[Cite as *A.F. Krainz Co., L.L.C. v. Jackson*, 2010-Ohio-6029.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94864

STATE EX REL., A.F. KRAINZ CO., LLC

PLAINTIFF-APPELLANT

vs.

MAYOR FRANK G. JACKSON

DEFENDANT-APPELLEE

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-662854

BEFORE: Cooney, J., Rocco, P.J., and Stewart, J.

RELEASED AND JOURNALIZED: December 9, 2010

ATTORNEYS FOR APPELLANT

Jeffrey J. Fanger
Barbara L. Miller
Fanger & Associates, LLC
36 Alpha Park
Highland Hts., Ohio 44143

ATTORNEYS FOR APPELLEE

Robert J. Triozzi
Director of Law
Joseph F. Scott
Chief Assistant Director of Law
Joseph G. Hajjar
Assistant Director of Law
City of Cleveland City Hall
601 Lakeside Avenue, Room 106
Cleveland, Ohio 44114

COLLEEN CONWAY COONEY, J.:

{¶ 1} Relator-appellant, A.F. Krainz, Co., L.L.C. ("Krainz"), appeals the trial court's de facto denial of its motion to amend the complaint and the granting of summary judgment in favor of respondent-appellee, Mayor Frank G. Jackson ("Mayor Jackson"). We find merit to the appeal and reverse.

{¶ 2} On March 14, 2007, Krainz submitted a public records request to the city of Cleveland ("Cleveland" or "the City") requesting documents pertaining to the change in traffic patterns on East 47th Street between Superior Avenue and St. Clair Avenue. The street had recently changed from a one-way street to a two-way street. In response to the request, the

City provided a letter from counsel on behalf of Councilman Joe Cimperman, three Traffic Sign Orders, and a Memorandum dated March 19, 2007.

{¶ 3} In April, Krainz sent a letter to Kim Roberson, Public Records Administrator for the City, which stated, in part:

> "Additionally, it appears from your response that Day-Glo on or about January 16, 2007 requested the change and no effort to communicate with our client or any other business owner was engaged in. As no documentation was provided from Day-Glo and as the date of the request as noted on the only documentation is all the same, we assume that said request was via telephone. If that is not the case, please be advised that our records request would include any documents supporting this requested change that are in your files."

{¶ 4} In December 2007, the City forwarded to Krainz a follow-up letter and five photographs. The City provided no other documentation or response regarding Day-Glo.

{¶ 5} In June 2008, Krainz filed a complaint for mandamus against Mayor Jackson seeking an order compelling the mayor to remove the newly installed street signs on East 47th Street, which changed the portion of East 47th Street between Superior Avenue and St. Clair Avenue from a one-way street to a two-way street. Krainz alleged that the change resulted in the removal of three street parking spaces on the west side of the street adjacent to its property. Krainz also alleged that the new traffic pattern is dangerous and that the removal of street parking on the west side of East 47th Street has damaged the value of its property. Krainz claims the changes to East 47th

Street were made in violation of Cleveland Codified Ordinances ("CCO") 403.03(b), which requires that certain traffic changes be published in the city record and shared with the City Council before those traffic changes are made. Finally, Krainz claims the City did not provide notice to any other residents of East 47th Street prior to changing the street's traffic pattern.

{¶ 6} In response to discovery, the City produced several emails between individuals at Day-Glo and Mr. Mavec, the Cleveland traffic commissioner, and Mr. Wasik, another City employee. Krainz maintains these emails contained relevant information that should have been produced pursuant to the public records requests of March 14, 2007 and April 16, 2007, which specifically referenced Day-Glo in the follow-up request. Consequently, on March 20, 2009, Krainz filed a motion for leave to amend its complaint to include causes of action for alleged violations of R.C. 149.351 and 149.43, Ohio Public Records Act.

{¶ 7} While the motion for leave to amend the complaint was pending, Mayor Jackson moved for summary judgment. After receiving Krainz's brief in opposition and Mayor Jackon's reply brief, the trial court granted summary judgment in favor of Mayor Jackson on February 24, 2010, but never ruled on Krainz's motion for leave to amend the complaint, which was filed almost one year earlier. Krainz now appeals, raising three assignments of error.

Leave to File Amended Complaint

{¶ 8} In the first assignment of error, Krainz argues the trial court abused its discretion in failing to rule upon its motion for leave to amend the complaint, which was based upon information obtained during discovery. As previously stated, Krainz claims it discovered information that supported new causes of action for violations of the Ohio Public Records Act. In the second assignment of error, Krainz argues the trial court abused its discretion by granting summary judgment in favor of Mayor Jackson without ever ruling on the motion to amend the complaint. As both of these assignments of error concern the merit of Krainz's motion for leave to file an amended complaint, we address them together.

{¶ 9} Leave to file an amended complaint lies in a trial court's sound discretion. The Civil Rules instruct trial courts to exercise their discretion liberally. ("Leave of court shall be freely given when justice so requires.") Civ.R. 15(A); *Mills v. Deere*, Cuyahoga App. No. 82799, 2004-Ohio-2410. "The term 'abuse of discretion' connotes more than error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 404 N.E.2d 144. Further, "[i]t is an abuse of discretion for a court to deny a motion, timely filed, seeking leave to file an amended complaint, where it is possible that

plaintiff may state a claim upon which relief may be granted and no reason otherwise justifying denial of the motion is disclosed." *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, 297 N.E.2d 113, paragraph six of the syllabus.

{¶ 10} Here, Krainz's motion for leave to amend its complaint sought to add two new causes of action for violations of the Ohio Public Records Act. The first of these causes of action alleges violation of R.C. 149.43, which provides a claim for statutory damages and attorney fees for failure of a public office to provide public records as mandated under R.C. 149.43(B)(1). R.C. 149.43(C) provides, in pertinent part:

> "If a person allegedly is aggrieved by the failure of a public office or the person responsible for public records to promptly prepare a public record and to make it available to the person for inspection in accordance with division (B) of this section or by any other failure of a public office or the person responsible for public records to comply with an obligation in accordance with division (B) of this section, the person allegedly aggrieved may commence a mandamus action to obtain a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section, that awards court costs and reasonable attorney's fees to the person that instituted the mandamus action, and, if applicable, that includes an order fixing statutory damages under division (C)(1) of this section. * * *
>
> "If a requestor transmits a written request by hand delivery or certified mail to inspect or receive copies of any public record in a manner that fairly describes the public record or class of public records to the public office or person responsible for the requested public records, except as otherwise provided in this section, the requestor shall be entitled to

recover the amount of statutory damages set forth in this division if a court determines that the public office or the person responsible for public records failed to comply with an obligation in accordance with division (B) of this section.

"The amount of statutory damages shall be fixed at one hundred dollars for each business day during which the public office or person responsible for the requested public records failed to comply with an obligation in accordance with division (B) of this section, beginning with the day on which the requester files a mandamus action to recover statutory damages, up to a maximum of one thousand dollars. The award of statutory damages shall not be construed as a penalty, but as compensation for injury arising from lost use of the requested information. The existence of this injury shall be conclusively presumed. The award of statutory damages shall be in addition to all other remedies authorized by this section."

{¶ 11} The second cause of action alleges violation of R.C. 149.351, which provides that public records:

"shall not be removed, destroyed, mutilated, transferred, or otherwise damaged or disposed of, in whole or in part, except as provided by law."

{¶ 12} R.C. 149.351(B) provides that:

"[a]ny person who is aggrieved by the removal, destruction, mutilation, or transfer of, or by other damage to or disposition of a record in violation of division (A) * * * may commence either * * * either [a] civil action for injunctive relief to compel compliance with division (A) or * * * [a] civil action to recover a forfeiture in the amount of one thousand dollars for each violation, and to obtain an award of the reasonable attorney's fees incurred by the person in the civil action." R.C. 149.351(A).

{¶ 13} The City contends Krainz's claims for violations of the Ohio Public Records Act is moot because Krainz obtained all the available public records through discovery without the need to file a mandamus action to compel production of the public records. See *State ex. rel. Nix v. Cleveland* (1998), 83 Ohio St.3d 379, 700 N.E.2d 12 (holding that claims to inspect records under the Ohio Public Records Act are moot insofar as they request records that requesters either already possessed at the time they filed the action, or that they obtained as a result of subsequent transmission of certain records). However, Krainz is not seeking to inspect those records now but is seeking damages for the failure to produce those records pursuant to his earlier public records request. Krainz has the right to raise this claim in the trial court.

{¶ 14} Krainz admits in its motion for leave to amend the complaint that it obtained additional email documentation in response to discovery and pursuant to a subpoena, which it served on Day-Glo. However, Krainz also claims that a Traffic Sign Order produced as part of the public records request references a "UC Map," which has still not been produced. During the deposition of Mamie Lemons ("Lemons"), a traffic sign-marking technician for Cleveland, the following exchange took place:

> "LEMONS: * * * [A]t the bottom under special instructions, a U.C. map attached where before we dig, we have to have a U.C. clearance to make sure we don't hit any wires or any pipes underneath the ground.
>
> "MR. FANGER: Let's go off the record for a second.
>
> (Thereupon, a discussion was had off the record.)
>
> "MR. FANGER: Back on. Counsel, you will look into it? I mean, let the record reflect that the map has not been produced.
>
> "Mr. HAJJAR: I will look for the map that's the map for the underground detail."

{¶ 15} There is nothing in the record demonstrating that this map was ever produced. Thus, under both R.C. 149.43 and 149.351, Krainz had a basis to commence an action seeking an award of statutory damages, court costs, and reasonable attorney fees as set forth in R.C. 149.43(C) and 149.351(B).

{¶ 16} In Krainz's proposed amended complaint, Krainz prays for, inter alia, "a peremptory Writ of Mandamus compelling Respondent to comply with R.C. 149.43, and Relator further prays for any and all relief to which Relator is entitled pursuant to R.C. 149.43(C) including an award of court costs, reasonable attorney fees and applicable statutory damages * * * ." Krainz also prays for "injunctive relief compelling Respondent to comply with O.R.C. 149.351(A), reasonable attorney fees, and the recovery of statutory damages in the amount of $1,000.00 for each separate violation of R.C. 149.351 * * *."

Thus, Krainz stated two viable causes of action in its amended complaint. Therefore, the trial court's de facto denial of the motion to amend the complaint approximately one year after it was filed constitutes an abuse of discretion. Accordingly, the first and second assignments of error are sustained.

Mandamus

{¶ 17} In the third assignment of error, Krainz argues the trial court abused its discretion in granting the City's motion for summary judgment because there were genuine issues of fact regarding whether the change from a one-way street to a two-way street rendered the street unsafe. Krainz also argues there were genuine issues of material fact as to whether the City had authority to change the street's traffic pattern without council's approval and whether it followed its own procedures for changing the street's traffic pattern.

{¶ 18} However, having determined that the trial court should have granted Krainz leave to amend the complaint, we find our review of the granting of summary judgment at this stage would be premature because it would amount to a review of a partial summary judgment of only one of Krainz's claims. The Supreme Court of Ohio has repeatedly expressed its desire to avoid piecemeal litigation in our court system. *Denham v. New*

Carlisle, 86 Ohio St.3d 594, 597, 1999-Ohio-128, 716 N.E.2d 184, citing *Gen. Elec. Supply Co. v. Warden Elec., Inc.* (1988), 38 Ohio St.3d 378, 380-82, 528 N.E.2d 195. Indeed, with the addition of the claims set forth in the amended complaint, the summary judgment is rendered a non final, appealable order. Therefore, we decline to rule on the propriety of the summary judgment until Krainz's other claims are resolved by the trial court.

Judgment reversed, and case remanded.

It is ordered that appellant recover of said appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas 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.

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COLLEEN CONWAY COONEY, JUDGE

KENNETH A. ROCCO, P.J., CONCURS;
MELODY J. STEWART, J., DISSENTS (WITH SEPARATE OPINION ATTACHED).

MELODY J. STEWART, J., DISSENTING:

{¶ 19} I respectfully dissent because I am unable to conclude that the court's refusal to rule on Krainz's motion to amend its complaint was so

arbitrary and unreasonable as to be an abuse of the court's discretion. Even if I were to agree that Krainz was entitled to amend its complaint, I see no basis for the majority's conclusion that the substantive mandamus claim is unreviewable for want of a final appealable order.

{¶ 20} One could question why the trial court did not permit Krainz to amend its complaint to set forth causes of action stemming from alleged violations of the public records law when those claims arguably arose in the course of litigation on the mandamus claims. On the other hand, the court could rationally conclude that the public records causes of action were moot because the city had produced all relevant records.[1] This left Krainz with nothing more than a claim for alleged damages resulting from the city's delay in producing certain records — claims that were so unrelated to the claims alleged in mandamus that they could be brought in a separate action under the public records law. The court thus had plausible reasons for refusing to allow Krainz to amend its complaint. The majority's disagreement with the court's decision to take one plausible course of action over another does not,

[1]The majority references deposition testimony concerning the city's failure to produce a "UC map" that was appended to the traffic sign order used by the sign-marking technician for the city. This map apparently indicates the presence of underground wires or pipes near the subject street. A map of underground wires or pipes does not have any obvious relevance to the city's decision to reroute the traffic flow in front of Krainz's premises, nor does the majority attempt to suggest how the map would have been relevant in any way to that decision.

by definition, meet the very stringent standard for showing an abuse of discretion.

{¶ 21} I also disagree with the majority's refusal to review the summary judgment on the mandamus claim. The majority appears to believe that reviewing the summary judgment when it has decided to allow the public records claims to go forward would result in piecemeal litigation. The prevention of piecemeal litigation is a concern for the trial courts, not the courts of appeals. As noted by *Denham v. New Carlisle*, 86 Ohio St.3d 594, 1999-Ohio-128, 716 N.E.2d 184, our jurisdiction is premised on orders that are both final under Civ.R. 54(B) and appealable under R.C. 2505.02. Id. at 596. When the court granted summary judgment, it undeniably issued a final appealable order, thus vesting this court with jurisdiction to hear the appeal. Our decision to allow Krainz's public records claims to go forward has no effect on our jurisdiction over the summary judgment, so we continue to have an App.R. 12(A)(1)(b) obligation to "determine the appeal on the merits[.]" I would therefore reach the question of whether the court erred by granting summary judgment.