[Cite as *Hartle v. Coshocton Cty. Dept. of Health*, 2010-Ohio-2588.]

COURT OF APPEALS
COSHOCTON COUNTY, OHIO
FIFTH APPELLATE DISTRICT

GLENN HARTLE

Plaintiff-Appellant

-vs-

COSHOCTON COUNTY
DEPARTMENT OF HEALTH, ET AL.

Defendants-Appellees

JUDGES:
Hon. W. Scott Gwin, P.J.
Hon. William B. Hoffman, J.
Hon. John W. Wise, J.

Case No. 2009CA0019

O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Coshocton County Court of Common Pleas, Case No. 09CI0254
JUDGMENT:	Affirmed in part; Reversed in part and Remanded
DATE OF JUDGMENT ENTRY:	June 9, 2010

APPEARANCES:

For Plaintiff-Appellant	For Defendants-Appellees Coshocton County Department of Health, Et Al.
JAMES H. BANKS P.O. BOX 40 DUBLIN, OHIO 43017	KENNETH E. HARRIS Freud, Freeze & Arnold Capitol Square Office Building, Suite 800 Columbus, Ohio 43215-4247

Hoffman, J.

{¶1} Plaintiff-appellant Glenn Hartle appeals the July 9, 2009 Judgment Entry of the Coshocton County Court of Common Pleas finding in favor of Defendants-appellees the Coshocton County Department of Health, the Ohio Department of Health, Robert Brems, Jr., Steve Lonsinger, Mary Clifton and Eric Roberts.

STATEMENT OF THE CASE AND FACTS

{¶2} On March 20, 2009, Appellant filed the within action seeking damages and injunctive relief against Appellees, the Coshocton County Department of Health, the Ohio Department of Health, Robert R. Brems, Jr., Steve Lonsinger, Mary Clifton and Eric Roberts, employees of said health departments.

{¶3} On April 16, 2009, Appellees the Coshocton County Department of Health, Robert R. Brems, Jr. and Steve Lonsinger filed an answer to Appellant's complaint.

{¶4} On April 17, 2009, the Ohio Department of Health, Mary Clifton and Eric Roberts filed a motion to dismiss Appellant's complaint for failure to state a claim and for lack of jurisdiction to hear the matter. Appellees further asserted the individual employees named as defendants were entitled to immunity.

{¶5} Both the answer to the complaint and the motion to dismiss alleged Appellant failed to exhaust his administrative remedies.

{¶6} Via Judgment Entry of July 9, 2009, the trial court, treating the answer filed by the Coshocton County Department of Health, Brems and Lonsinger as a motion to dismiss relative to Appellant's failure to exhaust his administrative remedies, dismissed Appellant's complaint for lack of jurisdiction.

{¶7} Appellant now appeals, assigning as error:

{¶8} "I. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFF'S COMPLAINT.

{¶9} "II. THE TRIAL COURT ERRED IN TREATING THE ANSWER OF THE COUNTY DEFENDANTS AS A MOTION TO DISMISS."

I & II

{¶10} Appellant's assigned errors raise common and interrelated issues; therefore, we will address the arguments together.

{¶11} Appellant operates a campground pursuant to R.C. 3729.01, requiring a license to operate in the State of Ohio. R.C. 3729.05(A)(3). The license must be renewed annually. Id. Campgrounds are jointly regulated by the Ohio Department of Health and local boards of health to ensure the property is safe for public use. If the Director of the Ohio Department of Health or the local health department refuses to grant a license to operate a campground, the applicant has the right to an administrative hearing to challenge the denial pursuant to R.C. Chapter 119 and OAC 3701-26-02(A). In the event the applicant is unsuccessful at the administrative hearing, the applicant has a right to appeal the adjudication order to the Court of Common Pleas. Id.

{¶12} Initially, we shall address Appellant's claims against the Ohio Department of Health, Mary Clifton and Eric Roberts, acting in their individual and administrative capacities. At oral argument in this matter both parties represented to this Court the State of Ohio has issued Appellant a license to operate his campground subsequent to the within appeal. Accordingly, we find Appellant's assigned errors relative to the State of Ohio, Clifton and Roberts moot; therefore affirmed as to those defendants-appellees.

{¶13} As stated in the Statement of the Case, supra, with regard to Appellant's complaint alleging claims against the Coshocton County Health Department, Robert Brems, Jr. and Steve Lonsinger, the trial court considered the appellees' answer to Appellant's complaint tantamount to a Civil Rule 12(B) motion to dismiss. The rule reads, in pertinent part:

{¶14} "(A) When answer presented

{¶15} "*(1) Generally.* The defendant shall serve his answer within twenty-eight days after service of the summons and complaint upon him; if service of notice has been made by publication, he shall serve his answer within twenty-eight days after the completion of service by publication.

{¶16} "*(2) Other responses and motions.* A party served with a pleading stating a cross-claim against him shall serve an answer thereto within twenty-eight days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within twenty-eight days after service of the answer or, if a reply is ordered by the court, within twenty-eight days after service of the order, unless the order otherwise directs. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (a) if the court denies the motion, a responsive pleading, delayed because of service of the motion, shall be served within fourteen days after notice of the court's action; (b) if the court grants a motion, a responsive pleading, delayed because of service of the motion, shall be served within fourteen days after service of the pleading which complies with the court's order.

{¶17} "**(B) How presented**

{¶18} "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, **except that the following defenses may at the option of the pleader *be made by motion***: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19 or Rule 19.1. **A motion making any of these defenses shall be made before pleading if a further pleading is permitted**. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. When a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleading and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. Provided however, that the court shall consider only such matters outside the pleadings as are specifically enumerated in Rule 56. All parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56." (Emphasis added.)

{¶19} Appellant's Fifth Defense enumerated in the April 17, 2009 answer to Appellant's complaint states, "Plaintiff has failed to exhaust administrative remedies."

{¶20} Again, the trial court's July 9, 2009 Judgment Entry states,

{¶21} "Pursuant to Civil Rule 12, the Court treats the answer of the Coshocton County Department of Health Defendants regarding Plaintiff's alleged failure to exhaust administrative remedies as a motion to dismiss. This issue has been fully briefed in the Ohio Department of Health Defendant's motion to dismiss."

{¶22} We find Appellant's answer averring an affirmative defense is not equivalent to the filing of a motion required by Civil Rule 12(B).[1] Further, the trial court erred in not providing Appellant with notice or an opportunity to respond to the possible dismissal of the claims against the Coshocton County defendants despite the same issue being raised in the motion to dismiss filed by the State defendants. Accordingly, we hold the trial court erred in treating the Coshocton County appellees answer to the complaint the same as a Civil Rule 12(B) motion to dismiss.

[1] We are not persuaded Appellant's failure to specifically aver in his Complaint he exhausted administrate remedies renders his complaint subject to dismissal for failure to state a clam upon which relief can be granted. The affirmative defense must be established by Appellees and would seem to require evidence outside the pleadings.

{¶23} The July 9, 2009 Judgment Entry of the Coshocton County Court of Common Pleas is affirmed in part, reversed in part and remanded to the trial court in accordance with the law and this opinion.

By: Hoffman, J.

Gwin, P.J. and

Wise, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin
HON. W. SCOTT GWIN

s/ John W. Wise
HON. JOHN W. WISE

IN THE COURT OF APPEALS FOR COSHOCTON COUNTY, OHIO
FIFTH APPELLATE DISTRICT

GLENN HARTLE	:	
	:	
Plaintiff-Appellant	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
COSHOCTON COUNTY DEPARTMENT OF HEALTH, ET AL.	:	
	:	
Defendants-Appellees	:	Case No. 2009CA0019

For the reason stated in our accompanying Memorandum-Opinion, the July 9, 2009 Judgment Entry of the Coshocton County Court of Common Pleas is affirmed in part, reversed in part and remanded to the trial court in accordance with the law and this opinion. Costs to be divided.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin
HON. W. SCOTT GWIN

s/ John W. Wise
HON. JOHN W. WISE