IN THE COURT OF COMMON PLEAS OF MARION COUNTY, OHIO
GENERAL DIVISION

CITY OF MARION, OHIO	:	Case No. 14-CV-0080
Plaintiff,	:	
-vs-	:	JUDGE JIM SLAGLE
333 JOSEPH ST., LLC et al.,	:	
Defendants.	:	**JUDGMENT ENTRY OF DISMISSAL**
	:	**FINAL APPEALABLE ORDER**

This matter comes before the Court on various motions of the parties to dismiss the complaint, counterclaim, or the third-party complaint for failure to state a claim upon which relief can be granted pursuant Civ.R. 12(B)(6). Additionally, some of the motions request dismissal of the third-party complaint pursuant to Civ.R. 14. The various issues will be address separately.

Law – 12(B)(6)

The Third District Court of Appeals described the standard for Rule 12(B)(6) motion to dismiss for failure to state a claim as follows:

> "A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint." *State ex rel. Hanosn v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545, 548, 605 N.E.2d 378, citing *Assn. for the Defense of the Washington Local School Dist. v. Kiger* (1989), 42 Ohio St.3d 116, 117, 537 NE.2d 1292. For that reason, a trial court may not rely upon evidence or allegations outside the complaint when ruling on a Civ. R. 12(B)(6) motion. *State ex rel. Fugua v. Alexander* (1997), 79 Ohio St.3d 206, 207, 680

N.E.2d 985***

> To sustain a Civ. R. 12(B)(6) dismissal, "it must appear beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief". *LeRoy v. Allen, Yurasek, & Merklin*, 114 Ohio St.3d 323, 2007-Ohio-3608, 872 N.E.2d 254, ¶14, citing *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 2006-Phio-2625, 849 N.E.2d 268, ¶11. Additionally, the complaint allegations must be construed as true, and any reasonable inferences must be construed in the nonmoving party's favor. [Citations omitted].

Schlenker Ents., LP v. Reese, 2010-Ohio-5308, at ¶¶27-28.

Some of the parties have submitted or referenced evidence outside of the pleadings, such as depositions, correspondence, or e-mails. None of this evidence is pertinent to a 12(B)(6) motion as the Court is not determining the facts at this time. The Court is only determining whether the pleadings are sufficient to state a claim upon which relief can be granted.

Defendants' Motion to Dismiss

On April 11, 2014, Defendants Stanley Rosenfeld and 333 Joseph, LLC filed a motion to dismiss Plaintiff's complaint. Plaintiff's complaint is only seven paragraphs long and essentially alleges that the Defendants are owners of real property located at 333 Joseph Street, Marion, which property "is a hazard to public health by reason of inadequate maintenance, dilapidation, or abandonment." Paragraph 6 of the complaint states:

> "Plaintiff seeks damages in the amount of $14,500."

The sole relief requested in Plaintiff's complaint is "an order awarding damages

against the Defendants and costs of this action." The Defendants contend that monetary damages are not a remedy available to the Plaintiff, and therefore seek dismissal for failure to state a claim upon which relief can be granted. The Plaintiff contends that damages can be awarded either under common law or under R.C. 3767.41.

R.C. 3767.41 provides a number of possible remedies which include injunctive relief, an order for abatement of the nuisance, appointment of a receiver, demolition of the property by interested parties, or sale of the property. R.C. 3767.41, however, does not provide for an award of monetary damages. R.C. 3767.03 also gives the City Director of Law the authority to file a lawsuit to seek abatement of a nuisance. However, that statute also does not provide for recovery for monetary damages.

The Plaintiff contends that its common law authority to bring this action and seek an award of damages is supported by *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704. However, *Brown* was a suit brought by a private landowner and not by a municipality. Further, in *Brown*, the Court ruled that there could be no recovery in damages "unless there is a particular harm to the plaintiff that is of a different kind than that suffered by the public in general." Id. at 1160. See also Restatement of the Law 2d., Torts (1979), 94, §821(C)(1). The Plaintiff has failed to provide the Court with a single court case in which a municipality could obtain recovery for damages through a general public nuisance complaint. Moreover, the

Court's own research has failed to identify a single case supporting that proposition.

The case of *Thompson v. Argent Mortg. Co., LLC*, (Sept. 23, 2010) 8th App. Dist. Case No. 94613 provides excellent discussion of the authority to bring a public nuisance action. In *Thompson*, the Appellate Court upheld the dismissal of a complaint for failure to state a cause of action where an individual brought a public nuisance action and sought recovery of damages. The Court held that in order to recover damages for a public nuisance claim, the plaintiff must suffer some type of special injury distinct from that suffered by the public at large. Id. at ¶¶14 and 16.

In the instant case, not only has the Plaintiff failed to allege that it suffered some type of "special injury," the Complaint fails to allege that Plaintiff suffered any injury. Rather, the complaint simply states "Plaintiff seeks damages in the amount of $14,500.00." Since the complaint does not allege that the Plaintiff was damaged, it is impossible from the pleadings to determine the type of injury for which the Plaintiff seeks compensation. Rather, it appears that the Plaintiff simply chose the figure $14,500 in an effort to stay within the jurisdictional limits of Municipal Court.[1]

For purposes of ruling on the motion to dismiss for failure to state a claim, the Court must assume that the allegations in the Plaintiff's complaint are true and, therefore, the property constitutes a nuisance. However, the law does not support

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1 If the City did have a right to recover monetary damages, it would appear that the monetary damages would be much greater than $14,500. If the City were to obtain a judgment for $14,500, the doctrine of res judicata could bar the City from later recovering additional monetary damages.

the Plaintiff's claim for recovery of $14,500 in damages. Therefore, even if the Plaintiff proved its claim at trial, the Court could not grant the relief which the Plaintiff has requested. For that reason, the Defendants' motion to dismiss Plaintiff's complaint must be granted.

As the Court has outlined, the Plaintiff has multiple remedies available to it, if it chooses to pursue them. Moreover, in a related case (Case No. 13-CV-0453), the Attorney General is seeking various remedies which include monetary penalties which are authorized by statute. See R.C. 3704.06(C). Finally, the dismissal of this complaint does not bar the Plaintiff from pursuing other remedies available under the statutes. Moreover, by dismissing the Plaintiff's claims early in the litigation, this allows the Plaintiff to more quickly evaluate other remedies it may wish to pursue.

Third-Party Complaint

On February 10, 2014, along with its answer, Defendants 333 Joseph, LLC and Stanley Rosenfeld, along with Third-Party Plaintiff Robert Cendol, who was not a party to this action, filed a third-party complaint against the following third-party defendants: Christopher Keith; Eric Keith; Recycling Creations, LLC; Rumpke of Northern Ohio, Inc; Na-Churs Alpine Solutions Corp.; Norfolk Southern Railway Company; Tom Robbins; City of Marion, Ohio; and General Recycling of Ohio, LLC. The Third-Party Plaintiffs have since filed notices of dismissal to dismiss the third-party complaint against Third-Party Defendant Norfolk Southern Railway Company

and Third-Party Defendant Na-Churs Alpine Solutions Corp.

The third-party complaint includes seven causes of action as follows:

1. Breach of contract
2. Conversion
3. Contribution
4. Civil conspiracy
5. Declaratory judgment
6. Intentional or negligent misrepresentation
7. Negligence

The Third-Party Plaintiffs request multiple $4 million judgments against the various defendants.

Civ. R. 14(A) allows for the filing of a third-party complaint against "a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him." The Ohio Supreme Court described this requirement as follows:

> The transaction or occurrence which forms the subject matter of the primary claim must be the same transaction or occurrence that gives rise to legal rights in the defendant against the third-party defendant. If the claim asserted in the third-party complaint does not arise because of the primary claim, or is in some way derivative of it, then such claim is not properly asserted in the third-party complaint.
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> *State ex rel. v. Mun. Court of Franklin Cnty.* (1972), 30 Ohio St.2d 239, 242.

Thus, one is not permitted to file a third-party complaint just because there are legal claims a defendant wishes to pursue against other parties. Rather, the third-

party complaint is proper when a defendant has a claim he wishes to pursue against a third-party which would make the third-party liable for all or part of the plaintiff's claim against the defendant. Civ. R. 14 is designed to promote judicial efficiency by consolidating separate actions that could be tried together and to avoid a duplication of testimony and evidence or inconsistent verdicts. Id at 241.

In the instant case, since the Court has determined that, as a matter of law, the Plaintiff cannot recover monetary damages against the Defendants, it necessarily follows that none of the claims set forth in the third-party complaint could result in liability to the Defendants for all or part of the Plaintiff's claim, as required by Civ. R. 14. For that reason, the third-party complaint shall be dismissed without prejudice, as not being a proper pleading under Civ. R. 14. Third Party Defendants Christopher Keith; Eric Keith; Recycling Creations, LLC did not file their own motion to dismiss. However, the Court's ruling will apply to those Third Party Defendants, as well as the Third Party Defendants who did file a motion to dismiss.

While it will not be necessary for the Court to analyze each of the multiple claims, and the Court will not decide the viability of those claims at this time, it appears that the relationship between the Plaintiff's complaint and many of the claims are tenuous. In some instances, it appears that the claims do not state a cause of action upon which relief can be granted, even if pursued in a separate action. Moreover, no purpose would be served in maintaining these claims as a part of the

instant action since the Plaintiff's complaint is being dismissed.

Counterclaim

Civ. R. 13(B) permits a party to include in a counterclaim any claim against an opposing party regardless of whether it arose out of the transaction or occurrence in the complaint. Therefore, the Court must determine whether the allegations set forth in Defendant's counterclaim against the Plaintiff City of Marion state a claim upon which relief can be granted. The first and second counts of the counterclaim do not seek judgment against the Plaintiff. However, Counts 3, 4, 6 and 7 do seek judgment against the Plaintiff. Count 5 seeks judgment against Third Party Defendant Robbins, who is a alleged to an employee of the Plaintiff who was acting within the scope of his employment. The claims in Counts 3 through 7 will be addressed separately.

Count 3

Count 3 is labeled as a claim for contribution and seeks recovery against the Plaintiff for contribution towards clean-up costs that the Defendants have or will incur as a result of the actions brought the Plaintiff or by the Ohio EPA. The theory of this action is that the Plaintiff is an "operator" of the property. However, under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the United States Supreme Court has ruled that the operator is "someone who directs the workings of, manages, or conducts the affairs of the facility" and "must manage, direct, or conduct operations specifically related to pollution, that is

operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." *United States v. Best Foods* (1998), 524 U.S. 51. Assuming all of the allegations in the counterclaim are true, the Plaintiff can not be construed to be an operator.

While the Court must accept as true the factual allegations set forth in the Counterclaim, the Court need not accept the legal conclusions alleged in the pleading. See e.g. *Ashcroft v. Iqbal* (2009), 556 U.S. 662, 678-679. Therefore, the Court must evaluate the actual factual allegations contained in the Counterclaim to determine whether the Counterclaim sets forth a plausible claim for relief. Id at 678-679.

Initially, it should be noted that the counterclaim does not allege that the Plaintiff is a "operator." Rather, the counterclaim alleges that Tom Robbins is an operator (Para. 8). Even if one construes the counterclaim to allege that the Plaintiff is an operator under the theory that Tom Robbins is an employee of the Plaintiff acting within the scope of his employment (Para. 8), it is clear that Third-Party Defendant Robbins does not meet the definition of operator.

The counterclaim alleges that Robbins' actions were taken as an employee of the Plaintiff (Para. 8) and that in his capacity of City Safety Director, he demanded that the Defendants remove recyclable materials from the property (Para. 15), and that he was monitoring the cleanup work conducted on the facility (Para. 21, 25).

There is no allegation that Third-Party Defendant Robbins was taking any action other than to attempt to address City concerns about the condition of the property. In fact, the counterclaim alleges that Defendant 333 Joseph was the owner of the property (Para. 10) and that Defendant 333 Joseph contracted with various entities to accomplish the cleanup of the property (Paras. 16-20).

The Defendants have provided no legal authority to support the proposition that a municipality becomes the operator of a facility under these circumstances. Thus, Count 3 fails to state a claim upon which relief can be granted.

Count 4

Count 4 is labeled as a claim for civil conspiracy. The Third-Party Plaintiffs allege that Third-Party Defendants Eric Keith, Christopher Keith, Recycling Creations, General Recycling and Rumpke converted 333 Joseph's property to their own use (Para. 45). The counterclaim further alleges that the tort of conversion was accomplished as a part of a civil conspiracy, or malicious combination of persons, whereby Robbins and Rumpke, by vouching for Keith, and falsely reporting on the alleged progress of the debris removal, assisted Keith in the theft of 333 Joseph's property (Para 46). There is no allegation that the Plaintiff, City of Marion, engaged in the civil conspiracy. Rather, the theory of liability against the City is presumably because Third-Party Defendant Robbins was alleged to be a city employee acting within the scope of his duties for the City of Marion, thus making the City

vicariously liable for his actions (Para 8).

A claim of civil conspiracy requires a malicious combination of acts involving two or more persons. See e.g. *Kenty v. TransAmerica Premium Ins. Co.* (1995), 72 Ohio St.3d 415. The doctrine of *respondeat superior* makes an employer responsible for injuries proximately caused by the negligence of its employees acting within the scope of their employment. See e.g. 1 OJI-CV 423.03. If Third-Party Defendant Robbins was acting maliciously, as alleged in the complaint, and as required to establish a claim of civil conspiracy, he necessarily was not acting negligently within the scope of his employment. As such, the doctrine of *respondeat superior* cannot be used to establish liability against the City of Marion, based on the allegations in the Complaint.

The only allegation against the City of Marion with respect to the civil conspiracy claim is the following sentence contained in Paragraph 46:

> Following the theft, the City of Marion and/or Robbins had protected Keith by refusing to even accept a police report and by prosecuting or threatening to prosecute Cendol, Rosenfeld and/or 333 Joseph despite actual knowledge that Keith acted without authorization.

Since a prosecutor, in this case the City Law Director, has absolute discretion to refrain from prosecuting a case, this cannot be the basis for liability. Further, prosecutorial functions are defined by statute as governmental functions for which

there is statutory immunity.[2] Moreover, acts which took place after the alleged theft occurred cannot constitute the basis for a claim of conversion.

The Defendants have failed to provide any legal authority to support the proposition that a municipality can be liable for civil conspiracy under the facts alleged in this complaint. For all of these reasons, Count 4 fails to state a claim upon which relief can be granted.

Count 5

Count 5 is entitled as claim for declaratory judgment. This count requests that the Court declare that Keith, Rumpke and Robbins are solely responsible for the cleanup, damages, and penalties alleged by Plaintiff, as well as the State of Ohio in the event that 333 Joseph, Cendol, and Rosenfeld are found to be obligated for any such cleanup (Para. 50). This count in the counterclaim alleges no facts or theories to support this judgment other than to incorporate by reference all of the other allegations in the counterclaim. Since this count in the counterclaim does not request declaratory judgment against the Plaintiff, this count in the counterclaim necessarily does not state a claim upon which relief can be granted against the Plaintiff.

Count 6

Count 6 is entitled claim of intentional or negligent misrepresentation. In pertinent part, Defendants allege:

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2 See RC 2744.01(C)(2)(f) and 2744.02. See also pp. 13-15 herein for a fuller discussion of immunity.

- Robbins and Rumpke represented Eric Keith, Christopher Keith, and Recycling Creations as honest, reliable and competent contractors who were willing and able to complete the debris removal competently. (Para. 52)

- Robbins and Rumpke knowingly or negligently made these false representations upon which 333 Joseph, Rosenfeld and Cendol reasonably relied. (Para. 53)

- 333 Joseph, Rosenfeld, and Cendol were directly damaged by the intentional and/or negligent representation of Robbins and Rumpke in an amount in excess of $4 million. (Para. 54)

As a result of these allegations, Defendants seek judgment against the City of Marion for compensatory and punitive damages in an amount in excess of $4 million (Para. 55).

The theory of liability against the City of Marion appears to be based on the doctrine of *respondeat superior* since the actions taken by Third-Party Defendant Robbins are actions taken within the scope of his employment with the City (Para. 8). To the extent that recovery is sought on the basis of intentional misrepresentations, this would not constitute negligent conduct for which the doctrine of *respondeat superior* would apply. To the extent that recovery is sought based on the theory of negligent misrepresentation, the City would have statutory immunity.

Defendants' counterclaim alleges that Third-Party Defendant Robbins' recommendations to 333 Joseph were made in the course of his communication with Rosenfeld, Cendol, and 333 Joseph, as he was attempting to encourage them to clean up the property (Paras. 15-18). R.C. 2744.02(A)(1) grants broad immunity to political

subdivisions. The Defendants admit that the Plaintiff City of Marion is a municipal corporation (Para. 2 of answer). Pursuant to R.C. 2744.01(F), a municipal corporation is a political subdivision for purposes of the immunity statute.

R.C. 2744.02(B) provides five exceptions for which liability may be imposed against a political subdivision:

1. Negligent operation of a motor vehicle;

2. Negligent performance of acts by their employees with respect to proprietary functions;

3. Negligent failure to keep public roads in good repair;

4. Negligence with respect to physical defects in or on the grounds of governmental buildings; and

5. Civil liability expressly imposed upon a political subdivision by another section of the Revised Code.

Since the Defendants' counterclaim does not involve the operation of a motor vehicle, the failure to maintain public roads, or defects in governmental buildings, the first, third, and fourth exceptions are clearly not applicable. Since no statute expressly imposes liability on a political subdivision for negligent misrepresentations, the fifth exception is also not applicable. To evaluate the second exception, one must determine whether the Defendants have alleged Robbins' negligence was with respect to a "proprietary function."

For purposes of R.C. Chapter 2744, the functions of political subdivisions are classified as either governmental functions or proprietary functions. R.C.

2744.02(A)(1). R.C. 2744.01(C)(1) defines governmental functions to include functions for the common good of all citizens, as well as functions that promote or preserve the public's health, safety, or welfare. The statute specifically includes such things as the enforcement of any law, as well as prosecutorial functions. R.C. 2744.01(C)(2)(f & i). Defendants' counterclaim specifically alleges that Robbins was "demanding that the remaining recyclable material be removed and threatening criminal prosecution for the alleged violation of safety ordnances" (Para. 15). This is a governmental function as defined by statute. Moreover, R.C. 2744.01(G)(1) requires that for a function to be a proprietary function, it must be one that is "customarily engaged in by non-governmental persons." Non-governmental persons would not be in a position to enforce safety ordnances.

The Defendants have suggested that political subdivision immunity is generally reviewed as part of a motion for summary judgment. However, the Ohio Supreme Court has encouraged the early resolution as to whether a political subdivision is immune. *Hubbell v. City of Xenia* (2007), 115 Ohio St.3d 77, ¶25. The Third District Court of Appeals has cited *Hubbell* in support of the proposition that a Civ. R. 12(B)(6) motion to dismiss is a proper procedural device to assert political subdivision immunity. *Miller v. Van Wert Co. Bd. of Mental Retardation and Developmental Disabilities* (September 28, 2009), Case No. 15-08-11, at ¶19.

For all of these reasons, the Court finds that Count 6 fails to state a claim upon

which relief can be granted against the Plaintiff.

Count 7

Count 7 is listed as a claim for negligence. It incorporates the other allegations in the counterclaim and specifically alleges that "the actions of Eric Keith, Christopher Keith, Recycling Creations, Rumpke, Robbins, and the City of Marion constitute negligence, which proximately caused damage to the property of 333 Joseph." (Para 57). The political sudvision immunity statute bars recovery against the City on the basis of negligence in Count 7 for the same reason that it bars liability in Count 6. Thus, Count 7 fails to state a claim upon which relief can be granted against the Plaintiff.

Since of none of the individual counts in the counterclaim state a claim upon which relief can be granted against the Plaintiff, the counterclaim as a whole, necessarily, fails to state a claim upon which relief can be granted.

Conclusion

It is therefore ORDERED that Plaintiff's complaint is dismissed without prejudice for failure to state a claim upon which relief can be can be granted.

It is further ORDERED that the Third-Party Complaint filed by the Defendants and Third-Party Plaintiffs is dismissed without prejudice for the reason that it is not a proper third-party complaint in accordance with Civ. R. 14(A).

It is further ORDERED that Defendants' counterclaim is dismissed without

prejudice for failure to state a claim upon which relief can be granted.

Since all claims have been disposed of, this judgment constitutes a final appealable order. Costs are assessed against the Plaintiff.

JUDGE JIM SLAGLE

IN CASE NO: 14-CV-0080

cc: Mark Russell, Attorney for Plaintiff and Third-Party Defendant Tom Robbins
C. Charles Curley, Attorney for Plaintiff and Third-Party Defendant Tom Robbins
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IN CASE NO: 13-CV-0453 (For Information Only)

cc: Clint White, Attorney for Plaintiff

TO THE CLERK: Pursuant to Civil Rule 58(B), the Clerk is directed to serve upon the parties a notice of the filing of this Judgment entry and of the date of entry upon the Journal.