[Cite as *Beacon Sales Acquisition, Inc. v. M & C Siding & Roofing, L.L.C.*, 2020-Ohio-1191.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

BEACON SALES ACQUISITION, INC. DBA
NORTH COAST COMMERCIAL ROOFING SYSTEMS,

Plaintiff-Appellee,

v.

M & C SIDING AND ROOFING, LLC. DBA
M & C CONSTRUCTION ET AL.,

Defendant-Appellants.

OPINION AND JUDGMENT ENTRY
Case No. 19 MA 0054

Civil Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2018 CV 1197

BEFORE:
Gene Donofrio, Cheryl L. Waite, Carol Ann Robb, Judges.

JUDGMENT:
Affirmed.

Atty. Michael Bach and *Atty. Stephane Gilley*, DeHaan & Bach, L.P.A., 25 Whitney Drive, Suite 106, Milford, Ohio 45150, for Plaintiff-Appellee, and

Atty. Damian Billak, Creekside Professional Centre, Bldg. F, Suite 100, 6715 Tippecanoe Road, Canfield, Ohio 44406, for Defendants-Appellants..

March 26, 2020

Donofrio, J.

{¶1} Defendants-appellants, M&C Siding and Roofing, LLC, and Michael Stanec, appeal from a Mahoning County Common Pleas Court judgment granting summary judgment in favor of plaintiff-appellee, Beacon Sales Acquisition, Inc. d.b.a. North Coast Commercial Roofing Systems.

{¶2} Appellee is a material supplier. In 2015, appellants opened a commercial credit account with appellee. Appellants used this account to purchase roofing and related supplies.

{¶3} On May 3, 2018, appellee filed a complaint against appellants for breach of contract and related claims alleging appellants owed appellee the sum of $59,273.41.

{¶4} At an August 27, 2018 pretrial conference, the magistrate set appellee's discovery deadline for November 27, 2018 and appellants' discovery deadline for December 27, 2018. The magistrate set January 27, 2019 as the deadline for all dispositive motions.

{¶5} On January 10, 2019, appellee filed a motion for summary judgment. The motion alleged that appellants had failed to answer appellee's October 2, 2018 interrogatories and request for admissions, thus rendering them admitted. Therefore, appellee asserted, there was no genuine issue of material fact and it was entitled to judgment as a matter of law.

{¶6} On January 22, 2019, appellants filed notice of service of answers to appellee's interrogatories and request for admissions stating that it served its answers on appellant on or about January 18. Appellants then filed a motion in opposition to summary judgment.

{¶7} Appellee filed a response asserting appellants had failed to rebut its motion with any evidence pursuant to Civ.R. 56(C) to demonstrate a genuine issue of material fact.

{¶8} The magistrate considered the motion. He found that appellants' answers to appellee's interrogatories and admission were two-and-a-half months late. Moreover, he found that the answers were not sworn as required by Civ.R. 33(A)(3). Therefore, the magistrate found they were not properly before the court and could not be considered in opposition to appellee's motion for summary judgment. The magistrate went on to find that pursuant to Civ.R. 36(A), requests for admissions are deemed admitted if the opposing party does not respond to them. And pursuant to Civ.R. 36(B), any matter admitted is established unless the court, on a party's motion, permits the withdrawal or amendment of the admission. Because appellants never requested an extension of time to respond to discovery, never motioned the court to permit withdrawal or amendment of the admissions, and never provided any explanation for their failure to timely respond, the magistrate found all requests for admission were deemed admitted. These admissions, the magistrate found, served as a sufficient basis on which to grant summary judgment in favor of appellee.

{¶9} Appellants filed objections to the magistrate's decision. They argued that at no time did appellee or the court order a review of the authenticity of their discovery responses. They attached an affidavit verifying their responses to discovery. And they argued that this was not an issue to be decided on summary judgment.

{¶10} The trial court overruled appellants' objections and adopted the magistrate's decision. It granted summary judgment in favor of appellee and entered judgment against appellants in the amount of $59,273.41, plus interest.

{¶11} Appellants filed a timely notice of appeal on May 7, 2019. They now raise a single assignment of error.

{¶12} Appellants' sole assignment of error states:

> THE TRIAL COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT ON BEHALF OF PLAINTIFF-APPELLEE BASED SOLELY UPON A PROCEDURAL INTERPRETATION OF CIV.R. 36.

{¶13} Appellants argue the trial court erroneously granted summary judgment in favor of appellee based on a procedural error. They point out that they provided answers to appellee's discovery requests and subsequently provided an affidavit. Appellants

argue that appellee never filed a motion regarding outstanding discovery and never filed a motion to compel. They contend the trial court never provided them with the opportunity to correct any alleged deficiencies with discovery.

{¶14} An appellate court reviews a summary judgment ruling de novo. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 8. Thus, we shall apply the same test as the trial court in determining whether summary judgment was proper.

{¶15} A court may grant summary judgment only when (1) no genuine issue of material fact exists; (2) the moving party is entitled to judgment as a matter of law; and (3) the evidence can only produce a finding that is contrary to the non-moving party. *Mercer v. Halmbacher*, 9th Dist. Summit No. 27799, 2015-Ohio-4167, ¶ 8; Civ.R. 56(C). The initial burden is on the party moving for summary judgment to demonstrate the absence of a genuine issue of material fact as to the essential elements of the case with evidence of the type listed in Civ.R. 56(C). *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). A "material fact" depends on the substantive law of the claim being litigated. *Hoyt, Inc. v. Gordon & Assoc., Inc*., 104 Ohio App.3d 598, 603, 662 N.E.2d 1088 (8th Dist.1995), citing *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247-248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

{¶16} If the moving party meets its burden, the burden shifts to the non-moving party to set forth specific facts to show that there is a genuine issue of material fact. *Id*.; Civ.R. 56(E). "Trial courts should award summary judgment with caution, being careful to resolve doubts and construe evidence in favor of the nonmoving party." *Welco Industries, Inc. v. Applied Cos.*, 67 Ohio St.3d 344, 346, 617 N.E.2d 1129 (1993).

{¶17} First, we must resolve the issue surrounding the admissions. Appellee served appellants with requests for admissions on October 2, 2018.

{¶18} Pursuant to Civ.R. 36(A)(1), as to requests for admissions:

> *The matter is admitted unless*, within a period designated in the request, not less than twenty-eight days after service of the request or within such shorter or longer time as the court may allow, *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.

(Emphasis added).

{¶19} Thus, appellee's request for admissions were admitted, pursuant to the Civil Rules, when appellants failed to respond after 28 days of being served. If a party does not timely respond to a request for admissions, those matters are deemed admitted and may be used against the party for summary judgment purposes. *Colonial Credit Corp. v. Dana*, 7th Dist. Mahoning No. 06-MA100, 2007-Ohio-597, ¶ 13.

{¶20} Civ.R. 36(B) goes on to state, "Any matter admitted under Civ.R. 36 is conclusively established unless the court *on motion* permits withdrawal or amendment of the omission." (Emphasis added). Civ.R. 36(B) provided appellants the opportunity to ask the court to withdraw the admissions. But appellants never took advantage of this rule. Appellants never motioned the court to withdraw the admissions.

{¶21} Because appellants failed to timely respond to appellee's request for admissions, pursuant to the Civil Rules, those matters were admitted.

{¶22} Pursuant to Civ.R. 56(C):

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

According to Civ.R. 56(C), the admissions were proper summary judgment evidence.

{¶23} Based on the admissions, appellee satisfied its burden of establishing that appellants owed $59,273.41 for roofing supplies on an account with appellee. The burden then shifted to appellants to set forth specific facts to show that there was a genuine issue of material fact, which would preclude summary judgment.

{¶24} Appellants did attach several documents to their opposition to summary judgment including a copy of an email, copies of rebate request forms, and a copy of an invoice. The magistrate and the trial court did not consider these items, however, finding that none of the documents were authenticated by affidavit as is required for the court to consider them on summary judgment.

{¶25} Copies of documents are not proper summary judgment evidence under Civ.R. 56(C) and, therefore, a magistrate properly excludes them when ruling on a summary judgment motion. *ABL, Inc. v. CTW Dev. Corp*., 7th Dist. Mahoning No. 15 MA 20, 2016-Ohio-759, ¶ 29. Accordingly, pursuant to Civ.R. 56(C), it was proper for the court and the magistrate not to consider the copies of documents attached to appellants' opposition to summary judgment. As such, appellants offered no evidence to create a genuine issue of material fact.

{¶26} This court previously addressed a nearly identical set of facts in *Marafiote v. Kulow*, 7th Dist. Mahoning No. 93 C.A. 255, 1995 WL 574218 (Sept. 29, 1995). In that case, the appellants obtained leave until April 17 to respond to the appellee's request for documents, interrogatories and requests for admissions. But they did not respond to or otherwise comply with the discovery demands. On May 7, the appellee moved for summary judgment. In doing so, the appellee relied upon various documents, including the appellants' admissions, which had risen by operation of law due to the failure of the appellants to respond to the request for admissions. *Id*. at *1. The appellants opposed the summary judgment motion arguing in part that the failure to respond to the request for admissions was due to counsel's oversight and that it would be unfair to penalize them for such oversight. The trial court granted the appellee's motion for summary judgment.

{¶27} On appeal, the appellants argued the trial court erred by considering their failure to respond to the request for admissions as an admission of the matters contained therein for purposes of the appellee's motion for summary judgment. *Id*. at *2. They argued that they had a justification for not answering the admissions in that it was an attorney oversight. *Id.* Additionally, they argued the appellee's discovery requests were unduly burdensome and, accordingly, they had filed a motion for a protective order, albeit after the motion for summary judgment had been filed by appellee. *Id*.

{¶28} In response, the appellee argued that, in order for the appellants to have avoided the consequences of their failure to respond to the request for admissions, they were required to move for relief pursuant to Civ.R. 36. *Id*. Because the appellants failed to do so, the appellee asserted that the requests became admissions, which were properly relied upon by the trial court. *Id*.

{¶29} Quoting *T & S Lumber Co. v. Alta Constr. Co*., 19 Ohio App.3d 241, 244, 483 N.E.2d 1216 (8th Dist.1984), this court found: "'Clearly, the use of default admissions in support of a motion for summary judgment furthers the purpose of both Civ.R. 36 and 56. It also is in harmony with the guiding principle of construction set out in Civ.R. 1(B).'" *Id*. at *3. We then overruled the appellants' assignment of error and affirmed the trial court's judgment.

{¶30} This case involves the same situation as *Marafiote*. Because appellants failed to timely respond to appellee's request for admissions, the requests for admissions were deemed admitted by the Civil Rules. Those admissions were then proper summary judgment evidence. And because appellants failed to offer any proper summary judgment evidence that would create a genuine issue of material fact, the trial court appropriately granted summary judgment in appellee's favor.

{¶31} Accordingly, appellants' sole assignment of error is without merit and is overruled.

{¶32} For the reasons stated above, the trial court's judgment is hereby affirmed.

Waite, P. J., concurs.

Robb, J., concurs.

For the reasons stated in the Opinion rendered herein, the sole assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.