

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

PERRY HULL,

Plaintiff-Appellant,

v.

JOHN M. SOLDANO, et al.

Defendants-Appellees.

OPINION AND JUDGMENT ENTRY
Case No. 22 CO 0012

Civil Appeal from the
Court of Common Pleas of Columbiana County, Ohio
Case No. 2021 CV 446

BEFORE:

Cheryl L. Waite, David A. D'Apolito, Mark A. Hanni, Judges.

JUDGMENT:

Affirmed.

Atty. Bradley D. Keating, The Keating Firm, LTD., 62 Mill Street, Gahanna, Ohio 43230,
for Plaintiff-Appellant

Atty. Craig G. Pelini, Pelini, Campbell & Ricard, LLC, 8040 Cleveland Avenue NW, Suite
400, North Canton, Ohio 44720, for Defendants-Appellees.

Dated: July 13, 2023

WAITE, J.

{¶1} Appellant Perry Hull appeals an April 12, 2022 judgment entry of the Columbiana County Court of Common Pleas which granted summary judgment in favor of Appellees John M. and Melany Jo Soldano. Appellant argues that granting summary judgment in this matter was premature, as it prevented him from deposing Appellees. He believes discovery would have allowed him to obtain evidence to create an issue of genuine material fact. Pursuant to Civ.R. 56(E), Appellant's argument is without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} Due to the lack of discovery in this matter and the quick filing of Appellees' motion for summary judgment, the record before this Court is factually limited. The matter clearly arose from an automobile accident that occurred on November 30, 2019. Not many details are provided regarding the accident itself, which occurred in Saint Clair, Columbiana County. However, it appears that John M. Soldano borrowed a car belonging to Melany Jo Soldano and caused a collision with a vehicle driven by Appellant.

{¶3} On December 6, 2021, Appellant filed a complaint against Appellees and his own insurance company, Progressive Insurance. The first count of the complaint was directed at John, alleging negligent operation of the vehicle. The second count asserted negligent entrustment of the vehicle against Melany Jo. The third count raised a breach of contract claim against Progressive Insurance, however, this claim was dismissed shortly thereafter. The complaint hinted at Appellant's knowledge of a potential statute of limitations problem, as count one included the following language: "[Appellees] have been out of state or otherwise unavailable for at least the past 14 days." (12/6/21

Complaint, p. 2.) In Appellees’ answer, along with their other defenses, they asserted that the claims in the complaint had been filed after the statute of limitations had run.

{¶4} On February 24, 2022, the trial court issued a judgment entry providing scheduling deadlines in the matter, including other deadlines for discovery and dispositive motions. On March 10, 2022, Appellees filed a motion for summary judgment, arguing that the relevant statute, R.C. 2305.15(A), provides a two-year statute of limitations which had expired prior to the filing of the complaint. Appellees each attached an affidavit to their motion, averring that they have lived at the same address within Columbiana County throughout the relevant time period and stating that “at all times relevant to the within action, I was not outside the jurisdiction relevant to the within matter for any period of time.” (Motion for Summary Judgment, Exh. A.) Appellant filed a response simply stating that he had “a good faith reason to believe that there is at least some point between the date of the accident and the filing date that he fell into at least one of the categories provided for in the tolling statute.” (Response to Motion for Summary Judgment.) Appellant did not elaborate on this claim. Instead, he argued that that the court should not rely on Appellees’ affidavits, alone, to conclude that they remained within the State of Ohio during the relevant time period.

{¶5} On April 12, 2022, the trial court filed a judgment entry granting Appellees’ motion for summary judgment. The court noted that Appellant did not contest the motion for summary judgment or the affidavits. The trial court explained that even if the Appellant’s response was construed as a request for an extension of time to conduct discovery, it did not comport with the requirements of Civ.R. 56(F) which requires Appellant to file an affidavit. Appellant has timely appealed this entry.

Summary Judgment

{¶16} An appellate court conducts a *de novo* review of a trial court's decision to grant summary judgment, using the same standards as the trial court set forth in Civ.R. 56(C). *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Before summary judgment can be granted, the trial 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 favorably in favor of the party against whom the motion for summary judgment is made, the conclusion is adverse to that party. *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). Whether a fact is “material” 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).

{¶17} “[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim.” (Emphasis deleted.) *Dresher v. Burt*, 75 Ohio St.3d 280, 296, 662 N.E.2d 264 (1996). If the moving party carries its burden, the nonmoving party has a reciprocal burden of setting forth specific facts showing that there is a genuine issue for trial. *Id.* at 293. In other words, when presented with a properly supported motion for summary judgment, the nonmoving party must produce some evidence to suggest that a reasonable factfinder could rule in that party's favor. *Brewer v. Cleveland Bd. of Edn.*, 122 Ohio App.3d 378, 386, 701 N.E.2d 1023 (8th Dist.1997).

{¶18} The evidentiary materials to support a motion for summary judgment are listed in Civ.R. 56(C) and include the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact that have been filed in the case. In resolving the motion, the court views the evidence in a light most favorable to the nonmoving party. *Temple*, 50 Ohio St.2d at 327, 364 N.E.2d 267.

ASSIGNMENT OF ERROR

Appellant asserts the Trial Court committed reversible error in granting the Summary Judgment motion prior to the Plaintiff having the ability to depose the Soldano Defendants to properly refute the claims made in their affidavit filed with the Motion for Summary Judgment.

{¶19} Pursuant to R.C. 2305.15(A):

When a cause of action accrues against a person, if the person is out of the state, has absconded, or conceals self, the period of limitation for the commencement of the action as provided in sections 2305.04 to 2305.14, 1302.98, and 1304.35 of the Revised Code does not begin to run until the person comes into the state or while the person is so absconded or concealed. After the cause of action accrues if the person departs from the state, absconds, or conceals self, the time of the person's absence or concealment shall not be computed as any part of a period within which the action must be brought.

{¶10} Importantly, it is apparent from the statute that the relevant absence must in some way involve an attempt to abscond or involve concealment for purposes of avoiding litigation. As stated by the First District:

R.C. 2305.15 was not meant to reward a dilatory plaintiff by extending the time in which to file a complaint because a defendant vacationed out of state, enjoyed out-of-state restaurants, visited relatives out of state, or participated in a myriad of out-of-state activities. The statute was meant to avoid the loss of a meritorious claim because a diligent plaintiff was prevented from timely bringing an action because a defendant absconded or concealed himself to avoid service of process.

Permanent Gen. Ins. Cos., Inc. v. Dressler, 130 Ohio App.3d 628, 632, 720 N.E.2d 959 (1st Dist.1998).

{¶11} Appellant argues that a genuine issue of material fact exists in this case as to whether Appellees left the state for more than fourteen days during the relevant time period. Appellees respond by arguing that Appellant failed to produce any evidence to rebut their affidavits in which they averred that they remained within the jurisdiction at all relevant times herein.

{¶12} Appellant has filed no actual evidence that Appellees left the jurisdiction for any purpose for fourteen days or more, other than his unspecified “good reason to believe” that they were outside of the jurisdiction “at some point” during the relevant period of time and that this alleged absence “fell into at least one of the categories provided for in the tolling statute.” (Summary Judgment Response, p. 4.) Appellant objects to being

forced to file a response to Appellees' summary judgment motion based on the inclusion of their affidavits. He contends that he must be allowed to depose Appellees, first, because a judgment based solely on these affidavits prevents him "from observing [Appellees'] demeanor or assessing their credibility and veracity." (4/8/23 Summary Judgment Response, p. 4.)

{¶13} However, it is not Appellant's job to assess Appellees' credibility. Appellant has presented absolutely no evidence in any form that Appellees left the state, let alone absconded or were attempting to conceal themselves to avoid service. He failed to present evidence regarding which dates he believed Appellees were out of town, or even why he may have cause to believe they were out of the jurisdiction for any period of time. Appellant merely speculates Appellees may have been out of the jurisdiction despite the fact the record contains two affidavits from Appellees to the contrary. Instead of producing his own affidavits contesting Appellees' contentions or any other acceptable evidence, he asks us to order the trial court to allow him to engage in a fishing expedition which may, or may not, support his speculation. Appellant's arguments are unsupported by Ohio law and do not raise a genuine issue of material fact in order to avoid summary judgment.

{¶14} While the trial court cited to Civ.R. 56(F), the relevant subsection, subsection (E), provides in relevant part: "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

{¶15} Appellees in this case supported their motion for summary judgment with affidavits. Appellant did not produce any evidence, instead responding with mere denials and vague speculation. It is apparent from this record that Appellant did not meet his burden. Accordingly, Appellant’s sole assignment of error is without merit and is overruled.

Conclusion

{¶16} Appellant argues that the trial court erroneously granted summary judgment in favor of Appellees instead of allowing the matter to proceed with discovery. Pursuant to Civ.R. 56(E), Appellant’s argument is without merit and the judgment of the trial court is affirmed.

D’Apolito, P.J., concurs.

Hanni, J., concurs.

For the reasons stated in the Opinion rendered herein, Appellant's 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 Columbiana 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.