89-LW-2903 (8th)

CITY OF CLEVELAND, Plaintiff-Appellant,

v.

NORTHEAST OHIO REGIONAL SEWER DISTRICT, Defendant-Appellee.

No. 55709.
8th District Court of Appeals of Ohio, Cuyahoga County.
Decided on September 14, 1989.

Civil appeal from Common Pleas Court Case No. 127,712.

Marilyn G. Zack, Director of Law by Malcolm C. Douglas and Paul A. Janis, Assistant Law Directors, Cleveland, for plaintiff-appellant.

William B. Schatz and Paul T. Murphy, Cleveland, for defendant-appellee.

JOURNAL ENTRY and OPINION

THOMAS J. PARRINO, Judge ®*¯.

The city of Cleveland brought this action for injunctive and declaratory relief against the Northeast Ohio Regional Sewer District ("NEORSD"). The city challenged NEORSD Resolution No. 83-87 which provides that the total cost of designing and implementing the Intercommunity Relief Sewer Program ("IRSP") is to be borne by all the users of the district's facilities. The trial court rejected the city's claim that it should be exempt from costs associated with the IRSP. In a timely appeal the city raises five assignments of error.

The NEORSD was created in 1972 under the authority of R.C. 6119.02 et seq. The purpose of the district is to provide a total wastewater control system for the collection, treatment and disposal of wastewater within the Cleveland metropolitan area. The district is composed of subdistrict one^the city of Cleveland^and subdistrict two^the surrounding suburbs. The district is governed by a "Plan of Operation" ("the Plan") as adopted in 1972 and subsequently amended in 1979.

The Plan provides, inter alia, for the construction of the Southwest Interceptor Sewer and the Heights/Hilltop Interceptor Sewers. These sewers will remove wastewater from the Cleveland combined sewer system and transport it to the appropriate treatment plants. The Plan requires maximum use of state and federal funds for these projects.

In the late 1970's and early 1980's the district undertook surveys of the suburban sewage needs. The Federal Environmental Protection Agency ("EPA") requested more detailed surveys for the areas to be serviced by the Heights/Hilltop and Southwest Interceptor Sewers. These studies revealed large sewer overflows in the suburban areas. As a condition for EPA funding of the interceptor sewers, the district was required to alleviate the overflows. The district proposed using its regulatory powers to force the individual communities to rectify the overflow problems. The EPA rejected this plan whenever the specific overflow involved more than one community. As a consequence, the district agreed to construct the intercommunity relief sewers in areas where the sewers would carry overflow generated by more than one community. Pursuant to NEORSD Resolution No. 83-87 the Intercommunity Relief Sewer Program ("IRSP") is to be financed by all the district's users. The cost of the program is estimated at eighty-three million dollars. The district also initiated the Community Relief Sewer Program ("CRSP") to eliminate overflow generated by a single community. The cost of the CRSP is to be borne by the individual community.

The city's challenge to NEORSD Resolution No. 83-87 is based upon Section 5(C)(3) of the Plan of Operation which provides that the construction and financing of local sewage collection systems is the responsibility of the individual communities. The city argues that the IRSP involves the construction of local sewers.

The city's first assignment of error asserts:

"The trial court erred in granting defendant sewer district's motion to consolidate because, (1) consolidation was with dormant cases no longer pending, (2) there were no common issues of fact or law

linking the new case to the dormant litigation, (3) consolidation was granted without hearing, and (4) the order of consolidation sanctioned forum shopping by defendant district."

The district moved to consolidate the city's lawsuit with the 1972 and 1979 cases organizing the NEORSD. These cases were decided by Judge George J. McMonagle and, in his 1979 opinion, he retained jurisdiction over the cases pursuant to R.C. 6119.051. This statute governs the amendment or abandonment of the plan and its purposes. The city opposed the motion and argued that the earlier cases were no longer pending for consolidation.

Civ.R. 42(A) governs consolidation and states:

"(A) When actions involving a common question of law or fact are pending before a court, that court after a hearing may order a joint hearing or trial of any or all the matters in issue in the actions; it may order some or all of the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

It is undisputed that the court issued decisions in the 1972 and 1979 cases. The entry of final judgment in those cases concluded the actions, and thus the cases are no longer pending before the trial court. The court's retenton of jurisdiction in the 1979 case is unrelated to the present action since this lawsuit does not involve an amendment or abandonment of the Plan or its purposes pursuant to R.C. 6119.051. Thus, consolidation would not have been proper. The record demonstrates, however, that the case was transferred not under Civ.R. 42(A) but on the authority of the administrative judge as delineated in C.P.Sup.R. 3(B) and Loc.R. 2 of the Court of Common Pleas of Cuyahoga County, General Division. See Berger v. Berger (1981), 3 Ohio App.3d 125, 129.

The trial judge to whom the case was initially assigned granted the district's motion to consolidate. As we previously noted, this ruling was improper under Civ.R. 42(A). However, one and one-half months later the administrative judge reassigned the case to visiting Judge George McMonagle citing the "heavy trial schedule" of the original judge. In Berger, supra at 130 this court held that an administrative judge may reassign a case pursuant to C.P.Sup.R. (3)(B) due to docket congestion and a need for immediate action in the lawsuit. We find no abuse of discretion by the administrative judge in the present case.

Accordingly, this assignment of error is overruled.

The city's second assignment of error states:

"The trial court erred in entering judgment against the city of Cleveland because the trial court lacked subject matter jurisdiction over the case sub judice."

The city asserts the court lacked subject matter jurisdiction since this case was not heard by the "court for the district" as required by R.C. 6119.03 and R.C. 6119.051.

R.C. 6119.03 provides that a court for the district, composed of a common pleas judge from each county within the sewer district, shall preside over a petition filed to form a sewer district. R.C. 6119.051 further provides:

"At any time after the creation of a water and sewer district, the district, after action by its board of trustees, may file a petition in the court of common pleas requesting the order of such court permitting the district to:

"(A) Increase or add to its purposes heretofore approved by the court so long only as its purposes are those described in section 6119.01 of the Revised Code, or

"(B) Abandon or surrender any purpose heretofore approved by the court, or

"(C) Amend any provision of the petition filed pursuant to section 6119.02 of the Revised Code.

Finally, R.C. 6119.011 provides that the court of common pleas "means the court in which the organizational petition is filed unless the context clearly indicates otherwise."

The city argues that since the district includes a portion of Summit County, the Cuyahoga County trial judge lacked jurisdiction to singularly decide this case. We disagree. This case does not involve the initial filing of an organization petition under R.C. 6119.02 and R.C. 6119.03. Nor does it involve an action to amend or abandon the Plan or its purposes pursuant to R.C. 6119.051. This case required only an

interpretation of the NEORSD Plan of Operation, its regulations and Resolution No. 83-87. Thus, a decision by the "court of the district" was not mandated by statute.

This assignment of error fails.

The city's third assignment of error asserts:

"The trial court erred in entering judgment against the city of Cleveland because such judgment was not based on the evidence presented, and was against the manifest weight of said evidence."

The city argues that the IRSP involves local sewers and since the NEORSD Plan of Operation requires local communities to fund the construction of local sewers, Resolution No. 83-87 is invalid.

Section 5(C)(3) of the Plan of Operation states:

"3.Except as otherwise provided in Chapter 6119 and paragraph 5(m) hereof, the construction and financing of local sewage collection systems will be the responsibility of the individual municipalities or political subdivisions."

Title III, Chap. 2, Section 30216 of the NEORSD Regulations defines a local sewer as:

" * * * any sewer built or to be built within the service area of the Northeast Ohio Regional Sewer District by one of the several communities within the same, for the purpose of connecting with intercepting or main sewers as branches thereof."

It is undisputed that the sewers to be constructed as part of the IRSP will carry overflow generated by more than one community. This fact alone supports the trial court's decision that district-wide financing is permissible under the plan. We do not find persuasive the city's argument that it should not have to bear any costs of the IRSP since the city may receive little direct benefit from the construction program. The issue is not one of benefits but rather of judicial interpretation of the NEORSD Plan of Operation and its regulations. Further, the district introduced evidence that alleviation of the suburban overflow will reduce the wet weather flow into the Cleveland system, Lake Erie and the surrounding streams. (Tr. 163-164, 172-175). As a result, all users of the district including city residents will benefit from the IRSP.

A reviewing court will not disturb a trial judge's decision if it is supported by some competent, credible evidence. C.E. Morris Co. v. Foley Construction Co. (1978) 54 Ohio St.2d 279. We find the trial court's interpretaion to be reasonable and supported by the evidence.

Accordingly, this assignment of error is overruled.

The fourth assignment of error asserts:

"The trial court erred in entering final judgment against the city of Cleveland by unconstitutionally failing to exercise its independent judgment in developing findings of fact and conclusions of law from the evidence submitted at trial."

Nothing in the record indicates the trial court failed to independently assess the evidence offered at trial. The court issued findings of fact and conclusions of law and a separate memorandum to counsel detailing the pertinent facts as well as the relevant portions of the Plan of Operations and regulations. The court explained its reasons for rejecting the city's challenge to Resolution No. 83-87. The fact that the court chose to interpret the regulation defining local sewers in a manner consistent with the resolution does not mean the court failed to fulfill its duties. Accordingly, we overrule this assignment of error.

The city's final assignment of error contends:

"The trial court erred in rendering a decision which is beyond the authority of the trial court, because it constitutes an amendment or modification to the plan of operation."

The city argues that the court's decision constitutes a defacto modification of the Plan of Operation and thus is invalid pursuant to R.C. 6119.051 which requires a decision by the court of the district. In our disposition of the city's second and third assignments of error we found that the court's decision constituted only an interpretation of the Plan of Operations and the regulation defining local sewers. The court did not modify or amend the Plan. Thus, R.C. 6119.051 is inapplicable.

Accordingly, this assignment of error is overruled and the trial court's decision is affirmed.

Judgment affirmed.

PATTON, P.J., and PAUL H. MITROVICH,®**¯ J., concur.

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

Footnote * Judge Thomas J. Parrino, retired of the Eighth District Court of Appeals, sitting by assignment.

Footnote ** Judge Paul H. Mitrovich of Lake County Common Pleas Court, sitting by assignment.