

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

LFL LOGISTICS CO.

Plaintiff

-vs-

MINERVA ENTERPRISES, INC., et al.

Defendants-Appellees

-vs-

SERVICE TRANSPORT GROUP, INC.

Defendant-Appellant

JUDGES:

Hon. John W. Wise, P. J.

Hon. W. Scott Gwin, J.

Hon. Sheila G. Farmer, J.

Case No. 2006 CA 00012

OPINION

CHARACTER OF PROCEEDING:

Civil Appeal from the Court of Common
Pleas, Case No. 2005 CV 01747

JUDGMENT:

Reversed and Remanded

DATE OF JUDGMENT ENTRY:

December 4, 2006

APPEARANCES:

For Defendant-Appellee Minerva

For Defendant-Appellant

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Wise, P. J.

{¶1} Appellant Service Transport Group, Inc. (“STGI”) appeals the decision of the Stark County Court of Common Pleas that granted Minerva Enterprises, Inc.’s (“Minerva”) motion to dismiss pursuant to Civ.R. 12(B)(6). The following facts give rise to this appeal.

{¶2} Minerva is an Ohio corporation and the owner of real property located at 9000 Minerva Road, Waynesburg, Ohio. Minerva uses the property as a landfill. Prior to September 16, 2003, Minerva owed a debt to Dart Trucking Company, Inc. and Dart Services, Inc. (“Dart”). Dart and Minerva entered into an agreement, on September 16, 2003, settling the debt between the parties. Pursuant to the terms of the agreement, in full satisfaction of the debt owed by Minerva to Dart, Minerva agreed to allow Dart to dispose of 225,000 tons of legally permissible waste of a specified kind at the landfill.

{¶3} On August 19, 2004, Dart unilaterally filed an affidavit of facts relating to title and a copy of the agreement with the Stark County Recorder. However, based upon Dart’s alleged breach of the agreement, the agreement was subsequently terminated by Minerva. On May 27, 2005, LFL Logistics Co. (“LFL”) filed a foreclosure action, with regard to the property located at 9000 Minerva Road, naming Minerva and Dart as defendants. On August 26, 2005, Dart filed its cross-claim against Minerva. In the cross-claim, Dart alleged that Minerva owed it the sum of \$3,075,000 based upon an alleged default under the agreement. Dart also asserted that it held a lien on the property based upon the affidavit.

{¶4} On September 14, 2005, in response to the cross-claim, Minerva filed a motion to dismiss. Dart did not respond to the motion to dismiss, but instead filed an

amended cross-claim. In the amended cross-claim, Dart asserted that it held a valid lien and encumbrance on the property based on the agreement. Dart also asserted that the agreement was an easement and/or equitable lien and/or consensual lien.

{¶15} Thereafter, Dart assigned the agreement to STGI. STGI was substituted as the real party in interest on October 6, 2005. Subsequently, Minerva filed a motion to dismiss the amended cross-claim on October 24, 2005. The trial court granted Minerva's motion on December 14, 2005. In its judgment entry, the trial court determined STGI did not have a lien, encumbrance or interest in the property and without such, any dispute STGI may have with Minerva, regarding the agreement, was not properly part of the foreclosure action and should be brought in a separate legal proceeding.

{¶16} STGI timely filed a notice of appeal and sets forth the following assignments of error for our consideration:

{¶17} "I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING MINERVA ENTERPRISES, INC.'S (RESPONDENT/APPELLEE'S) MOTION TO DISMISS DEFENDANT SERVICE TRANSPORT GROUP, INC.'S (MOVANT/APPELLANT'S) AMENDED CROSS-CLAIM UNDER OHIO CIVIL RULE 12(B)(6), BECAUSE THE APPELLANT'S AMENDED CROSS-CLAIM STATED A VALID CAUSE OF ACTION WARRANTING RECOVERY AND PROHIBITING DISMISSAL OF ITS CLAIM.

{¶18} "II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING THAT SERVICE TRANSPORT GROUP, INC. (MOVANT/APPELLANT) DID NOT HAVE AN EXISTING, VALID AND SUBSISTING LIEN AGAINST THE PREMISES OWNED

BY MINERVA ENTERPRISES, INC. (RESPONDENT/APPELLEE), BECAUSE APPELLANT HAD AN EASEMENT AND/OR EQUITABLE LIEN AND/OR A LIEN BY CONTRACTUAL CONSENT.”

I

{¶9} In its First Assignment of Error, STGI maintains the trial court erred when it granted Minerva’s motion to dismiss STGI’s amended cross-claim, pursuant to Civ.R. 12(B)(6), because said claim stated a valid cause of action warranting recovery and prohibiting dismissal of its claim. We agree.

{¶10} In its judgment entry granting Minerva’s motion to dismiss, the trial court concluded the agreement did not provide Dart with an express easement, easement by implication, easement by estoppel, or a lien or encumbrance. Judgment Entry, Dec. 14, 2005, at 4-5. Further, the trial court held that if the parties wished to litigate the dispute relating to the termination of the agreement, it should be brought in a separate legal proceeding and not in this foreclosure action. *Id.* at 5. Finally, the trial court stated that, “[u]pon review of the pleadings, and accepting the allegations contained in Defendant STGI’s Amended Cross-Claim as true, the Court finds that Defendant can prove no set of facts warranting recovery and that its claims must be dismissed.” *Id.*

{¶11} In the case of *In the Matter of the Appeal of the Chadwick # 135 Drainage Improvement Petition v. Delaware Cty. Bd. of Commrs.*, Delaware App. No. 06CAH010007, 2006-Ohio-5294, we recently discussed the applicable standard of review on a Civ.R. 12(B)(6) motion to dismiss. In doing so, we explained:

{¶12} “Our standard of review on a Civ.R. 12(B)(6) motion to dismiss is *de novo*. *Perrysburg Township v. city (sic) of Rossford*, 103 Ohio St.3d 79, 81, * * *. 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 Comms.*, 65 Ohio St.3d 545, * * *. Under a de novo analysis, we must accept all factual allegations of the complaint as true and all reasonable inferences must be drawn in favor of the nonmoving party. *Byrd. (sic) v. Faber* (1991), 57 Ohio St.3d 56, * * *. In order for the trial court to dismiss a complaint pursuant to Civ.R. 12(B)(6), the court must find beyond a doubt that the plaintiff can prove no set of facts that would support his claim for relief. *O'Brien v. Univ. Community Tenants Union* (1975), 42 Ohio St.2d 242, * * *." Id. at ¶ 8.

{¶13} In the case sub judice, STGI maintains the trial court improperly granted Minerva's Civ.R. 12(B)(6) motion to dismiss because under Civ.R. 13(G) it was entitled to file its amended cross-claim against Minerva. Civ.R. 13(G) addresses cross-claims against a co-party and provides as follows:

{¶14} "A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant."

{¶15} This court addressed a similar fact pattern and issue in *The Mohler Lumber Co. v. Feller* (Dec. 17, 1978), Stark App. No. CA 4932. In *The Mohler Lumber Company* case ("Mohler"), Mohler commenced an action against various defendants for foreclosure of mortgage upon property located in Lake Township, Stark County, Ohio.

Id. at 1. Defendants/Appellees were described as owners of said property and also as mortgagors. Id. Defendants/Appellants were not originally named as defendants in the action, however, they were subsequently joined as such. After being joined as defendants, with leave of court, defendants/appellants filed a cross-claim against defendants/appellees. Id. Defendants/Appellants sought specific performance of a written agreement between defendants/appellees, as sellers, and defendants/appellants, as buyers, for the sale and purchase of the property that was the subject of Mohler's lawsuit. Id. In the alternative, defendants/appellants sought monetary damages in the amount of \$25,000. Id.

{¶16} Thereafter, the trial court rendered judgment on the pleadings establishing priority of liens and ordering foreclosure. Id. With regard to defendants/appellants' cross-claim, the trial court held that:

{¶17} “* * * [I]t cannot grant specific performance as the demand for foreclosure takes precedence. The demand for compensatory damages is an action at law and this procedure is not the proper forum for said action. Therefore, this defendants' [appellants'] cross-complaint is dismissed without prejudice.” Id.

{¶18} On appeal to this court, we reversed the trial court's decision pursuant to Civ.R. 13(G). Id. at 2. In doing so, we explained:

{¶19} “The ‘subject matter of the original action’ was the real property at 10815 Market Avenue, North. The cross-claim was for damages for breach of contract to sell that very property. A party asserting a cross-claim may join, either as independent or as alternative claims, as many claims, legal or equitable, as he has against an opposing party. See Civ.R. 18(A).

{¶20} “We find defendant-appellants had the right to have their claim adjudicated in the instant case.” *Id.*

{¶21} Similarly, in the matter currently before the court, the subject matter of LFL’s original action is the property located at 9000 Minerva Road. STGI’s cross-claim against Minerva concerns whether Minerva breached the agreement entered into with Dart and as a result of the alleged breach, whether STGI, as assignee of Dart, is entitled to monetary damages. Because the subject matter of the original action was the property located at 9000 Minerva Road, under Civ.R. 13(G), STGI was entitled to maintain its cross-claim against Minerva.

{¶22} In addition to concluding that STGI is entitled to maintain its cross-claim against Minerva, we also conclude the trial court erred when it determined STGI could prove no set of facts warranting recovery. A motion to dismiss tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 1992-Ohio-73, at 548. A movant may not rely upon allegations or evidence outside the complaint; otherwise, the motion must be treated as a Civ.R. 56 motion for summary judgment. *Id.*

{¶23} The elements of a breach of contract claim are summarized as follows: “A breach of contract occurs when a party demonstrates the existence of a binding contract or agreement; the nonbreaching party performed its contractual obligations; the other party failed to fulfill its contractual obligations without legal excuse; and the nonbreaching party suffered damages as a result of the breach.” *Phillips v. Spitzer Chevrolet Company, et al.*, Stark App. No. CA00002, 2006-Ohio-4701, at ¶ 17. In its cross-claim, STGI sets forth a plain statement of the claim showing that it is entitled to

relief based upon breach of contract. Specifically, STGI alleges the existence of an agreement; partial performance of the agreement; breach of the agreement by Minerva; and the monetary value or damages as a result of the breach.

{¶24} In reviewing Minerva's motion to dismiss, the trial court relied upon evidence outside the complaint by reviewing the agreement that is the basis of STGI's breach of contract claim and making findings based upon its review of that agreement. The trial court's review of Minerva's motion to dismiss should have been limited to whether the cross-claim stated a cause of action for breach of contract. Based upon our de novo review of the cross-claim, we find that it does.

{¶25} Accordingly, we sustain STGI's First Assignment of Error. We will not address the merits of STGI's Second Assignment of Error as it is moot based upon our disposition of the First Assignment of Error.

{¶26} For the foregoing reasons, the judgment of the Court of Common Pleas, Stark County, Ohio, is hereby reversed and remanded for further proceedings consistent with this opinion.

By: Wise, P. J.
Gwin, J., and
Farmer, J., concur.

HON. JOHN W. WISE

HON. W. SCOTT GWIN

HON. SHEILA G. FARMER

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

LFL LOGISTICS CO.	:	
	:	
Plaintiff	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
MINERVA ENTERPRISES, INC., et al.	:	
	:	
Defendants-Appellees	:	
	:	
-vs-	:	
	:	
SERVICE TRANSPORT GROUP, INC.	:	
	:	
Defendant-Appellant	:	Case No. 2006 CA 00012

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio, is reversed and remanded for further proceedings consistent with this opinion.

Costs assessed to Minerva.

HON. JOHN W. WISE

HON. W. SCOTT GWIN

HON. SHEILA G. FARMER