

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92408

**FRATERNAL ORDER OF POLICE LODGE
No. 8, ET AL.**

PLAINTIFFS-APPELLEES

vs.

CITY OF CLEVELAND, ET AL.

DEPENDENTS OF DECEASED

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-616220

BEFORE: Blackmon, P.J., Stewart, J., and Celebrezze, J.

RELEASED: September 3, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days

of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

PATRICIA ANN BLACKMON, P.J.:

{¶ 1} Appellants, the City of Cleveland, the Civil Service Commission, and Safety Director Martin Flask (“the City”) appeal the trial court’s decision awarding attorney fees to the Fraternal Order of Police, Lodge No. 8, Richard Kerber and Brian Betely (“FOP”) on their complaint for declaratory judgment. The City assigns the following error for our review:

“I. The trial court committed reversible error as there was no legal basis for its granting plaintiff-appellee’s motion for attorney fees in a declaratory judgment action when none of the exceptions on the ban on attorney fees applied.”

{¶ 2} Having reviewed the record and pertinent law, we affirm the trial court’s decision. The apposite facts follow.

{¶ 3} On October 25, 2005, the eligibility list for promotions in the Cleveland Division of Police expired. In October and December 2005, respectively, the FOP requested that the City conduct a competitive promotional examination to establish an eligibility list to fill the vacancies in the Division of Police. The City did not conduct any competitive examinations to establish the eligibility list to fill the vacancies.

{¶ 4} On May 26, 2006, the FOP filed a policy grievance under the parties’ collective bargaining agreement and asserted that the City had violated the

agreement by failing to fill the vacancies. The City did not respond to the FOP's policy grievance and did not conduct any competitive examinations.

{¶ 5} On February 20, 2007, the FOP filed a complaint for declaratory judgment and sought to have the City declared in violation of Ohio Law, the City Charter, and the Civil Service Commission Rules for failing to hold a competitive promotional examination. The complaint specifically alleged that the eligibility list for promoting officers within the Cleveland Division of Police expired on October 25, 2005. The complaint further alleged that despite regular and repeated requests, the City had failed to hold a promotional examination in order to establish a promotional eligibility list in accordance with R.C. 124.44.

{¶ 6} Following the filing of the declaratory action, the FOP and the City agreed to hold the grievance in abeyance pending the outcome of the case. Subsequently, and as a result of pre-trial discussions, the City entered into a consent agreement, whereby it agreed to certify all promotional lists by May 30, 2008.

{¶ 7} Thereafter, the City agreed to administer promotional examinations and establish eligibility lists for the ranks of sergeants, lieutenants, and captains in the Division of Police. On January 19, 2008, the City began conducting promotional examinations for sergeants, lieutenants, and captains. By May 1, 2008, the Civil Service Commission had established an eligibility list for sergeants

and by May 28, 2008, had established an eligibility list for lieutenants and captains.

{¶ 8} On May 30, 2008, the FOP requested that the City promote into vacancy lieutenant and captain positions using the certified promotional lists. On June 5, 2008, Martin Flask, the City's Safety director asserted that no vacancies existed with the Division of Police. On July 2, 2008, the FOP filed a motion to show cause asserting that the City's refusal to utilize the eligibility list was a violation of the parties' consent agreement. In the motion, the FOP also requested an award of attorney fees citing the City's frivolous conduct. In response, the City filed a brief in opposition arguing that the trial court could not award attorney fees on a declaratory judgment action.

{¶ 9} On September 2, 2008, the trial court held that because the City had produced the eligibility lists, the motion to show cause was moot. The trial court also held that the FOP was entitled to attorney fees because the action was necessary to force compliance. After a hearing, the trial court awarded the FOP \$9,275.50 in attorney fees.

Attorney Fees

{¶ 10} In its sole assigned error, the City argues that the trial court had no basis to award attorney fees. We disagree.

{¶ 11} The awarding of attorney fees is within the sound discretion of the trial court.¹ Thus, an award of attorney fees will only be disturbed upon a finding of an abuse of discretion.² The term abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.³ When applying the abuse of discretion standard, a reviewing court is not free to merely substitute its judgment for that of the trial court.⁴

{¶ 12} In awarding attorney fees to the FOP, the trial court stated in pertinent part as follows:

“The Court previously found that the actions and then in-actions of the Defendant necessitated the pursuance of this lawsuit to force compliance with R.C. 124.44. The Defendant at all times acknowledged their obligation under the statute. The Court then found the Plaintiff's eligible for attorney fees pursuant to R.C. 2721.16(A)(1)(b) for frivolous conduct (R.C. 2323.51) on behalf of the Defendant. The Court then set this matter down for hearing to determine the amount and reasonableness of the claimed attorney fees.

The matter came before the Court upon hearing for attorney fees. The Defendant City did not dispute either the hours or

¹ *State ex rel. Delmonte v. Vill. of Woodmere*, Cuyahoga App. No. 86011, 2005-Ohio-6489, citing *Tovar v. Tovar* (November 10, 1993), Cuyahoga App. No. 63933.

² *Id.*

³ *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

⁴ *R.C.H. Co., An Ohio Partnership v. 3-J Machining Service, Inc., et al.*, Cuyahoga App. No. 82671, 2004-Ohio-57.

the reasonableness of the hourly rate. Upon all testimony and evidence presented, the Court hereby awards reasonable attorney fees in the amount of \$9,275.50.”⁵

{¶ 13} The City now argues that the trial court was without authority to award attorney fees because the instant case involved a claim for declaratory relief. We are not persuaded.

{¶ 14} Initially, we note, pursuant to R.C. Chapter 2721, a trial court shall not award attorney’s fees on a claim for declaratory relief unless, “[a] section of the Revised Code explicitly authorizes a court of record to award attorney’s fees on a claim for declaratory relief under this chapter.”⁶ We find that R.C. 2721.16(A)(1)(b) authorizes such an award by stating:

“An award of attorney’s fees is authorized by section 2323.51 of the Revised Code, by the Civil Rules, or by an award of punitive or exemplary damages against the party ordered to pay attorney’s fees.”

{¶ 15} In the instant case, the trial court awarded attorney fees to the FOP because of the City’s frivolous conduct. R.C. 2323.51(A)(2)(a) defines frivolous conduct, in relevant part, as conduct by a party to a civil action when:

“(i) It obviously serves merely to harass or maliciously injure another party to the civil action or appeal or is for another improper purpose, including, but not limited to, causing

⁵Journal Entry dated October 15, 2008.

⁶*LeMay v. Seckler*, 6th Dist. No. OT-04-032, 2005-Ohio-306. See, also, R.C. 2721.16(A)(1)(a).

unnecessary delay or a needless increase in the cost of litigation.

“(ii) It is not warranted under existing law, cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new law.

“(iii) The conduct consists of allegations or other factual contentions that have no evidentiary support or, if specifically so identified, are not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

“(iv) The conduct consists of denials or factual contentions that are not warranted by the evidence or, if specifically so identified, are not reasonably based on a lack of information or belief.”⁷

{¶ 16} Here, the trial court stated that the City’s actions and then in-action necessitated the pursuance of the lawsuit to force the City to comply with the statute. The trial court also stated that the City acknowledged its obligation under the statute. In addition, the trial court noted that the City acknowledged that they were in fact in default of conducting the requisite examination to produce an eligibility list.⁸ Further, the trial court noted that the parties to the action had met on four separate occasions, dating back to May 2007, and each time the City acknowledged its failure to comply with the statute.

⁷*Nguyen v. Kramer*, Cuyahoga App. No. 87756, 2008-Ohio-4573.

⁸Journal Entry dated September 2, 2008.

{¶ 17} Finally, the record indicates that the FOP expended significant effort in order to effect the City's compliance with the statute. The eligibility list for promotions in the Cleveland Division of Police expired on October 25, 2005, but it took the City until May 28, 2008 to establish the new eligibility lists. In the interim, the FOP had to file a policy grievance under the parties' collective bargaining agreement. This proved unsuccessful and ultimately led to the filing of the instant action. After the action commenced, the FOP had to file two motions to show cause before the City ultimately complied with the statute.

{¶ 18} Based on the foregoing, we find that there was no abuse of discretion in the trial court's award of attorney fees to the FOP.

{¶ 19} Nonetheless, at oral argument, the City argued that the trial court failed to hold a hearing to determine if the City's conduct was frivolous. However, the City has not separately assigned as error the trial court's failure to hold a hearing, so we consider any alleged error to be waived.⁹

{¶ 20} Moreover, the record indicates that the FOP filed two separate motions for attorney fees citing the City's frivolous conduct as the basis. Both times the City filed briefs in opposition addressing the merits of the FOP's allegations of frivolous conduct. We conclude the trial court had sufficient

⁹*Cleveland Bluffs Dev., LLC v. A.J. Hai & Sons (1922), LLC*, Cuyahoga App. Nos. 89635 and 89674, 2008-Ohio-5148, citing *Lewallen v. Mentor Lagoons, Inc.* (1993), 85 Ohio App.3d 91, 97.

information before it to determine the issue of frivolous conduct as the basis for awarding attorney fees. Accordingly, we overrule the City's sole assigned error.

Judgment affirmed.

It is ordered that appellees recover of appellants their costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, PRESIDING JUDGE

MELODY J. STEWART, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR

