

COURT OF APPEALS
GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

BOBBY STARKS	:	JUDGES:
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellant	:	Hon. Julie A. Edwards, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	
WHEELING TOWNSHIP TRUSTEES,	:	Case Nos. 2008 CA 000037 and
ET AL.	:	2009 CA 000003
	:	
Defendants-Appellees	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: On Appeal from the Guernsey County Court of Common Pleas, Case No. 06-CV-461

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: September 10, 2009

APPEARANCES:

For Plaintiff-Appellant

BRAD L. HILLYER
201 North Main Street
P. O. Box 272
Uhrichsville, OH 44683

For Defendants-Appellees

DAVID H. DESELM
Assistant Prosecuting Attorney
819 Steubenville Avenue
Cambridge, OH 43725

Delaney, J.

{¶1} Plaintiff-Appellant Bobby Starks appeals the December 3, 2008 and December 22, 2008 Judgment Entries of the Guernsey County Court of Common Pleas, which granted summary judgment in favor of Defendants-Appellees, Wheeling Township Trustees, and denied Appellant's motion for summary judgment.

STATEMENT OF THE FACTS AND THE CASE

{¶2} On August 21, 2006, Appellant filed a Complaint, naming Appellees as defendants. The Complaint arose from a line fence dispute in which Appellees notified Appellant he was required to build a portion of such fence pursuant to R.C. 971.02, et seq. In Count One of the Complaint, Appellant alleged the cost he was assessed to pay for the line fence exceeded the benefits conferred upon him. Count Two sought an injunction prohibiting Appellees from assessing the cost of the fence to Appellant.

{¶3} In Count Three, Appellant sought a mandamus action pursuant to R.C. 149.43(C), directing Appellees to release all of the public records requested by him. On March 21, 2006, Appellant had sent Appellees a written public records request under R.C. 149.43(B) and demanded the following:

{¶4} "Please accept this letter as a request for all records relating to a line fence dispute between Bobby Starks, Wheeling Township and any other parties. Please include all copies of correspondence, meeting minutes, notes, estimates or any other written documentation including oral transcripts. Please include letters from the Prosecutor's office regarding this matter. If you tape your meetings, please provide a copy of the audio tape of each meeting where this matter was discussed.

{¶5} " * * *

{¶6} “I would expect to have them within seven (7) days. * * *.” (Exhibit M, Delma Staser Deposition).

{¶7} Delma Staser, the elected Fiscal Officer for Wheeling Township, noted that she received the request on March 21, 2006. (Exhibit M, Staser Depo.). At the April 6, 2006 Wheeling Township Trustee Meeting, Staser stated in the meeting minutes that Appellees had received Appellant’s records request and that she had complied with the request. (Exhibit N, Staser Depo.).

{¶8} Count Three of Appellant’s Complaint states in pertinent part:

{¶9} “15. The Plaintiff, both in writing and orally, requested certain public records, specifically public records relating to the line fence dispute between himself and Wheeling Township Trustees;

{¶10} “16. To date the Plaintiff has not received all of these records, nor has he been informed that they are available for his inspection;

{¶11} “17. Specifically, the Plaintiff has not received notices of bids for the construction of the line fence, the award of a contract for the line fence, a copy of the contract for construction of the line fence and a copy of the payment of the obligation for the line fence;

{¶12} “18. Further, the Defendant is not open for reasonable business hours to allow for the inspection of these public records;”

{¶13} Appellant requested the trial court award costs and reasonable attorney’s fees for Appellee’s failure to promptly prepare the public records and make them available to Appellant for his inspection in accordance with R.C. 149.43(B).

{¶14} Appellees filed a timely answer, asserting Appellant was estopped from seeking relief as he failed to exhaust all of his administrative remedies.

{¶15} Appellees filed a Motion for Summary Judgment on September 18, 2007. Appellees maintained there was no genuine issue as to any material fact because Appellant failed to file an appeal from Appellees' December 30, 2005 Decision which assigned to Appellant responsibilities related to the construction of the line fence. Appellant filed a response to Appellees' motion for summary judgment and also sought summary judgment in his favor. Appellees filed a supplemental memorandum in support of their motion for summary judgment to which Appellant replied. Via Entry filed December 28, 2007, the trial court found no genuine issues of material fact remained and granted summary judgment in favor of Appellees. The trial court also denied Appellant's motion for summary judgment.

{¶16} Appellant appealed the December 29, 2007 judgment of the trial court to this Court. On September 19, 2008, this Court affirmed the decision of the trial court as to its decision to grant summary judgment in favor of Appellees on Counts One and Two of Appellant's Complaint. See *Starks v. Wheeling Twp. Trustees*, Guernsey App. No. 08CA000001, 2008-Ohio-4790. In the judgment granting summary judgment in favor of Appellees, however, the trial court did not rule on Count Three of Appellant's Complaint, which sought a mandamus for public records. *Id.* at ¶ 15. This Court remanded the matter to the trial court to proceed to disposition of Count Three. *Id.*

{¶17} Upon remand, the parties submitted their previously filed arguments related to Count Three to the trial court for consideration as motions for summary judgment. In support of their motion for summary judgment, Appellees referenced the

deposition of Delma Staser and the exhibits attached thereto. Appellees argued that they were entitled to judgment as a matter of law because the public records specifically listed in Count Three of Appellant's Complaint were not in existence at the time of Appellant's public records request on March 21, 2006. On November 25, 2008, the parties agreed that the trial court would receive the attachments to Appellees' memorandum as the exhibits attached to deposition of Delma Staser filed on September 21, 2007:

{¶18} Exhibit Z shows that notice of bids for the construction of the line fence was published beginning June 8, 2006. The Wheeling Township Trustees awarded the contract for the line fence construction at their meeting on August 3, 2006. (Exhibit V). The copy of the contract for construction of the line fence is dated August 12, 2006. (Exhibit S). The copy of the payment of the obligation for the line fence is dated September 4, 2006. (Exhibit AA).

{¶19} On December 3, 2008, the trial court filed its judgment entry finding that summary judgment should be granted in favor of Appellees on Count Three of Appellant's Complaint. In the entry, the trial court ordered that Appellees file a proposed entry in keeping within the court's decision within fourteen days. The trial court filed a second judgment entry on December 22, 2008, again granting summary judgment in favor of Appellees on Count three of Appellant's complaint.

{¶20} Appellant timely appealed both judgment entries and raises the following Assignment of Error:

{¶21} "1. THE TRIAL COURT ERRED WHEN IT GRANTED JUDGMENT IN FAVOR OF THE APPELLEE-DEFENDANT, WHEELING TOWNSHIP TRUSTEES, ET

AL., ON THEIR MOTION FOR SUMMARY JUDGMENT AND DENIED JUDGMENT IN FAVOR OF THE APPELLANT-PLAINTIFF, BOBBY STARKS, ON HIS MOTION FOR SUMMARY JUDGMENT.”

{¶22} We review Appellant’s Assignment of Error pursuant to the standard set forth in Civ.R. 56. Said rule was reaffirmed by the Supreme Court of Ohio in *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 448, 1996-Ohio-211:

{¶23} “Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined 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 such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex. rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377, 1379, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O3d 466, 472, 364 N.E.2d 267, 274.”

{¶24} As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35.

{¶25} R.C. 149.43, the Ohio Public Records Act, sets forth the remedy to compel compliance with a proper public records request as a mandamus action. R.C. 149.43(C). The Ohio Supreme Court has set forth three requirements which must be met in establishing a right to a writ of mandamus: (1) the relator demonstrates a clear

legal right to the relief prayed for; (2) the respondent is under a corresponding legal duty to perform the actions that make up the prayer for relief; and, (3) the relator has no plain and adequate remedy in the ordinary course of law. *Doss Petroleum, Inc. v. Columbiana Cty. Bd. of Elections*, 164 Ohio App.3d 255, 2005-Ohio-5633, 842 N.E.2d 66, citing to *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28, 29, 451 N.E.2d 225.

{¶26} In *Cwynar v. Jackson Twp. Bd. of Trustees*, 178 Ohio App.3d 897, 2008-Ohio-5011, 897 N.E.2d 1181, ¶21, this Court reiterated the purpose of the Ohio Public Records Act:

{¶27} “The purpose of the Ohio Public Records Act, R.C. 149.43, is to allow citizens access to public records, thereby exposing government activity to public scrutiny. *State ex rel. Long v. Cardington Village Council* (2001), 92 Ohio St.3d 54, 56, 748 N.E.2d 58 and *State ex rel. Sensel v. Leone* [(Feb. 9, 1998)], Butler App. No. CA97-05-102, * * * 1998 WL 54392, reversed on other grounds (1999), 85 Ohio St.3d 152, 707 N.E.2d 496. The exposure of government activity to public scrutiny is essential to the proper working of a democracy. *Sensel*, supra. (citing *State ex rel. Gannett Satellite Network, Inc. v. Petro* (1997), 80 Ohio St.3d 261, 264, 685 N.E.2d 1223; *State ex rel. WHIO-TV[-] 7 v. Lowe* (1997), 77 Ohio St.3d 350, 355, 673 N.E.2d 1360). ‘Scrutiny of public records allows citizens to evaluate the rationale behind government decisions so government officials can be held accountable.’ *Sensel* (citing *White v. Clinton Cty. Bd. Of Commrs.* (1996) 76 Ohio St.3d 416, 420, 667 N.E.2d 1223). Revised Code 149.351 is a deterrent to the improper disposition of public records. Since the improper disposition of the document is not likely to be made public, or may

be kept secretive, the public may not be aware of the act until someone seeks to review an improperly disposed of record.”

{¶28} The parties do not dispute the records listed in Appellant’s Complaint are public records as defined under R.C. 149.43(A). The issue is whether Appellees are in violation of R.C. 149.43(B) in their failure to provide the specific records listed in Count Three of Appellant’s Complaint.

{¶29} R.C. 149.43 pertains to the availability of public records and provides, in pertinent part:

{¶30} “(B)(1) Upon request and subject to division (B)(8) of this section, all public records responsive to the request shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. Subject to division (B)(8) of this section, upon request, a public office or person responsible for public records shall make copies of the requested public record available at cost and within a reasonable period of time. * * *

{¶31} “(7) Upon a request made in accordance with division (B) of this section * * * a public office or person responsible for public records shall transmit a copy of a public record to any person by United States mail or by any other means of delivery or transmission within a reasonable period of time after receiving the request for the copy. The public office or person responsible for the public record may require the person making the request to pay in advance the cost of postage if the copy is transmitted by United States mail or the cost of delivery if the copy is transmitted other than by United States mail, and to pay in advance the costs incurred for other supplies used in the mailing, delivery, or transmission.

{¶32} “Any public office may adopt a policy and procedures that it will follow in transmitting, within a reasonable period of time after receiving a request, copies of public records by United States mail or by any other means of delivery or transmission pursuant to this division. A public office that adopts a policy and procedures under this division shall comply with them in performing its duties under this division.”

{¶33} Upon our de novo review of the record, we find that reasonable minds could only conclude that Appellees complied with R.C. 149.43(B) in promptly preparing and transmitting the public records which existed at the time of Appellant’s March 21, 2006 public records request. There is no genuine issue of material fact that the records listed in Count Three of Appellant’s Complaint were not in existence at the time of Appellant’s March 21, 2006 records request.

{¶34} Appellant’s March 21, 2006 public records request stated that Appellees should transmit the records to him within seven days. The records listed in Count Three were not created within the seven days in which Appellant requested that the records be transmitted to him. On April 6, 2006, Staser told the Wheeling Township Trustees that she had complied with Appellant’s March 21, 2006 public records request. Staser testified in her deposition that she fully responded to Appellant’s March 21, 2006 request. There is no evidence that Appellant made another public records request after the March 21, 2006 request.

{¶35} Appellant also states in his brief that he stated in Paragraph 18 of his Complaint that Appellees were not open for reasonable business hours to allow Appellant to inspect the requested documents. Appellant and Appellee moved for summary judgment on Count Three of Appellant’s Complaint, and filed supplemental

memorandums of law on Count Three. Nowhere in the parties' motions for summary judgment, supplemental memorandum or Civ.R. 56 evidence submitted in support of the motions for summary judgment was this issue addressed before the trial court. We find the matter was not raised before the trial court and cannot now be raised for the first time on appeal.

{¶36} Appellant also argues that Appellees are in violation of the Ohio Public Records Act because Staser testified in her deposition that she destroyed her notes of the Wheeling Township Trustee meetings after she transcribed them into the official meeting minutes. (Staser Depo., 12). Count Three of Appellant's Complaint makes no allegation on this issue, Appellant did not raise this argument before the trial court; therefore, he cannot raise this issue for the first time on appeal.

{¶37} Accordingly, we overrule Appellant's Assignment of Error.

{¶38} The judgment of the Guernsey County Court of Common Pleas is affirmed.

By Delaney, J.

Farmer, P. J. and

Edwards, J. concur.

HON. PATRICIA A. DELANEY

HON. SHEILA G. FARMER

HON. JULIE A. EDWARDS

PAD:kgb

