

IN THE COURT OF COMMON PLEAS
TRUMBULL COUNTY, OHIO

STATE OF OHIO, ex rel.) CASE NO. 2007-CV-618
RICHARD CORDRAY)
OHIO ATTORNEY GENERAL) JUDGE W. WYATT MCKAY
)
PLAINTIFF,) MAGISTRATE ANTHONY M. CORNICELLI
vs)
) <u>MAGISTRATE'S DECISION</u>
LEVIO BALDARELLI,)
)
DEFENDANT,)

The instant case came on for consideration upon the parties' cross motions for summary judgment. As a matter of housekeeping, this Magistrate first addresses some procedural issues relating to the timeliness of filings on the part of both parties. Plaintiff, State of Ohio, alleges that during a telephone status conference held on September 23, 2009, this Magistrate established October 7, 2009 as the deadline for filing dispositive motions. No Order was formalized or filed. The Plaintiff, State of Ohio, now complains that Baldarelli's Motion for Summary Judgment was filed on December 8, 2009, two months after the dispositive motion deadline had passed and without seeking leave to file instanter. However, this Magistrate is aware that there were several telephone communications amongst counsel for both parties during the interim in which extensions previously established in this case were discussed. Therefore, it is the Order of this Magistrate that Defendant Baldarelli's Motion for Summary Judgment filed on December 8, 2009 is deemed to be properly and timely filed and is properly before the Court. Plaintiff has had the opportunity, and in fact, has responded in opposition to same.

Additionally, the Plaintiff, State of Ohio, has filed a motion to file its memorandum in opposition to Defendant's summary judgment instanter. The Plaintiff State avers that the

subject document was improperly sent via mail to the wrong Court resulting in late filing in this Court. Under such circumstances, this Magistrate extends the time period within which Plaintiff's filing may be made and hereby accepts Plaintiff, State of Ohio's Reply to Defendant's Memorandum in Opposition to Summary Judgment and Response to Defendant's Motion for Summary Judgment for filing, instanter.

In considering a motion for summary judgment, (and in this case cross-motions for summary judgment) a Court may consider "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action." Civ.R. 56(C). This Magistrate has reviewed Plaintiff State of Ohio's Motion for Summary Judgment and Memorandum in Support with attachments, Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and Defendant's Motion for Summary Judgment with attachments and Plaintiff State of Ohio's Reply to Defendant's Memorandum in Opposition to Summary Judgment and Response to Defendant's Motion for Summary Judgment.

The legal standard for consideration and disposition of issues on summary judgment is well settled. Not only does the moving party have the burden of showing that no genuine issue of fact exists as to any material fact, but also that he is entitled to judgment as a matter of law. Civ. R. 56(C); *Harless v. Willis Day Warehousing Co. Inc.*, 54 Ohio St.2d 64 (1978).

The trial court must review the facts of the case in the light most favorable to the non-moving party and resolve any doubt in favor of the non-moving party. *Viock v. Stow-Woodward Co.*, 13 Ohio App.3d 7 (6th Dist. 1983); *Swiss Reinsurance M. Vorp. Inc. v. Roetzel & Andress*, 163 Ohio App.3d 336 (9th Dist. 2005).

Pursuant to Civ. R. 56(C) as interpreted by the Ohio Supreme Court, summary judgment is proper if: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made that conclusion is adverse to that party. *Temple v. Wean United, Inc.*, 50 Ohio St.2d 319 (1977).

After construing all of the evidence and the reasonable inferences that can be drawn therefrom in the light most favorable to the Defendant Baldarelli, the Magistrate finds that there are genuine issues of material facts which remain to be litigated upon which reasonable minds could come to differing conclusions and/or that Plaintiff is not entitled to judgment as a matter of law. Accordingly, Plaintiff's Motion for Summary Judgment is not well taken and is hereby denied.

Conversely, after viewing all of the evidence and reasonable inferences that can be drawn therefrom in the light most favorable to the Plaintiff State of Ohio, this Magistrate finds that reasonable minds can come to but one conclusion and that there are no genuine issues of material fact which remain to be litigated and that the Defendant Baldarelli is entitled to judgment as a matter of law.

Specifically, the critical issue in this case is whether Defendant Baldarelli was the owner or operator of a demolition operation and whether the buildings that Baldarelli demolished fell within the "residential" exclusion to Ohio's asbestos inspection and reporting requirements.

The Ohio Revised Code prohibits violations of air pollution control statutes. It provides in pertinent part, §3704.05(G):

G. No person shall violate any order, rule or determination of the Director issued, adopted or made under this Chapter.

Ohio Administrative Code provides rules and regulations for asbestos handling-demolition, renovation and disposal.

Ohio Administrative Code, Section 3745-20-01, provides, in pertinent part:

Section 3745-20-01, Definitions and incorporation by reference:

13. "Demolition" means the wrecking or taking out of any load supporting structural member of a facility together with any related handling operations or the intentional burning of any facility.

18. "Facility" means any institutional, commercial, public, industrial or residential structure, installation or building (including any structure, installation, or building containing condominiums or individual dwelling units operated as a residential cooperative, but excluding residential buildings having 4 or fewer dwelling units);...

28. "Installation" means any building or structure or any group of buildings or structures at a single demolition or renovation site that are under the control of the same owner or operator or owner or operator under common control.

34. "NESHAP" means National Emission Standards for Hazardous Air Pollutants.

39. "Owner or Operator" means:

a. As it applies to Rules 3745-20-02 to 3745-20-05 of the Administrative Code, any person who owns leases, operates, controls, or supervises the

facility being demolished or renovated or any person who owns, leases, operates, controls, or supervises the facility being demolished or renovated or any person who owns, leases, operates, controls or supervises the demolition or renovation, or both; or...

(C) Incorporation by reference.

This Chapter includes references to certain matter or materials. The text of the incorporated materials is not included in the regulations contained in this Chapter. The materials are hereby made a part of the regulations in this Chapter...

2. Incorporated materials.

4. 40 CFR Part 61, Subpart M; "National Emission Standards for Hazardous Air Pollutants;" 38 FR 8820 April 6, 1979, as amended at 55 FR 48414, November 20, 1990...

Section 3745-20-03, Standard for notification prior to demolition or renovation:

A. Each owner or operator to whom this Rule applies shall:

(1) Provide the Director of Ohio EPA with written notice of intention to demolish or renovate.

(2) Delivery of the notice shall be by the United States postal service...

(3) Postmark or deliver the notice to the Ohio EPA field office having jurisdiction in the county where the demolition or renovation is to occur as follows:

(a) At least ten working days before the beginning of the demolition operation...

Section 3745-20-02, Standards for demolition and renovation, facility inspection, and determination of applicability:

(A) Notwithstanding any other exclusion of this Rule, and to determine which requirements of this Rule and of Rules 3745-20-03 and 3745-20-04 of the Administrative Code apply, each owner or operator of any demolition or renovation operation shall have the affected facility or part of the facility where a demolition or renovation operation will occur thoroughly inspected by a certified asbestos hazard evaluation specialist, in accordance with Paragraph (C) of Rule 3701-34-02 of the Administrative Code prior to the commencement of the demolition...

This Magistrate finds that by the clear and unambiguous language of the Ohio Administrative Code Section 3745-20-01, "definitions and incorporation by reference", that the tearing down of three (3) residential homes containing a total of three (3) residential dwelling units collectively do not qualify as a "facility" or an "installation" as those terms are defined by law.

Specifically, the Code section provides, in pertinent part:

"Facility" means any institutional, commercial, public, industrial or residential structure, installation or building (including any structure, installation, or building containing condominiums or individual dwelling units operated as a residential cooperative, but excluding residential buildings having 4 or fewer dwelling units): (Emphasis added)

The definition of facility contained in the Ohio Administrative Code excludes residential buildings having four (4) or fewer dwelling units. There is no dispute that the three (3) houses owned by St. Patrick's were residential buildings. The residential buildings owned by St. Patrick's had four (4) or fewer dwelling units. In fact, the three (3) houses were all single family dwellings. By definition, the three (3) houses owned by St. Patrick's were not a facility.

The Plaintiff State of Ohio cites as authority 40 CFR Part 61 which has been incorporated in the Ohio Administrative Code 3745-20-01 (C). The rules and regulations of the Environmental Protection Agency set forth in that section of the Code of Federal Regulations clarify the definition of facility as follows:

"...the EPA does not consider residential structures that are demolished or renovated as part of a commercial or public project to be exempt from this rule. For example, the demolition of 1 or more houses as part of an urban renewal project, a highway construction project or a project to develop a shopping mall, industrial facility or other private development would be subject to NESHAP... To clarify...the owner of a home that renovates his house or demolishes it to construct another house is not to be subject to NESHAP.
(Emphasis added)

The Ohio Administrative code excludes single family residential buildings from the definition of a facility. The Code of Federal Regulations also excludes residential buildings provided they are not part of a public project or commercial development. In this case, there is no dispute that the tearing down of these three (3) houses (residential buildings) which in fact contained fewer than four (4) dwelling units apiece, and collectively, were not part of a public project or commercial development. The tearing down of these (3) houses was not part of an urban renewal project. It was not part of a highway construction project. It was not part a project to develop a shopping mall, industrial facility or other private development which would subject it to NESHAP.

Although the Plaintiff State of Ohio has cited authority applying NESHAP coverage to residential buildings under common ownership demolition as part of a larger governmental, commercial, industrial or private development project, none of those authorities specifically address the issue where there are multiple residential buildings containing collectively four (4) or fewer dwelling units. Since those authorities are presented in the context of larger projects such as an urban renewal, a highway construction project or a project to develop a shopping mall, for instance, it is likely that the Court or governmental authority relied solely upon the issue of whether or not each building containing four (4) or fewer dwelling units would qualify as an exclusion under the definitional section. The Court and/or governmental authorities seem to focus on the common ownership or demolition of the buildings.

Accordingly, it is the decision of this Magistrate that where multiple buildings are involved which contain collectively a total of four (4) or fewer dwelling units, then in that event those structures are properly excluded from the definitional sections relating to

“facilities” and “installations”, and therefore, no legal mandate arises under such occurrence to inspect and/or to notify.

Based upon the foregoing Defendant Baldarelli’s Motion for Summary Judgment is well taken and is hereby granted so that Plaintiff’s Complaint against Defendant Baldarelli be and the same is hereby dismissed with prejudice at Plaintiff’s costs.

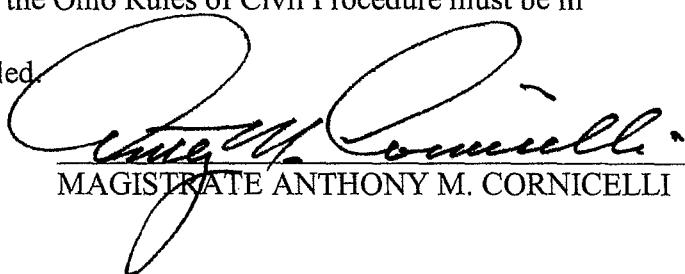
In light of this Magistrate’s foregoing decision, it is unnecessary to address the remaining issues presented by Defendant Baldarelli in his Motion for Summary Judgment.

A party may, within fourteen (14) days of the filing of this Magistrate's Decision, serve and file written objections. If objections are timely served and filed by any party, any other party may serve and file objections within ten (10) days of the date on which the first objections were filed, or within the time otherwise prescribed by Rule 53, O.R.C.P., whichever period last expires. Such objections shall be considered a motion. Objections shall be specific and state with particularity the grounds therefore. **A PARTY SHALL NOT ASSIGN AS ERROR ON APPEAL THE COURT’S ADOPTION OF ANY FINDING OF FACT OR CONCLUSION OF LAW UNLESS THE PARTY TIMELY AND SPECIFICALLY OBJECTS TO THAT FINDING OR CONCLUSION AS REQUIRED BY CIVIL RULE 53(E)(3).** Upon consideration of the objections, the Court may: adopt, reject or modify the Magistrate's Decision; hear additional evidence; recommit the matter to the Magistrate with instructions; or hear the matter itself. (See Rule 53, O.R.C.P. as amended.)

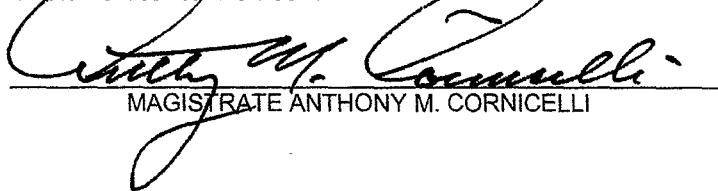
These and all other provisions of the Ohio Rules of Civil Procedure must be in compliance or objections may be overruled.

DATE: 2/22/10

cc: James A. Fredericka
Samuel Peterson


MAGISTRATE ANTHONY M. CORNICELLI

TO THE CLERK OF COURTS: YOU ARE ORDERED TO SEND COPIES OF THIS JUDGMENT ON ALL COUNSEL OF RECORD OR UPON THE PARTIES WHO ARE UNREPRESENTED FORTHWITH BY ORDINARY MAIL.


MAGISTRATE ANTHONY M. CORNICELLI

KAREN INFANTE ALLEN
CLERK OF COURTS
TRUMBULL COUNTY

TRUMBULL COUNTY
CLERK OF COURTS

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