[Cite as *State ex rel. DeWine v. Big Sky Energy*, 2015-Ohio-2594.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO ex rel. MICHAEL DeWINE ATTORNEY GENERAL OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2014-A-0060**
- vs -	:	
BIG SKY ENERGY, INC.,	:	
Defendant-Appellant.	:	

Civil Appeal from the Ashtabula County Court of Common Pleas, Case No. 2012 CV 11.

Judgment: Reversed and remanded.

Casey L. Chapman, Christine L. Rideout, and *L. Scott Helkowski,* Assistant Attorneys General, State Office Tower, 30 East Broad Street, 25th Floor, Columbus, OH 43215 (For Plaintiff-Appellee).

Gino Pulito, Pulito & Associates, 230 Third Street, Suite 200, Elyria, OH 44035, and *Kathleen M. Amerkhanian,* Kryszak & Associates Co., LPA, 5330 Meadow Lane Court, Suite A, Sheffield Village, OH 44035 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Big Sky Energy, Inc., appeals from the judgments of the Ashtabula County Court of Common Pleas, granting appellee, the state of Ohio, a permanent injunction and civil penalties for actions occurring upon its property which caused damage or destruction to certain wetlands and pollution of other waters on or adjacent to its property. Appellant additionally appeals the trial court's judgment

denying its Civ.R. 60(B) motion for relief from the judgment granting a permanent injunction. For the reasons discussed in this opinion, we reverse the judgment of the trial court entering a permanent injunction in appellee's favor, vacate the civil damages judgment, and remand the matter to the trial court to proceed with a new hearing on liability.

{¶2} On January 5, 2012, appellee filed a complaint for injunctive relief and civil penalties alleging appellant was in violation of Ohio's water pollution control laws codified under R.C. Chapter 6111. Appellant filed an answer, admitting it was the proper party named in the complaint, but denied the substantive allegations. On February 9, 2012, the trial court issued notice that an injunction hearing would be held on Wednesday, April 18, 2012. The notice was subsequently entered on the court's appearance docket. Meanwhile, the parties proceeded with discovery.

{¶3} Although discovery was incomplete and no experts had been named, the trial court convened for the hearing on April 18, 2012. The state appeared, represented by counsel; appellant, however, did not appear and the trial judge confirmed on record that the court had not received any phone calls or other communications from counsel for appellant justifying the absence. The court recognized that notice was not mailed to appellant's counsel because, while appellant's answer was filed on February 8, 2012, it was not docketed until February 13, 2012. Despite appellant's absence, the trial court determined the case should still proceed, finding:

> **{¶4}** I think given the realities of some of these problems, especially for attorneys who practice in multiple jurisdictions, I think the onus is really on the attorney to track the case, to contact the court or the clerk to make sure that he is aware – or she is aware – of whether

> or not the case has been scheduled for any type of hearing. So I don't know why – and no one appeared here on behalf of the defendant, but I think that the notice was sent based on the information we had, and if a client or the agent failed to notify counsel, or if counsel failed to monitor this case himself to find out where it was procedurally, I think that's unfortunate for the defendant.

{¶5} The hearing consequently proceeded during which the state presented two witnesses, one of which was declared an expert in wetlands while testifying, and entered various exhibits. After the hearing, on May 2, 2012, the trial court determined "there's clearly evidence before the Court that there were violations of the pertinent Ohio Revised Code provisions," that "any reasonable person looking at this evidence would have to conclude even though a number of years have gone by that it has not been remediated." And, pursuant to R.C. 6117.07, which authorizes the attorney general to seek an injunction for violations of R.C. Chapter 6111., the trial court ordered a permanent injunction against appellant. The order required, inter alia, appellant to hire a qualified environmental consultant to determine wetland boundaries on the site and submit on-site wetland and stream restoration plans.

{¶6} On May 21, 2012, appellant filed a motion for relief from judgment. In its motion, appellant argued, inter alia, it had a meritorious defense because it complied with all statutory requirements and administrative rules; it further, pursuant to its answer, denied the alleged violations. Appellant additionally claimed it was entitled to relief pursuant to Civ.R. 60(B)(1), due to either mistake, inadvertence, surprise or excusable neglect as well as Civ.R. 60(B)(5), the "catch-all" provision. Appellant maintained

neither it nor its counsel had notice of the hearing, irrespective of whether the notice was sent. Furthermore, it argued, it was entitled to actual notice and counsel cannot be reasonably expected to monitor a court's docket on every case to make certain he or she would not miss a hearing.

{¶7} The trial court denied the motion, ruling appellant failed to establish it had a meritorious defense to the complaint and, under the circumstances, appellant had constructive notice of the underlying hearing. Appellant appealed this judgment, but this court dismissed the matter for lack of a final, appealable order. *State ex rel. Dewine v. Big Sky Energy Inc.*, 11th Dist. Ashtabula No. 2012-A-0042, 2013-Ohio-437, ¶12.

{¶8} On October 31, 2013, the trial court held the civil penalty hearing. During the hearing, the state introduced testimony that appellant had violated various provisions within R.C. Chapter 6111. for 4,928 successive days, and other evidence showing the areas appellee's expert deemed wetlands that had been impacted, degraded, and in certain circumstances destroyed.

{¶9} On September 8, 2014, the trial court issued a judgment in which it ordered appellant to pay $492,800 in civil penalties. The number represented $100 per day or one percent of the maximum $10,000 per day per violation proven permissible under R.C. 6111.09. Appellant filed the instant appeal and assigns five errors for this court's review. We shall address appellant's first and fifth assignments of error together, as they are dispositive of the instant appeal. They provide, respectively:

{¶10} "[1.] The trial court erred in proceeding with an ex parte trial even though Big Sky had not received reasonable notice of the trial under the circumstances, thus violating Big Sky's constitutional right to due process."

{¶11} "[5.] The trial court erred in holding that Big Sky had not established that it was entitled to relief under Ohio Civ.R. 60(B)."

{¶12} Under its first assignment of error, appellant contends its due process rights were violated because it did not receive actual notice of the injunction hearing. Moreover, although appellant acknowledges constructive notice is sufficient under certain circumstances, it asserts that theory should not apply to this case. Appellant points out that it was unreasonable to impute notice in this case because discovery was incomplete, no pretrials had occurred, and the docket merely indicated a "hearing" would take place, not a trial vis-à-vis the issue of liability. Appellant contends that even if counsel reviewed the docket, the entry was insufficient to place him on reasonable notice that a trial on the merits of the complaint for injunction would take place. Given the foregoing, appellant asserts the proceedings were fundamentally unfair and constitute reversible error.

{¶13} Furthermore, under its fifth assignment of error, appellant claims it was entitled to relief from the judgment granting appellee a permanent injunction because its motion was filed within a reasonable time, it advanced facts that, if true, would entitle it to relief, and, finally, its failure to be at the hearing was a result of excusable neglect.

{¶14} In this case, the trial judge stated, on record, he "assumed" notice was "probably" sent to Robert Barr, appellant's statutory agent. Although Mr. Barr averred, by affidavit and through testimony at the damages hearing, that he never received notice of the trial, the notice purportedly sent to him was not returned. The court recognized that the postal service is not always perfect and the notice may have been lost; the court nevertheless observed that counsel for appellant, who had filed an answer and engaged in preliminary discovery, had an ongoing duty to check the

appearance docket to remain current on the progress of the case. Because the docket reflected a hearing date and the entry was journalized more than two months before the hearing, the court determined the circumstances were sufficient to impute reasonable constructive notice of the trial to appellant. Given the facts of this case, we hold the trial court abused its discretion in holding the injunction/liability hearing ex parte.

{¶15} Initially, this matter involved a request for a permanent injunction. Although it is not uncommon for a court to proceed ex parte to hearing on a preliminary injunction, which *temporarily* enjoins a party from engaging in prohibited conduct, the remedy of a permanent injunction affects a party's rights in perpetuity. A defending party's interests at stake in a proceeding for permanent injunction are, without question, significantly heightened and therefore necessitate greater attention to the procedural safeguards designed to protect those interests. In this matter, these safeguards were either overlooked or ignored.

{¶16} Ashtabula County Loc.R. 7 sets forth basic case management guidelines in civil cases. It provides that the court should conduct a status check within the first three months, a scheduling conference within the first four months, and a formal pretrial within the first 12 months. The record fails to disclose that *any* of these events took place; instead, this case proceeded to trial on the permanent injunction/liability less than two months after appellee filed its complaint and only six weeks after appellant filed its answer.

{¶17} Moreover, Loc. R.6(B) governs scheduling conferences. Subsection (1) provides: "After service of the complaint, the Judge assigned to the case *shall make* a scheduling order. The Judge *shall make* the order after a scheduling conference with

all counsel of record and pro se parties. The conference may be conducted in person or with leave of Court by telephone. * * *"

{¶18} Further, Loc.R. 6(B)(2) provides that "[t]he scheduling order shall make provision for and limit the time to: (a.) join new parties and amend pleadings; (b.) file and hear pretrial motions; (c.) name experts; (d.) complete discovery; (e.) schedule pretrial conference and file pretrial statements; (f.) schedule trial date; (g.) other appropriate matters. * * *"

{¶19} In this case, the record does not include a scheduling order and there is no indication a scheduling conference ever occurred. As a result, the parties did not mutually convene to establish, together, procedural timeframes or important dates. Further, because no scheduling conference occurred, no pretrial conference occurred. The pretrial conference, which is *required* by Loc.R. 6(E), mandates attendance by counsel for both parties and further mandates the parties submit their pretrial statements to the court. Had the court followed Local Rules 6 and 7, it would have been unnecessary to discuss the application of "constructive notice" in this case.

{¶20} Further, Loc.R. 6(A) provides, in relevant part:

> **{¶21}** The goal of this Rule is prompt but fair disposition of litigation. This goal can only be accomplished by early and continuing judicial control and management of each case assigned to the Judge's docket. This Rule will establish a general framework for management of cases, leaving to the discretion of the individual Judge the use of additional procedures to accomplish the goal of this Rule.

{¶22} Loc.R. 6(A) makes it clear, a court must, *at a minimum*, comply with the general case management framework set forth in Loc.R. 6. A court has the discretion to introduce additional procedures to ensure prompt and fair disposition of a case; it is not, however, permitted to fall below the minimal guidelines introduced by its own rule. Pursuant to its local rules the trial court had affirmative, particularized obligations to manage the way in which this case proceeded. Under any reasonable metric, it failed to meet its obligations.

{¶23} Compounding the foregoing problems was the court's, as well as appellee's, awareness that appellant had retained counsel and each acknowledged, prior to the hearing, that counsel *did not receive actual notice of the hearing.* There is nothing to suggest counsel was in any way responsible for this failure of notice; moreover, there is nothing in the record indicating counsel had engaged in any gamesmanship or dilatory tactics. To the contrary, counsel filed appellant's answer several days before the hearing notice was issued; the clerk, however, for unknown reasons, did not enter the answer on the docket until after the notice was sent. Counsel's failure to receive actual notice was, in effect, recognized as an oversight or error of the clerk's processing. Given these factual points, it is unclear how, in light of the provisions set forth in the local rules, counsel could be held professionally accountable for his absence at the injunction/liability hearing.

{¶24} To satisfy due process, a defending party is simply entitled to reasonable notice of the hearing date. *Nalbach v. Cacioppo*, 11th Dist. Lake No. 2001-T-0062, 2002 Ohio App. LEXIS 83, *12 (Jan. 11, 2002), citing *Ohio Valley Radiology Associates, Inc*., 28 Ohio St.3d 118, 123-125 (1986). With respect to providing notice of a hearing, the Supreme Court has also indicated that there is more than one way to satisfy the

requirement of a reasonable notice. *Id.* In other words, the Court has refused to recognize one rule which a trial court must always follow in providing notice. *Id*. Accordingly, in certain cases, entry of the date of trial on the court's docket may constitute reasonable, constructive notice of the fact. *Id.* at 124. Nevertheless, the Court has also indicated the mere entry on a docket could be insufficient where, as here, a local rule of court requires more. *Id. See also Cacioppo*, *supra.*

{¶25} The court's failure to adhere to its local rules, especially in light of counsel's active participation defending the case prior to the hearing, rendered its conclusion that appellant had constructive notice of the hearing unreasonable. And, even assuming an attorney is required to monitor the case, the docket in this matter was somewhat cryptic. The entry for February 8, 2012 states that an injunction hearing was scheduled for April 18, 2012; this, however, could mean various things. On one hand, it could mean a hearing on the merits. It could also mean, especially in light of the timeframe guidelines set forth in Loc.R. 7, that the matter was set for a pretrial hearing. Regardless, we decline to endorse the position that, less than three months after the complaint had been filed, the docket was sufficient to place counsel on notice of a trial on the merits.

{¶26} We must now determine exactly what is being reversed. We note that the court was without authority to grant appellant's Civ.R. 60(B) motion because such relief may be granted *only* from a final judgment. *See e.g. O'Stricker v. Robinson Mem. Hosp. Found.*, 11th Dist. Portage No. 2013-P-0043, 2013-Ohio-4313, ¶5. The judgment on liability, unto itself, however, was not a final order. "Judgments that determine liability but defer the issue of damages for later adjudication, are neither final nor appealable because damages are part of a claim rather than a separate claim in and of

themselves." *Evans v. Rock Hill Local Sch. Dist. Bd. of Educ.*, 4th Dist. Lawrence No. 04CA39, 2005-Ohio-5318, ¶15.

{¶27} The fact that the judgment on liability was not final does not imply, however, the court lacked authority to construe the arguments advanced in appellant's motion as an interlocutory motion to reconsider its decision to go forward with the hearing in appellant's absence. *See* Civ.R. 54(B) (providing, in relevant part that a judgment adjudicating fewer than all of the claims, rights or liabilities of the parties "is subject to revision at any time" before final judgment.) This court has observed "[a] motion which seeks relief from an interlocutory order is more properly characterized as a motion for reconsideration." *Thorpe v. Oakford*, 11th Dist. Portage No. 94-P-0057, 1996 Ohio App. LEXIS 129, *7 (Jan. 19, 1996), citing *In re Estate of Horowitz*, 11th Dist. Trumbull No. 92-T-4710, 1993 Ohio App. LEXIS 1827 (Mar. 31, 1993). Under the circumstances, the court should have construed appellant's purported Civ.R. 60(B) motion as a motion for reconsideration and granted the same.

{¶28} Given the foregoing, we hold that the specific circumstances of this case, in conjunction with the arguments advanced in appellant's motion, established reasonable and equitable grounds for the court to reconsider its decision to proceed ex parte. As a result, the court should have vacated its judgment relating to the injunction/liability hearing and set a new hearing date of which each party had actual notice, pursuant to Loc.R. 6.

{¶29} Appellant's first and fifth assignments of error have merit.

{¶30} Appellant's second, third, and fourth assignments of error provide:

{¶31} "[2.] The trial court committed reversible error by failing to apply the correct standard of proof to the state's request for a permanent injunction."

{¶32} "[3.] The trial court erred in granting a permanent injunction against Big Sky because the Ohio EPA did not prove the existence of wetlands and thus the Ohio EPA had no jurisdiction over the property."

{¶33} "[4.] The trial court erred in imposing a civil penalty against Big Sky."

{¶34} Given our disposition of appellant's first and fifth assignments of error, all remaining orders, including the imposition of civil penalties must be vacated. Thus, appellant's remaining assigned errors are rendered moot.

{¶35} For the reasons discussed above, the judgment of the Ashtabula County Court of Common Pleas is reversed and the matter is remanded for the court to proceed with a new hearing on liability.

TIMOTHY P. CANNON, P.J.,

DIANE V. GRENDELL, J.,

concur.