

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

EAST LIVERPOOL CITIZENS AGAINST TRAFFIC CAMERAS ET AL.,

Plaintiffs-Appellees,

v.

CITY OF EAST LIVERPOOL OHIO ET AL.,

Defendants-Appellants.

OPINION AND JUDGMENT ENTRY
Case No. 18 CO 0027

Civil Appeal from the
Court of Common Pleas of Columbiana County, Ohio
Case No. 2017 CV 481

BEFORE:

David A. D'Apolito, Cheryl L. Waite, Carol Ann Robb, Judges.

JUDGMENT:

Reversed and Dismissed.

Atty. Mark Hanni, and Atty. Kevin Daley, 839 Southwestern Run, Youngstown, Ohio 44514, for Plaintiffs-Appellees and

Atty. Charles Payne, Payne Law Office, 617 St. Clair Avenue, P.O. Box 114, East Liverpool, Ohio 43920, for Defendants-Appellants.

Dated: September 19, 2019

D'APOLITO, J.

{¶1} Appellants, City of East Liverpool Ohio (“City”) and City Auditor Marilyn Bosco (“Auditor”), appeal from the August 6, 2018 judgment of the Columbiana County Court of Common Pleas, granting Appellees’, East Liverpool Citizens Against Traffic Cameras and Donald Bean (“Citizens”), motion for summary judgment in a declaratory judgment action. This appeal centers upon a determination as to whether Citizens’ petitions comply with the requirements of R.C. 731.28 and 731.31. Because this case should have been dismissed for lack of a justiciable case or controversy, the judgment of the trial court is reversed and this cause is dismissed.

FACTS AND PROCEDURAL HISTORY

{¶2} Citizens is an organization engaged in an effort to prohibit the use of traffic laws enforcement cameras within the City’s limits. Donald Bean is a member of Citizens. The City is a municipal corporation duly formed and operating under the laws of the State of Ohio. At all times material to this action, the City has operated traffic laws enforcement cameras within its city limits pursuant to local ordinance. Also, the Auditor has served as the duly designated auditor of the City. Columbiana County Board of Elections (“Board”) is a duly authorized governmental agency.

{¶3} On February 6, 2017, East Liverpool City Council (“City Council”) approved Ordinance Number 17, 2017, an ordinance adopting a traffic law photo-monitoring program and establishing civil penalties for automated speed violations. Subsequently, the ordinance was codified as Chapter 309 of the City’s Codified Ordinances. Ordinance Number 17, 2017 was enabled by the Ohio legislature in Senate Bill 342 adopting Ohio Revised Code 4511.092 et seq., authorizing the use of traffic law photo monitoring devices.

{¶4} With passage of Ordinance Number 17, 2017, City Council contemporaneously passed Ordinance Number 16, 2017 on February 6, 2017 that repealed Chapter 307 of the City’s Codified Ordinances, created by Ordinance Number

53, 2005 that constituted an automated traffic enforcement system which provided for criminal traffic penalties including fines, suspensions, and points on a driver's record.

{¶15} In July 2017, Citizens sought to invoke the process of initiative which is governed by R.C. 731.28. Citizens circulated initiative petitions among qualified voters residing in the City and proposed the following ordinance, citing the wrong legislation:

{¶16} "AN ORDINANCE RESTRICTING THE USE OF MOBILE SPEED ENFORCEMENT VEHICLES AND TRAFFIC LAW PHOTO-MONITORING DEVICES AND REPEALING ORDINANCE NUMBER 53, 2005 AND CHAPTER 307 OF THE CODIFIED ORDINANCES OF EAST LIVERPOOL, OHIO."¹ (Plaintiff's Exhibits 1-21).

{¶17} Citizens delivered the circulated petitions to the Auditor. The Auditor transmitted a certified copy of the proposed ordinance and copies of the signed petitions to the Board. The Board determined that the petitions contained the requisite number of signatures to place the proposed ordinance on the November 2017 election ballot. The Board returned the petitions to the Auditor with a statement attesting to the validity of the signatures.

{¶18} On August 8, 2017, Charles Payne, the City Law Director ("Law Director"), sent a letter to the Auditor. The Law Director indicated that his office reviewed the proposed ordinance pursuant to R.C. 731.28. The Law Director noted that the proposed ballot language contained in the initiative petitions sought to repeal the City's traffic laws enforcement camera ordinance. Because the initiative petitions sought to repeal an existing ordinance, the Law Director concluded that the initiative petitions were: "in actuality, a referendum of Ordinance Number 53, 2005 as codified in Chapter 307 of the Co of the Codified Ordinances of the City of East Liverpool, Ohio that was required to be filed within thirty days after the Ordinance Number 53, 2005 was filed or passed." (Defendant's Exhibit G).

{¶19} The next day, on August 9, 2017, the Auditor sent a letter addressed to Mr. Bean indicating that she reviewed Citizens' initiative petitions as required by R.C. 731.28. The Auditor refused to certify the sufficiency and validity of the petitions without providing an explanation in her letter. (Plaintiff's Exhibit 22). It was later discovered that the Auditor

¹ Citizens' counsel later acknowledged that the wrong legislation was cited in the initiative petitions and that the proper ordinance that should have been cited is Ordinance Number 17, 2017.

adopted the Law Director's legal opinion and reasoning. As a result, the ordinance was not placed on the November 2017 election ballot.

{¶10} On September 25, 2017, Citizens filed a complaint for declaratory judgment against Appellants and the Board.² Appellants filed an answer.

{¶11} On February 14, 2018, Citizens filed a motion for summary judgment. Appellants filed a response. Citizens filed a reply. The trial court held a hearing on July 19, 2018. At the hearing, Citizens' attorney stated the following:

{¶12} "And I do concede that the wrong legislation was cited in the initiative petition; therefore, we understand that - - we're looking for declaration so they can recirculate new petitions and they'll have the proper legislation - - or the proper ordinance in there."³ (7/19/18 Summary Judgment T.p. 8).

{¶13} On August 6, 2018, the trial court granted Citizens' motion for summary judgment. Appellants filed a timely appeal and raise two assignments of error.

SUMMARY JUDGMENT STANDARD OF REVIEW

An appellate court conducts a de novo review of a trial court's decision to grant summary judgment, using the same standards as the trial court set forth in Civ.R. 56(C). *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Before summary judgment can be granted, the trial court must determine that: (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most favorably in favor of the party against whom the motion for summary judgment is made, the conclusion is adverse to that party. *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). Whether a fact is 'material' depends on the substantive law of the claim being litigated. *Hoyt, Inc. v.*

² Citizens filed an amended complaint one month later. The Board was subsequently dismissed and is not a named party in this appeal.

³ It was revealed at oral argument that a second set of petitions was circulated.

Gordon & Assoc., Inc., 104 Ohio App.3d 598, 603, 662 N.E.2d 1088 (8th Dist.1995).

‘(T)he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party’s claim.’ (Emphasis deleted.) *Dresher v. Burt*, 75 Ohio St.3d 280, 296, 662 N.E.2d 264 (1996). If the moving party carries its burden, the nonmoving party has a reciprocal burden of setting forth specific facts showing that there is a genuine issue for trial. *Id.* at 293, 662 N.E.2d 264. In other words, when presented with a properly supported motion for summary judgment, the nonmoving party must produce some evidence to suggest that a reasonable factfinder could rule in that party’s favor. *Brewer v. Cleveland Bd. of Edn.*, 122 Ohio App.3d 378, 386, 701 N.E.2d 1023 (8th Dist.1997).

The evidentiary materials to support a motion for summary judgment are listed in Civ.R. 56(C) and include the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact that have been filed in the case. In resolving the motion, the court views the evidence in a light most favorable to the nonmoving party. *Temple*, 50 Ohio St.2d at 327, 364 N.E.2d 267.

Doe v. Skaggs, 7th Dist. Belmont No. 18 BE 0005, 2018-Ohio-5402, ¶ 10-12.

ASSIGNMENT OF ERROR NO. 1

THE COURT ERRED BY NOT DISMISSING THE COMPLAINT OF THE EAST LIVERPOOL CITIZENS AGAINST TRAFFIC CAMERAS AND DONALD BEAN, HEREINAFTER “THE CITIZENS” ON THE GROUNDS THAT THERE WAS NO CASE OR CONTROVERSY.

ASSIGNMENT OF ERROR NO. 2

THE COURT ERRED IN FINDING THAT THE CITIZENS MAY USE AN INITIATIVE PETITION TO REPEAL ORDINANCE NUMBER 53, 2005 AS CODIFIED IN CHAPTER 307 OF THE CODIFIED ORDINANCES OF EAST LIVERPOOL, OHIO AND/OR ORDINANCE NUMBER 17, 2017 AS CODIFIED IN CHAPTER 309 OF THE CODIFIED ORDINANCES OF EAST LIVERPOOL, OHIO.

{¶14} Because Appellants’ assignments of error both center upon a determination as to whether Citizens’ petitions comply with the requirements of R.C. 731.28 and 731.31, this court will address them in a consolidated fashion.

{¶15} Citizens cast its complaint as a declaratory judgment action. Appellants contend that Citizens’ complaint does not present a justiciable claim for declaratory relief. Based on the facts presented, we agree.

{¶16} In order to obtain declaratory relief, a plaintiff must establish (1) that a real controversy exists between the parties, (2) that the controversy is justiciable, and (3) that speedy relief is necessary to preserve the rights of the parties. *State ex rel. Thernes v. United Loc. School Bd. Dist. of Edn.*, 7th Dist. Columbiana No. 07 CO 45, 2008-Ohio-6922, ¶ 22, citing *Burger Brewing Co. v. Liquor Control Comm.*, 34 Ohio St.2d 93, paragraph one of the syllabus (1973). “For a controversy to be real or justiciable, the complainant cannot seek a decision which is advisory, which answers a mooted question, or which answers an abstract question based on facts that may or may not actually materialize.” *State ex rel. Thernes, supra*, at ¶ 24, citing *Thomas v. Cleveland*, 140 Ohio App.3d 136, 142 (8th Dist.2000).

{¶17} Generally, election statutes are mandatory and require strict compliance. *State ex rel. Baker v. Brook Park*, 8th Dist. Cuyahoga No. 98991, 2012-Ohio-5043, ¶ 10, citing *Stutzman v. Madison Cty. Bd. of Elections*, 93 Ohio St.3d 511, 514 (2001).

{¶18} R.C. 731.28 states in part: “Such initiative petition must contain the signatures of not less than ten percent of the number of electors who voted for governor at the most recent general election for the office of governor in the municipal corporation.”

{¶19} R.C. 731.31 states in part:

Any initiative or referendum petition may be presented in separate parts, but each part of any initiative petition shall contain a full and correct copy of the title and text of the proposed ordinance or other measure, and each part of any referendum petition shall contain the number and a full and correct copy of the title of the ordinance or other measure sought to be referred.

{¶20} The reason for the R.C. 731.31 “full and correct copy of the title and text” requirement “is to ensure that the issue is fairly and substantially presented to the electors and to avoid misleading electors.” *Brook Park, supra*, at ¶ 10, citing *Stutzman, supra*, at 515.

{¶21} In this case, Citizens’ initiative petitions did not merely involve a de minimis error or a slight misstatement. Rather, the wrong legislation was cited.

{¶22} Ordinance Number 53, 2005 as codified in Chapter 307 of the City’s Codified Ordinances was repealed in February 2017. As stated, in July 2017, Citizens circulated initiative petitions seeking to repeal Ordinance Number 53, 2005 and Chapter 307 of the City’s Codified Ordinances instead of Ordinance Number 17, 2017. Citizens’ counsel later stipulated and conceded that the wrong legislation was cited in the initiative petitions.

{¶23} Thus, the initiative petitions contained a fatal defect because they did not comply with the requirement in R.C. 731.31 that “each part of any initiative petition shall contain a full and correct copy of the title and text of the proposed ordinance or other measure[.]” As a result, the case should have been dismissed.⁴ See *R.A.S. Entertainment, Inc. v. Cleveland*, 130 Ohio App.3d 125, 129 (8th Dist.1998).

{¶24} Because there was no justiciable controversy between the parties, the trial court erred in granting declaratory relief. See *State ex rel. Thernes, supra*, at ¶ 22. The court’s ruling without a case or controversy resulted in an advisory opinion. *Id.* at ¶ 24.

⁴ To the extent that the petitions are referendums, as determined by the Law Director and the Auditor, they are untimely and, thus, invalid. See R.C. 731.29 (“No ordinance or other measure shall go into effect until thirty days after it is filed with the mayor of a city or passed by the legislative authority in a village”); *State ex rel. Cody v. Stahl*, 8th Dist. Cuyahoga No. 83037, 2003-Ohio-6180, ¶ 16.

CONCLUSION

{¶25} For the foregoing reasons, Appellants' assignments of error are well-taken. The judgment of the Columbiana County Court of Common Pleas, granting Appellees' motion for summary judgment in a declaratory judgment action, is reversed and this cause is dismissed.

Waite, P.J., concurs.

Robb, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are sustained and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Columbiana County, Ohio, is reversed and this cause is dismissed. Costs to be taxed against the Appellee.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.