[Cite as *Koe-Krompecher v. Columbus*, 2005-Ohio-6504.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Pedro Koe-Krompecher et al.,	:	
Plaintiffs-Appellants,	:	
v.	:	No. 05AP-697 (C.P.C. No. 01CVH05-5144)
City of Columbus,	:	(ACCELERATED CALENDAR)
Defendant-Appellee.	:	

O P I N I O N

Rendered on December 8, 2005

Colley, Shroyer & Abraham, David I. Shroyer and *Dennis V. Yacobozzi, II,* for appellants.

Richard C. Pfeiffer, Jr., City Attorney, and *Susan E. Ashbrook*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Plaintiffs-appellants, Pedro Koe-Krompecher and David Giles, appeal from the judgment of the Franklin County Court of Common Pleas that dismissed appellants' civil claims pursuant to a Civ.R. 12(B)(6) motion that defendant-appellee, the City of Columbus, filed.

{¶2} On May 31, 2001, appellants filed a complaint against appellee. The complaint alleged the following. Appellants owned real estate in Columbus, Ohio, and each paid a storm water assessment under Columbus City Ordinance 1200-91 ("Ordinance 1200-91") from 1991 to 1994. Appellee repealed the ordinance in 1994. Under Ordinance 1200-91, appellee assessed storm water fees on the amount of water that appellants used. However, according to appellants, "the amount of stormwater generated by a property is totally unrelated to the amount of water that a property draws from city water systems" because "[t]he amount of stormwater generated by a land parcel is governed by a variety of factors including the size of the land parcel, the amount of the parcel paved or covered by structures and thus generating runoff * * *, the porosity of the soils under the property, and the slope of the land." Thus, appellants contended that, through Ordinance 1200-91, appellee assessed storm water fees in violation of appellants' constitutional rights pursuant to *Home Builders Assn. of Dayton & the Miami Valley v. Beavercreek* (2000), 89 Ohio St.3d 121, which held that a city must use a "reasonable relationship test in the collection of fee assessments." In making the above allegations, appellants sought damages, which included a refund of each assessment paid from 1991 to 1994, under the theory that appellee's assessment through Ordinance 1200-91 constituted an unconstitutional taking in violation of the Ohio and United States Constitutions.

{¶3} In July 2001, appellants filed an amended complaint reiterating the above allegations, and also noting that, "[a]t the time of the payment of [the assessment] by [appellants], [appellants] believed that [appellee] was acting in a lawful manner[.]" However, after noting the above Ohio Supreme Court decision in *Beavercreek*,

appellants further asserted that the assessment under Ordinance 1200-91 "constituted an unjust taking and detention of [appellants'] personal property, money[.]" Moreover, appellants noted in the amended complaint that appellee failed to respond to appellants' demand that appellee refund their money by July 13, 2001. Likewise, in addition to the above taking claim in the original complaint, appellants added in the amended complaint a conversion claim. In the amended complaint, appellants also sought a declaratory judgment on the constitutionality of Ordinance 1200-91.

{¶4} Appellee filed a Civ.R. 12(B)(6) motion to dismiss the amended complaint, arguing that the statute of limitations barred appellants' claims. The trial court agreed and dismissed appellants' taking and conversion claims. The trial court also dismissed appellants' declaratory action.

{¶5} Appellants appeal, raising one assignment of error:

> THE TRIAL COURT ERRED BY GRANTING DEFENDANT CITY OF COLUMBUS'S MOTION TO DISMISS.

{¶6} Appellants' single assignment of error concerns the trial court's decision to grant appellee's Civ.R. 12(B)(6) motion to dismiss. In their assignment, appellants focus on the trial court's decision to dismiss the taking and conversion claims, but make no arguments against the trial court's decision to dismiss the declaratory action. Thus, we will address the trial court's decision to dismiss the taking and conversion claims, but will not address the trial court's decision to dismiss the declaratory action. See App.R. 16(A) and 12(A)(2).

{¶7} In filing the Civ.R. 12(B)(6) motion to dismiss, appellee claimed that appellants failed to state a claim upon which relief may be granted. A Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief may be granted tests the

sufficiency of a complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545, 548. Therefore, a trial court must limit its consideration to the four corners of the complaint when deciding a Civ.R. 12(B)(6) motion to dismiss. *Singleton v. Adjutant Gen. of Ohio*, Franklin App. No. 02AP-971, 2003-Ohio-1838, at ¶18. Likewise, courts must accept as true the factual allegations of the complaint, and courts must provide the plaintiff all reasonable inferences derived from such factual allegations. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192. In addition, we review de novo a trial court's decision to dismiss a case pursuant to Civ.R. 12(B)(6). *Martin v. Ghee* (Apr. 9, 2002), Franklin App. No. 01AP-1380.

{¶8} In raising the Civ.R. 12(B)(6) motion, appellee contended that appellants failed to file their claims within the pertinent statute of limitations. A party may assert a statute of limitations defense through a Civ.R. 12(B)(6) motion to dismiss if the defense is apparent in the complaint. *Charles v. Conrad*, Franklin App. No. 05AP-410, 2005-Ohio-6106, at ¶24; *Stuller v. Price*, Franklin App. No. 02AP-29, 2003-Ohio-583, at ¶27; *Leichliter v. Natl. City Bank of Columbus* (1999), 134 Ohio App.3d 26, 32. Here, as demonstrated below, appellee's statute of limitations defense is apparent on the face of appellants' amended complaint.

{¶9} We next address which statute of limitations governed appellants' claims. Initially, we note that neither party has asserted the applicability of R.C. 2723.01, which states that an action challenging the payment of taxes or assessments must be brought within one year of collection. Cf. *Amherst Builders v. Amherst* (1980), 61 Ohio St.2d 345, 349-350, quoting *State ex rel. Gordon v. Taylor* (1948), 149 Ohio St. 427, 434 (holding that R.C. 2723.01 et. seq. did not apply to a city's fee on new users of a

sewage system and recognizing that " 'it is well established that charges for sewer services * * * are neither taxes nor assessments' ").

{¶10} Rather, in its motion to dismiss, appellee contended that *State ex rel. R.T.G., Inc. v. State*, 98 Ohio St.3d 1, 2002-Ohio-6716, dictated the statute of limitations for appellants' case. In *R.T.G.*, the state deemed 833 acres of property in Guernsey County unsuitable for mining. Id. at ¶2. R.T.G. owned in fee a substantial portion of such property, and owned coal rights to other portions of the regulated property. Id. at ¶5. R.T.G. filed suit to compel the state to appropriate coal on the regulated property. Id. at ¶14. The Ohio Supreme Court concluded that R.C. 2305.07 set the statute of limitations in the appropriation action. Id. at ¶30. The court noted that R.C. 2305.07 "provides that 'an action upon a contract not in writing, express or implied, or upon a liability created by statute * * * shall be brought within six years after the cause thereof accrued.' " (Emphasis deleted.) Id. The court stated that R.C. 2305.07 applied to R.T.G.'s appropriation action because the state initiated a regulatory taking and because, "[i]n an appropriation action * * * when the state takes property, it is impliedly contracting that it will pay the property owner just compensation." Id. at ¶31, citing *Yearsley v. W.A. Ross Constr. Co.* (1940), 309 U.S. 18, 21.

{¶11} As noted above, *R.T.G.* involves the state taking through regulation real property without just compensation. See *Mead Corp. v. Huntington Natl. Bank* (Apr. 25, 1983), Jackson App. No. 472, quoting *Terteling Bros., Inc. v. Glander* (1949), 151 Ohio St. 236, 241 (recognizing that minerals in place on or beneath land constitutes real property). *R.T.G.* and R.C. 2305.07 are not entirely applicable here because appellants' case does not involve appellee taking or regulating real property without just

compensation. Rather, appellants' case is based on appellee taking personal property, i.e., money, outright with no authority to do so. See *Phillips v. Washington Legal Found.* (1998), 524 U.S. 156, 172 (recognizing that interest income generated in "Interest on Lawyers Trust Account[s]" constitutes private property).

{¶12} In *Thomas v. City of Columbus* (1987), 39 Ohio App.3d 53, a plaintiff sought to recover damages after the city of Columbus allegedly demolished the plaintiff's building improperly and, as a result, damaged personal property in the building. This court applied the four-year statute of limitations in R.C. 2305.09(B), which states:

> "An action for any of the following causes shall be brought within four years after the cause thereof accrued:
>
> "* * *
>
> "For the recovery of personal property, or for taking or detaining it[.]"

Thomas at 54. In applying R.C. 2305.09(B), we noted that the plaintiff sought to recover damages "for personal property taken at the time the building * * * was razed." Id.

{¶13} Appellants, and now appellee, both assert that the four-year statute of limitations in R.C. 2305.09(B) applied, given appellants' allegation that appellee unlawfully took appellants' personal property. Given the parties' concession, and in light of *Thomas*, we consider R.C. 2305.09(B) here, and we next address appellants' contention that their taking and conversion claims remain viable because a court has not yet determined the constitutionality of Ordinance 1200-91.

{¶14} Under R.C. 2305.09, "[i]f the action is for * * * the wrongful taking of personal property, the causes thereof shall not accrue until the wrongdoer is

discovered[.]" This provision in R.C. 2305.09, known generally as the "discovery rule," provides that an applicable cause of action accrues "at the time when the plaintiff discovers or, in the exercise of reasonable care, should have discovered the complained of injury." *Investors REIT One v. Jacobs* (1989), 46 Ohio St.3d 176, 179. Appellants contend that the discovery rule in R.C. 2305.09 applied to their taking and conversion claims. Appellants argue that, under the discovery rule, the statute of limitations has not commenced because a court has not yet deemed Ordinance 1200-91 unconstitutional. In claiming as such, appellants argue that, under *State v. Dorso* (1983), 4 Ohio St.3d 60, 61, Ordinance 1200-91 is presumed constitutional and, therefore, "no wrongdoing has been revealed" until a court rules on the constitutionality of the ordinance.

{¶15} However, the discovery rule applies to the "discovery of facts, not to the discovery of what the law requires." (Emphasis deleted.) *Lynch v. Dial Finance Co. of Ohio No. 1, Inc.* (1995), 101 Ohio App.3d 742, 747. As an example, in *Venture Coal Sales Co. v. United States* (C.A.D.C.2004), 370 F.3d 1102, 1103, a corporation filed suit to obtain a refund of taxes that it paid on coal it exported from 1988 through 1995. The corporation paid the taxes pursuant to the Coal Sales Act. Id. In 1998, a federal district court held that the Coal Sales Act was unconstitutional. Id. The corporation filed its suit for refund in October 2003. Id. The government argued that the applicable six-year statute of limitations had expired, and the government moved to dismiss the corporation's claim. Id. at 1103-1104. In response to the government's motion to dismiss, the corporation argued that its claim did not accrue until the federal district court deemed the Coal Sales Act unconstitutional. Id. at 1104. According to the

corporation, "until that decision, events sufficient to support its own claim had not yet occurred and it had no cause of action." Id. Thus, the corporation asserted that the six-year statute of limitations did not bar its claim because it initiated its suit within six years of the federal court's 1998 decision. Id.

{¶16} The appellate court rejected the corporation's argument that the district court's 1998 decision started the running of the six-year statute of limitations. Id. at 1105. According to the court:

> * * * Each time that [the corporation] paid the Coal Sales Tax, the language of the statute and its possible unconstitutional nature were thus fixed, injury was inflicted, and a separate claim accrued when [the corporation] remitted each payment of the Coal Sales Tax. * * *

Id. 1105. Thus, the appellate court concluded that the corporation "was able to bring its claims as soon as the taxes were paid." Id. The appellate court similarly recognized that the federal district court's 1998 decision "was not the action that damaged [the corporation], and thus it cannot serve" as the trigger for the corporation's claims. Id.

{¶17} The appellate court further rejected the corporation's alternative argument that its claims did not accrue when it paid the taxes because it had no way of knowing at the time that the Coal Sales Act was unconstitutional. Id. at 1107. The appellate court stated "[t]hat [the corporation] may have justifiably assumed that a statute enacted by Congress was presumptively constitutional does" not change the actuality that "a claim for damages from an invalid statute accrues on making a payment under the statute." Id. In the end, the appellate court concluded that the corporation's claims were not subject to a delayed accrual despite the corporation's claim that "it did not know the legal theory on which its refund claim might succeed." (Emphasis deleted.) Id.

Therefore, the appellate court held that the six-year statute of limitations barred the corporation's untimely claim. Id.

{¶18} Similarly, in *Kuhn v. Colorado* (Colo.1995), 897 P.2d 792, 798, the Colorado Supreme Court concluded that plaintiffs' suit, which alleged the unconstitutionality of a Colorado tax statute, did not accrue on the date that the United States Supreme Court ruled unconstitutional a similar Michigan tax statute. Rather, the Colorado Supreme Court concluded that the plaintiffs "were injured when they paid the tax" and that "[a]fter they paid the tax they had the ability to challenge the lawfulness of the tax." Id. The court recognized, in part, that to conclude otherwise " 'would allow virtually unlimited litigation every time precedent changed.' " Id. at 798, fn. 9, quoting *Jolly v. Eli Lilly & Co.* (Cal.1988), 751 P.2d 923, 932.

{¶19} Here, like the plaintiffs in *Kuhn* and *Venture Coal Sales*, appellants' argument under the discovery rule hinges on a court's future determination that Ordinance 1200-91 was unconstitutional. However, as *Lynch* indicates, the discovery rule concerns the discovery of facts, not the "discovery of what the law requires." (Emphasis deleted.) *Lynch* at 747. In this fashion, as *Kuhn* and *Venture Coal Sales* establish, appellants' alleged injuries occurred when they paid the assessment and, after paying the assessment, they had the ability to challenge the lawfulness of the ordinance that set the assessment. *Kuhn* at 798; *Venture Coal Sales* at 1105, 1107. Thus, as *Venture Coal Sales* further indicates, Ordinance 1200-91's presumption of constitutionality did not delay the accrual of appellants' claims, given that their injuries took place when they paid the assessment. Id. at 1107; see, also, *Olinik v. Nationwide Mut. Ins. Co.* (1999), 133 Ohio App.3d 200, 211 (stating that "a change in caselaw

should not revive a cause of action"). Similarly, for these reasons, appellants' claims accrued when they paid the assessment, despite appellants not having been aware of specific legal theories to challenge Ordinance 1200-91's constitutionality at the time that they paid the assessment. See *Flowers v. Walker* (1992), 63 Ohio St.3d 546, 549 (recognizing that "knowledge of facts, rather than actual knowledge of their legal significance, is enough to start the statute of limitations running under the discovery rule"). (Emphasis deleted.) Accordingly, based on the above, appellants' taking and conversion claims accrued when they paid the assessment under Ordinance 1200-91, and the discovery rule in R.C. 2305.09 did not delay the accrual of the claims.

{¶20} Next, appellants alternatively argue that their conversion claim accrued in July 2001, after appellee refused to refund to appellants the assessment. We first reject appellants' alternative contention because "[w]hen personal property is taken unlawfully, the demand for and refusal to return are not necessary." *Kelly v. Kelly*, Clark App. No. 2005 CA 7, 2005-Ohio-4740, at ¶21.

> A demand of return of personal property is not always a pre-requisite to the maintenance of an action for conversion thereof. A demand and refusal is necessary only where the person alleged to have converted the property has rightfully obtained possession thereof and, therefore, cannot be found to have converted the property unless he either fails to restore it upon demand or by some other act of his creation unlawfully exercises dominion over the property. * * *

Drakoules v. Dairy Queen of Whitehall, Inc. (Aug. 9, 1977), Franklin App. No. 76AP-961. Here, in alleging that appellee unlawfully obtained the assessment through Ordinance 1200-91, appellants asserted, in part, that the ordinance "constituted an unjust taking and detention of [appellants'] personal property, money[.]" Thus, under

appellants' own allegation, and pursuant to *Kelly* and *Drakoules*, the "demand" and "refusal" were not required. *Kelly* at ¶21; *Drakoules*.

{¶21} In addition, pursuant to the discovery rule, the statute of limitations for conversion runs when "the complainants have discovered, or should have discovered, the claimed matters." *Investors REIT One* at paragraph 2b of the syllabus. As an example, in *Firsdon v. Mid-American Natl. Bank & Trust Co.* (Oct. 11, 1991), Wood County App. No. 90WD083, the Sixth District Court of Appeals reviewed plaintiffs' conversion claim that concerned plaintiffs' grain. The defendants allegedly wrongfully sold the plaintiffs' grain. Afterwards, the plaintiffs demanded that the defendants return the grain, but the defendants refused. The appellate court concluded that the plaintiffs discovered, or should have discovered, the alleged conversion soon after the defendants sold the plaintiffs' grain. As a result, the appellate court held that the statute of limitations began to run after the defendants allegedly sold the grain wrongfully, and not when the defendants refused to return the grain pursuant to the plaintiffs' demands.

{¶22} Here, like *Firsdon*, and pursuant to *Investors REIT One*, the statute of limitations on appellants' conversion claim did not begin to run when appellee refused to refund the assessment. Rather, as we concluded above, appellants were injured when they paid the assessment, and appellants had the ability to challenge the lawfulness of the assessment at that time.

{¶23} Accordingly, we next calculate the four-year statute of limitations under R.C. 2305.09(B). Appellants last paid the assessment in 1994, and, accordingly, 1994 is the latest triggering event on appellants' claims. See *Venture Coal Sales* at 1105. Four years from 1994 is 1998, but appellants filed their claims in 2001, beyond the 1998

expiration of the R.C. 2305.09(B) statute of limitations. Indeed, we further note that appellants filed their claims beyond the six-year statute of limitations in R.C. 2305.07 that appellee originally posited.

{¶24} Thus, we conclude that the statute of limitations barred appellants' taking and conversion claims, and that the trial court did not err by dismissing the claims pursuant to Civ.R. 12(B)(6). As such, we overrule appellants' single assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and McGRATH, JJ., concur.

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