[Cite as *Durham v. Ohio Dept. of Pub. Safety*, 2014-Ohio-5979.]

Court of Claims of Ohio
The Ohio Judicial Center
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CHARLES DURHAM

Plaintiff

v.

OHIO DEPARTMENT OF PUBLIC SAFETY

Defendant

Case No. 2013-00688

Judge Patrick M. McGrath
Magistrate Robert Van Schoyck

ENTRY GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

{¶1} On August 29, 2014, defendant filed a motion for summary judgment pursuant to Civ.R. 56(B). On September 23, 2014, plaintiff filed a motion for an extension of time to file a memorandum contra; defendant did not file a response, and the motion is hereby GRANTED. On October 2, 2014, plaintiff filed a combined memorandum contra and cross-motion for summary judgment pursuant to Civ.R. 56(A). Defendant filed a combined response and reply on October 16, 2014. The motions for summary judgment are now before the court for a non-oral hearing pursuant to L.C.C.R. 4(D).

{¶2} Civ.R. 56(C) states, in part, as follows:

{¶3} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable

minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor." *See also Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317 (1977).

{¶4} There is no dispute that on the night of December 17, 2010, and into the next morning, agents or employees of both defendant and the Crawford County Sheriff's Office conducted a raid and executed a search warrant at a business plaintiff owns and operates near the city of Bucyrus, known as Club Enferno. An authenticated copy of the search warrant attached to the affidavit of Enforcement Agent Andrew J. Bouza, an employee of defendant and whose affidavit defendant filed in support of its motion for summary judgment, provides that the warrant was obtained to search for and seize certain property from the premises as evidence of criminal offenses, including violation of the rules for sales of beer and intoxicating liquor under R.C. 4301.22(B), illegal operation of a sexually oriented business under R.C. 2907.40(B), and illegal sexually oriented activity in a sexually oriented business under R.C. 2907.40(C).

{¶5} It is undisputed that, in accordance with the search warrant, certain property was seized from the premises during the raid and that plaintiff was arrested and criminally charged. It is also undisputed that the business premises was seized and that a forfeiture action was brought against it and the real estate on which it is located. The parties do not dispute that the business was closed and out of plaintiff's possession during the pendency of the forfeiture action, that a November 17, 2011 decision rendered by the Crawford County Common Pleas Court denied forfeiture and ordered that the property be released to plaintiff, and that at some point in 2012 plaintiff reopened the business.

{¶6} On November 18, 2013, plaintiff filed the complaint in this action, naming as defendants both the Ohio Department of Public Safety and the Crawford County

Sheriff. On November 21, 2013, the court issued an order dismissing the Crawford County Sheriff as a party for the reason that under R.C. 2743.02(E), only instrumentalities of the state can be defendants in original actions in the court of claims.

{¶7} According to plaintiff's complaint, and as explained more particularly in his motion for summary judgment, his theory of relief is essentially that the forfeiture action was unlawfully or unjustifiably brought either by defendant or on the orders of defendant, and that as a result of the seizure and closure of the business in conjunction with the forfeiture action he sustained damages of $699,300 in lost business income. Plaintiff also alleges that the business premises was not reasonably cared for during the pendency of the forfeiture action, and that, as a result, he incurred damages in the amount of $14,558, to the extent that a sign for the business and an air conditioning unit were stolen, siding on the building was damaged by a mower, and holes were drilled into the doors to fasten new locks on them.

{¶8} Plaintiff basically frames his claims for relief as an unlawful taking in violation of the Ohio Constitution with respect to the seizure and temporary closure of the business, and negligence with respect to the loss and damage of property on the premises while he was out of possession; additionally, in his motion for summary judgment, it is stated that the taking claim is "tantamount to a conversion." Although defendant argues that the court lacks subject matter jurisdiction over the taking claim, it has been held that "[a]n action may be brought in the Court of Claims where there has been a 'taking' of private property, and such court has jurisdiction to consider the matters involved whether the 'taking' is a permanent or 'pro tanto' type." *Kermetz v. Cook-Johnson Realty Corp.*, 54 Ohio App.2d 220 (10th Dist.1977), paragraph one of the syllabus. With respect to the other theories of relief advanced by plaintiff, "in order to establish actionable negligence, one seeking recovery must show the existence of a duty, the breach of the duty, and injury resulting proximately therefrom." *Strother v. Hutchinson*, 67 Ohio St.2d 282, 285 (1981). "Conversion 'is the wrongful exercise of

dominion over property to the exclusion of the rights of the owner, or withholding it from his possession under a claim inconsistent with his rights.' * * * This definition can be broken down into three basic elements: (1) a defendant's exercise of dominion or control (2) over a plaintiff's property (3) in a manner inconsistent with the plaintiff's rights of ownership." *State Farm Mut. Auto Ins. Co. v. Advanced Impounding & Recovery Servs., Ltd.*, 165 Ohio App.3d 718, 2006-Ohio-760, ¶ 9 (10th Dist.), quoting *Joyce v. Gen. Motors Corp.*, 49 Ohio St.3d 93, 96 (1990).

{¶9} In support of its motion, defendant submitted plaintiff's deposition transcript. Therein, plaintiff testified that during the raid he observed Crawford County Sheriff Ronny Shawber instruct a deputy to arrest him, that he was transported to the sheriff's office, and that sheriff's office employees then handed him a notice stating that they were seizing the business premises, and they also told him at that time to stay off the premises. (Deposition, pp. 67-70, 76-77.) Indeed, according to documents submitted by plaintiff, plaintiff received and signed a "SEIZURE NOTICE" issued by the Crawford County Sheriff pursuant to R.C. Chapter 2981 on December 18, 2010, notifying plaintiff that the property in question was "BEING SEIZED by the Crawford County Sheriff's Office." (Plaintiff's Motion for Summary Judgment, Exhibit C, p. 1.)

{¶10} Although plaintiff argues in his motion, for the first time, that an agent of the Ohio Department of Taxation apparently signed the notice of seizure, the document expressly provides that his signature was merely as a "witness," and it cannot be construed to suggest that the named defendant or any other state instrumentality seized the property. Furthermore, although plaintiff now states in an affidavit that an unknown agent of defendant told him during the raid that he was in charge and that the state of Ohio was seizing the business, plaintiff previously testified in his deposition that he did not know who was in charge of the raid and he made no mention of any such statements at that time. (Deposition, p. 130.) The affidavit does not explain the inconsistency and as a general rule this sort of contradictory statement in an affidavit

cannot be used to establish an issue of fact. *Burt v. Harris*, 10th Dist. Franklin No. 03AP-194, 2004-Ohio-756, ¶ 18. Regardless, the notice of seizure establishes that the premises were seized by the Crawford County Sheriff's Office, not defendant.

{¶11} Plaintiff also submitted a copy of the complaint from the ensuing forfeiture action, providing in part that the action was commenced pursuant to R.C. 2981.05 by the Crawford County Prosecutor, who requested therein that the property at issue be "forfeited to the Crawford County Prosecutors Office." (Plaintiff's Motion for Summary Judgment, Exhibit C, p. 2.) R.C. Chapter 2981 provides that either the state or a political subdivision may seek a forfeiture, and, under R.C. 2981.03(A)(1), acquire provisional title in the subject property while doing so. Here, the complaint from the forfeiture action specifically requested a forfeiture to the Crawford County Prosecutor's Office, which is a political subdivision. *See Howard v. Supreme Court of Ohio*, 10th Dist. Franklin Nos. 04AP-1093 & 04AP-1272, 2005-Ohio-2130, ¶ 9. Though a county prosecutor has authority to act on behalf of the state of Ohio in certain matters, this does not make the prosecutor's office an instrumentality of the state for purposes of suit in the court of claims. *Walden v. State*, 10th Dist. Franklin No. 87AP-1060 (May 5, 1988). Indeed, Agent Bouza avers in his affidavit that defendant played no role in the forfeiture action.

{¶12} Plaintiff testified in his deposition that once the forfeiture action ended, a deputy sheriff removed the locks on the doors and told him he could come back on the premises. (Deposition, p. 77.) In fact, plaintiff provided a narrative report from the deputy sheriff concerning that encounter and, among other things, the report states that the locks had been installed by the Crawford County Sheriff's Office at the time of the seizure. (Plaintiff's Motion for Summary Judgment, Exhibit H, p. 1.) Furthermore, while plaintiff alleges that employees or agents of defendant engaged in active negligence on the premises at some point between the time of the seizure and the termination of the forfeiture action, in particular by drilling holes in the doors and

damaging the siding of the building with a mower, plaintiff admitted in his deposition that he does not know who damaged the doors or mowed the grass. (Deposition, pp. 76, 91.) Agent Bouza, in his affidavit, specifically avers that defendant did not drill holes in the doors or play any role in controlling or maintaining the property during the pendency of the forfeiture action.

{¶13} Upon review, the evidence presented by the parties does not permit an inference that defendant seized the property in question, controlled or exercised dominion over the property in question at any time thereafter, or otherwise had a duty to maintain or care for the property in question, nor is there any evidence to support the allegations that defendant damaged the building through some act of active negligence. Accordingly, it must be concluded that plaintiff cannot prevail under any of his stated claims for relief.

{¶14} Furthermore, no matter how plaintiff styles his claims, to the extent that they may be construed as sounding in malicious prosecution, any such claim would have accrued upon the final disposition of the forfeiture action on November 17, 2011. *See Nationwide Ins. Ent. v. Progressive Speciality Ins. Co.*, 10th Dist. Franklin No. 01AP-1223, 2002-Ohio-3070, ¶ 11. Defendant asserts, among other things, that all potential claims for relief are time-barred, and in this instance, plaintiff filed his complaint on November 18, 2013, beyond the one-year statute of limitations for malicious prosecution set forth in R.C. 2305.11(A). Accordingly, there can be no recovery under this theory of relief.

{¶15} Finally, to the extent that the complaint includes allegations that employees of defendant acted with malicious purpose, in bad faith, or in a wanton or reckless manner, such that they may be personally liable under R.C. 2743.02(F) and 9.86, the burden of proving that personal liability should be imposed upon a state employee rests with the plaintiff. *Fisher v. Univ. of Cincinnati Med. Ctr.*, 10th Dist. Franklin No. 98AP-142 (Aug. 25, 1998). Here, no evidence has been presented from which a trier

of fact could reasonably conclude that personal liability should be imposed upon any employee of defendant.

{¶16} For the foregoing reasons, the court concludes that there are no genuine issues of material fact and that defendant is entitled to judgment as a matter of law. As a result, defendant's motion for summary judgment is GRANTED, plaintiff's motion for summary judgment is DENIED, and judgment is hereby rendered in favor of defendant. All other pending motions are DENIED as moot. All previously scheduled events are VACATED. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

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PATRICK M. MCGRATH
Judge

cc:

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Filed October 31, 2014
Sent to S.C. Reporter 12/1/15