[Cite as *Shelton v. Twin Twp.*, 2015-Ohio-1602.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

PREBLE COUNTY

JOHN E. SHELTON, et al.,	:	
Plaintiffs-Appellees,	:	CASE NO. CA2014-07-004
	:	O P I N I O N
- vs -		4/27/2015
	:	
TWIN TOWNSHIP, OHIO, et al.,	:	
Defendants-Appellants.	:	

CIVIL APPEAL FROM PREBLE COUNTY COURT OF COMMON PLEAS
Case No. 13CV029878

McNamee & McNamee, Michael P. McNamee, Gregory B. O'Connor, 2625 Commons Blvd., Beavercreek, Ohio 45431, for plaintiffs-appellees, John E. Shelton, Betty J. Shelton and John E. Shelton, Jr.

Smith Rolfes & Skavdahl, James P. Nolan II, Jason P. Walker, 600 Vine Street, Suite 2600, Cincinnati, Ohio 45202 and Martin P. Votel, Preble County Prosecutor, Preble County Courthouse, 101 East Main Street, 1st Floor, Eaton, Ohio 45320, for defendant-appellants, Twin Township, Ohio, Donnie Jones and Rodney Creech

RINGLAND, J.

{¶ 1} Defendants-appellants, Twin Township, Ohio ("Township") and Township Trustees Donnie Jones and Rodney Creech (collectively, the "Trustees"), appeal a decision of the Preble County Court of Common Pleas, granting partial summary judgment in favor of plaintiffs-appellees, John E. Shelton, Betty J. Shelton, and John E. Shelton, Jr., (collectively,

the "Sheltons"), and denying appellants' motion for summary judgment in its entirety.

{¶ 2} At issue in the present case is the Township's demolition of a barn on the Sheltons' property, and the Trustees' actions in pursuing and overseeing that demolition.

{¶ 3} The Township had unsuccessfully attempted to convince the Sheltons to repair or demolish the barn since 2003. Having failed to reach a successful resolution on the status of the barn by 2010, the Township requested an analysis from a Miami County building inspector contracted by Preble County to perform on behalf of their Building Inspections Department. That building inspector, Robert England, submitted a report to the Township stating that, "the barn is unsafe to remain standing on the property; the original integrity has been lost over the years and it is close to falling down."

{¶ 4} Based upon England's report, the Township passed a resolution ordering that the barn be demolished and removed. On January 11, 2011, the Township sent a notice of the resolution to the Sheltons and demanded that the Sheltons either, (1) remove the barn within 30 days, (2) enter into an alternative agreement with the Township for the demolition, or (3) request a hearing before the Township Trustees.

{¶ 5} The Township agreed to delay the demolition of the barn in order to afford the Sheltons an opportunity to discuss the matter with the Trustees at the Township meeting on March 8, 2011. The parties reached an agreement at that meeting, which was memorialized in a letter from Preble County Prosecutor Martin Votel to the Sheltons. Pursuant to that agreement, the Sheltons were granted 90 days, as of March 12, 2011, to remove the dilapidated portion of the barn and repair the salvageable portion.

{¶ 6} On the 91st day after March 12, 2011, the Township commissioned a contractor to demolish the Sheltons' barn and remove the resulting debris. The Township had the debris recycled and credited those funds against the tax lien placed on the Sheltons' property.

{¶ 7} The Sheltons subsequently filed suit in the United States District Court for the Southern District of Ohio. That court granted partial judgment on the pleadings in favor of the Township with respect to the Sheltons' claim of violations of procedural and substantive due process. The District Court dismissed without prejudice the Sheltons' state law causes of action.

{¶ 8} The Sheltons then filed a complaint in the Preble County Court of Common Pleas. The complaint asserted claims for wrongful demolition, breach of contract, and conversion against the Township. Against the Trustees, the Sheltons asserted claims for trespass.

{¶ 9} Both parties subsequently filed motions for summary judgment. The trial court ruled in favor of the Sheltons on their claims of wrongful demolition and breach of contract. The court denied appellants' motion in its entirety.

{¶ 10} Appellants now appeal that decision, raising two assignments of error for review

Summary Judgment Standard of Review

{¶ 11} Summary judgment is a procedural device used to terminate litigation when there are no issues in a case requiring a formal trial. *Roberts v. RMB Ents., Inc.*, 197 Ohio App.3d 435, 2011-Ohio-6223, ¶ 6 (12th Dist.). On appeal, a trial court's decision granting summary judgment is reviewed de novo. *Moody v. Pilot Travel Ctrs., L.L.C.*, 12th Dist. Butler No. CA2011-07-141, 2012-Ohio-1478, ¶ 7, citing *Burgess v. Tackas*, 125 Ohio App.3d 294, 296 (8th Dist.1998). In applying the de novo standard, the appellate court is required to "us[e] the same standard that the trial court should have used, and * * * examine the evidence to determine whether as a matter of law no genuine issues exist for trial." *Bravard v. Curran*, 155 Ohio App.3d 713, 2004-Ohio-181, ¶ 9 (12th Dist.), quoting *Brewer v. Cleveland Bd. of Edn.*, 122 Ohio App.3d 378, 383 (8th Dist.1997).

{¶ 12} Pursuant to Civ.R. 56, a trial court may grant summary judgment only when (1)

there is no genuine issue of any material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) the evidence submitted can only lead reasonable minds to a conclusion that is adverse to the nonmoving party. *BAC Home Loans Servicing, L.P. v. Kolenich*, 194 Ohio App.3d 777, 2011-Ohio-3345, ¶ 17 (12th Dist.). The party moving for summary judgment bears the initial burden of demonstrating that no genuine issue of material fact exists. *Touhey v. Ed's Tree & Turf, L.L.C.*, 194 Ohio App.3d 800, 2011-Ohio-3432, ¶ 7 (12th Dist.), citing *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293 (1996).

{¶ 13} Once this burden is met, the nonmoving party must then present evidence to show that there is some issue of material fact yet remaining for the trial court to resolve. *Smedley v. Discount Drug Mart, Inc.*, 190 Ohio App.3d 684, 2010-Ohio-5665, ¶ 11 (12th Dist.). In determining whether a genuine issue of material fact exists, the evidence must be construed in the nonmoving party's favor. *Walters v. Middletown Properties Co.*, 12th Dist. Butler No. CA2001-10-249, 2002-Ohio-3730, ¶ 10. We are mindful of these principles in addressing the following assignments of error.

{¶ 14} Assignment of Error No. 1:

{¶ 15} THE TRIAL COURT FAILED TO PROPERLY APPLY THE IMMUNITY SAFEGUARDS OF R.C. 2744.02, AND INSTEAD CREATED A NEW CAUSE OF ACTION UNDER R.C. 2744.03 WITH ITS SUPPORT RESTING ENTIRELY UPON A SINGLE OUTDATED AND ABROGATED DECISION.

{¶ 16} Within this assignment of error, appellants argue that the trial court erred in failing to apply immunity to the Township and Trustees, thus denying appellants' motion for summary judgment in its entirety.

{¶ 17} The trial court relied upon *Solly v. Toledo*, 7 Ohio St.2d 16 (1966), in determining that immunity did not apply in the present case. However, *Solly* was decided before R.C. Chapter 2744 was adopted in 1989. *Solly* is applicable only to claims of

constitutional violations. *Englewood v. Turner*, 2d Dist. Montgomery No. 22270, 2008-Ohio-4637, ¶ 22. The *Englewood* court recognized that if a claim "were construed as an attempt to recover for wrongful demolition, it would be considered a tort and could be precluded under the sovereign immunity granted to political subdivisions in R.C. Chapter 2744." *Id*. Furthermore, the *Englewood* court acknowledged that, "[t]he Ohio Supreme Court also noted in *Solly* that the city of Toledo did not raise the defense of governmental immunity. As a result, *Solly* is not controlling on the issue of recovery for wrongful demolition." *Id*., citing *Monesky v. Wadsworth*, 9th Dist. Medina App. No. 2478–M, 1996 WL 148655 (Apr. 3, 1996).

{¶ 18} We agree with the *Englewood* court's analysis and find that the trial court improperly relied on *Solly* in the present case where no constitutional violations were alleged.[1] Therefore, we must determine whether immunity should have been applied pursuant to R.C. Chapter 2744.

Township Immunity

{¶ 19} The Ohio Supreme Court has set forth a three-tiered analysis for determining whether a political subdivision is immune from liability. *Cater v. Cleveland*, 83 Ohio St.3d 24, 28, 1998-Ohio-421. Under the first tier, a political subdivision is granted broad immunity for any injury arising out of its governmental functions. R.C. 2744.02(A)(1). The immunity afforded to the political subdivision, however, is not absolute but instead is subject to five exceptions under R.C. 2744.02(B). Thus, the second tier of the analysis focuses on the exceptions to immunity set forth in R.C. 2744.02(B). Finally, in the third tier of the analysis, if an exception exists, immunity can be reinstated if the political subdivision can successfully argue that one of the defenses set forth in R.C. 2744.03(A) applies. *Cater*.

{¶ 20} The parties do not dispute that the Township is a political subdivision pursuant

1. The alleged constitutional violations were previously decided upon in federal court, as set forth above.

to R.C. 2744.01(F). With respect to whether the Township was engaged in a governmental function, R.C. 2744.01 provides, in pertinent part:

> (C)(1) "Governmental function" means a function of a political subdivision that is specified in division (C)(2) of this section or that satisfies any of the following:
>
> * * *
>
> (c) A function that promotes or preserves the public peace, health, safety, or welfare; that involves activities that are not engaged in or not customarily engaged in by nongovernmental persons; and that is not specified in division (G)(2) of this section as a proprietary function.
>
> (2) A "governmental function" includes, but is not limited to, the following:
>
> " * * *
>
> (p) The provision or nonprovision of inspection services of all types, including, but not limited to, inspections in connection with building, zoning, sanitation, fire, plumbing, and electrical codes, and the taking of actions in connection with those types of codes, including, but not limited to, the approval of plans for the construction of buildings or structures and the issuance or revocation of building permits or stop work orders in connection with buildings or structures * * *[.]

{¶ 21} In the present case, the Township demolished the Sheltons' barn under authority granted in R.C. 505.86, which provides, in pertinent part:

> (B) A board of township trustees may provide for the removal, repair, or securance of buildings or other structures in the township that have been declared insecure, unsafe, or structurally defective by any fire department under contract with the township or by the county building department or other authority responsible under Chapter 3781. of the Revised Code for the enforcement of building regulations or the performance of building inspections in the township, or buildings or other structures that have been declared unfit for human habitation by the board of health of the general health district of which the township is a part.
>
> At least thirty days prior to the removal, repair, or securance of any insecure, unsafe, or structurally defective building, the board of township trustees shall give notice by certified mail of its

> intention with respect to the removal, repair, or securance to the holders of legal or equitable liens of record upon the real property on which the building is located and to owners of record of the property. If the owner's address is unknown and cannot reasonably be obtained, it is sufficient to publish the notice once in a newspaper of general circulation in the township. The owners of record of the property or the holders of liens of record upon the property may enter into an agreement with the board to perform the removal, repair, or securance of the insecure, unsafe, or structurally defective building. If an emergency exists, as determined by the board, notice may be given other than by certified mail and less than thirty days prior to the removal, repair, or securance.

{¶ 22} Based on the foregoing, the Township engaged in a governmental function under R.C. 505.86 when it exercised its authority to order the demolition of a barn which was declared unsafe by a building inspector under contract with Preble County.[2] Consequently, unless one of the exceptions set forth under R.C. 2744.02(B) applies, the trial court in this case erred in concluding that sovereign immunity did not apply to the Township.

{¶ 23} R.C. 2744.02(B)(1)-(5) provides the exceptions to immunity for a political subdivision: (1) the negligent operation of a motor vehicle by an employee; (2) the negligent performance of a proprietary function; (3) the negligent failure to keep public roads open and in repair; (4) injury caused by a defect on the grounds of a public building, and (5) instances in which civil liability is expressly imposed upon the subdivision by a section of the Revised Code.

{¶ 24} None of those exceptions apply in the present case. The Sheltons argued in their memorandum in opposition to appellants' motion for summary judgment that R.C. 2744.02(B)(2) applied as the Township negligently performed a proprietary function. However, R.C. 2744.01(G)(1)(a) specifically excludes governmental functions from the

2. The record includes the agreement whereby the Preble and Miami County Boards of Commissioners contracted to have the Miami County Building Inspection Department provide backup services to the Preble County Building Inspection Department.

definition of proprietary functions. As set forth above, the Township was engaged in a governmental function under R.C. 505.86. Accordingly, the exception to immunity for the negligent performance of a proprietary function does not apply.

{¶ 25} The Sheltons also argued below that they were not provided proper notice of the demolition. Pursuant to R.C. 505.86, the Township was required to provide notice to the Sheltons at least 30 days prior to the demolition of the barn. The requisite notice was sent to the Sheltons on January 11, 2011, well in advance of the June 11, 2011 demolition. The Township was not required to send repeated notices to the Sheltons in advance of the demolition where notice was given in the preceding six months and the only reason for delay was an agreement with the Sheltons to provide them additional time to remedy the situation. The Sheltons were clearly on notice of the impending demolition if they failed to repair or remove the barn prior to June 11, 2011.

{¶ 26} The same logic applies to the Sheltons' assertion that the Township was required to conduct another inspection prior to the demolition. At the time of the demolition, the barn remained half-collapsed. It was evident that no significant repairs took place to remedy the safety hazard posed by the barn. Thus, it was unnecessary for the Township to order another inspection within a few months of the first where it remained in essentially the same condition as when it was initially inspected.

{¶ 27} Finally, the trial court found that the Township ignored its own procedures by failing to refer the matter to a zoning enforcement officer. The trial court reached this conclusion by referencing sections of the Preble County Zoning Resolution which was adopted by the Township. While it is true that zoning issues in the Township are subject to that resolution, the present case does not deal in any way with a violation of the zoning code. Therefore, any requirements and rules set forth under the Preble County Zoning Resolution are irrelevant.

{¶ 28} We find that the Township followed the requirements set forth in R.C. 505.86 for removing an unsafe structure. Therefore, we find that the trial court erred in failing to grant the Township's motion for summary judgment as to the wrongful demolition claim.

Trustee Immunity

{¶ 29} Township trustees are generally immune from suit when performing governmental duties. *Champion Mall Corp. v. Champion Twp. Bd. of Trustees*, 11th Dist. Trumbull No. 2009-T-0102, 2010-Ohio-2051, ¶ 35. However, civil liability may attach to township trustees if the plaintiffs can show that one of the exceptions to immunity exists under R.C. 2744.02, and the trustees "acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner." R.C. 2744.03(A)(6)(b).

{¶ 30} As discussed above, the defenses set forth in R.C. 2744.03(A) apply only if one of the exceptions to immunity under R.C. 2744.02 are applicable. Having already found that the demolition constituted a governmental function and that none of the exceptions set forth in R.C. 2744.02 apply, there is no need for an analysis of the available defenses that would reinstate immunity under R.C. 2744.03(A). Consequently, individual immunity applies to the Trustees.

{¶ 31} Accordingly, we find that the trial court erred in denying the Trustees' motion for summary judgment as to the claims for trespass.

Conversion

{¶ 32} The trial court denied summary judgment to both parties on the issue of conversion. The court found that issues of fact remained as to whether the Township deprived the Sheltons of their property when debris and metal roofing was removed following the demolition.

{¶ 33} The Sheltons' conversion claim asserts that the Township wrongfully exercised dominion over "the structural steel that comprised part of the barn." There is no mention of

miscellaneous debris in their conversion claim. R.C. 505.86 provides for the "removal * * * of buildings." It is inherent that the removal of the barn includes removing "the structural steel that comprised part of the barn." If the very materials that comprise the building are not to be removed, then that portion of the statute would have little or no meaning. Pursuant to R.C. 505.86 and having previously found that the Township is entitled to immunity for the demolition of the barn, we find that the Township is equally entitled to immunity for the removal of the materials that comprised the barn.

{¶ 34} Accordingly, we find that the trial court erred in failing to grant the Township's motion for summary judgment as to the conversion claim.

{¶ 35} In light of the foregoing, having found that, (1) the trial court erred in relying on *Solly* where no constitutional issues were raised, (2) none of the exceptions to immunity under R.C. 2744 are applicable, and (3) sovereign immunity applied to the Township and Trustees as they were engaged in a governmental function pursuant to R.C. 505.86, appellants' first assignment of error is sustained.

{¶ 36} Assignment of Error No. 2:

{¶ 37} NO CONTRACT EXISTED AS THE SHELTONS ASSERT A MATERIAL CLAIM WAS ABSENT FROM THE CONTRACT.

{¶ 38} Within this assignment of error, appellants argue first that no contract exists because the agreement was silent as to an element the Sheltons considered essential. Appellants assert that the Sheltons considered a "weather permitting" condition to be essential to the contract. However, the Sheltons have not argued that a "weather permitting" contingency was an essential term, nor did they seek to have it incorporated into the contract. Accordingly, we find that the "weather permitting" condition was not essential to the contract, and that the Sheltons accepted the terms of the contract as stated in the letter from Votel to the Sheltons.

{¶ 39} In the alternative, appellants argue that if the agreement created a binding contract, the Sheltons materially breached the contract by failing to perform. Whether or not the Sheltons committed a material breach in failing to perform on the contract within 90 days turns upon whether time of performance was of the essence to the contract.

{¶ 40} Ohio courts are split as to whether and when "time is of the essence" may be implied in a contract. Generally, time of performance is not of the essence to a contract unless expressed. *Brown v. Brown*, 90 Ohio App.3d 781, 784 (11th Dist.1993); *Mays v. Hartman*, 81 Ohio App. 408, 412 (1st Dist.1947). However, some courts have found it may be implied that time is of the essence depending on the nature of the contract or circumstances under which it was negotiated. *Green, Inc. v. Smith*, 40 Ohio App.2d 30, 37-38 (4th Dist.1974); *Franklin Mgt. Indus., Inc. v. Far More Properties, Inc.*, 8th Dist. Cuyahoga No. 101397, 2014-Ohio-5437, ¶ 16. Other courts have found that it may be implied whenever a definite date is fixed for compliance. *See, e.g., Lake Ridge Academy v. Carney*, 9th Dist. Lorain No. 91CA005063, 1991 WL 215024, *4 (Oct. 16, 1991); *Calabrese v. Vukelic*, 7th Dist. Jefferson No. 94-J-37, 1995 WL 750140, *1 (Dec. 14, 1995), citing *Domigan v. Domigan*, 46 Ohio App. 542, 546 (5th Dist.1933). Finally, there are courts that combine the above approaches and consider both the nature and circumstances of the negotiation, as well as the fixed date of the contract in determining whether to imply that time is of the essence. *Marion v. Hoffman*, 3rd Dist. Marion No. 9-10-23, 2010-Ohio-4821, ¶ 23; *Nippon Life Ins. Co. of Am. v. One Source Mgt., Ltd.*, 6th Dist. Lucas No. L-10-1247, 2011-Ohio-2175, ¶ 24.

{¶ 41} This court has previously indicated that it may be implied that time is of the essence to a contract in certain situations. In *SRW Environmental Servs. Inc. v. Dudley*, 12th Dist. Butler No. CA2008-11-282, 2009-Ohio-3681, this court held that the fact that a contract contains a specified date or deadline does not in and of itself automatically make time of the

essence. Instead, "when it is said that time is of the essence, the proper meaning of the phrase is that the performance by one party at the time specified in the contract or within the period specified in the contract is essential in order to enable him to require performance from the other party." *Id*., quoting *Lake Ridge Academy v. Carney*, 66 Ohio St.3d 376, 378 (1993). This court went on to hold that, "performance by a specific date must be an essential element of the contract based on the circumstances under which it was negotiated." *Id*. at ¶ 16. This court also held that time was not of the essence where the party failed to show that "any provision in the contract or circumstance of this case [ ] would render time of performance as being of the essence * * *." *Merritt v. Anderson*, 12th Dist. Fayette No. CA2008-04-010, 2009-Ohio-1730, ¶ 25.

{¶ 42} In the present case, the facts support implying that time of performance was of the essence based upon the fixed date in the contract and the nature and circumstances under which the contract was negotiated.

{¶ 43} First, the sole reason the Township sought to persuade the Sheltons to repair or demolish the barn was because it presented a safety hazard. The building inspector had advised the Township that, "the barn is unsafe to remain standing on the property; the original integrity has been lost over the years and it is close to falling down." The Township subsequently passed a resolution requiring that the barn be demolished as a result of those safety concerns. The Sheltons were made aware of the safety issues in the notice sent on January 11, 2011, and at the Township meeting on March 8, 2011. Where the essential purpose of a contract is to remedy a present public safety hazard, it is axiomatic that time of performance is essential.

{¶ 44} Furthermore, we recognize that the Township had authority under R.C. 505.86(B) to demolish the unsafe barn 30 days after providing notice to the Sheltons. The contract in the present case simply deferred the Township's statutory authority in order to

provide the Sheltons an opportunity to remedy the situation on their own. It was evident from the building inspector's report, the resolution, the notice sent to the Sheltons, the Township meeting, and the content of the agreement that the timeliness of performance in this final opportunity to repair or demolish the barn was vital.

{¶ 45} Thus, the circumstances under which the contract was negotiated involved the Township voluntarily providing the Sheltons one last opportunity to fix the issues on their own before the Township exercised its authority, and the nature of the contract was to remedy an immediate public safety concern. Finally, with respect to the fixed date, the contract specifically provides that "[t]he term of this agreement is ninety (90) days beginning on Saturday, March the 12th, 2011."

{¶ 46} Accordingly, we find that the combination of the nature and circumstances of the negotiation and the fixed date provided in the contract establish that time for performance was of the essence. Thus, the Sheltons materially breached the contract when they failed to repair or demolish the barn within 90 days of March 12, 2011.

{¶ 47} Following the Sheltons' material breach of the contract, the Township was discharged from its obligations under the contract. *Bd. of Comm'rs. of Clermont Cnty., Ohio v. Vill. of Batavia*, 12th Dist. Clermont App. No. CA2000-06-039, 2001-Ohio-4210, *3. Consequently, we find that the Township was not subject to any potential limitations of authority under the contract following the Sheltons' material breach outlined above.[3] The Township instead acted under the statutory authority provided pursuant to R.C. 505.86(B). The building inspector's report upon which the Township relied stated that the "barn is unsafe to remain standing on the property." That report did not differentiate between safe and

3. We further recognize that the contract itself does not expressly provide the Township authority to demolish any portion of the barn. The contract is silent as to the repercussions for either party's failure to perform.

unsafe portions of the barn.[4] Thus, the Township had authority under R.C. 505.86(B) to demolish the entirety of the structure and immunity applied as discussed under the first assignment of error. The trial court erred in failing to grant the Township's motion for summary judgment as to the breach of contract claim.

{¶ 48} In light of the foregoing, having found that (1) a contract was properly entered into as a "weather permitting" condition was not an essential term missing from the agreement, (2) the nature and circumstances of negotiation and fixed date in the contract imply that time for performance was of the essence, and (3) the Township acted under its statutory authority to demolish the entire barn after being discharged from all contractual obligations following the Sheltons' material breach of the contract, appellants' second assignment of error is overruled in part and sustained in part.

{¶ 49} Judgment reversed as to the partial summary judgment granted in favor of appellees, and reversed as to the denial of appellants' motion for summary judgment. Judgment is granted on all claims in favor of appellants.

PIPER, P.J., and M. POWELL, J., concur.

4. We note that "salvageable" is not akin to presently safe.