[Cite as *State Farm Mut. Auto. Ins. Co.*, 2010-Ohio-2795.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State Farm Mutual Automobile Insurance Company

Appellee

v.

City of Toledo

Appellant

Court of Appeals No. L-10-1026

Trial Court No. CI0200804993

DECISION AND JUDGMENT

Decided: June 18, 2010

* * * * *

James R. Gallagher, for appellee.

Adam W. Loukx, Acting Director of Law, and Jeffrey B. Charles, Chief of Litigation, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, the city of Toledo ("the city"), appeals from the judgment in the Lucas County Court of Common Pleas granting summary judgment to appellee, State

Farm Mutual Automobile Insurance Company. For the reasons set forth below we affirm.

{¶ 2} This matter arose from an automobile accident which occurred on July 7, 2004. An employee for the city negligently ran a dump truck into the rear of an automobile occupied by Alvin and Joanne Willis, injuring both of them. At the time of the accident, the Willises carried an insurance policy issued by appellee. In part, the policy provided the Willises with uninsured motorist coverage.

{¶ 3} Following the accident, the Willises filed claims against the city for their injuries and damages. The city denied responsibility for the damages, claiming it was uninsured and thus, unable to be held liable. Thereafter, the Willises submitted a claim for uninsured motorist's coverage with appellee. Appellee denied their claim based on the fact that they disputed the city's claim that it was uninsured.

{¶ 4} On August 12, 2005, the Willises filed suit against appellant and appellee seeking damages for their injuries. In a letter dated October 12, 2006, counsel for appellee informed the city that appellee had settled their case with the Willises in exchange for a voluntary dismissal, with prejudice, of all their claims against the city and appellee. The only issue remaining for litigation would be the dispute between the city and appellee regarding who was responsible for paying the Willises' claims. Thus, before filing a voluntary dismissal of the Willises' claims, counsel for appellee advised that appellee and the city should each file cross-claims.

{¶ 5} On September 25, 2007, the trial court, noting that there had been no activity for six months and no assigned trial date, ordered the Willises' suit dismissed pursuant to Civ.R. 41. On June 24, 2008, appellee filed the instant action against the city, labeled "a refiled case previously pending," arguing that the city was liable pursuant to the May 21, 2008 Ohio Supreme Court case of *Rogers v. City of Dayton* (2008), 118 Ohio St.3d 299. Both parties moved for summary judgment, and the trial court awarded summary judgment to appellee on January 6, 2010.

{¶ 6} The city now appeals setting forth the following assignment of error:

{¶ 7} "The trial court erred when it determined there was an agreement to be enforced between the City of Toledo and State Farm."

{¶ 8} Appellate review of summary judgment is de novo. *Hillyer v. State Farm Mut. Auto. Ins. Co.* (1999), 131 Ohio App.3d 172, 175; *Brown v. Scioto Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. Summary judgment is proper only when, looking at the evidence as a whole: (1) there is no genuine issue of material fact; (2) reasonable minds can come to only one conclusion, that is adverse to the party against whom the motion for summary judgment is made, and; (3) the moving party is entitled to judgment as a matter of law. Civ.R. 56(C); *Bostic v. Conno* (1988), 37 Ohio St.3d 144, 146. All the issues that are in doubt must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-59.

{¶ 9} When seeking summary judgment, a party must specifically delineate the basis upon which the motion is brought, *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112,

syllabus, and identify those portions of the record that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. When a properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations or denials in the pleadings, but must respond with specific facts showing that there is a genuine issue of material fact. Civ.R. 56(E); *Riley v. Montgomery* (1984), 11 Ohio St.3d 75, 79. A "material" fact is one which would affect the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, I*nc. (1999), 135 Ohio App.3d 301, 304; *Needham v. Provident Bank* (1996), 110 Ohio App.3d 817, 826, citing *Anderson v. Liberty Lobby, Inc*. (1986), 477 U.S. 242, 248.

{¶ 10} The city contends that there was no enforceable agreement between the two parties because there was no mutual assent to form a contract. The city argues that the agreement was to dispute the issue of who is liable for the coverage when the settlement is made at a time when the substantive law was in their favor. The city contends that timeliness of the agreed litigation of coverage was an essential element to the agreement, and by waiting for the Supreme Court's resolution of *Rogers v. The City of Dayton*, supra, some 16 months later, there was no meeting of the minds and no contract was formed. Furthermore, the city contends there was not proper approval for an agreement to be made on behalf of appellant because the required city council approval was absent.

{¶ 11} On the first issue of filing the cross-claim immediately, no cross-claim is compulsory and thus is not lost when the case is involuntarily dismissed without prejudice. However, similar to the trial court's reasoning, the city has produced no

quantifiable evidence that they have been prejudiced in any matter as a result of waiting for the resolution of a pending case before the claim was filed. This court agrees with the trial court that "[t]here is no procedural distinction between a cross-claim and the claim presented by [appellee] in the present action. And, [the city] has failed to demonstrate any prejudice by the manner the claim was presented." Nor does this court believe there was an issue of timeliness. The city, as a matter of law, timely filed suit well within Ohio's Saving Statute, R.C. 2305.19. Considering the fluctuation of insurance law, it was reasonable for appellee to wait for the Ohio Supreme Court's resolution of the conflict to determine the issue of whether the uninsured motorist policy would be applicable. Furthermore, there is no evidence in the record to support the city's claim that the parties agreed to apply the substantive law as it was at the time appellee settled with the Willises. As such, pursuant to *Rogers v. City of Dayton*, the city is found to be self insured and thereby liable for the settlement amount of $ 22,000 to appellee. See, also, *Smith v. Matten*, 6th Dist. Nos. L-07-1408, L-07-1409, L-07-1365, 2008-Ohio-4275.

{¶ 12} The city next contends that no agreement existed because the city council did not approve such agreement. R.C. 5705.41 states:

{¶ 13} "No subdivision or taxing unit shall * * * make any contract or give any order involving the expenditure of money unless there is attached thereto a certificate of the fiscal officer of the subdivision that the amount required to meet the obligation or, in the case of a continuing contract to be performed in whole or in part in an ensuing fiscal year, the amount required to meet the obligation in the fiscal year in which the contract is

made * * *. This certificate need be signed only by the subdivision's fiscal officer. Every such contract made without such a certificate shall be void, and no warrant shall be issued in payment of any amount due thereon."

{¶ 14} In this case, there was no agreement for an exchange of money or services. The two parties merely agreed to settle with the plaintiffs in the matter and to reserve two issues for litigation in the future. Accordingly, the city's sole assignment of error is found not well-taken.

{¶ 15} On consideration whereof, we find substantial justice has been done the party complaining and the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
CONCUR.
JUDGE