

STATE OF MICHIGAN
COURT OF APPEALS

GENERAL MOTORS CORPORATION,

UNPUBLISHED

May 27, 1997

Plaintiff-Appellant,

v

No. 184890

Bay Circuit Court

BAY CITY WASTEWATER TREATMENT PLANT,

LC No. 92-3347-AV

Defendant-Appellee.

Before: Reilly, P.J., and MacKenzie and Neff, JJ.

PER CURIAM.

Plaintiff appeals as of right from an opinion and order finding that two administrative compliance orders issued by defendant were valid and enforceable, and that defendant properly imposed fines for plaintiff's violations of both its access permit and the city's sewer use ordinance. We affirm.

Plaintiff had a long-standing relationship with defendant, Bay City's publicly owned water treatment works, whereby it would send industrial wastewater to defendant for processing and eventual release into the environment. Plaintiff was also a long-standing polluter, sending illegal levels of PCBs into defendant's facility. Under pressure from state and federal regulatory agencies, defendant and its municipal owner began to tighten their pollution standards and laws. Defendant eventually fined plaintiff for plaintiff's failure, with regard to its PCB effluent, to comply with its industrial user permit and with the city's sewer use ordinance.

Plaintiff first claims that defendant violated plaintiff's due process rights by imposing fines on it without granting it notice and a hearing. We disagree. The trial court found that plaintiff waived its due process rights with regard to the fines at issue when it entered into a contract with defendant and agreed to abide by the conditions of its industrial user permit and the provisions of the sewer use ordinance. Plaintiff argues that this was error, asserting that defendant may not condition the receipt of a government benefit upon waiver of constitutional rights. Plaintiff cites *The Home Ins Co of New York v Morse*, 87 US 445; 22 L Ed 365 (1874), and *Barron v Burnside*, 121 US 186; 7 S Ct 931; 30 L Ed 915 (1887), in support of this proposition. However, these cases, and the more recent case of *Dolan v City of Tigard*, 512 US 374; 114 S Ct 2309, 2317; 129 L Ed 2d 304 (1994), are

distinguishable because they involve the granting of a discretionary government benefit -- a license to conduct business within the state in *Barron* and *Home Ins Co* and a building permit in *Dolan* -- giving the respective plaintiffs the right to perform acts that would be impossible to undertake legally without the permission of the defendant state regulators. The state licenses at issue in *Barron*, *Home Ins Co*, and *Dolan* were the only means available to the plaintiffs for operating their businesses or improving their property. In contrast, in this case plaintiff's relevant activity was the discharge of its wastewater. A permit from defendant was not essential to conduct that activity; plaintiff could (and apparently to some extent did) legally discharge its wastewater by processing its waste through its own on-site facilities. The crux of the difference between this case and *Barron*, *Home Ins Co*, and *Dolan*, then, is that defendant is *not* acting as a state regulator but as a business entity. Plaintiff was not dependent on defendant for permission to discharge its waste but rather contracted with defendant for defendant's services, paying defendant to process its waste. Therefore, the industrial user permit was not a discretionary government benefit within the meaning of *Barron*, *Home Ins Co*, or *Dolan*. The trial court correctly held that, by contracting with defendant and agreeing to abide by the terms and conditions of its industrial user permit and the sewer use ordinance, plaintiff knowingly and intelligently waived any due process rights with regard to the imposition of penalties for violations of the permit and the ordinance.

In its reply brief, plaintiff raises two other arguments disputing its waiver of due process rights. However, these arguments are not properly before this Court because "reply briefs must be confined to rebuttal of the arguments in the appellee's or cross-appellee's brief . . .". The arguments in plaintiff's reply brief were nowhere raised in or engendered by defendant's brief. MCR 7.212(G).

Because we find that plaintiff has waived its due process rights with regard to the fines at issue, it is unnecessary to address the remainder of plaintiff's arguments on appeal, as these arguments all challenge the imposition of those fines.

Affirmed.

/s/ Maureen Pulte Reilly
/s/ Barbara B. MacKenzie
/s/ Janet T. Neff