

[Cite as *Fuller v. Cuyahoga Metro.Hous. Auth.*, 2009-Ohio-4716.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92270

TOMMY FULLER

PLAINTIFF-APPELLANT

VS.

**CUYAHOGA METROPOLITAN
HOUSING AUTHORITY, ET AL.**

DEFENDANTS-APPELLEES

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-653230

BEFORE: Stewart, P.J., Boyle, J., and Sweeney, J.

RELEASED: September 10, 2009

**JOURNALIZED:
ATTORNEYS FOR APPELLANT**

Nancy C. Schuster
Kami D. Rowles
Schuster & Simmons Co., L.P.A.
The Bevelin House
2913 Clinton Avenue
Cleveland, OH 44113-2940

ATTORNEYS FOR APPELLEE

Ernest L. Wilkerson, Jr.
Kathryn M. Miley
Wilkerson & Associates Co., L.P.A.
1422 Euclid Avenue, Suite 248
Cleveland, OH 44115

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).
MELODY J. STEWART, P.J.:

{¶ 1} Police officers employed by defendant Cleveland Metropolitan Housing Agency (“CMHA”), arrested plaintiff Tommy Fuller, an off-duty CMHA employee, after scuffling with him on CMHA grounds. A jury later acquitted Fuller of two counts of felonious assault on a peace officer relating to the incident. Fuller brought suit against CMHA and the arresting officers, alleging that the rough treatment he suffered during arrest was a consequence of CMHA’s negligent hiring and supervision of its officers. CMHA did not answer the complaint, but filed a motion to dismiss on grounds that it was immune from liability because the operation of a metropolitan housing authority was a governmental function with no applicable exceptions for liability. The court granted the motion over Fuller’s request to stay the proceedings to wait for the release of a pending supreme court decision that he claimed would be dispositive of the issues. That decision, *Moore v. Lorain Met. Hous. Auth.*, 121 Ohio St.3d 455, 2009-Ohio-1250, has since been released by the supreme court. *Moore* vindicates CMHA’s assertion of immunity, so we affirm.

{¶ 2} Civ.R. 12(B)(6) allows a complaint to be dismissed for failure to state a claim only when it appears “beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery.” *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.* (1996), 76 Ohio St.3d 521, 524, 1996-Ohio-298, citing *O’Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d

242, 245. “[W]hen a party files a motion to dismiss for failure to state a claim, all the factual allegations of the complaint must be taken as true and all reasonable inferences must be drawn in favor of the non-moving party.” *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 60. The complaint cannot be dismissed unless it appears beyond all doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery. *O’Brien*, 42 Ohio St.2d at 245.

{¶ 3} Fuller’s complaint alleged that he had been a 16-year CMHA employee. He worked as a boilermaker and maintained, repaired and serviced heating boilers and residential heating units. On the night of his arrest, Fuller was dressed in CMHA-issued attire consisting of a shirt, a hat with the CMHA heating logo, and a “CMHA issued coat” with his name embroidered on the chest. Fuller entered a vacant CMHA unit that he and other boilermakers used as a “rest stop and office.” Prior to his arrival at the unit, defendant police officers Burdyslaw and Harris had parked their car on the street. Fuller entered the unit and used the restroom. The officers followed and tried to enter the unit, but their master keys did not work. They knocked, but Fuller “was in the restroom and did not answer.” When Fuller exited the unit, the officers “ran up to him with guns drawn” and surrounded him.

{¶ 4} Fuller identified himself by name and told the officers that he was a CMHA employee. Despite this, the officers told him that they were going to search him. Fuller was pushed to the ground and held face-down in the snow, handcuffed and repeatedly pepper sprayed. The officers restrained him for 45 minutes without allowing him to wash the pepper spray off his face. The police took Fuller to a hospital for treatment of “contusions and abrasions to his face and chemical conjunctivitis.” After being released from the hospital, the police held him in jail for four days without charging him, and denied him access to “necessary medication.”

{¶ 5} Fuller set forth two claims for relief: (1) negligent hiring, retention, supervision, and training and (2) intentional infliction of emotional distress. CMHA did not answer the complaint, but filed a motion to dismiss in which it argued that it is a political subdivision and was immune from liability.

{¶ 6} Fuller asked for an extension of time in which to respond to CMHA’s motion to dismiss and at the same time asked the court to stay ruling on the motion to dismiss pending the supreme court’s release of *Moore*. He told the court that *Moore* would decide whether the operation of a housing facility by a metropolitan housing authority is a governmental function and, if so, whether a housing unit is a building used to perform a governmental

function. Fuller argued that the resolution of those two issues would “determine whether Defendants in this case are immune from suit.”

{¶ 7} The court granted the motion to dismiss and denied the motion to stay.¹

{¶ 8} We engage in a three-tiered analysis to determine whether a political subdivision is entitled to immunity from civil liability pursuant to R.C. Chapter 2744. *Hubbard v. Canton City School Bd. of Edn.*, 97 Ohio St.3d 451, 2002-Ohio-6718, at ¶10. We first determine whether the entity claiming immunity is a political subdivision and whether the alleged harm occurred in connection with a governmental or a propriety function. If the political subdivision is entitled to immunity, we next consider whether the plaintiff has shown that there are any exceptions to immunity under R.C. 2744.02(B). If there are exceptions to immunity, we then consider whether the political subdivision can assert one of the defenses to liability under R.C. 2744.03. See *Cater v. Cleveland*, 83 Ohio St.3d 24, 28, 1998-Ohio-421.

{¶ 9} In *Moore*, the supreme court held that a metropolitan housing authority is a political subdivision. *Id.* at ¶8. It further held that: “The operation of a public housing authority is a governmental function under R.C.

¹Fuller maintains that the court abused its discretion by denying his request to stay the matter pending *Moore*’s release. Now that *Moore* has been released, any error relating to the refusal to grant the stay is now moot.

2744.01(C)(2) for purposes of political subdivision immunity under R.C. Chapter 2744.” *Id.* at syllabus.

{¶ 10} The second tier of the sovereign immunity analysis requires us to consider whether there are any applicable defenses under R.C. 2744.02(B). The parties agree that the only applicable defense would be former R.C. 2744.02(B)(4), which at the time stated:²

{¶ 11} “(4) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property that is caused by the negligence of their employees and that occurs within or on the grounds of buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code.”

{¶ 12} *Moore* states that “a unit of public housing is a building ‘used in connection with the performance of a governmental function’ within the meaning of R.C. 2744.01(C)(2).” *Id.* at ¶24. CMHA boilermakers indisputedly maintain CMHA’s facilities, so they are engaged in the

²Fuller’s arrest predated the April 9, 2003 effective date of the current statute. That statute now requires that the injury occur within or on the grounds of, and be “due to physical defects within or on the grounds of” buildings that are used in connection with the performance of a governmental function.

performance of a governmental function. Fuller alleged that the boilermakers used a vacant CMHA housing unit as an “office and rest stop,” so the boilermakers’ use of the vacant unit during the course of their duties meant that the unit was being used in connection with the performance of a government function.

{¶ 13} The third tier of the analysis requires us to consider whether CMHA proved any of the defenses to liability set forth under R.C. 2744.03. In its motion to dismiss, CMHA argued that it had a defense to both of Fuller’s causes of action under R.C. 2744.03(A)(3). That section states:

{¶ 14} “(3) The political subdivision is immune from liability if the action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee.”

{¶ 15} The statute does not define the term “discretion,” but in other contexts the supreme court has stated that discretion involves the option between the “doing and not doing of a thing which cannot be demanded as an absolute legal right[.]” *Krupp v. Poor* (1970), 24 Ohio St.2d 123, paragraph two of the syllabus. Inherent in the concept of discretion is the understanding that the person in whom discretion is reposed must act in a

just and proper manner, “guided by the spirit, principles and analogies of the law[.]” Id.

{¶ 16} The negligent hiring claim alleged that CMHA and its chief of police knew or should have known that the police officers who took part in Fuller’s arrest were “incompetent to perform their duties” and that by negligently hiring and retaining the officers, the chief of police acted with a malicious purpose and in bad faith because he knew or should have known that the officers were inadequately trained in the use of force and “constitutional requirements[.]”

{¶ 17} CMHA is immune from liability for negligent hiring and supervision under R.C. 2744.03(A)(5) if the hiring decision arose from “the exercise of judgment or discretion” in determining how to “use” personnel. And as an employee, the chief’s hiring decision was a discretionary act under R.C. 2744.03(A)(3). *Drew v. Laferty* (1999), Vinton App. No. 98CA522. Whether he acted with malice or in bad faith is immaterial to an assertion of immunity under R.C. 2744.03(A)(3) because, unlike R.C. 2744.03(A)(5), there is no exception from immunity for acts committed with malice or bad faith. See *Railroad Ventures, Inc. v. Tracy* (2000), 138 Ohio App.3d 315, 323.

{¶ 18} R.C. 2744.03(A)(3) likewise provides a defense for Fuller’s intentional infliction of emotional distress claims against the individual police officers.

{¶ 19} Fuller alleged that the two CMHA police officers were “vested with authority to search, seize and arrest on CMHA property * * *.” Police officers have discretion under most circumstances in deciding how to perform their duties. *McClesky v. Kemp* (1987), 481 U.S. 279, 297 (“discretion is essential to the criminal justice process”). For purposes of R.C. 2744.03(A)(3), the officers were engaged in the exercise of discretion in performing their duties of searching, seizing, and arresting, as alleged in the complaint. See, e.g., *Willis v. Commodity Specialists Co.*, 158 Ohio App.3d 444, 2004-Ohio-4807 (police officer’s decision to allow traffic to proceed over grain spill an exercise of police discretion under R.C. 2744.03(A)(3)); *Englehardt v. City of Beavercreek* (Aug. 13, 1992), Greene App. No. 91-CA-71 (police officer’s orders on the scene of a traffic accident were within officer’s discretion under R.C. 2744.03(A)(3)).

{¶ 20} Fuller did not allege that the officers were acting outside the scope of their defined duties, but that they exercised those duties negligently. However, “* * * state officers have no liability under the doctrine of official immunity for the erroneous exercise of discretion resulting from negligence or mistake of judgment where such discretion is exercised in good faith * * *.” *Smith v. Wait* (1975), 46 Ohio App.2d 281, 285. As alleged in the complaint, the officers had authority to search, detain, and arrest. Fuller’s factual allegations show that the officers both detained and arrested him as a result

of his presence in the makeshift office used by the boilermakers. The duty to search, detain, and arrest leads to the sole conclusion that, for purposes of R.C. 2744.03(A)(3), the officers' actions were undertaken within the discretionary powers granted to police officers. See *Vasquez v. Village of Windham*, Portage App. No. 2005-P-0068, 2006-Ohio-6343, at ¶32. Moreover, a police officer is justified in using whatever degree of physical force is necessary and sufficient to effectuate that arrest of a person. *State v. Davis* (Sept. 30, 1992), Montgomery App. No. 12820. The use of force during an arrest is related to the "enforcement powers" vested in police officers, so they were immune from liability under R.C. 2744.03(A)(3).

{¶ 21} Finally, Fuller claims the court abused its discretion by not giving him the chance to file a brief in opposition to CMHA's motion to dismiss, but the record indicates otherwise. Fuller requested a seven-day extension of time until April 28, 2008 to file his brief in opposition to the motion to dismiss. Rather than file the brief in opposition on the date he requested, he filed a motion to stay the proceedings. The court extended the time for Fuller's brief in opposition until April 28, 2008, but Fuller did not file the brief, apparently choosing to wait for a decision on his motion to stay. As of September 19, 2008, the date on which the court granted CMHA's motion to dismiss, Fuller had not filed his brief in opposition to the motion to dismiss. At no point did Fuller seek an additional extension of time to file a

brief in opposition, nor did the court indicate that Fuller was excused from filing a brief pending resolution of the stay request. The court did not abuse its discretion by granting the motion to dismiss under these circumstances.

{¶ 22} We therefore conclude from the complaint that Fuller can prove no set of facts entitling him to recovery on his claims against the arresting officers and his negligent hiring claim. As a matter of law, the defendants are immune from liability under R.C. 2744.03(A)(3).

{¶ 23} Judgment affirmed.

It is ordered that appellees recover of appellant 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 Cuyahoga County Court of Common Pleas 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.

MELODY J. STEWART, PRESIDING JUDGE

MARY J. BOYLE, J., and
JAMES J. SWEENEY, J., CONCUR