

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
FAYETTE COUNTY

OHIO PYRO, INC., et al.,	:	
	:	CASE NOS. CA2005-03-009
Plaintiffs-Appellees,	:	CA2005-03-011
	:	
-vs-	:	<u>OPINION</u>
	:	3/6/2006
	:	
OHIO DEPARTMENT OF COMMERCE,	:	
DIVISION OF STATE FIRE MARSHAL,	:	
et al.,	:	
	:	
Defendants-Appellants.	:	

CIVIL APPEAL FROM FAYETTE COUNTY COURT OF COMMON PLEAS
Case No. 2004-142-CVH

Bricker & Eckler LLP, T. Earl LeVere, Corey A. Goldsand, 100 S. Third Street, Columbus, OH 43215-4291, for plaintiff-appellee, Ohio Pyro, Inc., and Raymond J. Grabow & Associates, Raymond J. Grabow, Crown Centre, Suite 425, 5005 Rockside Road, Independence, OH 44131, for intervenor plaintiff-appellee, West Salem Fireworks Co., Inc.

Wiles, Boyle, Burkholder & Bringardner Co., L.P.A., Michael L. Close, Dale D. Cook, 300 Spruce Street, Floor One, Columbus, OH 43215, and W. Scott Simon, 37 W. Broad Street, Suite 710, Columbus, OH 43215, for defendants-appellants, Safety 4th Fireworks, Inc. and Liberty Fireworks, Inc.

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POWELL, P.J.

{¶1} Defendants-appellants, Ohio Department of Commerce, Division of the State Fire Marshal ("SFM"), Safety 4th Fireworks, Inc., and Liberty Fireworks, Inc.,¹ appeal the decision by the Fayette County Court of Common Pleas to grant a permanent injunction and summary judgment to appellees, Ohio Pyro, Inc. and West Salem Fireworks Co., Inc., on a matter regarding the transfer of three wholesale fireworks licenses. Judgment is affirmed for the reasons outlined below.

{¶2} Ohio Pyro filed a complaint in Fayette County in 2004, asking for a declaration of rights and an order to enjoin the SFM from approving the geographic relocation or transfer of three specifically enumerated wholesale fireworks licenses as being contrary to law.² After taking evidence, the trial court issued a preliminary injunction prohibiting the SFM from approving the transfer of the three licenses.

{¶3} Appellees moved for summary judgment, and the SFM and Safety 4th filed motions to dismiss and cross-motions for summary judgment. The trial court denied the motions of Safety 4th and the SFM, granted appellees' motion for summary judgment, and issued a permanent injunction prohibiting the relocation of the three licenses.

{¶4} Both the SFM and Safety 4th appealed the trial court's decision. A review of the assignments of error presented by both appellants indicates that their arguments and assignments of error are the same and, therefore, will be discussed together in this consolidated appeal.

{¶5} The three assignments of error are couched in terms of error regarding the

1. For this appeal, we will refer to Safety 4th Fireworks, Inc. and Liberty Fireworks, Inc., collectively as "Safety 4th."

2. Appellee West Salem Fireworks Co., Inc. later intervened in this case as a plaintiff and Safety 4th and Liberty Fireworks were named in the amended complaint as defendants.

grant or denial of summary judgment and motions to dismiss. However, within that framework, the main thrust of appellants' challenge is the trial court's decision to hear this case and to grant a permanent injunction. We will address these challenges accordingly.

{¶6} First, we note that neither side disputes the requisite standards of review for summary judgment or for a motion to dismiss, and therefore, we will dispense with an extended discussion and apply the applicable standards as appropriate for summary judgment and motions to dismiss. See Civ.R. 56; Civ.R. 12 (B)(6); *Towne v. Progressive Ins. Co.*, Butler App. No. CA2005-02-031, 2005-Ohio-7030, ¶7; *Springer v. Fitton Ctr. for Creative Arts*, Butler App. No. CA2004-06-128, 2005-Ohio-3624, ¶12.

{¶7} Under their first assignment of error, appellants argue that the action in Fayette County represented an improper collateral attack on a valid judgment of another common pleas court and, therefore, the trial court below had no jurisdiction to entertain such an action.

{¶8} In a discussion of the respective arguments, it is essential that we briefly identify the applicable statutory chapter and the other judgment to which appellants are referring when they argue that the trial court was permitting a collateral attack by hearing and deciding this case.

{¶9} Ohio Pyro relies upon R.C. Chapter 3743, the chapter that deals with fireworks licensing, for the proposition that the SFM is acting contrary to law by permitting the geographic transfer of the three licenses to other areas of the state because the applicable statutes allow no geographic transfers except those transfers within the same city or township where the license was previously located. See R.C. 3743.75 and R.C. 3743.17.

{¶10} Appellants argue that the SFM can approve the relocation of the three

licenses outside the geographic limitations contained in the language of the fireworks statutes because the SFM and Safety 4th settled a lawsuit between them in the Jefferson County Court of Common Pleas by agreeing that the SFM would permit the three geographic license transfers to any political subdivision in Ohio, upon the performance of specific conditions. Under the agreement, if those conditions are met, the SFM would approve only the three license transfers to any area in the state as if all the requirements for the license transfers had been perfected when a variance to permit the transfer was, arguably, available. See *Safety 4th Fireworks, Inc. v. Ohio Department of Commerce, Division of State Fire Marshal* (June 6, 2001), Jefferson C.P. No. 99-CV-275.

{¶11} An agreed entry of the settlement between Safety 4th and the SFM was signed and entered into the court's record by the Jefferson County Court of Common Pleas in June 2001. The entry also dismissed the complaint with prejudice.

{¶12} A collateral attack on a judgment may be defined as an attempt to avoid, defeat, or evade judgment, or to deny its force and effect, in some judicial proceeding not provided by law for the express purpose of reviewing it. *Hall v. Tucker*, 161 Ohio App.3d 245, 261, 2005-Ohio-2674, ¶42; *In re Guardianship of Titington* (P.C.1958), 82 Ohio Law Abs. 563.

{¶13} After reviewing the record, we cannot agree with appellants' position that the trial court's assumption of jurisdiction over the action seeking declaratory judgment and injunctive relief constitutes a collateral attack on the Jefferson County judgment.

{¶14} Despite requests to linger on the individual components of the Jefferson County agreed entry, we decline to do so. The Jefferson County agreed entry is an entry confirming a settlement between Safety 4th and the SFM. Other fireworks companies, including appellee Ohio Pyro, but not appellee West Salem, attempted to intervene in the

Jefferson County action, but were denied.³

{¶15} The Jefferson County judgment is referenced here simply because it indicates the SFM's intent to approve the geographic transfer of these three specific licenses.

{¶16} It appears that even the Jefferson County court anticipated, or rather, required other entities to seek their day in court elsewhere. The Jefferson County Common Pleas Court stated in its "Order Overruling Motions to Intervene" that one of the fireworks companies seeking to intervene would not be permitted to do so, but was "free to file its own case in [the county in which it did business]." In denying Ohio Pyro's attempt to intervene, the Jefferson County court stated that Ohio Pyro's interests were "so speculative that it cannot be seriously considered" because Ohio Pyro had not claimed that Safety 4th was actually moving into its territories.⁴

{¶17} In addition, we note that the Fourth District Court of Appeals found that a lower court in its district lacked jurisdiction to consider the matter in an action filed in Washington County by a fireworks company that was attempting to stop the SFM from approving the geographic transfer of one of the fireworks licenses at issue. The Fourth Appellate District found that the claim was not ripe in the court below because there was no evidence at that time that Safety 4th was attempting to transfer a license to Washington County. *Eagle Fireworks, Inc. v. Ohio Department of Commerce*, Washington App. No. 03CA28, 2004-Ohio-509, appeal not allowed by 102 Ohio St.3d 1472, 2004-Ohio-2830.

{¶18} It is axiomatic that once the locations of the license transfers were identified, the issues set forth by Ohio Pyro and West Salem were ripe. The trial court in the case at

3. Ohio Pyro did not appeal the denial of their motion to intervene.

bar had jurisdiction to hear the matter when steps were taken to build in Fayette County and other specific counties were identified as potential locations for the transfer of the other two fireworks licenses.⁵

{¶19} The trial court in Fayette County had jurisdiction to hear this case and apply state law. It is not necessary to defeat or avoid the operation of the Jefferson County agreed settlement entry for the trial court to address the issues brought forth in this action filed below.

{¶20} Keeping within the narrow focus of appellants' first assignment of error, under the applicable standards of review for summary judgment and motions to dismiss, we find that the trial court did not err when it assumed jurisdiction over the case filed in Fayette County. Accordingly, appellees' complaint stated a claim for relief, and construing the evidence most favorably for appellants, reasonable minds could come to but one conclusion and that conclusion is adverse to appellants. Summary judgment was appropriate and it was not error for the trial court to deny appellants' motions to dismiss or for summary judgment, and to grant summary judgment to Ohio Pyro and West Salem on the limited issue of jurisdiction. Appellants' combined first assignment of error is overruled.

{¶21} Appellants' second combined assignment of error asserts that the trial court erred in finding that appellees proved irreparable harm and no adequate remedy at law to receive injunctive relief.

{¶22} In order to obtain a permanent injunction, a party must show by clear and convincing evidence that immediate and irreparable injury, loss or damage will result to the

4. In its 2000 entry, the Jefferson County court also found that the SFM would adequately represent the other fireworks companies by "vigorously defend[ing] the Fireworks Code as it now stands."

applicant and that no adequate remedy at law exists. *Franklin Cty. Bd. of Health v. Paxson*, 152 Ohio App.3d 193, ¶25; see, also, Civ.R. 65.

{¶23} A court should exercise great caution regarding the granting of an injunction that would interfere with another branch of government and especially with the ability of the executive branch to enforce the law. *Garono v. State* (1988), 37 Ohio St.3d 171, 173 (injunction would be proper where the police are unwarranted in going beyond their authority or duty).

{¶24} Irreparable harm exists where there is no plain, adequate, and complete remedy at law, and for which money damages would be impossible, difficult, or incomplete. *Crestmont Cadillac Corp. v. General Motors Corp.*, Cuyahoga App. No. 83000, 2004-Ohio-488, ¶36.

{¶25} In determining the propriety of injunctive relief, adequate remedy at law "means that the legal remedy must be as efficient as the indicated equitable remedy would be; that such legal remedy must be presently available in a single action; and that such remedy must be certain and complete." *Mid-America Tire, Inc. v. PTZ Trading Ltd.* 95 Ohio St.3d 367, 380, 2002-Ohio-2427, ¶81, quoting *Fuchs v. United Motor Stage Co., Inc.* (1939), 135 Ohio St. 509.

{¶26} While the grant or denial of an injunction is solely within the trial court's discretion, and we normally review that determination for an abuse of discretion, *Garano v. State*, 37 Ohio St. at 173, we are also mindful that this matter is before us on both a grant of summary judgment and permanent injunction. Therefore, we choose to proceed on the side of caution and review this matter de novo. See *Premier Health Care Services Inc. v.*

5. The trial court heard evidence that the areas identified for relocation of the three licenses would impact either Ohio Pyro or West Salem, or both.

Schneiderman, Montgomery App. No. 18795, 2001-Ohio-7087.

{¶27} During the hearing on the preliminary injunction, there was testimony that appellees could lose a substantial number of customers and corresponding fireworks sales if Safety 4th was permitted to relocate its three licenses into the areas where appellees are located or where they draw their customer base. There was additional testimony that this loss of business could endanger the financial viability of appellees' applicable showrooms, which could have a detrimental impact on the businesses as a whole.

{¶28} An Ohio Pyro officer testified that competition is not unwelcomed, but the "playing field" is not level when Safety 4th is permitted to relocate three licenses to presumably favorable locations and no one else is permitted by the law in Chapter 3743 to do so.

{¶29} After reviewing the record under the applicable standards of review, we find that dismissal is not warranted and a grant of summary judgment to appellees is appropriate on the issue of irreparable harm to appellees and no adequate remedy at law. Further, reasonable minds could only conclude that irreparable harm is created and there is no other adequate remedy at law when a governmental agency like the state fire marshal manifests an intent to ignore state law and approve the geographic transfer of these three licenses beyond that permitted by law. See *Garano v. State*, 37 Ohio St.3d at 173 (injunction ordinarily employed to prevent a future wrong); R.C. 3743.75 and R.C. 3743.17; Civ.R. 65.

{¶30} Appellants' combined second assignment of error is overruled.

{¶31} And finally, under their third assignment of error, appellants argue that dismissal was appropriate and summary judgment should not have been granted because

no justiciable controversy exists.

{¶32} To maintain an action for declaratory judgment, there must be a real controversy between the parties that is justiciable in character, and speedy relief is necessary to preserve the rights of the parties. *Burger Brewing Co. v. Liquor Control Comm.* (1973), 34 Ohio St.2d 93, 97. For a cause to be justiciable, there must exist a real controversy presenting issues which are ripe for judicial resolution and which will have a direct and immediate impact on the parties. *Tradesmen Intern., Inc. v. City of Massillon*, Stark App. No. 2002CA00251, 2003-Ohio-2490, ¶32.

{¶33} Appellants argue that Ohio Pyro cannot create a controversy with the SFM by attacking the Jefferson County agreed entry when Ohio Pyro did not appeal the denial of their attempt to intervene in Jefferson County. Appellants further argue that no controversy exists because the Jefferson County agreed order places Safety 4th's application for the transfer of the three licenses within the time frame when it was permissible and therefore, the licenses existed at those three new locations before the law changed.

{¶34} We disagree with appellants' arguments concerning the lack of a justiciable controversy. Appellants continue to focus the attention of this case on the Jefferson County judgment by settlement. Regardless of the intervention decisions in Jefferson County, neither Ohio Pyro nor West Salem was a party to that settlement agreement.

{¶35} A review of the record indicates that the instant case presents a real controversy between the parties that is ripe for judicial resolution and has a direct and immediate impact on the parties. The SFM indicated that it will approve the geographic relocation of three specific fireworks licenses when the applicable law does not permit it. See, e.g., *Shady Acres Nursing Home, Inc. v. Canary* (1973), 39 Ohio App.2d 47, 50

(license is frequently defined as permission to do some act without which the act would be illegal, but license is not a contract, nor does it constitute property in a constitutional sense; it does not confer an absolute right, and governmental authority can impose new burdens, create additional burdens, or revoke the license); see, also, e.g., *Scharff v. State Bd. of Liquor Control* (1955), 99 Ohio App. 139, 142, (there is no vested right in an application for a liquor permit and, therefore, the law in effect at the time of passing on the permit, rather than on the date of filing the application, governed the applicant's right to a permit); *Save the Lake v. Schregardus*, 141 Ohio App.3d 530, 538-539, 2001-Ohio-4377, appeal not allowed by 92 Ohio St.3d 1429, 2001-Ohio-4573; R.C. 3743.75; R.C. 3743.17.

{¶36} This case meets the requirements of a declaratory judgment action. Dismissal of the action was not appropriate. Construing the evidence most favorably for appellants, reasonable minds could come to but one conclusion on this issue and that conclusion is adverse to appellants. Summary judgment for appellees is appropriate and the trial court did not err in finding a justiciable controversy exists. Appellants' motion to dismiss is, likewise, not well-taken.

{¶37} Appellants' combined third assignment of error is overruled.

{¶38} Judgment affirmed.

WALSH and BRESSLER, JJ., concur.

[Cite as *Ohio Pyro, Inc. v. Ohio Dept. of Commerce, Div. of State Fire Marshal*, 2006-Ohio-1002.]