[Cite as *1020 Bolivar L.L.C. v. Zarnas*, 2011-Ohio-106.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94711

1020 BOLIVAR, LLC, ET AL.

PLAINTIFFS-APPELLEES

vs.

NICHOLAS A. ZARNAS, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case Nos. CV-636138 and CV-636139

BEFORE: Sweeney, J., Stewart, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: January 13, 2011

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JAMES J. SWEENEY, J.:

{¶ 1} Defendants-appellants, Nicholas A. Zarnas and Nicholas A. Zarnas, Inc.,[1] appeal from the trial court's order that granted partial summary judgment to plaintiffs-appellees, 1020 Bolivar, LLC and 1104 Prospect Avenue Park and Lock,

[1]Referred to in this opinion as "Zarnas" and "NAZ, Inc.," individually and the "Zarnas appellants" collectively.

L.L.C.[2] to declare NAZ, Inc.'s mechanics' liens against their properties void and to discharge the related properties from the liens as a matter of law. For the following reasons, we reverse and remand.

{¶ 2} We recognize that the underlying consolidated litigation involves multiple parties and claims that remain pending. However, the trial court's judgment entry expressly provided "no just reason for delay." Civ.R. 54(B). Therefore, for purposes of this appeal, our factual references will be limited to only those relevant to a determination of the sole issue before us — that is, whether the trial court erred in granting appellees' partial motion for summary judgment concerning two mechanics' liens.

Summary Judgment Standard

{¶ 3} Summary judgment is appropriate where it appears that: (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co., Inc*. (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46; Civ.R. 56(C).

{¶ 4} The burden is on the movant to show that no genuine issue of material fact exists. Id. Conclusory assertions that the nonmovant has no evidence

[2] Referred to in this opinion as "Bolivar" and "Prospect" individually and the "appellees" collectively.

to prove its case are insufficient; the movant must specifically point to evidence contained within the pleadings, depositions, answers to interrogatories, written admissions, affidavits, etc., which affirmatively demonstrate that the nonmovant has no evidence to support his claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107, 662 N.E.2d 264; Civ.R. 56(C). Unless the nonmovant then sets forth specific facts showing there is a genuine issue of material fact for trial, summary judgment will be granted to the movant.

{¶ 5} An appellate court reviews a trial court's grant of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241.

{¶ 6} The facts set forth below are construed under the applicable standard.

{¶ 7} On September 19, 2007, Bolivar and two other parties (who are not involved in this appeal) commenced an action against the Zarnas appellants asserting a claim for slander of title and seeking a declaratory judgment concerning the existence of a contract between them and the Zarnas appellants and to, among other things, declare the mechanics' lien filed on August 15, 2007[3] by "Nicholas A. Zarnas, President, Nicholas A. Zarnas, Inc." against 1020 Bolivar Avenue, Cleveland, Ohio (the "Bolivar lien") invalid, null and void.[4]

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[3]The affidavit averred that service was made on the lienholder to commence suit on November 20, 2007.

[4]Referred to in this opinion as the "Bolivar litigation."

{¶ 8} On September 19, 2007, Prospect and two other parties (who are also not involved in this appeal) commenced a separate action against the Zarnas appellants asserting claims for breach of contract, unjust enrichment, slander of title, and seeking a declaratory judgment to, among other things, determine the parties' rights and obligations under their contract with the Zarnas appellants and to declare the mechanics' lien filed on August 15, 2007[5] by "Nicholas A. Zarnas, President, Nicholas A. Zarnas, Inc." against 1104 Prospect Avenue, Cleveland, Ohio 44115 invalid, null, and void.[6]

{¶ 9} The Zarnas appellants filed an answer, counterclaim, and third-party complaint in both the Bolivar litigation and Prospect litigation on January 4, 2007 and January 10, 2007, respectively.

{¶ 10} In the Prospect litigation, the Zarnas appellants' counterclaim defines two counterclaimants, that being, Zarnas, the individual and NAZ, Inc., an Ohio company doing business in Cuyahoga County. In the Prospect litigation, the "counterclaimant" and "third-party plaintiff"[7] asserted claims for breach of oral contract/unjust enrichment, breach of written contract, fraudulent transfers, alter

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[5]The affidavit averred that service was made on the lienholder to commence suit on November 20, 2007.

[6]Referred to in this opinion as the "Prospect litigation"

[7]Which party is being referred to as the counterclaimant and third-party plaintiff, Zarnas or NAZ, is not specified. The Zarnas appellants essentially contend this was a typographical error in that they intended to assert the counterclaim and third-party complaint on behalf of both Zarnas and NAZ as they were jointly referred to in the opening paragraph of their pleading.

ego, fraud and misrepresentation, conversion/constructive trust, and foreclosure pursuant to the Prospect lien.

{¶ 11} In the Bolivar litigation, the Zarnas appellants' counterclaim/third-party complaint identifies only Zarnas, the individual, as the counterclaimant and third-party plaintiff. In the Bolivar litigation, the counterclaimant asserted claims for breach of oral contract/unjust enrichment, fraud and misrepresentation, fraudulent transfers, and alter ego against various parties for services performed by Zarnas on the Bolivar property. Zarnas also commenced a third-party complaint for foreclosure pursuant to the Bolivar lien.[8]

{¶ 12} According to the record and averments of both appellees and appellants, "Nicholas Zarnas" as a "Developer" entered into a development agreement with Prospect. According to the Zarnas appellants' pleadings in the Bolivar litigation, in 2006, Zarnas, in his individual capacity, entered into an oral agreement with "Frangos" to repair and renovate the Bolivar property.

{¶ 13} The Bolivar and Prospect litigations were eventually consolidated.

{¶ 14} Bolivar and Prospect moved for partial summary judgment requesting the court to declare that the Bolivar and Prospect liens were invalid. The Zarnas appellants' opposed the motion and at the same time moved to have their pleadings amended "by interlineations to reflect that Nicholas A. Zarnas and

[8]Again, the Zarnas appellants essentially allege this was a clerical mistake as they intended to assert the claims on behalf of both Zarnas and NAZ as they had indicated in the opening paragraph of their pleading.

Nicholas A. Zarnas, Inc. are both bringing their counterclaims and third-party complaints collectively." R. 41.

{¶ 15} The trial court denied Bolivar and Prospects' motions for partial summary judgment on July 24, 2008.

{¶ 16} On June 30, 2008, the Zarnas appellants moved for an extension of time regarding discovery matters. Therein, the Zarnas appellants sought both an extension of the discovery deadline and leave to respond to plaintiffs' discovery requests. Specifically, the Zarnas appellants petitioned the court to extend "their time to respond to Plaintiffs' discovery requests an additional 60 days." R. 65. In their motion, the Zarnas appellants explicitly requested additional time to respond to the requests for admissions and attached them as an exhibit. Appellees admit that they "did not oppose [plaintiff's] request." Noting that the motion was unopposed, the trial court granted it and included an extension of the discovery cutoff date. R. 71, 74.

{¶ 17} The Zarnas appellants read this judgment entry to mean either they had an additional 60 days to respond to the discovery from the date of the order granting their motion or they had an additional 60 days from the date their initial responses were due. R. 98.

{¶ 18} On September 5, 2008, Bolivar and Prospect filed a "notice of matters deemed admitted." On September 8, 2008, Bolivar and Prospect filed supplemental motions for partial summary judgment on the validity of the mechanics' liens based on the perceived admissions. On September 9, 2008,

the Zarnas appellants gave notice that they had served answers on September 8, 2008, to the requests for admissions that were propounded upon them. The Zarnas appellants opposed the supplemental motions for partial summary judgment, claiming they had timely responded to the discovery within the context of the trial court's order.

{¶ 19} The trial court denied the supplemental motions for partial summary judgment on December 11, 2008. On the same day, the trial court issued a separate judgment entry that provided as follows:

{¶ 20} "Counterclaimants/third-party plaintiffs' Nicholas Zarnas and Nicholas Zarnas Inc. motion to amend by interlineations to reflect that both parties are bringing the counterclaims and third-party complaints collectively is granted."

{¶ 21} In a judgment entry dated February 26, 2009, the trial court notified the parties it would sua sponte reconsider plaintiff's motion for partial summary judgment. On March 26, 2009, Bolivar and Prospect refiled their motions for partial summary judgment concerning the validity of the mechanics' liens. The Zarnas appellants opposed the motions by incorporating their previous arguments.

{¶ 22} The trial court granted the motion for partial summary judgment on October 22, 2009. The Zarnas appellants appeal, asserting the following sole assignment of error for our review:

{¶ 23} "I. The trial court erred in granting the Frangos appellees' motion for summary judgment."

{¶ 24} To this point, three different trial court judges have presided over this litigation. The consolidated docket is voluminous and contains, among other things, multiple parties, multiple claims/counterclaims/third-party claims, a denied request to appoint a receiver, and one attempted appeal prior to this appeal. The partial motions for summary judgment that are the subject of this appeal were denied on two previous occasions. A careful review of the record illustrates an inconsistency, if not contradiction, among the various rulings and supports the conclusion that the granting of partial summary judgment and discharging the mechanics' liens was error.

{¶ 25} Both parties assert technical defects in the procedures relating to the perfection or discharge of the mechanics' liens, with the appellees claiming there was a failure to timely commence suit based on inconsistently drafted pleadings,[9] and the appellants claiming a defect in the notice to commence suit for failure to specifically identify the owner pursuant to R.C. 1311.11.

{¶ 26} We are mindful of 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.

{¶ 27} Appellees' notices to commence suit are vague as to the identity of the owner; both being signed by an attorney purporting to be "the authorized

[9]Particularly, the vacillating usages of the singular and plural tense of subjects, such as "counterclaimant" versus "counterclaimants."

representative of the owner."[10] Despite this defect, we find that the alleged owners of the subject properties were revealed by the litigation and the appellants commenced suit on the mechanics' liens within 60 days of being served with notice to commence suit.

{¶ 28} The Zarnas appellants' pleadings, as detailed above, are equally vague in terms of deciphering the precise identity of the counterclaimant(s)/third-party plaintiff(s). However, we find that the trial court's order that granted an amendment by interlineation dispelled any confusion in these pleadings by explicitly specifying that both Zarnas appellants were advancing the claims.

{¶ 29} Unlike a motion for leave to file an amended complaint, an amendment by interlineation invokes a different procedure. At least one other court has noted that "the use of amendment by interlineation *** is not under the Civil Rules an approved practice." *Hardesty v. Cabotage* (July 22, 1981), 3d Dist. No. 5-80-51. But this practice has still been utilized in some cases. In this case,

[10]We find *Whitesides v. Mason* (1974), 47 Ohio App.2d 173, 352 N.E.2d 648, inapposite to the extent the lienholder in that fact pattern notified the owner of the defects in the notice to commence suit, after which the owner did nothing to correct the errors. This was critical to the court's decision where it specifically held that the notice (which described the wrong property and wrong lien) "was not sufficient to give rise to the forfeiture provisions of R.C. 1311.11, especially where the person giving such notice has been advised of the errors and fails to correct them * * *." Id. at 176. Nonetheless, even assuming (without deciding) that an "authorized representative" could execute the notice to commence suit, in order to effectuate the purposes of the statute, it seems only logically that the actual identity of the owner would have to be included or referenced in the notice to commence suit.

the trial court granted the request for interlineation. Interlineation[11] by its very definition contemplates an amendment of the original pleading and not the filing of a new one. E.g., *Phillips v. Stein* (1927), 25 Ohio App. 423, 158 N.E. 198.

{¶ 30} The trial court's order granted the motion to amend the pleadings by interlineation "to reflect that both parties are bringing the counterclaims and third-party complaints collectively * * *." The trial court did not instruct appellants to do anything further and the order clarifies that the counterclaims and third-party complaints were being pursued by both Zarnas and NAZ, Inc.

{¶ 31} One of the bases for granting partial summary judgment was the trial court's belief that the counterclaimants/third-party complaints were asserted by Zarnas individually. The journal entry, however, makes no mention of the trial court's previous order that effectively amended the pleadings to specifically reflect that "both parties" (NAZ, Inc. and Zarnas) were bringing these claims. We are mindful that the applicable standard for summary judgment is de novo review and not for an abuse of discretion. Since the amendment by interlineation was accomplished by the aforementioned journal entry, the award of partial summary judgment was not justified on this ground.

{¶ 32} The other basis the trial court gave for granting partial summary judgment was that NAZ, Inc. failed to deny or object to the plaintiffs' request for admissions addressing NAZ, Inc.'s failure to bring any claims in the lawsuits

[11]"Interlineation. The act of writing between the lines of an instrument; also what is written between the lines." Black's Law Dictionary, 5th Edition.

including claims arising from the mechanics' liens. We notice that this argument was previously rejected by the trial court when it denied the appellees' supplemental motions for partial summary judgment in December 2008. At that time, appellees sought to have the same matters deemed admitted. The Zarnas appellants had opposed this effort and successfully argued that their responses to the request for admissions were timely filed. Said responses were attached as an exhibit to the Zarnas appellants' September 18, 2008 brief in opposition. R. 100, Ex. B.

{¶ 33} When the trial court denied the supplemental motions for partial summary judgment in December 2008, the trial court necessarily denied appellees' request to deem the requests admitted, which had formed a basis for the motions. Then later, without explanation or notice to appellants, the trial court changed its ruling and deemed the requests admitted and proceeded to award partial summary judgment based on the deemed admissions. The irreconcilable rulings, without any change in the operative facts at issue in the intermittent time period between the rulings, was simply arbitrary.

{¶ 34} When the trial court initially denied the partial motions for summary judgment, it necessarily concluded that the admissions were not deemed admitted. If they had been, the partial motion for summary judgment would have been granted.[12] Notably, the Zarnas appellants had responded to the requests

[12]When the record is carefully reviewed, there is no other conceivable way to reconcile the trial court's rulings. Specifically, the Zarnas appellants moved for an

for admissions at the time the trial court initially denied the partial summary judgment motions.[13] Certainly it was within the trial court's discretion to have deemed the matters admitted or not in the first instance. However, thereafter to sua sponte change its position on this issue is not supported by any basis in the record.

{¶ 35} This Court recently addressed a similar fact pattern wherein the trial court had initially overruled as moot a request to deem matters admitted but later sua sponte reconsidered the ruling, deemed the matters admitted, and awarded summary judgment based upon the deemed admissions. See *Lesco v. Heaton*, Cuyahoga App. No. 94121, 2010-Ohio-3880, ¶21. Ordinarily, matters not admitted within the 28-day time limit set forth in Civ.R. 36 will justify a finding that the matter has been admitted. Id. at ¶30. This, however, is not a case where a party utterly fails to respond to requests for admissions. Rather, in this case,

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extension to respond to certain discovery that included and attached the propounded requests for admissions. This request was unopposed as admitted by the parties and noted by the trial court when it granted the motion. The trial court granted the Zarnas appellants an extension to respond to the discovery and did not indicate it was being denied as to the request for admissions. Finally, the trial court then proceeded to deny appellees' supplemental motions for summary judgment that were based upon their position that the requests for admissions were deemed admitted. Therefore, it is not difficult to conclude that the trial court intended to extend the discovery deadline for responding to the request for admissions and then reconsidered it after the fact. If this was not the case, the court would have granted appellees' supplemental motions for partial summary judgment in December of 2008 instead of denying them. Later and only upon sua sponte reconsideration did the trial court render a contrary summary judgment ruling.

[13]Responses were served September 8, 2008 and the trial court denied the motions for partial summary judgment in December 2008.

appellants sought "an additional 60 days" to respond to appellees' 152 requests for admissions. The motion was unopposed and the trial court granted it.[14]

{¶ 36} Appellants' filed responses to the requests for admissions on September 8, 2008 and the trial court initially rejected appellees' position that these responses were untimely and did not deem the matters admitted under Civ.R. 36. As this Court found in *Lesco,* where the court previously accepts the responses to admissions and implicitly denies a motion to deem matters admitted, it is unreasonable to sua sponte reconsider this ruling months later; and neither does this further the intent of Civ.R. 36. Accordingly, after initially accepting the responses to the requested admissions, the trial court erred by reconsidering this ruling months later and deeming the matters admitted and granting partial summary judgment on this basis.

{¶ 37} Based on the foregoing, the order granting partial summary judgment and wholly discharging the mechanics' liens is reversed and the matter is remanded for further proceedings.

Judgment reversed and remanded.

It is ordered that appellants recover from appellees their costs herein taxed.

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[14] The order granting the motion that requested the extension is somewhat confusing in that it "granted" appellants' motion, without limitation, but also included a new discovery cutoff date. Appellants' motion had sought both a new discovery cutoff date as well as an additional 60 days to respond to the discovery that had been served on them in June of 2008. Under these circumstances, it was reasonable for appellants to interpret the order as they did, which was that it allowed for 60 days in addition to its

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas 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.

JAMES J. SWEENEY, JUDGE

MARY J. BOYLE, J., CONCURS;
MELODY J. STEWART, P.J., CONCURS IN JUDGMENT ONLY

initial 28-day limit, making the responses served September 8, 2008 timely.