[Cite as *Cleveland v. Bedol*, 2010-Ohio-1978.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93061

CITY OF CLEVELAND

PLAINTIFF-APPELLANT

vs.

MARSHALL T. BEDOL, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-654364

BEFORE: Sweeney, J., McMonagle, P.J., and Blackmon, J.
RELEASED: May 6, 2010

JOURNALIZED:

ATTORNEYS FOR APPELLANT

Robert J. Triozzi
Director of Law
BY: Katherine S. Zvomuya
William H. Armstrong, Jr.
Assistant Directors of Law
City Hall - Room 106
601 Lakeside Avenue
Cleveland, Ohio 44114-1077

David M. Douglass
Douglass & Associates Co., L.P.A.
4725 Grayton Road
Cleveland, Ohio 44135

ATTORNEY FOR APPELLEE MAJOR INVESTMENTS, LLC

Michael J. Cheselka, Jr.
75 Public Square, Suite 920
Cleveland, Ohio 44113-2084

ATTORNEYS FOR MARSHALL AND ALAN BEDOL

James A. Zaffiro
Robert J. Belinger
4200 Rockside Road, Suite 101
Independence, Ohio 44131

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), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten 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. 2.2(A)(1).

JAMES J. SWEENEY, J.:

{¶ 1} Plaintiff-appellant, city of Cleveland ("Cleveland"), appeals the trial court's denial of its motion for summary judgment regarding defendant-appellee, Major Investments, LLC's ("Major"), counterclaim. After reviewing the facts of the case and pertinent law, we affirm.

{¶ 2} The instant case concerns the demolition of a condemned industrial building formerly located at 1971 West 85th Street, in Cleveland, Ohio (the "Building"). The Building was owned by a string of corporations run by the Bedol family (the "Bedols") dating back to at least 1958. By the year 2000, the Building was in a state of disrepair and in October, Cleveland issued an order to Alamar Industries, Inc. ("Alamar"), which was the Bedol-run corporation that owned the Building at the time, to cease occupancy of, and operations at, the Building. Subsequently, the Bedols stopped using the Building, which remained vacant until it was destroyed.

{¶ 3} In 2002, Alamar deeded the Building to Major, which is another Bedol corporation. In the meantime, the Bedols did nothing about the condition of the Building, although on December 8, 2003, they received a bid to demolish the Building for $175,000.

{¶ 4} On November 29, 2006, Cleveland sent Major a notice declaring the Building a public nuisance subject to abatement by demolition. Major received this notice on December 7, 2006. The notice stated that Major had a right to appeal the declaration of the building as a public nuisance, in writing, within 30 days of the issuance date.

{¶ 5} On December 11, 2006, Major sent a fax to Cleveland entitled "Right to Appeal," which stated the following: "The facts shown in your violation are incorrect. We request a hearing to dispute."

{¶ 6} On January 24, 2007, Cleveland sent a letter to Major stating that demolition of the Building will move forward beginning "this week," at the price of the lowest submitted bid, which was $387,873. The letter also stated that Major was required to pay demolition costs.

{¶ 7} On January 27, 2007, Cleveland began to demolish the Building. Demolition was completed in August 2007.

{¶ 8} On March 19, 2008, Cleveland filed a complaint against the Bedols and Major to collect $415,056 for the demolition and attorney fees. On September 17, 2008, Major filed a counterclaim against Cleveland, alleging a

taking of property without due process. Major claimed that as a result of the due process violation, Cleveland was barred from recovering the demolition costs and Major was entitled to recover from Cleveland the value of the Building.

{¶ 9} On January 16, 2009, Cleveland filed a summary judgment motion regarding Major's counterclaim, alleging statutory immunity under R.C. 2744, et seq. On February 26, 2009, the court summarily denied Cleveland's motion.

{¶ 10} Cleveland now appeals raising one assignment of error for our review.

{¶ 11} "I. The trial court erred by not granting the City of Cleveland's motion for summary judgment on Major Investments, LLC's counterclaim because the City of Cleveland is immune from liability under R.C. Chapter 2744 and Major Investments, LLC had actual and constructive notice of the condemnation of its property and failed to exhaust its administrative remedies."

{¶ 12} We first note that "[a]n order that denies a political subdivision * * * the benefit of an alleged immunity from liability * * * is a final order." R.C. 2744(C). See, also, *Hubbel v. City of Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878. Appellate review of a trial court's decision regarding summary judgment is de novo. Pursuant to Civ.R. 56(C), the party seeking summary judgment must prove that 1) there is no genuine issue of material fact; 2) they are entitled to judgment as a matter of law; and 3) reasonable minds can come to but

one conclusion and that conclusion is adverse to the non-moving party. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 662 N.E.2d 264.

{¶ 13} As a general rule, political subdivisions are immune against tort liability under R.C. 2744.02(A)(1), subject to the exceptions listed in R.C. 2744.02(B). Pertinent to the instant case, R.C. 2744.02(B)(5) states that "a political subdivision is liable for * * * loss to * * * property when civil liability is expressly imposed upon the political subdivision by a section of the Revised Code * * *."

{¶ 14} In turn, R.C. 2744.09(E) states that political subdivision immunity "does not apply to * * * [c]ivil claims based upon alleged violations of the constitution * * * of the United States * * *." Thus, in analyzing whether R.C. 2744.09(E) bars Cleveland from asserting the defense of immunity, we must determine whether Major's counterclaim alleged violations of the United States Constitution.

{¶ 15} On September 17, 2008, Major filed its counterclaim against Cleveland. The counterclaim is essentially based on two propositions: first, that Cleveland deprived Major of property in violation of Cleveland ordinances; and second, that Cleveland deprived Major of property "without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution."

{¶ 16} In *Bram v. City of Cleveland* (1993), 97 Ohio App.3d 718, 647 N.E.2d 523, this Court addressed a similar issue. However, we reach the opposite conclusion in the instant case. Our reasoning follows. In *Bram*, the property owner sued Cleveland for wrongful demolition, which is a tort. Cleveland raised the issue of immunity in its summary judgment motion. The property owner then amended his complaint to allege a constitutional violation. The court held that this was insufficient to invoke an exception to governmental immunity.

{¶ 17} "We do not find that the vague assertion of a constitutional rights violation is enough to change the essential nature of that claim and to circumvent the purpose of the tort immunity provisions." Id. at 721. See, also, *Cleveland v. Wescon Constr. Corp.* (Aug. 23, 1990), Cuyahoga App. No. 57405 (holding that raising constitutional issues in a brief in opposition to summary judgment was insufficient under R.C. 2744.09(E)); *Broadview Mtge. Co. v. Cleveland* (Mar. 18, 1993), Cuyahoga App. No. 61939 (holding that R.C. 2744.09(E) was inapplicable to constitutional claims raised only "in a vague and undefined way at the Common Pleas evidentiary hearing"); *McCallister v. City of Portsmouth* (1996), 109 Ohio App.3d 807, 811-12, 673 N.E.2d 195 (holding that although the property owner alleged constitutional violations in her complaint, she failed to meet her burden under Civ.R. 56(C) to produce evidence in support of the claims to survive summary judgment).

{¶ 18} The instant case, on the other hand, concerns a constitutional issue that was raised in Major's counterclaim, namely a due process violation. The plaintiff is the master of his or her claims, and we will not unnecessarily re-characterize an aptly pled cause of action. See, e.g., *Caterpillar, Inc. v. Williams* (1987), 482 U.S. 386, 107 S.Ct. 2425, 96 L.Ed.2d 318.

{¶ 19} One of the basic tenets of constitutional law is found in the Fourteenth Amendment to the United States Constitution, which states that the government shall not "deprive any person of life, liberty, or property, without due process of law." In *Holtz v. City of Toledo*, Lucas App. No. L-05-1217, 2006-Ohio-3390, the Sixth District Court of Appeals of Ohio held the following: "Procedural due process demands at a minimum that one who is to be deprived of property by the state be given notice of the action and an opportunity to be heard." See, also, *State v. Hochhauser* (1996), 76 Ohio St.3d 445, 668 N.E.2d 435; *Englewood v. Turner*, 178 Ohio App.3d 179, 2008-Ohio-4637, 897 N.E.2d 213, at ¶30 (holding that due process requires "some legal procedure in which the person proceeded against * * * shall have an opportunity to defend himself") (internal citations omitted).

{¶ 20} We find, as a matter of law, that Major alleged a constitutional violation as envisioned by R.C. 2744.09(E). We now turn to the merits of Major's allegations.

{¶ 21} Major alleges, among other things, that Cleveland did not provide Major with an opportunity to be heard. In *City of Cleveland v. W.E. Davis Co.* (July 18, 1996), Cuyahoga App. No. 69915, this Court held that "where a city has failed to provide a property owner with an opportunity for hearing or appeal prior to the razing of property, the city has denied the owner due process of law."

{¶ 22} In the instant case, the November 29, 2006 notice stated that the demolition determination could be appealed: "If you wish to appeal, you must file a written appeal within 30 days of the issuance date on this notice. The appeal must be filed at: Cleveland City Hall, 601 Lakeside Avenue, Room 516, Cleveland, Ohio 44114." See, also, Cleveland Codified Ordinances 3103.09(g). In addition, the notice listed the inspector's name as "Mario Grgic."

{¶ 23} Cleveland Codified Ordinances 3103.20(e) governs the procedure of building and housing violation appeals, and subsection (2) states that an appeal "shall be made within 30 days after the decision from which appeal is taken is rendered, by filing with the officer or agency from whose decision the appeal is taken, and with the Board, a notice of appeal specifying the grounds thereof. However, in the case of a dangerous or unsafe condition, the administrative officer having jurisdiction may, in his or her order, limit the time for such appeal to a shorter period. The officer or agency from whose decision the appeal is taken shall forthwith transmit to the Board all papers constituting the record upon which the action appealed from was taken."

{¶ 24} Cleveland's procedure for appealing the demolition notice also states that the appeal "shall stay all proceedings in furtherance of the action appealed from, unless the officer or agency from whom the appeal is taken shall file with the Board, after the notice of appeal has been filed with the officer or agency, a certificate, a copy of which shall forthwith be mailed to the appellant at the address stated in the notice of appeal, that, by reason of facts stated in the certificate, a stay would in the officer's or agency's opinion, cause immediate peril to life or property, in which case proceedings shall not be stayed otherwise than by a restraining order which may be granted by the Board, or by a court of competent jurisdiction upon application, and upon notice to the officer or agency from whom the appeal is taken, and on due cause shown." 3103.20(e)(3).

{¶ 25} As applied to the case-at-hand, Major had until December 29, 2006 to file a written appeal, "specifying the grounds thereof," to Cleveland's Department of Building and Housing. Upon filing an appeal, demolition of the Building should have been stayed unless Cleveland filed a certificate with the Board of Building Standards and Building Appeals, stating that a stay would "cause immediate peril to life or property * * *."

{¶ 26} Our review of the record shows that on December 11, 2006, Major faxes a letter to "Cleveland City Hall, Building and Housing Ordinances, 601 Lakeside, 44114, Att: Mario Grgic." This letter was captioned "Right to Appeal," and it stated "The facts shown in your violation are incorrect. We request a

hearing to dispute." Additionally, the Bedols left several phone messages for inspector Grgic.

{¶ 27} Cleveland does not dispute receiving Major's December 11, 2006 correspondence; however, Cleveland argues that it was "only" a letter stating Major's "intention to file an appeal," which "was not sufficient to perfect the appeal because it was not filed with the Board of Building Standards and Appeals and it did not contain the appropriate filing fee."

{¶ 28} It is also undisputed that Cleveland did not respond to the December 11, 2006 letter or the messages the Bedols left for inspector Grgic. Rather, Cleveland sent a letter on January 24, 2007, notifying Major that demolition of the Building was going forward. Two days later, Major faxed another letter to Cleveland's Building Department, stating that "prior to any demolition we would like to give our advice and consent," adding that it had two potential buyers for the Building. However, the Building was demolished without Cleveland giving Major an opportunity to be heard.

{¶ 29} The next step in our analysis is to determine whether Major properly requested an opportunity to be heard. We compare filing an appeal under Cleveland Codified Ordinances Chapter 3103, et seq., to filing an administrative appeal pursuant to R.C. 4123.511. In *State ex rel. Lapp Roofing & Sheet Metal Co., Inc.*, 117 Ohio St.3d 179, 2008-Ohio-850, 882 N.E.2d 911, the Ohio Supreme Court held that the requirements of a notice of appeal filed under R.C.

4123.511 must be reviewed for substantial compliance. "'Substantial compliance' occurs 'when a timely notice of appeal * * * includes sufficient information, in intelligible form, to place on notice all parties to a proceeding that an appeal has been filed from an identifiable final order which has determined the parties' substantive rights and liabilities.'" (Quoting *Fisher v. Mayfield* (1987), 30 Ohio St.3d 8, 11, 505 N.E.2d 975.)

{¶ 30} In viewing the evidence in the instant case against Cleveland's requirements to appeal a building violation notice, we conclude that Major substantially complied with Cleveland's procedures. The correspondence was faxed within the 30-day time frame. It listed both the agency and the officer's name, and was faxed to the proper building. It was clear who the correspondence was from. It contained the words "violation," "appeal," and "dispute." In short, it included intelligible information which put the proper party on notice that Major was appealing from an identifiable order.

{¶ 31} We acknowledge that Major did not send the notice to the Board, as required by Cleveland Codified Ordinance 3103.20(e). However, given the *Lapp Roofing* standard, we find that Major substantially complied with Cleveland's requirements.

{¶ 32} Cleveland argues that Major's letter did not contain the appropriate filing fee; however, Cleveland does not support this argument with legal authority.

{¶ 33} Although we have determined that Major was denied a hearing, it is not clear from the record what evidence either party would have produced at that hearing. Accordingly, under the authority of *Xenia*, we cannot reach the merits of statutory immunity. "If a genuine issue of material fact remains, the court of appeals can remand the case to the trial court for further development of the facts necessary to resolve the immunity issue." *Xenia*, at ¶21.

{¶ 34} Accordingly, the court did not err when it denied Cleveland's summary judgment motion on the issue of immunity under R.C. 2744.09(E).

{¶ 35} Cleveland's sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant its 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 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.

JAMES J. SWEENEY, JUDGE

CHRISTINE T. McMONAGLE, P.J., and
PATRICIA A. BLACKMON, J., CONCUR