

FILED
MIAMI COUNTY
COMMON PLEAS COURT

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

JAN A. MOTTINGER
CLERK OF COURTS

STATE OF OHIO, ex rel. : CASE NO. 10-762
RICHARD CORDRAY : JUDGE CHRISTOPHER GEE

PLAINTIFF :

VS. :

CAP INDUSTRIES, INC. :

DEFENDANT.

ORDER OVERRULING DEFENDANT'S MOTION TO DISMISS AND MOTION
FOR SUMMARY JUDGMENT

This matter came on for the Court's consideration upon the motion of Defendant, CAP Industries, Inc. ("CAP") to dismiss and alternatively for a motion for summary judgment. Plaintiff, State of Ohio, ex rel Richard Cordray, Ohio Attorney General, ("Cordray"), has filed a memorandum in opposition to the motion to dismiss and the alternative motion for summary judgment. CAP filed a reply memorandum.

The complaint filed by Cordray alleges that the defendant CAP illegally stored hazardous waste at its business location in Piqua, in Miami County, Ohio. The complaint alleges that during an inspection at CAP's business in 2005, an investigator for the Ohio Environmental Protection Agency ("EPA") "...discovered approximately 250

55-gallon drums containing hazardous waste.” As a result, the complaint alleges that CAP is subject to regulation as an operator of a hazardous waste facility. The complaint alleges that CAP, as an operator of a hazardous waste facility, failed to comply with multiple regulations dealing with permitting, storage, risk assessment, reporting, training, contingency planning, equipment, labeling, container management, inspection and disposal of hazardous waste. Cordray seeks injunctive relief, a civil penalty of \$10,000 per day for each violation and costs and fees, including attorney fees.

When resolving a motion to dismiss under Rule 12(B)(6), a trial court is confined to the averments set forth in the complaint and may not consider evidentiary materials.¹ All factual allegations of the Complaint must be taken as true and all reasonable inferences must be drawn and liberally construed in favor of the nonmoving party.² A complaint may only be dismissed by the trial court when it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief.³

As these cases illustrate, motions to dismiss are usually overruled because the law does not favor them. “Because it is so easy for the pleader to satisfy the standard of Civ. R. 8(A), few complaints are subject to dismissal.”⁴ Civil Rule 12(B)(6) does not require Plaintiffs to try their cases at this stage in the litigation. The only purpose of Civil Rule 8(A) is to give the parties notice of the allegations. Consequently, a movant bears an enormous burden in order to be entitled to a dismissal of a complaint at the

¹ State ex rel. Baran v. Fuerst, 55 Ohio St. 3d 94, 97, (1990).

² State ex rel. Martines v. Cleveland City School District Board of Education, , 70 Ohio St. 3d 416, (1994); Mitchell v. Lawson Milk Company, 40 Ohio St. 3d, 190, 192, (1988); Civil Rule 8(F).

³ Perez v. Cleveland 66 Ohio St. 3d 397, 399, (1993); York v. Ohio State Highway Patrol, 60 Ohio St. 3d 143 (1991).

⁴ Leichtman v. WLW Jacor Communications, Inc., 92 Ohio App. 3d 232(1994).

pleading stage of litigation.⁵ Here, the defendant failed to satisfy the heavy burden to succeed under Ohio Civil Rule 12(B)(6). Accordingly, the defendant's motion to dismiss must be overruled.

In the alternative to the motion to dismiss, the defendant has filed a motion for summary judgment. Civil Rule 56(C) specifically provides that before Summary Judgment may be granted, the Court must determine that (1) no genuine issue as to any 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 upon reviewing the evidence most strongly in favor of the party against whom the Motion for Summary Judgment is made, that conclusion is adverse to the party against whom the Motion has been made.

Summary Judgment is to be granted only on the basis of the pleadings, depositions, answers to interrogatories, admissions, affidavits, transcripts of evidence, and written stipulations. In this case, the Court has examined all evidentiary materials, including but not limited to the affidavits attached to the memoranda of each party.

The burden of establishing that material facts are not in dispute and that no genuine issue of fact exists is on the party moving for summary judgment.⁶ Once a motion for summary judgment has been filed Civ. R. 56 places a burden on the non-moving party to then set forth specific evidentiary facts showing the existence of a genuine issue for trial.⁷

⁵ Herbert v. Banc One Brokerage Corporation, 93 Ohio App. 3d 271, 275, (1994).

⁶ Harless v. Willis Day Warehousing Co. (1978) 54 Ohio St. 2d 64.

⁷ Van Fossen v. Babcock & Wilcox Co. (1988), 36 Ohio St. 3d 100; Wing v. Anchor Media, Ltd. of Texas (1991), 59 Ohio St. 3d 108. See also: Jackson v. Alert Fire & Safety Equip., Inc. (1991), 58 Ohio St. 3d 48; Mitseff v. Wheeler (1988), 38 Ohio St. 3d 112, 115.

On March 6, 1996, the Ohio Supreme Court clarified the standards for granting summary judgment under Civil Rule 56 when a moving party asserts that a nonmoving party has no evidence to establish an essential element of a nonmoving party's case. In Dresher v. Burt⁸ the Supreme Court stated at page 293:

"Accordingly, we hold that a party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case. Rather, the moving party must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. However, if the moving party has satisfied its initial burden, the nonmoving party then has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party.."

CAP filed the affidavit of Robert Heckman, the president of CAP.

According to Heckman, CAP is in the business of customized packaging of a variety of paint, lubricant and other specialty consumer products, most of which are aerosol products. During the packaging process, about 5% to 10% of the production does not meet the requirement for immediate delivery and is retained as "off spec" product. According to Heckman, "off spec" production is "...stored on site for subsequent inspection to determine whether it is saleable as is, can be reworked in to the production process, is recoverable or is to be disposed of." In the spring and summer of 2005, CAP was busier than normal and had more off

⁸ 75 Ohio St. 3d 280 (1996),

spec product stored than usual. Heckman's affidavit asserts that in August, 2005, the EPA inspector showed up and demanded that all of the off spec material be disposed of as hazardous waste. Heckman asserts he was "intimidated" by the inspector and accommodated the demand by shipping all of the stored off spec material to a disposal site.

The pivotal issue raised by CAP in its motion for summary judgment is whether or not the off spec material meets the definition of "hazardous waste in R.C. 3734.01(J) and Ohio Adm. Code 3745-51-03 as alleged by Cordray in the complaint. The above administrative code section requires an initial determination of whether the off spec product meets the definition of "waste" in Administrative Code section 3745-51-04, "Definition of waste". The applicable sections define waste as"

(A)

(1) A "waste" is any discarded material that is not excluded by paragraph (A) of rule 3745-51-04 of the Administrative Code or that is not excluded by variance granted under rules 3745-50-23 and 3745-50-24 of the Administrative Code.

(2) A "discarded material" is any material which is:

- (a) Abandoned, as explained in paragraph (B) of this rule; or
- (b) Recycled, as explained in paragraph (C) of this rule; or
- (c) Considered inherently waste-like, as explained in paragraph (D) of this rule; or
- (d) A military munition identified as a waste in rule 3745-266-202 of the Administrative Code.

(B) Materials are waste if they are abandoned by being:

- (1) Disposed of; or
- (2) Burned or incinerated; or
- (3) Accumulated, stored, or treated (but not recycled) before or in lieu of

being abandoned by being disposed of, burned, or incinerated.

(C) Materials are wastes if they are recycled or accumulated, stored, or treated before recycling, as specified in paragraphs (C)(1) to (C)(4) of this rule.

(1) Used in a manner constituting disposal.

(a) Materials noted with an asterisk in column 1 of the table in this rule are wastes when they are:

(i) Applied to or placed on the land in a manner that constitutes disposal; or

(ii) Used to produce products that are applied to or placed on the land or are otherwise contained in products that are applied to or placed on the land (in which cases the product itself remains a waste).

(b) However, commercial chemical products listed in rule 3745-51-33 of the Administrative Code are not wastes if they are applied to the land and that is their ordinary manner of use.

(2) Burning for energy recovery.

(a) Materials noted with an asterisk in column 2 of the table in this rule are wastes when they are:

(i) Burned to recover energy; or

(ii) Used to produce a fuel, or are otherwise contained in fuels (in which cases the fuel itself remains a waste).

(b) However, commercial chemical products listed in rule 3745-51-33 of the Administrative Code are not wastes if they are themselves fuels.

(3) Reclaimed. Materials noted with an asterisk in column 3 of the table in this rule are wastes when reclaimed [except as provided in paragraph (A)(17) of rule 3745-51-04 of the Administrative Code]. Materials noted with a dash in column 3 of the table in this rule are not wastes when

reclaimed.

(4) Accumulated speculatively. Materials noted with an asterisk in column 4 of the table in this rule are wastes when accumulated speculatively.

In its memorandum in support of summary judgment, CAP argues that under the above code section, “waste” is defined as “discarded material” under subsection (2) above. CAP argues that under section (C)(1), recycled materials can only be considered discarded when they are “used in a manner constituting disposal”. CAP cites the Curtis Management Report, attached to the affidavit of Steven Curtis, to demonstrate that CAP did not use the off spec material” in a manner constituting disposal”. However, the affidavit of Curtis fails to meet the evidentiary standards under Civil Rule 56(E), which states that affidavits “...shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit.”⁹

The affidavit of Curtis does not state that it was based upon personal knowledge and it does not set forth facts that would otherwise be admissible in evidence. He states that his firm was hired to “document historic storage and recycling practices”. He then asserts the conclusion that CAP “...was engaged in the practice of storing and recycling off spec materials, and was in compliance with hazardous waste regulations applicable to this practice.” The Curtis affidavit does not provide any underlying facts to support the conclusion that CAP was engaged in the business of “storing and

⁹ Civil Rule 56(E)

recycling” the off spec materials.

The affidavit of Robert Heckman recites that the off spec material is held on site to determine it “whether it is saleable as is, can be reworked in to the production process, is recoverable or *is to be disposed of.*” (Emphasis added) Since the plaintiff alleges that off spec material may constitute waste if it is stored for the purpose of disposal under Ohio Adm. Code 3745-51-03(B), there is a factual issue created that makes summary judgment inappropriate at this time. The defendant’s alternative motion for summary judgment is overruled.

IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read 'C. Gee', is written over a horizontal line.

CHRISTOPHER GEE, JUDGE

cc: All Counsel of Record