

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

James A. Telb

Court of Appeals No. L-13-1069

Appellant

Trial Court No. CI0201103305

v.

Lucas County Board of County
Commissioners

DECISION AND JUDGMENT

Appellee

Decided: January 31, 2014

* * * * *

Richard M. Kerger and Kimberly A. Conklin, for appellant.

Gerald R. Kowalski and Sarah Skow, for appellee.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Plaintiff-appellant, James A. Telb, appeals the March 22, 2013 judgment of the Lucas County Court of Common Pleas which granted summary judgment in favor of appellee, Lucas County Board of County Commissioners. Because we find that there are no genuine issues remaining for trial, we affirm.

{¶ 2} Appellant commenced this declaratory judgment action on May 16, 2011.

At all times relevant herein, appellant was employed as the elected Sheriff of Lucas County, Ohio. Appellant requested that the court declare that the Lucas County Board of County Commissioners (“the Commissioners”) reimburse him for legal expenses incurred following a criminal indictment and trial in the United States District Court for the Northern District of Ohio. The April 14, 2009 indictment stemmed from allegations that appellant provided false statements in an attempt to conceal the circumstances of the death of an inmate at the Lucas County Jail. Following a five-week trial, appellant was acquitted of the charges.

{¶ 3} On July 14, 2011, the Commissioners filed a motion for judgment on the pleadings arguing that appellant’s contention that they had a “moral obligation” to reimburse his legal fees was legally unsupportable. In opposition, appellant referred to an Ohio appellate case which found that the county board of commissioners and the prosecuting attorney abused their discretion when they refused to apply to the common pleas court for reimbursement of the board of election employees legal fees incurred in their defense of criminal charges. *State ex rel. Dreamer v. Mason*, 189 Ohio App.3d 420, 2010-Ohio-4110, 938 N.E.2d 1078 (8th Dist.2010).

{¶ 4} Appellant also filed motion for leave to file an amended complaint for declaratory judgment. The Commissioners opposed the motion. On September 15, 2011,

the trial court granted appellant's motion for leave and denied the Commissioners' motion for judgment on the pleadings. The amended complaint contained claims for unjust enrichment and breach of duty

{¶ 5} On August 1, 2012, the Commissioners filed a motion for summary judgment based on three legal arguments. First, they claimed that Ohio law prohibits reimbursement of a county officer's legal fees after the case has concluded. Next, appellant failed to comply with the "strict statutory requirements" for having the Commissioners approve outside counsel. And third, the federal charges against appellant could not be construed as stemming from a "good-faith" attempt to perform his duties. In support of the motion, the Commissioners relied on appellant's deposition as well as the deposition of assistant prosecuting attorney Steven Papadimos.

{¶ 6} On August 3, 2013, appellant filed a motion for summary judgment contending that he was entitled to declaratory relief because the criminal charges arose from the performance of his official duties and he was acquitted. Appellant relied on the *Dreamer* decision as well as the Supreme Court of Ohio's decision on appeal. *See State ex rel. Dreamer v. Mason*, 129 Ohio St.3d 94, 2011-Ohio-2318, 950 N.E.2d 519. Appellant also relied on his and Papadimos' deposition testimony. Briefs in opposition to the motions were filed.

{¶ 7} An oral hearing on the cross-motions was held on February 20, 2013. On March 22, 2013, the trial court granted the Commissioners' motion for summary judgment and denied appellant's motion for summary judgment. The court held that

because appellant failed to request that the prosecutor and the Commissioners petition the court of common pleas for appointment of outside counsel until after the matter had concluded, he failed to comply with the statutory requirements under R.C. 309.09(A). The court indicated that appellant could have written a letter to the Commissioners and the prosecuting attorney demanding action or could have commenced an action seeking to compel the prosecuting attorney to represent him or for permission to retain counsel at county expense. The court also relied on two Ohio Attorney General Opinions which indicated that the application for counsel must be made prior to the conclusion of the matter. The court further commented that because the factual scenario in *Dreamer*, was too divergent from the present facts it was “inapposite.” Finally, the court noted that if there had been a breach of duty, it was by the prosecuting attorney who was not a party to the action. This appeal followed.

{¶ 8} On appeal, appellant raises the following assignment of error:

The trial court committed error when it granted summary judgment in favor of appellees by finding that appellant failed to comply with R.C. 309.09(A).

{¶ 9} We initially note that appellate review of a trial court’s grant of summary judgment is de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Accordingly, we review the trial court’s grant of summary judgment independently and without deference to the trial court’s determination. *Brown v. Scioto Cty. Bd. of Commrs.*, 87 Ohio App.3d 704, 711, 622 N.E.2d 1153 (4th Dist.1993).

Summary judgment will be granted only when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978). The burden of showing that no genuine issue of material fact exists falls upon the party who moves for summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 294, 662 N.E.2d 264 (1996). However, once the movant supports his or her motion with appropriate evidentiary materials, the nonmoving party “may not rest upon the mere allegations or denials of the party’s pleadings, but the party’s response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” Civ.R. 56(E).

{¶ 10} The statutory sections implicated in this action are R.C. 309.09(A) and 305.14(A). R.C. 309.09(A) provides:

The prosecuting attorney shall be the legal adviser of the board of county commissioners, board of elections, all other county officers and boards, and all tax-supported public libraries, and any of them may require written opinions or instructions from the prosecuting attorney in matters connected with their official duties. The prosecuting attorney shall prosecute and defend all suits and actions that any such officer, board, or tax-supported public library directs or to which it is a party, and no county

officer may employ any other counsel or attorney at the expense of the county, except as provided in section 305.14 of the Revised Code.

{¶ 11} R.C. 305.14(A) states:

The court of common pleas, upon the application of the prosecuting attorney and the board of county commissioners, may authorize the board to employ legal counsel to assist the prosecuting attorney, the board, or any other county officer in any matter of public business coming before such board or officer, and in the prosecution or defense of any action or proceeding in which such board or officer is a party or has an interest, in its official capacity.

{¶ 12} In his sole assignment of error, appellant argues that the trial court erroneously concluded that R.C. 309.09(A) imposed an affirmative duty on appellant. He states that the statutory provisions place a duty on the Lucas County Prosecuting Attorney and the Commissioners to either defend appellant in the criminal prosecution or petition the court of common pleas for the retention of outside counsel. Appellant contends that the prosecuting attorney and the Commissioners further failed to act when they failed to petition the court of common pleas to appoint him outside counsel.

{¶ 13} Appellant asserts that the outcome of this action is “determined” by the above-cited case of *Dreamer*, 129 Ohio St.3d 94, 2011-Ohio-2318, 950 N.E.2d 519. In *Dreamer*, the Ohio Supreme Court determined that the county board of elections employees were not “county officers” and, thus, were not entitled to reimbursement of

legal fees under R.C. 309.14(A). The court, however, did not address the issue decided in the lower court regarding whether mandamus was the proper remedy where the board of commissioners failed to apply for the appointment outside counsel for board of elections employees. *Dreamer*, 189 Ohio App.3d 420, 2010-Ohio-4110, 938 N.E.2d 1078.

{¶ 14} In *Dreamer*, the relators were board of elections employees who were accused of not complying with the statutory provisions regarding a ballot recount. *Id.* at ¶ 3. Following their indictments they obtained independent counsel. *Id.* at ¶ 6. Counsel repeatedly requested that the elections board ask the respondents, county commissioners and the prosecuting attorney, to apply to the court of common pleas for authorization for them to employ him as legal counsel. Respondents did not apply to the court because they believed that the prosecutor could find that the relators' conduct did not constitute a well-intended attempt to perform their official duties. *Id.* at ¶ 7.

{¶ 15} The appellate court disagreed noting that the affidavits demonstrated that the elections board committed to pay the relators' legal fees if they were acquitted of the criminal charges. Further, an assistant county prosecutor informed the board members that the county would pay the legal fees if the relators were acquitted. *Id.* at ¶ 8. The proceedings concluded in September 2008, with no convictions. *Id.* at ¶ 38. Approximately one year later, relators commenced the mandamus action. *Id.*

{¶ 16} After initially determining that the relators met the definition of "officers" as provided under R.C. 309.09(A) (the finding that was reversed on appeal), the court

turned to the merits of the action. In granting realtors' motion for summary judgment, the court found that due to the prosecuting attorney's conflict of interest, the respondents had a clear legal duty to apply for the appointment of outside counsel in the court of common pleas. The court noted that based on the specific facts of the case, representation of relators created a conflict of interest and the failure to make the application was an abuse of discretion. *Id.* at ¶ 34. The court then found that the relators had no other adequate remedy at law. *Id.* at ¶ 36.

{¶ 17} The final issue addressed by the court was whether the matter had been brought within a reasonable time. The court first noted that the respondents' wrongful act continued throughout the litigation. *Id.* at ¶ 39. Distinguishing Ohio Attorney General Opinions which state that reimbursement is precluded after the conclusion of the legal action, the court noted:

[R]elators did not hire independent counsel merely on their own initiative. Relators relied on continuous support and representations from the BOE that their legal fees would be paid. Additionally, relators petitioned the BOE, who, in turn, petitioned respondents to apply for the appointment. In the end, the county refused to provide relators with advice, and respondents refused to make the appropriate application under R.C.

305.14. *Id.* at ¶ 46.

The court concluded that "under the limited circumstances" of the case, mandamus was the appropriate remedy. *Id.* at ¶ 51.

{¶ 18} Unlike *Dreamer*, it is undisputed that appellant is a county officer as provided under R.C. 309.09(A) and that the county prosecuting attorney was the “legal advisor” to appellant. Also distinguishable from *Dreamer* is the critical fact that neither appellant nor his counsel ever requested that the prosecuting attorney or the Commissioners apply to the court for the appointment of outside counsel until after the conclusion of the federal action on December 3, 2010. At no point were representations made that the county would reimburse appellant for his legal expenses. Moreover, *Dreamer* involved a mandamus, rather than a declaratory judgment action.

{¶ 19} In his deposition, appellant stated that he had two pre-indictment telephone conversations with the assistant prosecutor where the prosecutor indicated that he did not believe that the office could represent appellant due to the nature of the charges and that they would not provide private counsel. Following his acquittal, appellant’s counsel wrote a letter to Assistant Prosecutor Steven Papadimos, dated December 10, 2011, requesting indemnification. Appellant met with the prosecuting attorney and Papadimos and informed them that he felt he should be reimbursed for his legal expenses. According to appellant, they indicated that they would speak with the Commissioners.

{¶ 20} Papadimos’ deposition testimony confirmed that early in the criminal matter appellant had contacted the prosecutor’s office about representation. Papadimos stated that he informed appellant that he had never encountered a similar situation and that appellant should address it with the Commissioners.

{¶ 21} On January 10, 2011, appellant wrote letters to each of the three Commissioners requesting indemnification for his legal expenses. Appellant admitted that he had had no prior oral or written communication with the Commissioners on the subject. Following the letters, appellant met separately with each commissioner. According to appellant, no promises to pay were made but that there were indications that the matter would be investigated.

{¶ 22} As noted in *Dreamer*, the Ohio Attorney General determined that “R.C. 309.09 and R.C. 305.14 do not authorize a board of county commissioners to reimburse a county officer for expenses incurred in a legal action which is no longer pending.” 1988 Ohio Atty.Gen.Ops. No. 88-055, at syllabus. In reaching his decision, the attorney general observed that the cost-saving policy considerations in R.C. 305.17, which authorizes the board of commissioners to set the compensation of all individuals appointed or employed under R.C. 305.14, would be undercut by ad hoc requests for reimbursement. Further, he considered the language used in R.C. 305.14, which permits “employment” of outside counsel (a prospective action), not reimbursement. *Accord* 1990 Ohio Atty.Gen.Ops. No.90-096 (where no application to the court of common pleas was sought as required under R.C. 305.14(A), the board could not reimburse the county children services executive secretary for expenses of privately retained legal counsel.)

{¶ 23} Based on the foregoing, we find that because appellant neither requested, nor did the Commissioners or prosecuting attorney apply to the court of common pleas

for the employment of outside counsel under R.C. 305.14(A), appellant is precluded from seeking reimbursement. Accordingly, there are no genuine issues remaining for trial and appellant's assignment of error is not well-taken.

{¶ 24} On consideration whereof, we find that substantial justice was done the party complaining and the judgment of the Lucas County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

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, J.
CONCUR.

JUDGE

<p>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.</p>
