

RECEIVED
MAR 27 1984
ENVIRONMENTAL PROTECTION

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

Plaintiff, :
FILED

-vs-COMMON PLEAS COURT :
DARKE COUNTY, OHIO

WEAVER BROTHERS, INC., et. al., :

'84 MAR 26 AM 11 '54
Defendants. :

CASE NO. 47034

JUDGMENT ENTRY

MARION PLANT, CLERK

Before the Court is the Motion of Weaver Brothers, Inc., John D. Weaver and Timothy Weaver to dismiss the Complaint of the Attorney General pursuant to Civil Rule 12 (B) (6) for failure to state a claim against the Defendants upon which relief may be granted. All parties have filed Memoranda in support of their position and the issues are submitted for decision upon the pleadings.

This is an action by the Ohio Attorney General to assess civil penalties on the Defendants and to obtain an injunction prohibiting the Defendants from proceeding with the construction of their facility until the Director of the Ohio EPA has issued the necessary permits. Because this is a motion to dismiss, pursuant to Civil Rule 12 (B) (6), the Court must accept, as true, the allegations of the Complaint.

After June 1, 1983, the Defendants began constructing an egg production facility in Darke County. When complete, the facility is to consist of five chicken buildings,

containing 370,000 chickens, an egg processing structure and a sanitation system to handle the collection of sanitary wastes and egg wash water. In a companion case, the adjoining landowners have brought a private nuisance action against the Defendants, alleging that the collection of chicken manure will cause noxious odors and fumes. Apparently the manure is to be stored in pits on the premises, dried and applied to the land as fertilizer. This action is currently pending on the docket of the Court.

The Ohio EPA, by letter dated September 9, 1983, demanded that the Defendants cease construction until they had complied the preconditions to construction imposed by the EPA's regulations. On September 12, 1983, Weaver Brothers ceased construction in accord with the EPA's letter. Shortly thereafter, Weaver Brothers recommenced construction so that, at present, there exist at the site several buildings and many thousand chickens. Since construction has been recommenced, the Director of the Ohio EPA issued to Weaver Brothers, Inc. the necessary and required permits. This is not a case where the EPA is attempting to enjoin the further construction of a project until the permits have been issued. Here, the State of Ohio is attempting to collect civil penalties imposed by statute

for failure to obtain the necessary permits before construction.

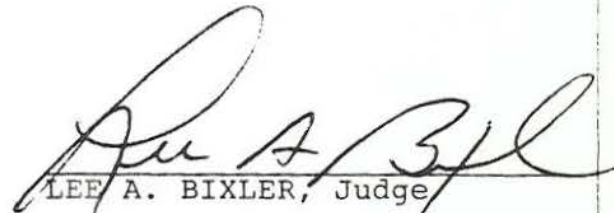
Weaver Brothers, Inc. contend that the Complaint of the State of Ohio should be dismissed, pursuant to Civil Rule 12 (B) (6) for failure to state a claim upon which relief can be given. Under Civil Rule 12 (B) (6), the moving party must demonstrate that, under no circumstances, assuming the facts alleged in the Complaint are true, the Plaintiff will be able to state a cause of action. Viewing the uncontested facts most favorably to the State of Ohio, the Court cannot find that the Complaint fails to state a cause of action.

Weaver Brothers, Inc. contends that O. R. C. 3767.13 (D), Ohio's "Right to Farm" Law, exempts the egg production facility from the requirements of the Water Pollution laws. There is a substantial question of fact as to whether Weaver Brothers' facility is the type of agricultural enterprise which the General Assembly intended to exempt from the Water Pollution laws. There is a question of fact as to whether there will be odors or noxious gases from the facility which might be subject to regulation under Ohio's air pollution laws. If questions of fact exist, the Complaint cannot be dismissed for failure to state a claim.

Whitman v Ohio Sports Center, an unreported Summit County Common Pleas Court case, held that the EPA could

not enjoin construction of the Coliseum until the Coliseum had received approval of its plans from EPA. That case was decided on its merits on a claim for injunctive relief by the Ohio EPA. Here, the only claim is for civil damages by reason of the failure of Weaver Brothers to obtain approval of its permits before commencing construction. There are questions of fact as to whether the "Right to Form" Laws, the Water Pollution Laws and the Air Pollution Laws apply to Weaver Brothers. While the result in this case may be the same, ultimately, as was reached in the Whitman case, it is premature to reach that decision at this stage in the litigation.

It is ordered that the Motion to Dismiss be overruled for the reasons stated above. All issues shall be continued for trial.


LEE A. BIXLER, Judge

LAB:cka

cc: Terrence M. Fay
William H. Howard