
IN THE COURT OF APPEALS FOR THE
TENTH APPELLATE JUDICIAL DISTRICT
FRANKLIN COUNTY, OHIO

LYNN E. MACK, D.D.S.	:	Franklin County
	:	Court of Common Pleas
Plaintiff/Appellant,	:	Case No. 99 CVA11-9365
	:	The Honorable John P. Bessey
v.	:	Presiding Judge
	:	
OHIO STATE DENTAL BOARD,	:	
ET AL.,	:	
	:	
Defendants/Appellees.	:	

CORRECTED BRIEF OF APPELLANT LYNN E. MACK, D.D.S.

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I. STATEMENT OF THE CASE

A. Procedural Posture

On November 5, 1999, Lynn E. Mack, D.D.S. (“Dr. Mack”) filed a Complaint for Declaratory Judgment, For Relief Pursuant to 42 U.S.C. §§ 1983, 1985 and 1988, And For Preliminary And Permanent Injunction, alleging that the Ohio State Dental Board (“the Board”), under color of state law, willfully and maliciously violated her civil and constitutional rights and caused her severe emotional and financial damages and damage to her reputation. On November 18, Dr. Mack served a Request for Admissions on all Defendants, with responses due in 30 days. On December 16, 1999, the Board and its members, Demkee, Silverman, Lightfoot, Awadalla, Marsh, Sabat and Hills (“Board Members”), filed a Motion to Dismiss the Complaint pursuant to Civ. R. 12(B)(6) and a Motion for Stay of Discovery and Protective Order. On January 14, 2000, Dr. Mack filed a Memorandum Contra to each motion. The Defendants filed Replies on January 25.

On February 7, the trial court granted the Defendants’ Motion for Stay of Discovery, with the stay automatically expiring on March 20, and converted Defendants’ Motion to Dismiss into a Motion for Summary Judgment, allowing the Defendants 14 days to file a supplemental motion or supporting materials pursuant to Civ. R. 56(C). The court also gave Dr. Mack until March 6, to file a supplement pursuant to Civ. R. 56(C). The Defendants did not file any supplement motion or materials. Dr. Mack filed supplementary materials on March 6 and the Defendants filed a Reply on March 8.

On March 30, Dr. Mack filed a Notice of Admissions, asserting that because the Defendants failed to timely respond to her Request for Admissions after the automatic expiration of the trial court’s stay of discovery, the Requests were deemed admitted

pursuant to Civ. R. 36(A). The Defendants filed a Memorandum Contra on April 4. On April 6, the court entered a Decision granting Defendants' Motion to Dismiss and its Decision Denying Plaintiff's Notice of Admissions (attached as Appendix A). Judgment was entered on May 16 and Dr. Mack timely filed her Notice of Appeal on May 24, 2000.

B. Statement of the Facts

Dr. Mack is licensed to practice dentistry in Ohio. She and her husband, Charles Fink, were having serious marital problems, exacerbated by Mr. Fink's physical, emotional and psychological abuse of Dr. Mack and by his own alcohol abuse. (Dr. Mack and Mr. Fink are engaged in divorce proceedings at the time of this filing.) In May of 1999, Mr. Fink contacted two Board investigators and told them, among other things, that Dr. Mack was an alcoholic. (Complaint, ¶¶ 6, 7) Neither Mr. Fink nor anyone else ever claimed Dr. Mack's alleged abuse of alcohol affected her practice. (Complaint, ¶ 37)

On May 26, 1999, two Board investigators, acting in their official positions as agents of the Board and with the consent and purported authority of the Board, arrived, unannounced, at Dr. Mack's dental office, informed her that the Board had received a complaint about her drinking and told her to immediately admit herself into Shepherd Hill Hospital ("Shepherd Hill") or they would physically remove her from her office, "kicking and screaming." The investigators also advised her, and her employees, that if she refused, she would be "flipping burgers at Denny's" because her license would be revoked. (Complaint, ¶¶ 9, 10) At the time the investigators made these representations to Dr. Mack, they and the Board Members knew they had no evidence of any **"inability to practice under accepted standards of the profession because of . . . dependence on alcohol,"** as required by R.C. § 4715.30(A)(8) (emphasis added). (Complaint, ¶¶ 11, 13)

The Board's authority to take disciplinary action related to the alleged abuse of alcohol or other drug is specifically conditioned on the above quoted language. Furthermore, in order for the Board to institute disciplinary action against a dentist, it must first issue a Notice of Opportunity for Hearing, pursuant to R.C. Chapter 119.¹

Nevertheless, as a result of the representations and threats of the investigators, Dr. Mack admitted herself into Shepherd Hill in Newark, Ohio. (Complaint, ¶ 15) On June 24, a Board investigator made an unannounced visit to her at Shepherd Hill and told her that Shepherd Hill personnel said she was "doing well" and would be released soon. (Complaint, ¶ 17) During his visit, he told Dr. Mack the Board would not institute disciplinary action against her if she executed a Consent Agreement ("Agreement"), which he presented to her for the first time. (Complaint, ¶¶ 18, 28 & Ex. A) The investigators' actions on May 26 and June 24 were calculated to create undue influence and duress and resulted in Dr. Mack executing the Agreement. (Complaint, ¶ 20) When the investigator made these representations to Dr. Mack, he omitted material facts crucial to obtaining Dr. Mack's signature, with the intent that she rely upon his misrepresentations, which she justifiably did. (Complaint, ¶ 23) At no time did the investigators advise Dr. Mack that her husband was the source of the sole complaint

¹ The Ohio Administrative Code provides safeguards for "impaired practitioners" under the State Medical Board, which includes physicians allegedly abusing alcohol. The Medical Board may only "compel the individual to submit to a mental or physical examination, or both" **after it has issued a "notice" to the physician**. That notice must "delineate acts, conduct or behavior committed or displayed by him which establish reason to believe that he is impaired." OAC 4731-16-02(A) (Anderson 1999) (emphasis added).

If the examination indicates the physician is impaired, "or if the board has other reliable, substantial, and probative evidence demonstrating impairment, . . . the board **shall initiate proceedings** to suspend or deny the applicant." OAC 4731-16-02(B)(3) (emphasis added). The Code also provides that "the practitioner may, in lieu of submitting to such examinations, submit to the board . . . a signed statement containing the following elements: (1) An admission of impairment; and (2) Authorization to the board to enter an order limiting the license of the practitioner, as specified in paragraph (B) of this rule; and (3) **The signature of the practitioner, sworn to under penalty of perjury, notarized or witnessed by two competent persons.**" OAC 4731-16-03(A) (emphasis added). The Defendants did not provide Dr. Mack with *any* of these safeguards!

against her. (Complaint, ¶ 25) The investigators exerted undue influence over Dr. Mack by their threats. Because of her reliance on the representations of the Board's agents and the duress they caused her, Dr. Mack did not consult legal counsel before signing the Agreement. (Complaint, ¶ 26) The Board ratified the Agreement, knowing it had given no consideration for the promises made in the Agreement and knowing it had no evidence that Dr. Mack's alleged abuse of alcohol resulted in an inability to practice under the acceptable standards of care and knowing that it had no lawful authority to take action against a licensee solely based upon alcohol abuse. (Complaint, ¶¶ 29-31)

Following her discharge from Shepherd Hill on September 1 for allegedly bringing coffee to her room after a weekend visit at home and using her cellular telephone (Complaint, ¶¶ 34, 35), Dr. Mack learned that the sole complaint lodged with the Board was made by her husband and that it contained no allegation that her alleged alcohol abuse ever affected her practice. She also learned the investigators interviewed her dental office employees and found no evidence of an "inability to practice under accepted standards of the profession." (Complaint, ¶¶ 36-38)

After her discharge from Shepherd Hill, Dr. Mack retained legal counsel. On September 17, Frank R. Recker contacted Mary K. Crawford, Assistant Attorney General and legal counsel for the Board. (Complaint, ¶¶ 52, 53) Mr. Recker attempted to resolve the matter with counsel and acted on Dr. Mack's behalf to rescind and disavow the Agreement. Mr. Recker provided Ms. Crawford with documentation of Dr. Mack's attendance at Alcoholics Anonymous meetings and continued counseling sessions and documentation of her admission to the Caduceus Program at Cleveland Clinic, and explained Dr. Mack's discharge from Shepherd Hill. (Complaint, ¶¶ 54, 55) Even after

receiving this information, the Board refused to authorize her to return to practice, contending she had not complied with the Agreement, and refused to consider the matter until December 2 at its next regularly scheduled meeting. (Complaint, ¶¶ 57, 60-62)

On October 21, Dr. Mack returned to her dental practice. (Complaint, ¶ 64) That day, a Board investigator made an unannounced visit to her office. (Complaint, Ex. E) On October 26, an investigator called a dentist from whom Dr. Mack rents space and in whose office she treats patients several days a month and told him Dr. Mack was not allowed to practice dentistry. (Complaint, Ex. H) The investigator made these statements to injure her professional relationship with the dentist and her professional reputation. (Complaint, ¶ 68) On November 5, Dr. Mack filed her Complaint, seeking a declaratory judgment, alleging that the Defendants, under color of state law, willfully and maliciously violated, and continued to violate, her civil rights and her constitutional rights and that they caused her severe emotional and financial damages and damage to her reputation in the dental community.

II. ARGUMENT

A. STANDARD OF REVIEW.

On appeal from a granting of summary judgment, the appellate court's review is de novo, without deference to the trial court. The same summary judgment standard articulated in Civ. R. 56 is applied on appeal. Hounshell v. American States Ins. Co. (1987), 67 Ohio St. 2d 427, 433, 424 N.E.2d 311. Summary judgment is appropriate only where the movant demonstrates that there are no genuine issues of material fact in dispute and that he is entitled to judgment as a matter of law. Civ. R. 56(C); Harless v. Willis Day Warehousing Co. (1978), 54 Ohio St. 2d 64, 375 N.E.2d 46. The Rule places a

heavy burden upon the party seeking summary judgment to affirmatively demonstrate the absence of issues of material fact. Mitseff v. Wheeler (1988), 38 Ohio St. 3d 112, 115, 526 N.E.2d 798. A court cannot grant summary judgment unless it appears from the evidence that “reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made.” Civ. R. 56(C). Rule 56(C) provides that the non-moving party is entitled to have the evidence construed most strongly in his or her favor. Civ. R. 56(C); Williams v. First United Church of Christ (1974), 37 Ohio St. 2d 150, 309 N.E.2d 924.

B. THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY FINDING THAT THE ACTION WAS COMMITTED TO SPECIAL STATUTORY PROCEEDINGS AND THAT AN EQUALLY SERVICEABLE ADMINISTRATIVE REMEDY WAS AVAILABLE.

1. Dr. Mack’s cause of action was not committed to special statutory proceedings.

The trial court relied on the Ohio Supreme Court’s decision in State ex rel. Albright v. Court of Common Pleas of Delaware County (1991), 60 Ohio St. 3d 40, 42 572 N.E.2d 1387, 1389, and this Court’s decision in Aust v. Ohio State Dental Board (March 21, 2000), Franklin App. No. 99AP-946, unreported, in dismissing this case. However, the claims litigated in Albright and Aust were not filed pursuant to 42 U.S.C. §§ 1983, 1985 and 1988, nor did those decisions conclude that claims filed pursuant to the federal civil rights act are “special statutory proceedings.” On the contrary, the plaintiff in Albright filed a declaratory judgment action while his annexation petition was pending before the Board of Commissioners. Albright, 572 N.E.2d at 1389. Thus, Albright attempted to bypass a pending administrative proceeding and have the court review his case. These facts are clearly distinguishable from the present case.

Dr. Mack filed her claims under 42 U.S.C. § 1983, alleging that the Board and its members exceeded their statutory and legal authority and willfully and maliciously violated her constitutional rights. They failed to provide her with adequate notice of and charges against her and with an opportunity to be heard prior to forcing her into Shepherd Hill. In Count I of her Complaint, Dr. Mack asked the Court to find that the Agreement was invalid and unenforceable for the reasons stated therein. The validity and enforceability of a contract is not a matter committed to special statutory proceedings, nor is a determination of whether the Defendants violated her constitutional rights.

After Dr. Mack's complaint was filed, the Board issued a Notice of Opportunity for hearing ("Notice") to her, alleging that she had practiced dentistry while under *suspension* and had violated terms of *probation*. These allegations inherently demonstrate, ipso facto, the Board's conclusion that the Agreement was valid and enforceable, and further assume that Dr. Mack was suspended and/or on probation. Since Dr. Mack was never suspended or on probation, the Agreement's validity and enforceability was not at issue in any administrative proceeding. Therefore, because this matter has not been committed to special statutory proceedings and because Dr. Mack's claims could not be redressed in an administrative forum, this Court must reverse the trial court's decision and remand this case for a decision on its merits.

2. Dr. Mack did not have an equally serviceable administrative remedy.

The power to dismiss a case is within the sound discretion of the trial court, but that power is not unbridled. Pembaur v. Leis (1982), 1 Ohio St. 3d 89, 91, 437 N.E.2d 1199. Section 2721.03 of the Ohio Revised Code provides, in pertinent part, as follows:

Any person . . . whose rights, status, or other legal relations are affected by a . . . rule as defined in section 119.01 of the Revised Code, . . . may have

determined any question or construction or validity arising under such . . . rule . . . and obtain a declaration of rights, status, or other legal relations thereunder.

R.C. 2721.03 (“Declaratory Judgment Act” or “the Act”). Ohio Rule of Civil Procedure 57, which governs declaratory judgment actions, provides in pertinent part as follows:

The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may advance on the trial list the hearing of an action for a declaratory judgment.

Civ. R. 57 (emphasis added). Although “[a] declaratory judgment remedy is not an alternative remedy in the sense that it is always available even though there may be ground for full relief in equity or at law,” it may be “an alternative to other remedies in those cases in which the court, in the exercise of sound discretion, finds that the action is within the **spirit** of the uniform Declaratory Judgments Act.” Schaefer v. First Nat’l Bank of Findlay (1938), 134 Ohio St. 511, 518, 18 N.E.2d 263. The purpose of the Declaratory Judgment Act is “to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations.” Radaszewski v. Keating (1943), 141 Ohio St. 489, 496, 49 N.E.2d 167. The Ohio Supreme Court has long held that the Act is “remedial” and is to be “liberally construed and administered.” Id.

Three elements are required in order to pursue a declaratory judgment action as an alternative to other remedies: “(1) a real controversy must exist between the parties; (2) which is justiciable in nature; and (3) speedy relief is necessary to the preservation of rights that may otherwise be impaired or lost.” Fairview General Hosp. v. Fletcher (1992), 63 Ohio St. 3d 146, 148-149, 586 N.E.2d 80. The Supreme Court has established a specific standard to be applied when determining whether or not a declaratory judgment action should be dismissed. AT&T Technologies, Inc. v. Industrial Comm’n of Ohio

(1990), 1990 Ohio App. LEXIS 5410, *1, *5 (attached at Appendix B). Plaintiffs are not necessarily required, in all cases, to exhaust administrative remedies before seeking relief under the Act. Id. Nevertheless, the availability of another remedy is not the test. The trial court must determine that the other available remedy is “equally serviceable” before it can dismiss the declaratory judgment action. Swander Ditch Landowners’ Ass’n v. Joint Bd of Huron & Seneca Cty. Comm’rs (1990), 51 Ohio St. 3d 131, 135, 554 N.E.2d 1324. Courts have held that the “effect of the ‘another adequate remedy’ language in Civ. R. 57 is to validate a declaratory action even though there is available an alternative but nonexclusive remedy which could provide the relief sought.” Driscoll v. Austintown (1975), 42 Ohio St. 2d 263, 269, 328 N.E.2d 395.

The Court has described the “equally serviceable remedy” test as follows:

Where an administrative practice requires a party to incur substantial expense to obtain an administrative determination of a question which, standing alone, would not require such expense, the administrative remedy to determine the question is not equally as serviceable as an action for a declaratory judgment.

Swander Ditch, 51 Ohio St. 3d at 135 (quoting Burt Realty Corp. v. Columbus (1970), 21 Ohio St. 2d 265, 257 N.E.2d 355, Syll. ¶ 1). In Burt Realty, the declaratory judgment action provided an alternative to an “unnecessary onerous administrative appeal.” Id. In Swander Ditch, the declaratory judgment action provided a means of resolving all pending issues in one proceeding. Id. See also Rocky Fork Hunt & Country Club v. Testa (1997), 120 Ohio App. 3d 442, 698 N.E.2d 80 (court recognized that declaratory relief may be an alternative to a regular, administrative appeal).

In the present case, the court found that Dr. Mack had an equally serviceable administrative remedy, stating, “[t]he issues involved in Plaintiff’s declaratory judgment

action are the same issues that will be decided in the administrative proceeding; that is, whether Plaintiff is in violation of the Agreement by practicing dentistry without a license any [sic] by failing to successfully complete her alcohol abuse treatment.” Contrary to the trial court’s assertion, the issues involved in Dr. Mack’s declaratory judgment action were **not** the same issues to be decided in the administrative proceeding. The Board’s Notice, issued *after* Dr. Mack had filed the instant lawsuit, alleged that Dr. Mack had violated the Dental Practice Act by returning to her dental practice while under suspension and by violating terms of probation. Dr. Mack’s declaratory judgment action did not involve issues of whether she had violated the Agreement, but instead alleged that the Defendants exceeded their authority under the Dental Practice Act, asking the court to declare the Agreement invalid and unenforceable. Complaint, p. 20. Whether or not the *issues* were the same is not a part of the test for determining if an equally serviceable remedy is available. See, e.g., Fairview General Hosp., 63 Ohio St. 3d at 148-149.

Furthermore, the Board does not have jurisdiction to decide the allegations contained in Dr. Mack’s Complaint. The Dental Practice Act does not provide that the Board can determine whether it violated a dentist’s constitutional rights by failing to provide her with due process, nor does it provide that the Board can determine whether its own agreements are valid and enforceable contracts. These were issues to be decided in this case, which were not integral parts of the administrative hearing. Dr. Mack also asserted that the Board lacked jurisdiction to institute disciplinary proceedings against her because it had no evidence that her alleged alcohol abuse resulted in an “inability to practice under accepted standards of the profession because of . . . dependence on alcohol,” as required by R.C. § 4715.30(A)(8). Dr. Mack further asserted that the Board

violated her constitutional rights when it failed to provide her with notice of the charges against her and an opportunity to be heard prior to incarcerating her at Shepherd Hill and forcing her to execute an Agreement, without the benefit of counsel, which itself violated her substantive due process rights relative to her constitutionally protected property interest in her license. The Board, an administrative agency in Ohio, cannot itself determine whether or not its own actions violated Dr. Mack's constitutional rights. Therefore, Dr. Mack did not have an equally serviceable administrative remedy.

Furthermore, without the benefit of the Declaratory Judgment Act, Dr. Mack was not entitled to any pre-trial discovery. She was not allowed to discover the nature of the complaint filed against her, the name of the party filing it, the nature of the testimony of the witnesses against her, or the names and reports of any expert witnesses. Nor was she permitted take any prehearing discovery depositions of witnesses. Clearly, an administrative hearing conducted by the Dental Board pursuant to ORC 4715 and ORC 119 is hardly an equally serviceable remedy. Under the circumstances, a declaratory judgment is an available alternative to an unnecessarily onerous administrative remedy; the administrative remedy is far from equally serviceable in this case. See, e.g., Swander Ditch, 51 Ohio St. 3d at 135; Burt Realty, 21 Ohio St. 2d at 268. Therefore, this Court must reverse the trial court and remand this case for a determination on the merits.

C. THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY FINDING THAT APPELLEES ARE ENTITLED TO ABSOLUTE IMMUNITY AGAINST ALL LIABILITY FOR THEIR ACTIONS.

In its Decision, the trial court made several misstatements. For instance, it stated that "Plaintiff specifically contends that the board members are liable for money damages because their investigators forced Plaintiff to sign the agreement under duress."

Decision, p. 12. Dr. Mack made no such contention, but instead alleged that the Board Members were individually liable for violating her constitutional rights. The court also stated that “Plaintiff further contends that the board members are liable for relying upon the uncorroborated allegations of her former husband in relation to her alleged abuse of alcohol.” Dr. Mack made no such statement. Dr. Mack contended that the sole complaint against her contained no allegations of an “inability to practice under accepted standards of the profession because of . . . dependence on alcohol” (R.C. § 4715.30(A)(8)) and, therefore, the Board had no lawful authority to initiate disciplinary proceedings against her. Dr. Mack further contends that because the Board had no lawful authority to initiate disciplinary proceedings against her based on the complaint from her estranged husband, it did not provide any consideration for the promises contained in the Agreement, despite the self-serving prefatory language in the Agreement.

The United States Supreme Court held that “persons subject to [the restraints and safeguards of the judicial process] and performing **adjudicatory** functions within a federal agency are entitled to absolute immunity from damages liability for their **judicial** acts.” Butz v. Economu (1978), 438 U.S. 478, 514 (emphasis added). In the present case, Dr. Mack’s claims are based entirely on the Defendants’ conduct during an *investigation*, not during an *adjudication*. The trial court noted, “Administrative officers are entitled to absolute immunity if their decision-making process is **functionally equivalent to that of a judge**.” Decision, p. 13 [citations omitted] (emphasis added). The court also noted that “[e]xecutive agency **adjudications** that contain procedural safeguards similar to those contained in the judicial process are adequately analogous to the judicial process to justify the application of absolute quasi-judicial immunity.” Id. [citations omitted]

(emphasis added). “Butz’s absolute immunity protects agency officials who perform functions **comparable to either judges or prosecutors.**” Id. [citations omitted] (emphasis added). Finally, the court enumerated the following three-part test for determining whether or not an official’s conduct qualifies for protection:

- a) the official’s functions share the characteristics of the judicial process;
- b) the official’s activities are likely to result in recriminatory lawsuits by disappointed participants; and
- c) sufficient safeguards exist in the regulatory framework to control unconstitutional conduct. [citation omitted]

Id. (quoting from Butz).

The trial court found that the “functions of investigating target dentists and by conducting adversarial hearings within that process ‘shares characteristics of the judicial process.’ Thus, the individual board members satisfy the first element of Butz.” Id. However, the Defendants’ actions are not “comparable to either judges or prosecutors.” Dr. Mack’s claims focus solely on the Board’s investigation, an activity not conducted by either judges or prosecutors and for which the Defendants are not entitled to absolute immunity. Contrary to the trial court’s findings, the first part of the three-part test articulated in Butz was not met in this case.

The third element of the test requires that “sufficient safeguards exist in the regulatory framework to control unconstitutional conduct.” Id. Although some safeguards exist in the disciplinary framework of the Dental Practice Act, no safeguards exist during an investigation by the Board. The fact that these safeguards were absent in this case was the crux of Dr. Mack’s allegations—the Defendants violated her constitutional rights by failing to employ any safeguards and exploited the absence of safeguards! Dr. Mack was not charged with a violation of the Dental Practice Act, nor was she given an opportunity

to be heard, prior to being forced into Shepherd Hill under duress. The trial court found that “[t]here exists no evidence that any actions taken by the individual board members exceeded the scope of their authority.” Decision, p. 16 (citing Zandford v. Nat’l Ass’n of Securities Dealers, Inc. (1998), 30 F. Supp. 2d 1, 27, quoting Simons v. Bellinger (D.C. Cir. 1980), 643 F.2d 774, 786, citing Briggs v. Goodwin (1977), 569 F.2d 10, 15, quoting Spalding v. Vilas (1896), 161 U.S. 483, 498 (holding that “an act is within the official’s jurisdiction if it is not ‘manifestly or palpably beyond his authority’”). Contrary to the trial court’s finding, Dr. Mack demonstrated that the Defendants exceeded their authority, as shown above. Therefore, the Defendants are not entitled to absolute immunity and this Court must reverse the trial court and remand this case for a determination on its merits.

D. THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY FINDING THAT APPELLANT DID NOT HAVE A RIGHT TO HAVE HER ADMISSIONS DEEMED ADMITTED.

In a second Decision entered April 6, 2000 (“Decision II”), the trial court held:

An opposing party does not have a right to have its admissions deemed as true. That decision lies within the sound discretion of the trial court. Given the stay in this matter, Defendants are currently not out of rule in providing their responses. As such, this Court does not deem Plaintiff’s admissions upon Defendants as true.

Decision II, p. 1. Contrary to the trial court’s assertion, the stay of discovery to which it referred automatically expired, by the court’s own order, on March 20, 2000. Thus, the Defendants failed to timely respond to Dr. Mack’s Request for Admissions.

Ohio courts have held that “[w]hen a party fails to timely respond to the requests for admissions, ‘the admissions [become] facts of record which the court must recognize.’” National City Bank v. Moore (Summit Cty., March 1, 2000), 2000 Ohio App. LEXIS 723, *1, *5 (unreported) (attached as Appendix C) (quoting Cleveland Trust

Co. v. Willis (1985), 20 Ohio St. 3d 66, 67, 485 N.E.2d 1052, cert. denied (1986), 478 U.S. 1005, 106 S. Ct. 3295). Pursuant to explicit language in Civ. R. 36(A), “[t]he matter is admitted unless . . . the party to whom the request is directed serves . . . a written answer or objection addressed to the matter.” Civ. R. 36(A). Consequently, all matters contained in the Request are admitted, by operation of Civ. R. 36(A). Nat’l City, 2000 LEXIS 723 at *5. “It is unnecessary for the trial court to ‘deem’ them so admitted.” Id.

The stay of discovery automatically expired on March 20, 2000. The Defendants filed its motion for the stay only three days before their responses to the Requests were due. After expiration of the stay, the Defendants failed to file their responses. Ohio law provides that discovery is **not** automatically stayed while a motion requesting a stay of discovery or motion for protective order is pending. See, e.g., Hensley v. The New Albany Co. (Franklin Cty. 1994), 1994 Ohio App. LEXIS 3694, *1 (the mere moving for a protective order does not automatically stop the disputed discovery) (attached as Appendix D). Instead, the law provides that the parties are obligated to continue with discovery until the court renders its decision on the motion for a stay or protective order. The filing of the motion merely protects the party from having the court award sanctions against it for failing to comply with discovery while its motion is pending. Id. at *17. See also Dafco, Inc. v. Reynolds (1983), 9 Ohio App. 3d 4, 457 N.E.2d 916.

The Defendants’ responses were actually due prior to the court’s granting of the stay and are admitted by operation of Rule 36(A), without the trial court deeming them admitted. Therefore, the trial court erred in finding that the Admissions were not admitted and this Court must reverse the trial court’s decision relative to Plaintiff’s Requests for Admission.

III. CONCLUSION

For the reasons set forth above, Dr. Mack respectfully requests that this Court reverse the trial court's dismissal of her claims and remand this case for a decision on the merits. Dr. Mack further requests that this Court reverse the trial court's decision holding that her Requests for Admissions were not admitted and find that they are admitted by operation of law.

Respectfully submitted,

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