[Cite as *Eichenberger v. Graham*, 2013-Ohio-1203.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Raymond L. Eichenberger,	:	
Plaintiff-Appellant,	:	No. 12AP-216 (C.P.C. No. 11CVH-09-11228)
v.	:	(REGULAR CALENDAR)
Thomas Graham et al.,	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on March 28, 2013

Raymond L. Eichenberger, pro se.

Weston Hurd LLP, and *W. Charles Curley*, for appellee Thomas Graham.

Law Offices of Daniel R. Mordarski LLC, and *Daniel R. Mordarski*, for appellee Ohio Capital Conference.

Steven L. Craig, for appellee Ohio High School Athletic Association.

William J. Mooney, for appellee Wayne R. Roller.

Loren L. Braverman, for appellee Columbus City School District.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} Plaintiff-appellant, Raymond L. Eichenberger, appeals from a judgment of the Franklin County Court of Common Pleas granting judgment in favor of all defendants-appellees.

{¶ 2} Appellant sued five separate defendants in the court of common pleas, alleging claims for illegal and unfair trade practices, breach of contract, and age discrimination. Later amendments deleted the age discrimination claim and added a claim for defamation against one defendant. The gist of the complaint is that appellant, a long-time referee for high school athletic contests, has been systematically and wrongfully excluded from receiving sports officiating assignments. The complaint names the following five defendants: Columbus City Schools; the Ohio Capital Conference ("OCC"), an association of central Ohio schools that organizes athletic competitions for its members; the Ohio High School Athletic Association ("OHSAA"); Wayne R. Roller, a licensed sports assigner who provides officials for athletic contests; and Thomas Graham, another sports assigner licensed by OHSAA. Graham and Roller work under contracts with the OCC and Columbus City Schools to provide sports officials for athletic contests.

{¶ 3} Appellant removed the case to federal court based upon his age discrimination claim. He then filed an amended complaint that abandoned the age discrimination claim. This allowed the matter to return to the court of common pleas on remand. After answering the original complaint, Roller filed a legal ethics complaint against appellant, who is a licensed attorney in Ohio. Appellant then filed a second amended complaint adding a claim against Roller for defamation based upon Roller's purportedly frivolous ethics complaint.

{¶ 4} The trial court granted a Civ.R. 12(C) motion for judgment on the pleadings filed by the OCC and motions to dismiss, pursuant to Civ.R. 12(B)(6), filed by the other four defendants. The trial court decision does not develop the reasons for the judgment beyond stating that the facts alleged by appellant, even if taken as true, do not support any of the claims.

{¶ 5} Appellant has timely appealed and brings the following two assignments of error:

> [I.] THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION BY GRANTING DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED, IN THAT THE PLAINTIFF'S COMPLAINT WAS

> SUFFICIENT NOTICE TO THE DEFENDANTS OF THE CAUSES OF ACTION PURSUANT TO THE CIVIL RULES.
> [II.] THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION BY FAILING TO GRANT THE PLAINTIFF THE OPPORTUNITY TO AMEND HIS COMPLAINT BEFORE THE CIVIL RULE 12(B) MOTIONS WERE GRANTED BY THE COURT AND THE CASE DISMISSED.

{¶ 6} Although the various defendants sought to terminate the case by different procedural means, the substantive review by the trial court and by this court upon appeal is similar for each.

{¶ 7} When reviewing a judgment on a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted, an appellate court's standard of review is de novo. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, ¶ 5. A Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548 (1992), citing *Assn. for Defense of Washington Loc. School Dist. v. Kiger*, 42 Ohio St.3d 116, 117 (1989). A trial court must presume all factual allegations contained in the complaint to be true and must make all reasonable inferences in favor of the non-moving 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} Pursuant to Civ.R. 12(C), a defendant may file a motion for judgment on the pleadings after the close of the pleadings on the grounds the plaintiff failed to state a claim upon which relief can be granted. *Burnside v. Leimbach*, 71 Ohio App.3d 399, 402 (10th Dist.1991). Civ.R. 12(C) motions are specifically intended for resolving questions of law, and determination of a motion for judgment on the pleadings is restricted solely to allegations in the pleadings. *Peterson v. Teodosio*, 34 Ohio St.2d 161, 166 (1973). The

party against whom a motion for judgment on the pleadings is made is entitled to have all the material allegations in its complaint, along with all reasonable inferences to be drawn therefrom, construed in its favor as true. *Id*. Judgment on the pleadings is appropriate only when, viewing the allegations and reasonable inferences therefrom in the light most favorable to the non-moving party, no material factual issues exist and the movant is entitled to judgment as a matter of law. *State ex. rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 570 (1996).

{¶ 9} We will address appellant's assignments of error in inverse order. Appellant's second assignment of error asserts that the trial court erred as a matter of law by refusing to grant appellant the opportunity to further amend his complaint before ruling on the appellees' motions to dismiss or grant judgment on the pleadings. Civ.R. 15 provides that a party may amend a pleading once, as a matter of course, any time before a responsive pleading is served. Otherwise, the party must seek leave of court to amend the initial complaint. In the present case, the record is clear that appellant had already amended his complaint twice, and that the time had passed under Civ.R. 15 to amend his complaint as of right. More to the point, however, appellant never filed a motion in the trial court for leave to amend his complaint yet again. The trial court cannot be faulted for refusing to grant relief that was never requested. *Capital City Community Urban Redevelopment Corp. v. Columbus*, 10th Dist. No. 12AP-257, 2012-Ohio-6025, ¶ 20 ("As for appellants' claim that * * * the trial court should have granted appellants leave to amend their complaint pursuant to Civ.R. 15, appellants never requested such relief."). In the alternative, even if such a motion for leave had been filed, it would not have been an abuse of discretion to deny it, given the age of the case and its advanced procedural posture.

{¶ 10} Appellant's second assignment of error is therefore overruled.

{¶ 11} Appellant's first assignment of error argues that the trial court should not have dismissed his complaint for failure to state a claim under Civ.R. 12(B)(6) or granted judgment on the pleadings pursuant to Civ.R. 12(C). Because appellant presented different claims against different defendants, we will, where necessary, separately review his claims with respect to each defendant.

{¶ 12} The first cause of action in the complaint states a claim against all defendants for restraint of trade and monopoly under R.C. 1331.01 et seq., commonly known as the Valentine Act. This chapter generally prohibits actions or agreements in restraint of trade. The prohibition applies to such acts committed by "persons." R.C. 1331.04. For purposes of this chapter, the term "person" is defined as "includes corporations, partnerships, and associations existing under or authorized by any state or territory of the United States, and solely for the purpose of the definition of division (B) of this section, a foreign governmental entity." R.C. 1331.01(A).

{¶ 13} With respect to the validity of this claim against Columbus City Schools, the Supreme Court of Ohio has held that a board of education, and, thus, a school district, is not a "person" as defined under R.C. 1331.01(A). *Thaxton v. Medina City School Dist. Bd. of Edn.*, 21 Ohio St.3d 56, 57 (1986). Because Columbus City Schools, by and through the Columbus Board of Education, engaged in a governmental function when it contracted with schedulers to obtain game referees for athletic contests, the Valentine Act claim will not lie against Columbus City Schools.

{¶ 14} More generally, when applied to the other appellees, appellant's complaint also fails to state a claim upon which relief can be granted. The Valentine Act was modeled after the federal Sherman Antitrust Act, and the Supreme Court of Ohio has interpreted the Valentine Act in light of federal judicial construction of the Sherman Antitrust Act. *C.K. & J.K., Inc. v. Fairview Shopping Ctr.*, 63 Ohio St.2d 201, 204 (1980); *Johnson v. Microsoft Corp.*, 106 Ohio St.3d 278, 2005-Ohio-4985, ¶ 13; *Schweizer v. Riverside Methodist Hosps.*, 108 Ohio App.3d 539, 542 (10th Dist.1996). To establish a restraint of trade claim, a plaintiff must show that there is a combination of effort by two or more actors that unreasonably restrains trade in a relevant market. *N.H.L. Players' Assn. v. Plymouth Whalers Hockey*, 325 F.3d 712, 718 (2003). Anticompetitive practices include price fixing, artificial restrictions on supply, division of markets, group boycotts, and tying arrangements. R.C. 1331.01(B); *see also, N. Pacific Ry. Co. v. United States.*, 356 U.S. 1, 5 (1958).

{¶ 15} The use of the term "anticompetitive" reflects the underlying purpose of antitrust laws, which are intended to protect efficiently functioning markets by preserving

competition and the resulting efficient economic benefit for all economic actors. *Care Heating & Cooling, Inc. v. Am. Std., Inc.*, 427 F.3d 1008, 1014-15 (6th Cir.2005); *Szuch v. King*, 6th Dist. No. E-09-069, 2010-Ohio-5896. In light of this ultimate purpose, antitrust statutes are not designed or intended to protect the interests of any given individual competitor, and an antitrust claim must allege more than an act that adversely affects a plaintiff, it must allege an adverse affect on the market as a whole. *Id.*

{¶ 16} Appellant's complaint in the present case alleges, at worst, that the various defendants combined in various ways to deny him employment personally. Inferentially, he suggests a combination between the defendants that amounts to a boycott of his officiating services. "A group boycott, or 'concerted refusal to deal,' is an attempt by a group of competitors to exclude a fellow competitor or group from competition." *Szuch* at ¶ 101 (Cosme, J., dissenting), citing *E. States Retail Lumber Dealers' Assn. v. United States*, 234 U.S. 600, 609-11, (1914). Taking the allegations in the complaint as true, appellant may have been personally affected by a "concerted refusal to deal." In antitrust terms, however, this did not result in unlawful restraint of trade.

{¶ 17} In terms of antitrust law and alleged anticompetitive impact on the market, appellant's complaint does not allege adverse impact that amounts to restraint of trade. There is no allegation that his exclusion was meant to affect the availability or price of officiating services in the market; the desired officiating positions simply went to other qualified individuals in preference to appellant. There was no generalized restraint of trade or distortion of the market, even if appellant was denied employment for reasons that were otherwise actionable. Accepting all appellant's averments as true, the complaint does not meet the standard for establishing an antitrust claim. The trial court therefore did not err in granting, variously, the defendants' motions to dismiss for failure to state a claim or motion for judgment on the pleadings.

{¶ 18} Appellant's second claim in his amended complaint asserts that he is an intended third-party beneficiary of any existing contracts between the various defendants, and can assert resulting contractual rights.

{¶ 19} In order to enforce contractual rights under a third-party beneficiary theory, the plaintiff must be an intended beneficiary of the contract between two or more other

parties. *Grant Thornton v. Windsor House, Inc.*, 57 Ohio St.3d 158, 161 (1991). " ' "[A] beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and * * * the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." ' " *Prince v. Kent State Univ.*, 10th Dist. No. 11AP-493, 2012-Ohio-1016, ¶ 21, quoting *Huff v. FirstEnergy Corp.*, 130 Ohio St.3d 196, 2011-Ohio-5083, ¶ 10, quoting 2 Restatement of the Law 2d, Contracts, Section 302(1)(b), at 439-40 (1981). If the parties to a contract had no intent to benefit athird party specifically, then any third-party beneficiary is merely an incidental beneficiary with no enforceable rights under the contract. *Id.*. "In other words, a party who fortuitously receives some benefit from the performance of a contractual promise is an incidental, and not an intended, third-party beneficiary." *Id.*, citing *Trinova Corp. v. Pilkington Bros., P.L.C.*, 70 Ohio St.3d 271, 278 (1994).

{¶ 20} While the complaint in the present case does allege the existence of contracts between the various appellees pursuant to which Roller and Graham would, on the one hand, procure the availability of licensed officials for high school sports, and, on the other hand, furnish them to schools and athletic conferences, appellant, as a credentialed referee who had participated in the system before, is not a third-party beneficiary. There is no possible interpretation of the contractual relationships as alleged in the complaint that would give rise to a specific right intended by the contracting parties to have appellant personally be secured with refereeing work in preference to other possible candidates. We accordingly find that appellant's amended complaint did not state a claim upon which relief could be granted and dismissal on this basis or on the pleadings was appropriate.

{¶ 21} Appellant's final claim in the amended complaint is against Roller, alleging defamation. This claim is based upon a disciplinary grievance filed by Roller with the Supreme Court of Ohio Disciplinary Counsel. This fails to state a cognizable claim. A disciplinary grievance is a judicial proceeding, and statements made in the course thereof, as well as the filing of the complaint itself, enjoy an absolute privilege against civil action.

Hecht v. Levin, 66 Ohio St.3d 458 (1993), paragraph two of the syllabus. The trial court therefore did not err in dismissing this claim.

{¶ 22} For these reasons, the trial court did not err in dismissing or granting judgment on the pleadings with respect to appellant's various claims. Appellant's first assignment of error is overruled.

{¶ 23} In summary, appellant's two assignments of error are without merit and are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BROWN and SADLER, JJ., concur.