[Cite as *Schwert v. Abramczyk*, 2013-Ohio-3855.]

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

Gary Schwert, et al.

Appellees

v.

Douglas Abramczyk, et al.

Defendants

[Fulton County Board of Health—Appellant]

Court of Appeals No. F-12-016

Trial Court No. 09CV000169

DECISION AND JUDGMENT

Decided: September 6, 2013

* * * * *

Jan H. Stamm and Eric K. Nagel, for appellees.

Scott A. Haselman, Fulton County Prosecuting Attorney, and
Jon H. Whitmore, Assistant Prosecuting Attorney, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendant-appellant, Fulton County Board of Health ("the Board"), appeals the February 3, and September 5, 2012 judgments of the Fulton County Court of Common Pleas which, respectively, denied the Board's motion for judgment on the

pleadings and motion for summary judgment and granted appellees Gary and Sarah Schwert's motion for summary judgment on their declaratory judgment action. Upon review, we reverse.

{¶ 2} The relevant facts are as follows. In September 1998, Douglas and Tracy Abramczyk applied for a variance from the administrative code regulations requiring each dwelling on a lot to be served by its own sewage disposal system. The Abramczyks requested the variance in order to allow Tracy's ill grandmother to live in the mobile home on their property so they could care for her. In a letter from the Board dated December 8, 1998, the variance was granted with the following conditions:

> 1. Mary Yahner occupies the manufactured home.
>
> 2. At such time that Mary Yahner no longer occupies the manufactured home the manufactured home must be disconnected from the existing sewage disposal system. The manufactured home must remain vacant, removed, or a standard sewage system installed meeting all applicable regulations.
>
> 3. The existing sewage system must be inspected annually by the Fulton County Health Dept. to assure [sic] it is functioning and that Mary Yahner is still residing in the manufactured home.

{¶ 3} It is undisputed that Mary Yahner died shortly before the 2003 sale of the property to the Schwerts.

{¶ 4} On May 20, 2009, Gary and Sarah Schwert (appellees) commenced a lawsuit in the Fulton County Court of Common Pleas against Douglas and Tracy Abramczyk alleging misrepresentation and fraud in connection with the purchase of the property. Appellees requested the remedy of rescission. Specifically, appellees' complaint alleged that in 2003, they purchased the property under the false representation that it contained a habitable three-bedroom house and separate mobile home or ("guest house.") Appellees learned that there had been a variance granted with regard to the mobile home when they received a letter from the Board, dated March 18, 2009, providing that the 1998 temporary variance was no longer valid and requesting confirmation that the mobile home was no longer connected to the septic system. Following a site visit to the property, the Board determined that a second sewage treatment system needed to be installed if the mobile home was to be used as a dwelling.

{¶ 5} On July 29, 2010, the Abramczyks filed a motion for summary judgment based on the argument that the property was sold "as is" and, as such, they breached no legal obligation to appellees. They claimed that they made no misrepresentations about the nature of the septic system. The Abramczyks further argued that the claims were barred by the applicable statutes of limitations and laches.

{¶ 6} Appellees opposed the motion on August 27, 2010, arguing that reasonable minds could find that the advertisement of the property which included claims of the mobile home's potential use as a mother-in-law suite, guest house or family rental could be construed as an affirmative misrepresentation. Appellees further asserted that their

fraud claim was not time-barred because it was not discovered until 2009. On September 8, 2010, the motion for summary judgment was denied.

{¶ 7} On October 29, 2010, the Abramczyks filed a third-party complaint against Welles-Bowen Realty, Inc. and realtor Jonnie D. Wagner who served as a dual agent for the sale. The Abramczyks alleged that Wagner ignored their instructions to market the property as a single-family residence and that the mobile home was to be specified as personal property included in the sale. A motion to dismiss the complaint based on a statute of limitations argument was filed on December 27, 2010; the motion was denied.

{¶ 8} On June 2, 2011, appellees amended their complaint to include a claim for declaratory judgment against the Board. Appellees requested that Resolution 167.98 be declared a permanent modification of the Health Department regulations as to the mobile home on their property. The Board filed a motion for judgment on the pleadings, arguing that appellees lacked standing to bring the action because no justiciable controversy existed.

{¶ 9} On August 24, 2011, appellees filed a motion to require the Board to file an amended response to the request for admissions or, alternatively, to have the responses deemed admitted. The two requests and answers provide:

> Request for Admission No. 9: The residential system presently servicing Plaintiffs' property located at 1814 Co. Rd. 4-1, Swanton, Ohio was originally installed pursuant to regulations which did not limit the number of persons using the system.

Denied. The residential septic system was installed pursuant to regulations that limit the number of bedrooms serviced by the system. In this instance, the system was approved to service a three-bedroom dwelling.

Request for Admission No. 10: The existing residential septic system at 1814 Co. Rd. 4-1 Swanton, Ohio is designed to accommodate use by at least 12 people if properly maintained.

Denied. As addressed in previous response, the system was designed to accommodate three bedrooms.

{¶ 10} On February 2, 2012, finding that the above admissions were too "tenuous" the trial court deemed them "nonresponsive" and admitted. The court then denied the Board's motion for judgment on the pleadings.

{¶ 11} On March 13, 2012, the Board filed a motion for summary judgment. The Board first argued that if it lacked authority to grant a temporary variance then it was void ab initio. The Board further argued that if the board exceeded its authority to grant the temporary variance then the order was voidable; however, because an administrative appeal was not pursued in 1998, the issue was barred by res judicata.

{¶ 12} Thereafter, on July 20, 2012, appellees again sought to have two requests for admissions deemed admitted and to strike "irrelevant material." The requests and responses provided:

Request for Admission No. 11: Admit that under Ohio Administrative Code Section 3701-29-20 VARIANCE (copy attached), no

variance of any type could be granted by the Fulton County Health Department which would defeat the spirit and general intent of the Administrative Code dealing with sanitary system requirements for single family homes.

Deny. A variance defeating the spirit and general intent of the Administrative code dealing with sanitary system requirements for single family homes could be granted erroneously by the Fulton Co. Health Board. That is why such decisions are reviewable under the Administrative appeal process under R.C. 2506.

Request for Admission No. 14: Admit that no language under Administrative Code Section 3701-29-20 VARIANCE (copy attached) contains any express authorization for Defendant Fulton County Health Department to limit the duration of a variance from the requirements of Administrative Code Sections 3701-29-01 through 3701-29-21 of the Ohio Sanitary Code as it applies to single family dwellings.

Deny. OAC 3701-29-20(A) does not contain any express authorization or prohibition for Fulton County Health Department to limit the duration of a variance from the requirements of OAC 3701-29-01 through 3701-29-21. The Ohio Department of Health has provided clarification and states "Boards of Health have the authority to establish specific terms and conditions related to the variance, including provisions

for temporary approvals of sewage system configurations or designs." A copy of the clarification is attached. See attached exhibit (letter from State).

{¶ 13} Appellees argued that the responses did not comport with Civ.R. 36, in that the Board could not add additional language or attachments to its responses in an effort to limit the effect of the admission. The Board opposed the motion.

{¶ 14} Thereafter, on March 13, 2012 and July 30, 2012, the parties filed cross-motions for summary judgment. Appellees' arguments were based, in large part, on the requests for admissions which were answered or otherwise deemed admitted by the court (though the motion relating to request for admissions Nos. 11 and 14 was still pending) including the fact that, in contravention of the resolution, the Board had failed to make yearly inspections of the trailer and hook-up and, in fact, had done nothing until the 2009 letter it sent to appellees. Further the court deemed admitted the statements that the septic system was initially installed in the absence of a limitation on the number of persons using the system and that the existing system, if properly maintained, could accommodate use by 12 persons.

{¶ 15} Appellees summarized their argument as follows: Because the initial grant of the variance did not violate the spirit and intent of the rules or was contrary to public interest, and because variances typically run with the land and the Board failed to establish that it had the authority to issue a temporary variance, appellees were entitled to declaratory judgment in their favor finding the limited duration of the variance

unenforceable and allowing them to continue to use the septic system as modified by the variance.

{¶ 16} The Board responded that appellees' declaratory action improperly sought a review of the application of the rule regarding variances, not a determination of the construction of the rule. Thus, the Board again argued that an administrative appeal under R.C. Chapter 2056 was the proper avenue, rather than a declaratory judgment action. Finally, the Board argued that although they failed to inspect the premises as stated in the variance, estoppel should not be applied against a governmental agency due to the potential negative effect on its citizens.

{¶ 17} Attached to the Board's memorandum was the affidavit of Kim Cupp, Director of Environmental Health for Fulton County, detailing her correspondence with the Ohio Department for Health which culminated in a letter from Lance Himes, Acting General Counsel for the Ohio Department of Health, and which was attached to the affidavit. The April 5, 2012 letter stated that boards of health have the authority to establish specific terms and conditions related to a variance. Mr. Himes indicated that the Ohio Board of Health was aware of other local health districts issuing similar variances.

{¶ 18} On August 21, 2012, appellees filed a motion to strike the affidavit of Kim Cupp arguing that the letter from Hines was impermissible hearsay and that the affidavit did not comport with the personal knowledge requirements under Civ.R. 56(E). The court failed to rule on the motion.

{¶ 19} The court issued its judgment entry on September 5, 2012. In ruling on the motions, the court quickly summarized both arguments and, finding them "about fifty-fifty ... each way" determined that equity leaned in favor of appellees. The court granted the motion to have requests for admissions 11 and 14 deemed admitted. Applying the admissions, the court then granted appellees' motion for summary judgment and denied the Board's motion. This appeal followed.

{¶ 20} The Board raises two assignments of error for our consideration:

> Assignment of Error No. 1: The trial court committed error when it granted summary judgment in favor of the plaintiffs-appellees and denied defendant-appellant's motion for summary judgment and abused its discretion to grant plaintiffs-appellees declaratory relief on the basis of summary judgment.
>
> Assignment of Error No. 2: The trial court committed error when it denied appellant's motion for judgment on the pleadings.

{¶ 21} We will address the assignments of error in reverse order. In the Board's second assignment of error, it contends that because there was no justiciable controversy between the parties, the trial court erred when it denied the motion for judgment on the pleadings. Specifically, the Board argues that appellees lacked standing to maintain the declaratory judgment action because if the argument is that the Board had no authority to make the 1998 variance temporary, they are not the proper party to seek such a review.

{¶ 22} We first note that when ruling on a motion for judgment on the pleadings under Civ.R. 12(C), which specifically addresses questions of law, a trial court "must construe as true all of the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party." *Thornton v. Cleveland*, 176 Ohio App.3d 122, 2008-Ohio-1709, 890 N.E.2d 353, ¶ 3 (8th Dist.). Our review of the court's judgment is de novo. *Id.*

{¶ 23} In order to maintain a declaratory judgment action under R.C. Chapter 2721, the Declaratory Judgment Act, a party must show that a real, justiciable controversy exists between adverse parties and that speedy relief is necessary to preserve rights which may otherwise be lost. (Citations omitted.) *Huron Cty. Bd. of Commrs. v. Saunders*, 149 Ohio App.3d 67, 2002-Ohio-3974, 775 N.E.2d 892, ¶ 21 (6th Dist.).

{¶ 24} Under R.C. 2721.03:

> [A]ny person interested under a deed, will, written contract, or other writing constituting a contract or any person whose rights, status, or other legal relations are affected by a constitutional provision, statute, rule as defined in section 119.01 of the Revised Code, municipal ordinance, township resolution, contract, or franchise may have determined any question of construction or validity arising under the instrument, constitutional provision, statute, rule, ordinance, resolution, contract, or franchise and obtain a declaration of rights, status, or other legal relations under it.

{¶ 25} In the instant case, appellees claim that they purchased the property in 2003, based on representations that the mobile home was habitable and that they intended to rent it for extra income. Certainly, the Board's 2009 letter informing them of the temporary variance and requesting that they disconnect the mobile home from the septic system demonstrates that, as owners of the property, they will be affected by the enforcement of the temporary variance. Accordingly, we agree that a justiciable controversy existed and that the trial court did not err when it denied the Board's motion for judgment of the pleadings. The Board's second assignment of error is not well-taken.

{¶ 26} In its first assignment of error, the Board argues that the trial court erred in granting appellees' motion for summary judgment and denying its motion for summary judgment. This court employs a de novo standard in reviewing the grant of a motion for summary judgment. *Brown v. Scioto Cty. Bd. of Commrs*., 87 Ohio App.3d 704, 711, 622 N.E.2d 1153 (4th Dist.1993). The trial court's judgment is not afforded any deference, and this court applies the same test, set forth in Civ.R. 56(C), as the trial court. Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that no genuine issue as to any material fact remains to be litigated, the moving party is entitled to judgment as a matter of law, it appears from the evidence that reasonable minds can come but to one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Turner v. Turner*, 67 Ohio St.3d 337, 617 N.E.2d 1123 (1993).

{¶ 27} In appellees' complaint for declaratory judgment, they requested that the court determine that the 1998 variance issued by the Board was permanent in nature. As set forth above, in their motion for summary judgment appellees specifically argued that the Board did not have the authority to issue a temporary variance and because variance typically runs with the land, the variance was still valid following the transfer of property from the Abramczyks. Appellees also stressed the fact that although Mary Yahner died in 2003, the Board failed to notify them of the expiration of the variance until 2009. Further, appellees highlighted the deemed admissions that the septic system was originally installed without limitations on the number of individuals using it and that the existing system was designed to accommodate use by at least 12 individuals if properly maintained.

{¶ 28} The Board contended that if, in fact, it lacked authority to issue the temporary variance that rendered the variance void, not permanent. Alternatively, the Board claimed that if the variance was merely voidable, appellees' action is barred by res judicata because they did not file an administrative appeal of the 1998 order.

{¶ 29} A board of health may make orders and regulations as necessary for the public health and prevention and abatement of nuisances. R.C. 3709.21. Ohio Adm.Code 3701-29-07(A)(1)(b) limits appellees' 1500 gallon septic tank to a single family, three-bedroom dwelling. However, Ohio Adm.Code 3701-29-20(A) allows for variances "as will not be contrary to the public interest, where a person shows that because of practical difficulties or other special conditions their strict application will

cause unusual and unnecessary hardship. However, no variance shall be granted that will defeat the spirit and general intent of said rules, or be otherwise contrary to the public interest." A board of health has discretion in determining whether a particular difficulty or special condition will cause unusual hardship. *See* 2010 Ohio Atty.Gen.Ops. No. 2010-019. Reviewing the arguments of the parties and the record before us, we find that the Board, in its discretion, properly issued a temporary variance which expired at the time Yahner ceased to reside in the mobile home.

{¶ 30} The parties agree that the Board did not inspect the property to ensure compliance with the 1998 variance and failed to acknowledge Yahner's death in 2003; however, these facts do not alter the temporary nature of the variance and the Board's authority to seek compliance. The doctrines of laches or estoppel:

> [I]n general, do not apply against the state or its agencies in the exercise of a governmental function. *Hortman v. City of Miamisburg*, 110 Ohio St.3d 194, 199, 2006-Ohio-4251, ¶ 25. The state cannot be estopped from its duty to protect the public welfare, because it failed to act as expeditiously as possible. *Sekerak v. Fairhill Mental Health Ctr.* (1986), 25 Ohio St.3d 38, 39. *State ex rel. Petro v. Maurer Mobile Home Court, Inc.*, 6th Dist. Wood No. WD-06-053, 2007-Ohio-2262, ¶ 74.

{¶ 31} Based on the foregoing, the Board's first assignment of error is well-taken. Accordingly, pursuant to App.R. 12(B), we reverse the September 5, 2012 judgment of the Fulton County Court of Common Pleas in favor of appellees and enter judgment in

favor of the Board on its motion for summary judgment. Appellees are ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment reversed.

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

Stephen A. Yarbrough, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE