[Cite as *Bozeman v. Cleveland Metro. Hous. Auth.*, 2009-Ohio-5491.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 92435 and 92436

DAYTONA BOZEMAN, ET AL.

PLAINTIFFS-APPELLEES

vs.

CLEVELAND METROPOLITAN HOUSING AUTHORITY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, DISMISSED IN PART, AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-654055

BEFORE: Rocco, P.J., Kilbane, J., and Sweeney, J.

RELEASED: October 15, 2009

JOURNALIZED:

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KENNETH A. ROCCO, P.J.:

{¶ 1} In these consolidated appeals, defendant-appellant, Cuyahoga Metropolitan Housing Authority[1] ("CMHA"), appeals from two orders of the common pleas court. In the first order, the court struck CMHA's motion for judgment on the pleadings because the court found the motion constituted a motion for summary judgment, leave for which had not been granted. The court further denied leave to file a motion for summary judgment at that time. In the second order, the court summoned CMHA to show cause why it or its attorney should not be sanctioned for failing to comply with the court's discovery orders. We find CMHA's motion for judgment on the pleadings was properly denied. We lack jurisdiction to review the court's order scheduling a show cause hearing. Therefore, we affirm in part, dismiss in part and remand for further proceedings.

Procedural History

{¶ 2} The complaint asserted that from 1993 to 2002, plaintiffs-appellees, Daytona Bozeman and her minor child, Jazmine Bozeman, were residents of three properties owned by CMHA. While living on these properties, the minor child was exposed to lead paint, causing her "significant physical and psychological and/or developmental injury." Plaintiffs alleged that CMHA

[1] Although defendant calls itself *Cuyahoga* Metropolitan Housing Authority, neither party has moved to amend the complaint, which calls the defendant *Cleveland* Metropolitan Housing Authority.

negligently failed to inspect, monitor and/or test for lead paint at the premises, to warn plaintiffs of the paint, and to abate the lead paint hazard. Plaintiffs also alleged that CMHA was negligent per se because it failed to comply with state and federal laws governing the ownership and operation of rental properties. Plaintiffs claimed CMHA breached an implied warranty of habitability and an express warranty of fitness or habitability or safe condition. They also claimed CMHA created a nuisance. Finally, plaintiff-mother claimed loss of consortium with her minor child. Plaintiffs sought compensatory and punitive damages as well as costs and attorney's fees.

{¶ 3} CMHA's answer essentially denied the allegations of the complaint and asserted a number of affirmative defenses, including sovereign immunity. The court granted CMHA's unopposed motion to dismiss or for judgment on the pleadings on plaintiffs' claim for punitive damages. CMHA then filed a second motion for judgment on the pleadings and/or a motion for leave to file a motion for summary judgment, this time claiming that it was immune from liability under R.C. Chapter 2744. The court struck the motion for judgment on the pleadings, and denied leave to file a motion for summary judgment at this time. CMHA appealed from this order.

{¶ 4} In an order entered November 18, 2008, the trial court determined that CMHA had "failed to produce discovery as ordered" and set "a hearing on sanctions, ordering the defendant CMHA to appear on [November 20, 2008] at noon and to show cause why CMHA and/or counsel for CMHA should not be held

in contempt for failure to abide by this court's discovery orders." CMHA immediately appealed from this order.

Law and Analysis

{¶ 5} We do not have jurisdiction to review the common pleas court's order scheduling a show-cause hearing. This order is not a final order under any of the provisions of R.C. 2505.02. The scheduling of a hearing does not affect a substantial right. R.C. 2505.02(B)(1) and (2). It does not vacate or set aside a judgment. R.C. 2505.02(B)(3). It does not concern a "provisional remedy." R.C. 2505.02(A)(3) and (B)(4). Finally, it does not determine that an action may or may not be maintained as a class action. R.C. 2505.02(B)(5). Therefore, we have no jurisdiction to review this order and must dismiss Appeal No. 92436.[2] See *Lewis v. Old Republic Surety Co*., Franklin App. No. 06AP-319, 2006-Ohio-5302.

{¶ 6} CMHA's claim that the trial court erred by denying its motion for judgment on the pleadings stands on a different footing. The motion was based on CMHA's claim of sovereign immunity. R.C. 2744.02(C) provides that "[a]n order that denies a political subdivision * * * the benefit of an alleged immunity from liability as provided in this chapter or any other provision of the law is a final

[2]CMHA's contention that the court lacked jurisdiction to rule on discovery matters while CMHA's appeal was pending might be ground for a writ of prohibition. However, a writ does not lie unless the court patently lacks jurisdiction. Otherwise, an appeal is an adequate remedy. *State ex rel. Plant v. Cosgrove*, 119 Ohio St.3d 264, 2008-Ohio-3838, ¶5.

order." The trial court did not expressly find that CMHA was not entitled to immunity, but determined that the motion was actually a motion for summary judgment, leave for which had not been granted.

{¶ 7} The Ohio Supreme Court has held that an order denying a motion for summary judgment on sovereign immunity grounds is a final order under R.C. 2744.02(C), even if the denial is based on the existence of a genuine issue of material fact. *Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839. The court in *Hubbell* determined that the appellate court should review the motion de novo and determine whether genuine issues of fact exist, or whether the case can be resolved solely on questions of law. Id., ¶21. The scope and standard of review on a motion for judgment on the pleadings is analogous to that for a motion for summary judgment.[3] Although the trial court here did not address the merits of the motion for judgment on the pleadings, the supreme court has enjoined us not to avoid difficult questions of immunity by relying on the determinations of the trial court, at least when we would review the decision de novo. Id. at ¶20. Consequently, we find we have jurisdiction to review of the denial of the motion for judgment on the pleadings in the manner required by *Hubbell*.

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[3]We review a ruling on a motion for judgment on the pleadings de novo, based solely on the allegations of the pleadings. Judgment on the pleadings is appropriate if, "after construing all material allegations in the complaint, along with all reasonable inferences drawn therefrom in favor of the nonmoving party, the court finds that the plaintiff can prove no set of facts in support of its claim that would entitle it to relief." *Tenable Protective Servs., Inc. v. Bit E-Technologies, L.L.C.*, Cuyahoga App. No. 89958, 2008-Ohio-4233, ¶26.

{¶ 8} The trial court construed the motion for judgment on the pleadings as a motion for summary judgment, apparently because CMHA attached evidence to its motion. We will disregard this evidence and consider whether plaintiffs can prove any set of facts in support of their claims that would entitle them to relief based upon the pleadings alone. See footnote 3, supra.

{¶ 9} We begin by noting that a public housing authority is a political subdivision and it performs a governmental function for purposes of sovereign immunity under R.C. Chapter 2744. *Moore v. Lorain Metro. Hous. Auth.*, 121 Ohio St.3d 455, 2009-Ohio-1250, ¶8 and 19. It is therefore generally immune from liability in damages "in a civil action for injury * * * to a person * * * allegedly caused by any act or omission of the political subdivision * * * in connection with a governmental * * * function." R.C. 2744.02(A)(1).

{¶ 10} There is an exception to this immunity when the injury is "caused by the negligence of [the political subdivision's] employees and * * * occurs within or on the grounds of, and is due to physical defects within or on the grounds of, buildings that are used in connection with the performance of a governmental function." R.C. 2744.02(B)(4). The court in *Moore* concluded that units of public housing were buildings "used in connection with the performance of a governmental function." Id. at ¶24. Thus, a public housing authority may be liable for injuries caused by its employees' negligence due to

a physical defect within one of its buildings. The issue whether the presence of lead paint is a "physical defect" appears to be one of first impression and was not addressed in CMHA's motion. CMHA did not demonstrate that the plaintiffs can prove no set of facts showing they are entitled to relief based on their negligence claims.

{¶ 11} CMHA's motion assumed that all of plaintiffs' claims were based on negligence. However, plaintiff's complaint also asserts claims for breach of contract.[4] R.C. Chapter 2744 "does not apply to * * * [c]ivil actions that seek to recover damages from a political subdivision * * * for contractual liability." R.C. 2744.09(A). Therefore, CMHA's claim of sovereign immunity would not dispose of these claims.

{¶ 12} We find that CMHA failed to demonstrate that the plaintiffs could prove no set of facts showing that they were entitled to relief. Therefore, its motion for judgment on the pleadings was properly denied.

{¶ 13} Appeal No. 92436 is dismissed. The judgment at issue in Appeal No. 92435 is affirmed. We remand for further proceedings consistent with this opinion.

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[4] "A landlord who fails to maintain rental premises as required by R.C. 5321.04 is liable both for damages for breach of contract, as the rental contract necessarily incorporates the duties imposed by the revised code, and for damages for negligence, as the violation of a duty imposed by statute constitutes negligence per se." *Foss v. Reddy* (Nov. 2, 1995), Cuyahoga App. No. 68836, citing *Shroades v. Rental Homes* (1981), 68 Ohio St.2d 20; see, also, *Laster v. Bowman* (1977), 52 Ohio App.2d 379, 382.

It is ordered that appellees recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.

KENNETH A. ROCCO, PRESIDING JUDGE

MARY EILEEN KILBANE, J., and
JAMES J. SWEENEY, J., CONCUR