

[Cite as *Murgu v. Lakewood City School Dist. Bd. of Edn.*, 2018-Ohio-1636.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105699

VIOREL MURGU, ET AL.

PLAINTIFFS-APPELLEES

vs.

**LAKWOOD CITY SCHOOL DISTRICT,
BOARD OF EDUCATION**

DEFENDANT-APPELLANT

**JUDGMENT:
DISMISSED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-15-856093

BEFORE: Laster Mays, J., E.T. Gallagher, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: April 26, 2018

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ANITA LASTER MAYS, J.:

{¶1} Defendant-appellant Lakewood City School District, Board of Education (“Lakewood”), appeals the trial court’s decision denying their motion for leave to file a new motion for summary judgment. Lakewood asks this court to remand this matter to the trial court with instructions to grant Lakewood leave to pursue its political subdivision immunity defense through a motion for summary judgment. We dismiss the appeal.

I. Procedural History

{¶2} On December 21, 2015, plaintiffs-appellees Viorel and Marianne Murgu (“the Murgus”) filed a complaint against Lakewood after their minor daughter, A.M., fell through an auditorium stage floor at Lakewood High School. Lakewood filed its answer denying all of the

Murgus's allegations and did not raise its political subdivision immunity defense. Lakewood also filed a motion for summary judgment. Thereafter, Lakewood then filed a motion for leave to file supplement and surreply brief. The trial court issued a journal entry denying Lakewood's motion and granted the Murgus's motion to strike Lakewood's supplement to its motion for summary judgment and surreply. Lakewood then filed a motion for leave to file a motion for summary judgment on political subdivision immunity.

{¶3} The trial court did not rule on Lakewood's motion for leave to file a motion for summary judgment on political subdivision immunity. Instead, on October 18, 2016, the trial court granted Lakewood's motion for stay and ordered that Lakewood's motion for leave to file a motion for summary judgment on political subdivision immunity be held in abeyance. Lakewood had filed an appeal with this court, on October 6, 2016, arguing that the trial court abused its discretion in disallowing Lakewood from presenting its political subdivision immunity defense in summary judgment proceedings. The Murgus requested that this court dismiss the appeal. This court, in its journal entry, stated,

Motion by appellee to dismiss appeal is granted. A motion for summary judgment based on sovereign immunity is pending before the trial court. In light of the Ohio Supreme Court's decision in *Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878, the trial court's resolution regarding sovereign immunity is necessary.

Journal entry No. 503338 (Jan. 18, 2017).

{¶4} On April 4, 2017, the trial court denied Lakewood's motion for summary judgment stating that "genuine issues of material fact exist and the moving party is not entitled to judgment as a matter of law." The trial court also denied Lakewood's motion for leave to file a motion for summary judgment on political subdivision immunity. In the journal entry, the trial court stated that "affirmative defenses will be addressed at trial based on evidence presented.

Defendant's motion is out of rule.”

II. Facts

{¶5} On December 7, 2011, A.M. participated in a school band assembly at Lakewood Civic Auditorium at Lakewood High School. As A.M. walked toward her seat, she stepped through a trap door on the stage floor with her right leg up to her hip and sustained permanent injury. When Lakewood employees inspected the trap door, they discovered that a small piece of wood was missing from the trap door.

{¶6} On August 12, 2014, the deposition of Patricia Hendy (“Hendy”), the full-time auditorium manager of Lakewood City Schools, occurred, and Hendy gave her sworn testimony about altering the stage, specifically the trap door prior to A.M.’s fall. Hendy stated that she and the assistant manager, William Langenhop (“Langenhop”) were concerned about the auditorium stage floor, specifically the trap doors that would slightly give as “things were rolling across it.” Hendy testified that she and Langenhop put a piece of plywood under the trap door to keep the pieces all together and from sliding.

{¶7} Langenhop echoed Hendy’s testimony when he testified that he and Hendy put pieces underneath the trap door to bring the hole up all the way to floor level, “so that if it did flip or fall, you couldn’t fall farther than that half inch, inch down.” Both Langenhop and Hendy testified that they altered the stage floor to make it safer, and they were concerned that they observed the trap door slightly giving. They “assessed different ideas, again with the concern of the heavier and heavier equipment” being rolled across the stage floor.

{¶8} As a result of A.M.’s injuries, the Murgus filed a complaint against Lakewood. The trial court ruled against Lakewood, denying their summary judgment motion. As a result, Lakewood filed this appeal and argues one assignment of error for our review:

- I. The trial court abused its discretion in disallowing defendant-appellant Lakewood City School District, Board of Education from presenting its political subdivision immunity defense in summary judgment proceedings.

III. Political Subdivision Immunity

A. Standard of Review

{¶9} Accordingly,

[a]n appellate court applies an abuse of discretion standard of review to a trial court's decision to grant or deny a party leave to amend a pleading. *Wilmington Steel Prods. Inc. v. Cleveland Elec. Illum. Co.*, 60 Ohio St.3d 120, 122, 573 N.E.2d 622 (1991). "This court's role is to determine whether the trial judge's decision was an abuse of discretion, not whether it was the same decision we might have made." *Id.* An abuse of discretion connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983), citing *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

Jontony v. Colegrove, 2012-Ohio-5846, 984 N.E.2d 368, ¶ 12 (8th Dist.).

B. Law and Analysis

{¶10} In Lakewood's sole assignment of error, they contend that the trial court abused its discretion in disallowing them from presenting their political subdivision immunity defense in summary judgment proceedings.

Although the grant or denial of a leave to amend a pleading is within the sound discretion of the trial court, this discretion is not unfettered. "A motion for leave to amend should be granted absent a finding of bad faith, undue delay or undue prejudice to the opposing party." *Hoover v. Sumlin*, 12 Ohio St.3d 1, 5, 465 N.E.2d 377, at ¶ 6 (1984).

Id. at ¶ 14.

{¶11} "While the rule allows for liberal amendment, motions to amend pleadings pursuant to Civ.R. 15(A) should be refused if there is a showing of bad faith, undue delay, or undue prejudice to the opposing party. *Hoover* at paragraph two of the syllabus." *Turner v.*

Cent. Local School Dist., 85 Ohio St.3d 95, 99, 706 N.E.2d 1261 (1999). Also, “statutory immunity is an affirmative defense, and if it is not raised in a timely fashion, it is waived. *State ex rel. Koren v. Grogan*, 68 Ohio St.3d 590, 594, 629 N.E.2d 446, 450; Civ.R. 8(C); Civ.R. 12(H).” *Id.* at 99.

{¶12} The trial court decided to reserve its decision as to whether the exceptions apply to Lakewood essentially giving Lakewood another “bite at the apple.” The trial court stated in its journal entry that “affirmative defenses will be addressed at trial based on evidence presented.”

{¶13} The record reveals that Lakewood did not assert an affirmative defense in its original answer. However, the trial court did not deny Lakewood’s ability to assert an affirmative defense. The trial court determined that Lakewood’s motion was out of rule and would make an adjudication on the affirmative defense at a later date. Once the trial court has ruled whether or not Lakewood in fact has political immunity, then, depending on the decision, Lakewood can appeal the trial court’s decision.

An appellate court can review only final orders, and without a final order, an appellate court has no jurisdiction. *Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878, ¶ 9, citing *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.*, 44 Ohio St.3d 17, 20, 540 N.E.2d 266 (1989). Generally, an order denying leave to amend a pleading is not a final, appealable order. *See Trotwood v. S. Cent. Constr., L.L.C.*, 192 Ohio App.3d 69, 2011-Ohio-237, 947 N.E.2d 1291, ¶ 54 (2d Dist.); *Worthington v. Wells Fargo Bank Minnesota, N.A.*, 5th Dist. Richland No. 10 CA 40, 2010-Ohio-4541, ¶ 30-32.

Supportive Solutions, L.L.C. v. Electronic Classroom of Tomorrow, 137 Ohio St.3d 23, 2013-Ohio-2410, 997 N.E.2d 490, ¶ 10.

{¶14} Therefore, Lakewood’s assignment of error is overruled.

{¶15} Judgment is dismissed.

It is ordered that the appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANITA LASTER MAYS, JUDGE

MARY J. BOYLE, J., CONCURS;
EILEEN T. GALLAGHER, P.J., CONCURS IN JUDGMENT ONLY