

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

KIMBERLY R. BEEM

Plaintiff-Appellant

-vs-

TIMOTHY THORP, ET AL.

Defendants-Appellees

: JUDGES:

:
: Hon. Patricia A. Delaney, P.J.
: Hon. William B. Hoffman, J.
: Hon. Earle E. Wise, Jr., J.

: Case No. 16-CA-97

: OPINION

CHARACTER OF PROCEEDING:

Appeal from the Licking County Court of
Common Pleas, Case No. 2016 CV
00756

JUDGMENT:

AFFIRMED

DATE OF JUDGMENT ENTRY:

May 18, 2017

APPEARANCES:

For Plaintiff-Appellant:

KIMBERLY R. BEEM, PRO SE
P.O. Box 663
Johnstown, OH 43031

For Defendants-Appellees:

WILLIAM DOUGLAS LOVE
ROBERT N. ABDALLA
P.O. Box 919, 36 North – 2nd St.
Newark, OH 43058-0919

DANIEL T. DOWNEY
ANGELICA M. JARMUSZ
400 S. Fifth St., Suite 200
Columbus, OH 43215

Delaney, P.J.

{¶1} Plaintiff-Appellant Kimberly R. Beem appeals the October 24, 2016 judgment entry of the Licking County Court of Common Pleas.

FACTS AND PROCEDURAL HISTORY

{¶2} On January 23, 2015, the Ohio Bureau of Criminal Identification and Investigation filed six criminal complaints of telecommunications harassment against Plaintiff-Appellant Kimberly R. Beem. The complaints were related to communications sent to family members. A trial to the court was held on September 25, 2015. Beem was found guilty of five of the six counts and acquitted on one other.

{¶3} On August 15, 2016, Beem filed a complaint in the Licking County Court of Common Pleas against Defendants-Appellees, Licking County Sheriff Timothy “Randy” Thorp, Elmer “Dave” Starling, and Sierra Johnson. In her complaint, Beem alleged:

3. That Defendants have engaged in ongoing bullying, chronic defamation, falsification of legal documents, abuse of power by Thorp and Starling, collusion by all Defendants in an attempt to destroy the well being and happiness of the Plaintiff.

4. That on or about August 21, 2015, Plaintiff was wrongfully convicted of telecommunication harassment due to ongoing falsifications by the Defendants whose falsifications regarding the Plaintiff have been ongoing for several years. In the case of Defendant Thorp, he has gone to the extreme of knowingly violating the Plaintiff’s Constitutional rights to hide the corruption in his office and pursue a personal vendetta against the Plaintiff due to the fact that Plaintiff has exposed his conduct. Defendant Starling

has knowingly asserted falsifications regarding the Plaintiff, including but not limited to Licking County Sheriff Office (LCSO) and Bureau of Criminal Investigation (BCI) reports. Johnson's initial lies were acts of omission then various lies to cover up her criminal conduct of which she is not held accountable due to her collusion with rogue prosecutor's Kenneth Wayne Oswald, Douglas Sassen, and Christopher Kinsler.

5. All Defendants were well aware that their assertions were false and they engaged in a series of escalating lies to cover up their ongoing lies and to defame the Plaintiff.

Beem also requested a change of venue in her complaint.

{¶4} Sheriff Thorp, Starling, and Johnson filed motions to dismiss Beem's complaint pursuant to Civ.R. 12(B)(6). Beem responded to the motions. In her September 26, 2016 response, Beem requested the trial court judge recuse himself and the removal of Johnson's counsel.

{¶5} On October 7, 2016, the trial court held an oral hearing on the issues of recusal and removal. The trial court denied the request for recusal and removal via judgment entry filed on October 14, 2016.

{¶6} On October 24, 2016, the trial court granted the motions to dismiss pursuant to Civ.R. 12(B)(6).

{¶7} It is from these judgments Beem now appeals.

ASSIGNMENTS OF ERROR

{¶8} Beem's appellate brief does not comply with App.R. 16(A)(3). Beem fails to provide a statement of the assignments of error presented for review, with reference to

the place in the record where each error is reflected. Beem raises three arguments in the body of her appellate brief entitled: “First Error – Failure to Recuse”, “Second Error – Ignoring Request for Change of Venue”, and “Third Error – Absurd Dismissal.”

{¶9} Compliance with the appellate rule is mandatory. Beem’s failure to comply with App.R. 16 is tantamount to failing to file a brief in this matter. Such deficiencies permit this Court to dismiss Beem’s appeal. Notwithstanding the omissions in her brief, in the interests of justice and finality, we elect to review the appeal. *Erdman v. Williams*, 5th Dist. Tuscarawas No. 2012 AP 08 0054, 2013-Ohio-980, ¶ 9.

ANALYSIS

I. Failure to Recuse

{¶10} Beem argues in her first Assignment of Error that the trial court erred when the judge failed to recuse himself from the proceedings.

{¶11} The proper procedure in seeking recusal is to invoke R.C. 2701.03(A), which states the following:

If a judge of the court of common pleas allegedly is interested in a proceeding pending before the court, allegedly is related to or has a bias or prejudice for or against a party to a proceeding pending before the court or a party's counsel, or allegedly otherwise is disqualified to preside in a proceeding pending before the court, any party to the proceeding or the party's counsel may file an affidavit of disqualification with the clerk of the supreme court in accordance with division (B) of this section.

{¶12} The record is unclear whether Beem filed the required affidavit of disqualification with the clerk of the Supreme Court.

{¶13} This Court lacks jurisdiction to consider the trial judge's failure to recuse himself. *State v. Gregory*, 4th Dist. Gallia No. 16CA3, 2016-Ohio-7940, ¶ 5 citing *State v. Minton*, 69 N.E.3d 1108 2016–Ohio–5427, ¶ 84. See *State v. Batty*, 2014–Ohio–2826, 15 N.E.3d 347, ¶ 11 (4th Dist.), quoting *Citizen of Hocking Cty. v. Ohio Power Co.*, 4th Dist. Hocking No. 11CA24, 2012–Ohio–4985, ¶ 18 (“ ‘[A] court of appeals lacks jurisdiction to review [recusal] decisions.’ ”). “The Supreme Court of Ohio has explained that ‘only the Chief Justice or [the Chief Justice's] designee may hear disqualification matters[.]’ “ *Id.*, quoting *Ohio Power* at ¶ 18, quoting *Beer v. Griffith*, 54 Ohio St.2d 440, 441, 377 N.E.2d 775 (1978). “ ‘Consequently, a “Court of Appeals [is] without authority to pass upon disqualification or to void the judgment of the trial court upon that basis.” ‘ “ *Id.*, quoting *Ohio Power* at ¶ 18, quoting *Beer* at 441–442, 377 N.E.2d 775.

{¶14} Based on our lack of jurisdiction to consider this issue, Beem’s first Assignment of Error is overruled.

II. Ignoring Request for Change of Venue

{¶15} Beem contends in her second Assignment of Error that the trial court erred when the trial court failed to rule on her request to change venue. Beem argues she cannot receive a fair and impartial trial in Licking County due to a conspiracy among Licking County local officials.

{¶16} Beem raised her request for change of venue in her original complaint. The trial court dismissed Beem’s complaint pursuant to Civ.R. 12(B)(6) and did not specifically rule on Beem’s request for change of venue. We have held that a trial court's failure to rule on a motion is normally deemed to be a denial of that motion for purposes of appellate review. *Hollenbaugh v. Hollenbaugh*, 5th Dist. Delaware No. 13CAF070056, 2014-Ohio-

1124, ¶ 36 citing *Capital One Bank (USA), N.A. v. Rodgers*, 5th Dist. Muskingum No. CT2009–0049, 2010–Ohio–4421, ¶ 13.

{¶17} Licking County is the proper venue for the present action. Civ.R. 3(B). Change of venue in a civil action is governed by Civil Rule 3(C)(4), which states that, “upon motion of any party or upon its own motion the court may transfer any action to an adjoining county within the state when it appears that a fair and impartial trial cannot be had in the county in which the suit is pending.” The moving party has the burden of showing that a change of venue is necessary and proper. *Burns v. Prudential Securities, Inc.*, 167 Ohio App.3d 809, 2006-Ohio-3550, 857 N.E.2d 621 (3rd Dist.Marion). The decision whether to change venue is within the trial court’s sound discretion and will not be overturned absent an abuse of discretion. *Burton v. Dutiel*, 2015-Ohio-4134, 43 N.E.3d 874, ¶ 39 (5th Dist.) citing *State ex rel. Dunbar v. Ham*, 45 Ohio St.2d 112, 341 N.E.2d 594 (1976).

{¶18} Upon our review of the record, we find there was no abuse of discretion to retain the matter in Licking County.

{¶19} Beem’s second Assignment of Error is overruled.

III. Absurd Dismissal

{¶20} Beem contends in her third Assignment of Error that the trial court erred when it dismissed her complaint for failure to state a claim under Civ.R. 12(B)(6). We disagree.

{¶21} Our standard of review on a Civ.R. 12(B)(6) motion to dismiss is de novo. *Autumn Care Ctr., Inc. v. Todd*, 2014–Ohio–5235, 22 N.E.3d 1105, ¶ 7 (5th Dist.) citing *Greeley v. Miami Valley Maintenance Contractors, Inc.*, 49 Ohio St.3d 228, 551 N.E.2d

981 (1990). A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey County Board of Commissioners*, 65 Ohio St.3d 545, 1992-Ohio-73, 605 N.E.2d 378. “In construing a complaint upon a motion to dismiss for failure to state a claim, we must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party.” *Walker v. Toledo*, 143 Ohio St.3d 420, 2014-Ohio-5461, 39 N.E.3d 474, ¶ 4 citing *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988).

{¶22} Under the notice pleading requirements of Civ.R. 8(A)(1), the plaintiff only needs to plead sufficient, operative facts to support recovery under his claims. *Grossniklaus v. Waltman*, 5th Dist. Holmes No. 09 CA 15, 2010-Ohio-2937, ¶ 26 citing *Doe v. Robinson*, 6th Dist. Lucas No. L-07-1051, 2007-Ohio-5746, ¶ 17. Nevertheless, to constitute fair notice, the complaint must still allege sufficient underlying facts that relate to and support the alleged claim, and may not simply state legal conclusions. See *DeVore v. Mut. of Omaha Ins. Co.*, 32 Ohio App.2d 36, 38, 288 N.E.2d 202 (1972).

{¶23} We have reviewed Beem’s complaint and we agree with the trial court’s finding that it does not meet the requirements of Civ.R. 8(A)(1). Beem appears to raise claims of defamation and/or falsification in her complaint. Her claims, however, consist of conclusory statements regarding unspecified events. Unsupported conclusions of a complaint are not considered admitted and are not sufficient to withstand a motion to dismiss. *Phelps v. Office of the Attorney General*, 10th Dist. Franklin No. 06AP-751, 2007-Ohio-14, ¶ 4 citing *State ex rel. Seikbert v. Wilkinson*, 69 Ohio St.3d 489, 490, 1994-Ohio-39, 633 N.E.2d 1128. We realize Beem is acting pro se; she is nevertheless bound by the

same rules and procedures as litigants who retain counsel. *Miller v. State*, 5th Dist. Richland No. 15CA96, 2016-Ohio-4623, ¶ 27 citing *Meyers v. First National Bank of Cincinnati*, 3 Ohio App.3d 209, 210, 444 N.E.2d 412 (1st Dist.1981).

{¶24} Beem's third Assignment of Error is overruled.

CONCLUSION

{¶25} The judgment of the Licking County Court of Common Pleas is affirmed.

By: Delaney, P.J.,

Hoffman, J. and

Wise, Earle, J., concur.