

COMMON PLEAS COURT
MARION COUNTY, OHIO

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IN THE COURT OF COMMON PLEAS OF MARION COUNTY, OHIO
CLERK OF COURTS
GENERAL DIVISION

STATE OF OHIO, ex rel.,	:	Case No. 13-CV-0453
Plaintiff,	:	
vs.	:	JUDGE JIM SLAGLE
333, JOSEPH, LLC, et al.,	:	
Defendants.	:	JUDGMENT ENTRY (PRELIMINARY INJUNCTION)
	:	

This matter came before the Court for a hearing on November 1, 2013 on the State's Motion for Preliminary Injunction. Plaintiff was present with counsel. Although all parties were notified of the hearing, none of the Defendants were present. However, Defendants 333 Joseph, LLC, Stanley Rosenfeld and Robert Cendol were represented by counsel. The State presented the testimony of four witnesses, which included three representatives from the Ohio Environmental Protection Agency. Defendants presented the testimony of Roger Brett Goecke, a certified industrial hygienist. Plaintiff's Exhibits P-1, P-2, P-3, P-5, P-6, and P-7 were admitted into evidence along with Defendant's Exhibit A. Thereafter, the parties filed post-hearing briefs.

Background

The case involves a former industrial site located at 333 Joseph Street in Marion, Ohio. In April, 2010, the site was purchased by 333 Joseph, LLC, who continues to own the site. Between June, 2010 and January, 2012, the buildings on the site were demolished. Defendant Recycling Creations, LLC and/or Eric Keith were hired to complete at least some of the demolition. On August 14, 2012, September 19, 2012, October 17, 2012, and October 26, 2012, the EPA issued various notices of violations to Defendant Stanley Rosenfeld or Defendant Eric Keith or both regarding the demolition process, specifically with regard to the removal of asbestos (Plaintiff's Ex. P-5). On October 31, 2012, the EPA issued orders to immediately begin the process of removing regulated asbestos-containing materials from the property in accordance with EPA regulations and to have disposal completed by December 31, 2012. On July 24, 2013, Plaintiff filed suit in Marion County Common Pleas Court seeking injunctive relief and civil penalties.

Law

Plaintiff seeks injunctive relief pursuant to R.C. 3704.06(A) and R.C. 3767.03. R.C. 3704.06(B) permits the Attorney General, upon the request of the Ohio EPA, to bring an action for an injunction against any person violating or threatening to violate R.C. 3704.05. R.C. 3704.05(G) provides:

No person shall violate any order, rule, or determination of the director issued, adopted, or made under this chapter.

R.C. 3767.03 permits the Attorney General to seek injunctive relief when a nuisance exists. R.C. 3767.01(C)(1) defines a "nuisance" as anything "defined and declared by statutes to be a nuisance." Civ. R. 65(B)(1) provides that no preliminary injunction shall be issued without reasonable notice to the adverse party.

Generally, an injunction may not be granted unless the party seeking the injunction establishes by clear and convincing evidence that there is a substantial likelihood that the Plaintiff will prevail on the merits; the Plaintiff will suffer irreparable injury if the injunction is not granted; no third-parties will be unjustifiably harmed if the injunction is granted; and the public interest will be served by the injunction. However, the Ohio Supreme Court has held that, when a statute involves governmental agencies seeking injunctive relief to enforce statutory requirements, the requirements for obtaining an injunction are generally different. *Ackerman v. Tri-City Geriatric & Healthcare, Inc.* (1978), 55 Ohio St.2d 51. No balance of equities is necessary. Nor is it necessary to prove great or irreparable injury for which there is no adequate remedy because the General Assembly has already determined that violation of the statute warrants injunctive relief. *Id.*

Further, it is sufficient for the State to prove by a preponderance of the evidence that the statute has been violated. See e.g. *State, ex rel. Dann v. R&J*

Partnership, Ltd. (Dec. 28, 2007), 2nd App. Dist. Case No. 22162; *State, ex rel. DeWine v. Ashworth* (Nov. 28, 2012), 4th App. Dist. Case No. 11CA16. The Defendants assert that the requirements should be different for a preliminary injunctions than for a permanent injunctions. However, the cases do not appear to make such a distinction.

The Defendants also assert that the Third District Court of Appeals has held that the required standard proof is clear and convincing evidence. However, the leading "3rd District" case cited by the Defendants is actually a case decided by the 2nd Appellate District. *State, ex rel. Freeman v. Pierce* (1991) 61 Ohio App.3d 663. Moreover, *Freeman* was a case brought by a private citizen seeking to abate a nuisance pursuant to R.C. 3767.06. This statute permits the Court to keep a property closed for a period of one year when the owner has allowed criminal activity (most typically drug trafficking) to take place on the premises. The Third District Court of Appeals did cite *Freeman* for the proposition that clear and convincing evidence is required for an abatement action under R.C. 3767.06. *State, ex rel. Waldick v. Howard* (Feb. 6, 2012) 3rd Dist. Case No. 1-11-33. However, confiscation of real estate due to criminal activity is significantly different than enforcement of regulatory statutes intended to protect the public's health and safety.

Findings

1. The Court finds that on October 31, 2012, the Director of the Ohio Environmental Protection Agency issued an order directed to Defendants Stanley Rosenfeld and Eric Keith which ordered them to do the following:

Pursuant to ORC §3704.03(R), Respondents shall immediately begin the process of having the RACM [regulated asbestos-containing materials] removed from the 333 Joseph Street property. Respondents shall also ensure that public access to the property is precluded during the RACM removal process with the use of temporary fencing, and that the RACM are disposed of in a properly licensed landfill. All asbestos-related clean-up and removal activities occurring at the facility shall be conducted in full compliance with applicable asbestos regulations and laws (see OAC Chapters 3745-20 and 40 CFR Part 61, Subpart M). The RACM must be removed from the 333 Joseph Street property and disposed of properly no later than December 31, 2012.

(Plaintiff's Ex. P-6)

2. There has been no compliance with the order of the Ohio EPA Director as the EPA representatives have been to the property on a weekly basis and have observed no visible change to the condition of the property. Moreover, no required notifications have been provided to the EPA regarding asbestos removal.

3. Regulated asbestos-containing materials remain on the premises. The Court reaches this conclusion based on the following:

a. The October 31, 2012 EPA order (Plaintiff's Ex. P-6) found regulated asbestos-containing materials on the premises. The findings in this report are

admissible pursuant to Evid. R. 803(A)(8).

b. There has been no effort to clean up the premises, or any significant change at the property, since the issuance of the EPA order.

c. The EPA inspectors which have continually examined the premises on a weekly basis since the issuance of the order consistently observed materials which have the appearance of containing regulated asbestos-containing materials.

d. No contrary evidence has been presented. The Defendant's expert who testified had only been to the site for about 15 minutes on the day of the hearing and had conducted no testing. The primary thrust of his testimony was to suggest that the EPA regulations are unnecessarily restrictive.

4. The October 31, 2012 order issued by the EPA Director was issued to Defendants Stanley Rosenfeld and Defendant Eric Keith. Additionally, the order applies to successors in interest in the property. (See Sect. II, Plaintiff's Exhibit P-6). Since Defendant 333 Joseph, LLC is the owner of the property (as admitted in the pleadings), it is bound both by the order issued by the EPA Director as well as the various administrative regulations on which the order is based.

5. The Plaintiff has not established that the property constitutes a nuisance. The Plaintiff presented minimal evidence that the property constituted a health hazard.

6. The Plaintiff has met its burden to obtain a preliminary injunction against Defendants 333 Joseph, LLC, Stanley Rosenfeld, and Eric Keith pursuant to R.C. 3704.06(A) due to the Defendants' violation of R.C. 3704.05(G) for failure to comply with an order issued by the EPA Director as well as administrative rules issued by the Director.

Preliminary Injunction

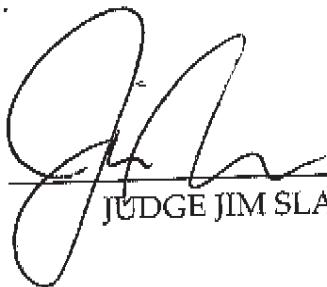
It is therefore ORDERED that Defendants 333 Joseph, LLC, Stanley Rosenfeld, and Eric Keith shall do the following:

1. Immediately begin the process of having regulated asbestos-containing materials removed the 333 Joseph Street property.
2. Ensure that public access to the property is precluded during the regulated asbestos-containing materials removal process through the use of temporary fencing.
3. Ensure that the regulated asbestos-containing materials are disposed of in a properly licensed landfill.
4. Ensure that all asbestos related clean-up and removal activities occurring at the facility are conducted in full compliance with the applicable asbestos regulations and laws, specifically including OAC Chapter 3745-20 and 40 CFR Part 61, Subpart M.

5. Complete the removal of all regulated asbestos-containing materials from the 333 Joseph Street property no later than March 1, 2014.

It is further ORDERED that no preliminary injunction is issued at this time against Defendant Robert Cendol or Defendant Recycling Creations, LLC.

The Court shall schedule a telephone conference to arrange a litigation schedule and further hearing in this case.



JUDGE JIM SLAGLE

cc: Clint R. White
Colin Skinner
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Eric Keith, 1010 Jamaica Dr., Marion, OH 43302