[Cite as *Bio Energy, L.L.C. v. Phoenix Golf Links, Ltd.*, 2012-Ohio-4421.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Bio Energy (Ohio), LLC,	:	
Plaintiff-Appellant,	:	
v.	:	No. 12AP-171 (C.P.C. No. 11CVH-08-10569)
Phoenix Golf Links, Ltd.,	:	(ACCELERATED CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on September 27, 2012

Thompson Hine LLP, *Terrence M. Fay*, *Daniel F. Edwards*, and *John B. Kopf, III*, for appellant.

Keating Muething & Klekamp PLL, *William A. Posey*, *Brian P. Muething*, and *Michael T. Cappel*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} Plaintiff-appellant, Bio Energy (Ohio), LLC, appeals from a judgment of the Franklin County Court of Common Pleas dismissing its forcible entry and detainer ("FED") claim against defendant-appellee, Phoenix Golf Links, Ltd.

{¶ 2} The details of the underlying facts in this matter are neither fully established at the trial court level nor immediately relevant to the present appeal. They will be summarized only briefly. Phoenix describes itself as the successor in interest to Model LF Golf, Ltd., which leased a reclaimed landfill from its owner, the Solid Waste Authority of Central Ohio ("SWACO") for purposes of developing and operating a golf course. Another affiliate of Phoenix, Model Gas Development, Ltd., also entered into a lease with SWACO for purposes of exploiting commercially utilizable gas generated by the former landfill site.

Model Gas then sublet to Bio Energy the rights under the gas lease These include the surface use of a small amount of the golf course property and the obligation to operate and maintain an underground gas collection system over the whole of the landfill.

{¶ 3} Dissatisfied with Bio Energy's performance under the terms of the gas lease, Phoenix took control of the gas collection system from Bio Energy and assumed operational control of the gas collection system.

{¶ 4} Phoenix then sued Bio Energy in the Franklin County Court of Common Pleas seeking compensation for alleged damages arising out of Bio Energy's faulty maintenance of the gas collection system and resulting damage to the golf course. Bio Energy then filed its own complaint in a new case in the same forum, also asserting a breach of the sublease. That is the case from which this appeal arises. Bio Energy in this action sought a temporary restraining order and preliminary injunction to regain control of the sublet premises. The trial court denied the temporary restraining order, and Bio Energy then filed an amended complaint asserting an FED claim, as well as further claims for breach, replevin, trespass, and tortious interference with contracts.

{¶ 5} Phoenix moved to dismiss the FED claim, asserting that such claim was inapposite to the relative position of the parties, being reserved as an action by landlords against tenants wrongfully in possession. The trial court granted Phoenix's motion to dismiss the FED claim, and included in its judgment the appropriate Civ.R. 54(B) language to allow the present appeal to go forward while all other claims and matters between the parties remain pending in the trial court.

{¶ 6} Bio Energy brings the following sole assignment of error:

> The trial court committee reversible error by deciding as a matter of law that under Ohio's forcible entry and detainer ("FED") statutes, only landlords- -and not tenants- -can seek immediate possession of real property, dismissing the tenant's/appellant's FED claim for failing to state a claim upon which relief can be granted.

{¶ 7} Initially we note that the trial court dismissed the present case for failure to state a claim. 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). 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 (1988), and *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).

{¶ 8} The sole issue in the present appeal is whether Ohio's FED statute, R.C. 1923.01 et seq, provides a remedy by which a sublessor can recover possession of the leased premises from the lessor, which itself holds rights to the property under a lease from the title owner.

{¶ 9} Bio Energy argues that, on its face, the FED statute provides a remedy not only to landlords seeking to recover possession from tenants, but to any person seeking to recover possession of property unlawfully held by another. The foundational statutory language is as follows:

> As provided in this chapter, any judge of a county or municipal court or a court of common pleas, within the judge's proper area of jurisdiction, may inquire about persons who make unlawful and forcible entry into lands or tenements and detain them, and about persons who make a lawful and peaceable entry into lands or tenements and hold them unlawfully and by force. If, upon the inquiry, it is found that an unlawful and forcible entry has been made and the lands or tenements are detained, or that, after a lawful entry, lands or tenements are held unlawfully and by force, a judge shall cause the plaintiff in an action under this chapter to have restitution of the lands or tenements.

R.C. 1923.01(A). R.C. 1923.01(C) goes on to define various terms used in the chapter, including the terms "tenant" and "landlord," which are given their commonly accepted meanings. R.C. 1923.01(C)(1) and (2).

{¶ 10} R.C. 1923.02 delineates those defendants who are subject to an FED action. This section describes many of the typical FED claims brought by landlords, judgment

creditors, and executors in probate proceedings, as well as incorporating more modern aspects allowing landlords expedited relief in the case of tenants violating various drug laws or sex offender restrictions. The section, however, retains two enumerated instances that reflect the broader language of R.C. 1923.01(A):

> Proceedings under this chapter may be had as follows:
>
> * * * *
>
> (5) When the defendant is an occupier of lands or tenements, without color of title, and the complainant has the right of possession to them;
>
> (6) In any other case of the unlawful and forcible detention of lands or tenements. For purposes of this division, in addition to any other type of unlawful and forcible detention of lands or tenements, such a detention may be determined to exist when both of the following apply: [specified drug-related criminal activity by tenants]

R.C. 1923.02(A)(5) and (6)

{¶ 11} Bio Energy points out that R.C. 1923.01(A) generically refers to "plaintiffs" as parties that may seek restitution of premises through an FED action, and defendants as "persons" unlawfully occupying the premises. Bio Energy correctly asserts that the statute thus does not on its face limit the class of defendants to "tenants" and the class of plaintiffs to "landlords," although concededly this is the posture of the parties in the vast majority of FED actions initiated in the state. Bio Energy asserts that the definitions of landlord and tenant provided elsewhere in the statute are not used in the operative part of the statute generally governing actions, but only invoked in certain detail provisions. Bio Energy points to two venerable cases from the courts of this state that applied older versions of the FED statute to apparently allow such an action by a tenant against a landlord. *Smith v. Whitbeck*, 13 Ohio St. 471 (1862), and *Yager v. Wilber*, 8 Ohio St. 398, 401 (1838).

{¶ 12} Phoenix asserts to the contrary that relief through an FED action is available only to "landlords" as defined in the statute. Phoenix cites innumerable cases in which the parties are so postured. None of these specifically remarks that the statute is limited to such circumstances.

{¶ 13} Applying basic principles of statutory construction, there is no restriction in R.C. 1923.01(A) upon who may bring an FED action, while under R.C. 1923.02 there is a defined class of defendants against whom it may be brought. Under R.C. 1923.02(A)(5), the action requires only that the defendant be an "occupier of lands or tenements, without color of title," and that the "complainant" have "the right of possession to them." Even more broadly, R.C. 1923.02(A)(6) provides that the action may be brought "[i]n any other case of the unlawful and forcible detention of lands or tenements."

{¶ 14} Under common rules of statutory interpretation, we will not furnish restrictive detail where the legislature has omitted it: " '[W]here the language of a statute is clear and unambiguous, it is the duty of the court to enforce the statute as written, making neither additions to the statute nor subtractions therefrom.' " *Terry v. Sperry*, 130 Ohio St.3d 125, 2011-Ohio-3364, ¶ 25, quoting *Sherwin-Williams Co. v. Dayton Freight Lines, Inc.*, 112 Ohio St.3d 52, 2006-Ohio-6498, ¶ 14. Phoenix here does not hold the property under color of title, and is therefore subject to R.C. 1923.02(A)(5). Phoenix, on the face of the FED complaint, is alleged to unlawfully and forcibly detain the subject property, and therefore meets the criteria for a defendant under R.C. 1923.02(A)(6).

{¶ 15} While the legislature elsewhere saw fit to use the words "landlord" or "tenant" under various detail provisions of the FED statute, it did not include such restrictive labels under the general description of who may bring an action, and against whom it may be brought. The vast majority of cases, as alluded to above, inevitably will involve landlords seeking prompt restitution from tenants who are in breach of lease or otherwise unlawfully in possession. The more common application of the statute, however, does not define its limits, and we conclude that an FED action may lie when brought by a tenant against a landlord who is otherwise one of the permissible defendants defined in R.C. 1923.02(A). Looking beyond the facts of this case, a general holding that flatly excludes tenants from the class of plaintiffs under R.C. 1923.01 would leave tenants without recourse to gain expedited restitution from all classes of persons, not just landlords, that infringe upon a right of occupancy; one can easily conceive of such situations involving competing co-tenants, squatters, or others.

{¶ 16} We accordingly find that the court of common pleas erred when it dismissed this action for failure to state a claim pursuant to Civ.R. 12(B)(6). We sustain Bio Energy's

sole assignment of error, reverse the trial court's judgment, and remand the matter to the Franklin County Court of Common Pleas for further proceedings. The present decision addresses only the procedural availability of the remedy and not the merits of the claim, and the court of common pleas of course remains free to apply the appropriate standard to determine whether relief is warranted under R.C. 1923.01, in conjunction with the other claims now pending between the parties.

Judgment reversed;
cause remanded.

BRYANT and TYACK, JJ., concur.
