[Cite as *State ex rel. Fatur v. Eastlake*, 2010-Ohio-1448.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

THE STATE OF OHIO ex rel. RICHARD FATUR, Plaintiff-Appellee, - vs - CITY OF EASTLAKE, et al., Defendants-Appellants.	: : : : :	**O P I N I O N** **CASE NO. 2009-L-037**

Civil Appeal from the Court of Common Pleas, Case No. 05 CV 001922.

Judgment: Affirmed.

Bret Jordan and *Daniel F. Lindner*, Lindner & Jordan, L.L.P., 55 Public Square, Suite 1800, Cleveland, OH 44113-1922 (For Plaintiff-Appellee).

Joseph R. Klammer, The Klammer Law Office, Ltd., Lindsay II Professional Center, 6990 Lindsay Drive, Suite 7, Mentor, OH 44060 (For Defendants-Appellants).

TIMOTHY P. CANNON, J.

{¶1} Appellants appeal from the February 12, 2009 judgment entry of the Lake County Court of Common Pleas denying their fourth motion to dismiss, which alleged that all of appellee's remaining claims were barred by Ohio's Political Subdivision Tort Liability Act, under R.C. Chapter 2744. For the following reasons, we affirm the judgment of the trial court.

{¶2} Appellee, the state of Ohio ex. rel. Richard Fatur, filed a complaint against appellants, the city of Eastlake; the Mayor of Eastlake Ted Andrzejewski; Finance

Director Mike Slocum; the individually-named members of Eastlake City Council, including Bryan LaJeunesse, Bruno Razov, David Knuchel, Mike Zontini, Derek Elshaw, and Dennis Morley; a former member of Eastlake City Council, Laura A. DePledge; and John Does 1-40.

{¶3} The complaint stems from the issuance of a tax levy by the city of Eastlake in 1986, which authorizes "[a]n additional tax *** for the purpose of the payment of debt charges on *** costs of improvements to the Willoughby-Eastlake Waste Water Treatment Plant and to the City's sanitary sewage collection system *** in the principal amount of $7,100,000.00 *** over a period of twenty years, at a rate not exceeding two and one-half mils ***."

{¶4} Appellee initiated the instant case by filing a five-count complaint in 2005,[1] alleging over-collection of taxes. The complaint was filed as a taxpayer's suit pursuant to R.C. 733.59, which permits a taxpayer to bring a suit on behalf of a municipal corporation.

{¶5} Count one of the complaint, a petition for writ of mandamus, sought an order requiring Finance Director Mike Slocum to (1) obtain all of the city of Eastlake's records which pertain to the receipt of taxes by appellants; (2) preserve all of the taxes and assessments and place them into a separate account; (3) audit the accounts of all other city of Eastlake officers, employees, and departments immediately; and (4) cause all over-collected taxes to be repaid to the citizens of the city of Eastlake. Appellee also sought an order requiring Appellants Eastlake City Council and the individual council members to (1) audit the accounts of all other officers, employees, and departments of

1. Appellee first filed a complaint on August 22, 2005. Appellee amended his complaint on August 24, 2005. Appellee filed his second amended complaint on January 24, 2006, hereafter referred to as "complaint."

the city of Eastlake; (2) return all over-collected taxes to the citizens of the city of Eastlake; and (3) submit an amendment to the financial recovery plan to the Eastlake Financial Recovery Commission.

{¶6} Count two of the complaint is an allegation of a pattern of corrupt activity by appellants under R.C. 2923.31, et seq., Ohio's Corrupt Activity Act.

{¶7} Count three of the complaint sought a declaration that appellee is entitled to (1) the imposition of reasonable restrictions upon the future activities of appellants, including but not limited to prohibiting appellants from engaging in said corrupt enterprise, (2) any and all financial records, and (3) any excess taxes collected.

{¶8} Count four of the complaint sought injunctive relief. Specifically, appellee sought a preliminary and permanent injunction ordering appellants to stop the disbursement of the second-half of property taxes collected in 2005, pursuant to the tax levy.

{¶9} Count five of the complaint sought a declaration that appellants comply with R.C. 118.01, et seq.

{¶10} Appellants filed numerous motions to dismiss in the trial court, and, throughout the proceedings, the trial court dismissed count one against the following appellants: Eastlake City Council, Mayor Ted Andrzejewski, and Mike Slocum. Finding that appellee's claims made for taxes collected between 1986 and 2003 are barred by the statute of limitations found in R.C. 2723.01, the trial court dismissed count one against Appellant Eastlake City Council as it relates to taxes collected between 1986 and July 2004. The trial court also dismissed count three against all appellants as it relates to taxes collected between 1986 and July 2004. The trial court further dismissed counts one and five against Appellants Laura A. DePledge and Mike Slocum, as

DePledge is no longer a council member, and Slocum is no longer the Finance Director of the city of Eastlake.

{¶11} The trial court declined to dismiss count one against Appellant Eastlake City Council as it relates to taxes collected August 2004-2005 and also declined to dismiss count three against appellants as it relates to taxes collected August 2004-2005, since the statute of limitation period found in R.C. 2723.01 had not expired when appellee filed the action on August 22, 2005.

{¶12} Appellants filed a fourth motion to dismiss appellee's remaining claims based on the doctrine of sovereign immunity set forth in R.C. Chapter 2744. In its February 12, 2009 judgment entry, the trial court stated:

{¶13} "The Court finds it unnecessary to review Defendants' alternative argument that Ohio's Political Subdivision Tort Liability Act bars any aspect of this cause of action which accrued greater than two years before the filing of the action is time-barred. The Court further agrees with Plaintiff that dismissal pursuant to Civ.R. 12(B)(6) cannot be based upon Defendants' claim of immunity under R.C. Chapter 2744 because the Court is required to accept all of the allegations in the Complaint as true in analyzing a Civ.R. 12(B)(6) motion and may not conduct analysis outside of the four corners of the Complaint.

{¶14} "***

{¶15} "Defendants' Fourth Motion to Dismiss is denied."

{¶16} Appellants appealed the February 12, 2009 judgment entry. On April 15, 2009, this court issued a judgment entry ordering appellants to show cause why the appeal should not be dismissed for lack of a final, appealable order.

{¶17} Appellants filed a brief on May 7, 2009. This court issued a May 19, 2009 judgment entry, stating that according "to this court's show cause order of April 15, 2009, and *Hubbell v. City of Xenia* (2007), 115 Ohio St.3d 77, it now appears that this court's jurisdictional concerns have been resolved."

{¶18} Oral arguments in this matter were heard on January 14, 2010. On February 3, 2010, appellants filed a "Motion for Leave to File Post-Hearing Brief on Issue of Civil Conspiracy and Tort Liability." This court granted appellants' motion and permitted appellee to file a response brief. The parties filed their briefs on February 22, 2010, and March 4, 2010, respectively.

{¶19} Appellants raise the following assignment of error for our review:

{¶20} "The trial court erred to the prejudice of defendants-appellants in denying the motion to dismiss plaintiff's claims for failing to state a claim upon which relief can be granted based [on] defendants' political subdivision immunity as provided in statute."

{¶21} Appellants' initially claim that a Civ.R. 12(B)(6) motion is a proper vehicle when sovereign immunity provides a basis to dismiss appellee's claims in an action for civil damages against a political subdivision.

{¶22} In *Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, at ¶21, the Supreme Court of Ohio analyzed whether an order overruling a motion for summary judgment based on a claim of sovereign immunity is a final, appealable order. The *Hubbell* Court expanded its holding beyond a motion for summary judgment, stating:

{¶23} "We conclude that the use of the words 'benefit' and 'alleged' illustrates that the scope of [R.C. 2744.02(C)] is not limited to orders delineating a 'final' denial of immunity. R.C. 2744.02(C) defines as final a denial of the 'benefit' of an 'alleged' immunity, not merely a denial of immunity. Therefore, the plain language of R.C.

2744.02(C) does not require a final denial of immunity before the political subdivision has the right to an interlocutory appeal.

{¶24} "***

{¶25} "Accordingly, we hold that when a trial court denies a *motion* in which a political subdivision or its employee seeks immunity under R.C. Chapter 2744, that order denies the benefit of an alleged immunity and thus is a final, appealable order pursuant to R.C. 2744.02(C)." *Hubbell*, supra, at ¶12, 27. (Emphasis added.)

{¶26} Viewing policy considerations, the *Hubbell* Court reasoned that a plain reading of R.C. 2744.02(C) better serves judicial economy, as "'the determination of immunity could be made prior to investing the time, effort, and expense of the courts, attorneys, parties, and witnesses ***.'" Id. at ¶26. (Citation omitted.)

{¶27} Based on *Hubbell*, the Ninth Appellate District, in *Slonsky v. J.W. Dinardo Electric Inc*., 9th Dist. No. 24228, 2008-Ohio-6791, at ¶4, 9, reversed a judgment of the trial court, which held that "'an affirmative defense of sovereign immunity cannot be raised in a motion pursuant to Civ.R. 12(B)(6).'"

{¶28} We do not necessarily agree with appellants' contention that the trial court ruled "a Civ.R. 12(B)(6) is not the correct legal basis upon which to assert a motion to dismiss due to sovereign immunity." On the contrary, the trial court stated the appropriate standard is that a trial court, in its review of such motion, must presume the facts presented in plaintiff's complaint as true. *Fahnbulleh v. Strahan* (1995), 73 Ohio St.3d 666, 667. (Citation omitted.) A trial court "cannot resort to evidence outside the complaint to support dismissal under Civ.R. 12(B)(6)." *Park v. Acierno*, 160 Ohio App.3d 117, 2005-Ohio-1332, at ¶29. Depending upon the allegations in a particular complaint, there is nothing to prevent a trial court from exercising jurisdiction and

properly determining whether a Civ.R. 12(B)(6) motion to dismiss has merit. The trial court did just that in this case – ruling the motion to dismiss the complaint did not have merit. We agree.

{¶29} A review of appellee's complaint reveals claims that would fall outside of the immunity provided under R.C. Chapter 2744. For example, the complaint sought to enjoin the illegal and improper collection of taxes under R.C. 2923.01, "which is outside the protective shield of sovereign immunity under a Civ.R. 12(B)(6) standard." *Bratton v. Couch*, 5th Dist. No. CA02-012, 2003-Ohio-3743, at ¶34. Therefore, the trial court did not err in denying appellants' fourth motion to dismiss, as the trial court properly stated that it construed appellee's allegations in the complaint as true and did not conduct analysis outside the four corners of the complaint.

{¶30} Second, appellants maintain that, pursuant to R.C. Chapter 2744, they are "immune from civil liability as a matter of law when acting in connection with a governmental function." In their brief, appellants state that the city of Eastlake is granted political subdivision immunity under R.C. 2744.02 and defenses under R.C. 2744.03, while city officials and employees are immune under R.C. 2744.03. Appellants assert that the collection of taxes for the provision of a sewer system is a governmental function as defined in R.C. 2744.01. We must, therefore, resolve whether appellants are immune from liability pursuant to R.C. Chapter 2744.

{¶31} R.C. Chapter 2744 provides a three-step test to determine whether a political subdivision enjoys immunity. First, R.C. 2744.02(A) provides broad immunity to political subdivisions: "'political subdivisions are not liable generally for injury or death to persons in connection with a township's performance of a governmental or proprietary function.'" *Cosimi v. Koski Constr. Co.*, 11th Dist. No. 2008-A-0075, 2009-Ohio-5892, at

¶64. (Citation omitted.) Second, exceptions to immunity are listed in R.C. 2744.02(B), and third, where one of the exceptions enumerated in R.C. 2744.02(B) is applicable, "a political subdivision or its employee can then 'revive' the defense of immunity by demonstrating the applicability of one of the defenses found in R.C. 2744.03." *Walker v. Jefferson Cty. Bd. of Commrs.*, 7th Dist. No. 02JE14, 2003-Ohio-3490, at ¶22. (Citation omitted.)

{¶32} In their briefs, the parties go to great lengths to argue whether the collection of taxes is a governmental function; however, we need not address this issue. To resolve appellants' assignment of error, we focus on the first-tier analysis. We recognize that R.C. 2744.02(A)(1) specifically states:

{¶33} "[A] political subdivision is not liable in *damages* in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function." (Emphasis added.)

{¶34} As previously noted, appellee filed a five-count complaint: count one (writ of mandamus), count two (corrupt activity, pursuant to R.C. 2923.31), count three (declaratory judgment), count four (injunctive relief), and count five (declaratory judgment). Although appellants are asserting immunity under R.C. Chapter 2744, "'by its very language and title, the (Ohio Political Subdivision Tort Liability Act) applies to tort actions for damages. See R.C. 2744.02.'" *McNamara v. Rittman* (1998), 125 Ohio App.3d 33, 47, quoting *Big Springs Golf Club v. Donofrio* (1991), 74 Ohio App.3d 1, 2.

{¶35} In addressing the application of R.C. Chapter 2744 to claims for injunctive and declaratory relief, this court, in *Portage Cty. Bd. of Commrs v. Akron*, 156 Ohio App.3d 657, 2004-Ohio-1665, at ¶186, stated:

{¶36} "Courts in Ohio have been uniform in the observation that '(b)y its very language and title, (Chapter 2744) applies to tort actions *for damages*.' [Emphasis sic.] *Big Springs Golf Club v. Donofrio* (1991), 74 Ohio App.3d 1, 2. *** It has no application whatsoever in actions for equitable relief. Id. See, also, *McNamara v. Rittman* (1998), 125 Ohio App.3d 33, 47. *** In other words, R.C. Chapter 2744 does not provide immunity to political subdivisions for claims that are 'constitutional in nature,' because statutory immunity is 'not a proper defense' to claims that do not 'sound in tort.' As a result, because Portage County's claims were for injunctive and declaratory relief, rather than tort damages, the trial court properly concluded that appellant was not statutorily immune." (Parallel citations omitted.)

{¶37} The Second Appellate District also reasoned that sovereign immunity is not applicable in claims for equitable relief. *Mega Outdoor*, *LLC v. Dayton*, 173 Ohio App.3d 359, 2007-Ohio-5666, at ¶54. In *Mega Outdoor*, *LLC v. Dayton*, the trial court granted the city's motion for summary judgment, stating the city was "'entitled to judgment, as a matter of law, on *all Counts* of Plaintiff's Complaint because the Defendant City is entitled to immunity.'" Id. at ¶54. (Emphasis sic). The Second District, however, overruled the trial court's judgment with respect to "Counts One (declaratory judgment), Two (declaratory judgment), Three (mandamus) and Five (injunctive relief) based on sovereign immunity." Id.

{¶38} Additionally, appellee's complaint included causes of action to enjoin the city of Eastlake from the illegal levying and collecting of the excess sewer tax. R.C. 2723.01, which specifically provides for an injunction against the illegal collection or levy of taxes, states, in pertinent part:

{¶39} "Courts of common pleas may enjoin the illegal levy or collection of taxes and assessments and entertain actions to recover them when collected, without regard to the amount thereof ***."

{¶40} As noted by the Ninth Appellate District, "[t]he General Assembly specifically allowed for an injunction against a political subdivision in one section of the Ohio Revised Code. Barring this statutory action by immunity in another part of the Revised Code would be nonsensical and clearly contrary to the intent of the General Assembly." *McNamara v. Rittman*, 125 Ohio App.3d at 47.

{¶41} Based on our foregoing analysis, sovereign immunity is not available when a party seeks declaratory or injunctive relief or a mandamus action.

{¶42} Appellee's second count contains a civil claim based under Ohio's Corrupt Activity Act, found in R.C. 2923.31, et. seq. The Ohio Corrupt Activity Act is adopted from the federal Racketeer Influenced Corrupt Organizations Act (RICO). *Universal Coach, Inc. v. New York City Transit Auth., Inc.* (1993), 90 Ohio App.3d 284, 291. As held by the Eighth Appellate District, "the failure of a plaintiff to plead any of the elements necessary to establish a RICO violation results in a defective complaint which cannot withstand a motion to dismiss as based upon a failure to state a claim upon which relief can be granted." Id.

{¶43} "A valid civil RICO claim must allege that the defendant violated one or more of the crimes set forth in R.C. 2923.32. See R.C. 2923.34(B); *U.S. Demolition & Contracting Inc. v. O'Rourke Constr. Co*. (1994), 94 Ohio App.3d 75, 83. *** A civil RICO claim must also state with *specificity* that (1) the defendant was involved in a 'corrupt activity' as defined by R.C. 2923.31(I), (2) that the defendant was involved in a pattern of corrupt activity that consisted of two or more incidents of corrupt activity as

prohibited by R.C. 2923.31(I), and (3) that an enterprise existed separate and apart from the defendant through which the defendant acted." *Salata v. Vallas*, 159 Ohio App.3d 108, 2004-Ohio-6037, at ¶10, citing *Universal Coach, Inc. v. New York City Transit Auth., Inc.*, 90 Ohio App.3d at 291. (Emphasis added and parallel citations omitted.)

{¶44} Although appellee's complaint was initially filed with allegations that did not contain the requisite specificity, the trial court permitted amendment of the complaint, and it was re-filed on January 24, 2006. Appellee's amended complaint claimed that appellants (1) "individually and in concert with each other constitute 'Enterprises' as defined in R.C. 2923.31(C)"; (2) were involved in a "pattern of corrupt activity" as defined in R.C. 2923.31(E); and (3) "have conducted or participated in, directly or indirectly the affairs of the enterprise through a pattern of corrupt activity by the collection of unlawful taxes and the misappropriation of said taxes." Appellee prayed for damages in excess of $25,000, reasonable costs, and treble damages, pursuant to R.C. 2923.34.

{¶45} In their post-hearing brief, appellants argue that a claim for civil conspiracy is an intentional tort, and, therefore, they are immune under Ohio's Political Subdivision Tort Liability Act, under R.C. 2744.02, as a political subdivision is immune from intentional tort claims. See *Sabulsky v. Trumbull Cty.*, 11th Dist. No. 2001-T-0084, 2002-Ohio-7275, at ¶14. While appellants may be correct in this assertion, a claim for civil conspiracy is not at issue here. A claim based on civil conspiracy and a claim based on Ohio's Corrupt Practices Act are two separate and distinct causes of action. A cause of action for a civil conspiracy claim includes allegations of "(1) a malicious combination, (2) involving two or more persons, (3) causing injury to person or property,

and (4) the existence of an unlawful act independent from the conspiracy itself." *Gibson v. City Yellow Cab Co.* (Feb. 14, 2001), 9th Dist. No. 20167, 2001 Ohio App. LEXIS 518, at *9, citing *Universal Coach, Inc. v. New York City Transit Auth., Inc.*, 90 Ohio App.3d at 292.

{¶46} Appellee's complaint set forth, with specificity, a claim based on Ohio's Corrupt Activity Act, found in R.C. 2923.31, et. seq. It does not separately allege a claim for civil conspiracy. Appellants are not afforded immunity under R.C. Chapter 2744 with respect to these claims as alleged herein. A claim under R.C. 2923.31, et. seq., like a RICO claim, is not a tort action. *Thorton v. Cleveland*, 176 Ohio App.3d 122, 2008-Ohio-1709, at ¶8. However, any of the other defenses available to appellants for this or any other cause of action remain.

{¶47} Accordingly, based on the allegations contained in the complaint, which the court must accept as true, appellants are not afforded immunity under R.C. Chapter 2744, as this immunity is only applicable to tort claims. The decision of the trial court is affirmed. The trial court should proceed in this matter consistent with the opinion of this court. Appellants' assignment of error is without merit.

MARY JANE TRAPP, P.J.,

DIANE V. GRENDELL, J.,

concur.