[Cite as *C & E Coal, Inc. v. James Brothers Coal Co.*, 2004-Ohio-5126.]

STATE OF OHIO, CARROLL COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

C & E COAL, INC.,	)	
	)	
PLAINTIFF-APPELLEE,	)	
	)	CASE NO. 04-CA-799
- VS -	)	
	)	OPINION
JAMES BROTHERS COAL CO.,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court Case No. 02-CVH-23303

JUDGMENT: Affirmed

APPEARANCES:

For Plaintiff-Appellee:
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JUDGES:

Hon. Gene Donofrio
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

Dated: September 21, 2004

DONOFRIO, J.

{¶1} Defendant-appellant, James Brothers Coal Co., appeals from a Carroll County Common Pleas Court judgment granting plaintiff-appellee, C&E Coal, Inc., a mandatory permanent injunction and requiring appellant to move a certain dragline.

{¶2} During 1998, appellant assigned a coal mining permit to appellee in Rose Township. A Marion 7400 Dragline (dragline), a 550-ton mining machine, is located on the permit area. Appellant owns the dragline, which was last used in the early 1990s. Appellee never owned or used the dragline, nor did appellant lease it to appellee as part of the coal-mining permit.

{¶3} Appellee has since completed its coal mining operation and is reclaiming the land. On September 5, 2002, the Ohio Department of Natural Resources (ODNR), Division of Mineral Resources Management, cited appellee for failing to remove the dragline in order to complete resoiling and revegetation of the parcel. Appellee notified appellant of the violation and requested that it respond with an action plan for removal of the dragline. Appellant failed to respond to appellee's notice. Subsequently, appellee appealed the violation with the Reclamation Commission and secured a temporary stay pending the resolution of the action in the trial court.

{¶4} On December 3, 2002, appellee filed suit for injunctive relief and breach of contract against appellant, seeking an order for appellant to remove the dragline and for damages. On April 10, 2003, the trial court granted preliminary injunctive relief to appellee, ordering appellant to submit a plan for removal of the dragline. Appellant failed to comply. Thereafter, the trial court held a bench trial on November 12, 2003, and entered judgment for appellee on count one of the complaint, granting a mandatory permanent injunction in favor of appellee, and requiring appellant to

remove the dragline. The court also dismissed appellee's breach of contract claim. Upon appellant's request, the trial court thereafter issued findings of fact and conclusions of law.

{¶5} On December 1, 2003, appellant filed a motion for a new trial, which the trial court denied. Appellant filed its timely notice of appeal on January 26, 2004.

{¶6} Appellant raises two assignments of error, the first of which states:

{¶7} "COUNT ONE OF THE COMPLAINT FAILS TO SET FORTH A CAUSE OF ACTION AGAINST THIS APPELLANT."

{¶8} The crux of appellant's argument is that appellee failed to demonstrate that the presence of the dragline was a violation of R.C. 1513. Appellant contends the trial court's findings of fact failed to set forth sufficient facts upon which the court could issue the mandatory injunction, because no facts demonstrated that the presence of the dragline was a violation of any Code provision. Specifically, appellant urges that the trial court failed to set forth findings of fact regarding the amount of ground cover taken up by the dragline, as required by Admin. Code 1501:13-9-15(G)(3)(b) and 1501:13-9-15(M)(4)(b), and whether the land covered by the dragline has been affected by coal mining, pursuant to R.C. 1513.01(P). And appellant urges that it has not knowingly prevented, hindered, delayed, or otherwise obstructed the operator from completing the reclamation process, as appellee failed to evidence a violation.

{¶9} When reviewing the grant of an injunction by a trial court, this court's standard of review is abuse of discretion. *Collins v. Moran*, 7th Dist. No. 02 CA 218, 2004-Ohio-1381, at ¶ 17. Abuse of discretion connotes more than an error of law or judgment; it implies that the trial court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶10} R.C. 1513.15(B)(1) provides that any person having an interest that is or may be adversely affected may file suit against any person who is alleged to be in

violation of any rule, order, or permit issued under R.C. 1513. in order to compel compliance with R.C. 1513. R.C. 1513.17(A) provides, in pertinent part:

{¶11} "(A) No person shall:

{¶12} "* * *

{¶13} "(2) Knowingly violate a condition or exceed the limits of a permit;

{¶14} "(3) Knowingly fail to comply with an order of the chief issued under this chapter;

{¶15} "* * *

{¶16} "(6) Knowingly prevent, hinder, delay, or otherwise obstruct the operator from completing backfilling, grading, resoiling, establishing successful vegetation, and meeting all other reclamation requirements of this chapter prior to the final release of the operator's bond."

{¶17} The trial court found that the presence of the dragline has hindered, delayed, and/or obstructed appellee, as the mining operator, from completing reclamation in compliance with its mining permit and the ODNR's orders. It also found that appellant has been unwilling or unable to comply with its previous orders to remove the dragline. Thus, the court issued the permanent injunction.

{¶18} The evidence adduced at trial supports the trial court's judgment. Appellee called Christopher Stefanov, an ODNR inspector to testify. Stefanov stated that his job is, in part, to enforce the reclamation provisions of the Revised Code. (Tr. 6-7). He testified the reason the ODNR issued a notice of violation to appellee was that it had not completed its reclamation obligations. (Tr. 7). Stefanov further stated that the only reclamation obligation appellee had not satisfied was the removal of the dragline, because the dragline's physical presence prevented appellee from completing the reclamation. (Tr. 7). He testified that appellee has completed all other reclamation obligations. (Tr. 8).

{¶19} It was not within the purview of the trial court to determine whether a violation has occurred. The ODNR already determined this matter when it issued the

notice of violation to appellee. (Exh. A). The notice of violation listed as applicable sections: R.C. 1513.16(A)(14) and (18), providing for reclamation duties; Admin. Code 1501:13-9-16(B)(2), providing all equipment must be removed upon cessation of mining; Admin. Code 1501:13-9-09(E), providing abandoned mining machinery shall be disposed of as provided by the Code; Admin. Code 1501:13-9-17(A)(1), providing for reclamation in a timely manner; and Admin. Code 1501:13-9-13(A), providing for reclamation timetables.

{¶20} This court has noted that, pursuant to R.C. 1513.02, the ODNR and the Reclamation Commission are the "experts" on these sorts of determinations. *Buckeye Forest Council v. Div. of Mineral Res. Mgmt.,* 7th Dist. No. 01-BA-18, 2002-Ohio-3010, at ¶ 29, citing *Weiss v. Pub. Util. Comm.* (2000), 90 Ohio St.3d 15, 17-18 ("Due deference should be given to statutory interpretations by an agency that has accumulated substantial expertise and to which the General Assembly has delegated enforcement responsibility"). Therefore, the trial court did not err by giving deference to the ODNR's determination that the presence of the dragline was, in fact, a violation of various provisions of R.C. 1513. and Admin. Code 1501.

{¶21} Since appellee established that the dragline was a violation of the Revised Code and the Administrative Code and that appellant was hindering its performance of its reclamation obligations, the trial court had clear and convincing evidence on which to issue the injunction ordering appellant to remove the dragline. Accordingly, appellant's first assignment of error is without merit.

{¶22} Appellant's second assignment of error states:

{¶23} "THE TRIAL COURT HAS SET FORTH A PENALTY CONTRARY TO LAW FOR VIOLATING THE MANDATORY INJUNCTION."

{¶24} The trial court stated in its judgment entry that if appellant did not remove the dragline within 120 days, it would forfeit the dragline to appellee, which would have authority to remove, dismantle, or sell the dragline to comply with the

ODNR's requirements. Additionally, any profits from the dragline's removal would inure to appellee's benefit.

{¶25} Appellant argues that the court's punishment for violation of the injunction is excessive and assesses forfeiture without due process. For support, it cites to R.C. 2727.12, which provides a procedure to follow if a party disobeys an injunction. It states:

{¶26} "Upon being satisfied, by affidavit, of the breach of an injunction or restraining order, the court or judge who issued such injunction or order may issue an attachment against the guilty party who shall pay a fine of not more than two hundred dollars, for the use of the county, make immediate restitution to the party injured, and give further security to obey the injunction or restraining order. In default thereof, said party may be committed to close custody until he complies with such requirement, or is otherwise discharged." R.C. 2727.12.

{¶27} Although it is not clear, appellant seems to argue that R.C. 2727.12 is the only punishment the court can impose if appellant violates the injunction. However, R.C. 2727.12 provides for a remedy if a party violates an injunction or restraining order. Here, appellant has not violated an injunction or restraining order. Thus, this argument is moot.

{¶28} Although appellant does not address the issue in an assignment of error, it notes in the conclusion of its brief that appellee failed to exhaust the prescribed administrative remedies available before seeking judicial review.

{¶29} As an initial matter, we note that exhaustion of administrative remedies ordinarily applies when a plaintiff brings an action against an administrative agency. However, appellee is not contesting the ODNR's finding. Rather, appellee is contesting appellant's failure to remove the dragline so that appellee can comply with its reclamation obligations. In fact, it is appellant that is contesting the ODNR's finding that the presence of the dragline is a violation of R.C. 1513. Therefore, appellant is actually contending that appellee is required to exhaust administrative

remedies on appellant's behalf, and for appellant's benefit. Because appellee is not contesting the ODNR's finding of a violation, the exhaustion of administrative remedies doctrine is not applicable here.

{¶30} Additionally, even if we were to apply this doctrine, the Ohio Supreme Court has stated, "where there is a judicial remedy that is intended to be separate from the administrative remedy, the requirement of exhaustion of administrative remedies does not apply." *Basic Distribution Corp. v. Ohio Dept. of Taxation*, 94 Ohio St.3d 287, 290, 2002-Ohio-794.

{¶31} R.C. 1513.15(B)(1) provides for this sort of separate judicial remedy:

{¶32} "(B) * * * any person having an interest that is or may be adversely affected may commence a civil action on the person's own behalf to compel compliance with this chapter against any of the following:

{¶33} "(1) * * * against any other person who is alleged to be in violation of any rule, order, or permit adopted or issued pursuant to this chapter."

{¶34} Therefore, appellee has a legal right, detached from administrative remedies, to enforce its rights and duty to complete reclamation.

{¶35} For the reasons stated above, the trial court's judgment is hereby affirmed.

Vukovich, J., concurs.
DeGenaro, J., concurs.