[Cite as *Ohio Power Co. v. Village of Mingo Junction*, 2004-Ohio-4994.]

STATE OF OHIO, JEFFERSON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

OHIO POWER COMPANY d/b/a/ AMERICAN ELECTRIC POWER,	)	
PLAINTIFF-APPELLANT,	)	CASE NO. 04-JE-3
VS	)	OPINION
VILLAGE OF MINGO JUNCTION,	)	
DEFENDANT-APPELLEE.	)	

CHARACTER OF PROCEEDINGS:	Civil Appeal from Jefferson County Court, No. 2 Case No. 03-CVF-00126
JUDGMENT:	Affirmed
APPEARANCES:	
For Plaintiff-Appellant:	Attorney Marilyn McConnell-Goelz P.O. Box 478 Worthington, Ohio 43085
For Defendant-Appellee:	Attorney John J. Mascio 325 North 4th Street Steubenville, Ohio 43952

JUDGES:

Hon. Gene Donofrio
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: September 20, 2004

DONOFRIO, J.

{¶1} Plaintiff-Appellant, Ohio Power Company, d/b/a American Electric Power, appeals a decision of the Jefferson County Court, No. 2, granting defendant-appellee's, Village of Mingo Junction, motion to dismiss the complaint for failure to state a claim upon which relief can be granted.

{¶2} Appellant, as part of its business and at appellee's request, relocated power poles and a wire to allow for a retaining wall and improvements on St. Clair Avenue in Mingo Junction, Ohio. Appellee completed an "Ohio Power Company Application and Agreement for Electric Service" signed by the Village Administrator of Mingo Junction, Frank Bovina, who agreed to pay $9,097.00 for the service. Appellee subsequently refused to pay appellant's bill dated February 12, 2002 pursuant to the account or contract.

{¶3} Appellant filed a complaint against appellee on June 30, 2003 alleging three counts: breach of contract, payment due on the account, and unjust enrichment. Appellee filed a motion to dismiss on October 8, 2003 on the basis of failure to state a claim upon which relief could be granted. Appellant filed a memorandum contra to the motion on October 17, 2003. Appellee cited two R.C. sections which specify the mandatory procedures which act as a condition precedent to contract formation with a village. R.C 731.141 requires all contracts "shall be executed in the name of the village and signed on its behalf by the village administrator and the clerk." R.C. 5705.41 places restrictions on the appropriation and expenditure of money and requires a certification by the subdivision's fiscal officer. Appellant and appellee's agreement complied with neither R.C. 731.141 nor 5705.41 and on November 14, 2003, the trial court determined the contract was null and void and granted the motion to dismiss on the first two counts. The trial court also dismissed the third count for unjust enrichment. The trial court reasoned that a party cannot recover for unjust enrichment against a political subdivision when the underlying contract is defective and void.

{¶4} Appellant's sole assignment of error states:

{¶5} "The Trial Court erred when it granted a Motion to Dismiss for Failure to State a Claim made by the Defendant Village of Mingo Junction."

{¶6} "A trial court may grant a motion to dismiss for failure to state a claim only when it appears 'beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery.' *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.* (1996), 76 Ohio St.3d 521, 524, citing *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 245. When reviewing a trial court's judgment granting a Civ.R. 12(B)(6) motion to dismiss, an appellate court must independently review the complaint. *Malone v. Malone* (May 5, 1999), 7th Dist. No. 98-CO-47. The appellate court is not required to defer to the trial court's decision to grant dismissal but instead considers the motion to dismiss de novo. *Harman v. Chance* (Nov. 14, 2000), 7th Dist. No. 99-CA-119. We are to presume the truth of all factual allegations in the complaint and must make all reasonable inferences in favor of the nonmoving party. *York v. Ohio State Hwy. Patrol* (1991), 60 Ohio St.3d 143, 144." *Hergenroder v. Ohio Bur. of Motor Vehicles*, 152 Ohio App.3d 704, 2003-Ohio-2561, 789 N.E.2d 1147, at ¶ 8.

{¶7} Appellant contends that the court erred in ruling that when a municipality enters into a defective contract with a public utility the municipality cannot be held liable in quasi-contract. Appellant argues that contracts between a public utility and a municipality fall outside the traditional rule that all governmental liability must be express and must be entered into in the prescribed statutory manner, and that a municipality or county is liable neither on an implied contract nor upon a quantum meruit theory by reason of benefits received.

{¶8} Where one of the parties is a municipal corporation, contract formation or execution may only be done in a manner provided for and authorized by law. *Village of Moscow v. Moscow Village Council* (1984), 29 Ohio Misc.2d 15, 18, 29 OBR 284, 504 N.E.2d 1227. Furthermore, contracts, agreements, and/or obligations of a municipality must be made and entered into in the manner provided for by statute or ordinance and cannot be entered into otherwise. *Wellston v. Morgan* (1901), 65 Ohio St. 219, 62 N.E. 127. The principle that the burden of complying

with statutory requirements falls on those who deal with municipalities is long standing and often reaffirmed. *Buchanan Bridge Co. v. Campbell* (1899), 60 Ohio St. 406, 54 N.E. 372.

{¶9} In *Lathrop v. City of Toledo* (1966), 5 Ohio St.2d 165, 173, 34 O.O.2d 278, 214 N.E.2d 408, the Ohio Supreme Court set forth the following explanation for this rule of law:

{¶10} "We think there is no hardship in requiring [private contractors], and all other parties who undertake to deal with a municipal body in respect of public improvements, to investigate the subject and ascertain at their peril whether the preliminary steps leading up to contract and prescribed by statute have been taken. No high degree of vigilance is required of persons thus situated to learn the facts. They are dealing with public agencies whose powers are defined by law, and whose acts are public transactions, and they should be charged with knowledge of both. If the preliminary steps necessary to legalize a contract, have not been taken, they can withdraw from the transaction altogether, or delay until the steps are taken. The citizen and taxpayer, in most instances, unless directly affected by the improvement, has but a remote, contingent and inappreciable pecuniary interest in the matter and should not be required to personally interest himself about its details. * * *

{¶11} "* * *

{¶12} "An occasional hardship may accrue to one who negligently fails to ascertain the authority vested in public agencies with whom he deals. In such instances, the loss should be ascribed to its true cause, the want of vigilance on the part of the sufferer, and statutes designed to protect the public should not be annulled for his benefit. * * *" quoting *McCloud & Geigle v. City of Columbus* (1896), 54 Ohio St. 439, 452 and 453, 44 N.E. 95.

{¶13} Within this general rule lie two narrow exceptions. The Ohio Supreme Court created the first exception in *Mutual Electric Co. v. Village of Pomeroy* (1918), 99 Ohio St. 75, 124 N.E. 58 and reaffirmed the rule in *Ohio Water Serv. Co. v. City of Washington* (1936), 131 Ohio St. 459, 3 N.E.2d 422. Both cases dealt with a political subdivision exercising their legislative power to establish utility rates over a term of years. In both cases, the municipality, after enacting the ordinance, refused

to pay for services rendered because the agreement violated statutory contracting procedure, voiding the contract. Despite this, the Supreme Court upheld the agreements in both cases. The Supreme Court determined that rate ordinances, though contractual in nature, are actually an exercise of legislative power. *Ohio Water Serv. Co.*, 131 Ohio St. at 463, 3 N.E.2d 422. This legislative power gives municipalities the right to fix the price of service and need not meet the general contracting requirements for municipalities. Id. Furthermore, in each case, the ordinance did not involve the expenditure of any fixed amount or stipulate the level of services the village would pay for, but only fixed the rate and stipulated for monthly payments based on that rate. Id.

{¶14} *Ohio Water Serv. Co.* further states that the exception for rate ordinances may be constitutionally required for public utilities, which cannot terminate its services at will. Id. at 464. The Court observed that "[u]nder present statutory requirements regulating and controlling public utilities, their duties and obligations are made mandatory. They are not conditioned upon * * * the existence of * * * a contract." Id. at 465. This exception is created to prevent the situation where "utility became bound but the municipality had no obligation whatever further than to pay at the rate fixed by its own ordinance if and to the extent that it did actually use such service." Id. Furthermore, the Court made these statements within the context of a failure to pay under a rate ordinance or failed negotiations for rates, so the exception's scope seems limited to rate ordinance cases.

{¶15} However, it is important to note that this line of cases does not allow the public utility to recover in quantum meruit. Instead, the statutory requirements that act as a condition precedent to contract formation are waived and the court enforces the contract. Neither case, express or impliedly, mentions quasi-contract as the basis for recovery by the public utility.

{¶16} The second exception was created by this court in *Bd. of Cty. Commrs. v. Bd. of Twp. Trustees* (1981), 3 Ohio App.3d 336, 3 OBR 391, 445 N.E.2d 664. In that case, this Court first decided that the rule established in *Ohio Water Service Co.* applies to a political subdivision acting in the same capacity as a public utility by providing fire hydrants to the township. Id. at 338. Like a public utility, the political

subdivision could not terminate its services at the end of the contract term without first making an application to the public utility commission under R.C. 4905.21. Id.

{¶17} Next, this Court held that township trustees could be held liable on the theory of quasi-contract when the underlying contract is defective and the other party is a political subdivision. Id. at 339. This court made clear that it permitted quasi-contractual relief because of the "uniqueness of the instant case" where two political subdivisions are involved. Id. at 338. The rule exempting municipalities from liability by quasi-contract is based on a policy that protects taxpayers from the fiscal irresponsibility of government officials. Id. When both parties are political subdivisions, this policy is ineffectual because a set of taxpayers will bear the cost of the irresponsibility. As the Eleventh District Court of Appeals stated in *Rua v. Shillman* (1985), 28 Ohio App.3d 63, 65, 28 OBR 104, 502 N.E.2d 220, "recovery was permitted in *Bd. of Cty. Commrs. v. Bd. of Twp. Trustees*, *supra*, under a quasi-contractual theory, so that county taxpayers would not be forced to pay for a service which benefited township taxpayers, merely because the certification requirements had not been met."

{¶18} In this case, appellant seeks to merge these two exceptions into a new principle that allows recovery under quantum meruit by a public utility. Appellant argues that because a public utility has a statutory duty to move power lines when requested, the rule under rate ordinance cases is applicable to all cases that involve statutory duties. Appellant also argues that the cost of moving the power lines, when left unpaid by the appellee, shifts to the ultimate consumer, which it classifies as the "public at large" and tries to analogize to a public taxpayer in the *Bd. Of Cty. Commrs.* case cited above. To protect the "public at large" from paying for public improvements in the Village of Mingo Junction, appellant argues the court should allow quasi-contractual recovery.

{¶19} This argument has several flaws. First, there are the obvious inconsistencies with prior precedent established in the *Ohio Water Serv. Co.* and *Bd. Of Cty. Commrs.* cases. Appellant is not attempting to recover against a municipality failing to adhere to its own rate ordinance. Appellant is also not a political subdivision assuming the burden of public improvements in another municipality.

Appellant's case does not fit into the pre-existing categories on which the narrow exceptions were created. On this basis alone, appellant has not properly stated a claim upon which relief can be granted.

{¶20} Looking beyond the rule created by the prior precedents, appellant's attempt to expand the exceptions by analogy is also flawed. First, it is unclear whether appellant has a statutory duty to move power lines. Appellant cites R.C. 4933.03, 4933.13, and 4933.16 as the basis of a statutory duty to move power lines when requested by a municipality. However, read together, these sections merely state that appellant places all power lines within a municipality at the consent of that municipality. If appellant refuses to move the power lines, it runs the risk that appellee will revoke consent or institute eminent domain proceedings to move the lines. These business risks are not the same as a statutory duty to continue providing an essential utility service to the public in spite of contractual failures, which was the basis for the *Ohio Water Serv. Co.* and *Bd. Of Cty. Commrs.* decisions.

{¶21} Second, appellant had control of pricing for the services provided in this case. According to *Ohio Water Serv. Co.*, rate ordinances are an exception because "the ordinance did not involve the expenditure of any fixed amount; it contained no stipulation as to the extent of service the village would be required to take or pay for; but, on the contrary, only fixed a rate for electric current and provided for monthly payments at that rate for current actually consumed." *Ohio Water Serv. Co.*, 131 Ohio St. at 463, 6 O.O. 145, 3 N.E.2d 422. When the utility has the power to fix the price for providing the service, as appellant did here, the exception should not apply. See *Mutual Electric Co.*, 99 Ohio St. at 86, 124 N.E. 58.

{¶22} Finally, although appellant will suffer a business loss if it cannot recover against appellee, this situation is common to all businesses that contract with municipalities. Appellant could easily avoid the loss to its customers by complying with all statutory requirements when contracting with appellee. Appellant is a knowledgeable public corporation and the requirements for contracting with municipalities have been established for over 100 years. Because appellant can mitigate this risk with careful contracting, there is no need to expand the narrow exceptions to allow quantum meruit recovery by a public utility against a municipality.

{¶23} Accordingly, appellant's sole assignment of error is without merit.

{¶24} The judgment of the trial court is hereby affirmed.

Waite, P.J., concurs.
DeGenaro, J., concurs.