[Cite as *Garfield Hts. ex rel. Kozelka v. Garfield Hts.*, 2009-Ohio-5009.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92511

CITY OF GARFIELD HEIGHTS, EX REL. RAYMOND KOZELKA

PLAINTIFF-APPELLANT

vs.

CITY OF GARFIELD HEIGHTS, OHIO, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case Nos. CV-667513 and CV-664197

BEFORE: Boyle, J., Stewart, P.J., and Sweeney, J.

RELEASED: September 24, 2009

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. II, Section 2(A)(1).

MARY J. BOYLE, J.:

{¶ 1} This case came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1, the record from the lower court and the briefs.

{¶ 2} Plaintiff-appellant, Raymond Kozelka, a taxpayer of the city of Garfield Heights ("Garfield Heights"), appeals from the trial court granting separate motions to dismiss filed by Garfield Heights and the Ohio Environmental Protection Agency ("Ohio EPA"). The trial court granted Garfield Heights' motion on the grounds that the action was not timely commenced within the one-year statute of limitations provided in R.C. 733.60, and granted the Ohio EPA's motion because it found that it did not have jurisdiction over the action. Finding no merit to the appeal, we affirm.

{¶ 3} In March 2005, the director of the Ohio EPA issued Director's Final Findings and Orders ("2005 Orders") authorizing McGill Property Group, L.L.C., Garfield Land Development, L.L.C., and GHLPF, L.L.C. (collectively known as the "McGill Group") to complete construction of a shopping complex, known as City View Center, over two closed landfills that had previously been operated as solid waste disposal facilities. The McGill Group signed the 2005 Orders.

{¶ 4} According to the Ohio EPA, the 2005 Orders required proper management and capping of the solid wastes disposed at the landfills, control of contaminated runoff (leachate), and control of any landfill gas generated at the site. The Ohio EPA claimed that if the 2005 Orders were followed, it would

assure full compliance with Ohio's solid waste and water pollution requirements. Garfield Heights also signed the 2005 Orders, agreeing that it would be responsible for the operation and maintenance requirements of the orders in the event the other parties failed to comply with them.

{¶ 5} Subsequently, the Ohio EPA discovered several violations of the 2005 Orders. From March 2005 to July 2008, the Ohio EPA and the Cuyahoga County Board of Public Health issued at least 21 notices of violation to the McGill Group for failure to comply with the 2005 Orders. Three of these notices were also sent to City View Center, which took ownership of certain portions of the land in December 2006 and as such, became fully subject to the 2005 Orders. In July 2008, the state of Ohio, at the written request of the director of the Ohio EPA, brought a 25-count complaint ("Enforcement Action") in the Cuyahoga County Court of Common Pleas against the parties to the 2005 Orders, including Garfield Heights and City View Center, to remedy past and continuing violations of Ohio's environmental laws. See *State ex rel. Nancy Rogers v. McGill Property Group, et al.*, Case No. CV-664197.

{¶ 6} On August 11, 2008, plaintiff-appellant, Raymond Kozelka, filed a taxpayer suit ("Taxpayer Suit"), pursuant to R.C. 733.59, against Garfield Heights and the director of the Ohio EPA (added later in an amended complaint as a new party defendant), alleging that the 2005 Orders were invalid against Garfield Heights, because Mayor Thomas Longo executed the orders in contravention of

state and municipal law. Kozelka sought to have the 2005 Orders, as it applied to Garfield Heights, be declared void and unenforceable, and sought to obtain an order enjoining Garfield Heights from complying with the orders. At Kozelka's request, the Taxpayer Suit was consolidated with the Enforcement Action on August 15, 2008.

{¶ 7} Garfield Heights and Ohio EPA moved separately to dismiss the Taxpayer Suit. Garfield Heights argued that the suit was beyond the applicable statute of limitations in R.C. 733.60, and the Ohio EPA argued that the common pleas court did not have jurisdiction.

{¶ 8} On December 2, 2008, the parties to the Enforcement Action filed a Consent Order and Final Judgment, which resolved all claims between them. The agreement bound the McGill Group and the City View Center to comply with Ohio's environmental laws and follow all orders set forth in the agreement. Three days later, the state of Ohio dismissed Garfield Heights without prejudice.

{¶ 9} Also on December 2, 2008, the trial court dismissed the Taxpayer Suit, finding that Kozelka's claims against Garfield Heights were beyond the statute of limitations and that it did not have jurisdiction to address his claims against the Ohio EPA.

{¶ 10} It is from this judgment that Kozelka appeals, raising two assignments of error for our review:

{¶ 11} "[1.] The Cuyahoga County Court of Common Pleas erred in granting Defendant City of Garfield Heights' Motion to Dismiss by erroneously concluding that the statute of limitations contained within Ohio Revised Code §733.60 had expired.

{¶ 12} "[2.] The Cuyahoga County Court of Common Pleas erred in granting Defendant Ohio Environmental Protection Agency's Motion to Dismiss by erroneously applying Ohio Revised Code §3745.04, which grants the Environmental Review Appeals Commission exclusive original jurisdiction over appeals brought by a party to a proceeding before the Director of Environmental Protection."

Standard of Review

{¶ 13} A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545. It is well settled that "when a party files a motion to dismiss for failure to state a claim, all factual allegations of the complaint must be taken as true and all reasonable inferences must be drawn in favor of the nonmoving party." *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 60, citing *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192.

{¶ 14} While the factual allegations of the complaint are taken as true, "[u]nsupported conclusions of a complaint are not considered admitted *** and

are not sufficient to withstand a motion to dismiss." *State ex rel. Hickman v. Capots* (1989), 45 Ohio St.3d 324, 324. In light of these guidelines, in order for a court to grant a motion to dismiss for failure to state a claim, it must appear "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 245; see, also, *Spalding v. Coulson* (1995), 104 Ohio App.3d 62.

Actions under R.C. 733.56 and 733.59

{¶ 15} In his first assignment of error, Kozelka argues that the trial court erred when it found that his taxpayer suit was filed beyond the statute of limitations under R.C. 733.60 because (in at least four of his claims) he was seeking declaratory judgments, not an injunction (he acknowledges that one of his prayers was for an injunction).

{¶ 16} R.C. 733.56 authorizes a city law director to seek injunctive relief in certain instances. It provides:

{¶ 17} "The *** city director of law shall apply, in the name of the municipal corporation, to a court of competent jurisdiction for an order of injunction to restrain the misapplication of funds of the municipal corporation, the abuse of its corporate powers, or the execution or performance of any contract made in behalf of the municipal corporation in contravention of the laws or ordinance[s] governing it, or which was procured by fraud or corruption."

{¶ 18} Where the law director fails to undertake the action contemplated by R.C. 733.56, a taxpayer of the municipality may file suit on its behalf pursuant to R.C. 733.59. This latter section provides as follows:

{¶ 19} "If the *** city director of law fails, upon the written request of any taxpayer of the municipal corporation, to make any application provided for in sections 733.56 to 733.58 of the Revised Code, the taxpayer may institute suit in his own name, on behalf of the municipal corporation. Any taxpayer of any municipal corporation in which there is no village solicitor or city director of law may bring such suit on behalf of the municipal corporation. ***"

{¶ 20} Kozelka sent a written request to the law director of Garfield Heights as mandated by R.C. 733.59 prior to the institution of the present action. The service of the request was entirely appropriate since the relief sought was clearly encompassed within the terms of R.C. 733.56. In his Taxpayer Suit, Kozelka alleged that the 2005 Orders executed by the mayor in March 2005 are void and unenforceable as to Garfield Heights because 1) city council did not authorize the mayor to execute the orders; 2) the law director did not endorse the 2005 Orders; 3) the director of finance did not certify the orders; and 4) the mayor did not possess the authority to execute the orders. Thus, Kozelka's Taxpayer Suit under R.C. 733.59 is an action seeking "to restrain *** the execution or performance of *** [a] contract made *** in contravention of the laws or ordinance[s] governing it ***." See R.C. 733.56.

Statute of Limitations under R.C. 733.60

{¶ 21} It is well established, however, that "'any action predicated upon R.C. 733.56 and 733.59 must be instituted within the limitation period prescribed by 733.60.'" *Cuyahoga Falls v. Robart* (1991), 58 Ohio St.3d 1, 3, quoting *Westbrook v. Prudential Ins. Co. of America* (1988), 37 Ohio St.3d 166, 169. R.C. 733.60 provides, "[n]o action to enjoin the performance of a contract entered into or the payment of any bonds issued by a municipal corporation shall be brought or maintained unless commenced within one year from the date of such contract or bonds."

{¶ 22} "The underlying purpose of R.C. 733.60 is to prevent prejudice to a party who enters into a contract with a municipal corporation and who substantially alters its position by partial performance of the contract." *Dehmer v. Campbell* (1993), 127 Ohio St. 285, 287-288.

{¶ 23} Kozelka claims the trial court erred because R.C. 733.60 only applies to injunctions and does not apply to declaratory judgment actions. He argues that he asserted "four distinct claims for relief in declaratory judgment, with only one claim for relief in injunction." Kozelka's argument, however, is not a novel one, and has been rejected.

{¶ 24} In *Chardon v. Burgess & Niple, Ltd.* (June 11, 1993), 11th Dist. No. 92-G-1734, the village of Chardon, at the request of a taxpayer, filed suit

to enjoin the the performance of a contract the village entered into with Burgess & Niple for engineering services. The complaint prayed for a declaration pursuant to R.C. 733.56 that the contract constituted either a misapplication of funds or abuse of corporate powers. The complaint further requested a declaration that the performance of the contract contravened Ohio law. The appellants in *Chardon* argued, as Kozelka does here, that the declaratory relief sought was not barred by R.C. 733.60. The court stated that "[w]hile phrased as a request for declarations, the relief entitled to under R.C. 733.56 is an injunction." The court noted that the taxpayer's letter that he sent to the village requested the village to seek *injunctive relief* (under R.C. 733.56), and stated:

{¶ 25} "The complaint and cross-claim may be characterized as declaratory relief, as the prayers for relief request the trial court to 'declare' certain things. However, *** R.C. Chapter 733 is the exclusive means by which a municipal corporation or a taxpayer may seek to enjoin a contract entered into by the municipal corporation. Therefore, appellants' attempt to characterize the action as a declaratory relief action is ineffective." Id., citing *Westbrook*, 37 Ohio St.3d at 170.

{¶ 26} Here, as in *Chardon*, Kozelka's letter to Garfield Heights' law director demanded the law director to "*file an action for injunctive relief*" in

accordance with R.C. 733.56 "*to enjoin performance* of the Ohio Environmental Protection Agency Director's [*2005 Orders*], signed by Mayor Thomas Longo, executed in contravention of the Charter and Ordinances of the City of Garfield Heights and the laws of the State of Ohio ***." Kozelka further warned, "[i]f you fail to file *for injunctive relief* ***, I will have no alternative but to bring a taxpayer's suit on behalf of the residents of the City of Garfield Heights, Ohio."

{¶ 27} We find that Kozelka's claims, despite being labeled declaratory actions, actually seek injunctive relief to enjoin Garfield Heights from performing any part of the 2005 Orders. He first sought relief under R.C. 733.56 (the demand letter) and then R.C. 733.59 (the Taxpayer Suit). As the Ohio Supreme Court made clear, "[w]here statutory relief is afforded and clearly applies to the circumstances giving rise to the action, the statute constitutes the exclusive avenue for seeking redress." *Westbrook*, 37 Ohio St.3d at 170. Further, "where the legislature has prescribed a time limit for bringing such action, a common-law suit instituted beyond the limitations period may not be maintained." Id.; see, also, *State ex rel. Wise v. Solon*, 8th Dist. No. 80352, 2002-Ohio-3442.

{¶ 28} Moreover, each of Kozelka's requested "declarations" emanate from one allegation, namely, that the 2005 Orders are founded upon an illegal

contract. Kozelka sought to declare as to Garfield Heights: (1) that the contract was void and unenforceable because city council did not authorize it; (2) that the contract was void and unenforceable because the law director did not endorse it; (3) that the contract was void and unenforceable because the finance director did not certify that the money required for the contract was in the treasury; and (4) that the contract was void and unenforceable because the mayor did not have the signatory authority to execute the contract. He further sought to enjoin Garfield Heights from performing on this contract. It is clear that each of Kozelka's claims ultimately sought to enjoin Garfield Heights from performing on an illegal contract. Thus, his action fell squarely within R.C. 733.56 and 733.59, and as such, was limited by the time requirements in R.C. 733.60.

{¶ 29} Kozelka further claims that R.C. 733.60 should not bar his claims because he, as a taxpayer, and Garfield Heights city council members were unaware that the mayor executed the 2005 Orders. He argues that this court should apply the discovery rule to R.C. 733.60 because if the complaint was barred by the "statute of limitations before public disclosure of the agreement," it would "lead to an unconscionable result."

{¶ 30} Generally a cause of action accrues at the time that a wrongful act is committed and the statute of limitations begins to run at that time.

Collins v. Sotka (1998), 81 Ohio St.3d 505, 507. However, "the discovery rule is an exception to this general rule and provides that a cause of action does not arise until the plaintiff discovers, or should have discovered, that he or she was injured by the wrongful conduct of the defendant." *Norgard v. Brush Wellman, Inc.*, 95 Ohio St.3d 165, 2002-Ohio-2007, at ¶8, citing *Collins*, citing *O'Stricker v. Jim Walter Corp.* (1983), 4 Ohio St.3d 84.

{¶ 31} "'A Civ.R. 12(B)(6) motion to dismiss based upon a statute of limitations should be granted only where the complaint conclusively shows on its face that the action is so barred.'" *Doe v. Catholic Diocese*, 158 Ohio App.3d 49, 2004-Ohio-3470, ¶23, quoting *Kennedy v. Heckard*, 8th Dist. No. 80234, 2002-Ohio-6805.

{¶ 32} In the instant case, a careful reading of the complaint shows that Kozelka does not mention a statute of limitations, tolling, or any dates other than March 18, 2005 (date the mayor signed the 2005 Orders), July 8, 2008 (date Enforcement Action was filed), and July 24, 2008 (date he sent letter to the law director pursuant to R.C. 733.56). Even more striking is the absence of Kozelka's discovery-rule theory in his complaint. Attached to his complaint is a copy of the letter that he sent to the law director, service of that letter, and a copy of the 2005 Orders. We fail to see any facts alleged in the complaint that toll the statute of limitations. See *Jackson v. Sunnyside Toyota, Inc.*, 175 Ohio App.3d

370, 2008-Ohio-687 (trial court properly dismissed the case because appellant did not mention statute of limitations in the complaint, did not allege any reason the statute may have been tolled, and did not raise the discovery rule or allege any facts that would implicate the discovery rule); *Doe v. Catholic Diocese*, supra (trial court properly dismissed the case for failure to state a claim because "Doe makes no claim of repressed memory in her complaint and ignores that she had a duty to exercise reasonable diligence to determine whether she had a claim").

{¶ 33} We note that Kozelka improperly attaches affidavits to his opposition to Garfield Heights' motion to dismiss wherein city council members claim that they were unaware of the mayor's execution of the 2005 Orders. When ruling on a motion to dismiss, however, the trial court could not consider these affidavits. Even if it could have, none of the affidavits allege that the mayor fraudulently concealed the signing of the 2005 Orders. Each affiant simply claims that he or she was unaware of the 2005 Orders until the Ohio EPA filed the Enforcement Action in July 2008. Further, notice of the 2005 Orders were published in the Ohio EPA Weekly Review and the Cleveland Plain Dealer on March 25, 2005.

{¶ 34} Thus, we find that the trial properly dismissed Kozelka's taxpayer action against Garfield Heights. Kozelka's first assignment of error is overruled.

Standing under R.C. 3745.04

{¶ 35} In his second assignment of error, Kozelka maintains that the trial court erred when it dismissed his action against the Ohio EPA, finding that it did

not have jurisdiction to decide the case. He claims that he could not have appealed the 2005 Orders to the Environmental Review Appeals Commission ("ERAC") because he was not a "party to the proceeding" resulting in the 2005 Orders.

{¶ 36} R.C. 3745.04(B) provides in pertinent part that "[a]ny person who was a *party to a proceeding* before the director of environmental protection may participate in an appeal to [ERAC] for an order vacating or modifying the action of the director or a local board of health, or ordering the director or board of health to perform an act. The environmental review appeals commission has exclusive original jurisdiction over any matter that may, under this section, be brought before it."

{¶ 37} R.C. 3745.04(A) defines "action" or "act" to include "the adoption, modification, or repeal of a rule or standard, the issuance, modification, or revocation of any lawful order other than an emergency order, and the issuance, denial, modification, or revocation of a license, permit, lease, variance, or certificate, or the approval or disapproval of plans and specifications pursuant to law or rules adopted thereunder." Id.

{¶ 38} There is no question that the 2005 Orders in the instant case were an "action" or "act" as defined under R.C. 3745.04(A). And although Kozelka makes a good argument that he was not a "party to a proceeding before the director of environmental protection," we find his argument to be without merit.

The following three cases, although not directly on point, shed light on the issue of standing under R.C. 3745.04 with respect to appeals to ERAC.

{¶ 39} In *State ex rel. Sierra Club v. Koncelik*, 10th Dist. No. 05AP-643, 2005-Ohio-6477, the director of the Ohio EPA had issued a permit to FDS Coke Plant, L.L.C. that would allow the company to install a coke oven battery and related facilities. The director and FDS Coke Plant were the only two parties to the proceeding. Nonetheless, the court held that the "Sierra Club or any other protesting party" could appeal the issuance of the permit to the ERAC pursuant to R.C. 3745.04, and "seek a stay of the permit during such an appeal." Id. at ¶8 (dismissing the Sierra Club's motion for writ of prohibition because it had an adequate remedy at law under R.C. 3745.04).

{¶ 40} In *FDS Coke Plant, L.L.C. v. Jones*, 166 Ohio App.3d 224, 2006-Ohio-1642, the director of the Ohio EPA had issued a permit to FDS Coke Plant. FDS Coke Plant appealed the permit conditions to ERAC. The Sierra Club moved to intervene in the appeal, but ERAC denied its motion to intervene. The Sierra Club appealed ERAC's denial to the Tenth Appellate District pursuant to R.C. 3745.06 (permits "[a]ny party adversely affected by an order of the environmental review appeals commission may appeal to the court of appeals of Franklin County"). The court reversed ERAC's decision to deny the Sierra Club's intervention because the Sierra Club was a "party" under R.C. 3745.04 and had standing to intervene in FDS Coke Plant's appeal to ERAC. Id. at ¶17.

In fact, the court noted that the Sierra Club could have brought its own direct appeal to ERAC. Id. This was so despite the fact that the Sierra Club was not a "party to the proceeding" when the director issued the permit to FDS Coke Plant.

{¶ 41} In *Jackson Cty. Environmental Commt. v. Shank, Director* (1990), 67 Ohio App.3d 635, the Environmental Board of Review (now called ERAC) dismissed an appeal filed by Jackson County Environmental Committee ("JCEC") because the Board determined that it lacked jurisdiction since there was no "action" or "act" as required by R.C. 3745.04. The "event" that led to JCEC's appeal was that the director of the Ohio EPA had modified a previous determination of the "maximum daily waste receipt limit" for Wellston Sanitary Landfill. Thus, the director and Wellston were the only parties to the original proceeding. JCEC appealed the board's dismissal to the Tenth Appellate District under R.C. 3745.06. JCEC argued that it had standing "since the director [had] made decisions which adversely affect the landfill policy in [its] community." Id. at 637. The only issue before the Tenth District was whether the director's modification was an "action" or "act" for purposes of R.C. 3745.04, which the court held that it was. Id. at 156. Notably, although JEC's standing was not an issue on appeal before the Tenth District, the court specifically emphasized that the board below had found that absent other considerations, JCEC "would have apparent standing to pursue the appeal." Indeed, according

to ERAC, JCEC (which was not a party to the original proceeding) had standing under R.C. 3745.04 to appeal the director's "action."

{¶ 42} In these three cases, a third party (not directly involved in the "action") was considered "a party to the proceeding" and had standing to appeal the "action" or "act" to ERAC under R.C. 3745.04. Further, R.C. 3745.04 makes clear that the ERAC "has exclusive original jurisdiction over any matter that *may, under this section, be brought before it*." (Emphasis added.) Thus, ERAC had exclusive jurisdiction over an appeal brought by a third party, here a taxpayer, challenging the validity of the 2005 Orders as applied to Garfield Heights.

{¶ 43} Accordingly, we find the trial court did not err when it dismissed Kozelka's action for want of jurisdiction.

{¶ 44} Kozelka's second assignment of error is overruled.

Judgment affirmed.

It is ordered that appellees recover from appellant 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.

MARY J. BOYLE, JUDGE

MELODY J. STEWART, P.J., and
JAMES J. SWEENEY, J., CONCUR