[Cite as *Viola Park, Ltd. v. Pickerington*, 2010-Ohio-584.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
VIOLA PARK, LTD.,	:	John W. Wise, P.J.
	:	Julie A. Edwards, J.
Plaintiff-Appellee	:	Patricia A. Delaney, J.
	:	
-vs-	:	Case No. 2008 CA 00052
	:	
	:	
CITY OF PICKERINGTON, OHIO, et al.,	:	O P I N I O N
Defendants-Appellants		

CHARACTER OF PROCEEDING: Civil Appeal from Fairfield County Court of Common Pleas Case No. 05 CV 490

JUDGMENT: Affirmed In Part and Reversed and Remanded In Part

DATE OF JUDGMENT ENTRY: February 10, 2010

APPEARANCES:

For Plaintiff-Appellee

BRUCE L. INGRAM, ESQ.
JILL TANGEMAN, ESQ.
JOSEPH R. MILLER, ESQ.
THOMAS H. FUSONIE, ESQ.
Vorys, Sater, Seymour and Pease, LLP
52 East Gay Street
Columbus, Ohio 43216-1008

For Defendants-Appellants

MARK LANDES
Isaac, Brant, Ledman & Teetor, LLP
250 East Broad Street, Suite 900
Columbus, Ohio 43215-3742

Edwards, J.

{¶1} Defendant-appellant, City of Pickerington, Ohio, appeals from the July 3, 2008, Judgment Entry of the Fairfield County Court of Common Pleas granting the Motion for Summary Judgment filed by plaintiff-appellee Viola Park, Ltd.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellee Viola Park, Ltd. is interested in developing two adjacent parcels of land located in Violet Township, which is in Fairfield County, Ohio, into a residential subdivision. The parcels are located outside of the boundaries of appellant City of Pickerington. Although appellee was in discussions with Violet Township about the proposed subdivision, such discussions ended when appellant, after hearing about the planned development, urged appellee to have the land annexed to the City of Pickerington.

{¶3} The pre-annexation agreement (hereinafter "annexation agreement") signed by the parties in the fall of 2000 required appellant City of Pickerington to prepare a petition for annexation within forty five (45) days of full execution of the agreement, to pay all costs and expenses in prosecuting the annexation, and to "not take any action that would result in the Viola Park property becoming non-contiguous to the City [of Pickerington] or otherwise make the Viola Park property not qualify for annexation." The agreement further called for appellee City of Pickerington to enact a City Service Resolution to provide certain city services, not including water and sewer, to the property and to rezone the property R-4, which is residential with no more than 4 units per acre.

{¶4} In turn, the annexation agreement required appellee to sign the petition for annexation and support the same through the annexation process. The annexation agreement further provided in paragraphs three (3) and four (4) as follows:

{¶5} "3. Water and Sewer. Viola Park has secured from Fairfield County (County) a letter dated October 12, 2000, a copy of which is attached hereto as exhibit 'B', wherein the County commits to provide water and sewer service for the subject Property. A final engineering plan describing the Water and Sewer service connections shall be prepared by Viola Park within three (3) months of completion of the annexation and will be submitted to the County. Upon approval of the County Engineer a copy of the plan will be given to the City for its information. As regards to the City, Viola Park shall be solely responsible for all cost of construction of the Sanitary sewer and Water lines. It is a condition of Viola Park that the water and sewer be provided by the County.

{¶6} "Viola Park will build the on-site water and sewer improvements per the specifications of the County. Upon completion of the construction of the water and sewer improvements to such specifications, the lines shall be accepted by the County, and thereafter the County shall be responsible for the maintenance and repair of such lines.

{¶7} "4. Storm Water. As to storm water, the property will meet the Storm Water Management Ordinances and Rules of the City of Pickerington and any other regulatory agency which has authority to review storm water disposal. If Viola Park's storm water plan meets the above, the City agrees Viola Park may use the creek located on the real property under Viola Park's control to discharge storm water from such real property."

{¶8} In accordance with the annexation agreement, appellee City of Pickerington prepared the annexation petition, annexed the land pursuant to Ordinance No. 2001-117, passed on October 24, 2001, enacted a resolution to provide services, and, in Ordinance No. 2001-118 passed on November 6, 2001, designated the property R-4. Appellant submitted the preliminary plats for the subdivision on March 26, 2002 and final plats on July 31, 2002. Effective October 17, 2002, the final plats were approved by appellee City of Pickerington and then recorded in accordance with R.C. 711.04.

{¶9} No building permits are issued by appellant City of Pickerington until streets and other necessary infrastructures for a subdivision have been constructed. Pursuant to Pickerington Codified Ordinance Section 1258.30, street, sewer, utility and other infrastructure improvements must be constructed "within one year of acceptance of the final plat, contingent upon unforeseen delays or extensions of time by Council," or the "platting process shall begin anew" and previous plat approvals "shall be null and void."

{¶10} On or about May 6, 2003, the Pickerington City Council adopted Ordinance No. 2003-41, which imposed a moratorium for one year from the effective date on housing permits in order to control residential growth. The ordinance indicated that the effective date was June 5, 2003. The Ordinance provided that 100 housing permits would be issued during the moratorium and that such permits would be issued based on a quarterly lottery system. On or about May 20, 2003, Ordinance No. 2003-47 was adopted which amended Ordinance No. 2003-41 to provide that the moratorium on housing permits would commence on August 1, 2003.

{¶11} For various reasons, the infrastructure for Viola Park was not completed by October 17, 2003, which is within one year of the final acceptance of the plat on October 17, 2002. Thus, appellee's plat became null and void in accordance with Pickerington Codified Ordinance Section 1258.30. Appellee did not receive notice from appellant that the plat was now null and void.

{¶12} In the interim, the voters of the City of Pickerington, as part of the November 2002 election, had passed a ballot initiative that limited the future density of single-family residences to two (2) per acre, with an R-2 designation. Since, as is stated above, appellee's plats became "null and void", appellee was affected by the change in density. Appellee was allowed to have four residences per acre on the original plat, but would only be allowed to have two on a new plat.

{¶13} Thereafter, appellee, on August 15, 2003, filed a complaint for declaratory judgment in the Fairfield County Court of Common Pleas in Case No. 03 CV 607. Appellee, in its complaint, alleged that the moratorium on housing permits established by Ordinances 2003-41 and 2003-47 was unconstitutional since it impaired the contract between appellant and appellee and that the moratorium constituted a breach of the parties' annexation agreement and a taking without just compensation. After the trial court, via an entry filed on November 5, 2003, found Ordinances 2003-41 and 2003-47 to be constitutional, appellee, on or about January 7, 2005, filed a Motion for Leave to file a Second Amended Complaint[1] to include all legal claims relating to appellant's application of Codified Ordinance 1258.30 to Viola Park's property. Such Motion was denied pursuant to an Entry filed on February 3, 2005.

[1] Appellee previously had amended its complaint.

{¶14} Subsequently, on June 8, 2005, appellee filed a complaint for declaratory judgment and damages against appellant in the Fairfield County Court of Common Pleas. Such case was assigned Case No. 05 CV 490. Appellee, in its complaint, sought a declaration as to the validity of City of Pickerington Codified Ordinance Section 1258.30. Appellee, in its complaint, also alleged that City of Pickerington Codified Ordinance Section 1258.30 was in conflict with state law, that appellant had breached the annexation agreement and committed fraud, and that appellant had taken appellee's property without just compensation. Appellee also set forth a claim of promissory estoppel and alleged that the application of Section 1258.30 was not a proper means of furthering a legitimate public purpose.

{¶15} Both parties filed Motions for Summary Judgment. As memorialized in a Judgment Entry filed in Case No. 05 CV 490 on February 23, 2006, the trial court granted summary judgment in favor of appellant.

{¶16} On the same date, the trial court, in an entry filed in Case No. 03 CV 607, stated, in relevant part, as follows:

{¶17} "It appearing that the claims raised by Plaintiff in this matter may be either moot or controlled by *res judicata* as a result of this Court's February 23, 2006 Judgment Entry filed in *Viola Park, LTD. V. City of Pickerington*, Case No. 05 CV 490, the parties are hereby ORDERED to notify this Court on or before March 9, 2006 how they wish to proceed with the present case. Said notice shall be filed as a Memorandum to the Court outlining the respective party's position."

{¶18} Both parties then filed motions regarding the issue of res judicata. Pursuant to a Judgment Entry filed on April 26, 2006, in Case No. 03 CV 607, the trial

court found that the doctrine of res judicata applied and that there were "no remaining justifiable issues." The trial court, in its entry, stated, in relevant part, as follows:

{¶19} "The contract between Plaintiff and Defendant was the pre-annexation agreement. This Court determined in Case No. 05CV490 that Defendant did not breach its contract [the pre-annexation agreement] with Plaintiff. Further, in light of the Court's determinations in the February 23, 2006 Entry filed in Case NO. 05CV490, as to the self-government, 'home rule' doctrine, constitutional issues, contract, estoppel, and fraud issues, this Court finds that the claims that Plaintiff contends remain in this case after the July 14, 2004 Entry have been determined and disposed of by the Entry in Case NO. 05CV490. Thus, those claims are controlled by res judicata and have been rendered moot and Defendant City of Pickerington is entitled to judgment in its favor in the present case."

{¶20} Appellee then appealed from the trial court's February 23, 2006, Judgment Entry, raising the following assignments of error in Case No. 06 CA 17:

{¶21} "I. THE TRIAL COURT ERRED WHEN IT HELD THAT CITY OF PICKERINGTON CODIFIED ORDINANCE SEC. 1258.30, WHICH PURPORTS TO VACATE APPROVED FINAL PLATS THAT HAVE BEEN PROPERLY RECORDED UNDER STATE LAW, IS A CONSTITUTIONAL EXERCISE OF MUNICIPAL HOME-RULE AUTHORITY UNDER ARTICLE 18, SECTION 3 OF THE OHIO CONSTITUTION.

{¶22} "II. THE TRIAL COURT ERRED WHEN IT HELD THAT THE RECORDED FINAL PLATS FOR VIOLA PARK WERE VACATED BY THE PROVISIONS OF PICKERINGTON CODIFIED ORDINANCE SEC. 1258.30 EVEN THOUGH THE

DELAYS IN CONSTRUCTING THE INFRASTRUCTURE WERE 'UNFORESEEN' AND THE CITY GAVE NO NOTICE, HELD NO HEARING, AND MADE NO DETERMINATION THAT THE DELAYS WERE FORESEEN.

{¶23} "III. THE TRIAL COURT ERRED WHEN IT ENTERED SUMMARY JUDGMENT DISMISSING VIOLA PARK'S ALTERNATIVE CLAIMS FOR BREACH OF CONTRACT AND PROMISSORY ESTOPPEL EVEN THOUGH THE CITY'S CONDUCT PREVENTED VIOLA PARK FROM RETAINING THE ZONING CLASSIFICATION PROMISED BY THE CITY."

{¶24} Appellee also appealed from the trial court's April 26, 2006, Judgment Entry in Case No. 06 CA 30, raising the following assignment of error:

{¶25} "THE TRIAL COURT ERRED IN ITS APPLICATION OF THE DOCTRINE OF *RES JUDICATA* IN ITS JUDGMENT ENTRY OF APRIL 26, 2006, THEREBY, FINDING THAT VIOLA PARK'S CONTRACTUAL CLAIMS ASSERTED IN THE INSTANT CASE WERE RENDERED MOOT BY THE TRIAL COURT'S FEBRUARY 23RD DECISION ENTERED IN THE *VIOLA II* CASE (NO. 05 CV 490)."

{¶26} Pursuant to an Opinion filed on June 6, 2007, in *Viola Park, Ltd v. Pickerington*, Fairfield App. Nos. 2006 CA 00017, 2006 CA 00030, 2007-Ohio- 2900, appeal not allowed 115 Ohio St.3d 1473, 2007-Ohio-5735, 875 N.E.2d 627, this Court reversed and remanded the judgment of the trial court. In our Opinion, we found that City of Pickerington Codified Ordinance Section 1258.30 impermissibly conflicted with R.C. Sections 711.17 and 711.39. For such reason, this Court sustained the first assignment of error in Case No. 06 CA 17. We also sustained the second assignment of error in such case, finding that appellee's procedural due process rights had been

violated by the vacation of the plats.[2] Finally, in our Opinion, we found that, based on our disposition of the above assignments of error, the third assignment of error in Case No. 06 CA 17 and the remaining assignment of error in Case No. 06 CA 30 were moot.

{¶27} Following remand, both parties moved for summary judgment. Appellant City of Pickerington, in its Motion for Summary Judgment, argued that it was immune from liability under Revised Code Chapter 2744. Appellant also argued that appellee had not preserved all counts on appeal and that appellee had no damages. Pursuant to a Judgment Entry filed on July 3, 2008, the trial court granted the Motion for Summary Judgment filed by appellee Viola Park "on all counts of its Complaint" and set a damages hearing for August 4, 2008.

{¶28} Appellant timely appealed from the trial court's July 3, 3008, Judgment Entry, raising the following assignment of error:

{¶29} "THE TRIAL COURT ERRED WHEN IT DENIED CITY OF PICKERINGTON'S MOTION FOR SUMMARY JUDGMENT SEEKING GOVERNMENTAL IMMUNITY UNDER REVISED CODE CHAPTER 2744 FROM DAMAGES ALLEGEDLY ARISING OUT OF THE ENFORCEMENT OF THE CITY'S PLAT ORDINANCE."

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[2] Appellee, in its brief in the previous appeal before this Court, argued, in its second assignment of error, in relevant part as follows: "Viola Park was fully justified in believing that the first exception to the Sec. 1258.30 one-year limit - - 'unforeseen delays' in completing the required infrastructure improvement - - applied to its recorded final plats. The City never gave any notice to Viola Park that it believed the delays should have been foreseen and that 'extensions of time by Council' were therefore necessary pursuant to the second exception to the ordinance. The City never provided a hearing or gave Viola Park any other chance to be heard on whether the delays were unforeseen. Instead, the City simply sent Viola Park a letter informing it that its recorded final plats had been 'vacated' by operation of the ordinance, that the R-4 zoning classification promised in the Pre-Annexation Agreement would be taken away by the City, and that there was nothing Viola Park could do about it."

I

{¶30} Appellant, in its sole assignment of error, argues that the trial court erred when it denied appellant's Motion for Summary Judgment seeking governmental immunity under Revised Code Section 2744 "for damages allegedly arising out of the enforcement of the City's plat ordinance."

{¶31} The parties, in their respective briefs, urge this Court to address whether the trial court had authority and/or jurisdiction to grant appellee summary judgment on all of appellee's claims. Appellant contends that some of appellee's claims were moot and that others were not preserved because they were not raised in the previous appeal to this Court.

{¶32} However, this is a limited, statutorily authorized appeal of a denial of summary judgment on sovereign immunity grounds. See, for example, *Gregory v. Phillips*, Fairfield App. No. 2008 CA 00058, 2009-Ohio-4854. The trial court, in the case sub judice, granted summary judgment to appellee "on all of the counts" in its complaint, thereby finding that appellant was not immune from liability. The trial court also scheduled a hearing on damages at a later date. The only issue before this Court at this time is whether or not the trial court erred in finding that appellant was not immune from liability under R.C. Chapter 2744. All other issues raised are premature until there is a final, appealable order in this case.[3]

{¶33} Appellant initially argues that the enforcement of zoning ordinances is a "governmental function" and that, under R.C. Chapter 2744, it is immune from damages allegedly arising out of its attempt to enforce its plat ordinance.

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[3] We note that appellee Viola Park, in its brief, acknowledged that this was an "interlocutory appeal."

{¶34} Revised Code 2744.02(A)(1) states, in part: "Except as provided in division (B) of this section, 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." Enforcement of zoning laws is in the nature of a governmental function. See *Helfrich v. City of Pastakula,* Licking App. No. 02CA38, 2003-Ohio-847. See also *State ex rel. Scadden,* Franklin App. No. 01AP-800, 2002-Ohio-1352, 2002 WL 452472, citing *City of Columbus v. Bazaar Mgmt., Inc.* (Jan. 6, 1983), Franklin App. No. 82AP 33, 1983 WL 3312. Thus, appellant's attempt to enforce its plat ordinance was a governmental function. We note that none of the exceptions contained in R.C. 2744.02(B) apply. Thus, we find that the trial court erred to the extent it denied the City immunity for those causes of action which are based solely on the City's enforcement of its plat ordinance, provided those causes of action do not allege violations of the Federal Constitution or federal statutes and do not allege breach of contract.

{¶35} Appellant also maintains that the trial court erred in finding that appellant was not immune from liability for any due process violations. We note that R.C. Chapter 2744.09 sets forth several exceptions that remove certain types of civil actions entirely from the purview of R.C. Chapter 2744. *Williams v. McFarland Properties*, 177 Ohio App.3d 490, 2008-Ohio-3594, 895 N.E.2d 208 at paragraph 13. R.C. 2744.09(E) provides that Chapter 2744 does not apply to "[c]ivil claims based upon alleged violations of the constitution and statues of the United States, …"

{¶36} The trial court, in its July 3, 2008, Judgment Entry in the case sub judice, granted summary judgment in favor of appellee "on all counts of its complaint." As noted by appellant in its brief, "no claim based on procedural due process was asserted by [appellee] in its complaint." Because no such claim was asserted in the complaint, we find that the trial court did not consider such a claim and, therefore, did not consider whether appellant was immune for any due process violations. Due process was not the basis of the trial court's decision. We, therefore, find it unnecessary to address such issue.

{¶37} Appellant, in its brief, also argues that the trial court erred in failing to grant appellant immunity with respect to the federal constitutional claims that appellee asserted in its complaint.

{¶38} Appellee, in its complaint, alleged that the plat ordinance and ballot initiative impermissibly impaired the contracts(s) in violation of the U.S. Constitution, Article I, Section 10, and the same constituted a taking without just compensation and were "not a proper means of furthering any legitimate public purpose."

{¶39} However, as is stated above, R.C. 2744.09(E) provides that R.C. Chapter 2744 does not apply to "[c]ivil claims based upon alleged violations of the constitution or statues of the United States, …" Thus, appellant would not be immune from liability for actions based upon violations of the United States Constitution. We find, therefore, that the trial court correctly found that appellant was not immune with respect to such claims. We note that, in so holding, this Court is not addressing the issue of whether or not, as appellant alleges, such claims were not preserved because they were not raised in the

previous appeal. Such issue is premature because this is an interlocutory appeal on the issue of sovereign immunity.

{¶40} Finally, appellant argues that the trial court erred in finding that appellant was not immune with respect to appellee's breach of contract claims.

{¶41} Pursuant to R.C. 2744.09(A), R.C. Chapter 2744 does not apply to '[c]ivil action that seeks to recover damages from a political subdivision or any of its employers for contractual liability." In accordance with such section, appellant is not immune from liability with respect to appellee's breach of contract claims. We note that, in so holding, we are not addressing the issues of whether there was, in fact, a breach of contract and whether, as appellant alleges, the breach of contract claims are moot. Because this is an interlocutory appeal on the issue of sovereign immunity, such issue is premature.

{¶42} Appellant's sole assignment of error is, therefore, sustained in part and overruled in part.

{¶43} Accordingly, the judgment of the Fairfield County Court of Common Pleas is affirmed in part and reversed and remanded in part.

By: Edwards, J.

Wise, P.J. and

Delaney, J. concur

s/Julie A. Edwards________________

s/John W. Wise__________________

s/Patricia A. Delaney______________

JUDGES

JAE/d1124

[Cite as *Viola Park, Ltd. v. Pickerington*, 2010-Ohio-584.]

IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO

FIFTH APPELLATE DISTRICT

VIOLA PARK, LTD.,	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
CITY OF PICKERINGTON, OHIO, et al.,	:	
Defendants-Appellants	:	CASE NO. 2008 CA 00052

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Fairfield County Court of Common Pleas is affirmed in part, and reversed and remanded in part. Costs assessed 50% to appellant, City of Pickerington, and 50% to appellee.

s/Julie A. Edwards___________________

s/John W. Wise_____________________

s/Patricia A. Delaney_________________

JUDGES