

[Cite as *Farra v. Ohio Dept. of Transp., Dist. 7, 2006-Ohio-7178.*]

IN THE COURT OF CLAIMS OF OHIO

DONALD M. FARRA	:	
Plaintiff	:	
v.	:	CASE NO. 2005-10551-AD
OHIO DEPARTMENT OF TRANSPORTATION, DISTRICT 7	:	<u>ENTRY OF DISMISSAL</u>
Defendant	:	
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{¶ 1} On October 24, 2005, plaintiff, Donald M. Farra, filed a complaint against defendant, Department of Transportation. Plaintiff alleges starting on December 18, 2003, and continuing for the next six months, defendant undertook a construction project on the Fifth Street Bridge in the city of Dayton. As the result of this project, trucks proceeded past plaintiff's properties at 117 Bank Street and 130-132 Sprague Street causing dust from the debris being hauled to settle on his property. Plaintiff asserts defendant should be responsible for the cleaning of the exteriors of his properties. Plaintiff seeks damages in the amount of \$695.00. Plaintiff submitted the filing fee with the complaint.

{¶ 2} On December 15, 2005, defendant filed a motion to dismiss. In support of the motion to dismiss, defendant stated in pertinent part:

{¶ 3} "Defendant has performed an investigation of this site and this area was under contract with Kokosing Construction Company to work on the Fifth Street Bridge Project 428(01). Kokosing Construction Company started work on this project February 13, 2002 but plaintiff did not contact ODOT's project Supervisor, Darreyl Davis, until December 8, 2003. (See Exhibit A.) Mr. Davis mentions that the City of Dayton was doing street improvements on Edwin C. Moses Blvd. and the Vic Cassano

{¶ 4} Medical Facility was being constructed all at the same time. (See map for locations.) When Kokosing Construction Company was contacted about this claim, they denied the claim because their Project Engineer, Tony Sharkins, did not feel plaintiff's claim was sound because of all the work being done in the area. (See Exhibit B.)

{¶ 5} "In sum, ODOT's project for the Fifth Street Bridge, City of Dayton doing street improvements on Edwin C. Moses Blvd and the Vic Cassano Medical Facility were all working in the same general area and liability cannot be placed on any particular entity."

{¶ 6} On December 21, 2005, plaintiff filed a memorandum opposing the motion to dismiss. Plaintiff relates that the dust damage caused to his properties was the result of defendant constructing a "new dirt road at the end of Bank Street." The road was constructed for the purpose of hauling away debris from the old bridge. "During the removal of the old bridge there never were any street sweepers, water or other measures used to keep the dust down." Plaintiff related that the other two

construction projects mentioned by defendant were east of his properties and both those projects utilized dust control measures. Accordingly, plaintiff asserts defendant's liability for the cleaning expenses incurred for his properties.

{¶ 7} On December 23, 2005, defendant filed a motion for leave to file and a supplemental memorandum in support of defendant's motion to dismiss. Defendant asserts plaintiff has failed to prove which construction project resulted in the dust accumulating on plaintiff's properties. A building adjacent to plaintiff's property on 117 Bank Street collapsed causing dust and debris to accumulate on plaintiff's property. Furthermore, plaintiff filed suit in the Court of Claims for this damage against Sinclair College. Unless there is a taking of property, damages asserted by plaintiff are not compensable and finally, any negligence should be attributable to defendant's independent contractor, Kokosing Construction Company.

{¶ 8} On January 6, 2006, plaintiff filed a second memorandum opposing defendant's supplemental memorandum in support of the motion to dismiss. The plaintiff asserts any dust and debris from the collapse of the adjacent building was already cleaned prior to defendant's work on the bridge site. Plaintiff submitted a bill for the cleaning costs dated November 9, 2001. Plaintiff went on to state: "[t]he building was covered with a great deal (of) dust and dirt because of the hundreds of truck loads of debris that were brought down the road in a residential area where the houses are few feet from the road."

{¶ 9} Defendant filed a motion to dismiss based on the pleadings. In order to be entitled to a dismissal under Civ R. 12(C), it must appear beyond doubt that plaintiff can prove no set of facts warranting the requested relief, after construing all material factual allegations in the complaint and all reasonable inferences therefrom in the plaintiff's favor. *State ex rel. Brantley v. Ghee* (1988), 83 Ohio St. 3d 521, 522-523.

{¶ 10} Accordingly, it will be assumed that all dust created was caused solely by defendant's contractor in the removal of old bridge debris, a public improvement project, and plaintiff's property, located in a residential area, was covered with dust and dirt the same as other residences in the area.

{¶ 11} "The rule in Ohio has long been that '[w]hen there is no taking [of property] altogether or pro tanto, damages consequential to the taking of other property in the neighborhood or to the construction of the improvement, are not recoverable; under such circumstances, loss suffered by the owner is *damnum absque injuria*.' *Smith v. Erie Rd. Co.*, 134 Ohio St. 135 [11 O.O. 571], paragraph two of the syllabus." *Norwood v. Forest Converting Co.* (1984), 16 Ohio App. 3d 411, 414. "Conversely, 'consequential damages, which would be *damnum absque injuria* in the absence of a taking, may be compensable [as] damages to the residue [i.e. the property not taken] in the event of a taking of a portion of the owner's property.' *Columbus v. Farm Bureau Cooperative Assn.* (1971), 27 Ohio App. 2d 197, 202; *Norwood Ib.* at 414. *Damnum absque injuria* means "[L]oss, hurt, or harm without injury in the legal sense, that

is, without such breach of duty as is redressible by a legal action. A loss or injury which does not give rise to any action for damages against the person causing it." Blacks Law Dictionary (6 Ed., 1990).

{¶ 12} In the case at bar, there was no taking of any of plaintiff's property. Plaintiff did not assert any specific damage unique to his property was caused by defendant's contractor hauling debris from the old bridge site. The Ohio Supreme Court in *Smith*, supra, held "the construction of public improvements often results in the lessening of the value of property which is not taken . . . [but] [t]here can be no taking when the property owner suffers an injury to his property which differs in degree but not in kind from that sustained by the general public." Accordingly, no damage is compensable because of dust conditions created by defendant which affected plaintiff's neighbors either to a greater or lesser extent than those suffered by him. Therefore, plaintiff has failed to state a cause of action upon which relief can be granted.

{¶ 13} Defendant's motion for leave to file is GRANTED. Defendant's motion to dismiss is GRANTED. Plaintiff's case is DISMISSED. The court shall absorb the court costs of this case. The clerk shall serve upon all parties notice of this entry of dismissal and its date of entry upon the journal.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

Donald M. Farra
P.O. Box 1603
Dayton, Ohio 45401-1603

Plaintiff, Pro se

Thomas P. Pannett, P.E.
Assistant Legal Counsel
Department of Transportation
1980 West Broad Street
Columbus, Ohio 43223

For Defendant

DRB/laa
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