[Cite as *Superior Waterproofing, Inc. v. Karnofel,* 2017-Ohio-7966.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

SUPERIOR WATERPROOFING, INC.,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2017-T-0010**
- vs -	:	
DELORES M. KARNOFEL,	:	
Defendant-Appellant.	:	

Civil Appeal from the Girard Municipal Court, Case No. 2014 CVF 01065.

Judgment: Affirmed.

Ned C. Gold, Jr., Ford, Gold, Kovoor & Simon, Ltd., 8872 East Market Street, Warren, OH 44484 (For Plaintiff-Appellee).

Delores M. Karnofel, pro se, 1528 Greenwood Avenue, Girard, OH 44420 (Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Delores M. Karnofel, appeals from a judgment entry of the Girard Municipal Court issued on January 20, 2017. The trial court granted summary judgment in favor of appellee, Superior Waterproofing, Inc., following a remand from this court. The municipal court's judgment is affirmed.

{¶2} On December 11, 2014, appellee filed a complaint against appellant in the municipal court alleging breach of a residential waterproofing service contract. Appellee asserted it performed the services required under the $9,500.00 contract plus an

additional $3,000.00 worth of work requested by appellant. The complaint alleged appellant owed $6,000.00 to appellee, while the invoice attached to the complaint indicated appellant owed $6,500.00. In her answer to the complaint, appellant maintained appellee did not fully or adequately perform under the contract and she does not owe appellee any money.

{¶3} Due to appellant's status as a vexatious litigator, she deemed it necessary to request leave from the municipal court prior to filing any pleadings. The municipal court granted appellant leave to file an answer, a counterclaim, and a motion for summary judgment. In this court's previous opinion on this matter, we held the municipal court did not have jurisdictional authority to grant or deny appellant's motions for leave to file any application that requested an order or other relief. *Superior Waterproofing, Inc. v. Karnofel*, 11th Dist. Trumbull No. 2015-T-0113, 2016-Ohio-6992, ¶15, citing R.C. 2323.52 (Ohio's vexatious litigator statute). Although appellant was not required to obtain leave to defend herself in the action (i.e., by filing an answer to the complaint or other responsive pleading), appellant was required to obtain leave from the Trumbull County Court of Common Pleas, the court that declared her vexatious, to file any application that requested an order or other relief. *Id.* at ¶12. Our instructions on remand provided, in part:

> Should appellant desire to file any application (i.e., motion, counterclaim, or any other request for relief) with the municipal court, she must first obtain leave to proceed from the Trumbull County Court of Common Pleas. The Trumbull County Court of Common Pleas has discretion to require appellant to file a motion for leave to proceed for each application she may file, or it may grant appellant leave to proceed for all, or a specific set of, applications with regard to this litigation.

Id. at ¶20.

{¶4} It does not appear from the record that, following remand from this court, appellant sought leave from the common pleas court to file a counterclaim or a motion for summary judgment. As a result, appellant's counterclaim and motion for summary judgment were not properly before the municipal court for consideration and cannot be considered on appeal.

{¶5} On October 6, 2015, appellee filed a motion to add Frank Kiepper, d.b.a. Superior Waterproofing, Inc., as a party plaintiff. The motion stated the corporation's charter had been revoked but that it remained a de facto corporation. The municipal court granted this motion on October 15, 2015.

{¶6} On October 9, 2015, appellee filed a motion for summary judgment. Four days later, on October 13, 2015, the municipal court granted summary judgment in appellee's favor prior to receiving a response in opposition from appellant. This judgment was reversed in our previous opinion, as appellant was not required to obtain leave to file a memorandum in response, and she had 24 days remaining within which to do so under Civ.R. 56(C). *Id.* at ¶17.

{¶7} Following our remand order, appellant filed a response in opposition to appellee's motion for summary judgment. The municipal court granted summary judgment in favor of appellee on January 20, 2017, and against appellant in the amount of $5,000.00 plus post-judgment interest at the rate of 3% per annum and costs.

{¶8} This court granted appellant's application for leave to proceed, pursuant to R.C. 2323.52(F)(2), from the January 20, 2017 order of summary judgment. Appellant filed her notice of appeal and asserts two assignments of error for our review.

{¶9} Appellee filed a responsive brief, to which it attached a copy of the trial court's judgment entry and a copy of two affidavits, with exhibits, that were filed in the municipal court in support of appellee's motion for summary judgment. Appellee posits these appendices were attached pursuant to this court's local rules. Counsel is advised that our local rules state appendices "shall *not* be employed without leave of court" except as provided for by Loc.R. 16(B)(3) and Ohio App.R. 16(E), i.e., when cited authority is not electronically available. *See* Loc.R. 16(B)(1).

{¶10} Appellant's second assignment of error states:

{¶11} "The Trial Court erred when it denied Appellant's Motion for Summary Judgment, because it violated her due process rights."

{¶12} Appellant alleges the municipal court was biased against her because she is a female, pro se litigant. There is absolutely nothing in the record to support this contention. Further, the argument is barred by res judicata, as we found it without merit in our previous opinion. *See Superior Waterproofing*, *supra*, at ¶19.

{¶13} Appellant's second assignment of error is without merit.

{¶14} Appellant's first assignment of error states:

{¶15} "The Trial Court abused its discretion when it granted Appellee's Motion for Summary Judgment."

{¶16} "Summary judgment is a procedural device intended to terminate litigation and to avoid trial when there is nothing to try." *Frano v. Red Robin Internatl., Inc.*, 181 Ohio App.3d 13, 2009-Ohio-685, ¶12 (11th Dist.), citing *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358 (1992). Summary judgment is proper when (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a

matter of law; and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to only one conclusion, and that conclusion is adverse to the nonmoving party. *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327 (1977), citing Civ.R. 56(C).

{¶17} The party seeking summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt,* 75 Ohio St.3d 280, 292 (1996). The moving party must point to some evidence of the type listed in Civ.R. 56(C) (e.g., depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact) that affirmatively demonstrates there is no genuine issue of material fact. *Id.* at 292-293. "Material facts are those relevant to the substantive law applicable in a particular case." *Frano*, *supra*, at ¶13, citing *Needham v. Provident Bank*, 110 Ohio App.3d 817, 827 (8th Dist.1996), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

{¶18} If this initial burden is not met, the motion for summary judgment must be denied. *Dresher, supra,* at 293. If the moving party has satisfied its initial burden, however, the nonmoving party then has a reciprocal burden, as outlined in Civ.R. 56(E), to set forth specific facts showing there is a genuine issue for trial; if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against it. *Id.*

{¶19} On appeal, we review a trial court's entry of summary judgment de novo, i.e., "independently and without deference to the trial court's determination." *Brown v. Cty. Commrs. of Scioto Cty.*, 87 Ohio App.3d 704, 711 (4th Dist.1993) (citation omitted); *see also Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996).

{¶20} Appellant argues the trial court erred by granting summary judgment in favor of appellee because there is a genuine issue as to whether the additional $3,000.00 in charges resulted from a "change order" to the original contract that should not have produced additional charges (appellant's position), or whether it was the result of additional work, not included in the original contract, that appellant later requested be performed (appellee's position). Appellant admits she agreed to an additional $200.00 cost for installing a French drain. Thus, the remaining disputed amount is $2,800.00—$1,200.00 for waterproofing around the back wall of a sunroom and $1,600.00 for the installation of new downspouts.

{¶21} Incorporated into appellee's motion for summary judgment are two affidavits of Frank Kiepper. Mr. Kiepper avers that the original contract included an agreement to hand dig 103 feet of basement walls; this did not include the back side of the sunroom, "which would have been much more expensive and unnecessary to accomplish the objective of waterproofing the basement. And we did not agree to put in new downspouts." He further avers that after the project was commenced, "Delores added the extra work, which included downspouts to the street, a French drain to the street and a dig down to the existing footer of the sunroom. None of that had been included in the original contract."

{¶22} These averments are supported by both the contract, which was attached to the complaint, and the invoice, which was attached to the complaint and the motion for summary judgment. The contract states:

> Bid is for hand digging 103 feet of basement walls. We will dig down to the footer and replace old footer pipe. New PVC pipe will be installed. All cracks will be repaired. Walls will be sealed with tar. We will backfill with wash gravel. Topsoil will be placed on top.

> Front porch will be taken down. A new front porch will be built consisting of 8 inch block and filling to grade. Pouring new concrete pad, 15 feet x 6 feet.

Additionally, the diagram of the house on the contract differentiates between the walls that were intended to be hand dug, represented by solid lines, and the back sunroom wall that was not intended to be dug, represented by a dashed line. The contract price is $9,500.00. The invoice provides the same information and price with regard to the basement waterproofing and front porch replacement. It then lists three line items under "Additional Work Requested":

Install new downspouts to street	$1,600.00
Additional waterproofing on back wall	$1,200.00
1- French Drain replaced with solid PVC pipe	$200.00

The total of the original bid and the additional work is $12,500.00. The invoice indicates $6,000.00 had been paid, leaving a balance due of $6,500.00.

{¶23} With regard to the balance due and owing, Mr. Kiepper averred: "It is fair to deduct $1,500.00 from the $6,500.00 balance shown as due on the account for the work that was contracted but not completed because she halted the work. That is a number much in favor of Ms. Karnofel. That leaves an undisputed balance of $5,000.00 now long past due and owing."

{¶24} Of course, that amount was disputed, and Mr. Kiepper avers that appellant instructed him not to return to the property because of the disagreement and, therefore, the project was not completed.

{¶25} Appellant filed a response in opposition to the motion for summary judgment. Attached to her response are pictures of the residence, which appellant claims is evidence that "the drainpipe was placed too close to the house, it was left

open (not filled with dirt), as well as the additional waterproofing on the backwall was left open. * * * The two, flimsy posts caused cracks and did not support the roof." She also attached copies of contracts with other parties she hired "to correct the problems left uncompleted," which amounted to $1,303.00. In her response, appellant further states she "had no knowledge of" the new downspouts and additional waterproofing on the back wall, and that "Frank Kiepper used these additional items as hidden costs to gain a profit." Finally, appellant admits to instructing appellee not to return to the property, but states it was because of a "sex stunt" Mr. Kiepper performed on her back porch.

{¶26} After a de novo review, we conclude that appellee met its burden on summary judgment by informing the municipal court of the basis for its motion and by identifying record evidence, of the type listed in Civ.R. 56(C), that demonstrates the absence of a genuine issue of material fact. Appellant, however, did not meet her reciprocal burden to set forth specific facts in evidentiary form showing there is a genuine issue for trial. *See* Civ.R. 56(E) ("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").

{¶27} Appellant's first assignment of error is without merit.

{¶28} The judgment of the Girard Municipal Court is affirmed.

CYNTHIA WESTCOTT RICE, P.J.,

THOMAS R. WRIGHT, J.,

concur.