

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

The State of Ohio, ex rel. Jude Meyers

Court of Appeals No. WD-09-034

Relator

v.

Fostoria Board of Education

DECISION AND JUDGMENT

Respondent

Decided: October 22, 2009

* * * * *

Donna J. Evans, for relator.

Teresa L. Grigsby, for respondent.

* * * * *

HANDWORK, P.J.

{¶ 1} This matter is before the court on the respondent's motion to dismiss relator's petition for an original writ of mandamus. On April 17, 2009, relator, Jude Meyers, filed a complaint seeking mandamus, specifically, to compel respondent,

Fostoria Board of Education ("Board"), to produce certain public records for inspection and copying, as required by R.C. 149.43(B). On August 12, 2009, the Board filed a motion to dismiss pursuant to Civ.R. 12(B)(6), and, on August 20, 2009, relator responded. For the reasons that follow we deny the Board's motion to dismiss.

{¶ 2} In his complaint for mandamus, relator asserts that the Board is responsible for conducting the official business of the school district and is mandated, pursuant to R.C. 121.22, to conduct the school's business openly and in full public gaze. Relator, principal of Fostoria High School, states that during an open forum of a school Board meeting, on November 17, 2008, relator "expressed his concerns and criticism of the performance and actions of two administrative employees of the school district." Following the meeting, the Board commissioned "an independent investigation" to "confirm or disprove" relator's allegations. Sara Santoli, an attorney with Squire, Sanders & Dempsey, L.L.C. of Cleveland, was hired by the Board to conduct the investigation. Relator states that Santoli met with him and numerous others regarding the situation and represented to relator that "she would interview all parties that [relator] requested and that she would prepare an unbiased report of her findings to share with the Board."

{¶ 3} According to relator's complaint, on January 27, 2009, after reviewing a report prepared by Santoli containing the results of her investigation, the Board met and passed a resolution, by a vote of 4-1, dismissing the accusations made by relator as unsubstantiated. Relator asserts that there was no public discussion about the findings of

the investigation, nor any specific information presented to the public regarding the Board's reasoning and adoption of its resolution. On February 3, and February 13, 2009, relator made written requests to the Board to be provided a copy of the report and requested "any communications between the Board members, the investigator and those persons interviewed as part of the investigation." Relator's repeated requests were denied on the basis that the report prepared by Santoli for the Board was subject to an attorney-client privilege and, therefore, was not available for release as a public record. Relator states in its complaint that only communication pertaining to legal advice provided to the Board would be privileged and that the report of an investigation, including its factual findings, does not constitute legal advice.

{¶ 4} In seeking its motion to dismiss, the Board argues that relator's complaint fails to state a claim upon which relief can be granted and, therefore, must be dismissed pursuant to Civ.R. 12(B)(6). The Board asserts that the document sought by relator is not a public record subject to mandatory production pursuant to R.C. 149.43 because it is a matter of attorney-client privilege and, therefore, the release of it "is prohibited by state or federal law." See R.C. 149.43(A)(1)(v). The attorney-client privilege is a state law prohibiting the release of records of communications between attorneys and their government clients pertaining to the attorneys' legal advice. *State ex rel. Besser v. Ohio State Univ.* (2000), 87 Ohio St.3d 535, 542; *State ex rel. Nix v. Cleveland* (1998), 83 Ohio St.3d 379, 383.

{¶ 5} The Board argues that this case is identical to *State ex rel. Toledo Blade Co. v. Toledo-Lucas Cty. Port Authority*, 121 Ohio St.3d 537, 2009-Ohio-1767, wherein the Ohio Supreme Court denied a writ of mandamus brought by The Toledo Blade ("Blade") that sought production of a report prepared by an attorney, who had been retained by the Toledo-Lucas County Port Authority ("port authority"), to investigate allegations of wrongdoing by a public employee. The writ was denied on the basis that the record was protected by the attorney-client privilege.

{¶ 6} In this case, the Board argues that even though Santoli was hired to engage in fact-finding, "the absence of legal research in an attorney's communication is not determinative of privilege, so long as the communication reflects the attorney's professional skill and judgment." See *Id.*, ¶ 31. The Board asserts that the Ohio Supreme Court, in *Toledo Blade*, "rejected the view that there is a distinction between fact-finding and lawyering, and refused to adopt the principle that the attorney-client privilege does not apply when the attorney is engaged to engage in a factual investigation." Rather, the Board argues that "the critical factor is simply that the report was related to the rendition of legal services." *Id.*, ¶ 33. Because the Board's resolution states that Santoli provided her report "in her capacity as counsel to the Board," the Board argues that the report is not a public record subject to production.

{¶ 7} In order for a court to dismiss a case, pursuant to Civ.R. 12(B)(6), "it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, syllabus. The court must presume all factual allegations in the complaint are true and draw all reasonable inferences in favor of the nonmoving party. *Bridges v. Natl. Engineering & Contracting Co.* (1990), 49 Ohio St.3d 108, 112. In considering a motion to dismiss under Civ.R. 12(B)(6), the court looks only to the complaint to determine whether the allegations are legally sufficient to state a claim. *Springfield Fireworks, Inc. v. Ohio Dept. of Commerce*, 10th Dist. No. 03AP-330, 2003-Ohio-6940.

{¶ 8} In *Toledo Blade*, the port authority had long been represented by Spengler Nathanson, P.L.L., a Toledo law firm. Based upon an allegation of wrongdoing on the part of a public employee, the port authority hired an attorney with Spengler Nathanson "to investigate the factual and legal issues" concerning the allegations. In order to encourage the staff members to be candid when interviewed, the chairman of the port authority wanted the confidentiality of the investigation to be ensured. After the public employee was fired for wrongdoing, the *Blade* sought copies of the investigative report and the associated documentation. Ultimately, the port authority gave the *Blade* all of the responsive documents that the attorney had reviewed in preparing the investigative report.

{¶ 9} The Ohio Supreme Court noted that the port authority received its attorney's investigative report and had custody of the records that the attorney reviewed in the investigation. Because these records documented the port authority's decisions and actions, the Ohio Supreme Court held that, unless the requested records were already provided or were excepted from disclosure, the Blade would be entitled to the records pursuant to R.C. 149.43.

{¶ 10} The port authority established that it had already provided all the underlying documents reviewed for the investigation, including resolutions, contracts, invoices, financial records, correspondence, and e-mails, and, therefore, the Blade's claim for these additional documents was denied as moot. With respect to the attorney's report, however, the Ohio Supreme Court held that "Exceptions to disclosure under the Public Records Act, R.C. 149.43, are strictly construed against the public-records custodian, and the custodian has the burden to establish the applicability of an exception. A custodian does not meet this burden if it has not proven that the requested records fall squarely within the exception." *Id.*, ¶ 17, quoting *State ex rel. Cincinnati Enquirer v. Jones-Kelly*, 118 Ohio St.3d 81, 2008-Ohio-1770, paragraph two of the syllabus.

{¶ 11} In determining whether the port authority established that the investigative report was related to the attorney's rendition of legal services, the Ohio Supreme Court held the following:

{¶ 12} "After applying this test to the facts here, we conclude that the factual investigation conducted by [the attorney] was incident to or related to any legal advice that the attorneys hired by the port authority would give concerning the mayor's allegations of misconduct by the port authority president. More specifically, the attorney's investigation required her to draw upon her legal training and experience as well as her knowledge of the law governing the port authority and its policies and personnel. Both the port authority and its outside counsel knew that the investigation was replete with various legal issues and consequences that would be better resolved by the port authority's employing its long-time attorney to conduct the investigation and prepare the report. Legal issues included interpretation of [the port authority president's] employment contract, an analysis of ethics law and criminal law, potential tort claims by [the president and his alleged mistress], and the construction of a confidentiality provision in the settlement agreement concerning a previous port authority investigation." Id., ¶ 29.

{¶ 13} Ultimately, the Ohio Supreme Court found that "[l]egal analysis related to the facts in the investigation [was] integrated throughout the report." The court also held that "the uncontroverted evidence established" that because port authority staff members knew that they were being questioned by an attorney, "they felt free to speak openly and candidly and with the understanding that their comments and the investigation were serious legal matters that could carry serious legal consequences." Id., ¶ 33.

{¶ 14} In this case, we recognize that investigation may be an important part of an attorney's legal services to a client. However, today we are presented with a motion to dismiss, which is determined solely upon the sufficiency of the complaint. Clearly, because the Board relied on the attorney's report, interviews with personnel, review of documents, etc., in deciding its resolution, unless subject to an exception, these documents would be disclosable to relator pursuant to R.C. 149.43. To this extent, relator's complaint does state a claim upon which relief can be granted.

{¶ 15} The Board, however, argues that, based upon the Ohio Supreme Court's decision in *Toledo Blade*, 2009-Ohio-1767, any report that was prepared by a public agency's counsel, incident to an investigation of wrongdoing, is protected by the attorney-client privilege from disclosure pursuant to the Public Records Act. We do not agree that this was the holding in *Toledo Blade*. Rather, the Ohio Supreme Court held that "[b]efore the attorney-client privilege applies to communications relating to investigative services, the client for whom the investigation was conducted must show that other legal advice or assistance was sought and that the investigation conducted was integral to that assistance." *Id.*, ¶ 28. In making that determination in *Toledo Blade*, it is apparent that the Ohio Supreme Court reviewed the actual report to determine the extent of legal services rendered. Because this matter is before this court on a motion to dismiss, we

have no evidence demonstrating that the report was more than a factual investigation or that the Board's counsel was called upon to render legal advice or services.

{¶ 16} Based solely upon the allegations contained in the complaint, we find that the relator's complaint does not fail to state a claim for relief and the Board's motion to dismiss is denied. Having denied the Board's motion to dismiss, the Board is granted ten days from the date of this order to file its answer to relator's complaint.

MOTION DENIED.

Peter M. Handwork, P.J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.