[Cite as *Baker v. Senior Emergency Home Repair EOPA*, 2015-Ohio-3083.]

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

William M. Baker, Jr.	Court of Appeals Nos. L-14-1203
Appellant	Trial Court No. CI0201403177
v.	
Senior Emergency Home Repair EOPA	**DECISION AND JUDGMENT**
Defendant	Decided: July 31, 2015

* * * * *

William M. Baker, pro se.

Adam W. Loukx, Law Director, and Jeffrey B. Charles, Chief of Litigation, for appellee, City of Toledo Department of Neighborhoods.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellant, William M. Baker, Jr. appeals an August 26, 2014 judgment of the Lucas County Court of Common Pleas dismissing his complaint against the city of Toledo Department of Neighborhoods (appellee) without prejudice. The judgment granted an unopposed July 28, 2014 motion by the city to dismiss appellant's complaint for failure to state a claim upon which relief can be granted, pursuant to Civ.R. 12(B)(6).

{¶ 2} Appellant has filed a timely notice of appeal of the judgment to this Court. The case has been placed on the court's accelerated calendar. Appellant appears pro se and asserts six assignments of error on appeal:

Assignments of Error

1. The trial court committed prejudicial and reversible error in granting the city defendant's motion to dismiss because the motion was based primarily on the defendant's immunity shield.

2. The trial court committed prejudicial and reversible error when the court refused to accept the plaintiff's complaint's and motion in opposition to dismiss's explanation that EOPA has concurrent jurisdiction with the City Department of Neighborhood Defendant with regard to the governmental function of administering the H.U.D. grant for repairing houses of qualified applicants.

3. The trial court committed prejudicial and reversible error. The trial court refused to accept explanation that EOPA had forwarded the plaintiff-appellant's application and case file to the City's Department of Neighborhoods for them to make repairs on plaintiff-appellant's home. However in past before the plaintiff's application as the City through referrals from EOPA as had in past from applicants with recorded land contracts and had been repairs made by the City of Toledo Department of Neighborhoods defendant. Been done for many other applicants liken to appellant in whom their referrals from EOPA were all referred in the past

with land contracts successfully, but as to the appellant, the defendant City of Toledo Department of Neighborhoods refused to do the repair work and falsely stated City Defendant Department of Neighborhood only repairs houses for persons with conventional mortgages, and not for applicants with registered land contracts with the Auditor's Office like the appellant.

4. The trial court committed prejudicial and reversible error when the court refused to accept the plaintiff-appellant's complaint and wouldn't accept opposition to motion to dismiss's plain interpretation of the EOPA's Emergency Repair Program based on HUD's guidelines, and how EOPA shared the repair responsibilities with the Department of Neighborhoods. How in the past practices of past referrals, a pattern and practice was set requiring the City Defendant to repair the houses passed to them by EOPA. EOPA' s duty was met once the referral to the city defendant was made by EOPA's determination that the applicant qualified for repairs. Further error in making the decision without allowing discovery in preparation for trial on how the referral was made of the plaintiff appellant's qualifying application by Mrs. Brown of EOPA, adjudicating the issue without her testimony in such regard, and dismissing the case without the City defendant providing guidelines other that what guidelines the plaintiff appellant provided from H.U.D. in Exhibit A of plaintiff's motion in opposition to the motion to dismiss; moreover error deciding to dismiss when City defendants did not provide any evidence of alternative

guidelines regarding repairs to properties of seniors 63 and older disabled homeowners, as well as applicants whom have recorded their property with the County Auditor's Office as proof of ownership, and have lived in the property, as single family house for more than 3 years.

5. The trial court committed prejudicial and reversible error when the court under plaintiff's motion in opposition to motion to dismiss and as a result of plaintiff's nunc pro tunc to the opposition motion filed September 11, 2014, the trial court dismissed even though the governmental function the City of Toledo Department of Neighborhood defendant have, and duties thereof there is a very limited that in certain situations there is no immunity from such reckless actions the defendant took and from defendant's intentional failure to act when there is as here established guidelines and expressed statutory governmental authority given defendant to regulate the home repair program in conjunction with EOPA based on following HUD's executive decision making, wherefore the actions and failure to act are those that are reckless and intentional unprotected by the City of Toledo's immunity shield.

6. The trial court committed reversible error when the court did not consider that the plaintiff-appellant's contract with EOPA was interfered with by CDN when they should have notified EOPA and requested that they make the emergency repairs under fact that the plaintiff-appellant had qualified for emergency repairs at EOPA Mr. Wagner and the others listed

on the plaintiff's motion in opposition to defendants motion to dismiss was wrongfully interfering with the contract approval and agreement of plaintiff and Mrs. Brown of EOPA. (Sic.)

{¶ 3} Appellant has argued his assignments of error together. As best we can determine, appellant argues (1) that the trial court erred in failing to consider materials filed in his opposition brief on the motion to dismiss that were filed after the court dismissed the case, and (2) that the city is not immune from liability on appellant's claim pursuant to R.C. Chapter 2744.

Civ.R. 12(B)(6) Standard

{¶ 4} Under Civ.R. 12(B)(6), a complaint may be dismissed for "failure to state a claim upon which relief can be granted." Generally, notice pleading is sufficient to meet the requirements of the rule. *State ex rel. Harris v. Toledo*, 74 Ohio St.3d 36, 37, 656 N.E.2d 334 (1995). "[T]he plaintiff need not allege in the complaint every fact he intends to prove since many facts are not available until after discovery. But, plaintiff must allege a set of facts that would support a cause of action. *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480,768 N.E.2d 1136, ¶ 5." *Haas v. Stryker*, 6th Dist. Williams No. WM-12-004, 2013-Ohio-2476, ¶ 8.

{¶ 5} A Civ.R. 12(B)(6) motion to dismiss should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 245, 327 N.E.2d 753 (1975). The Ohio Supreme Court also directs that in conducting this analysis, "we must presume that all factual allegations of the complaint

are true and make all reasonable inferences in favor of the nonmoving party." *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988); *Haas* at ¶ 9. We review a trial court's grant of a Civ.R. 12(B)(6) motion to dismiss on a de novo basis. *Perrysburg Twp. v. Rossford,* 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5.

{¶ 6} We consider first appellant's contention that the trial court erred in failing to consider materials he submitted in opposition to the motion to dismiss after the trial court had already granted the motion to dismiss and ordered the case dismissed without prejudice.

{¶ 7} The city filed its motion to dismiss on July 28, 2014. The trial court filed its judgment granting the motion to dismiss on August 26, 2014. In its judgment, the trial court noted that appellant had failed to oppose the motion. Appellant did file an opposing brief with exhibits, however, the brief and exhibits were filed on August 27, 2014, after the trial court had issued its judgment.

{¶ 8} The city contends that the trial court properly proceeded to judgment on August 26, 2014 pursuant to Local Rule 5.04(D) and that the record on appeal must be limited to the facts before the trial court at the time of judgment.

{¶ 9} Local Rule 54(D) of the Lucas County Court of Common Pleas provides: "OPPOSITION An opposing party may serve and file a memorandum in oppositions to any motion. The filing shall be made within 14 days after service." The City's motion to dismiss included a certification of service to appellant. Appellant did not claim his opposition brief was delayed by lack of service of the motion and did not seek an

extension of time to oppose the motion. The trial court waited 28 days before treating the city's motion decisional and proceeding to judgment.

{¶ 10} Pursuant to Article IV, Section 5(B) of the Ohio Constitution and Civ.R. 83(A), courts in Ohio may adopt local rules not inconsistent with the Ohio Rules of Civil Procedure and not inconsistent with other rules promulgated by the Ohio Supreme Court. *State ex rel. Henneke v. Davis*, 25 Ohio St.3d 23, 24, 494 N.E.2d 1133 (1986); *Vance v. Roedersheimer*, 64 Ohio St.3d 552, 554, 597 N.E.2d 153 (1992); *Hanson v. Moore*, 6th Dist. Erie No. E-06-039, 2007-Ohio-2829, ¶ 19. A local rule requirement that parties file a brief in opposition to a motion within 14 days of service as applied to motions to dismiss comes within the authority provided local courts under Civ.R 83(A).

Accordingly, we conclude that the trial court did not err in treating the motion to dismiss as decisional and proceeding to judgment on the motion on August 26, 2014.

Record on Appeal

{¶ 11} Ohio law is clear that we must limit our review on appeal to the record before the court at the time of judgment: "A reviewing court cannot add matter to the record before it, which was not a part of the trial court's proceedings and then decide the appeal on the basis of the new matter." *State v. Ishmail*, 54 Ohio St.2d 402, 377 N.E.2d 500 (1978), paragraph one of the syllabus. Accordingly, we limit our consideration in this appeal to material in the record at the time the trial court issued its judgment on August 26, 2014.

{¶ 12} To the extent appellant contends that the trial court erred in failing to consider his opposition brief and exhibits filed on August 27, 2014 after the court ruled on the motion to dismiss, we find the argument without merit.

Allegations of Complaint

{¶ 13} Appellant originally named two defendants in his complaint, Senior Emergency Home Repair/EOPA and the City of Toledo Department of Neighborhoods. He sought relief in the complaint based upon his unsuccessful applications for assistance "under the defendants' respective programs" affording emergency home repairs for seniors. Appellant voluntarily dismissed EOPA as a defendant on August 6, 2014, leaving the City as the sole defendant.

{¶ 14} The complaint is a pro se pleading and difficult to decipher. Appellant alleged in the complaint that the City failed to act on his application for emergency home repairs for months and ultimately denied it. Appellant alleged "mismanagement of the home repair program." The allegations of the complaint are that the city denied appellant's application for benefits based upon a determination that he did not qualify for assistance.

{¶ 15} On appeal, both parties acknowledge that the dispute is over whether a person holding only a land installment contract interest in the property to be repaired qualified for program assistance. Appellant argues that he held a land installment interest in the property and that his application for assistance was wrongfully denied.

{¶ 16} The city argues that the allegations of the complaint present no actionable claim against the city. Appellant does not claim the existence of a contract with the city

or breach of contract. The city contends that it is immune from liability under R.C. 2744.02 for claimed errors in administration of the home repair program. Appellant contends that political subdivision immunity under R.C. Chapter 2744 are unlawful or otherwise do not apply.

{¶ 17} The immunities afforded political subdivisions in Ohio under R.C. Chapter 2744 are valid and have been repeatedly upheld. *Pepper v. Bd. of Edn. Of the Toledo Pub. Schools*, 6th Dist. Lucas No. L-06-1199, 2007-Ohio-203, ¶ 16. R.C. 2744.01(F) includes municipal corporations such as Toledo within the definition of "political subdivisions" for purposes of immunity under R.C. Chapter 2744.

{¶ 18} R.C. 2744.02(A)(1) provides for a general grant of immunity for political subdivisions for governmental and proprietary functions:

> (A)(1) For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.

{¶ 19} R.C. 2744.01(C)(1) defines the term governmental function to include:

> (c) A function that promotes or preserves the public peace, health, safety, or welfare; * * *.

{¶ 20} R.C. 2744.01(C)(2) lists a series of distinct governmental functions, including:

> (f) Judicial, quasi-judicial, prosecutorial, legislative, and quasi-legislative functions;
>
> * * *
>
> (q) Urban renewal projects and the elimination of slum conditions, including the performance of any activity that a county land reutilization corporation is authorized to perform under Chapter 1724. or 5722. of the Revised Code;

{¶ 21} We conclude that appellant's claims of program mismanagement and claimed error by the city in determining whether he qualified for assistance under the senior emergency home repair program present claims that come within the general grant of immunity for governmental functions under R.C. 2744.02(A). *See David v. Toledo*, 6th Dist. No. L-89-229, 1990 WL 19408 (Mar. 2, 1990); *Lohmeyer v. State ex rel. Yosses*, 6th Dist. Lucas No. L-99-1398, 2000 WL 491740 (Apr. 28, 2000).

{¶ 22} R.C. 2744.02 (B) provides exceptions to the grant of complete immunity. We have carefully reviewed the specific statutory exceptions to general immunity set forth in R.C. 2744.02(B). Accepting the allegations of the complaint as true, we conclude that appellant can prove no set of facts providing for an exception to governmental immunity afforded the city under R.C. 2744.02(A)(1) to appellant's claim.

{¶ 23} We find appellant's assignments of error Nos. 1-6 not well-taken.

{¶ 24} We conclude that justice has been afforded to the party complaining and affirm the judgment of the Lucas County Court of Common Pleas. We order appellant 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

Thomas J. Osowik, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE