

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Ruby McDowell, et al.

Court of Appeals No. L-10-1229

Appellees

Trial Court No. CI0198901709

v.

City of Toledo, et al.

DECISION AND JUDGMENT

Appellant

Decided: April 15, 2011

* * * * *

Adam W. Loukx, Law Director, and Joyce Anagnos, Senior
Attorney, for appellant.

R. Edward Marks, George Thomas and Joshua Murnen,
for appellee Kyle Tate.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas that granted the Civ.R. 71 motion filed by appellee Kyle Tate seeking enforcement of a 1992 consent judgment which obligated the city of Toledo to provide certain rights

to the recipients of its water services. For the reasons that follow, the judgment of the trial court is affirmed.

{¶ 2} Appellant city of Toledo sets forth the following assignments of error:

{¶ 3} "1. The lower court erred in granting Movants-Appellees' Emergency Motion To Enforce Judgment Through Civ.R. 71 by finding Movant-Appellee, Kyle Tate, had standing as a third party beneficiary to an unambiguous contract which contains a manifest intention to include parties like him. (Decision p.2)

{¶ 4} "2. The lower court erred in granting Movants-Appellees' Emergency Motion To Enforce Judgment Through Civ.R. 71 by finding Movant-Appellee, Toledo Fair Housing Center, had standing as an incidental third party beneficiary of the Consent Judgment Entry. (Decision p. 2)

{¶ 5} "3. The lower court erred in granting Movants-Appellees' Emergency Motion To Enforce Judgment Through Civ.R. 71 by finding the expiration of the permanent injunction granted to Ruby McDowell had no effect on the balance of the parties' agreement. (Decision p. 2)

{¶ 6} "4. The lower court erred in granting Movants-Appellees' Emergency Motion To Enforce Judgment Through Civ.R. 71 by granting relief to Movant-Appellee, Kyle Tate, outside of the CJE and in direct violation of Toledo Municipal Code. (Decision p. 2)

{¶ 7} "5. The lower court erred in granting Movants-Appellees' Emergency Motion To Enforce Judgment Through Civ.R. 71 by finding that the Consent Judgment Entry in the case remains in full force and effect. (Decision p. 2)

{¶ 8} "6. The lower court erred in granting Movants-Appellees' Emergency Motion To Enforce Judgment Through Civ.R. 71 by finding that any rules and regulations of the Director of Public Utilities not consistent with the Consent Judgment Entry are invalid. (Decision p. 2)"

{¶ 9} This matter arises from a consent judgment entered nearly 20 years ago to which appellant city of Toledo was a party. In 1992, the city consented to a judgment entry which obligated the city to provide certain rights to the recipients of its water services, including non-property owners. The judgment entry was the result of a lawsuit initiated by four individuals who did not hold title to their homes but were tenants or land-contract vendees and lived within the city of Toledo; they claimed that the city's failure to provide them with notice before shutting off their water and its failure to offer options for continued water service had deprived them of a property interest in violation of due process of law.

{¶ 10} The parties reached an agreement and the city consented to a judgment entry ("CJE") that set forth procedures the city must follow before terminating water services. Pursuant to the CJE, before the city may shut off water service to a home, the city must send a notice to the address. The CJE provides a tenant with the right to receive notice before termination of water service and with limited rights to arrange to

make payments for water service if the tenant's water services are subject to termination due to non-payment by the landlord.

{¶ 11} The CJE also granted a permanent injunction in favor of plaintiff Ruby McDowell, precluding the termination of water service for lack of a contract or other written agreement for such services with McDowell's landlord. The injunction was conditioned upon McDowell's satisfying the quarterly water and sewer fees for the premises in a timely manner. The injunction stated that it was for the benefit of McDowell, individually, and was intended to terminate upon her failure to reside at the designated property, upon non-payment of the water and sewer bills, or upon further order of the court.

{¶ 12} After entry of the consent judgment, the city modified the Toledo Municipal Code's utility regulations to conform to the judgment. Specifically, the city updated one portion of the code to reflect the termination notice language, rent escrow, and account deposit procedures require by the CJE. The CJE as codified into the city's administrative regulations has been the stated policy of the city since the parties consented to the judgment in 1992.

{¶ 13} On June 3, 2010, the city terminated water service to appellee Tate without providing notice of the termination. At that time, Tate was a tenant at property located at 1607 Roosevelt Avenue in Toledo. Tate contacted the city, which refused to restore his water service or provide any options as outlined in the CJE and set forth in the 1992 modifications to the Toledo Municipal Code. At the same time, the city promulgated

changes to the administrative code that directly conflicted with the consent entry by eliminating any right to notice or options to continue services. The proposed changes were scheduled to go into effect on June 27, 2010.

{¶ 14} In response to these actions, Kyle Tate, along with the Toledo Fair Housing Center, filed an emergency motion on June 18, 2010, to enforce the CJE pursuant to Civ.R. 71 as to Tate's residence at 1607 Roosevelt Avenue, Toledo. Tate argued that the 1992 CJE entitled him as well as other occupants to notice and options to continue water services prior to a termination. The city's failure to send a notice prior to termination or provide Tate with options to continue services, Tate argued, was in direct violation of the CJE. Tate further argued that the city's proposed new regulations, set to become effective in a matter of days, would deny residents the rights set forth in the CJE. Tate asserted that he had standing to request enforcement of the CJE by virtue of his personal stake in the outcome of the controversy. Tate also argued that the Toledo Fair Housing Center's constituents, which include low income and minority renters, also had a stake in the outcome of this matter. Additionally, Tate argued that he and the Fair Housing Center were intended beneficiaries of the CJE by virtue of language in the entry that repeatedly obligated the city to give notice to "occupants," provide options to "residents" to maintain services at "the premises," and provide "vendees" options to continue services. Tate further argued that, while one portion of the CJE provided limited injunctive relief specifically to Ruby McDowell, the overall intent of the entry was clearly to provide its benefits to all Toledo residents.

{¶ 15} On June 27, 2010, the trial court ruled that the CJE remained in full force and effect, that Tate is an intended beneficiary of the 1992 consent entry, and that the city's proposed rules conflicted with the consent entry and are therefore invalid. The city was ordered to restore water service to Tate's residence and provide the occupants of the residence with notice as required by the 1992 CJE. The city appeals from the June 27, 2010 judgment.

{¶ 16} Before considering appellant's assignments of error, this court will address the "Notice of Suggestion of Death and Separation from Public Office by Defendant-Appellant" which the city of Toledo filed in this court on September 15, 2010. Appellee Tate timely filed a memorandum in opposition. In support, appellant cites Civ.R. 25 and App.R. 29. Appellant asserts that plaintiff Ruby McDowell died on or about September 28, 1995, and that the status of the three other original plaintiffs is unknown. Appellant concludes that suggestions of death apply to all plaintiffs. Appellant also states that the action should be dismissed as to two original defendants: former city manager Philip Hawkey because the office of city manager has since been eliminated, and Robert Reinbolt, former director of the department of public utilities, because he no longer holds that office. In its notice, appellant asks this court for an order dismissing with prejudice this action with respect to all of the above-named parties.

{¶ 17} The legal issue to be decided in this appeal does not involve any of the persons named by appellant. In response to Tate's Civ.R. 71 motion, the trial court ruled that the city must comply with the obligations set forth in the 1992 CJE and that Tate is

entitled to enforce the consent judgment as a third-party beneficiary. Additionally, Civ.R. 25, upon which appellant relies, applies to proceedings in the trial court and is therefore not applicable to this appeal. Further, Hawkey and Reinbolt have not appealed from the trial court's June 2010 decision and therefore there is no need for successors for either individual to be substituted pursuant to App.R. 29(C), also cited by appellant. As to McDowell and the other plaintiffs, App.R. 29(A) is intended to be used when a party dies after a notice of appeal is filed or while a proceeding is otherwise pending in the court of appeals. According to appellant, McDowell died in 1995, which removes her from either of those time frames. As to the other plaintiffs, there is no evidence in the record that any of them have died and, again, the status of those original plaintiffs is not relevant to Tate's Civ.R. 71 motion. We therefore find that appellant's "Notice of Suggestion of Death and Separation from Public Office by Defendant-Appellant" is moot and, accordingly, proceed with our review of appellant's appeal.

{¶ 18} In support of its first assignment of error, the city asserts that Tate was never a party to the original complaint and that only an intended third-party beneficiary has standing under Civ.R. 71 as a non-party to pursue enforcement of the consent decree. Appellant asserts that Tate cannot meet the burden of showing he is an intended third-party beneficiary. Appellant also argues that the CJE contained provisions for its termination, and that those provisions were met upon the death of Ruby McDowell in 1995. Therefore, appellant argues, Tate cannot establish any substantive rights to water service other than those the lower court granted him in the June 2010 decision

("* * * The City shall restore water service to the movant, Kyle Tate. The City shall provide the occupants of 1607 Roosevelt Avenue, Toledo, Ohio, with the notice provided for in the Consent Judgment Entry. * * *")

{¶ 19} Clearly, Tate was not a party to the 1992 consent judgment entry. However, in its June 27, 2010 decision, the trial court found that Tate was "* * * an emergency movant entitled to seek relief by reason of his inclusion as a third party beneficiary of the unambiguous contract which contains a manifest intention to include parties like him."

{¶ 20} In *Save the Lake Ass'n. v. Hillsboro* (2004), 158 Ohio App.3d 318, 324, the Fourth District Court of Appeals held that a non-party may enforce a consent judgment entry through Civ.R. 71 if he has standing and is an intended beneficiary of the consent judgment entry.

{¶ 21} Civ.R. 71 states in relevant part: "When an order is made in favor of a person who is not a party to the action, he may enforce obedience to the order by the same process as if he were a party; * * *." Civ.R. 71 "* * * is intended to eliminate the necessity of making persons technical parties to suits in order to reach a just and proper result." Staff Notes to Civ.R. 71 (1970).

{¶ 22} A review of the CJE reveals language that provides rights for persons other than the late Ruby McDowell and obligates the city to provide notice and options to continue water services to individuals such as Tate. In Section A, "Non-Payment Termination," the CJE sets forth the basic requirements for the city prior to termination of

water services for non-payment. Pursuant to the CJE, the city must provide "not less than eight (8) working days prior notice to occupant of a pending water shut-off when service is to be terminated for non-payment." The judgment then sets forth the specific notice requirements and the rights of occupants to make certain payment arrangements for services. It contains samples of the notices to be provided in the event of a non-payment termination and allows for the creation of a special deposit account so that tenants or other residents may make payments for water on the landlord's account. None of the requirements set forth in Section A are specific to Ruby McDowell.

{¶ 23} Section B of the CJE requires the city to provide a specific notice in the event of an owner-ordered shut-off. "Upon request of an owner of property for termination of utility service at premises occupied by another, [the city] will provide not less than eight (8) calendar days notice of the proposed turnoff." This right to notice is not specific to Ruby McDowell; the rights are provided to all residents faced with an owner-ordered shut-off.

{¶ 24} Section C of the CJE provides rights to land contract vendees. This section provides that such vendees may receive water services, although they are not the listed title holder, if they provide proof of their status as a vendee. The record reflects that Ruby McDowell was a tenant, not a land contract vendee. Again, this further demonstrates that the intent of the CJE was to confer rights and benefits to individuals other than Ruby McDowell.

{¶ 25} Lastly, Section D of the CJE provides that "[a]ll non-emergency termination of utility service, including termination based upon the death of the owner, will be preceeded by written notice when the service address differs from the billing address." This section also clearly was written to apply to all recipients of city water services, not just Ruby McDowell.

{¶ 26} A third-party beneficiary is one for whose benefit a promise has been made in a contract but who is not a party to the contract. *Berge v. Columbus Community Cable Access* (1999), 136 Ohio App.3d 281, 303. Before a third-party beneficiary can enforce that contract, however, the individual must be an intended beneficiary as opposed to merely an incidental beneficiary. *Hill v. Sonitrol of Southwestern Ohio, Inc.* (1988), 36 Ohio St.3d 36, 40.

{¶ 27} As explained above, in order to ensure compliance with the CJE, the city adopted the terms of the judgment entry when it revised its administrative regulations shortly thereafter, essentially mirroring the terms of the CJE. If the CJE had been intended to apply only to the original parties to the lawsuit in 1992, the city would not have incorporated identical terms into the Toledo Municipal Code as it did. There is no language in the CJE indicating that the rights to water services were in any way limited to Ruby McDowell's particular situation or terminable upon McDowell's death, as appellant argues.

{¶ 28} Based on our review of the 1992 CJE, we find that its purpose was to benefit all city residents who were recipients of city water services and not just

McDowell or the other named plaintiffs. The entry refers throughout to unnamed "occupants" or land contract "vendees" as well as to "premises" without reference to a specific address. Accordingly, the CJE must be read as applying to third parties who were intended to benefit from the order in the future and who may therefore enforce it. Therefore, Tate is an intended beneficiary who has enforceable rights under the judgment. Appellant's first assignment of error is not well-taken.

{¶ 29} Appellant argues in support of its second assignment of error that the trial court erred by finding that the Toledo Fair Housing Center ("FHC") had standing as an incidental third-party beneficiary of the CJE. While the trial court did find that the FHC was an "incidental beneficiary" to the CJE, it did not find that the center had standing. As an incidental beneficiary, the FHC has no enforcement rights under the CJE. Insofar as this assignment of error misrepresents the trial court's decision, it is not well-taken.

{¶ 30} In support of its third assignment of error, appellant asserts that the trial court erred by finding that the expiration of the injunction granted in favor of McDowell had no effect on the balance of the CJE. The city argues that it did not agree to extend the CJE's provisions beyond the date McDowell's occupancy of the premises terminated, and further asserts that the CJE contained provisions for termination which were met when McDowell died in 1995.

{¶ 31} Paragraph 2 of the CJE addresses the injunction and contains the following relevant language:

{¶ 32} "This injunction is for the benefit of Ruby McDowell, individually, and is intended to terminate upon her failure to reside at the captioned premises, the nonpayment of the quarterly water and sewer bills, or further Order of this Court."

{¶ 33} The injunction is not referred to again in the judgment entry. The language concerning the injunction in paragraph two is followed by 14 additional paragraphs under the headings "Non-Payment Termination," "Owner-Ordered Termination," "Land Contract Terminations," and "General." Clearly, the obligations and rights set forth in the balance of the CJE were not contingent upon McDowell's continued residence at 1433 Norwood in Toledo and were addressed separately from the issue of the injunction. The trial court could have included language specifying a termination date for the remainder of the judgment entry but obviously did not do so. There is simply no language in the CJE to support the conclusion that the entire entry terminated under the conditions set forth in the injunction. Accordingly, appellant's third assignment of error is not well-taken.

{¶ 34} In its fourth assignment of error, appellant asserts that the trial court's decision granting Tate's emergency motion was "outside the CJE" and in direct violation of the Toledo Municipal Code.

{¶ 35} Appellant argues that the trial court's decision was outside the CJE because the CJE had long since "expired" and because Tate was neither a party to the CJE nor an intended third-party beneficiary. In light of our finding above that the CJE had not

terminated and that Tate was an intended third-party beneficiary, this argument is without merit.

{¶ 36} Appellant also argues that the trial court's order of relief allowing restoration of water services to Tate violates Toledo Municipal Code 933.07 by providing Tate with the option to "open and maintain an active account" with the Department of Public Utilities ("DPU"). Toledo Municipal Code 933.07(a), cited by appellant, states that "[o]wners of real property shall be the only parties permitted to open and maintain active accounts with the Department of Public Utilities for water and/or sewer service to such property." Contrary to appellant's argument, however, the CJE does not contain language providing Tate or any other tenant of residential property in Toledo with the option of "opening and maintaining an active account" with the DPU. The CJE, under paragraph six, provides "a resident of the premises in question" with several options to "maintain or restore service" once the required notice is sent. Those options include paying the outstanding charges, depositing the rent into escrow, or depositing an amount equal to four months' average billing for the premises into the DPU water deposit trust fund. Finally, pursuant to paragraph seven of the CJE, once the tenant has selected an option, "[the city] shall establish a new account *in the titleholder's name* * * *." (Emphasis added.) Clearly, the CJE does not contain language violating Toledo Municipal Code 933.07(a) as appellant claims. This argument is without merit.

{¶ 37} Based on the foregoing, appellant's fourth assignment of error is not well-taken.

{¶ 38} In its fifth assignment of error, appellant asserts that the trial court erred by ordering that the CJE remains in full force and effect. The city argues that the judgment entry terminated at will—presumably at the city's will—under general contract law because a "reasonable time" had passed since the parties signed the entry. The city asserts that the CJE was entered more than 18 years ago and that it therefore would be reasonable for it to terminate. This argument must fail because the judgment entry is a judgment of the court, signed by the judge. The city cannot terminate it simply because a certain number of years has passed or by way of passing conflicting administrative regulations.

{¶ 39} Ohio courts have held that a consent judgment has the same force and effect as a judgment and is enforced as such. Finding that a consent judgment operates with the same force given to a judgment on the merits in a fully adversarial proceeding, the Supreme Court of Ohio has stated: "* * * Implicit in the rule is the recognition that a judgment entered by consent, although predicated upon an agreement between the parties, is an adjudication as effective as if the merits had been litigated and remains, therefore, just as enforceable as any other validly entered judgment." *In re Gilbraith* (1987), 32 Ohio St.3d 127, 129 (citations omitted.) See, also, *S. Ohio Coal Co. v. Kidney* (1995), 100 Ohio App.3d 661, 668. As stated in *S. Ohio Coal* at 668, a consent judgment "is no different from any other judgment." As such, the consent judgment in this case did not terminate simply due to the passage of time and remained in effect at the time Tate

filed his Civ.R. 71 emergency motion. Accordingly, appellant's fifth assignment of error is not well-taken.

{¶ 40} In its sixth assignment of error, appellant asserts that the trial court erred by finding in its June 2010 decision that "any rules and regulations of the director of public utilities not consistent with the Consent Judgment entry are invalid." Appellant argues that the Toledo Municipal Code is presumed valid and that Tate failed to meet his burden of establishing that the relevant rules and regulations are unconstitutional. Appellant states that when the validity of a municipal ordinance is challenged, the burden is on the complaining party to establish the unconstitutionality of the law. However, Tate did not challenge the validity of any portion of the Toledo Municipal Code; he merely sought to enforce the 1992 consent judgment entry as well as the existing rules and regulations as established in 1992. When Tate's emergency motion was filed on June 18, 2010, the changes made to the municipal code in 1992 were still in effect. In his emergency motion, Tate argued that the director of the department of public utilities was without power to overturn or interfere with the CJE by way of the proposed new regulations.

{¶ 41} As explained in *S. Ohio Coal*, supra, a properly designated city official may apply for an order granting relief from a consent judgment pursuant to Civ.R. 60. In the case before us, the city did not file a Civ.R. 60(B) motion for relief from judgment but rather promulgated new rules that were in conflict with the still-valid consent entry.

{¶ 42} As stated above, a consent judgment is just as enforceable as any other validly entered judgment. It remained valid at the time of the trial court's June 18, 2010 decision. Accordingly, appellant's sixth assignment of error is not well-taken.

{¶ 43} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. Costs of this appeal are assessed to appellant pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.