

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Matthew J. Dunlop, :
 :
 Plaintiff-Appellant, :
 :
 v. : No. 16AP-550
 : (C.P.C. No. 12CV-6052)
 Ohio Department of Job & Family Services, : (REGULAR CALENDAR)
 :
 Defendant-Appellee. :

D E C I S I O N

Rendered on June 27, 2017

On brief: *The Tyack Law Firm Co., L.P.A., and Jonathan T. Tyack*, for appellant. **Argued:** *Jonathan T. Tyack*.

On brief: *Michael DeWine, Attorney General, and Anne Light Hoke, and Jeffrey Jarosch*, for appellee. **Argued:** *Jeffrey Jarosch*.

APPEAL from the Franklin County Court of Common Pleas

SADLER, J.

{¶ 1} Plaintiff-appellant, Matthew J. Dunlop, appeals from the judgment entry of the Franklin County Court of Common Pleas granting the motion to reconsider a motion to dismiss pursuant to Civ.R. 12(B)(6) filed by defendant-appellee, Ohio Department of Job and Family Services ("ODJFS"). For the following reasons, we reverse the trial court judgment.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} This is our second involvement in appellant's suit against ODJFS relating to the state's alleged collection of money in excess of court-ordered child support. In May 2011, appellant sued ODJFS in the Court of Claims of Ohio with a complaint nearly

identical to the one here. The Court of Claims dismissed the complaint for lack of jurisdiction, finding appellant's claims equitable in nature. This court affirmed that decision in *Dunlop v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 11AP-929, 2012-Ohio-1378, and the Supreme Court of Ohio declined to take further review of the matter.

{¶ 3} Just after filing his complaint in the Court of Claims, appellant filed the instant class action complaint, on behalf of himself and similarly situated individuals he estimates to number in excess of 100,000, alleging claims of conversion, equitable restitution, constructive trust, breach of fiduciary duty and wrongful disposition against ODJFS and 300 John Doe defendants, and seeking actual money damages, equitable restitution and/or disgorgement of improperly obtained funds, a "constructive trust over all funds improperly obtained by ODJFS," injunction, and declaratory relief. (Compl. at 3.) Appellant alleges that each John Doe defendant "is a joint venture, partner, subsidiary, parent, agent, representative, franchisee or alter ego" of ODJFS, has a "unity of interest" with ODJFS, and "is legally, equitably or otherwise responsible in some manner for the damages" alleged. (Compl. at 3, 4.)

{¶ 4} The complaint alleges that ODJFS knowingly collects more money than he, and persons like him, have been ordered to pay in child support and then passes that money on to others (such as ex-spouses and/or the federal government in certain public assistance cases) and/or retains the over-collected funds. The complaint states under current ODJFS policies, overpaid child support may not be recouped while an active child support order is in place and that greater than 114,000 open child support accounts with ODJFS show a credit balance. Appellant alleges that Ohio's system of recoupment does not comport with federal regulations requiring prompt refund of amounts improperly withheld.

{¶ 5} Specific to his personal situation, appellant alleges in his complaint that after his divorce in 2007, the court of common pleas ordered him to pay \$691.72 per month beginning January 1, 2008. He alleges that the Franklin County Child Support Enforcement Agency ("CSEA") sent his employer a garnishment order that specified the amount of the monthly support, provided a calculation to determine how much money should be withheld from his compensation based on the company's pay cycle, and

included a handwritten withholding amount on the instructions.¹ On later suspecting that he was paying in excess of the order and contacting the CSEA, appellant alleges that the CSEA told him he was building a credit balance as a result of his employer's error in setting up the garnishment and that he would have to wait until the child support order was near expiration to recoup the overpayment. When appellant then spoke to his employer about the issue, appellant alleges that his employer told him the garnishment amount was based on the order from the CSEA and that they could not take instructions from appellant. Appellant alleges that he continues to carry a credit balance.

{¶ 6} In the complaint, under his claim for conversion, appellant asserts that ODJFS had no legal right to collect funds in excess of the court-ordered child support payment or charge percentage fees, if any, thereon without his consent. To appellant, he is effectively permanently deprived of his use of those funds and, "even to the extent that there is a mechanism to recoup funds at the conclusion of the child support term, no interest is paid on those funds." (Compl. at 15.) As such, appellant asks for actual damages for each class member into a fluid recovery fund, plus interest. Under his claim for equitable restitution, appellant alleges that ODJFS knowingly received and held or distributed money above the ordered child support belonging to him and that this constitutes a wrongful action. As such, appellant asks for restitution of all funds collected over the ordered child support to each class member into a fluid recovery fund, plus interest.

{¶ 7} On June 25, 2012, ODJFS filed a motion to dismiss for failure to state a claim, pursuant to Civ.R. 12(B)(6), which the trial court initially denied on April 15, 2014. On April 20, 2016, ODJFS asked the trial court to reconsider its decision based on new authority, *Cullinan v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 15AP-390, 2016-Ohio-1083. Appellant filed a memorandum contra and ODJFS replied.

{¶ 8} On July 13, 2016, the trial court granted ODJFS's motion for reconsideration and dismissed the complaint pursuant to Civ.R. 12(B)(6). In doing so, the

¹ For the first time, ODJFS seems to contend that appellant's factual allegation that the CSEA hand-wrote the amount of child support withholding on the instructions to the employer required appellant to attach that document to the complaint as a "written instrument" under Civ.R. 10(D). (Appellee's Brief at 24.) Even if ODJFS did not waive this argument by not raising it either in its motion to dismiss or its motion to reconsider, ODJFS does not cite, nor can we find, case law supporting the application of Civ.R. 10(D)(1) in this context.

trial court noted appellant's arguments that evidence will be established to show that the CSEA issued a mandatory wage withholding order to his employer in an amount exceeding the existing court-ordered child support obligation and that his complaint clearly alleges wrongful conduct by ODJFS as a result of garnishing monies from his paycheck in excess of the court order. The trial court stated that it is "not permitted to consider what future evidence may show" and that "[a]pplying this standard," it agreed appellant failed to allege any wrongful conduct on the part of ODJFS in his complaint. (July 13, 2016 Decision and Entry at 4.) Specifically, "[e]ven making all reasonable inferences in favor of [appellant], the Court cannot say that he has alleged the over-collection from his paycheck was caused by ODJFS." (Decision and Entry at 4.) The trial court noted, but said it was not dispositive, that appellant's complaint in the Court of Claims alleged the over collection was due to error by his employer, which this court discussed in *Dunlop*. The trial court ultimately determined that, like in *Cullinan*, appellant "failed to allege that ODJFS acted wrongfully in its collection of his child support payments and, as a matter of law, he cannot establish a claim for equitable restitution." (Decision and Entry at 5.) Therefore, "even construing the evidence and all reasonable inferences drawn therefrom in favor [of appellant]," the trial court found appellant failed to state a claim on which relief may be granted and accordingly dismissed appellant's case with prejudice. (Decision and Entry at 5.) Appellant filed a timely appeal to this court.

II. ASSIGNMENT OF ERROR

{¶ 9} Appellant presents one assignment of error:

The Trial Court erred by granting the Motion of Defendant-Appellee, ODJFS, to dismiss the complaint of Plaintiff-Appellant, Matthew Dunlop.

III. STANDARD OF REVIEW

{¶ 10} An appellate court reviews a trial court's dismissal pursuant to Civ.R. 12(B)(6) de novo. *State ex rel. Ohio Civ. Serv. Emps. Assn. v. State*, 146 Ohio St.3d 315, 2016-Ohio-478, ¶ 12, citing *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, ¶ 5. A motion to dismiss under Civ.R. 12(B)(6) for failure to state a claim on which relief can be granted tests the sufficiency of the complaint. *Volbers-Klarich v. Middletown*

Mgt., 125 Ohio St.3d 494, 2010-Ohio-2057, ¶ 11. Accordingly, "the movant may not rely on allegations or evidence outside the complaint; such matters must be excluded, or the motion must be treated as a motion for summary judgment." *Id.*, citing Civ.R. 12(B); *State ex rel. Natalina Food Co. v. Ohio Civ. Rights Comm.*, 55 Ohio St.3d 98, 99 (1990). Therefore, in reviewing a Civ.R. 12(B)(6) dismissal, an appellate court looks to the complaint, presumes that the complaint's factual allegations are true, and makes all reasonable inferences in the nonmoving party's favor. *Ohio Civ. Serv. Emps. Assn.* at ¶ 12, citing *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192 (1988). However, we need not accept as true unsupported conclusions in a complaint. *Ohio Civ. Serv. Emps. Assn.* at ¶ 21, citing *Mitchell* at 193. A judgment granting a Civ.R. 12(B)(6) motion to dismiss may be affirmed only when there is no set of facts under which the nonmoving party could recover. *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242 (1975), syllabus.

IV. DISCUSSION

{¶ 11} Under his single assignment of error, appellant contends that the trial court erred in granting ODJFS's motion to dismiss. For the following reasons, we agree.

{¶ 12} Appellant first argues that the trial court applied the incorrect standard of review and effectively converted the motion to dismiss into a motion for summary judgment without notice to appellant. To support his argument, he points to the trial court's decision indicating that it "constru[ed] the evidence * * * in favor [of appellant]," that it is "not permitted to consider what future evidence may show," that appellant cannot "establish a claim for equitable restitution," and that the result is analogous to *Cullinan*, a summary judgment case. (Decision and Entry at 4, 5.) Appellant also alludes to the trial court relying on information outside of the pleadings but does not specify what information was improperly considered. We agree the trial court could have used more precise language. However, considering the trial court stated the correct standard of review preceding its analysis and ultimately employed the correct standard in its conclusion, we cannot say the trial court erred in applying the incorrect standard under Civ.R. 12(B)(6).

{¶ 13} Regardless whether the trial court applied the correct standard of review, we agree with appellant's second argument going to the merits of the Civ.R. 12(B)(6)

dismissal. Specifically, appellant argues that "the Complaint in this matter sufficiently alleges a claim for wrongful collection under *Santos v. Ohio Bur. of Workers' Comp.*, [101 Ohio St.3d 74, 2004-Ohio-28] as the conduct of ODJFS violates Ohio common law, the Ohio Revised Code, and the Ohio Administrative Code" as well as "long standing principles of Anglo-American Law." (Appellant's Brief at 39.)

{¶ 14} It is well-established that a plaintiff may assert a claim for equitable restitution arising out of a state agency's wrongful collection or retention of the plaintiff's money. *Cullinan* at ¶ 15; *Interim HealthCare of Columbus, Inc. v. State Dept. of Adm. Servs.*, 10th Dist. No. 07AP-747, 2008-Ohio-2286, ¶ 17 ("Cases in which a plaintiff claims a state agency has wrongfully collected certain funds are characterized generally as claims for equitable restitution."); *Santos* at paragraph one of the syllabus ("A suit that seeks the return of specific funds wrongfully collected or held by the state is brought in equity.").

{¶ 15} This court has not addressed an allegation of wrongful collection by ODJFS directly in the context of a Civ.R 12(B)(6) motion to dismiss. However, as previously stated, ODJFS asked the trial court to reconsider its denial of a prior Civ.R. 12(B)(6) motion on the basis of our decision in *Cullinan* as new authority to show ODJFS did not act wrongfully.

{¶ 16} In *Cullinan*, the plaintiff initially made child support payments by issuing a personal check to the CSEA, which then sent the check to ODJFS. When the plaintiff twice failed to make child support payments, the CSEA sent the plaintiff and his employer a withholding notice. The plaintiff contended he did not see the notice and continued to pay the monthly child support payment by personal check, resulting in double payment. The plaintiff filed suit alleging:

ODJFS "has in the past, and continues to wrongfully exercise dominion over Plaintiff's personal property, namely that portion of Plaintiff's funds over collected above the court ordered child support, to the exclusion of the rights of Plaintiff." * * * Furthermore, appellant claimed that ODJFS "had absolutely no legal authority to collect double child support payments from 2004 through the first half of 2010, nor did Defendant have the authority to charge an extra 2% on that amount as a processing charge."

Id. at ¶ 16. After denying ODJFS's motion to dismiss, the trial court in *Cullinan* later granted summary judgment in favor of ODJFS. Thereafter, this court considered the plaintiff's appeal of the trial court's summary judgment decision.

{¶ 17} Prior to addressing the merits of the plaintiff's arguments, we believed it important to note that the plaintiff in *Cullinan* did not argue that ODJFS acted improperly by issuing a wage-withholding order following the plaintiff's failure to timely remit his child support payments. Thereafter, we rejected the plaintiff's contention that ODJFS acted wrongfully. We found that under the revised code and administrative code, impoundment of excess payments clearly applies in the context of a termination investigation. Moreover, we emphasized that R.C. 3121.50 requires " '[o]n receipt of *any amount* forwarded from a payor,' ODJFS must distribute such payments within 'two business days of its receipt' " and that the plaintiff failed to demonstrate that ODJFS is permitted or required to impound funds "whenever an obligor overpays his or her support obligation." (Emphasis sic.) *Id.* at ¶ 23, quoting R.C. 3121.50.

{¶ 18} We supported our conclusion in *Cullinan* that ODJFS did not act wrongfully with the testimony of the CSEA support officer, who stated that overpayments are not uncommon and can occur through no fault of the agency. Furthermore, we distinguished the allegations in *Cullinan* from those in *Santos*, which found any collection or retention of moneys collected under an unconstitutional statute to be wrongful, and *Ohio Hosp. Assn. v. Ohio Dept. of Human Servs.*, 62 Ohio St.3d 97, 105 (1991), which involved money collected under an invalid administrative rule. Unlike in *Santos* and *Ohio Hosp. Assn.*, we found the plaintiff in *Cullinan* "fails to demonstrate that ODJFS acted in violation of a duty, statutory or otherwise," and therefore, "as a matter law, [the plaintiff] cannot establish a claim for equitable restitution." *Id.* at ¶ 27. We additionally found the plaintiff's arguments regarding ODJFS's failure to contact him regarding the excess payments lacked merit as a result of the plaintiff's failure to update his contact information as required by the shared parenting plan. As a result of the above considerations, we held that the trial court did not err in granting summary judgment in favor of ODJFS.

{¶ 19} *Cullinan* notes that the Ohio statutory and administrative scheme for state collection and distribution of child support payments generally defers reimbursement of

over-collected money to the time of termination proceedings. Whether ODJFS otherwise acted wrongfully in collecting and distributing money in *Cullinan* was an evidentiary issue shaped by the record of that case and decided pursuant to the Civ.R. 56 standard of review.

{¶ 20} In the posture of this appeal, we are bound by Civ.R. 12(B)(6) to accept appellant's factual allegations as true and make all reasonable allegations in his favor. To that point, appellant's complaint alleges ODJFS acted wrongfully and that ODJFS and/or its agent or alter-ego was at fault for collecting money in excess of the court-ordered child support. Whether appellant will be able to establish his allegations as facts on the record and then demonstrate those facts amount to wrongful conduct to support his claim is beyond the scope of our review here.

{¶ 21} Considering our limited standard of review and the distinctions between this appeal and *Cullinan*, we agree with appellant that the trial court erred in determining appellant's complaint was not sufficient to state a claim for wrongful collection or retention of funds to survive ODJFS's Civ.R. 12(B)(6) motion to dismiss.

{¶ 22} Accordingly, we sustain appellant's assignment of error.

V. CONCLUSION

{¶ 23} Having sustained appellant's sole assignment of error, we reverse the judgment of the Franklin County Court of Common Pleas and remand the matter for further proceedings consistent with this decision.

*Judgment reversed;
cause remanded.*

KLATT and BRUNNER, JJ., concur.
