[Cite as *State ex rel. Yost v. Leonard*, 2021-Ohio-613.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO, EX REL., DAVE YOST, OHIO ATTORNEY GENERAL Plaintiff-Appellant -vs- JAMES LEONARD DBA GREEN LIGHT, LLC Defendant And ZERZER, LLC Defendant And SAMUEL SLIMAN Defendant-Appellee	JUDGES: Hon. W. Scott Gwin, P.J. Hon. William B. Hoffman, J. Hon. Patricia A. Delaney, J. Case No. 2020 CA 00113 O P I N IO N
CHARACTER OF PROCEEDINGS:	Appeal from the Stark County Court of Common Pleas, Case No. 2020-CV-00400
JUDGMENT:	Reversed and Remanded
DATE OF JUDGMENT ENTRY:	March 3, 2021
APPEARANCES:	
For Plaintiff-Appellant	For Defendant-Appellee
DAVE YOST Ohio Attorney General KARRIE P. KUNKEL JANEAN R. WEBER JENNA C. FOOS Environmental Enforcement Section 30 East Broad Street, 25th Floor Columbus, Ohio 43215	JAMES M. WILLIAMS Krugliak, Wilkins, Griffiths & Dougherty Co., LPA 4775 Munson Street, N.W. P.O. Box 36963 Canton, Ohio 44735

Hoffman, J.

{¶1} Appellant State of Ohio ex rel. Yost ("the state") appeals the April 29, 2020 Judgment Entry entered by the Stark County Court of Common Pleas, which granted appellee Samuel Sliman's motion to dismiss.

STATEMENT OF THE FACTS AND CASE

{¶2} Zerzer, LLC owns a warehouse building and an enclosed parking lot located at 1201, 1203, and 1221 East Tuscarawas Street, Canton, Stark County, Ohio ("the Property"). Appellee is the president and sole member of Zerzer. Zerzer leased the Property to James Leonard, who owned and operated a recycling business known as Green Light, LLC ("Green Light") at the location. Green Light accepted televisions, computer monitors, appliances, and spent fluorescent lamps in order to recover recyclable plastics, metals, and glass from cathode ray tubes ("CRTs"). Because CRTs contain lead and spent fluorescent lamps contain mercury at significant concentrations, those items are considered hazardous wastes as defined in R.C. 3734.01 and Ohio Adm. Code Sections 3745-51-03 and 3745-51-24.

{¶3} Beginning in 2013, the Ohio EPA conducted numerous inspections at the Property and found Green Light in violation of Ohio's hazardous waste laws and rules. The Ohio EPA issued several Notices of Violations ("NOVs") to Leonard for the hazardous waste present at the Property. The Ohio EPA also issued an NOV to Zerzer based upon its ownership of the Property as the Ohio EPA determined the Property to be a hazardous waste facility. On August 16, 2016, Zerzer entered into a consensual Director's Final Findings and Orders ("DFFO") with the Ohio EPA. The DFFO required Zerzer to submit to the Ohio EPA for review and approval and thereafter implement (1) a closure plan for

all unpermitted hazardous waste storage areas no later than November 21, 2016; (2) a lamp management plan no later than October 21, 2016; and (3) documentation showing all broken/crushed fluorescent lamps at the Property were evaluated and properly managed no later than September 21, 2016. Appellee signed the DFFO in his capacity as the president of Zerzer.

{¶4} On February 24, 2020, the state filed a complaint, naming Leonard DBA Green Light, LLC; Zerzer, LLC; and Appellee as defendants.[1] The complaint alleged Leonard was liable as the operator of Green Light, Zerzer was liable as the owner of the Property, and Appellee was individually liable for failing to exercise his authority as the owner or operator of Zerzer to prevent or stop the violations or, alternatively, as the alter ego of Zerzer.

{¶5} Via Judgment Entry filed April 29, 2020, the trial court granted Appellee's motion to dismiss. The trial court found "there [were] simply no allegations made by the State as to [Appellee] which would make him individually liable for any acts of Zerzer, LLC." April 29, 2020 Judgment Entry – Granting Motion to Dismiss at 3, unpaginated.

{¶6} It is from this judgment entry the state appeals, raising as its sole assignment of error:

[1] The state originally filed a complaint on July 18, 2018, naming only Leonard and Zerzer as defendants. Following the deposition of Appellee, the state believed Appellee was a liable party and, on December 16, 2019, filed a motion for leave to file an amended complaint. Via Judgment Entry filed January 14, 2020, trial court denied the state's motion for leave. On February 18, 2020, the state filed a voluntary dismissal without prejudice, and refiled the instant action on February 24, 2020.

THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT HELD THAT, PURSUANT TO CIV. R. 12(B)(6), THE STATE OF OHIO FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AGAINST SAMUEL SLIMAN.

STANDARD OF REVIEW

{¶7} Our standard of review on a Civ.R. 12(B)(6) motion to dismiss is de novo. *Greeley v. Miami Valley Maintenance Contrs., Inc.* (1990), 49 Ohio St.3d 228, 229, 551 N.E.2d 981; *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5. A Civ.R. 12(B)(6) 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 Commrs.,* 65 Ohio St.3d 545, 548, 605 N.E.2d 378 (1992), citing *Assn. for the Defense of the Washington Local School Dist. v. Kiger,* 42 Ohio St.3d 116, 117, 537 N.E.2d 1292 (1989). In considering a motion to dismiss, a trial court may not rely on allegations or evidence outside the complaint. *State ex rel. Fuqua v. Alexander*, 79 Ohio St.3d 206, 207, 680 N.E.2d 985 (1997). Rather, the trial court may review only the complaint and may dismiss the case only if it appears beyond a doubt the plaintiff can prove no set of facts entitling the plaintiff to recover. *O'Brien v. Univ. Community Tenants Union, Inc.,* 42 Ohio St.2d 242, 327 N.E.2d 753 (1975), syllabus.

I.

{¶8} In its sole assignment of error, the state asserts the trial court erred in granting Appellee's motion to dismiss. Specifically, the state challenges the trial court's

finding the complaint failed to state a claim upon which relief could be granted against Appellee.

{¶9} In granting Appellee's motion to dismiss, the trial court found:

> The State has not alleged that [Appellee] exerted control over Zerzer LLC in a method so complete that the LLC had no mind of its own. Nor did the State allege that any control so exerted by [Appellee] was used in such a manner to commit fraud or an illegal act against that State of Ohio. The State does contend that [Appellee] "by virtue of his position as an owner or officer of Defendant Zerzer * * * caused, participated in, controlled and/or ordered the violations of law alleged in this Complaint" (Plaintiff's Complaint ¶30) but none of the State's contentions rise to the level required by the Supreme Court in *Dombroski*, supra.
>
> Indeed, the State asserts further on in its Complaint that [Appellee] was acting in his capacity as president of Zerzer, LLC, a property [sic] incorporated company, stating that [Appellee] signed the Director's Final Findings and Orders "in his capacity as President of Defendant Zerzer. Plaintiff's Complaint ¶68. April 29, 2020 Judgment Entry at 3, unpaginated.

{¶10} When ruling on a motion to dismiss, the principles of notice pleading apply, and a plaintiff is not required to prove his or her case at the pleading stage. *York v. Ohio State Hwy. Patrol*, 60 Ohio St.3d 143, 144-45 (1991). Pursuant to Civil Rules 8(A) and 8(E), notice pleading simply requires a claim or defense concisely set forth only those

operative facts sufficient to give "fair notice of the nature of the action." *Devore v. Mutual of Omaha Ins. Co.*, 32 Ohio App.2d 36, 288 N.E.2d 202 (1972). A plaintiff is required under Civ.R. 8(A)(1) to provide a short and plain statement of the claim demonstrating the claimant is entitled to relief. *McBride v. Parker*, 5th Dist. Richland No. 11 CA 122, 2012-Ohio-2522, ¶ 27. "[A]s long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss." *Sacksteder v. Senney*, 2d Dist. Montgomery No. 24993, 2012-Ohio-4452, ¶ 50 (Internal citation and quotations omitted).

{¶11} The state maintains the complaint sets forth "the requisite pleading language for two legal theories under which [Appellee could] be held personally liable: (1) personal participation and (2) piercing the corporate veil." Brief of Appellant at 4.

{¶12} "A corporation is an artificial person, created by the General Assembly and deriving its power, authority and capacity from the statutes. * * * A corporate officer or shareholder normally will not be held liable for the debts or acts of the corporate entity." *Mohme v. Deaton*, 12th Dist. Warren No. CA2005-12-133, 2006-Ohio-7042, ¶ 7. (Citation omitted). "An exception to shareholder liability exists where, 'upon piercing the corporate veil,' it appears that a corporation is simply the 'alter ego' of the individual sought to be held liable." *Id.* at ¶ 8. (Citation omitted).

{¶13} In order to pierce the corporate veil and impose personal liability upon shareholders, the person seeking to pierce the corporate veil must show: (1) those to be held liable hold such complete control over the corporation that the corporation has no separate mind, will, or existence of its own; (2) those to be held liable exercise control over the corporation in such a manner as to commit fraud or an illegal act against the

person seeking to disregard the corporate entity; and (3) injury or unjust loss resulted to the plaintiff from such control and wrong. *Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Cos., Inc.*, 67 Ohio St.3d 274, 617 N.E.2d 1075 (1993), paragraph three of the syllabus

{¶14} "In addition, a corporate officer can be held personally liable for tortious acts he or she has committed and, under such circumstances, a plaintiff need not pierce the corporate veil to hold individuals liable who have personally committed such acts." *Id.* at ¶ 9 (citations omitted). This has become known as the "personal participation" theory and has been applied to environmental law violations. *See, e.g.*, *State ex rel. DeWine v. Sugar*, 7th Dist. Jefferson, 2016-Ohio-884, 60 N.E.3d 735, ¶ 35 (citation omitted); *State ex rel. DeWine v. Marietta Indus. Enters., Inc.*, 4th Dist. Washington No. 15CA33, 2016-Ohio-7850, 2016 WL 6875425, ¶ 25.

{¶15} The complaint sets forth the following operative facts relative to Appellee:

{¶16} "During the time the recycling business was operating, the property was owned by Defendant Zerzer, LLC." Complaint at p.1, unpaginated. Appellee was the president and sole member of Zerzer. The Ohio EPA conducted an inspection of Green Light on July 23, 2013, after receiving a complaint alleging a large pile of televisions, monitors, and other electronic was being accumulated outdoors at the Property. *Id.* at para. 6. Hazardous waste violations were observed. *Id*. The Ohio EPA conducted follow-up inspections on May 29, 2014, and September 30, 2015. *Id*. at para. 7-8. The violations remained. *Id*. "On August 22, 2016, Defendant Zerzer entered into consensual Director's Final Findings and Orders ("DFFOs") with Ohio EPA." *Id*. at para. 9. "The DFFOs required

Defendant Zerzer to submit and implement the following to Ohio EPA for review and approval." *Id*.

{¶17} The complaint further alleges Appellee is individually liable:

> 30. Defendant Sliman, by virtue of his position as an owner or officer of Defendant Zerzer, alone or in conjunction with others, caused, participated in, controlled, and/or ordered the violations of law alleged in this Complaint. In addition, or in the alternative, Defendant Sliman knew about or should have known about the violations of law alleged in this Complaint, and by himself or in conjunction with others, had the authority to prevent or stop these violations, but failed to exercise his authority to do so. Accordingly, Defendant Sliman is personally liable for these violations or, in the alternative, is liable as the alter ego of Defendant Zerzer, LLC for the violations alleged in this Complaint. *Id*. at para. 30.

{¶18} The complaint raises five claims. Claims one through four are asserted against all of the defendants, which includes Appellee. These claims assert violations (illegal acts) of R.C. 3734.02(F), illegal storage and/or disposal of hazardous wastes; violations of R.C. 3734.02(E), the establishment and operations of a hazardous waste facility without a permit; violations of Ohio Adm. Code 3745-55-11, 3745-55-12, 3745-55-13(A) and (B), and R.C. 3734.11, failure to develop and implement a closure plan; and violations of Ohio Adm. Code 3745-55-42, 3745-55-43, and 3745-55-47, failure to maintain written estimates of closure cost, adequate financial assurance, and liability

coverage. The complaint further states, "The conduct or omissions of Defendant Zerzer and [Appellee] violate R.C. 3734.13 and 3734.11, for which Plaintiff is entitled to injunctive relief pursuant to R.C. 3734.10 and 3734.13(C) and for which Defendant Zerzer and [Appellee] are liable for a civil penalty * * *." *Id*. at para. 72.

{¶19} Liberally construing the complaint, as we are required to do, we find sufficient operative facts were alleged to support a claim of individual liability against Appellee, who as the sole member and president of Zerzer would appear to have complete control over the LLC and was aware of the violations as evidenced by his signing, as president, the DFFO's. A complaint is not "fatally defective and subject to dismissal" simply because it does not set forth each element of a cause of action "with crystalline specificity." *Border City Sav. & Loan Ass'n. v. Moan*, 15 Ohio St.3d 65, 66, 472 N.E.2d 350 (1984). The Ohio Civil Rules require "notice pleading" rather than "fact pleading." *Salamon v. Taft Broadcasting Co.,* 16 Ohio App.3d 336, 338, 475 N.E.2d 1292 (1984). To reiterate, notice pleading under Civ.R. 8(A) and 8(E) merely requires a claim concisely set forth only those operative facts sufficient to give "fair notice of the nature of the action." *DeVore*, supra.

{¶20} We find the state set forth "operative facts sufficient to give [Appellee] fair notice of the nature of the action" as to both theories of personal liability of Appellee, i.e., personal participation and piercing the corporate veil.

{¶21} Accordingly, we find the trial court erred in granting Appellee's motion to dismiss.

{¶22} The state's sole assignment of error is sustained.

{¶23} The judgment of the Stark County Court of Common Pleas is reversed and the matter remanded for further proceedings consistent with this Opinion and the law.

By: Hoffman, J.
Gwin, P.J. and
Delaney, J. concur