[Cite as *Miller v. Thyssenkrup Elevator Corp.*, 2010-Ohio-5011.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94352

NATHAN MILLER

PLAINTIFF-APPELLEE

vs.

THYSSENKRUP ELEVATOR CORPORATION, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-686244

BEFORE: Rocco, P.J., McMonagle, J., and Dyke, J.

RELEASED AND JOURNALIZED: October 14, 2010

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KENNETH A. ROCCO, P.J.:

{¶ 1} Defendant-appellant the Cuyahoga Metropolitan Housing Authority ("CMHA") appeals pursuant to R.C. 2744.02(C) from the trial court order that denied its Civ.R. 12(C) motion for judgment on the pleadings.

{¶ 2} CMHA presents two assignments of error. It asserts it is immune from liability on the complaint filed by plaintiff-appellee Nathan Miller, and Miller's amended complaint was inadequate to withstand a motion for judgment on the pleadings.

{¶ 3} Upon a review of the record, this court cannot agree with CMHA's assertions. Consequently, the trial court order is affirmed.

{¶ 4} According to Miller's original complaint, he sustained injuries on September 6, 2008 when he "fell down an elevator shaft located at 1441 W. 25th Street" in Cleveland, Ohio. Miller claimed his injuries were caused by the negligence of defendant ThyssenKrup Elevator Corporation ("TKE").

{¶ 5} After TKE filed an answer to his claim, Miller requested leave of the trial court to file an amended complaint instanter. Miller stated that since the premises where he sustained his injuries was "owned and operated by CMHA," he sought to add CMHA as a new-party defendant. The trial court granted Miller's request.

{¶ 6} In his amended complaint, Miller presented a cause of action in negligence against TKE, and a separate cause of action against CMHA. In relevant part, Miller alleged:

{¶ 7} "9. Defendant [CMHA] * * * was a common carrier.

{¶ 8} "10. Said fall was caused by the defendant CMHA's negligence in owning, controlling, operating, inspecting, and/or maintaining the above-referenced elevator on the premises * * *. Said negligence, included, but was not limited to, the defendant CMHA's failure to properly maintain and repair the elevator thereby creating a defective condition and exposing the plaintiff to an unreasonable risk. Said negligence proximately caused the plaintiff to suffer personal injury. The defendant CMHA created and/or was on notice of the defective condition of the elevator.

{¶ 9} "11. Additionally, CMHA's negligence included a violation of O.R.C. 2744.02(B)(4)."

{¶ 10} After TKE duly filed its answer to the amended complaint, CMHA filed a Civ.R. 12(E) motion for a "definite statement." In particular, CMHA requested Miller to state "specific facts" regarding each of the numbered paragraphs relating to the claims against CMHA.

{¶ 11} Miller filed a brief in opposition to the motion. Although the trial court

{¶ 12} permitted CMHA to file a reply, in the same judgment entry, the court denied CMHA's motion for a definite statement.

{¶ 13} CMHA thereafter filed its answer to Miller's complaint, and filed a cross claim against TKE and a third-party complaint against an insurance company. CMHA's "second defense" against Miller's claim stated as follows:

{¶ 14} "3. Prior to the date upon which plaintiff joined CMHA as an additional party * * * CMHA responded to certain requests, presented to it by plaintiff's counsel, for information * * * which information included, *inter alia*, a motion picture of the occurrence of said event and a full and fair inspection of the location * * *.

{¶ 15} "4. Although the information * * * confirmed * * * plaintiff's having fallen down an elevator shaft — such information failed to support the conclusion that said event proximately resulted from a physical defect in CMHA's premises which had been caused to exist by any specific, identifiable, failure on the part of one or more CMHA employee(s) to exercise due care.

{¶ 16} "* * *

{¶ 17} "6. By reason of the provisions of R.C. 2744.01, *et seq.* * * * CMHA is immune [from] suit and to the imposition of liability against it * * *; which statutory immunity is neither negated nor circumvented by generalized allegations of 'defect' and 'negligence' unsupported by case-specific facts."

{¶ 18} As to Miller's allegation in paragraph 9 that it was a "common carrier," CMHA further stated:

{¶ 19} "11. * * * CMHA says that it owed no such duty or duties to plaintiff herein, for the reason, inter alia, that the 'elevator' referenced in numbered paragraph 2 of the amended complaint was not a passenger elevator."

{¶ 20} TKE filed an answer to CMHA's cross claim. Before the insurance company filed its answer to CMHA's third-party complaint, CMHA filed a motion for judgment on the pleadings.

{¶ 21} CMHA asserted in its brief in support of the motion that it was entitled to immunity from liability on Miller's claim pursuant to R.C. 2744.02(A). It additionally asserted that Miller had not alleged specific facts to "suggest" any of the exceptions to immunity set forth in R.C. 2744.02(B) applied. Finally, CMHA asserted that since its answer indicated Miller's injury occurred in an elevator that was not a "passenger" elevator, he could not prove CMHA was a "common carrier."

{¶ 22} Miller filed an opposition brief, arguing that dismissal was inappropriate. He also suggested, based upon CMHA's reliance in its motion upon "several factual issues that [went] beyond the pleadings" and upon "factual allegations" set forth in CMHA's answer, that summary judgment was a more appropriate method to resolve the issues CMHA raised. In order to support his point, he attached some evidentiary material to his brief.

{¶ 23} The trial court denied CMHA's motion for judgment on the pleadings. CMHA filed its appeal from that order pursuant to R.C. 2744.02(C).[1]

{¶ 24} CMHA presents two assignments of error.

{¶ 25} **"I. The trial court committed error prejudicial to defendant Cuyahoga Metropolitan Housing Authority ("CMHA") by entering its November 25, 2009 order which denied CMHA's September 25, 2009 Motion for Judgment on the Pleadings, which motion asserted CMHA's entitlement to immunity pursuant to R.C. [Sections] 2744.01(C)(2) and 2744.02(A).**

{¶ 26} **"II. The trial court committed error prejudicial to defendant [CMHA] by entering its November 25, 2009 order which denied CMHA's September 25, 2009 Motion for Judgment on the Pleadings, when it failed to apply a heightened pleading requirement to the construction of the allegations of Appellee's amended complaint and, upon such application, dismiss the amended complaint as to CMHA for failure to state a claim upon which relief may be granted."**

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[1]R.C. 2744.02(C) states: "*An order that denies* a political subdivision or an employee of 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 order*." (Emphasis added). The Ohio Supreme Court has determined that a political subdivision may immediately appeal an order denying it immunity pursuant to this section. *Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878, ¶23-27; see, also, *Parsons v. Greater Cleveland Regional Trans. Auth.*, Cuyahoga App. No. 93523, 2010-Ohio-266.

{¶ 27} In its first assignment of error, CMHA argues the trial court should have granted its Civ.R. 12(C) motion. CMHA asserts that Miller acknowledged the deficiency of his amended complaint by attaching evidentiary material to his opposition brief. This court disagrees.

{¶ 28} Judgment on the pleadings pursuant to Civ.R. 12(C) 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." *Bozeman v. Cleveland Metro. Hous. Auth.*, Cuyahoga App. Nos. 92435 and 92436, 2009-Ohio-5491, fn. 3, citing *Tenable Protective Servs., Inc. v. Bit E-Technologies, L.L.C.*, Cuyahoga App. No. 89958, 2008-Ohio-4233, ¶26. This court reviews the ruling de novo. *Williams v. Cuyahoga Metro. Hous. Auth.*, Cuyahoga App. No. 92964, 2009-Ohio-6644, ¶5.

{¶ 29} CMHA is a political subdivision engaging in a governmental function. *Moore v. Lorain Metro. Hous. Auth.*, 121 Ohio St.3d 455, 2009-Ohio-1250, 905 N.E.2d 606. Therefore, it is entitled to immunity pursuant to R.C. 2744.02(A) unless an exception to immunity applies. Id.

{¶ 30} Miller's amended complaint clearly sought to allege the exception set forth in R.C. 2744.02(B)(4), which states in pertinent part: " * * * [P]olitical 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, 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 * * *." (Emphasis added.) Miller alleged his injuries were caused by CMHA's negligence in operating and maintaining the elevator in the building.

{¶ 31} In answering Miller's amended complaint, CMHA set forth several factual assertions in contravention of Civ.R. 8(B), which states that a defendant "shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies." CMHA thus "invited" Miller's error on placing evidence in the record outside the pleadings.[2] This court disregards the improper allegations and evidence in reviewing the propriety of the trial court's order. *Bozeman*, ¶8.

{¶ 32} Since CMHA may be liable for injuries caused by its employees' negligence due to a physical defect within its buildings, the trial court correctly denied CMHA's motion for judgment on the pleadings. *Diaz v. Cuyahoga Metro. Hous. Auth.*, Cuyahoga App. No. 92907, 2010-Ohio-13; *Williams*; *Bozeman*.

{¶ 33} CMHA's first assignment of error, accordingly, is overruled.

{¶ 34} In its second assignment of error, CMHA argues that allegations that a political subdivision is not entitled to immunity should be subject to a heightened pleading requirement. CMHA has presented this precise argument

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[2]CMHA previously has engaged in the same practice. See, *Bozeman*, ¶8.

previously, and this court consistently has rejected it. *Diaz*; *Williams*; see, also, *Rogers v. Akron School Sys.*, Summit App. No. 23416, 2008-Ohio-2962.

{¶ 35} Consequently, CMHA's second assignment of error also is overruled.

{¶ 36} The trial court's order is affirmed, and this case is remanded for further proceedings.

It is ordered that appellee 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

ANN DYKE, J., CONCURS;
CHRISTINE T. McMONAGLE, J., DISSENTS
(SEE ATTACHED DISSENTING OPINION)

CHRISTINE T. McMONAGLE, J., DISSENTING:

{¶ 37} Respectfully, I dissent because I would dismiss this matter for lack of a final appealable order. CMHA appeals a denial of its Civ.R. 12(C) motion to dismiss, arguing that for public policy reasons, this court should adopt what is perhaps a heightened pleading standard articulated in two U.S.

Supreme Court cases: *Bell Atlantic Corp. v. Twombly* (2007), 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929, and *Ashcroft v. Iqbal* (2009), __ U.S. __, 129 S.Ct. 1937, 173 L.Ed.2d 868. The Ohio Supreme Court has not (and legally need not) adopt this standard and the law remains that Ohio is a notice pleading state.

{¶ 38} The fact that CMHA makes this argument in context of portions of the pleading regarding sovereign immunity issues does not elevate this inquiry to one covered by R.C. 2744.02(C). In denying CMHA's Civ.R. 12(C) motion, the trial court did not deny CMHA immunity (entitling it to instant appeal), but rather declined to adopt a heightened pleading standard in order to dismiss certain claims.

{¶ 39} Accordingly, I would hold that this is not a final appealable order and this matter should be dismissed.