

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

|                           |   |                           |
|---------------------------|---|---------------------------|
| Amy H. Gambrel,           | : |                           |
| Plaintiff-Appellant,      | : |                           |
| v.                        | : | No. 14AP-940              |
|                           | : | (Ct. of Cl. No. 13-00749) |
| Ohio Department of Aging, | : |                           |
|                           | : | (ACCELERATED CALENDAR)    |
| Defendant-Appellee.       | : |                           |

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D E C I S I O N

Rendered on June 25, 2015

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*Hammond Sowards & Williams, and Gary W. Hammond, for appellant.*

*Michael DeWine, Attorney General, Amber Wootton Hertlein and Emily M. Simmons, for appellee.*

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APPEAL from the Court of Claims of Ohio

TYACK, J.

{¶ 1} Plaintiff-appellant, Amy H. Gambrel, appeals the Court of Claims of Ohio's decision to grant the Ohio Department of Aging's motion to dismiss pursuant to Civ.R. 12(B)(6). For the following reasons, we affirm the Court of Claims' decision.

{¶ 2} Gambrel brings one assignment of error for our consideration:

The Court of Claims erred by applying the public-duty rule found at R.C. 2743.02(A)(3) to find that Plaintiff-Appellant's Second Amended Complaint failed to state a claim upon which relief can be granted and dismissing her claims pursuant to Civ.R. 12(B)(6).

{¶ 3} Gambrel is a graduate of Youngstown State University and holds a Bachelor of Arts in psychology. She began working at Easter Seals of Mahoning, Trumbull, and Columbiana Counties in 1972. Easter Seals receives state funding to provide services to

elderly individuals. Gambrel held various positions in her 40 years working at Easter Seals including the last 2 years as an Activity Coordinator. She was terminated from that position on June 22, 2012.

{¶ 4} In February 2012, an agent of the Ohio Department of Aging ("ODA"), had conducted a compliance review of Easter Seals. As a result, ODA found that there was no documentation to indicate that Gambrel met the criteria for being an Activity Coordinator which the agency listed as: "(a) Possess a baccalaureate or associate degree in recreational therapy or related degree; (b) Have at least two years experience as an activity director, activity coordinator, or a related position; or (c) Demonstrate proof of successful completion of the national certification council of activities professionals." (R. 16; Amended Complaint, exhibit No. 1.)

{¶ 5} Easter Seals received a letter from an ODA agent dated April 5, 2012, stating there was a lack of documentation that Gambrel and another employee were certified. *Id.* The letter stated documentation must be provided by April 11, 2012, a plan for compliance provided within 7 days, and compliance occur by July 5, 2012. The letter also served as a level one sanction in accordance with Ohio Adm.Code 173-39-05. ODA also placed an immediate hold on referrals for Passport consumers to Easter Seals' Adult Day Care program. The hold was to remain in effect until the issue was resolved. Failure to comply by July 5, 2012, could result in a level two or three sanction.

{¶ 6} Gambrel alleges in her complaint that she met with Easter Seals' CEO and the HR Director on April 10, 2012. At the meeting, they advised her verbally that they needed to be in compliance with Ohio Adm.Code 173-39-02.1(B)(4)(b)(ii) within 90 days and that the ODA would not/could not advise Easter Seals whether Gambrel's BA degree in psychology qualified as a related degree for compliance purposes. As a result, the CEO and HR director stated they felt Easter Seals was forced by the ODA to terminate Gambrel's employment. (R. 16; Amended Complaint, ¶ 6.) Gambrel was terminated effective June 22, 2012. (R. 16; Amended Complaint, exhibit No. 2.)

{¶ 7} Gambrel filed suit against ODA but not against Easter Seals. Gambrel's initial complaint against the ODA was dismissed by the Court of Claims, but she was allowed to amend her complaint. Gambrel's amended complaint claims ODA tortiously interfered with her employment contract with Easter Seals. The Court of Claims

dismissed the case under Civ.R. 12(B)(6) as a result of ODA's claim that it is immune under the public duty rule found in R.C. 2743.02. Gambrel timely appealed.

{¶ 8} Dismissal of a claim pursuant to Civ.R. 12(B)(6) or Civ.R. 13(C) is appropriate only where it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *York v. Ohio State Hwy. Patrol*, 60 Ohio St.3d 143, 144 (1991); *Lin v. Gatehouse Constr. Co.*, 84 Ohio App.3d 96, 99 (8th Dist.1992). A court must presume all factual allegations contained in the complaint to be true and make all reasonable inferences in favor of the non-moving party. *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192 (1988). "In resolving a Civ.R. 12(B)(6) motion to dismiss, the trial court may consider only the statements and facts contained in the pleadings and may not consider or rely on evidence outside the complaint." *Powell v. Vorys, Sader, Seymour & Pease*, 131 Ohio App.3d 681, 684 (10th Dist.1998). As an appellate court, we must independently review the complaint to determine if dismissal was appropriate. *McGlone v. Grimshaw*, 86 Ohio App.3d 279, 285 (4th Dist.1993).

{¶ 9} The sole assignment of error argues that the Court of Claims should not have applied the public-duty rule to dismiss the case pursuant to Civ.R. 12(B)(6).

{¶ 10} Gambrel's sole claim is that of tortious interference with a contract. Ohio recognized tortious interference with a contract as a claim when the Supreme Court of Ohio adopted the Restatement of Law 2d, Torts, Section 766 (1997) in *Kenty v. Transamerica Premium Ins. Co.*, 72 Ohio St.3d 415 (1995). "One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract." *Id.* at 418-19.

{¶ 11} A claim of tortious interference with a contract requires proof of five elements: the existence of a contract, the wrongdoer's knowledge of the contract, the wrongdoer's intentional procurement of the contract's breach, the lack of justification, and resulting damages. *Fred Siegel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St.3d 171, 175. Only improper interference with a contract is actionable. *Id.* "[E]ven if an actor's interference with another's contract causes damages to be suffered, that interference does not constitute a tort if the interference is justified." *Id.* at 176.

[I]n determining whether an actor has acted improperly in intentionally interfering with a contract or prospective contract of another, consideration should be given to the following factors: (a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference, and (g) the relations between the parties.

*Id.* at 178-79; *Bridge v. Park Natl. Bank*, 10th Dist. No. 03AP-380, 2003-Ohio-6932, ¶ 6.

{¶ 12} Presuming all factual allegations contained in the amended complaint to be true, and making all reasonable inferences in favor of Gambrel, we still cannot find that ODA acted improperly. Examining the factors of whether ODA acted improperly, we do not find that ODA lacked justification for its actions. Concerning ODA's conduct, motive, and interest sought to be advanced, it is clear that ODA is simply fulfilling its statutory obligation to assure that Easter Seals is in compliance with Ohio law and code. These factors weigh extremely heavily in providing ODA justification for its actions. Likewise, the social interest in protecting the freedom of ODA to regulate Easter Seals weighs heavily in our consideration. We note that ODA's actions were not for financial or other gain, but in line with one of the duties it is charged with performing, namely assuring that agencies which receive public funds are entitled to those funds. Regarding proximity or remoteness of ODA actions, inferring from the complaint that ODA, in bringing to light that Easter Seals was not in compliance with the Ohio Administrative Code and leveling quick sanctions against Easter Seals, was the proximate cause of Gambrel's termination, we cannot find that ODA acted improperly. Its actions were justified, and perhaps even required.

{¶ 13} The only additional allegation of note in the amended complaint is that ODA would not/could not advise Easter Seals whether Gambrel's BA degree in psychology qualified as a related degree such that her employment as Activity Coordinator was permissible once ODA was advised of the psychology degree. This is the only action that could possibly be seen as a failing of ODA in performance of its statutory obligations. However, this information, according to the complaint, was relayed to Easter Seals, not

directly to Gambrel. There is no evidence of communication between Gambrel and ODA before she was fired by Easter Seals.

{¶ 14} Such alleged inaction of not advising whether Gambrel's BA degree in psychology is a related degree cannot be seen as intentional procurement of a contract breach, a separate element of tortious interference with a contract. *Fred Siegel Co.* at 175. An administrative appeal by Easter Seals would be the proper channel to be pursued if ODA either denied or refused to acknowledge that a BA in psychology would qualify as a related degree.

{¶ 15} Gambrel has failed to sufficiently allege for purposes of Civ.R. 12(B)(6) two of the elements of her claim. First that ODA's actions were improper or lacking justification, and second that ODA's failure to state to Easter Seals whether or not Gambrel's BA in psychology was a related degree somehow intentionally caused Easter Seals to fire Gambrel, as opposed to causing Easter Seals to contest the issue through appropriate channels or provide additional documentation to ODA.

{¶ 16} Therefore, it is not necessary to rely on the public-duty rule as a separate basis to resolve this case. Gambrel can prove no set of facts in support of her claim of tortious interference with a contract against ODA which would entitle her to relief given the necessary elements of that claim. *York* at 144.

{¶ 17} The assignment of error is overruled.

{¶ 18} The Court of Claims of Ohio's decision granting ODA's Civ.R. 12(B)(6) motion is affirmed.

*Judgment affirmed.*

KLATT and HORTON, JJ., concur.

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