amended Notice of Appeal and Complaint, defendants have filed the within motions to dismiss.

I. Defendants ODJFS' Motion to Dismiss:

Defendants ODJFS ask this Court to dismiss this case for lack of jurisdiction, failure to exhaust administrative remedies, and/or failure to state a claim upon which relief may be granted. Defendants ODJFS argue that plaintiff's claims fail as she improperly attempts to litigate, in an original action, matters that are committed to special statutory proceedings; improperly attempts to combine an original action and two appeals which cannot be litigated in the same proceeding; failed to exhaust her administrative remedies by not timely requesting appropriate hearings or appeals at the agency level; failed to timely appeal one of her attempted appeals to this Court; and shows no basis for recovering attorney fees since she is a *pro-se* litigant.

Plaintiff argues that her three counts sounding in equity (i.e., declaratory judgment, injunctive/mandamus relief, and equitable restitution) are properly before this Court and she properly availed herself of all administrative remedies. Plaintiff contends that ODJFS cannot bring a motion to dismiss the two appeals as she is entitled to a hearing on the merits of her appeal under her procedural due process rights. Plaintiff also argues that bringing alternative claims for equitable relief and administrative appeals in the same action is proper and sanctioned by the Civil Rules and

case law. Finally, plaintiff asserts that Counts 4 and 5 (administrative appeals) are not precluded by a failure to timely request agency appeals as she sought appeals as soon as it was apparent the defendants would not comply with the result of the hearing decision and any delay should be excused because plaintiff can show good cause.

Defendants ODJFS seek dismissal of plaintiff's Complaint pursuant to Civ. R. 12(B)(1) and (6). Ohio Rules of Civil Procedure Rule 12(B) provides, in pertinent part, that "every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter; * * * (6) failure to state a claim upon which relief can be granted.." Civ. R. 12(B)(1) and (6).

The standard to apply for a dismissal pursuant to Civ.R. 12(B)(1), lack of jurisdiction over the subject matter, is whether the plaintiff has alleged any cause of action which the court has authority to decide. *McHenry v. Indus. Comm.* (1990), 68 Ohio App.3d 56, 62. However, in determining whether the plaintiff has alleged a cause of action sufficient to withstand a Civ.R. 12(B)(1) motion to dismiss, the trial court is not confined to the allegations of the complaint and it may consider material pertinent to such inquiry without converting the motion into one for summary judgment. *Southgate Dev. Corp. v. Columbia Gas Transm. Corp.* (1976), 48 Ohio St.2d 211, paragraph one of the syllabus. A court may dismiss a complaint for lack of jurisdiction over subject matter on the basis of (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Jenkins v. Eberhart* (1991), 71 Ohio App.3d 351, 355; citing *Williamson*

v. *Tucker* (C.A.5, 1981), 645 F.2d 404, 413.

The Supreme Court of Ohio has set forth the standard to be applied in determining whether a complaint has failed to state a claim upon which relief may be granted pursuant to Civ. R. 12(B)(6). The syllabus in *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, states:

“In order for a court to dismiss a complaint for failure to state a claim upon which relief can be granted ***, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery.”

Further, in construing the complaint, the court ““must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party.”” *York v. Ohio State Hwy. Patrol* (1991), 60 Ohio St.3d 143, 144, quoting *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192. “Nevertheless, even though the factual allegations of the complaint are taken as true, ‘unsupported conclusions of a complaint are not considered admitted * * * and are not sufficient to withstand a motion to dismiss.’ *State ex rel. Hickman v. Capots* (1989), 45 Ohio St. 3d 324.” *Avery v. City of Rossford* (2001), 145 Ohio App.3d 155, 164.

Defendants ODJFS also seek dismissal for plaintiff's failure to exhaust administrative remedies. “It is the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.” *Myers v. Bethlehem Shipbuilding Corp.* (1938), 303 U.S. 41, 50-51. “The doctrine of failure to exhaust administrative remedies is not a jurisdictional defect to a declaratory judgment action; it is an affirmative defense that may be waived if not timely asserted and maintained. (*Driscoll v. Austintown Assoc.* (1975), 42 Ohio St. 2d 263, 71 Ohio Op. 2d 247, 328 N.E.2d 395, clarified and

followed)." *Jones v. Village of Chagrin Falls*, 77 Ohio St. 3d 456, syllabus by the Court (Ohio 1997). "When, * * *, the affirmative defense of failure to exhaust administrative remedies is applicable and has been timely raised and maintained, a court will deny declaratory and injunctive relief. See, e.g., *Haught v. Dayton* (1973), 34 Ohio St. 2d 32, 35-36, 63 Ohio Op. 2d 49, 51, 295 N.E.2d 404, 406." *Clagg v. Baycliffs Corp.*, 82 Ohio St. 3d 277, 281 (Ohio 1998).

a. Plaintiff's Claims for Declaratory Judgment, Injunctive/Mandamus Relief, and Equitable Restitution:

In her claim for declaratory judgment, plaintiff alleges that defendants are bound by law to comply with and implement the decision of the hearing officer and defendants intentionally disregarded the hearing officer's decision and only recalculated plaintiff's food assistance award in a minor and perfunctory manner. (Plaintiff's First Amended Notice of Appeal and Complaint, ¶¶29 and 30). Plaintiff seeks declarations that: 1) she is entitled to a food assistance award properly calculated with an average of ongoing medical expenses deducted from her income; 2) defendants improperly calculated her food assistance; 3) defendants deprived her of benefits to which she is entitled; 4) defendants improperly disregarded, failed to comply with, and failed to implement the agency decision in violation of the law; and 5) defendants abdicated their responsibility to monitor, train, supervise, and take corrective action against their subagents and employees in allowing their employees to ignore an agency decision and improperly calculate benefits. (Plaintiff's First Amended Notice of Appeal and Complaint, ¶33).

For plaintiff's injunctive or mandamus relief claim, she alleges that her rights to have her food assistance properly calculated and to have the agencies bound to follow their own decisions are legally protected rights and judicially enforceable rights. (Plaintiff's First Amended Notice of Appeal

and Complaint, ¶35). Plaintiff alleges that defendants have abused their discretion by not complying with the state hearing decision and by not properly calculating and awarding food assistance to her and since she prevailed at the agency level and defendants have ignored their loss, the law does not provide other means for plaintiff to obtain relief and an equitable remedy is necessary and justified. (Plaintiff's First Amended Notice of Appeal and Complaint, ¶¶37 and 38). Plaintiff further alleges that the Court has the authority to compel defendants to comply with their own rulings, follow the law, and properly calculate her food assistance and thus seeks a writ of mandamus or an injunction compelling defendants to properly calculate her food assistance award. (Plaintiff's First Amended Notice of Appeal and Complaint, ¶¶39 and 40).

In her equitable restitution claim, plaintiff alleges that defendants miscalculated her food assistance award and ignored its own agency decision in violation of law. (Plaintiff's First Amended Notice of Appeal and Complaint, ¶42). Plaintiff alleges that defendants underpaid her food assistance and is holding the difference between the correct amount and the amount they paid and therefore, plaintiff seeks equitable restitution for this Court to order defendants to remit those funds that belong to plaintiff that they are improperly holding. (Plaintiff's First Amended Notice of Appeal and Complaint, ¶¶43-45).

Defendants ODJFS argue that plaintiff's claims for declaratory judgment, injunctive or mandamus relief, and equitable restitution should be dismissed for failure to exhaust administrative remedies. Plaintiff argues that her equity claims are properly before this Court and she properly availed herself of all administrative remedies.

"The failure to exhaust administrative remedies is an affirmative defense." *Mankins v. Paxton*, 142 Ohio App. 3d 1, 9 (Ohio Ct. App., Franklin County 2001). "Normally, affirmative

defenses require reference to materials outside of the complaint and, therefore, cannot be raised by means of a Civ.R. 12(B)(6) motion to dismiss." *Loyer v. Turner* (1998), 129 Ohio App. 3d 33, 35. However, "an exception exists where the existence of the affirmative defense is obvious from the face of the complaint." *Id.* See, also, *Esselburne v. Ohio Dept. of Agriculture* (1990), 64 Ohio App. 3d 578, 580.

In this case, all three of plaintiff's equity claims for declaratory judgment, injunctive or mandamus relief, and equitable restitution involve the same basic allegation that defendants miscalculated plaintiff's food assistance and ignored or disregarded its own agency decision. It needs to be noted here that plaintiff has also appealed, in this action, her two separate administrative decisions that were rendered by defendants ODJFS as to the miscalculation of her food assistance benefits and for agency compliance of previous decisions. Plaintiff's equity claims seek the same relief as her administrative appeals.

The Ohio Supreme Court in *State ex rel. Albright v. Court of Common Pleas*, 60 Ohio St. 3d 40 (Ohio 1991), found that "courts of appeals have uniformly held that actions for declaratory judgment and injunction are inappropriate where special statutory proceedings would be bypassed. *Dayton Street Transit Co. v. Dayton Power & Light Co.* (1937), 57 Ohio App. 299, 10 O.O. 500, 13 N.E. 2d 923; *State, ex rel. Iris Sales Co., v. Voinovich* (1975), 43 Ohio App. 2d 18, 72 O.O. 2d 162, 332 N.E. 2d 79; *Wagner v. Krouse* (1983), 7 Ohio App. 3d 378, 7 OBR 479, 455 N.E. 2d 717; *Beasley v. East Cleveland* (1984), 20 Ohio App. 3d 370, 20 OBR 475, 486 N.E. 2d 859; and *Arbor Health Care Co. v. Jackson* (1987), 39 Ohio App. 3d 183, 530 N.E. 2d 928." *Id.* at 42.² "Generally,

²In *Schomaeker v. First Natl. Bank* (1981), 66 Ohio St. 2d 304 and *Tootle v. Wood* (1974), 40 Ohio App. 2d 576, the courts indicated that an action for a declaratory judgment is improper where the plaintiff has failed to pursue remedies by way of administrative or judicial

the rule is that proceedings for declaratory relief will not be entertained where another equally serviceable remedy has been provided." *Swander Ditch Landowners' Ass'n v. Joint Bd. of Huron & Seneca County Comm'rs*, 51 Ohio St. 3d 131, 135 (Ohio 1990).

Plaintiff has asserted her two administrative appeals pursuant to R.C. 119.12 and R.C. 5101.35 which provide for a party adversely affect by or in disagreement with an order of a board to appeal to a court of common pleas. In this case, plaintiff has improperly attempted to bypass the special statutory procedures set forth by R.C. 119.12 and R.C. 5101.35 in filing her action for declaratory judgment, injunction or mandamus relief, and equitable restitution. Therefore, this Court finds that plaintiff has failed to exhaust all of her administrative remedies as is apparent from the face of plaintiff's Complaint. Thus, this Court finds Defendants ODJFS' Motion to Dismiss plaintiff's claims for declaratory relief, injunctive or mandamus relief, and equitable restitution well-taken and GRANTED.

b. Plaintiff's Claims for Appeal from Agency Decisions:

Plaintiff has asserted two administrative appeals from decisions by the ODJFS for Appeal #1834258 dated October 16, 2012 and for Appeal #1872662 dated January 30, 2013.

I. Administrative Appeal #1834258:

The Decision rendered by the State Hearing Officer on Appeal #1834258 on October 16, 2012 sustained with compliance plaintiff's appeal finding that "the Agency shall contact plaintiff to go over the budget and, if needed, re-explore the FA (food assistance) calculation beginning with the date of the recertification application and should verification be needed, plaintiff shall be advised in writing of the necessary information and granted a reasonable amount of time to provide such
_____ appellate review.

documents." (Appeal #1834258, Certification of Record, State Hearing Decision, p.2). On December 10, 2012, defendants ODJFS received a letter from plaintiff which they construed as a request for appeal of the October 16, 2012 decision. On December 18, 2012, defendants ODJFS dismissed plaintiff's appeal as untimely as it was in excess of 15 calendar days after the hearing decision was issued. Plaintiff filed her appeal to this Court of the ODJFS December 18, 2012 decision on May 17, 2013.

Defendants ODJFS argue that plaintiff's Appeal #1834258 should be dismissed for failure to state a valid claim, failure to exhaust administrative remedies by not timely requesting an appeal at the agency level, and for lack of jurisdiction as plaintiff did not file the appeal in this Court by the 30 day statutory appeal deadline.

Plaintiff argues that her administrative appeal is not precluded by a failure to timely request an agency appeal as the appeal was sought as soon as it was apparent that defendants would not comply with the result of the hearing decision and any delay in filing should be excused because plaintiff can show good cause for the delay.

Ohio Revised Code Section 5101.35 provides for appeals by applicants with the ODJFS. R.C. 5101.35(B) states that:

"Except as provided by divisions (G) and (H) of this section, an appellant who appeals under federal or state law a decision or order of an agency administering a family services program shall, at the appellant's request, be granted a state hearing by the department of job and family services. This state hearing shall be conducted in accordance with rules adopted under this section. The state hearing shall be recorded, but neither the recording nor a transcript of the recording shall be part of the official record of the proceeding. Except as provided in section 5160.31 of the Revised Code, a state hearing decision is binding upon the agency and department, unless it is reversed or modified on appeal to the director of job and family

services or a court of common pleas." *Id.*

R.C. 5101.35(C) provides for an appeals process if the appellant disagrees with a state hearing decision and states that:

"Except as provided by division (G) of this section, an appellant who disagrees with a state hearing decision may make an administrative appeal to the director of job and family services in accordance with rules adopted under this section. This administrative appeal does not require a hearing, but the director or the director's designee shall review the state hearing decision and previous administrative action and may affirm, modify, remand, or reverse the state hearing decision. An administrative appeal decision is the final decision of the department and, except as provided in section 5160.31 of the Revised Code, is binding upon the department and agency, unless it is reversed or modified on appeal to the court of common pleas." *Id.*

Finally, R.C. 5101.35(E) allows an appellant to appeal a decision of the director of the ODJFS to the court of common pleas and provides that:

"An appellant who disagrees with an administrative appeal decision of the director of job and family services or the director's designee issued under division (C) of this section may appeal from the decision to the court of common pleas pursuant to section 119.12 of the Revised Code. The appeal shall be governed by section 119.12 of the Revised Code except that:

* * *

(3) The appellant shall mail the notice of appeal to the department of job and family services and file notice of appeal with the court within thirty days after the department mails the administrative appeal decision to the appellant. For good cause shown, the court may extend the time for mailing and filing notice of appeal, but such time shall not exceed six months from the date the department mails the administrative appeal decision. Filing notice of appeal with the court shall be the only act necessary to vest jurisdiction in the court." *Id.*

R.C. 119.12 provides, in relevant part, that:

"Any party adversely affected by any order of an agency issued pursuant to an adjudication denying an applicant admission to an examination, or denying the issuance or renewal of a license or registration of a licensee, or revoking or suspending a license, or allowing the payment of a forfeiture under section 4301.252 of the Revised Code may appeal from the order of the agency to the court of common pleas of the county in which the place of business of the licensee is located or the county in which the licensee is a resident,

* * *

* * *

Any party desiring to appeal shall file a notice of appeal with the agency setting forth the order appealed from and stating that the agency's order is not supported by reliable, probative, and substantial evidence and is not in accordance with law. The notice of appeal may, but need not, set forth the specific grounds of the party's appeal beyond the statement that the agency's order is not supported by reliable, probative, and substantial evidence and is not in accordance with law. The notice of appeal shall also be filed by the appellant with the court. In filing a notice of appeal with the agency or court, the notice that is filed may be either the original notice or a copy of the original notice. Unless otherwise provided by law relating to a particular agency, notices of appeal shall be filed within fifteen days after the mailing of the notice of the agency's order as provided in this section.

* * *

The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and any additional evidence the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of this finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law." *Id.*

R.C. 5101.35(E)(3) allows an appellant who disagrees with an administrative appeal decision of the director of ODJFS to appeal to the common pleas court pursuant to R.C. 119.12, but requires appellant to file his/her appeal within 30 days after the department mails the administrative appeal

decision.

In this case, the Administrative Appeal Decision was sent to plaintiff on December 18, 2012 which gave plaintiff until January 18, 2013 to file her notice of appeal with the common pleas court. Plaintiff did not commence this action with the filing of her Notice of Appeal and Complaint until May 17, 2013 which is well past the required 30 days under R.C. 5101.35(E)(3). However, R.C. 5101.35(E)(3) also allows this Court to extend the time for filing her notice up to six months if good cause can be shown.

Plaintiff argues that she can show good cause to extend the deadline for filing her notice of appeal with this Court. Plaintiff contends that her medical condition at the time compromised her ability to meet the 30 day deadline and that filing this action sooner would have been premature. However, plaintiff fails to provide any evidence of her medical condition at the time of the required filing that could warrant good cause. Nor has plaintiff established good cause that filing this action within the required deadline would be premature. Moreover, plaintiff acknowledges in her opposition to defendants ODJFS' motion to dismiss that she was faced with a choice to either file an action in the common pleas court or request another agency hearing and she chose to request another agency hearing to compel compliance with the October 16, 2012 State Hearing Decision. Regardless, plaintiff failed to meet the requirements under R.C. 5101.35(E)(3) for good cause to extend the time for filing her notice. As such, plaintiff was required to file her notice within 30 days after the department mails the administrative appeal decision which is no later than January 18, 2013. She failed to do so. Consequently, since plaintiff failed to timely file her appeal, the Court finds Defendants ODJFS' Motion to Dismiss plaintiff's administrative appeal (specifically, Appeal #1834258) well-taken and GRANTED.

ii. Administrative Appeal #1872662:

The Decision rendered by the State Hearing Officer on Appeal #1872662 on January 30, 2013 sustained with compliance plaintiff's appeal finding that "the Agency shall review FA (food assistance) budgeting from 8-2012 to current, ensuring that the appellant has received all allowable deductions in the computation of FA and issue any FA benefits owed to the appellant, if applicable, and the Agency shall notify appellant with it's determinations from August 2012 to current via the appropriate ODHS form." (Appeal #1872662, Certification of Record, State Hearing Decision, pp.5-6). On April 18, 2013, defendants ODJFS received a request from plaintiff for an Administrative Appeal of the state hearing decision rendered on January 30, 2013. On April 22, 2013, defendants ODJFS dismissed plaintiff's appeal as untimely as it was in excess of 15 calendar days after the hearing decision was issued. Plaintiff filed her appeal to this Court of the ODJFS April 22, 2013 decision on May 17, 2013.

Defendants ODJFS again argue that plaintiff's Appeal #1872662 should be dismissed for failure to state a valid claim and failure to exhaust administrative remedies by not timely requesting an appeal at the agency level.

As stated above, plaintiff argues that her administrative appeal is not precluded by a failure to timely request an agency appeal as the appeal was sought as soon as it was apparent that defendants would not comply with the result of the hearing decision and any delay in filing should be excused because plaintiff can show good cause for the delay.

As previously discussed above, R.C. 5101.35(E)(3) provides an appellant who disagrees with an administrative decision of the director of ODJFS to appeal to the common pleas court within 30 days after the department mails the administrative appeal decision to the appellant. In this instance,

the administrative decision of the director of ODJFS denying plaintiff's appeal of the January 30, 2013 decision was sent to plaintiff on April 22, 2013 and plaintiff filed her Notice of Appeal and Complaint on May 17, 2013 within the 30 day requirement. Therefore, plaintiff timely filed her Appeal #1872662 with this Court as required by R.C. 5101.35(E)(3). Thus, since plaintiff's appeal was timely filed, this Court finds Defendants ODJFS' Motion to Dismiss plaintiff's Appeal #1872662 not well-taken and DENIED.

c. Plaintiff's Claim for Attorney Fees:

Plaintiff alleges in her Complaint that she has filed this action *pro-se* but has received substantial assistance from an attorney acting *pro bono* and that additional counsel may appear, if necessary.³ (Plaintiff's First Amended Notice of Appeal and Complaint, ¶¶63 and 64). Plaintiff alleges that she is, by statute and case law, entitled to attorneys' fees both for the appeals and for the claims arising in equity. (Plaintiff's First Amended Notice of Appeal and Complaint, ¶65).

Defendants ODJFS argue that plaintiff's claim for attorney's fees must be dismissed as they are unavailable to a *pro-se* litigant, are prohibited in an appeal under R.C. 5101.35 by R.C. 2335.39(F)(3)(c), and plaintiff fails to even allege the basic material facts necessary to recover attorney fees.

Plaintiff argues that her claim for attorney fees is not predicated on her receiving the fees, the claim is in the Complaint to compensate the attorneys who have worked on this case. Plaintiff contends that dismissal of her claim is premature as one or more attorneys may appear in this matter

³On January 21, 2014, Attorney James O'Brien entered his appearance as counsel for plaintiff Brooke T. Smith in this matter. No subsequent filings have been made by Mr. O'Brien on plaintiff's behalf as to the current motions before this Court. All briefing as been completed and there is currently no outstanding requests by Mr. O'Brien to file anything additional.

before it concludes.

R.C. 119.12 allows for attorney fees and provides that "the court shall award compensation for fees in accordance with section 2335.39 of the Revised Code to a prevailing party, other than an agency, in an appeal filed pursuant to this section." *Id.*

R.C. 2339.39 provides for a prevailing eligible party in a civil action against the state to move for compensation for attorney fees. However, R.C. 2339.39(F)(3)(c) provides that:

"(F) The provisions of this section do not apply in any of the following:

* * *

(3) An appeal pursuant to section 119.12 of the Revised Code that involves any of the following:

* * *

(c) An administrative appeal decision made under section 5101.35 of the Revised Code." *Id.*

Plaintiff's action contains multiple claims. However, this Court has already dismissed plaintiff's claims for declaratory judgment, injunctive or mandamus relief, and equitable restitution as well as plaintiff's Appeal #1834258 above. This only leaves plaintiff's appeal of the April 22, 2013 Administrative Appeal Decision (Appeal #1872662). Administrative Appeal #1872662 is clearly an appeal under R.C. 119.12 of a R.C. 5101.35 decision by the ODJFS. Therefore, plaintiff is not entitled to attorney fees pursuant to R.C. 2339.39(F)(3)(c), even if she had counsel and was not a *pro-se* litigant. Thus, the Court finds Defendants ODJFS' Motion to Dismiss plaintiff's sixth claim for attorney fees well-taken and GRANTED.

II. LCDJFS' Motion to Dismiss:

LCDJFS moves this Court to dismiss this case as plaintiff has failed to establish that she is indigent.⁴ LCDJFS argues that plaintiff has the financial ability and access to income to pay the filing fee in this case which does not qualify her for indigency status and waiver of the filing fee. LCDJFS asserts that pursuant to R.C. 2323.33 and since plaintiff is not indigent, plaintiff's First Amended Notice of Appeal and Complaint should be dismissed.

Plaintiff argues that LCDJFS' motion is without foundation in law or facts and should be denied. Plaintiff contends that the only asset she has in the world is her house, but due to her debt to income ratio any equity in her house is not able to be tapped to give her the ability to prepay the court costs. As a result, plaintiff asks the Court to exercise its discretion and allow her case to proceed as she qualifies for indigency status.

Plaintiff asserts claims against LCDJFS for declaratory judgment, injunctive or mandamus relief, equitable restitution, and for attorney fees. Plaintiff does not assert claims against LCDJFS for the two administrative appeals dated December 18, 2012 and April 22, 2013.

a. Plaintiff's Claims for Declaratory Judgment, Injunctive/Mandamus Relief, and Equitable Restitution:

Without restating what has already been stated above and since LCDJFS has incorporated

⁴ LCDJFS also joins and fully incorporates herein the motion to dismiss filed by defendants ODJFS. In their motion, defendants ODJFS raise the argument that the only proper party to plaintiff's administrative appeals is ODJFS, not any officials or county agency such as LCDJFS or the ODJFS and LCDJFS Directors. See *Baker v. Lucas County Dep't of Job & Family Servs.*, 2005-Ohio-1028 (Ohio Ct. App., Lucas County Mar. 11, 2005). Since LCDJFS has incorporated herein defendants ODJFS' motion to dismiss and arguments thereto, this Court shall consider defendants ODJFS' argument regarding the proper party for plaintiff's administrative appeal claims four and five as well as all other arguments made by defendants ODJFS in their motion to dismiss.

defendants ODJFS' arguments from their motion to dismiss here, the Court finds the same analysis as stated above in Section I, Subpart a for ODJFS applies in this instance. Consequently, the Court finds LCDJFS' Motion to Dismiss plaintiff's claims for declaratory judgment, injunctive or mandamus relief, and equitable restitution well-taken and GRANTED.

b. Plaintiff's Claim for Attorney Fees:

Plaintiff alleges in her Complaint that she has filed this action *pro-se* but has received substantial assistance from an attorney acting *pro bono* and that additional counsel may appear, if necessary.⁵ (Plaintiff's First Amended Notice of Appeal and Complaint, ¶¶63 and 64). Plaintiff alleges that she is, by statute and case law, entitled to attorneys' fees both for the appeals and for the claims arising in equity. (Plaintiff's First Amended Notice of Appeal and Complaint, ¶65).

This Court has already dismissed all underlying claims asserted by plaintiff against LCDJFS. Although R.C. 2335.39 allows for attorney fees for a prevailing party, plaintiff is not the prevailing party in this case since all of her claims against LCDJFS have been dismissed. Therefore, plaintiff is not entitled to attorney fees here. Thus, the Court finds LCDJFS' Motion to Dismiss plaintiff's claim for attorney fees well-taken and GRANTED.

JUDGMENT ENTRY

For the reasons set forth above, it is ORDERED, ADJUDGED and DECREED that Defendants-Appellees Ohio Department of Job and Family Services and Michael B. Colbert, Director of Ohio Department of Job and Family Services' Motion to Dismiss be, and hereby is, found well-taken and same is GRANTED as to plaintiff's claims for relief count one - declaratory

⁵On January 21, 2014, Attorney James O'Brien entered his appearance as counsel for plaintiff Brooke T. Smith in this matter. No subsequent filings have been made by Mr. O'Brien on plaintiff's behalf as to the current motions before this Court. All briefing as been completed and there is currently no outstanding requests by Mr. O'Brien to file anything additional.

judgment, count two - injunctive or mandamus relief, count three - equitable restitution, count four - appeal from an agency decision, and count six - attorney fees.

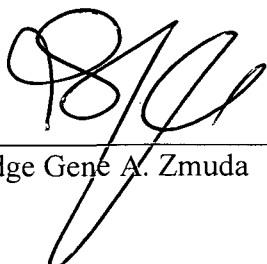
It is FURTHER ORDERED, ADJUDGED and DECREED that plaintiff's claims for declaratory judgment, injunctive or mandamus relief, equitable restitution, appeal from an agency decision (count four), and attorney fees set forth against Defendants-Appellees Ohio Department of Job and Family Services and Michael B. Colbert, Director of Ohio Department of Job and Family Services in Plaintiff's Complaint are hereby dismissed.

It is FURTHER ORDERED, ADJUDGED and DECREED that Defendants-Appellees Lucas County Department of Job and Family Services and Deb Ortiz-Florez, Director of Lucas County Department of Job and Family Services' Motion to Dismiss be, and hereby is, found well-taken and same is GRANTED as to plaintiff's claims for relief count one - declaratory judgment, count two - injunctive or mandamus relief, count three - equitable restitution, and count six - attorney fees.

It is FURTHER ORDERED, ADJUDGED and DECREED that all claims set forth against Defendants-Appellees Lucas County Department of Job and Family Services and Deb Ortiz-Florez, Director of Lucas County Department of Job and Family Services for declaratory judgment, injunctive or mandamus relief, equitable restitution, and attorney fees in the Plaintiffs' Complaint are hereby dismissed.

It is FURTHER ORDERED, ADJUDGED and DECREED that the only claim remaining in Plaintiff's Complaint is count five for appeal of an Administrative Appeal dated April 22, 2013 against Defendants ODJFS, with said claim proceeding on the parties' briefs on the merits.

5/26/15
Date


Judge Gene A. Zmuda