

[Cite as *Larson v. Canton Util.*, 2019-Ohio-5400.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

TODD LARSON

Plaintiff-Appellee

-vs-

CANTON CITY UTILITIES

Defendant-Appellant

JUDGES:

Hon. John W. Wise, P. J.
Hon. Craig R. Baldwin, J.
Hon. Earle E. Wise, Jr., J.

Case No. 2019CA00041

O P I N I O N

CHARACTER OF PROCEEDING:

Civil Appeal from the Canton Municipal
Court, Case No. 2018CV17318

JUDGMENT:

Reversed and Remanded

DATE OF JUDGMENT ENTRY:

December 20, 2019

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Wise, John, P. J.

{¶1} Defendant-Appellant City of Canton appeals from the February 21, 2019, Judgment Entry of the Canton Municipal Court.

STATEMENT OF THE FACTS AND CASE

{¶2} The relevant facts and procedural history are as follows:

{¶3} On December 19, 2018, Plaintiff-Appellee Todd Larson filed a Small Claims Complaint naming Canton City Utilities as the defendant, seeking a refund of \$3,392.00, which he paid to the City of Canton for utility services.

{¶4} On January 14, 2019, the City of Canton, through its Law Department, filed a motion to dismiss asserting the City of Canton is entitled to immunity pursuant to Chapter 2744 of the Ohio Revised Code and that Canton City Utilities is not *sui juris*, capable of being sued or bringing suit.

{¶5} On January 18, 2019, Plaintiff-Appellee filed his response.

{¶6} By Judgment Entry filed January 30, 2019, the trial court held the matter should proceed for further inquiry.

{¶7} The small claims hearing before the Magistrate was held on January 30, 2019 at 1:30 p.m.

{¶8} No appearance was made for Defendant. The Magistrate requested and obtained from the Plaintiff permission to contact the Canton Law Department to advise of the hearing. No representative of the City was available. The Magistrate then determined at 2:19 p.m. that the matter should proceed.

{¶9} At the hearing, the Magistrate heard and took into consideration the sworn testimony of the Plaintiff. Plaintiff testified that he is a landlord in the City of Canton,

owning several properties. Plaintiff said he had a master billing contract with Canton. Plaintiff testified that under the contract, Canton obligated itself to provide timely notice of water charges to tenants, and Plaintiff agreed to be liable for unpaid bills. Plaintiff indicated that he was suing Canton City concerning its provision of utility services. In particular, he was claiming that the City of Canton failed to bill him for water services promptly and waited nine years to do so.

{¶10} At the conclusion of the hearing, the Magistrate found in favor of the Plaintiff on his claims.

{¶11} The City of Canton objected to the magistrate's decision stating again that "Canton City Utilities" was not a party *sui juris*. The trial court overruled Canton's objection, reasoning, "it can be determined that [Larson] was seeking to sue the City of Canton and that amendments to the pleadings were permitted". (Judgment Entry at 4). In its Judgment Entry, the trial court also "amended (the Complaint) to reflect the proper party Defendant as the City of Canton, Ohio". *Id.*

{¶12} Appellant now raises the following assignments of error on appeal:

ASSIGNMENTS OF ERROR

{¶13} "I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN DENYING CANTON'S MOTION TO DISMISS LARSON'S COMPLAINT BECAUSE "CANTON CITY UTILITIES" IS NOT A PARTY SUI JURIS.

{¶14} "II. BECAUSE LARSON NEVER SOUGHT LEAVE TO AMEND HIS COMPLAINT UNDER CIV.R. 15(A), AND NEVER THOUGHT IT WAS NECESSARY TO DO SO, THE COURT CANNOT "AMEND" LARSON'S COMPLAINT FOR HIM."

I.

{¶15} Appellant, in its first assignment of error, argues that the trial court erred in denying its motion to dismiss. We agree.

{¶16} The City argued Appellees' complaint should be dismissed for failure to state a claim. 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 County Bd. of Commissioners*, 65 Ohio St.3d 545, 605 N.E.2d 378 (1992)

{¶17} Our standard of review on a Civil Rule 12(B) motion to dismiss is *de novo*. *Huntsman v. State*, 5th Dist. Stark No. 2016CA00206, 2017-Ohio-2622, 2017 WL 1710432, ¶ 20, citing *Greeley v. Miami Valley Maintenance Contractors Inc.*, 49 Ohio St.3d 228, 551 N.E.2d 981 (1990). 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 v. Faber*, 57 Ohio St.3d 56, 565 N.E.2d 584 (1991). In order to dismiss a complaint pursuant to Civil Rule 12(B)(6), it must appear beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle plaintiff to relief. *York v. Ohio State Highway Patrol*, 60 Ohio St.3d 143, 573 N.E.2d 1063 (1991).

{¶18} Appellant City of Canton argues that “Canton City Utilities” is not *sui juris*, it is not an entity that is capable of being sued.

{¶19} As set forth above, Appellee named “Canton City Utilities” as the defendant in his Complaint, rather than the municipality, City of Canton. Appellant is correct. Canton City Utilities, as a department of the City of Canton, a municipal corporation, is not *sui juris* and cannot be sued absent statutory authority. *Saint Torrance v. Firststar*, 529 F.Supp.2d 836, 850 (S.D. Ohio 2007); See *City of Cuyahoga Falls v. Robart*, 58 Ohio

St.3d 1, 567 N.E.2d 987, 992 (1991) (citing *State, ex. rel. Cleveland Municipal Court v. Cleveland City Council*, 34 Ohio St.2d 120, 296 N.E.2d 544, 547 (1973); *Council of Whitehall v. Rogers*, 69 Ohio App.2d 124, 432 N.E.2d 216 (1980)). See also, e.g., *Dobbranchin v. City of Canfield*, 7th Dist. Mahoning No. 07MA119, 2008-Ohio-4968; *Mollette v. Portsmouth City Council*, 169 Ohio App.3d 557, 2006–Ohio–6289, 863 N.E.2d 1092, ¶ 24 (a city council may not be sued, and the proper entity is either the city or the individual members of council); *Richardson v. Grady* (Dec. 18, 2000), 8th Dist. Nos. 77381, 77403 (city police department is not *sui generis* and is not capable of being sued).

{¶20} Pursuant to Ohio Revised Code § 715.01, “[e]ach municipal corporation is a body politic and corporate, which ... may sue and be sued....” O.R.C. § 715.01. However, there is no statutory authority affording a department, such as Canton City Utilities, the capacity to be sued. Thus, it appears that the City of Canton is the real party in interest.

{¶21} As such, because Appellant has failed to demonstrate that Canton City Utilities is *sui juris*, his claims against such should be dismissed. See *Robart*, 567 N.E.2d at 992.

{¶22} Appellant’s first assignment of error is, therefore, sustained.

II.

{¶23} Appellant, in its second assignment of error, contends that the trial court erred by *sua sponte* amending the complaint. We agree.

{¶24} Civ.R. 15 sets forth parameters for amending complaints, and states:

(A) Amendments. A party may amend its pleading once as a matter of course within twenty-eight days after serving it or, if the pleading is one

to which a responsive pleading is required within twenty-eight days after service of a responsive pleading or twenty-eight days after service of a motion under Civ.R. 12(B), (E), or (F), whichever is earlier. In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court shall freely give leave when justice so requires. Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within fourteen days after service of the amended pleading, whichever is later.

{¶25} Here, the record shows no attempt by Appellee to tender an amended complaint or motion to amend his complaint. We find no authority in Civ.R. 15, or elsewhere, which allows a trial court to amend a Complaint to add a defendant *sua sponte*.

{¶26} We therefore find Appellant's second assignment of error well-taken and sustain same.

{¶27} Accordingly, the judgment of the Canton Municipal Court is reversed and the matter is remanded for further proceedings consistent with the law and this opinion.

By: Wise, John, P. J.
Baldwin, J., and
Wise, Earle, J., concur.

JWW/d 1217