[Cite as *Champion Mall Corp. v. Champion Twp. Bd. of Trustees*, 2010-Ohio-2051.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

CHAMPION MALL CORP.,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2009-T-0102**
- vs -	:	
BOARD OF TRUSTEES, CHAMPION TOWNSHIP, OHIO, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2008 CV 3014.

Judgment: Affirmed.

Donald L. Guarnieri, Guarnieri & Secrest, L.L.P., 431 East Market Street, P.O. Box 392, Warren, OH 44482 (For Plaintiff-Appellant).

W. Scott Fowler, Comstock, Springer & Wilson Co., L.P.A., 100 Federal Plaza East, #926, Youngstown, OH 44503-1811(For Defendants-Appellees).

COLLEEN MARY O'TOOLE, J.

{¶1} Champion Mall Corporation appeals from the grant of summary judgment by the Trumbull County Court of Common Pleas to the Board of Trustees of Champion Township, Ohio, and individual trustees Tim Down, Tom Tracey and Jeff Hovanic, in its action for trespass. We affirm.

{¶2} Champion Mall owned property located at 4199 Mahoning Avenue, Ohio. July 20, 2006, the Champion Township Fire Department conducted an inspection, and issued an "Inspection Report & Notice of Hazards," detailing numerous dangers at the site. September 20, 2006, the Trumbull County Board of Health declared the structure at 4199 Mahoning Avenue "Unfit for Human Habitation." October 3, 2006, the Champion Township Zoning Inspector forwarded the letter from the board of health regarding the "unfit" status of the 4199 Mahoning Avenue property to Champion Mall, requesting the latter provide plans for bringing the property into compliance.

{¶3} December 6, 2006, the Champion Township Zoning Inspector again sent a letter to Champion Mall, noting the latter's failure to answer the October 3, 2006 letter, and forwarding a copy of the October 3, 2006 letter, the board of health's declaration that the property was unfit, as well as an "unsafe" notice from the Fire Chief of Champion Township, and a letter from the Trumbull County Building Inspector declaring the structure on the property "unsound." Once again, the zoning inspector requested plans from Champion Mall to remediate the situation, and further warned that legal action might result if the problems continued unabated. The zoning inspector repeated this process by a letter dated January 4, 2007.

{¶4} Based on the findings of the fire department and board of health, the Champion board of trustees declared the 4199 Mahoning Avenue property a public nuisance at their March 5, 2007 meeting. Pursuant to statute, the board of trustees informed Champion Mall of its decision by certified mail, as well as by publishing a legal notice in *The Tribune*. These notices informed Champion Mall it had thirty days to remediate the problems noted, or the township would enter the property and do so itself.

Legal notices were further sent to Champion Mall, care of its statutory agent, the Trumbull County Treasurer, and the Ohio Department of Taxation. These notices included the information that thirty days existed for Champion Mall to enter an agreement with the Champion board of trustees regarding the property, or to request a hearing.

{¶5} August 6, 2007, the Champion board of trustees passed another resolution ordering removal of the structure at 4199 Mahoning Avenue, and sent notice of the resolution to Champion Mall, care of its statutory agent. When Champion Mall failed to respond, demolition went forward.

{¶6} October 28, 2008, Champion Mall filed its complaint in trespass against the Champion board of trustees, the trustees individually, and D.C. Rappach, Inc. The board and trustees filed their answer December 3, 2008. April 16, 2009, the board and trustees moved the trial court for summary judgment. Champion Mall filed its brief in opposition April 28, 2009; and, the board and trustees replied May 18, 2009. June 24, 2009, D.C. Rappach answered the complaint. September 10, 2009, the trial court entered judgment in favor of the board and trustees. It found they had fully complied with the requirements of R.C. 505.86, governing the removal of unsafe structures. It further found they were immune under the doctrine of sovereign immunity.

{¶7} October 7, 2009, Champion Mall noticed this appeal. It assigns three errors:

{¶8} "[1.] THE TRIAL COURT ERRED IN FINDING THE TRUSTEES ARE IMMUNE OF (sic) CIVIL LIABILITY FOR DAMAGES BY A CONTRACTOR.

{¶9} "[2.] THE TRIAL COURT FAILED TO FIND THAT THE TRUSTEES FAILED TO PROVIDE STATUTORY NOTICE TO THE CORPORATION. FAILURE TO PROVIDE STATUTORY NOTICE.

{¶10} "[3.] TRIAL COURT ERRED IN GRANTING MOTION FOR SUMMARY JUDGMENT UPON CONFLICTING AFFIDAVITS AND NOT APPLICABLE COURT DECISION OR ISSUES PRESENTED IN THE COMPLAINT."[1]

{¶11} "'Pursuant to Civ.R. 56(C), summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.' *Holik v. Richards*, 11th Dist. No. 2005-A-0006, 2006-Ohio-2644, ¶12, citing *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, ***. 'In addition, it must appear from the evidence and stipulations that reasonable minds can come to only one conclusion, which is adverse to the nonmoving party.' Id. citing Civ.R. 56(C). Further, the standard in which we review the granting of a motion for summary judgment is de novo. Id. citing *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, ***.

{¶12} "Accordingly, '(s)ummary judgment may not be granted until the moving party sufficiently demonstrates the absence of a genuine issue of material fact. The moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim.' *Brunstetter v. Keating*, 11th Dist. No. 2002-T-0057, 2003-Ohio-3270, ¶12, citing *Dresher* at 292. 'Once the moving party meets the initial burden, the nonmoving party must then set

forth specific facts demonstrating that a genuine issue of material fact does exist that must be preserved for trial, and if the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party.' Id., citing *Dresher* at 293.

{¶13} "***

{¶14} "***

{¶15} "Since summary judgment denies the party his or her 'day in court' it is not to be viewed lightly as docket control or as a 'little trial.' The jurisprudence of summary judgment standards has placed burdens on both the moving and nonmoving party. In *Dresher v. Burt*, the Supreme Court of Ohio held that the moving party seeking summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record before the trial court that demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. The evidence must be in the record or the motion cannot succeed. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case but must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) that affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden outlined in the

---

1. We note that there are slight discrepancies between the first and second assignments of error as set

last sentence of Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial. If the nonmoving party fails to do so, summary judgment, if appropriate shall be entered against the nonmoving party based on the principles that have been firmly established in Ohio for quite some time in *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, ***.

{¶16} "The court in *Dresher* went on to say that paragraph three of the syllabus in *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, ***, is too broad and fails to account for the burden Civ.R. 56 places upon a *moving* party. The court, therefore, limited paragraph three of the syllabus in *Wing* to bring it into conformity with *Mitseff*. (Emphasis added.)

{¶17} "The Supreme Court in *Dresher* went on to hold that when *neither* the moving nor nonmoving party provides evidentiary materials demonstrating that there are no material facts in dispute, the moving party is not entitled to a judgment as a matter of law as the moving party bears the initial responsibility of informing the trial court of the basis for the motion, 'and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim.' Id. at 276. (Emphasis added.)" *Welch v. Ziccarelli*, 11th Dist. No. 2006-L-229, 2007-Ohio-4374, at ¶36-37, 40-42. (Parallel citations omitted.)

{¶18} By its first assignment of error, Champion Mall asserts the trial court erred in finding the board of trustees and trustees, individually, were clothed with sovereign

---

forth in the table of contents and the body of appellant's merit brief. They are merely semantic. We have set forth the assignments of error as they appear in the body of the brief.

immunity, insofar as the demolition of the structure located at 4419 Mahoning Avenue involved the destruction of personal property located at the structure.

{¶19} "'R.C. Chapter 2744 sets forth a three tiered analysis for determining a political subdivision's immunity from liability. *Greene Cty. Agricultural Soc. v. Liming*, (2000), 89 Ohio St.3d 551, 556, *** (***) First, R.C. 2744.02(A)(1) codifies the general rule of sovereign immunity, viz., that "a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function." However, this general rule is limited by R.C. 2744.02(B), which sets forth five instances in which a political subdivision is not immune. Hence, the second tier of the analysis requires a court to determine whether any of the exceptions under R.C. 2744.02(B) apply. Finally, if a political subdivision is exposed to liability through the application of R.C. 2744.02(B), a court must consider whether the political subdivision could legitimately assert any of the defenses or immunities under R.C. 2744.03. See, e.g., *Greene Cty. Agricultural Soc*., supra, at 557.'" *Moore v. Lake Cty. Dept. of Job and Family Servs.*, 11th Dist. No. 2009-L-053, 2010-Ohio-825, at ¶32, quoting *Frazier v. Kent*, 11th Dist. Nos. 2004-P-0077 and 2004-P-0096, 2005-Ohio-5413, at ¶20.

{¶20} A township is a political subdivision for purposes of R.C. Chapter 2744. Cf. *Chalker v. Howland Twp. Bd. of Trustees* (1995), 74 Ohio Misc.2d 5, 15-17. In this case, the board of trustees acted to demolish appellant's structure under authority of R.C. 505.86, which provides, in pertinent part:

{¶21} "(B) A board of township trustees may provide for the removal, repair, or securance of buildings or other structures in the township that have been declared insecure, unsafe, or structurally defective by any fire department under contract with the township or by the county building department or other authority responsible under Chapter 3781. of the Revised Code for the enforcement of building regulations or the performance of building inspections in the township, or buildings or other structures that have been declared unfit for human habitation by the board of health of the general health district of which the township is a part.

{¶22} "At least thirty days prior to the removal, repair, or securance of any insecure, unsafe, or structurally defective building, the board of township trustees shall give notice by certified mail of its intention with respect to the removal, repair, or securance to the holders of legal or equitable liens of record upon the real property on which the building is located and to owners of record of the property. If the owner's address is unknown and cannot reasonably be obtained, it is sufficient to publish the notice once in a newspaper of general circulation in the township. The owners of record of the property or the holders of liens of record upon the property may enter into an agreement with the board to perform the removal, repair, or securance of the insecure, unsafe, or structurally defective building. If an emergency exists, as determined by the board, notice may be given other than by certified mail and less than thirty days prior to the removal, repair, or securance."

{¶23} R.C. 2744.01 provides, in pertinent part:

{¶24} "(C) (1) 'Governmental function' means a function of a political subdivision that is specified in division (C)(2) of this section or that satisfies any of the following:

{¶25} "***

{¶26} "(c) A function that promotes or preserves the public peace, health, safety, or welfare; that involves activities that are not engaged in or not customarily engaged in by nongovernmental persons; and that is not specified in division (G)(2) of this section as a proprietary function.

{¶27} "(2) A 'governmental function' includes, but is not limited to, the following:

{¶28} "***

{¶29} "(i) The enforcement or nonperformance of any law;

{¶30} "***

{¶31} "(p) The provision or nonprovision of inspection services of all types, including, but not limited to, inspections in connection with building, zoning, sanitation, fire, plumbing, and electrical codes, and the taking of actions in connection with those types of codes, including, but not limited to, the approval of plans for the construction of buildings or structures and the issuance or revocation of building permits or stop work orders in connection with buildings or structures ***[.]"

{¶32} Pursuant to the foregoing, it is evident that a board of township trustees is engaged in a governmental function under R.C. 505.86 when it exercises its power to order the demolition of a structure which has been declared unsafe by the appropriate authorities, as occurred in this case. See, e.g., *Chalker* at 20-21. Consequently, unless one of the exceptions set forth under R.C. 2744.02(B) applies, the trial court in this case correctly concluded that, insofar as Champion Mall sought liability against Champion Township, sovereign immunity applied. R.C. 2744.02(A)(1). In *Moore* at ¶34, this court defined the R.C. 2744.02(B) exceptions as follows:

{¶33} "The potential exceptions to immunity for a political subdivision involve: (1) the negligent operation of a motor vehicle by an employee; (2) the negligent performance of a proprietary function; (3) the negligent failure to keep public roads open and in repair; (4) injury caused by a defect on the grounds of a public building, and (5) instances in which civil liability is expressly imposed upon the subdivision by a section of the Revised Code. See R.C. 2744.02(B)(1)-(5). The record below does not support the applicability of any of these exceptions to immunity."

{¶34} Similarly, nothing in the record of this case indicates that any of the R.C. 2744.02(B) exceptions to sovereign immunity apply in this case. Consequently, insofar as Champion Mall sought to impose liability upon the township for demolition of the subject structure, the trial court correctly granted summary judgment on the basis of sovereign immunity, R.C. 2744.02(A)(1).

{¶35} Generally, township trustees are individually clothed with sovereign immunity in carrying out their official duties. *Chalker* at 17. However, individual liability may attach to township trustees, in ordering demolition of a structure pursuant to R.C. 505.86, if personal property is destroyed, and the plaintiff can show the trustees acted "with malicious purpose, in bad faith, or in a wanton or reckless manner[.]" R.C. 2744.03(A)(6)(b); *Chalker* at 21. In this case, however, there is absolutely nothing in the record to show the trustees acted maliciously, in bad faith, wantonly, or recklessly. Consequently, the trial court was correct in finding the trustees, individually, were clothed with immunity.

{¶36} The first assignment of error lacks merit.

{¶37} By its second assignment of error, Champion Mall asserts it never received proper notice of the board of trustees' decision to demolish the structure at 4199 Mahoning Avenue. It seems to assert that service of any notice had to be upon its statutory agent, pursuant to R.C. 1701.07.

{¶38} In a related case, *Champion Mall Corp. v. Bd. of Trustees, Champion Twp.*, 11th Dist. No. 2008-T-0042, 2008-Ohio-4976, at ¶26, this court has already determined the published notice made in *The Tribune* was sufficient for purposes of R.C. 505.86. In that prior case, we warned that abatement of a nuisance through the destruction of private property pursuant to R.C. 505.86 required opportunity for a hearing. *Champion Mall Corp.*, 2008-Ohio-4976, at ¶28-29. In this case, following passage of each resolution under R.C. 505.86, the board of trustees served legal notice by certified mail upon Champion Mall, care of its statutory agent, that demolition of the structure at 4199 Mahoning Avenue would occur, unless Champion Mall reached an agreement about the structure with the board, or demanded a hearing. In an affidavit attached to its memorandum in opposition to the board's motion for summary judgment in the trial court, Champion Mall asserted that it is not located at the address to which these legal notices were sent. R.C. 1701.07 does not require that the statutory agent have the same address as the corporation for which it acts. Further, nothing in the record indicates that these notices were not actually received: indeed, they were signed for by a person identifying himself or herself as an agent for the addressee. Finally, service upon a corporation need not be on its statutory agent, R.C. 1701.07(J): it may be at "any of its usual places of business; or by serving an officer or a managing or general agent ***[.]" Civ.R. 4.2(F).

{¶39} The second assignment of error lacks merit.

{¶40} By its third assignment of error, Champion Mall asserts the trial court erred in granting the board and trustees summary judgment, in that other claims set forth in the complaint remain pending, and its claims relating to D.C. Rappach have not been resolved.

{¶41} Pursuant to Civ.R. 54(B), a trial court's grant of summary judgment as to less than all claims or parties is final and appealable if it disposes of a discreet issue, and the trial court finds there is no just reason for delay. In this case, the trial court's judgment entry disposed of all issues pertaining to the liability of the Champion Township board of trustees, and the trustees individually. It further determined it was a final appealable order, and there was no just cause for delay. It fully comports with the requirements of Civ.R. 54(B).

{¶42} The third assignment of error lacks merit.

{¶43} The judgment of the Trumbull County Court of Common Pleas is affirmed.

{¶44} It is the further order of this court that appellant is assessed costs herein taxed.

{¶45} The court finds there were reasonable grounds for this appeal.

MARY JANE TRAPP, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.