

[Cite as *State ex rel. Zimmer v. Cincinnati*, 2010-Ohio-4597.]

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

CITY OF CINCINNATI EX REL. : APPEAL NO. C-090850
JOSEPH D. ZIMMER, : TRIAL NO. A-0604909

Relator-Appellant, :

DECISION.

and :

CITY OF CINCINNATI EX REL. :
ANTHONY BRICE, :

Relator, :

vs. :

CITY OF CINCINNATI, :

Respondent-Appellee, :

and :

353 WEST FOURTH STREET LLC, :

Respondent. :

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: September 29, 2010

Cosme, D'Angelo & Szollosi Co., L.P.A., and Joseph M. D'Angelo, for Relator-Appellant,

Terrance A. Nestor, Assistant City Solicitor, for Respondent-Appellee.

Please note: This case has been removed from the accelerated calendar.

DINKELACKER, Judge.

{¶1} Relator-appellant Joseph Zimmer appeals the trial court’s decision granting a motion for summary judgment filed by respondent-appellee the city of Cincinnati while denying his own motion for summary judgment. The trial court determined that the housing project involved in this case was not subject to Ohio’s prevailing-wage law.¹ Zimmer also contests the trial court’s denial of attorney fees and its imposition of court costs. We affirm in all respects.

Construction Project Leads to Litigation

{¶2} Zimmer is a resident and taxpayer of the city of Cincinnati. He is also the executive secretary of the Greater Cincinnati Building and Construction Trades Council. Respondent 353 West Fourth Street LLC (“the developer”) is the owner and developer of the Parker Flats Development Project (“Parker Flats”) in downtown Cincinnati.

{¶3} Parker Flats consists of a 49-unit housing development built atop a three-story parking garage. One story of the parking garage will be open to the public. The developer received a \$600,000 grant from the city. The city also conveyed to the developer, for one dollar, the property on which Parker Flats would be constructed, although it had a fair market value of \$230,000. Cincinnati retained no ownership rights in the property, and while the public parking in the garage was to be made available at the same rates charged for metered parking on the city streets, Cincinnati was not to receive the revenue from these spaces.

{¶4} The funding agreement between Cincinnati and the developer provided that the city funding would be expended on certain delineated aspects of the parking

¹ R.C. 4115.03 et seq.

garage. As a result, they agreed that the construction of the parking garage was subject to Ohio's prevailing-wage law. But they treated the housing development separately and proceeded as if that was exempt from the prevailing-wage law.

{¶5} Zimmer and relator Anthony Brice, as taxpayers, sent letters to the city solicitor and the Ohio Attorney General, asking them to compel Cincinnati and the developer to comply with the prevailing-wage law for the housing aspect of the development. When the solicitor and the attorney general failed to act, they filed a taxpayer suit under R.C. 733.59. They claimed that the construction of the parking garage and the housing development was a single project. They asked that the developer be ordered either to conform to the prevailing-wage law for the housing development or to return the public financing to the city.

{¶6} The trial court initially determined that Zimmer and Brice could not proceed with a taxpayer suit because they had a remedy under Ohio's prevailing-wage statutes. This court reversed that determination, holding that "individuals who are not interested parties under R.C. 4115.03(F) may use a taxpayer suit to challenge a public official's failure to enforce the prevailing-wage law."²

{¶7} On remand, the developer and the relators entered into a consent judgment in which the developer agreed to pay prevailing wages for the construction of the housing. But Cincinnati continued to deny that prevailing wages were owed. Relators filed a motion for summary judgment against Cincinnati, seeking a declaration that Cincinnati should have required the developer to pay prevailing wages from the outset. They also sought an award of attorney fees for having to seek such a declaration. The city filed its own motion for summary judgment. The trial court overruled the

² *Cincinnati ex rel. Zimmer v. Cincinnati*, 176 Ohio App.3d 588, 2008-Ohio-3156, 892 N.E.2d 987, at ¶25.

relators' motion, entered summary judgment for the city, and denied the relators' request for attorney fees. The court also ordered relators to pay court costs.

{¶8} Zimmer has now appealed and, in four assignments of error, claims that the trial court improperly determined that Ohio's prevailing-wage law did not apply to the construction of the housing, that the request for attorney fees was improperly denied, and that costs were improperly assessed against him.

***The Condominium Project was Not
Subject to Prevailing-Wage Law***

{¶9} In his first two assignments of error, Zimmer claims that the trial court improperly granted Cincinnati's motion for summary judgment, concluding that the construction of the housing was not subject to Ohio's prevailing-wage law, and that the court improperly denied his own motion for summary judgment.

{¶10} Summary judgment is appropriate when, because reasonable minds can come to only one conclusion, no issue of material fact exists for trial.³ To make this decision, the trial court must construe all evidence most strongly in favor of the nonmoving party.⁴ If the only legal conclusion to be reached from this construction of the evidence is adverse to the nonmoving party, the moving party is entitled to judgment in its favor as a matter of law.⁵

{¶11} "The prevailing wage statutes, R.C. 4115.03 through R.C. 4115.16, require contractors and subcontractors for public improvement projects to pay laborers and mechanics the so-called prevailing wage in the locality where the

³ *Greene v. Whiteside*, 181 Ohio App.3d 253, 2009-Ohio-741, 908 N.E.2d 975, at ¶23; *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267; *Stinespring v. Natorp Garden Stores* (1998), 127 Ohio App.3d 213, 215, 711 N.E.2d 1104.

⁴ *Id.*

⁵ *Id.*

project is to be performed.”⁶ Prevailing wages must be paid on “construction projects that are ‘public improvements’ as defined in R.C. 4115.03(C).”⁷ To qualify as a public improvement, the project must be constructed by a public authority or must benefit a public authority.⁸

{¶12} The core issue in this case is what constituted the “project” for purposes of Ohio’s prevailing-wage law. If the “project” was only the parking garage, then the prevailing-wage law did not apply to the construction of the housing. If, on the other hand, the construction of the parking garage and the housing together made up the “project,” then prevailing-wage requirements applied to the construction of both.

{¶13} The contract between Cincinnati and the developer clearly explained what the “project” was. Section 103 indicated that the “project” was “the work specified in the ‘Statement of Work and Budget’ * * *.” The Statement of Work and Budget was a chart that delineated how the \$600,000 from Cincinnati was to be spent, and it addressed only the construction of the parking garage. In particular, the money from Cincinnati was to be paid for “General Conditions” (\$285,000), “Architecture/Code Review/Engineering” (\$172,500), “Building Concrete” (\$140,000), and “Rough Carpentry” (\$2,500). The Statement of Work and Budget also set forth, under the title “Parking Garage Schedule,” a time line governing when various phases were to be completed. The only reference to the construction of the

⁶ *Northwestern Ohio Bldg & Constr. Trades Council v. Ottawa Cty. Improvement Corp.*, 122 Ohio St.3d 283, 2009-Ohio-2957, 910 N.E.2d 1025, at ¶14, citing *J.A. Crosón Co. v. J.A. Guy, Inc.*, 81 Ohio St.3d 346, 349, 1998-Ohio-621, 691 N.E.2d 655.

⁷ *Id.* at ¶15, quoting *Episcopal Retirement Homes, Inc. v. Ohio Dept. of Indus. Relations* (1991), 61 Ohio St.3d 366, 369, 575 N.E.2d 134.

⁸ *Id.*, citing *U.S. Corrections Corp. v. Ohio Dept. of Indus. Relations*, 73 Ohio St.3d 210, 219, 1995-Ohio-102, 652 N.E.2d 766.

housing was a note that the “Garage Occupancy” date was “subject to work on building above.”

{¶14} The contract clearly indicated that the funds received from the city were to be exclusively used for the parking garage. Zimmer, however, argues that the parking garage and the housing were parts of one project that could not be divided because the developers are selling parking spaces in the garage to those who purchase housing units. These parking agreements intertwine the two projects. But such agreements are between the developer and the housing purchasers. Cincinnati is not involved in these transactions in any way. This court can not allow third parties to bind a government entity to prevailing-wage requirements through an independent contract that the government entity has no part in.

{¶15} Zimmer argues that treating the projects separately violates R.C. 4511.033, which states that “[n]o public authority shall subdivide a public improvement project into component parts or projects * * * unless the projects are conceptually separate and unrelated to each other, or encompass independent and unrelated needs of the public authority.” But that is not what has occurred here. In this case, the parking garage was the project as defined by the contract between Cincinnati and the developer. And the projects “are conceptually separate and unrelated to each other, or encompass independent and unrelated needs of the public authority.” Cincinnati contributed funds for the construction of a parking garage so that a portion of it can be used by the general public while shopping or dining in its downtown district. This is independent and unrelated to the development of more housing in the district.

{¶16} Further, the fact that Cincinnati may benefit from having housing constructed in its downtown area is not sufficient to turn the construction of the

housing into a benefit to a public authority. In *Episcopal Retirement Homes*, the Ohio Supreme Court held that the renovation of a retirement home was not a public-authority benefit.⁹ The court reasoned that “ERH’s projects serve a public benefit. They provide jobs to county residents and improved health care for the aged. However, benefiting the public and benefiting a public authority are separate and distinct functions.”

{¶17} This case stands in contrast to our decision in *Harris v. Cincinnati*.¹⁰ That case involved the construction of a retail complex, also in downtown Cincinnati. Unlike this case, *Harris* involved a contract between Cincinnati and a developer in which Cincinnati maintained a possessory interest in the property, financed its construction, and expected to benefit from its construction.¹¹ In this case, Cincinnati retained no possessory interest in the property and did not finance the construction of the housing. It limited its financing to the construction of the parking garage. And as in *Episcopal Retirement Homes*, the mere fact that Cincinnati may benefit from the private construction of housing is not, standing alone, enough to make such construction a benefit to a public authority.

{¶18} For these reasons, we overrule Zimmer’s first two assignments of error.

Attorney Fees and Court Costs

{¶19} In a taxpayer suit, the award of attorney fees is discretionary.¹² But the discretion to award fees may be invoked only “if judgment is finally ordered in

⁹ *Episcopal Retirement Homes, Inc. v. Ohio Dept. of Indus. Relations* (1991), 61 Ohio St.3d 366, 369, 575 N.E.2d 134.

¹⁰ (1992), 73 Ohio App.3d 163, 607 N.E.2d 15.

¹¹ *Id.* at 171.

¹² *Hubbard ex rel. Creed v. Sauline*, 74 Ohio St.3d 402, 1996-Ohio-174, 659 N.E.2d 781.

[the taxpayer’s] favor.”¹³ Since this court has determined that Cincinnati was correct when it claimed that the housing construction was not subject to prevailing-wage requirements, the denial of the request for an award of attorney fees was not an abuse of the trial court’s discretion.

{¶20} In addition to denying Zimmer’s request for attorney fees, the trial court also taxed court costs against him. R.C. 733.61 states that “[i]f the court * * * is satisfied that the taxpayer had good cause to believe that his allegations were well founded, or if they are sufficient in law, it shall make such order as the equity of the case demands. In such case the taxpayer shall be allowed his costs * * *.” The trial court indicated that it had “reviewed the motions, pleadings, and evidence filed by the parties” when making its determination on costs. Since Zimmer received what he was asking for—payment of prevailing wages on the housing construction—by reaching an agreement with the developer, but he continued to pursue Cincinnati on the same issue, we cannot say that “the equity of the case” demanded that court costs not be assessed against him.

{¶21} For the foregoing reasons, we overrule Zimmer’s third and fourth assignments of error and affirm the judgment of the trial court.

Judgment affirmed.

HILDEBRANDT, P.J., and SUNDERMANN, J., concur.

Please Note:

The court has recorded its own entry this date.

¹³ R.C. 733.61.