

[Cite as *Johnson v. Barbosa*, 2018-Ohio-2558.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

CUTHBERT JOHNSON

C.A. No. 28616

Appellant

v.

VIOLET BARBOSA

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV-2016-09-4159

Appellee

DECISION AND JOURNAL ENTRY

Dated: June 29, 2018

CARR, Judge.

{¶1} Plaintiff-Appellant Cuthbert Johnson appeals, pro se, from the judgment of the Summit County Court of Common Pleas. This Court reverses and remands for proceedings consistent with this opinion.

I.

{¶2} Mr. Johnson is a former patient of Defendant-Appellee Violet Barbosa, D.D.S. Mr. Johnson received orthodontic care from Dr. Barbosa for a period of time. Dr. Barbosa dismissed Mr. Johnson from her care in October 2010. Mr. Johnson thereafter filed complaints with various agencies alleging that he had been obstructed in obtaining his medical records from Dr. Barbosa. Those cases were closed by the agencies. Mr. Johnson also made several requests to Dr. Barbosa for his medical records, including casts, models, impressions, and molds. Dr. Barbosa supplied Mr. Johnson with copies of his medical records, but denies possessing casts, models, impressions, or molds.

{¶3} In September 2016, Mr. Johnson filed a complaint pursuant to R.C. 3701.74(C) seeking an order requiring Dr. Barbosa to provide him with a copy of all records, documents, models, and impressions that Dr. Barbosa created with respect to Mr. Johnson's care, and an order requiring Dr. Barbosa to pay all of Mr. Johnson's costs and attorney fees related to the action. Dr. Barbosa answered, admitting that Dr. Barbosa was a health care practitioner under the statute, that Mr. Johnson was a patient under the statute, and that Dr. Barbosa prepared and created various documents, models, and impressions that qualified as medical records under the statute. However, she maintained that she had provided Mr. Johnson all requested and available medical records.

{¶4} Thereafter, Dr. Barbosa filed a motion for summary judgment asserting that Mr. Johnson's claim was either moot or that he was not authorized to file it based upon a ruling in prior litigation. Mr. Johnson opposed the motion and Dr. Barbosa submitted a reply. Ultimately, the trial court granted Dr. Barbosa's motion for summary judgment.

{¶5} Mr. Johnson has appealed, raising a single assignment of error for our review.

II.

ASSIGNMENT OF ERROR

THE LOWER COURT ERRED BY DISMISSING THE APPELLANT'S CASE FOR DENTAL RECORDS WITHOUT GIVING ANY SPECIFIC REASONS FOR ITS DECISION. ADDITIONALLY, THE LOWER COURT DISMISSED THE APPELLANT'S CASE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE PRESENTED BY THE APPELLANT THAT DEFENDANT ORTHODONTIST FAILED TO RETAIN THE APPELLANT'S DENTAL RECORD AND PRODUCE THE REQUESTED MODELS.

{¶6} Mr. Johnson argues in his assignment of error that the trial court erred in granting summary judgment to Dr. Barbosa. Mr. Johnson maintains that there was evidence that Dr. Barbosa possessed the models or casts.

{¶7} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). This Court applies the same standard as the trial court, viewing the facts in the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.*, 13 Ohio App.3d 7, 12 (6th Dist.1983).

{¶8} Pursuant to Civ.R. 56(C), summary judgment is proper if:

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 party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc., 50 Ohio St.2d 317, 327 (1977).

{¶9} The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293 (1996). Specifically, the moving party must support the motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). *Id.* Once a moving party satisfies its burden of supporting its motion for summary judgment with acceptable evidence pursuant to Civ.R. 56(C), Civ.R. 56(E) provides that the non-moving party may not rest upon the mere allegations or denials of the moving party's pleadings. *Id.* at 293. Rather, the non-moving party has a reciprocal burden of responding by setting forth specific facts, demonstrating that a "genuine triable issue" exists to be litigated at trial. *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 449 (1996).

{¶10} Dr. Barbosa moved for summary judgment on the basis that Mr. Johnson’s claim was either moot or that he was not authorized to file it. We will resolve the mootness argument first.

{¶11} R.C. 3701.74(C) provides that, “[i]f a health care provider fails to furnish a medical record as required by division (B) of this section, the patient, personal representative, or authorized person who requested the record may bring a civil action to enforce the patient’s right of access to the record.”

{¶12} In the trial court, Dr. Barbosa argued that Mr. Johnson’s claim was moot because she had provided his then-attorney with a copy of his medical records in 2017, after the suit had been filed. Additionally, she argued that she had produced Mr. Johnson’s medical records no less than three times. In support of her motion, Dr. Barbosa submitted a filing, signed by Mr. Johnson’s former attorney, indicating that the attorney had received “the dental file and records” of Mr. Johnson in the possession of Dr. Barbosa. Additionally, Dr. Barbosa submitted a letter she sent to the Summit County Clerk of Courts in 2011 in response to a complaint filed by Mr. Johnson. In that letter, Dr. Barbosa indicated that certain records had already been provided to Mr. Johnson, including various digital pictures. Dr. Barbosa asserted in her letter that, in that complaint, Mr. Johnson sought impressions and molds that did not exist.

{¶13} Mr. Johnson responded in opposition to the motion for summary judgment. In support of his argument, Mr. Johnson submitted what he asserted was a portion of Dr. Barbosa’s 2011 answer to Mr. Johnson’s complaint. In that document, Dr. Barbosa stated that Mr. Johnson insisted that she should have his impressions and molds and that she told him that she did not have the impressions but did have the “casts” and was not going to give them to him. Additionally, Mr. Johnson submitted what he claimed was part of a file that Dr. Barbosa had

emailed an attorney of Mr. Johnson's at some unidentified point in time. That document details a list of treatment records that apparently accompanied the document. The document also states that Dr. Barbosa does not have any casts or molds belonging to Mr. Johnson.

{¶14} Dr. Barbosa filed a reply brief in which she did not deny that the document that Mr. Johnson submitted was a portion of her answer to Mr. Johnson's 2011 complaint. Instead, she asserted that the reference to her having the casts was a clerical error. Dr. Barbosa submitted no evidence to support her assertion that the comment was a clerical error.

{¶15} We note that neither side submitted evidentiary materials that were appropriate under Civ.R. 56(C). In fact, no affidavits were submitted. "Civ.R. 56(C) provides an exclusive list of materials that a trial court may consider when deciding a motion for summary judgment. Those materials are 'pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact.'" (Internal citation omitted.) *Emerson Family Ltd. Partnership v. Emerson Tool, LLC*, 9th Dist. Summit No. 26200, 2012-Ohio-5647, ¶ 14, quoting Civ.R. 56(C). "Documents that are not sworn, certified, or authenticated by affidavit have no evidentiary value and cannot be considered by the trial court on summary judgment unless the opposing party has raised no objection." (Internal quotations and citation omitted.) *Id.* ¶ 15. Because neither side objected to the consideration of any of the improper summary judgment evidence, we will consider all of it in reviewing the trial court's decision.

{¶16} Even if we were to conclude that Dr. Barbosa met her initial burden with respect to summary judgment, in light of the evidence presented by Mr. Johnson, which Dr. Barbosa did not object to or move to have stricken, we can only conclude that there remains a genuine issue of material fact with respect to whether Mr. Johnson's claim is moot. Viewing the evidence in a

light most favorable to Mr. Johnson, there is evidence that Dr. Barbosa possessed cast/models and refused to provide them to Mr. Johnson. Further, there has been no argument or evidence submitted that those items would not be considered part of Mr. Johnson's medical record under the statute. The fact that, around the same time period, Dr. Barbosa denied having those items evidences the existence of a genuine issue of material fact. Moreover, from the evidence before us, and resolving all doubts created by that evidence in favor of Mr. Johnson, we cannot say that Dr. Barbosa demonstrated that, even if she had the casts or molds at the time of her 2011 answer, she no longer has them to provide to Mr. Johnson.

{¶17} Given the foregoing, we cannot say that Dr. Barbosa demonstrated the absence of a genuine issue of material fact with respect to whether Mr. Johnson's claim was moot.

{¶18} Next, we examine whether Dr. Barbosa demonstrated her entitlement to summary judgment based upon her argument that Mr. Johnson was not authorized to file his complaint.

{¶19} In support of her argument, Dr. Barbosa submitted a judgment entry from a 2011 case, which was captioned Cuthbert Johnson v. Violet Orthodontics. That entry states that the matter was before the court on Mr. Johnson's petition for Discovery. The trial court therein stated that the petition was dismissed and additionally ordered "the Clerk's office to prohibit any documents filed between Plaintiff, Cuthbert Johnson, and Defendant, Violet Orthodontics, without prior Court Order." Further, in support of her reply brief, Dr. Barbosa submitted a letter from a magistrate of the trial court judge in the 2011 case which reaffirmed that Mr. Johnson could not continue to file anything in the 2011 case with the clerk's office, absent permission.

{¶20} With respect to this argument, we conclude that Dr. Barbosa failed to satisfy her initial summary judgment burden. Even assuming that the trial court order from the 2011 case was somehow valid, *see Karnofel v. Girard Police Dept.*, 11th Dist. Trumbull No. 2006-T-0063,

2007-Ohio-7114, ¶ 20, Dr. Barbosa has not demonstrated that it applies to the instant matter. The instant matter involves Cuthbert Johnson v. Violet Barbosa, D.D.S., not Cuthbert Johnson v. Violet Orthodontics. Accordingly, Dr. Barbosa did not meet her burden to demonstrate that Mr. Johnson was not authorized to file the instant lawsuit.

{¶21} Given the foregoing, the trial court erred in granting summary judgment to Dr. Barbosa as a genuine issue of material fact remains with respect to whether Mr. Johnson's claim is moot and Dr. Barbosa failed to meet her burden to demonstrate that Mr. Johnson was not authorized to file his claim. Mr. Johnson's assignment of error is sustained and the matter is remanded for proceedings consistent with this opinion.

III.

{¶22} Mr. Johnson's assignment of error is sustained. The judgment of the Summit County Court of Common Pleas is reversed and the matter is remanded for proceedings consistent with this opinion.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is

instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

DONNA J. CARR
FOR THE COURT

HENSAL, J.
CONCURS.

SCHAFFER, P. J.
DISSENTING.

{¶23} I respectfully dissent. Dr. Barbosa stated many times in this matter that although molds and casts were produced, they “do not exist after their use” since they are broken at the laboratory during the process to prepare retainers. I would, therefore, affirm the judgment of the Summit County Court of Common Pleas.

APPEARANCES:

CUTHBERT JOHNSON, pro se, Appellant.

MICHAEL PELAGALLI, Attorney at Law, for Appellee.