[Cite as *Wilkins v. Village of Harrisburg*, 2013-Ohio-2751.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Paula J. Wilkins,	:	
Plaintiff-Appellant,	:	
		No. 12AP-1046
v.	:	(C.P.C. No. 12CVH08-10438)
Village of Harrisburg et al.,	:	(ACCELERATED CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on June 27, 2013

Paula J. Wilkins, pro se.

Kopech & O'Grady LLC, and *Michael P. O'Grady*, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶ 1} Plaintiff-appellant, Paula J. Wilkins, appeals from a judgment of the Franklin County Court of Common Pleas granting a motion for judgment on the pleadings filed by defendants-appellees, Village of Harrisburg, Village of Harrisburg Council Members Melisa Craker, Ellen M. Dawson, and Janet Ray, and Village of Harrisburg Fiscal Officer Patsy Frost. For the reasons that follow, we affirm the judgment of the trial court.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} Appellant filed a complaint for injunctive relief, a writ of mandamus, and civil damages against appellees for alleged violations of Ohio's "Sunshine Law," R.C. 121.22, for failure to conduct public meetings and failure to keep proper minutes of said meetings. According to the complaint, Larry Taylor, a.k.a. Beannie Taylor, resides at 9171

Taylor Road where meetings were held on May 24 and July 16, 2010 in violation of R.C. 121.22. The complaint alleges that in attendance at the May 24, 2010 meeting were appellees Craker and Ray, as well as Mayor Rebecca Peterson, Village of Harrisburg Council President Ed Erwin, and Village of Harrisburg Solicitor Michael O'Grady. The complaint also alleges that attending the July 16, 2010 meeting were appellees Dawson and Frost, and Village of Harrisburg Council Members Charity Evans and Jessica Morrow. Appellant's complaint further alleges that, because public business was discussed at these meetings, appellees violated R.C. 121.22.

{¶ 3} A month after the instant complaint was filed, appellees filed a motion for judgment on the pleadings. Appellees argued because "meetings," as that term is defined for purposes of R.C. 121.22, did not occur on May 24 and July 16, there was no violation of R.C. 121.22. Appellees also argued the complaint failed to include an affidavit or sworn statement in support of the requested writ of mandamus rendering mandamus relief inappropriate. The trial court concluded the gatherings challenged in appellant's complaint could not be considered "public meetings," and, therefore, appellees were entitled to judgment on the pleadings. Accordingly, the trial court granted appellees' motion and dismissed appellant's complaint.

II. ASSIGNMENTS OF ERROR

{¶ 4} This appeal followed, and appellant brings the following two assignments of error for our review:

> [I.] The trial court erred in dismissing plaintiffs' [sic] complaint as a matter of law pursuant to Ohio Civil Rule 12(C).
>
> [II.] The trial court erred in dismissing plaintiff's complaint relative to violations of the Open Meetings Act, Ohio Revised Code 121.22.

III. DISCUSSION

A. First Assignment of Error

{¶ 5} In her first assignment of error, appellant argues the trial court erred in considering appellees' motion for judgment on the pleadings because said motion was prematurely filed. Civ.R. 12(C) provides:

> After the pleadings are closed but within such times as not to delay the trial, any party may move for judgment on the pleadings.

{¶ 6} According to appellant, because appellees did not file a pleading prior to filing their Civ.R. 12(C) motion, the pleadings were not closed and their motion could not be considered. While a Civ.R. 12(C) motion filed before pleadings are closed is premature and not to be considered by the trial court, any error in considering a premature Civ.R. 12(C) motion is harmless if dismissal was otherwise appropriate. *State ex rel. Kaylor v. Bruening*, 80 Ohio St.3d 142, 144 (1997); *Nationwide Ins. Ents. v. Progressive Specialty Ins. Co.*, 10th Dist. No. 00AP-1474 (July 26, 2001); *Brown v. Vaniman*, 2d Dist. No. 17503 (Aug. 20, 1999).

{¶ 7} A premature Civ.R. 12(C) judgment may be upheld on appeal if the judgment was appropriate under Civ.R. 12(B)(6), failure to state a claim upon which relief can be granted, because a Civ.R. 12(B)(6) motion may be entertained after a claim is filed and before a party asserting the motion has filed a responsive pleading. *Yank v. Howard Hanna Real Estate Servs.*, 7th Dist. No. 02 CA 117, 2003-Ohio-3471, ¶ 15. As this court has recognized, because it has been held that the same standard of review for both Civ.R. 12(B)(6) and 12(C) is applied at the trial and appellate levels, one is not prejudiced by consideration of a premature Civ.R. 12(C) motion if dismissal under Civ.R. 12(B)(6) is otherwise appropriate. *Nationwide*.

{¶ 8} Accordingly, we overrule appellant's first assignment of error and proceed to appellant's second assignment of error challenging the trial court's dismissal of her complaint.

B. Second Assignment of Error

{¶ 9} In her second assignment of error, appellant argues the trial court erred in dismissing her complaint. As explained in our disposition of appellant's first assignment of error, we will uphold a trial court's dismissal of a premature motion for judgment on the pleadings if dismissal is otherwise appropriate under Civ.R. 12(B)(6), which provides, in relevant part:

> **(B) How presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the

> responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: * * * (6) failure to state a claim upon which relief can be granted. * * * A motion making any of these defenses shall be made before pleading if a further pleading is permitted.

{¶ 10} When reviewing a judgment on a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted, an appellate court's standard of review is de novo. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, ¶ 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 (1992), citing *Assn. for the Defense of the Washington Local School Dist. v. Kiger*, 42 Ohio St.3d 116, 117 (1989). A trial court must presume all factual allegations contained in the complaint to be true and must make all reasonable inferences in favor of the nonmoving party. *Garofalo v. Chicago Title Ins. Co.*, 104 Ohio App.3d 95, 104 (8th Dist.1995), citing *Perez v. Cleveland*, 66 Ohio St.3d 397 (1993); *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190 (1989); *Phung v. Waste Mgt., Inc.*, 23 Ohio St.3d 100 (1986). "[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." *York v. Ohio State Hwy. Patrol*, 60 Ohio St.3d 143, 145 (1991).

{¶ 11} Appellant's complaint alleged appellees violated R.C. 121.22, which provides in relevant part:

> (A) This section shall be liberally construed to require public officials to take official action and to conduct all deliberations upon official business only in open meetings unless the subject matter is specifically excepted by law.
>
> (B) As used in this section:
>
> * * *
>
> (2) "Meeting" means any prearranged discussion of the public business of the public body by a majority of its members.
>
> * * *

> (C) All meetings of any public body are declared to be public meetings open to the public at all times. A member of a public body shall be present in person at a meeting open to the public to be considered present or to vote at the meeting and for purposes of determining whether a quorum is present at the meeting.
>
> The minutes of a regular or special meeting of any public body shall be promptly prepared, filed, and maintained and shall be open to public inspection. The minutes need only reflect the general subject matter of discussions in executive sessions authorized under division (G) or (J) of this section.

{¶ 12} The intent and purpose of R.C. 121.22 is to enable any member of the general public to seek enforcement of the statute when public officials circumvent the public's right to observe public officials as they conduct official business. *State ex rel. Mason v. State Emp. Relations Bd.*, 133 Ohio App.3d 213, 218 (10th Dist.1999). To violate R.C. 121.22, a public body must simultaneously conduct a "meeting" and "deliberate" over public business. *Tyler v. Village of Batavia*, 12th Dist. No. CA2010-01-002, 2010-Ohio-4078, ¶ 15, citing *Berner v. Woods*, 12th Dist. No. 07CA009132, 2007-Ohio-6207, ¶ 15, citing *Monraine v. Montgomery Cty. Bd. of Commrs.*, 67 Ohio St.2d 139, 145 (1981).

{¶ 13} According to appellees, they were entitled to have appellant's complaint against them dismissed because the complaint fails to allege a violation of R.C. 121.22. Appellees contend that not only did the gatherings of May 24 and July 16 not constitute "meetings" as defined by R.C. 121.22 because a majority of members were not present, but, also, appellant's complaint fails to allege that the purpose of the gatherings was to "deliberate" public business.

{¶ 14} "Meeting" is defined in R.C. 121.22(B)(2) as "any prearranged discussion of the public business of the public body by a majority of its members." The parties do not dispute that the Village of Harrisburg is made up of six council members. Because the facts in appellant's complaint allege only three members attended the gathering on May 24, and only three members attended the gathering on July 16, neither of these constitute a meeting to which R.C. 121.22 is applicable.

{¶ 15} Though neither gathering constitutes a "meeting" under R.C. 121.22, appellant argues that, since half of the counsel members attended the gathering on May 24 and the other half of the council members attended the gathering on July 16, the two gatherings should be construed as two parts of the same meeting. In support, appellant relies on *State ex rel. Cincinnati Post v. Cincinnati*, 76 Ohio St.3d 540 (1996), in which the Supreme Court of Ohio held the city council's "back-to-back meetings, which, taken together, were attended by a majority of council members, violated the provisions of R.C. 121.22." *Id*. at 542.

{¶ 16} In *Cincinnati Post*, the city's professional teams were threatening to leave the city if the city failed to provide better sports facilities. On June 21, 1995, the city manager called a series of non-public, back-to-back sessions with council members purposefully so that no session would have a majority of council members, and, thus, R.C. 121.22 could be avoided. After the county announced its proposal on June 22, 1995, the city manager had another series of back-to-back sessions on June 23 and again on June 26, 1995. On June 29, 1995, council held a special session open to the public at which time it approved the memorandum between the city and the county. A mandamus action followed and the Supreme Court of Ohio held that the city council's back-to-back meetings, which, taken together, were attended by a majority of council members, violated the provisions of R.C. 121.22, that the dictates of R.C. 121.22 are applicable to Cincinnati City Council, and that the Cincinnati Post is entitled to its requested relief. *Id*. at 542.

{¶ 17} The facts alleged in appellant's complaint are in stark contrast to those presented in *Cincinnati Post*. As alleged in appellant's complaint, subject to certain exceptions not relevant here, the Village of Harrisburg's regular council meetings are held on the first Tuesday of each month. According to the council meeting minutes of May 11, 2010 contained in appellant's complaint, Taylor inquired about zoning for his potential development. The minutes state that, due to several new council members, "copies of his previous documents are to be distributed to everyone," and a meeting was scheduled for May 24 to be held at 9171 Taylor Road for review of documents related to zoning and property development. (Complaint, 4.) According to the June 11, 2010 minutes, only three council members attended on May 24 and another "presentation" was going to be

scheduled for those who could not attend on May 24. The August 3, 2010 minutes reflect three council members attended the same presentation on July 16. According to the August 3 minutes, council president asked "what everyone thought of the potential undertaking," and it was suggested that council begin talking with others about the merits of the project "as a start to moving this project forward." (Complaint, 5.) The complaint includes portions of council meeting minutes from the September 7, October 5, and November 9, 2010 meetings, at which council reviewed various resolutions and zoning changes.

{¶ 18} Thus, we are not presented with back-to-back sessions of elected officials meeting secretly to deliberate on public issues without accountability to the public, as was at issue in *Cincinnati Post*. From the minutes reflected in appellant's complaint, not only were the gatherings of May 24 and July 16 discussed at regularly scheduled council meetings, a regularly scheduled meeting occurred between the May 24 and July 16 gatherings. Accordingly, the May 24 and July 16, 2010 gatherings cannot be construed under *Cincinnati Post* as a "meeting" for purposes of R.C. 121.22.

{¶ 19} Additionally, appellant's complaint fails to state a claim because the complaint fails to allege the council members "deliberated" over public business. "The timing of a public body's private investigative or information-gathering session with persons who are not public officials is not determinative of whether a violation of Ohio's Open Meetings Act has occurred; in the absence of deliberations or discussions by the public body's members, such a session is not a 'meeting' as defined by the act, so it need not occur in public." *Cincinnati Enquirer v. Cincinnati Bd. of Edn.*, 192 Ohio App.3d 566, 2011-Ohio-703, paragraph two of the syllabus, discretionary appeal not allowed, 128 Ohio St.3d 1557, 2011-Ohio-2905.

{¶ 20} R.C. 121.22 seeks to prevent public bodies from engaging in secret deliberations with no accountability to the public. *Cincinnati Enquirer* at ¶ 9. As previously stated, to violate R.C. 121.22, a public body must simultaneously conduct a "meeting" and "deliberate" over public business. *Tyler*.

{¶ 21} Though R.C. 121.22 does not define the term "deliberations," it has been held that a public body deliberates " 'by thoroughly discussing all of the factors involved [in a decision], carefully weighing the positive factors against the negative factors,

cautiously considering the ramifications of its proposed action, and gradually arriving at a proper decision which reflects th[e] legislative process.' " *Cincinnati Enquirer* at ¶ 12, quoting *Theile v. Harris*, 1st Dist. No. C-860103 (June 11, 1986). Deliberations involve "more than information-gathering, investigation, or fact-finding," which are essential functions of any board. *Id.* The Ninth District Court of Appeals has held "[q]uestion-and-answer sessions between board members and other persons who are not public officials do not constitute 'deliberations' unless a majority of the board members also entertain a discussion of public business with one another. In this context, 'discussion' entails an 'exchange of words, comments or ideas by the board.' A conclusive decision among board members on any measure, however, is not necessary to prove a violation." (Internal citations omitted.) *Krueck v. Kipton Village Council*, 9th Dist. No. 11CA009960, 2012-Ohio-1787, ¶ 14, quoting *Berner v. Woods*, 9th Dist. No. 07CA009132, 2007-Ohio-6207, ¶ 15.

{¶ 22} Appellant's complaint does not allege that council members engaged in "deliberations" at the May 24 and July 16 gatherings. As set forth in appellant's complaint, the council meeting minutes state a presentation was given on May 24 and that another was given on July 16. There is nothing in appellant's complaint to suggest *any* deliberations occurred or *any* decisions were made at either gathering. Rather, as evidenced by the meeting minutes in appellant's complaint, the deliberations based on the information obtained at the gatherings occurred at council's regularly scheduled meetings. In the absence of deliberations or discussions by board members at the gatherings, the sessions were not "meetings," as defined by R.C. 121.22, so they were not required to occur in public. *Cincinnati Enquirer* at ¶ 15.

{¶ 23} Upon our review of appellant's complaint, we conclude the complaint fails to allege a violation of R.C. 121.22, as appellant's complaint does not allege appellees conducted a "meeting" to "deliberate" public business. Therefore, we conclude appellant's complaint fails to state a claim upon which relief can be granted, and the trial court did not err in dismissing appellant's complaint.

{¶ 24} Accordingly, appellant's second assignment of error is overruled.

IV. CONCLUSION

{¶ 25} For the foregoing reasons, appellant's two assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

BROWN and CONNOR, JJ., concur.
