[Cite as *Lecso v. Heaton*, 2010-Ohio-3880.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94121

MADELEINE L. LECSO

PLAINTIFF-APPELLEE

vs.

JACK R. HEATON, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-666103

BEFORE: Boyle, J., Kilbane, P.J., and McMonagle, J.

RELEASED AND JOURNALIZED: August 19, 2010

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MARY J. BOYLE, J.:

{¶ 1} Defendants-appellants, Jack Heaton, Robert Heaton, and Ruth Heaton (collectively "the Heatons"), appeal the trial court's order granting summary judgment in favor of plaintiff-appellee, Madeleine Lecso, and awarding her $44,197.28 on her negligence and trespass claims. Because we find that Lecso failed to satisfy her burden and that genuine issues of material fact exist, we reverse the judgment of the trial court.

Procedural History and Facts

{¶ 2} In July 2008, Lecso commenced the underlying action against the Heatons, owners of real property located at 31 Mapledale Avenue in Bedford, alleging that they negligently caused a fire at their premises, which caused her

neighboring real and personal property "to be covered in burning smoke and soot." Based on these same allegations, she alleged that this fire resulted in a trespass on her property. The Heatons subsequently answered the complaint and denied the allegations.

{¶ 3} On September 25, 2008, Lecso served by mail identical discovery requests on each of the Heaton defendants, containing the following requests for admissions:

{¶ 4} "REQUESTS FOR ADMISSION

{¶ 5} "(1) That each of the following statements are true:

{¶ 6} "a.) Admit that the Defendant Jack R. Heaton caused a fire at 31 Mapledale Ave., Bedford, Ohio on 9/24/07 which caused the real and personal property at 21 Mapledale to be covered in burning smoke and soot.

{¶ 7} "b.) Admit that as a proximate result of Defendant Jack R. Heaton's acts in causing a fire at 31 Mapledale Ave., the real and personal property at 21 Mapledale Ave. was permanently damaged.

{¶ 8} "c.) Admit that Defendants trespassed on Plaintiff's real property by allowing a fire to fall on her premises and causing smoke and soot to land on the Plaintiff's real and personal property causing permanent damage."

{¶ 9} The Heatons collectively responded on October 27, 2008, but failed to sign the verification forms for the interrogatories propounded. As to the three requests for admission propounded on each defendant, the Heatons

collectively responded that they were "unable to admit or deny as discovery is incomplete." They later submitted a supplemental response to discovery on January 19, 2009. By this date, they had also provided verification forms signed by Ruth and Robert Heaton but not Jack Heaton. Specific to the requests for admission, the Heatons collectively supplemented their earlier response as follows:

{¶ 10} "Defendants' Supplemental Answers and Responses to Plaintiff's Discovery Requests

{¶ 11} "* * *

{¶ 12} "31. Admit Jack Heaton emptied an ashtray into a wastepaper basket. Deny remaining statement.

{¶ 13} "32. Deny.

{¶ 14} "33. Deny."

{¶ 15} The responses and objections were signed by the Heatons' attorney.

{¶ 16} Eleven days later, Lecso filed a "motion to deem matters admitted" as to defendant Jack Heaton only. In her motion, Lecso argued that Jack never responded to her requests for admission and therefore they had been deemed admitted by operation of Civ.R. 36. Lecso, however, did not mention the discovery responses sent on October 27, 2008 nor that they had been supplemented on January 19, 2009. The crux of Lecso's argument in support

of her motion was that Jack neither signed the responses to the requests nor a verification form, thereby rendering the matters admitted. Specifically, she argued that "[a]n answer not under oath is not an answer according to the Ohio Civil Rules." Jack opposed the motion, indicating that he filed unverified answers on October 27, 2008 and later sent a supplemental response on January 19, 2009.

{¶ 17} Prior to the court ruling on Lecso's motion to deem matters admitted, Lecso moved for summary judgment. The gravamen of her motion was that liability is established by virtue of Jack's purported admissions. As to damages, Lecso attached an affidavit, averring that she "ha[d] provided estimates of $44,197.28 to Defendants [sic] Heaton to repair her real and personal property which was caused by the fire on 9/24/07." Along with the affidavit, Lecso submitted a list of 16 items that purportedly required repair or replacement as a result of the Heatons' alleged negligence. The items included the following: (1) roof and gutters; (2) windows; (3) house painting; (4) fence; (5) driveway; (6) automobile; (7) brickwork; (8) entry doors; (9) storm doors; (10) market umbrella; (11) hammock; (12) lounge chair; (13) cedar picnic table; (14) door bells and chime; (15) exterior light fixtures; and (16) mailbox. She attached estimates from various stores, such as Lowe's and Sears, and included one invoice for $5,000 that she had generated for painting she completed herself.

{¶ 18} While Lecso's summary judgment motion was pending, the trial court issued an order on February 23, 2009, finding her motion to deem matters admitted to be moot.

{¶ 19} The Heatons subsequently filed their brief in opposition to the motion for summary judgment, specifically noting that Lecso's motion to deem matters admitted was adjudged moot by the court, and therefore Lecso failed to establish liability. The Heatons further argued that Lecso failed to establish proximate cause and damages, arguing that these matters need to be resolved by a jury.

{¶ 20} The court subsequently held a settlement conference, but the case did not settle. The parties proceeded to prepare for trial, filing proposed jury instructions, jury interrogatories, and trial briefs.

{¶ 21} On the day of trial, the court heard an argument on Lecso's motion for summary judgment and did not proceed with trial. Approximately six months later, the court sua sponte reconsidered its earlier ruling on Lecso's motion to deem matters admitted, found that the motion was not moot, and granted Lecso's motion for summary judgment against all the Heatons, awarding her $44,197.28.

{¶ 22} From this decision, the Heatons appeal, arguing that the trial court erred in granting summary judgment because genuine issues of fact exist as to liability and damages. Although they fail to specifically designate two separate

assignments of error, they raise two specific arguments in support of their general assignment of error that "the trial court erred in granting appellee's motion for summary judgment." We will address each argument in turn.

Summary Judgment Standard of Review

{¶ 23} We review an appeal from summary judgment under a de novo standard. *Baiko v. Mays* (2000), 140 Ohio App.3d 1, 10, 746 N.E.2d 618. Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate. *Northeast Ohio Apt. Assn. v. Cuyahoga Cty. Bd. of Commrs.* (1997), 121 Ohio App.3d 188, 192, 699 N.E.2d 534.

{¶ 24} Civ.R. 56(C) provides that before summary judgment may be granted, a court must determine that "(1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the nonmoving party." *State ex rel. Duganitz v. Ohio Adult Parole Auth.* (1996), 77 Ohio St.3d 190, 191, 672 N.E.2d 654.

{¶ 25} The moving party carries an initial burden of setting forth specific facts that demonstrate his or her entitlement to summary

judgment. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264. If the movant fails to meet this burden, summary judgment is not appropriate, but if the movant does meet this burden, summary judgment will be appropriate only if the nonmovant fails to establish the existence of a genuine issue of material fact. Id. at 293.

Requests for Admission

{¶ 26} The Heatons first argue that the trial court improperly reconsidered its order finding that Lecso's motion to deem matters admitted was moot. They contend that the court only reconsidered after wrongly concluding that Jack Heaton had to personally sign and verify the responses.

{¶ 27} Civ.R. 36 governs requests for admission and provides in relevant part that "[t]he matter is admitted unless, within a period designated in the request, not less than twenty-eight days after service of a printed copy of the request or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney."

{¶ 28} Initially, we note that this was not a situation where there was a failure to respond within the 28-day time limit and the failure to respond requires that the matters be admitted. Here, the discovery requests were sent by mail on September 25, 2008; therefore, under Civ.R. 6(E), an additional three days

is added to the 28-day deadline. See *Cleveland Trust Co. v. Willis* (1985), 20 Ohio St.3d 66, 485 N.E.2d 1052. And because the 31st day fell on a Sunday, the responses to the requests for admission were required to be served on the next business day, Monday, October 27, 2008, which the Heatons did. See Civ.R. 6(A).

{¶ 29} But relying on Civ.R. 36(A), the trial court found that "plaintiff's motion to deem matters admitted should have been granted without a court order because defendant failed to respond within twenty-eight days after service of the discovery requests." The court referenced Civ.R. 33 and noted that "Jack Heaton never verified his answers to the interrogatories. Therefore, noncompliance with the requirements established by the rules of procedure will result in the matters being deemed admitted." But, Civ.R. 33, which imposes the requirement that interrogatories be signed and sworn by the person answering them, does not authorize a court to deem matters admitted based on its noncompliance. Civ.R. 32 exclusively governs requests for admission and, unlike Civ.R. 33, contains no requirement for the party to submit a signed verification. Instead, an attorney's signature on the responses to requests for admission is sufficient. *First Fed. Bank of Ohio v. Angelini*, 160 Ohio App.3d 821, 2005-Ohio-2242, 828 N.E.2d 1064. Therefore, to the extent that the trial court deemed the matters admitted based on its belief that Jack had to personally sign or verify the responses, this was error.

{¶ 30} We recognize, however, that the Heatons failed to strictly comply with Civ.R. 36(A) in their initial responses filed on October 26, 2008. Civ.R. 36(A)(2) specifically states that "[a]n answering party may not give lack of information or knowledge as a reason for failure to admit or deny *unless* the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny." (Emphasis added.) See, also, Civ.R. 36(A)(1).[1] The Heatons' response that they were "unable to admit or deny as discovery is incomplete" was essentially the same as not answering due to a "lack of information." And we struggle to see how discovery would have aided Jack in answering requests for admission involving his own actions. Under different circumstances, such noncompliance may justify a finding that the matter has been deemed admitted to support a summary judgment motion. See, e.g., *Equitable Life Assur. Soc. of U.S. v. Kuss Corp.* (1984), 17 Ohio App.3d 136, 138-139, 477 N.E.2d 1193; *Stephens v. Cleveland* (Feb. 1, 1990), 8th Dist. No.

[1]Civ.R. 36(A)(1) provides in relevant part that "[t]he party to whom the requests for admissions have been directed shall quote each request for admission immediately preceding the corresponding answer or objection." The Heatons failed to comply with this requirement. They also combined their responses instead of providing three separate sets of responses. The Heatons suggest that their failure to strictly comply was due in part to Lecso's alleged failure to provide an electronic version of the requests. But if Lecso failed to provide an electronic copy, the Heatons' remedy was to petition the court to order compliance, not to ignore the requirements of Civ.R. 36. Although we do not condone any practice of ignoring a specific requirement contained in the Civil Rules, we find the Heatons' noncompliance in this regard harmless, however, because it is clear as to what they were responding to.

56419 (where defendant merely stated "unable to admit or deny for lack of information" was found to be an insufficient response and matters were deemed admitted).

{¶ 31} But we find the unique procedural posture in this case, coupled with the fact that the intent of Civ.R. 36 was not served by deeming the matters admitted, distinguishes this case from the above cited cases. Here, Lecso's motion to deem the matters admitted was based entirely on Jack Heaton's not signing or verifying the responses, including the supplemental responses provided on January 19, 2009. Her argument, however, lacked merit, and the January 19, 2009 responses did actually answer the requests in accordance with Civ.R. 36. In its opinion, the trial court referenced the January 19, 2009 responses and recognized that it had the discretion to accept late responses and withdraw the former admissions under Civ.R. 36(B). It declined to do so, however, because "Jack Heaton never moved to withdraw or amend any of the admissions." But the court had previously accepted Jack's January 19, 2009 responses when it found Lecso's "motion to deem matters admitted as to Jack Heaton" moot. We therefore find it unreasonable to expect Jack to file a written motion to withdraw or amend the October 27, 2008 responses when the court had implicitly accepted the January 19, 2009 responses.[2]

[2]We further note that there is no requirement under Civ.R. 36 that a motion to withdraw or amend admissions be in writing, or as to when the motion must be filed. *Balson v. Dodds* (1980), 62 Ohio St.2d 287, 405 N.E.2d 293, syllabus. Indeed, the

{¶ 32} Significantly, the court reconsidered its ruling nearly nine months after its initial ruling and after the parties were prepared and ready to go to trial. After reconsidering its earlier ruling, the court then relied on the admissions in granting Lecso's motion for summary judgment. The court therefore gave Jack no opportunity to either (1) defend Lecso's motion for summary judgment with notice of its finding that the matters were deemed admitted or (2) defend his responses to the requests for admissions. The intent of Civ.R. 36 is not served under such circumstances.

{¶ 33} Indeed, Civ.R. 36(B) expressly recognizes that "the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice the party in maintaining his action or defense on the merits." Aside from admitting that Jack emptied an ashtray into a wastebasket, the Heatons had consistently and repeatedly denied (1) that the fire at their home proximately caused any damage to Lecso's property, and (2) that they trespassed on her property. Given that Lecso never relied on any admissions for the sake of trial, i.e., her motion to deem the matters admitted was declared moot more than eight months before the trial, there was absolutely no reason for the court to

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Ohio Supreme Court has held that a party's brief in opposition to a motion for summary judgment disputing the admissions can be considered a motion to withdraw or amend the admissions under Civ.R. 36. Id.

reconsider its ruling. See *Aetna Cas. & Sur. Co. v. Roland* (1988), 47 Ohio App.3d 93, 547 N.E.2d 379. Moreover, our holding is further supported by "the basic tenet of Ohio jurisprudence that cases should be decided on their merits." *Perotti v. Ferguson* (1983), 7 Ohio St.3d 1, 3, 454 N.E.2d 951.

{¶ 34} Accordingly, in light of our finding that the trial court should not have deemed the matters admitted, Lecso failed to satisfy her burden to demonstrate that she is entitled to judgment as a matter of law on her claims for negligence and trespass.

Proximate Cause and Damages

{¶ 35} The Heatons also argue that summary judgment was improperly granted because genuine issues of material fact exist as to the issue of proximate cause and damages. We agree.

{¶ 36} Lecso moved for summary judgment on both her negligence and trespass claims, seeking damages for either one in the amount of $44,197.28. The trial court granted the motion and awarded her actual damages. To have recovered actual damages under either theory, it was incumbent upon Lecso to demonstrate both (1) that the tort proximately caused her damages and (2) the amount of those damages. See *Osler v. Lorain* (1986), 28 Ohio St.2d 345, 347, 504 N.E.2d 19 ("negligence is without legal consequence unless it is a proximate cause of an injury"); *Misseldine v. Corporate Investigative Serv., Inc.*, 8th Dist. No. 81771, 2003-Ohio-2740 (in order to recover actual damages, as

opposed to nominal damages, "the plaintiff must prove that the trespass proximately caused that for which compensation is sought and the amount of those damages").

{¶ 37} Generally, the issue of proximate cause is a question of fact and is not resolvable by means of summary judgment. *Creech v. Brock & Assoc. Constr.*, 183 Ohio App.3d 711, 2009-Ohio-3930, 918 N.E.2d 541, ¶14. "[S]ummary judgment may be granted on the issue of proximate cause only where the facts are clear and undisputed and the relation to cause and effect is so apparent that only one conclusion may be fairly drawn." Id., citing *Schutt v. Rudolph-Libbe, Inc.* (Mar. 31, 1995), 6th Dist. No. WD-94-064.

{¶ 38} Here, even assuming the Heatons were negligent that the smoke from the fire constituted a trespass, we cannot say that only one conclusion may be fairly drawn as to whether their tortious conduct proximately caused injury to the 16 items that Lecso sought recovery for. Indeed, Lecso's requests for admission do not even specify the items that were damaged. Thus, even if we would have found that the trial court properly deemed the matters admitted, there would still be an issue of fact as to proximate cause and damages. As for Lecso's submission of separate estimates and a single invoice, which demonstrate costs of $44,197.28, there is insufficient evidence in the record connecting the estimates and invoice to the alleged damage caused to her real and personal property. The only evidence offered was Lecso's affidavit

averring the following: "Plaintiff Lecso has provided estimates of $44,197.28 to Defendants Heaton to repair her real and personal property which was caused by the fire on 9/24/07." This simply is not enough to establish the Heatons' liability for such damages.

{¶ 39} We further find that reasonable minds could differ as to the amount of damages Lecso is entitled to recover, even if liability and proximate cause were established. A party seeking to recover damages for a temporary injury to real property must demonstrate that the cost of restoration is reasonable. *Martin v. Design Constr. Servs., Inc.*, 121 Ohio St.3d 66, 2009-Ohio-1, 902 N.E.2d 10, ¶24-25. As for personal property, "the general rule is that the measure of damages * * * is the difference between its market value immediately before and immediately after the injury." *Falter v. Toledo* (1959), 169 Ohio St. 238, 240, 158 N.E.2d 893. But the cost of repair is an acceptable measure of damages provided that it does not exceed the diminution in market value. *Allstate Ins. Co. v. Reep* (1982), 7 Ohio App.3d 90, 91, 454 N.E.2d 580; *Werr v. Moccabee*, 4th Dist. No. 07CA2986, 2008-Ohio-595. These principles are founded in the well-established tenet that "[i]n making a party injured by wrongful conduct whole, the damages awarded should not place the injured party in a better position than that party would have enjoyed had the wrongful conduct not occurred." *Collini v. Cincinnati* (1993), 87 Ohio App.3d 553, 622 N.E.2d 724.

{¶ 40} Here, there was no admission as to the amount of damages. In her affidavit, Lecso did not even aver that the costs of repair and replacement of both her real and personal property were reasonable. Nor is there any indication as to the fair market value of her personal property before and after the fire. Further, in her trial brief, Lecso indicated that the proper amount of damages, taking into consideration depreciation, was $40,007.30 — an amount differing by at least $4,000 from the amount that she was awarded.

{¶ 41} Based on this record, we find that Lecso failed to carry her burden, genuine issue of material fact exist, and that reasonable minds could reach differing conclusions as to (1) the Heatons' liability, and (2) the amount of damages.

{¶ 42} The Heatons' sole assignment of error is sustained.

{¶ 43} Judgment reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellants recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.

MARY J. BOYLE, JUDGE

MARY EILEEN KILBANE, P.J., and
CHRISTINE T. McMONAGLE, J., CONCUR