

COPY

IN THE COURT OF COMMON PLEAS OF HENRY COUNTY, OHIO

FILED  
HENRY COUNTY  
COMMON PLEAS COURT

STATE OF OHIO, ex rel. MARC DANN  
ATTORNEY GENERAL OF OHIO

CASE NO: 07CV1662011

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JUDY SCHNEBERG  
CLERK OF COURTS

Plaintiff,

Judge John S. Collier

vs.

TRI-STATE GARDEN  
SUPPLY, INC., et al.,

JUDGMENT ENTRY

Defendants.

\* \* \* \* \*

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Attorney General  
Toreco Regional Office

This case involves eleven counts alleging various violations by the Defendant of Ohio Revised Code sections pertaining to solid and hazardous wastes and Environmental Protection Agency laws.

Defendant owns a Class III composting facility in Henry County, Ohio, which is operated by Defendant's wholly owned subsidiary, Yoder Compost & Supply, Inc. In March of 2005 Defendant's composting facility was inspected by the Henry County Health Director. Upon inspection, he objected to the use of sawdust obtained from Sauder's in Archbold as a bulking agent. A bulking agent is "a material added to a composting system to provide structural support, improve aeration, or absorb moisture from the decomposing waste." O.A.C § 3745-27-01(B)(8). He also objected to the presence of N-Viro Soil on the premise. Stemming from these inspections, orders were issued by the Henry County Board of Health in February of 2006. In March of 2006, Defendant filed a timely appeal of the orders. The orders were subsequently revoked and no hearing occurred. The revocation of the orders was never appealed by the Ohio EPA.

## Discussion

### I. *Subject Matter Jurisdiction Over Counts 1-10.*

Defendant argues that counts 1-10 are substantially the same as the original orders issued to Defendant and further asserts that in order to enforce these orders, the Ohio EPA would have had to appeal the revocation by the Henry County Board of Health to the Environmental Review Appeals Commission (“ERAC”), because of the exclusive original jurisdiction granted to ERAC over the Board of Health orders in O.R.C. § 3745.04(B). This Court agrees.

The Revised Code is very clear on this matter. “The [ERAC] has *exclusive original* jurisdiction over any matter that *may*, under this section, be brought before ERAC under section .04 of title 37 and chapter 45 of the O.R.C. must be brought before ERAC or not at all. This includes an appeal brought by the Director of the Ohio EPA. O.R.C. § 3745.04(C). Part C of the statute reads, “The director may appeal an action of the local board of health...” Plaintiff contends that because the orders were revoked they had no duty to appeal, however, revocation of orders by the local board of health are specifically mentioned in the definition of “action” in part A of the statute, which, in the view of this court, defeats that particular argument by Plaintiff. Furthermore, this court reads the word “may” in part C of the statute not to mean that the Director of the Ohio EPA has forum choice, but rather that the Director merely has a choice to bring the appeal or not.

The EPA had yet another method of obtaining relief under O.R.C. § 3745. Part B reads in part, “[ERAC] has exclusive original jurisdiction over any matter that may, under this section, be brought before it. *However*, the director has and retains jurisdiction to...renew...any...order, or other action that has been appealed to [ERAC].” The Director of the Ohio EPA could have simply renewed the orders and put the ball back in Defendant’s court to appeal to ERAC.

The fact that an attempt has been made by Plaintiff to mask the original orders in the form of a civil complaint, when the Director of the Ohio EPA clearly was obliged to either appeal the orders

to ERAC or simply renew them in an effort to enforce them, is not acceptable. It is very clear that in order for Plaintiff to successfully attempt what they are trying to do now, that being enforce the original Henry County Board of Health orders through judicial relief, Plaintiff's only forum is ERAC and not this Court. Consequently, counts 1-10 of the complaint are dismissed for lack of subject matter jurisdiction.

II. *Personal Jurisdiction over David Kasmoch, Jr.*

Defendant further raises the issue of lack of personal jurisdiction over co-defendant David Kasmoch, Jr. After thorough analysis, this Court indeed has personal jurisdiction over David Kasmoch, Jr. because of his action in conducting business operations while Defendant's articles of incorporation were cancelled.

Defendant contends that actions conducted by David Kasmoch, Jr. in his role as an officer of the Tri-State between the cancellation and reinstatement of the articles of incorporation in the State of Ohio do not render Kasmoch, Jr. amenable to personal jurisdiction, because of O.R.C. § 1701.922. Defendant incorrectly cites this statute in that the section cited pertains to the rights of a corporation returning to the corporation as if the articles of incorporation were never cancelled, not the officers' actions. A separate test is present in the same statute to determine if Defendant would be immune from personal jurisdiction for his actions as an officer during the time the articles were cancelled.

§ 1701.922 (B) states that in order for an officer to be immune from personal jurisdiction for actions conducted during the time between cancellation and reinstatement of the articles of incorporation, the officer must have been operating within the scope of the corporations articles of incorporation, prior to cancellation, and the officer must not have known the articles of incorporation had been cancelled. Although the first of this test may have been true, the second part certainly was not. However, this does not render David Kasmoch, Jr. subject to personal jurisdiction. It simply means he cannot be sheltered behind the corporation. The Court can determine personal jurisdiction

over a defendant without a prior evidentiary hearing on the matter, *Goldstein v. Christiansen*, 70 Ohio St. 3d 232, 236 (1994); *Giachetti v. Holmes*, 14 Ohio App. 3d 306, 307 (1984). The standard is if reasonable minds could find jurisdiction after viewing the evidence in the light most favorable to the non-moving party, then the Court must refuse dismissal. *Giahetti* at 307. The Ohio long arm statute and due process analysis under the 14<sup>th</sup> Amendment of the U.S. Constitution must still be applied to David Kasmoch, Jr. and his claim for lack of personal jurisdiction is a question of law to be determined by the Court.

Under Ohio's long arm statute, Ohio may exercise personal jurisdiction over anyone transacting any business in Ohio. O.R.C. § 2307.382. The Ohio Supreme Court has held "transact" to mean "to carry on business." *Kentucky Oaks Mall Co. v. Mitchell's Formal Wear, Inc.*, 53 Ohio St. 3d 73, 65 (1990). Defendant has even admitted that David Kasmoch, Jr. has had business contacts with Ohio. Furthermore, Plaintiff has established enough to make a prima facie case that David Kasmoch, Jr. continued to "carry on business" in his capacity as an officer of Tri-State Garden Supply during the time between the cancellation and reinstatement of the articles of incorporation. The elements of this case satisfy the long arm statute requirements as to David Kasmoch, Jr. being amendable to personal jurisdiction in Ohio.

Moving on now to the second element of the personal jurisdiction analysis; that being the due process concerns. The test for this was established by the U.S. Supreme Court to be whether or not Defendant had purposefully established "minimum contacts" with the State. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). David Kasmoch, Jr. certainly had continuing contacts with the State of Ohio while he was carrying on business as an officer of Tri-State Garden Supply, which owned the wholly owned subsidiary that operated the composting facility in question. Furthermore he was statutorily exempt from hiding behind the corporate veil. §1701.922(B), *Supra*. It would be unfair to allow a person who has purposefully derived benefit from their contacts with a state, which

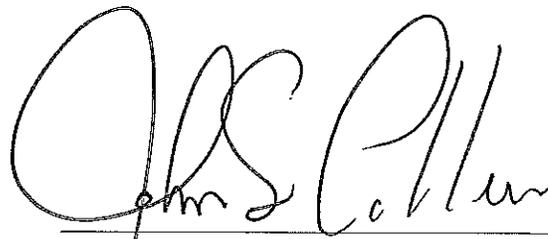
David Kasmoch, Jr. has through the continued business operations of the composting facility in question, to assert a lack of minimum contacts in order to avoid personal jurisdiction of that state over him. *Burger King Corp. v Rudzewicz*, 471 U.S. 462, 474 (1985). Furthermore, modern transportation makes it much less convenient for an out of state Defendant to defend himself against allegations arising out of his contacts with another state. *Id.*

For the foregoing reasons, this Court finds it has personal jurisdiction over David Kasmoch, Jr.

**Conclusion**

The Motion to Dismiss is granted in part and denied in part. The Motion to Dismiss is granted on counts 1-10 for lack of subject matter jurisdiction as to all defendants. The Motion to Dismiss is denied regarding count 11. The Court further finds it has personal jurisdiction over Defendant, David Kasmoch, Jr.

**IT IS SO ORDERED.**



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Judge John S. Collier

cc: John F. Cayton  
Kevin P. Braig