[Cite as *Fink v. Twentieth Century Homes, Inc.*, 2010-Ohio-5486.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94519

KEVIN T. FINK, ET AL.

PLAINTIFFS-APPELLEES

vs.

TWENTIETH CENTURY HOMES, INC., ET AL.

DEFENDANTS-APPELLANTS

[APPEAL BY CITY OF BRECKSVILLE]

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-685925

BEFORE: Kilbane, P.J., Dyke, J., Cooney, J.

RELEASED AND JOURNALIZED: November 10, 2010

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MARY EILEEN KILBANE, P.J.:

{¶ 1} Appellant, the city of Brecksville ("Brecksville" or "the City"), appeals the trial court's denial of its motion to dismiss under Civ.R. 12(B)(6). Brecksville argues that it is entitled to immunity under R.C. 2744.02(A) for the design, installation, and maintenance of a storm water management system that overflows onto the property of homeowners Kevin and Carolin Fink. Brecksville also argues that no other statutory exceptions to immunity apply and that the Finks do not make specific, factual claims in their complaint that overcome a motion to dismiss under Civ.R. 12(B)(6). After reviewing the appropriate law and facts, we affirm.

Statement of Facts and Procedural History

{¶ 2} On February 25, 2009, the Finks, who have lived at 8651 Dunbar Lane, Brecksville, Ohio since 1983, filed a nine-count complaint against Brecksville and nine other defendants, including two John Doe defendants, who are not part of this appeal,[1] alleging that these parties committed trespass, nuisance, negligence, waste, and unjust enrichment.

{¶ 3} On August 20, 2009, after agreeing to several leaves to plead with

[1]In addition to Brecksville and the John Doe defendants mentioned above, these defendants include Twentieth Century Homes, Inc.; Broadview Service Corporation; Sherwood Construction; American Midwest Title Agency; Fidelity National Title Insurance Company; the Cuyahoga County Engineer; John Doe Successor Corporation to Broadview Savings & Loan Co.

multiple defendants, the Finks filed their own motion for leave to file an amended complaint, instanter.

{¶ 4} On September 10, 2009, the trial court granted the Finks' motion and allowed them to file their amended complaint. The counts pertinent to Brecksville in the Finks' amended complaint included Counts 1 through 5 and Count 9 of the complaint.

The Finks' Amended Complaint

{¶ 5} Aside from their design and construction allegations against Brecksville and other parties, the Finks alleged at paragraph 17 of their amended complaint that Brecksville, among other parties, accepted the dedication of a storm water management system to carry and disburse storm water throughout the Finks' subdivision when it was first built in 1983.

{¶ 6} The Finks alleged at paragraphs 24 through 35 that when they purchased their property in 1983, Brecksville maintained an interest in the property in the form of an easement bisecting the Finks' property. They further alleged that the City has failed to repair or maintain that easement and has specifically failed to maintain an 18" storm pipe across their property. Brecksville's alleged negligence and inaction has caused flooding, damage, erosion, and a decrease in their property value, according to the Finks.

{¶ 7} The Finks also allege that they have repeatedly advised

Brecksville about its negligent failure to maintain the storm water management system, and that Brecksville has failed to repair the damage caused by the system. At paragraph 36, the Finks allege that the only remedy the City has offered is for the Finks to evacuate their home.

Amended Complaint Counts Pertinent to Brecksville

Count 1 - Trespass

{¶ 8} Count 1 alleged trespass by Brecksville for exceeding the scope of its easement with the Finks in an intentional, wanton, and willful manner. The Finks alleged specifically that the storm sewer easement held by the City encroached upon their property. They further alleged that the City's failure to maintain and repair the storm water management system caused it to overflow discharging storm water across their property.

Count 2 - Trespass for Lack of a Valid Easement

{¶ 9} Count 2 alleged trespass by the City for lack of a valid easement with the Finks, since no document clearly depicting the easement could be found, and even if there was, in fact, such a document, the City encroached upon the Finks' property in ways never contemplated by the original easement.

Count 3 - Nuisance by the City

{¶ 10} Count 3 alleged nuisance for failure to remedy the continuing drainage problem.

Count 4 - Waste

{¶ 11} Count 4 alleged waste by the City for excessive and improper use and damage to the Finks' property, causing a decline in its value.

Count 5 - Negligence

{¶ 12} Count 5 alleged that the City negligently failed to maintain the easement area adjacent to the Finks' property, causing loss of use and enjoyment of the property.

Count 9 - Unjust Enrichment

{¶ 13} Count 9 alleged that the City unjustly enriched itself in committing these acts.

Brecksville's Motion to Dismiss

{¶ 14} On September 24, 2009, Brecksville filed a motion to dismiss under Civ.R. 12(B)(6), arguing that it was entitled to political subdivision immunity without exception under R.C. 2744.02(A).

{¶ 15} On October 5, 2009, the Finks opposed the motion to dismiss.

The Trial Court's Ruling

{¶ 16} On December 28, 2009, the trial court granted Brecksville's

motion in part, denied it in part, and dismissed any intentional tort allegations in their complaint, as well as any statutory claims for waste and unjust enrichment, finding as follows:

> **"The court * * * finds that the City of Brecksville is immune from any claims based on intentional conduct and thus the punitive damages portion of count one is hereby dismissed.**
>
> **Defendant's motion to dismiss is granted as to counts 4 and 9 of the complaint. Count 4 of the complaint alleges that the city committed waste. A claim for waste is statutory in Ohio and can only be based on O.R.C. 2103.07, O.R.C. 2105.20 and O.R.C. 5307.21. Plaintiff's claim of waste is not related to the statutory sections and is hereby dismissed. Count 9 of the complaint alleges unjust enrichment. As unjust enrichment claims may not be brought against a political subdivision this count is hereby dismissed. *G.R. Osterland v. Cleveland* (2000), 140 Ohio App.3d 574."**

{¶ 17} The trial court denied Brecksville's motion to dismiss with respect to several other counts in the Finks' complaint, finding as follows:

> **"In reviewing a defendant's motion to dismiss this court must take all factual allegations of the complaint as true and must draw all reasonable inferences in favor of the plaintiff. *Byrd v. Faber* (1991), 57 Ohio St.3d 56. Drawing all reasonable inferences in favor of the plaintiff, this court finds that the plaintiff could prove a set of facts which would entitle him to relief against the City of Brecksville on the non-intentional part of count 1 as well as counts 2, 3 and 5 of the complaint. The motion to dismiss is denied as to said counts."**

{¶ 18} In partially denying Brecksville's motion, the trial court also stated that it would be allowed to present defenses at summary judgment that require the court to go beyond the pleadings.

{¶ 19} Brecksville asserts the following assignment of error on appeal.

"The lower court erred in denying appellant's motion to dismiss because the city is immune."

Analysis

The Trial Court's Denial of Brecksville's Motion to Dismiss is a Final Appealable Order

{¶ 20} For purposes of this appeal, there is no question that the City is a political subdivision of the state of Ohio, created pursuant to R.C. 306.31 et seq. *Drexler v. Greater Cleveland Regional Transit Auth*. (1992), 80 Ohio App.3d 367, 609 N.E.2d 231.

{¶ 21} 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 order." See, also, *Hubbell v. Xenia,* 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878. *Hubbell* states that a plain reading of R.C. 2744.02(C) supports "[e]arly resolution of the issue of whether a political subdivision is immune from liability" and that "[a]s the General Assembly envisioned, the determination of immunity could be made prior to investing the time, effort, and expense of the courts, attorneys, parties, and witnesses[.]" Id. at 82, 873 N.E.2d 878, distinguishing *State Auto. Mut. Ins. Co. v. Titanium Metals Corp.*, 108 Ohio St.3d 540, 2006-Ohio-1713, 844 N.E.2d 1199.

{¶ 22} Since the trial court's entry denied the City the benefit of an alleged immunity under R.C. 2744.02(C), it was a final appealable order.

Standard of Review

{¶ 23} An order granting a Civ.R. 12(B)(6) motion to dismiss is subject to de novo review. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 81, 2004-Ohio-4362, 814 N.E.2d 44. In reviewing whether a motion to dismiss should be granted, we accept as true all factual allegations in the complaint. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192, 532 N.E.2d 753. When granting a motion to dismiss under Civ.R. 12(B)(6), it must appear beyond doubt that the plaintiff can prove no set of facts that would entitle plaintiff to relief. *Vail v. Plain Dealer Publishing Co.*, 72 Ohio St.3d 279, 1995-Ohio-187, 649 N.E.2d 182.

{¶ 24} While the Finks cannot survive a motion to dismiss through the mere incantation of an abstract legal standard, they can defeat such a motion if there is some set of facts consistent with their complaint, which would allow them to recover. See *Byrd*; *York v. Ohio State Hwy. Patrol* (1991), 60 Ohio St.3d 143, 573 N.E.2d 1063. However, the claims set forth in the complaint must be plausible, rather than conceivable. *Bell Atlantic Corp. v. Twombly* (2007), 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929. While a complaint attacked by a Civ.R. 12(B)(6) motion to dismiss does not need detailed factual allegations, the Finks' obligation to provide the grounds of their entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Id. Factual allegations must be enough to raise a right to relief above the speculative level. Id.

Brecksville's Arguments

{¶ 25} In its first assignment of error, the City argues that the trial court erred when denying its motion to dismiss because the Finks cannot show that any exceptions to immunity under R.C. 2744.02(B) apply to the City, entitling the City to immunity under R.C. 2744.02(A).

{¶ 26} Brecksville argues that the Finks must affirmatively demonstrate an exception to immunity at this stage of the proceedings in order to survive a Civ.R.12(B)(6) motion to dismiss. It also argues that because the Finks' negligence claims emanate solely from the design and construction of the storm water management system, their claims must fail. Brecksville claims that the Finks' claims emanate from mere legal conclusions, as opposed to facts; that the complaint must not only be plausible, but conceivable under the standard set forth in *Bell Atlantic.* We disagree.

{¶ 27} First, maintenance is an entirely separate act from design and construction, and these functions are not mutually exclusive. See R.C. 2744.01(G)(1)(d); R.C. 2744.02(C)(2)(1). Second, nothing in the record supports Brecksville's contention that the Finks must affirmatively demonstrate an exception to immunity at this stage of pleading. Requiring them to do so would be tantamount to overcoming a motion for summary judgment at the pleading stage.

{¶ 28} In this regard, we note that "Ohio is a notice-pleading state, Ohio

law does not ordinarily require a plaintiff to plead operative facts with particularity." *Cincinnati v. Beretta U.S.A. Corp*., 95 Ohio St.3d 416, 2002-Ohio-2480, 768 N.E.2d 1136. Civ.R. 8(A)(1) only requires a complaint to include a "short and plain statement of the claim showing that the party is entitled to relief." As recognized by the Ohio Supreme Court: "Under [the Ohio Rules of Civil Procedure], a plaintiff is not required to prove his or her case at the pleading stage. Very often, the evidence necessary for a plaintiff to prevail is not obtained until the plaintiff is able to discover materials in the defendant's possession. If the plaintiff were required to prove his or her case in the complaint, many valid claims would be dismissed because of the plaintiff's lack of access to relevant evidence. Consequently, as long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss." *York* at 145.

{¶ 29} In order to survive a motion to dismiss under Civ.R. 12(B)(6), the Finks must merely allege a set of facts that would plausibly allow them to recover. *Gallo v. Westfield Natl. Ins. Co.*, 8th Dist. No. 91893, 2009-Ohio-1094. This language applies to political subdivisions in the same manner as other defendants. When reviewing their amended complaint, it is clear that the Finks allege specific facts, which if proven, overcome the presumption of immunity. They need not affirmatively dispose of the immunity question altogether at the Civ.R. 12(B)(6) stage.

{¶ 30} In support of its arguments, Brecksville cites four cases: *Nadeau*

v. Fairborn, 2d Dist. No. 2004-CA-4, 2004-Ohio-5779; *Alden v. Summit Cty.* (1996), 112 Ohio App.3d 460, 679 N.E.2d 36; *Smith v. Cincinnati Stormwater Mgmt. Div.* (1996), 111 Ohio App.3d 502, 676 N.E.2d 609; *Ward v. Napoleon*, 3d Dist. No. 7-07-14, 2008-Ohio-4643. However, none of these cases address the requirement of a party to affirmatively demonstrate an exception to immunity at the pleading stage. Further, none of the cases cited by Brecksville were decided under Civ.R. 12(B)(6).

{¶ 31} Instead, each case was decided on factual questions raised at summary judgment under Civ.R. 56, or on a strictly legal basis as a judgment on the pleadings under Civ.R. 12(C). None of the cases were decided upon the sufficiency of the claims stated in the complaint, as required by Civ.R. 12(B)(6).

{¶ 32} Recently, in *Parsons v. Greater Cleveland Regional Transit Auth.*, 8th Dist. No. 93523, 2010-Ohio-266, we affirmed the trial court's denial of immunity upon a Civ.R. 12(B)(6) motion for these very reasons, holding:

> **"The cases cited by RTA each contain one common element standing in the way of their full analysis for our purposes here—each was decided on factual questions raised by summary judgment motions under Civ.R. 56. None of the cases were decided upon the sufficiency of the claims stated in the complaint, as required by Civ.R. 12(B)(6)."**

{¶ 33} At this stage of the proceedings, we must decide whether, when viewing all factual allegations as true in the complaint, there is any doubt appellees can prove any set of facts entitling them to relief. *Parsons*.

{¶ 34} We adopted the *Bell Atlantic* standard in *Gallo*, stating that a party's

obligation to provide the grounds of their entitlement to relief "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level." Id., citing *Bell Atlantic*.

{¶ 35} While the City correctly cites *Gallo* for this proposition, we note that *Gallo* was not decided solely on those grounds, but dealt mainly with a party's ability to amend its complaint at the pleading stage without seeking leave of court. *Gallo* did not involve a party seeking immunity under R.C. 2744.02.

{¶ 36} When we review the Finks' complaint, it is clear that they have done more than merely recite abstract and conclusory legal standards. They have provided factual allegations which, if proven through discovery, could show that the City is not immune from liability on the claims in the complaint. Indeed, the "maintenance, destruction, operation and upkeep of a sewer system" is expressly defined as a proprietary function under R.C. 2744.01(G)(1)(d). If the Finks prove Brecksville acted negligently in this regard, this would deny Brecksville the benefit of an alleged immunity under R.C. 2744.02(B).

{¶ 37} On the other hand, under R.C. 2744.02(C)(2)(1), governmental functions include the "provision or nonprovision, planning or design, construction, or reconstruction of a public improvement, including, but not limited to, a sewer system * * *," thus potentially granting Brecksville immunity, based upon facts revealed in discovery. The Finks' complaint alleges actions that cover decades of planning, construction, design, upkeep, and improvement between public and

private parties, and includes 41 paragraphs of factual allegations and history before even reaching the allegations contained Count 1. Regardless of whether their factual allegations will be borne out, the Finks recite more than mere formulaic conclusions in their amended complaint.

{¶ 38} As this court stated in *Parsons*, "[w]hether appellees will prove they are entitled to relief remains to be seen through the discovery process. However, the adequacy of appellees' complaint and the facts as alleged and accepted to be true under Civ.R. 12(B)(6) do make a colorable claim for relief under the rule." Id. We therefore cannot say beyond doubt that the Finks can prove no set of facts entitling them to relief. That is all that is required at this stage of the proceedings.

{¶ 39} The City's sole assignment of error is overruled. We affirm the trial court's decision granting only partial immunity to the City at this stage of the proceedings.

Judgment affirmed.

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 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.

MARY EILEEN KILBANE, PRESIDING JUDGE

ANN DYKE, J., CONCURS IN JUDGMENT ONLY;
COLLEEN CONWAY COONEY, J., CONCURS