[Cite as *State ex rel. Hope Academy, N.W. v. Sanders*, 2010-Ohio-14.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93173

STATE OF OHIO EX REL. HOPE ACADEMY, N.W., ET AL.

PLAINTIFFS-APPELLANTS

vs.

DR. EUGENE T.W. SANDERS, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-646450

BEFORE: Dyke, J., Stewart, P.J., and Celebrezze, J.
RELEASED: January 7, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac. R. 2.2(A)(1).

ANN DYKE, J.:

{¶ 1} Plaintiffs Hope Academy Northwest Campus ("Hope Academy") and Teragram Realty, LLC ("Teragram") appeal from the order of the trial court that granted summary judgment to defendants Dr. Eugene Sanders and the Cleveland Metropolitan School District Board of Education ("Board"). For the reasons set forth below, we affirm.

{¶ 2} On January 7, 2008, plaintiffs filed this action against defendants alleging that the Board had eight parcels[1] for one year and had not outlined plans for this property and that the Board was therefore required to offer them for sale to start-up community schools pursuant to R.C. 3313.41(G)(2). Plaintiffs set forth public records requests, claims for mandamus and injunctive relief, and a claim for declaratory judgment.

{¶ 3} On March 1, 2008, defendants filed a motion to dismiss, or alternative motion for summary judgment, in which it asserted that Teragram does not have standing,[2] the time period set forth in R.C. 3313.41(G)(2) had not yet expired, and that on June 26, 2007, the school district promulgated a resolution providing for the use of the parcels, thus meeting the terms of R.C. 3313.41(G)(2). It stated in relevant part:

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[1] The parcels at issue are: Mount Auburn; Alexander Hamilton; Cranwood School; Wilson School; Alfred Benesch School; Douglas MacArthur School; Kenneth Clement School; and Valley View School.

[2] Because the issue of standing was not discussed in the trial court's judgment entry and is not argued within the assignments of error, we assume for purposes of this appeal, but do not specifically decide, that Teragram has standing in this matter.

{¶ 4} "WHEREAS, Ohio Revised Code 3313.41(G)(2) provides that a Board of Education may adopt a resolution outlining a plan for using real property suitable for classroom use, that has not been used for academic instruction, administration, storage, or any other educational purpose for one full school year; and

{¶ 5} "WHEREAS, the Board of Education of the Cleveland Municipal School District has plans to use its closed buildings within the next three years; now therefore be it

{¶ 6} "RESOLVED, that the Board hereby outlines the following plan for using the following closed school buildings within the next three years:

{¶ 7} "* * *

{¶ 8} "Alexander Hamilton School will be used as a swing space for academic instruction during the school facilities construction program. Administration, storage or other educational purpose;

{¶ 9} "Alfred A. Benesch School will continue to be used for storage;

{¶ 10} "* * *

{¶ 11} "Cranwood School will be used as a swing space for academic instruction during the school facilities construction program. Administration, storage or other educational purpose;

{¶ 12} "Douglas MacArthur School will be reopened beginning in the 2007-2008 school year * * *;

{¶ 13} "* * *

{¶ 14} "Kenneth W. Clement will be reopened beginning in the 2007-2008 school year * * *;

{¶ 15} "Mount Auburn School will be used as a swing space for academic instruction during the school facilities construction program. Administration, storage or other educational purpose;

{¶ 16} "Thomas Jefferson School will be demolished * * *;

{¶ 17} "Valley View School will be reopened beginning in the 2007-2008 school year * * *;

{¶ 18} "Wilson School will be used as a swing space for academic instruction during the school facilities construction program. Administration, storage or other educational purpose[.]"

{¶ 19} Plaintiffs filed a brief in opposition and alternative motion for summary judgment in which they asserted that the Board's resolution is untimely since R.C. 3313.41(G)(2) became effective in March 2007 and the buildings closed in 2005. Plaintiffs also argued that the resolution is not a genuine plan due to lack of specificity and the Board's financial circumstances. Plaintiffs subsequently dismissed the public records claim, and the trial court entered summary judgment in favor of defendants. Plaintiffs appealed to this court, but the appeal was dismissed because the claim for declaratory judgment remained pending. See *State ex rel. Hope Academy, Northwest v. Sanders* (Nov. 21, 2008), Cuyahoga App. No. 91749. Thereafter, the trial court issued an order that states, in relevant part, as follows:

{¶ 20} "Plaintiffs failed to establish that any of the properties owned by the Cleveland Schools satisfy the requirements of R.C. 3313.41(G)(2) when the facts and circumstances are examined from the effective date of the statute forward.

{¶ 21} "There are no properties owned by the Cleveland Schools currently subject to sale under R.C. 3313.41(G)(2). Therefore, Plaintiffs do not currently have the statutory right to compel the sale of school properties * * *."

{¶ 22} Plaintiffs now appeal and assign two errors for our review:

{¶ 23} In their first assignment of error, plaintiffs assert that the trial court erred in granting defendants' motion for summary judgment because R.C. 3313.41, that became effective on March 30, 2007, required the Board to offer for sale all properties which were unused for one year as of that date. Thus, according to plaintiffs, the June 26, 2007 resolution is untimely with regard to buildings that were closed at the end of the 2005 school year. In opposition, defendants assert that the statute is prospective in its operation and that any parcels that were unused as of March 30, 2008 would be subject to sale pursuant to R.C. 3313.41. Plaintiffs also assert that the Board merely stored "obsolete and dilapidated furniture" at the schools, and this does not meet the requirements of R.C. 3313.41(G)(2) which, plaintiffs assert, requires "storage for an educational purpose." They further maintain that the resolution is defective for lack of specificity.

{¶ 24} R.C. 3313.41(G) provides in relevant part as follows:

{¶ 25} "(2) When a school district board of education has not used real property suitable for classroom space for academic instruction, administration, storage, or any other educational purpose for one full school year and has not adopted a resolution outlining a plan for using that property for any of those purposes within the next three school years, it shall offer that property for sale to the governing authorities of the start-up community schools established under Chapter 3314 of the Revised Code located within the territory of the school district, at a price that is not higher than the appraised fair market value of that property. If more than one community school governing authority accepts the offer made by the school district board, the board shall sell the property to the governing authority that accepted the offer first in time."

{¶ 26} This statute became effective on March 30, 2007. Am. Sub. H.B. 79; *Hope Academy v. Ohio Dept. of Edn.,* Franklin App. No. 07AP-758, 2008-Ohio-4694. R.C. 1.48 establishes a presumption that statutes are prospective in operation unless the legislature expressly declares the statute to be retroactive. Id. A statute that is prospective in operation applies to and regulates conduct that occurs after its effective date. The *Hope Academy* Court stated:

{¶ 27} "* * * Section 28, Article II of the Ohio Constitution * * * states, in relevant part, that '[t]he general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; * * *.' A retroactive statute is one that 'affect[s] acts or facts occurring, or rights accruing, before it came into

force.' *Bielat v. Bielat* (2000), 87 Ohio St.3d 350, 353, 721 N.E.2d 28, citing Black's Law Dictionary (6 Ed.1990) 1317. A statute is impermissibly retroactive in effect if either it takes away or impairs rights that vested or accrued before the statute came into force or it attaches a new disability in respect to past transactions or considerations. *State ex rel. Matz v. Brown* (1988), 37 Ohio St.3d 279, 281, 525 N.E.2d 805, citing *Soc. for the Propagation of the Gospel v. Wheeler* (C.C.D.N.H.1814), 22 F.Cas. 756, 767. * * *

{¶ 28} "The text of R.C. 3314.02(E)(2) does not contain any clear or express language indicating the General Assembly intended it to be retroactive in application, and the parties do not argue otherwise. The General Assembly's failure to include such language means the statute can be applied prospectively only. Accordingly, the necessary analysis relates to the prospective operation of the statute.

{¶ 29} "The 'presumption is that the legislature intends a statute to take effect at the time it declares the statute shall be in effect * * *.' *U.S.X. Corp. v. Ohio Unemp. Comp. Bd. of Rev*. (1990), 70 Ohio App.3d 566, 570, 591 N.E.2d 818, citing *State ex rel. Harness v. Roney* (1910), 82 Ohio St. 376, 92 N.E. 486, paragraph one of the syllabus, followed in *State ex rel. Conn v. Noble* (1956), 165 Ohio St. 564, 569, 138 N.E.2d 302."

{¶ 30} Construing subpart (E) of R.C. 3314.02, which was also enacted within Am.Sub. H.B. 79, the *Hope Academy* Court held that R.C. 3314.02(E)(2)

takes effect and applies prospectively, on its March 30, 2007 effective date, to conduct that occurs after that date.

{¶ 31} Similarly, in this matter, we note that the legislature did not expressly declare Am.Sub. H.B. 79 or R.C. 3313.41(G)(2) to be retroactive. Therefore, the presumption is that the legislature intends a statute to take effect at the time it declares the statute shall be in effect, i.e., March 30, 2007.

{¶ 32} We further note that to interpret R.C. 3313.41(G)(2) in the manner that plaintiffs advocate would affect acts or facts occurring, or rights accruing, before the statute came into force. We therefore decline to apply the statute retroactively and reject the claim that all parcels that were unused for one year as of March 30, 2007 are subject to the provisions of R.C. 3313.41(G)(2), and more specifically, reject the claim that parcels that were unused as of 2005 are subject to sale to a community school under the statute. Further, we cannot accept plaintiffs' claim that defendants' storage of "obsolete and dilapidated furniture" at the parcels does not constitute "storage" pursuant to R.C. 3313.41(G)(2). Here, we reject plaintiffs' assertion that the statute requires "storage for an educational purpose," as the plain language of the statute simply lists "storage" as a use that exempts the parcel from sale. Further, the statute does not define the nature or quality of the items that are stored, and we will not engraft additional provisions onto the legislation.

{¶ 33} As to plaintiffs' final claim that the June 26, 2007 resolution is defective for lack of specificity, we again note the statute requires only that the

resolution "[outline] a plan for using that property for any of [the stated] purposes within the next three school years." In this matter, defendants adopted a resolution that clearly and plainly identified its plans for all of the parcels at issue over the next three years, and the plan listed permissible uses under R.C. 3313.41(G)(2). Accordingly, we reject the claim that the resolution was deficient.

{¶ 34} For all of the foregoing reasons, the trial court did not err in granting defendants' motion for summary judgment, and the first assignment of error is without merit.

{¶ 35} For their second assignment of error, plaintiffs assert that the trial court erroneously declared the parties' rights and liabilities in this matter because defendants were not entitled to summary judgment.

{¶ 36} Inasmuch as we have determined that defendants' resolution was both timely and adequate to exempt the parcels at issue from the sale provisions of R.C. 3313.41(G)(2), this claim is without merit. Accordingly, the trial court's declaration of rights and liabilities in this matter is not erroneous. This assignment of error is overruled.

Affirmed.

It is ordered that appellees recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANN DYKE, JUDGE

FRANK D. CELEBREZZE, JR., J., CONCURS
MELODY J. STEWART, P.J., CONCURS IN JUDGMENT ONLY