**[Cite as *Barton v. Cuyahoga Cty.*, 2017-Ohio-7171.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
**No. 105008**

## CARLTON BARTON, JR., ET AL.

PLAINTIFFS-APPELLEES

vs.

## COUNTY OF CUYAHOGA, ET AL.

DEFENDANTS-APPELLANTS

**JUDGMENT:**
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-16-857905

**BEFORE:** Boyle, J., Kilbane, P.J., and Jones, J.

**RELEASED AND JOURNALIZED:** August 10, 2017

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MARY J. BOYLE, J.:

**{¶1}** Defendants-appellants, county of Cuyahoga and Timothy McGinty, Esq.[1] (collectively the "County"), appeal from the trial court's judgment denying their motion to dismiss the first amended complaint of plaintiffs-appellees, Carlton Barton, Jr., Darryl E. Pittman, and Pittman Alexander Attorneys Co., L.P.A. (collectively "Barton"), pursuant to Civ.R. 12(B)(6).

**{¶2}** Finding no merit to the appeal, we affirm.

## I. Factual Background and Procedural History

**{¶3}** In January 2016, Barton filed a complaint against the County for unlawful retention of forfeited funds, breach of contract, unjust enrichment, and fraud based on the County's alleged refusal to release forfeited funds it obtained from two criminal cases to satisfy a civil judgment obtained by Barton. In response to the complaint, the County filed a motion to dismiss. Instead of opposing the motion to dismiss, Barton filed a first amended complaint.

**{¶4}** Like the original complaint, the first amended complaint arose out of a judgment Barton obtained against Uri Gofman and Karka, Inc. in a civil mortgage fraud racketeering case, *Barton v. Realty Corp. of Am.*, Cuyahoga C.P. No. CV-10-739282. Attorney Darryl Pittman represented Barton in the mortgage fraud case. In September

[1]Timothy McGinty was the Cuyahoga County Prosecutor at the time relevant to this case.

2013, the trial court in the civil mortgage fraud racketeering case found that Gofman and Karka "conducted the affairs of their enterprise through a pattern of racketeering activity" and issued a judgment in favor of Barton. Specifically, the trial court issued a judgment "in the amount of $158,520.00 in Barton's favor, $284,388.33 in attorneys' fees in Pittman's favor, and an award of costs in the amount of $15,861.05." The court also found "by clear and convincing evidence [that Gofman and Karka] violated Ohio Revised Code Sections 2923.32(A)(1) and (A)(3)." Barton attached a copy of the civil judgment to the first amended complaint.

**{¶5}** During the pendency of the civil mortgage fraud racketeering case, however, the state of Ohio criminally prosecuted Gofman and Karka in separate cases "involving these same mortgage fraud claims," namely *State v. Karka, Inc.*, Cuyahoga C.P. No. CR-10-536877-S, and *State v. Gofman*, Cuyahoga C.P. No. CR-11-557589-A. Each of the criminal indictments included forfeiture specifications against Gofman and Karka.

**{¶6}** Barton alleged that he "fully cooperated with, and assisted the [County], in the [criminal] prosecution of Gofman and Karka" and that his "resources and efforts expended in [the] civil [mortgage fraud racketeering] case * * * were fully utilized, and relied upon, by the [County] to successfully prosecute" Gofman and Karka in the criminal cases. Barton further alleged that "during the extensive period of cooperation and sharing of information * * * representatives of the [County] made several agreements and

representations to [Barton] that if [he] successfully prosecute[d] [the] civil case, that [he] would be entitled to the forfeited funds" from Gofman and Karka's criminal cases.

**{¶7}** In February 2012, the trial court, as part of its sentencing entries, issued forfeiture orders against Karka and Gofman in the criminal cases. According to Barton, Karka "forfeited $468,829.03 to the Cuyahoga County Prosecutor's Office" and Gofman "forfeited $277,089.05 to the Cuyahoga County Prosecutor's Office." Barton attached the forfeiture orders to the first amended complaint.

**{¶8}** Because of the criminal forfeiture orders issued in February 2012 and the civil judgment he obtained in September 2013, "[o]n June 16, 2014, [Barton] made a public-record request to [the County] for [its] accounting information from January 1, 2012 to December 31, 2013." In response, Barton received a copy of the County's accounting records, which he attached to the first amended complaint. Barton alleged that this "response * * * substantiated that [the County is], and/or [was], in possession of such [forfeited] funds." Barton further alleged that he "repeatedly tried to obtain the forfeited funds," but the County has refused to provide, or otherwise turn over, the funds.

**{¶9}** Barton's first amended complaint claimed that, "[the County] violate[d] R.C. 2923.23(M)(1) daily by refusing to release the forfeited funds" and that "under R.C. 2981.01, [the County has] no right to retain such forfeited funds." Therefore, Barton asserted claims against the County for unlawful retention of funds, replevin, and conversion in an effort to obtain the funds forfeited by Gofman and Karka in the criminal cases to satisfy Barton's judgment in the civil mortgage fraud racketeering case.

**{¶10}** In response to the first amended complaint, the County filed a motion to dismiss. The County raised the defense of immunity from Barton's claims under R.C. Chapter 2744, entitled "Political Subdivision Tort Liability."[2]

**{¶11}** Barton opposed the motion to dismiss arguing that the County was not entitled to immunity under R.C. Chapter 2744 because his claims did not seek damages; rather, he sought a declaration as to the priorities to the forfeited funds, and thus, R.C. Chapter 2744 did not apply. And even if the political subdivision tort liability immunity statute applied, Barton argued that his claims fit within an exception to the immunity statute.

**{¶12}** On August 31, 2016, the trial court denied the County's motion to dismiss the first amended complaint and entered the following judgment:

> Defendants' motion to dismiss, filed 04/04/2016, is denied. A motion to dismiss tests the sufficiency of a complaint only. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545, 548. A motion to dismiss is not designed to act as a determination of the merits of a claim. *Fallang v. Hickey* (Aug. 31, 1987), 12th App. Dist. No. CA86-11-163, 1987 Ohio App. LEXIS 8542, *11-12. Therefore, a court's only task in reviewing a motion to dismiss is to determine whether the allegations of the challenged pleading, if true, state a legal cause of action. *Id.* at *12. The court finds that plaintiff's allegations, taken as true, may support a basis for recovery. Therefore, defendants' motion is denied.

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[2] The County made additional arguments as to why the first amended complaint failed as a matter of law, but those issues are not before us on appeal. Although an order denying a motion to dismiss is generally not a final, appealable order, R.C. 2744.02(C) provides that, "[a]n 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." Thus, appellate review under R.C. 2744.02(C) is limited to review of alleged errors involving denial of "the benefit of an alleged immunity from liability." *Owens v. Haynes*, 9th Dist. Summit No. 27027, 2014-Ohio-1503, ¶ 8-9.

**{¶13}** It is from this judgment that the County appeals.

**{¶14}** The County raises the following assignments of error:

1. Individuals/Entities acting in [a] prosecutorial manner are entitled to absolute prosecutorial immunity for those activities and O.R.C. 2744.03(A)(7) incorporates common law immunity. The trial court erred in failing to dismiss claims against Cuyahoga County on the basis of absolute prosecutorial immunity under R.C. 2744.

2. O.R.C. Chapter 2744 establishes a rule of immunity for political subdivisions. The trial court erred, and improperly denied appellants/defendants Cuyahoga County and Cuyahoga County Prosecutor Timothy McGinty's motion to dismiss predicated under O.R.C. Chapters 2744 et seq. thereby depriving appellants the benefit of statutory immunity.

## II. Law and Analysis

### A. Standard of Review

**{¶15}** This court applies a de novo standard of review of a trial court's ruling on a Civ.R. 12(B)(6) motion to dismiss. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5, citing *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 768 N.E.2d 1136 (2002).

**{¶16}** A Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 605 N.E.2d 378 (1992). In deciding whether a complaint should be dismissed pursuant to Civ.R. 12(B)(6), the court's review is limited to the four corners of the complaint along with any documents

properly attached to or incorporated within the complaint. *Glazer v. Chase Home Fin. L.L.C.*, 8th Dist. Cuyahoga Nos. 99736 and 99875, 2013-Ohio-5589, ¶ 38.

**{¶17}** In ruling on a motion to dismiss, the court accepts as true all the material factual allegations of the complaint and construes all reasonable inferences to be drawn from those facts in favor of the nonmoving party. *Brown v. Carlton Harley-Davidson, Inc.*, 8th Dist. Cuyahoga No. 99761, 2013-Ohio-4047, ¶ 12.

**{¶18}** To prevail on a Civ.R. 12(B)(6) motion, it must appear beyond doubt that the plaintiff can prove no set of facts in support of his or her claims that would entitle the plaintiff to relief. *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 327 N.E.2d 753 (1975), syllabus. If 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." *High St. Properties, L.L.C. v. Cleveland*, 8th Dist. Cuyahoga No. 101585, 2015-Ohio-1451, ¶ 16, citing *York v. Ohio State Hwy. Patrol*, 60 Ohio St.3d 143, 573 N.E.2d 1063 (1991). "A court cannot dismiss a complaint under Civ.R. 12(B)(6) merely because it doubts the plaintiff will prevail." *Bono v. McCutcheon,* 2d Dist. Clark No. 2004CA23, 2005-Ohio-299, ¶ 8, citing *Leichtman v. WLW Jacor Communications, Inc.*, 92 Ohio App.3d 232, 234, 634 N.E.2d 697 (1st Dist.1994).

**{¶19}** Because Ohio remains a notice pleading jurisdiction, this court has stated that "few complaints fail to meet the liberal [pleading] standards of Rule 8 and become subject to dismissal," and that "the motion to dismiss is viewed with disfavor and should

rarely be granted." *Tuleta v. Med. Mut. of Ohio*, 8th Dist. Cuyahoga No. 100050, 2014-Ohio-396, ¶ 15, citing *Slife v. Kundtz Properties, Inc.*, 40 Ohio App.2d 179, 182, 318 N.E.2d 557 (8th Dist.1974).

**B. Political Subdivision Immunity**

**{¶20}** The County's two assignments of error relate to the political subdivision tort liability immunity statute codified at R.C. Chapter 2744. Therefore, we will consider both assignments of error together.

**{¶21}** The County argues that its motion to dismiss should have been granted because it and its prosecuting attorney are entitled to immunity under R.C. Chapter 2744. According to the County, "the entire basis for" the first amended complaint "is that [Barton is] allegedly entitled to be compensated from the forfeited property for assisting the Prosecutor's office in the prosecution of Gofman and Karka," and thus, the immunity statute shields the County from liability. And because the County "fall[s] within the scope of the definition of a political subdivision" and because it allegedly "w[as] engaged in a governmental function," the County argues that it met the criteria under R.C. 2744.02(A)(1) — the first tier of the political subdivision tort liability immunity statute. The County also argues that none of the exceptions to the immunity statute apply, including R.C. 2744.02(B)(5), because "neither R.C. 2923.34(M)(1) nor R.C. 2981.06 expressly impose liability."

**{¶22}** Barton, however, claims that R.C. Chapter 2744 does not apply because he is "not seeking compensatory damages." Rather, Barton claims that the first amended

complaint seeks relief in the form of "equitable restitution" because of the civil judgment he obtained and his alleged rights to the forfeited money under R.C. 2981.01 and 2923.34. And even assuming the political subdivision tort liability immunity statute applies, Barton argues that the exception in R.C. 2744.02(B)(5) controls because R.C. 2923.34(M) and 2981.01 expressly impose liability upon the County. Barton further argues that none of the defenses set forth in R.C. 2744.03 apply to shield the County from liability.

**{¶23}** In Ohio, political subdivision immunity is governed by R.C. Chapter 2744. This chapter sets forth a three-tiered analysis for determining whether a political subdivision is immune from liability for injury or loss to property. *See Rankin v. Cuyahoga Cty. Dept. of Children & Family Servs.*, 118 Ohio St.3d 392, 2008-Ohio-2567, 889 N.E.2d 521. The first tier of the analysis, R.C. 2744.02(A)(1), states:

> For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death or loss to person or property allegedly caused by an act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.

**{¶24}** The second tier of the analysis considers whether any exceptions to immunity apply, as set forth in R.C. 2744.02(B). If an exception applies, then, under the third tier of the analysis, immunity may be reinstated if the political subdivision can demonstrate the applicability of any of the defenses set forth in R.C. 2744.03.

**{¶25}** By its very language and title, R.C. Chapter 2744 applies only to tort actions for damages. *Big Springs Golf Club v. Donofrio*, 74 Ohio App.3d 1, 2, 598 N.E.2d 14 (9th Dist.1991); *Brkic v. Cleveland*, 124 Ohio App.3d 271, 282, 706 N.E.2d 10 (8th Dist.1997). Immunity under R.C. Chapter 2744 is therefore not a defense for claims involving declaratory judgment or injunctive relief. *See Laborde v. Gahanna*, 10th Dist. Franklin Nos. 14AP-764 and 14AP-806, 2015-Ohio-2047.

**{¶26}** In addition, a claim for money damages does not invoke immunity under R.C. Chapter 2744 if the claim is one for equitable relief. "Unlike a claim for money damages where a plaintiff recovers damages to compensate, or substitute, for a suffered loss, equitable remedies are not substitute remedies, but an attempt to give the plaintiff the very thing to which it was entitled." *Interim Health Care of Columbus, Inc. v. State Dept. of Admin. Servs.*, 10th Dist. Franklin No. 07AP-747, 2008-Ohio-2286, ¶ 15, citing Ohio *Hosp. Assn. v. Ohio Dept. of Human Servs.*, 62 Ohio St.3d 97, 579 N.E.2d 695 (1991). Consequently, a party seeks equitable relief when "[t]he relief sought is the very thing to which the claimant is entitled under the statutory provision supporting the claim." *Zelenak v. Indus. Comm.*, 148 Ohio App.3d 589, 2002-Ohio-3887, 774 N.E.2d 769, ¶ 18 (10th Dist.), citing *Henley Health Care v. Ohio Bur. of Workers' Comp.*, 10th Dist. Franklin No. 04AP-E08-1216, 1995 Ohio App. LEXIS 715 (Feb. 23, 1995).

**{¶27}** Ohio courts have generally found that cases where a plaintiff has alleged that a state agency wrongfully collected funds should be characterized as claims for equitable restitution. *See Morning View Care Center-Fulton v. Ohio Dept. of Job &*

*Family Servs.*, 10th Dist. Franklin No. 04AP-57, 2004-Ohio-6073, ¶ 19. Similarly, a claim that seeks to require a state agency to pay amounts it should have paid all along is a claim for equitable relief, not monetary damages. *Zelenak* at ¶ 19.

**{¶28}** Here, we must review the allegations contained in the first amended complaint, along with its attachments, to determine whether Barton alleged a set of facts that would entitle him to relief.

**{¶29}** Barton asserted that he obtained a judgment in the civil mortgage fraud racketeering case against Karka and Gofman and attached the judgment to the first amended complaint. Barton further alleged that he cooperated with the County during the criminal prosecutions of Karka and Gofman. According to the first amended complaint, Barton provided the County with depositions, pleadings, and motions to assist in Karka's and Gofman's criminal prosecutions. As further alleged by Barton, the County successfully prosecuted Karka and Gofman; obtained restitution orders, which were attached to the first amended complaint; and Karka and Gofman forfeited a substantial sum of money to the County, as set forth in the accounting records attached to the first amended complaint.

**{¶30}** Barton claimed that he has priority over the forfeited funds pursuant to the statutory provisions contained in R.C. 2923.34 and/or 2981.06. And despite these statutes and an "agreement and/or representations" made by the County that Barton would receive Karka's and Gofman's criminally forfeited funds if he obtained a judgment in the

civil case, the County refused to provide Barton the forfeited funds despite repeated demands.

**{¶31}** Barton's prayer for relief includes a request for compensatory and other damages. But the alleged amounts — $158,200, $284,488.33, and $15,861.05 — mirror the amounts of the judgment Barton obtained against Karka and Gofman in the civil mortgage fraud racketeering case. Thus, the first amended complaint seeks to collect on a judgment from the forfeited funds in the Karka and Gofman criminal cases pursuant to R.C. 2923.34 and/or 2981.06 — statutes Barton argues permit recovery of the forfeited funds that were allegedly unlawfully retained by the County. Barton's claims for relief are tantamount to those seeking the County "to pay amounts it [allegedly] should have paid all along" and, therefore, are claims "for equitable relief, not monetary damages." *Zelenak* at ¶ 19.

**{¶32}** Taking the allegations in the first amended complaint as true and construing all reasonable inferences drawn from those allegations in favor of Barton, we find that it does not appear beyond doubt that Barton can prove no set of facts entitling him to the relief requested. We cannot say, at this stage of the litigation, that R.C. Chapter 2744 — the political subdivision tort liability immunity statute — bars Barton's claims as alleged. We, however, are not commenting on the merits of Barton's claims. Rather, given the liberal pleading standard and the disfavoring of motions to dismiss, we hold that the trial court did not err in denying the County's motion to dismiss the first amended complaint.

**{¶33}** Judgment affirmed.

It is ordered that appellees recover from appellants the 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.

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MARY J. BOYLE, JUDGE

MARY EILEEN KILBANE, P.J., and
LARRY A. JONES, SR., J., CONCUR