[Cite as *Triple Diamond Trucking v. Trumbull Cty. Land Reutilization Corp.*, 2018-Ohio-5193.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

TRIPLE DIAMOND TRUCKING & EXCAVATING LLC,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2018-T-0017**
- vs -	:	
TRUMBULL COUNTY LAND REUTILIZATION CORPORATION, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 2016 CV 02161.

Judgment: Affirmed.

Michael J. McGee, Harrington, Hoppe & Mitchell, Ltd., 108 Main Avenue, S.W., Suite 500, Warren, OH 44481 (For Plaintiff-Appellant, Triple Diamond Trucking & Excavating LLC).

Stuart A. Strasfeld and *David S. Barbee,* Roth, Blair, Roberts, Strasfeld & Lodge, 100 East Federal Street, Suite 600, Youngstown, OH 44503 (For Defendant-Appellee, Holton, Inc.).

Rebecca A. Smith, P.O. Box 4289, Warren, OH 44482 (For Defendants-Appellees, Trumbull County Land Reutilization Corporation and Trumbull Neighborhood Partnership, Inc.).

H. Gilson Blair, 391 Mahoning Avenue, N.W., Warren, OH 44483 (For Defendants-Appellees, Christopher Taneyhill and Harold Kriner).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Triple Diamond Trucking & Excavating, LLC, appeals the summary judgment entered by the Trumbull County Court of Common Pleas against it and in favor of appellees, Trumbull County Land Reutilization Corporation, Trumbull Neighborhood Partnership, Christopher Taneyhill, and Harry Kriner. The principal issue is whether the trial court erred in entering summary judgment. For the reasons that follow, we affirm.

{¶2} The statement of facts outlined herein is based on the parties' evidentiary materials presented on summary judgment. Appellee, Trumbull County Land Reutilization Corporation (the "Land Bank"), was organized in Ohio as a non-profit corporation in 2010. The Land Bank Board of Directors ("board") consists of seven members, the Trumbull County Treasurer (currently Sam Lamancusa), who serves as the President/Chairman of the board, two Trumbull County Commissioners, a representative from the largest city in the county, a representative of the County townships, a real estate professional, and a representative active in community development and non-profit corporations.

{¶3} Mr. Lamancusa stated in his affidavit that in 2013, the Land Bank board contracted with appellee, Trumbull Neighborhood Partnership ("TNP"), a local non-profit neighborhood revitalization organization, to run the Land Bank's program. TNP's primary focus is to improve the quality of life in Warren through strategic planning.

{¶4} Matt Martin, Executive Director of TNP, stated in his affidavit that the U.S. Treasury set aside funds, which the federal government wanted to use to remedy the damage caused by the foreclosure and housing crisis of 2008. Ohio was one of 18 states the federal government designated as "Hardest Hit States." The Ohio Housing

Financial Agency ("OHFA") is charged with distributing these "Hardest Hit Funds" in a way that affects the most change. Part of these funds is allocated to programs that help families stay in their homes after foreclosure. Demolition has been determined to be an effective use of these funds and substantial funds have been allocated to a program called "Neighborhood Initiative Program." ("NIP"), which funds county land banks for the purpose of residential demolition.

{¶5} In January 2014, the Land Bank's President, Mr. Lamancusa, completed an application to obtain demolition funds from OHFA. The application included "Demolition Policies and Procedures," which were adopted by the Land Bank board.

{¶6} The application was sent to OFHA, which approved the Land Bank's policies and procedures and awarded the Land Bank demolition funds through its NIP.

{¶7} Mr. Martin stated that the Land Bank, through its NIP, groups homes ready for demolition into "rounds" of about 20 homes. Once a round is determined, at least three demolition contractors are invited to bid through an e-mail that contains a bid package, which in turn contains the Land Bank's demolition requirements. The e-mail is sent by Shawn Carvin, the Land Bank Coordinator with the TNP.

{¶8} Mr. Carvin stated in his affidavit that on the date and time of a bid opening, he opens each bid and states aloud the contractor's name and bid amount. No contracts are ever awarded at that time. The Land Bank team then discusses each bid and each contractor in determining which company will best complete the demolition work. The team selects the winning bidder based on objective criteria, which includes the price, ability to timely complete the entire round, past performance, and references. Price is just one of these criteria.

{¶9} Mr. Carvin stated that on May 20, 2016, the Land Bank invited demolition contractors to bid for Round 13. The initial e-mail invitation said the bids would be opened on May 30, 2016, and invited all bidders to the bid opening. On May 30, 2016, Mr. Carvin opened each bid and read each aloud. No one from appellant, Triple Diamond, attended.

{¶10} Mr. Carvin noted that on June 3, 2016, he received an e-mail from appellant's principal and owner, Rebecca Bretz, stating she understood she had been awarded Round 13. Mr. Carvin responded, saying that no one had as yet been awarded Round 13. He said that before a decision is made, there are "several variables" that factor into their contractor-selection process. On June 6, 2016, he asked appellant to submit additional references from other demolition projects.

{¶11} After the Land Bank team deliberated, they awarded Round 13 to appellant. Mr. Carvin notified Ms. Bretz by e-mail on June 7, 2016, that appellant had been selected as the demolition contractor for Round 13.

{¶12} Mr. Carvin stated that soon after appellant began performing the contract, problems with its performance began to surface. Several properties needed to be re-graded. A subcontractor notified the Land Bank that it had not yet been paid, in violation of appellant's contract. As a result, Mr. Carvin had to remind Ms. Bretz of her contractual obligation to timely pay subcontractors. After a neighbor's garage was damaged, the Land Bank determined that appellant had damaged it, but Ms. Bretz refused to repair it.

{¶13} Ms. Bretz testified in her deposition that she understood she would be required to follow the rules and regulations of the Warren Building Department, but that,

due to her experience in demolition work in general, she did not believe she needed to learn Warren's requirements. She also stated that, although she had never worked in Warren before, it was unreasonable to ask her if the city had any requirements that were different from her contract with the Land Bank.

{¶14} Mr. Carvin stated that, per the NIP program, contractors are paid 90% of the contract price when the work is substantially completed. He further stated that, in order for the Land Bank to release the 90%, a visual inspection is done to make sure the house is down and the remaining hole is filled. A 10% retainage is held back to ensure funds are available if the contractor has not completed the job to the Land Bank's satisfaction. The retainage was held from appellant until November 2016, when the contract was finally completed to the Land Bank's satisfaction. However, from that 10%, the Land Bank withheld $940, the amount necessary to repair the neighbor's garage.

{¶15} Mr. Carvin said that in his experience, appellant was "the most difficult" demolition contractor the Land Bank ever dealt with and was the first and only contractor to cause the Land Bank to withhold a portion of the 10% retainage in order to fix a problem caused by a contractor.

{¶16} Mr. Carvin said that, while the Land Bank and appellees, Taneyhill and Kriner, who are building inspectors with the city of Warren, were trying to work with appellant to finish Round 13, Rounds 16 and 17 went out for bid. The bids for both rounds were due on October 17, 2016. On that date, Mr. Carvin opened each bid and read the contractor's name and bid amount out loud. Again, no representative from appellant attended the bid opening.

{¶17} Ms. Bretz testified that she received a phone call from someone, who told her he had received a phone call from someone else, who told him that appellant had won Rounds 16 and 17. Unlike Round 13, Mr. Carvin stated that appellant did not contact him to verify that appellant had won these rounds. Ms. Bretz pointed out that, before anyone at the Land Bank or TNP told her that appellant had won either round, she contacted her insurance company to obtain the necessary bond for both rounds.

{¶18} Mr. Carvin noted that appellant's insurance agent contacted him and told him that appellant was applying for bonds for Rounds 16 and 17. Mr. Carvin immediately e-mailed Ms. Bretz, telling her that appellant had not been awarded either round.

{¶19} Ms. Bretz testified she then drove to Mr. Carvin's office demanding an explanation as to why appellant, who had submitted the lowest bid, had not won Rounds 16 and 17. Mr. Carvin stated that, although appellant was the lowest bidder, it was not chosen due to: (1) its past performance issues and unresolved problems with Round 13; and (2) the Land Bank was not going to award both Rounds 16 and 17 to any one contractor. The Land Bank subsequently awarded Round 16 to Holton, Inc., and Round 17 to Siegel Excavating.

{¶20} Mr. Martin stated in his affidavit that on November 14, 2016, Ms. Bretz and her attorney met with him and the Land Bank's counsel. Mr. Martin explained to them that price is only one of the factors the Land Bank considers when awarding demolition contracts. He asserted the Land Bank, using the discretion given it by its approved demolition policies and procedures, decided appellant's past performance and still-unresolved issues from Round 13 disqualified appellant from Rounds 16 and 17, even

though appellant was the lowest bidder. When asked, Mr. Martin stated that if the pending problems were resolved and past problems could be corrected, appellant would be eligible to apply for future rounds.

{¶21} Ms. Bretz testified that the city discriminated against her because it treated appellant differently than other contractors by subjecting it to "extra scrutiny" by "nitpicking everything." This extra scrutiny required appellant to remove roots that Ms. Bretz felt did not need to be removed and to repair cracked sidewalks for which Ms. Bretz felt appellant was not responsible. All this was allegedly done to make it appear that appellant was not completing its projects so the Land Bank could hire other male-owned contractors.

{¶22} On November 23, 2016, appellant filed a complaint against the Land Bank, Taneyhill, and Kriner, alleging breach of contract regarding Rounds 16 and 17; gender discrimination, in violation of 42 U.S.C. Sec. 1983; and conspiracy to interfere with civil rights, in violation of 42 U.S.C. Sec. 1985. Appellant also filed a petition for a temporary restraining order and preliminary injunction to prevent the Land Bank from entering a demolition contract for Rounds 16 and 17.

{¶23} On December 14, 2016, the trial court denied appellant's request for a temporary restraining order and preliminary injunction without a hearing and ordered that the case would "proceed for hearing on permanent injunction and on the merits."

{¶24} Appellees, Taneyhill and Kriner, filed their combined answer and the Land Bank filed its separate answer.

{¶25} On February 2, 2017, appellant issued a subpoena duces tecum to non-party, Holton, Inc., requesting: (1) copies of all of Holton's corporate records from 2012

to date; (2) copies of all e-mail and text messages between Holton and the city of Warren employees as well as the Land Bank from 2012 to date; (3) Holton's entire job file regarding Rounds 13, 14, 15, 16, 17, and 18; and (4) copies of all bank account statements and financial records of Holton from 2001 to date. Holton filed a motion for a protective order and a motion to quash the subpoena. Appellant opposed Holton's motions. Following a hearing, the court granted both of Holton's motions.

{¶26} On April 24, 2017, appellant filed a supplemental complaint for a preliminary injunction against the Land Bank and new-party defendant, Trumbull Neighborhood Partnership, Inc. ("TNP"), asserting a claim against these defendants for retaliation against appellant for filing its complaint by not allowing it to bid on additional phases of housing demolition, in violation of 42 U.S.C. Sec. 1983. On that date, appellant also filed a supplemental petition for a preliminary injunction.

{¶27} The trial court set a hearing on appellant's supplemental petition for a preliminary injunction on June 7, 2017. Prior to the hearing, the court asked the parties to brief their arguments for and against an injunction.

{¶28} On August 13, 2017, the magistrate issued his decision denying the supplemental petition and appellant filed objections thereto.

{¶29} On October 19, 2017, the Land Bank and TNP filed a joint motion for summary judgment. Subsequently, Taneyhill and Kriner filed a joint motion for summary judgment. Appellant filed its opposition to both motions.

{¶30} On February 5, 2018, the court granted both summary-judgment motions. In the court's entry, it overruled appellant's objections to the magistrate's August 13, 2017 decision denying an injunction, but found the court's rulings on the summary-

judgment motions disposed of appellant's claims, thus rendering the magistrate's decision moot.

{¶31} Appellant now appeals, asserting five assignments of error. For ease of analysis, the assignments of error are addressed out of order. For its third assignment of error, appellant alleges:

{¶32} "The trial court erred in granting appellees' motion for summary judgment."

{¶33} A trial court's decision to grant a motion for summary judgment is reviewed by an appellate court under a de novo standard of review. *Duncan v. Hallrich, Inc*., 11th Dist. Geauga No. 2006-G-2703, 2007-Ohio-3021, ¶10.

{¶34} Pursuant to Civ.R. 56(C), summary judgment is proper if (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, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and, viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Temple v. Wean United, Inc*., 50 Ohio St.2d 317, 327 (1977).

{¶35} The party seeking summary judgment initially bears the burden of informing the trial court of the basis for the motion and identifying portions of the record demonstrating an absence of genuine issues of material fact as to the essential elements of the nonmoving party's claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. *Id*. If this burden is satisfied, the nonmoving party has the

burden, as set forth in Civ.R. 56(E), to offer specific facts showing a genuine issue for trial. *Id*.

{¶36} Appellant raises five issues under its first assigned error. First, appellant argues the trial court erred in finding that the Land Bank is not required to comply with public bidding requirements.

{¶37} Appellant argues that because the Land Bank is a political subdivision under the immunity statute, it is required to comply with the competitive bidding laws; however, appellant is mistaken.

{¶38} A county land reutilization corporation, as defined in R.C. 1724.01(A)(3), is organized under R.C. Chapter 1724 (regarding community improvement corporations) and R.C. Chapter 1702 (regarding non-profit corporations). As such, county land reutilization corporations are non-profit corporations. The Land Bank is registered as a non-profit corporation with the Ohio Secretary of State.

{¶39} While the General Assembly has clothed county land reutilization corporations with certain attributes of a governmental entity, in other respects they act as a non-profit corporation, independent of the county or any of its departments. R.C. 1724.08, regarding the applicability of non-profit corporation laws, provides: "The provisions of Chapter 1702. of the Revised Code [regarding non-profit corporation laws] are applicable to [county land reutilization corporations] to the extent [the non-profit corporation laws] are not inconsistent [with county land reutilization corporations]." Thus, aside from its limited governmental functions, which are expressly set forth in the Revised Code, the Land Bank acts as an independent non-profit corporation.

{¶40} As an example of the governmental role of county land reutilization corporations, R.C. 2744.01(F) defines the term "political subdivision" to include county land reutilization corporations *for purposes of political subdivision immunity.* In addition, county land reutilization corporations are required to keep their financial records in accord with the Governmental Accounting Standard Board regulations. R.C. 1724.05.

{¶41} In contrast, R.C. 5722.06, regarding the powers of county land reutilization corporations, provides: "A county land reutilization corporation * * * shall maintain, operate, hold, transact, and dispose of such land as provided in its plan and pursuant to its purpose under Chapter 1724 of the Revised Code." Under this provision, the Land Bank board has authority, as a non-profit corporation, to hold and dispose of land it owns pursuant to *its own demolition policies and procedures*. This statute does not require county land reutilization corporations to comply with competitive bidding requirements.

{¶42} Appellant cites R.C. 307.86 to support its argument that the Land Bank is subject to competitive bidding. That section provides in pertinent part:

> **{¶43}** Anything to be * * * constructed, including, but not limited to, any * * * construction, reconstruction, improvement, maintenance, repair, or service, except the services of an accountant, architect, attorney at law, * * * consultant, surveyor, or appraiser, by or on behalf of the county or contracting authority, as defined in section 307.92 of the Revised Code, at a cost in excess of fifty thousand dollars, * * * shall be obtained through competitive bidding.

{¶44} Further, "contracting authority" is defined as: "any board, department, commission, authority, trustee, official, administrator, agent, or individual which has *authority to contract for or on behalf of the county or any agency, department, authority,*

commission, office, or board thereof." (Emphasis added.) R.C. 307.92. The Land Bank is not Trumbull County, nor is it a department or board of the county.

{¶45} Thus, contrary to appellant's argument, R.C. 307.86 regarding competitive bidding does not apply to the Land Bank with respect to its demolition activities because it is not a "county or contracting authority as defined in R.C. 307.92."

{¶46} Contrary to appellant's argument, the fact that two of the three county commissioners are on the Land Bank's seven-member board or that the Land Bank does not pay income tax is of no consequence because R.C. 5722.06 does not require the Land Bank to comply with the competitive bidding laws.

{¶47} In contrast, other provisions of the Ohio Revised Code require certain political subdivisions to engage in competitive bidding, such as municipal corporations, townships, and school districts. Significantly, appellant has not referenced any section of the Revised Code providing that county land reutilization corporations are required to engage in competitive bidding. If the legislature intended to require such non-profit corporations to engage in competitive bidding, it could have done so.

{¶48} Further, the Ohio Supreme Court has held that "a public entity is not required to engage in competitive bidding in the absence of legislation requiring it." *Danis Clarkco Landfill Co. v. Clark Cty. Solid Waste Mgt. Dist*, 73 Ohio St.3d 590, 601 (1995).

{¶49} As the trial court noted, "[t]here is nothing in the statutory construction which requires [the Land Bank] or any county land reutilization corporation to engage in the competitive bidding process pursuant to R.C. 9.312."

{¶50} We therefore hold the trial court did not err in finding that the Land Bank was not required to engage in competitive bidding.

{¶51} Second, appellant argues the trial court erred in finding that the Land Bank did not breach any demolition contract regarding Rounds 16 and 17.

> **{¶52}** To prevail on a contract action, the complaining party must prove all of the essential elements of a contract, including an offer, acceptance, manifestation of mutual assent, consideration, and certainty as to the essential terms of the contract. * * *. In order for a party to be bound to a contract, the party must consent to its terms, the contract must be certain and definite and there must be a meeting of the minds of the parties. * * *. *Ameritech Publishing, Inc. v. Mayfield*, 7th Dist. Mahoning No. 10 MA 27, 2011-Ohio-2971, ¶13.

{¶53} Further, in order to establish a claim for breach of contract, appellant was required to prove: "(1) the existence of a contract; (2) performance by the plaintiff; (3) breach by the defendant; and (4) damages" *Byers DiPaola Castle, LLC v. Portage Cty. Bd. of Commrs*., 11th Dist. Portage No. 2014-P-0047, 2015-Ohio-3089, ¶23.

{¶54} Appellant argues that simply because its bid was the lowest bid with respect to Rounds 16 and 17, it was automatically entitled to the demolition contracts. In support of its argument, appellant relies on *Highland Cty. Cmmrs. v. Rhoades*, 26 Ohio St. 411 (1875). In *Rhoades*, the Court held that "[t]he contract between the parties was complete upon the acceptance of the proposal and notice to the bidder." There is no evidence here that the Land Bank ever accepted appellant's bids or gave appellant notice that it had been awarded the contracts. Moreover, even if the contract was competitively bid, a contract does not automatically come into existence simply because of a low bid. *See* R.C. 9.312.

{¶55} The trial court made the following pertinent findings:

{¶56} Count One of the Plaintiff's Complaint sets forth a cause of action for breach of contract. Specifically, Plaintiff alleges, "* * * Triple Diamond and [the Land Bank] entered into a valid and enforceable agreement under which Triple Diamond was the lowest apparent bidder and lowest responsible bidder for Phase 16 and 17 of the demolition projects being managed by [the Land Bank]."

{¶57} However, the evidence before this Court establishes exactly the opposite of this allegation. There was no contract or agreement between Triple Diamond and [the Land Bank] for Rounds 16 and 17. Triple Diamond assumed it had been awarded the contract for these demolition rounds when Rebecca Bretz, the owner of Triple Diamond, was notified via a third party that she was the lowest bidder. [The Land Bank] never notified Bretz that Triple Diamond had been awarded the contract. Bretz never verified she had been awarded the contract. Bretz took it upon herself to assume her third-party source was accurate. The Court cannot impute any costs incurred as a result of this improper assumption to [the Land Bank] as it did nothing to contribute to such assumption. Again, there was NO contract for Rounds 16 and 17 between [the Land Bank] and Triple Diamond.

{¶58} The Court finds the assumptions made by Bretz that Triple Diamond was the successful bidder for Rounds 16 and 17 were unreasonable and unfounded. Triple Diamond was awarded the contract for Round 13. Bretz, for Triple Diamond, was notified of the successful bid via e-mail from Shawn Carvin. On June 7, 2016, Carvin e-mailed Bretz advising "You have been awarded the contract for Round 13-2016 through the [Land Bank] * * *." The e-mail also sets forth the requirements for the project and the successful bid amount. Bretz did not receive a similar e-mail for Rounds 16 and 17. In addition, Bretz executed a written contract for Round 13 on behalf of Triple Diamond within days of the notification. No such contract was offered for Rounds 16 and 17. Past practice alone dictated Bretz would have received a similar notification and written contract for the rounds in question had Triple Diamond indeed been awarded the contract.

{¶59} * * *

{¶60} There is no evidence before this Court to suggest that [the Land Bank] led Triple Diamond * * * to believe that they would award the demolition contracts for Rounds 16 and 17 (or any other Round for that matter) on price alone. In fact, the written "Demolition Policies and Procedures" of [the Land Bank] detail the strategy, process and general outline for the demolition process. This includes the

> following statement: "The Land Bank will partner with public and private sectors to facilitate the demolition of properties as swiftly as possible after the demolition decision has been made. The Land Bank will request proposals, from no fewer than three private contractors on a competitive basis. Contractors will be screened and selected by [the Land Bank]. The Land Bank holds the right to deny a demolition bid, in whole or in part, for any reason."
>
> **{¶61}** The Court finds [the Land Bank] was not subject to any statutory requirement to award the demolition contract for Rounds 16 and 17 to an "apparent low bidder." The Court finds [the Land Bank] awarded the contract for Rounds 16 and 17 in accordance with its own guidelines and in accordance with the law.

{¶62} We agree with the foregoing findings of the trial court and hold the court did not err in finding that appellant and the Land Bank did not enter a demolition contract for Rounds 16 and 17 and thus the Land Bank did not breach any contract in awarding the contract to other entitles.

{¶63} Third, appellant argues the trial court erred in finding appellant failed to present any evidence that appellees discriminated against it because its owner is a woman.

{¶64} 42 U.S.C. Sec. 1983 provides: "Every *person* who under color of any statute, ordinance, regulation, custom, or usage, of any State * * * subjects, or causes to be subjected, any citizen of the United States * * * to the deprivation of any rights * * * secured by the Constitution and laws, shall be liable to the party injured in an action at law." (Emphasis added.)

{¶65} In *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978), the Supreme Court held that municipalities and other local government bodies are "persons" for purposes of a 1983 action. *Monell* at 690-691. In contrast, private corporations are generally not persons under 1983. *Perdue v. Quorum Health*

Resources, Inc., 934 F. Supp. 919 (1996). As demonstrated above, in the context of providing for the demolition of its blighted housing structures, the Land Bank acts solely in its capacity as a non-profit corporation, rather than a local government, and, thus, is not a "person" for 1983 purposes. Likewise, appellee, the TNP, the Land Bank's contractual agent, is merely a non-profit corporation and, as such, is not a person for 1983 purposes. However, even if the Land Bank and TNP were considered local governments in this context, they could not be liable in a 1983 action because in *Monell, supra*, the Supreme Court held that "a local government may not be sued under 1983 for an injury inflicted solely by its employees or agents." *Id*. at 694. Thus, the only remaining appellees against whom a 1983 claim could potentially lie are the TNP's employee, Shawn Carvin, and the city of Warren's building inspectors, Taneyhill and Kriner.

{¶66} "When a plaintiff alleges gender discrimination * * *, she bears the initial burden of presenting either direct evidence of discrimination, or establishing discriminatory intent indirectly through the four-part test set forth in *Barker v. Scovill, Inc*., 6 Ohio St.3d 146 (1983), adopted from the standards established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)." *Weber v. Ferrellgas, Inc.*, 11th Dist. Trumbull No. 2015-T-0071, 2016-Ohio-4738, ¶24. "The analysis requires that the plaintiff demonstrate that: (1) she is a member of a protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position, and (4) she was replaced by an individual outside the protected class, or that a comparable (similarly-situated), non-protected person was treated more favorably." *Id*.

{¶67} However, the only evidence of sex discrimination to which appellant points with respect to Carvin and the city building inspectors was that when Ms. Bretz had a question or needed an inspection they would give her the run-around or make her wait. Further Ms. Bretz said that appellant was subjected to extra scrutiny that male-owned companies were not. Without citing any evidence in support, appellant argues, "[t]his treatment was clearly because she was a woman in male dominated [sic.] field which Appellees did not approve of." In short, appellant's only "evidence" in support of her gender-discrimination claim is her subjective belief that these annoyances were due to her status as a woman. It is well-settled that a plaintiff's "subjective belief of discrimination is not sufficient to preclude summary judgment." *Aramburu v. Boeing Co*., 112 F.3d 1398, 1408, fn. 7 (10th Cir.1997).

{¶68} Despite this lack of evidence, appellees presented ample evidence of legitimate reasons for denying appellant's bid for the demolition contracts for Rounds 16 and 17. Mr. Carvin told Ms. Bretz that appellant was denied Rounds 16 and 17 for two reasons: (1) appellant performed poorly in Round 13 and still had unresolved issues, and (2) no one contractor was going to win both rounds.

{¶69} As evidence that appellees did not have a discriminatory intent, M & M Excavating, *a male-owned company*, was also denied future rounds on which it was the lowest bidder due to its poor, prior performance and unresolved issues. Further, of the 23 rounds of demolition work that were completed, most of them were awarded to Holton, Inc., *a female-owned corporation*. And, Round 16 was awarded to Holton.

{¶70} With respect to appellant's discrimination claim, the trial court stated:

> **{¶71}** According to the complaint, since Triple Diamond is owned by Bretz, a female, the actions of [the Land Bank] and City Defendants

[Taneyhill and Kriner] constitute discrimination. * * * However, after reviewing the evidence in a light most favorable to Triple Diamond as the non-moving party, the Court finds a substantial lack of evidence to support [the] claim. There is no evidence to support an allegation of gender discrimination other than a belief held by Bretz that the defendants treated her differently.

{¶72} The Court finds there is absolutely no evidence to support the claim that the contract for Rounds 16 and 17 was not awarded to Triple Diamond as a result of discriminatory practices. Likewise, the Court finds there is no evidence to support any differential treatment of any kind based on discriminatory * * * practices.

{¶73} Bretz refers repeatedly in her depositions to the way she was treated by the City Defendants, specifically Taneyhill, and the [Land Bank], specifically Carvin. However, there is a lack of evidence to back up the opinions of Bretz. According to Bretz, the City Defendants continually gave her the run-around, delayed inspections and placed more stringent requirements on her company. Yet Bretz offers no evidence to the Court to support these theories other than her belief that if she were a man she would not have been treated in this manner.

{¶74} In fact, Bretz' own testimony contradicts her discrimination * * * theory. According to Bretz, she was warned by other contractors to "stay away from Trumbull County" because they were difficult to work with on such projects. This is actually evidence that the City Defendants and [the Land Bank] are challenging for all constituents – regardless of gender.

{¶75} One example of differential treatment, according to Bretz, was the manner in which the City Defendants spoke to her. To quote Bretz from her deposition, "They spoke to me in a very disrespectful manner. There was nothing professional about the * * * conversation. They were demeaning. 'I don't care Becky. You're not working for me. I don't work for you. I'll get there when I get there, and you're just going to have to agree and accept it.'" Although the Court agrees that this type of exchange certainly lacks professionalism, it is not discriminatory.

{¶76} Bretz also cited the "nitpicking" of the City Defendants in the inspection process of the demolition projects for Round 13 as an example of discriminatory treatment. However, there is nothing but Bretz' own beliefs to back up this claim. Consequently, Bretz blames the loss of Rounds 16 and 17 on the city Defendants since the "nitpicking" created issues where there would have been none.

> To the contrary, [the Land Bank], pursuant to its own demolition policy, was permitted to award the contract for Rounds 16 and 17 to a contractor of its own choosing. There is nothing in the record before this Court to lend any support to Bretz' theory that the parties were scheming to deny her company the contracts.

{¶77} The beliefs of Bretz are not enough to support a claim for discriminatory * * * treatment or a "scheme" to direct work away from her company. Bretz focuses on the sidewalk issues as the predominant means for differential treatment and the ultimate reason why Triple Diamond was not awarded the contract for Rounds 16 and 17. However, the evidence before the Court suggests there were multiple issues with the performance of Triple Diamond during Round 13 which affected the decision of [the Land Bank] in awarding the contract to another contractor.

{¶78} * * *

{¶79} Based on the evidence before the Court, the only evidence to support the position advanced by Triple Diamond on * * * the gender discrimination claim * * * are the beliefs of Bretz. The Court does not discount Bretz' beliefs; however, they are not evidence of any inappropriate treatment or actions. The actual evidence overwhelmingly contradicts Bretz' beliefs to the point where the Court determines that reasonable minds could reach only one conclusion; there is no evidence of discriminatory * * * actions in violation of Sec. 1983.

{¶80} We agree with the trial court's findings, which are supported by the case law cited above. We therefore hold the trial court did not err in finding that appellant failed to present any evidence of discrimination.

{¶81} Fourth, appellant argues the trial court erred in finding there was no evidence that appellees retaliated against it by not allowing appellant to bid on rounds after it filed suit.

{¶82} "The elements of a retaliation claim are * * * distinct from those of a discrimination claim." *Laster v. City of Kalamazoo*, 746 F.3d 714, 730 (6th Cir.2014). "To establish a prima facie case of retaliation under Title VII, the plaintiff must demonstrate

that: "(1) [s]he engaged in activity protected by Title VII; (2) h[er] exercise of such protected activity was known by the defendant; (3) thereafter, the defendant took an action that was 'materially adverse' to the plaintiff; and (4) a causal connection existed between the protected activity and the materially adverse action." *Id*.

{¶83} Appellant's reliance on an e-mail in which appellees' attorney said that appellant would not be invited to bid on Round 18 due to pending litigation, attached to appellant's brief, is not properly before us and cannot be considered since it is not part of the trial court's record.

{¶84} In any event, prior to filing suit, appellant and her attorney met with Mr. Carvin, and he explained that the reason appellant would not be invited to bid on future rounds were twofold: (1) the unresolved issues with appellant's performance of Round 13 and (2) the fact that, according to the bid documents, Rounds 16 and 17 were to be performed by different contractors. Thus, appellees made the decision not to invite appellant to bid for these legitimate reasons prior to and without reference to her filing suit. Moreover, upon being questioned, Mr. Martin told Ms. Bretz and her attorney that if appellant resolved the issues with Round 13, she would qualify to bid on future rounds.

{¶85} In these circumstances, we agree with the trial court's finding that there was no evidence of retaliation.

{¶86} We therefore hold the trial court did not err in finding that appellant failed to present any evidence in support of her retaliation claim.

{¶87} Fifth, appellant argues the trial court erred in finding there was no evidence that appellees conspired to interfere with appellant's civil rights.

{¶88} To prove a case of private conspiracy under 42 U.S.C. Sec. 1985(3), the plaintiff must prove four elements: (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States. *United Bhd. Of Carpenters & Joiners of America, Local 610, AFL-CIO v. Scott*, 463 U.S. 825, 828-829 (1983). To prove the first and second elements of a Sec. 1985(3) conspiracy claim, the plaintiff must establish an *agreement,* concerted action, and the existence of a discriminatory motive to deprive him of equal protection or equal privileges and immunities. *Id.*

{¶89} Here, appellant failed to present any evidence that an agreement was entered into between or among any of the parties; that any of the appellees had a discriminatory motive to deprive appellant of the equal protection of the laws; that any act was committed in furtherance of the conspiracy; or that**,** as a result of the foregoing, a person was injured or deprived of any right of a citizen of the United States.

{¶90} The trial court found that "[t]here is no evidence to support any conspiracy of any nature between the City Defendants and [the Land Bank]. Nor is there any evidence to demonstrate any singular one of these defendants operated in a manner to deprive Triple Diamond of any equal protection or rights under the law."

{¶91} We therefore hold the trial court did not err in finding that appellant failed to present any evidence in support of her conspiracy claim.

{¶92} Appellant's third assignment of error is overruled.

{¶93} Because appellant's first and second assignments of error are related and disposed of on identical grounds, they are addressed together. They allege:

{¶94} "[1.] The trial court erred when it failed to conduct an evidentiary hearing on the appellant's motion for preliminary injunction.

{¶95} "[2.] The trial court erred when in denying [sic.] plaintiff's petition for preliminary injunction and temporary restraining order."

{¶96} Appellant argues that it was entitled to an oral hearing on its motions for preliminary injunction and temporary restraining order and that the trial court abused its discretion in denying the motions without a hearing.

{¶97} The trial court in its summary-judgment entry, in adopting the magistrate's decision, found these motions lacked merit because appellant never identified any statute requiring the Land Bank to engage in competitive bidding. Moreover, R.C. 5722.06, the statute that outlines the powers of a county land reutilization corporation, does not require such entities to comply with the competitive bidding laws. As a result, the court held that appellant was not entitled to injunctive relief and no hearing was necessary. However, the court found the issue was moot in light of its summary-judgment entry. This finding is supported by *Johnson v. Morris*, 108 Ohio App.3d 343 (4th Dist.1995), in which the court held that while, in the circumstances of that case, the court abused its discretion in not holding a hearing on the request for a preliminary injunction, any error was harmless in light of the court's subsequent summary judgment against the plaintiff. The court stated: "We find that the trial court's error in not conducting an evidentiary hearing on the preliminary injunction motions does not affect

the substantial right of the appellant because he was never entitled to a preliminary injunction." *Id*. at 352.

{¶98} Since we hold the Land Bank is not subject to the competitive bidding laws, as a matter of law, it was not entitled to an injunction to require the Land Bank to comply with those laws. Thus, the trial court did not err in not holding a hearing on appellant's motions for injunctive relief and in denying its request for a preliminary injunction and a temporary restraining order.

{¶99} Appellant's first and second assignments of error are overruled as moot.

{¶100} Appellant's fourth and fifth assignments of error are related and disposed of on identical grounds. They are therefore addressed together. They allege:

{¶101} "[4.] The trial court erred in granting Holton, Inc.'s motion to quash and motion for protective order as the subpoena was not overly broad and did not seek protected or privileged information.

{¶102} "[5.] The trial court erred in failing to order Holton, Inc., to disclose the information in a designated way pursuant to Civ.R. 26(C)(7)."

{¶103} "[C]ourts have broad discretion over discovery matters." *State ex rel. Citizens for Open, Responsive & Accountable Gov't v. Register*, 116 Ohio St.3d 88, 2007-Ohio-5542, ¶18. "As such, this Court generally applies an abuse of discretion standard of review in appeals from discovery rulings, including a ruling on a motion to quash a subpoena." *Kaplan v. Tuennerman–Kaplan*, 9th Dist. Wayne No. 11CA0011, 2012-Ohio-303, ¶10.

{¶104} Holton, who is not a party to this action and in fact is a direct competitor with appellant, filed a motion to quash a subpoena duces tecum issued by appellant and

a motion for a protective order to avoid the production of documents. The subpoena directed Holton to produce: (1) copies of all of Holton's corporate records from 2012 to date; (2) copies of all e-mail and text messages between Holton and the city of Warren employees as well as the Land Bank from 2012 to date; (3) Holton's entire job file regarding Rounds 13, 14, 15, 16, 17, and 18; and (4) copies of all bank account statements and financial records of Holton from 2001 to date.

{¶105} The trial court in its entry granting the motions found the subpoena was overly broad. Further, the court found it sought information that was potentially entitled to privilege or otherwise protected. Most importantly, the court found the information sought was not relevant to appellant's claims, but that, even if the information was relevant, it was available from other sources, i.e., the defendants involved in this case, via discovery.

{¶106} Further, Civ.R. 26(C) provides: "Upon motion by any party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had * * *."

{¶107} Since the trial court articulated its reasons for granting Holton's motions and those reasons are supported by the record and, further, because the denial of discovery is one of the available remedies in these circumstances, by definition, the trial court did not abuse its discretion in granting the motions.

{¶108} Appellant's fourth and fifth assignments of error are overruled.

{¶109} For the reasons stated in this opinion, the assignments of error lack merit and are overruled. It is the order and judgment of this court that the judgment of the Trumbull County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J., concurs in judgment only,

COLLEEN MARY O'TOOLE, J., concurs in part and dissents in part, with a Concurring/Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., concurs in part and dissents in part, with a Concurring/Dissenting Opinion.

{¶110} I concur with the majority's disposition of the last three assignments of error. I dissent regarding its disposition of the first two, since I believe the trial court was required to hold an evidentiary hearing on appellant's motion for a preliminary injunction.

{¶111} This court has held that, pursuant to the language of Civ.R. 65, trial courts *must* hold evidentiary hearings on motions for preliminary injunctions. *Sea Lakes, Inc. v. Sea Lakes Camping, Inc.*, 78 Ohio App.3d 472, 476 (11th Dist.1992). This is based on "basic due process considerations." *Id*. at 477.

{¶112} I respectfully concur in part, and dissent in part.