

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Lonnie Rarden,	:	
	:	Nos. 12AP-225
Plaintiff-Appellant,	:	(Ct. of Cl. 2011-11092)
v.	:	and
	:	12AP-227
Department of Rehabilitation	:	(Ct. of Cl. 2011-10797)
and Correction,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	
	:	

D E C I S I O N

Rendered on December 4, 2012

Lonnie Rarden, pro se.

Michael DeWine, Attorney General, and Ashley L. Oliker, for appellee.

APPEALS from the Court of Claims of Ohio

BRYANT, J.

{¶ 1} Plaintiff-appellant, Lonnie Rarden, appeals from judgments of the Court of Claims of Ohio granting summary judgment to defendant-appellee, Ohio Department of Rehabilitation and Correction ("ODRC"), on plaintiff's defamation claims against defendant. Because plaintiff failed to provide evidence of a genuine issue of material fact to be resolved at trial, we affirm.

I. Facts and Procedural History

A. The Complaints

{¶ 2} On September 6 and 15, 2011, plaintiff filed complaints in the Court of Claims of Ohio against ODRC, the first arising from the alleged actions of Corrections Officer J. Burton and the second from the alleged actions of Kimberly Loesche.

{¶ 3} In his complaint concerning Loesche, plaintiff asserted that he never had been part of the prison 4-Paws program but on July 25, 2010 requested that Case Manager Loesche place him into the program. According to the complaint, she responded she could not due to central office criteria stating that past or present sex offenders were not allowed into the program. Plaintiff asserted no such criteria was in place.

{¶ 4} The complaint further alleged that officers nonetheless continued to bring dogs to him because they liked the manner in which he handled them. Plaintiff alleged that by July 8, 2011, Loesche became disgruntled with plaintiff, approached each officer she knew to be bringing their dogs to plaintiff, and told them plaintiff was not to be watching their dogs because he was convicted of raping a 13-year-old girl. According to the complaint, Loesche then told the block officers the same thing and conveyed the same sentiments to several inmates at the institution.

{¶ 5} Plaintiff's complaint stated that, contrary to Loesche's statements, he never was arrested for any rape charge, but some staff and inmates believed Loesche's false statement. The complaint alleged that, as a result of Loesche's statement, plaintiff suffered damage to his reputation as a model prisoner and is now subject to resentment, ridicule, hatred, humiliation, and embarrassment for which the complaint sought monetary damages. ODRC responded with an answer on October 4, 2011 denying the pertinent allegations of the complaint.

{¶ 6} Plaintiff's complaint against Burton is similar and contended a dispute arose over dog handling that ultimately led to Burton's filing a conduct report. The complaint alleged Burton's report falsely informed others that plaintiff threatened bodily harm to Burton, a statement both staff and inmates believed. According to the complaint, plaintiff suffered resentment, ridicule, hatred, humiliation, and embarrassment as a result of Burton's false statements, causing "[p]laintiff great pain of mind and body and emotional distress" for which plaintiff sought monetary damages. (Complaint, at ¶ 5.) ODRC responded with an answer on October 5, 2011 denying the pertinent allegations of the complaint.

{¶ 7} By entry dated October 11, 2011, the Court of Claims scheduled trial for both cases on April 12, 2012 at 10:00 a.m. at Lebanon Correctional Institution in Lebanon, Ohio, scheduled a case management conference for November 4, 2011 at 11:00 a.m., and set January 12, 2012 as the last day dispositive motions could be filed. The court further established no discovery would be allowed after December 12, 2011 without leave of court. On December 9, 2011, ODRC filed notice of its first set of interrogatories, requests of production of documents, and request for admissions to plaintiff.

B. ODRC's Summary Judgment Motions and Affidavits

{¶ 8} On January 11, 2012, ODRC filed motions for summary judgment in both cases; the court, by entry dated January 18, 2012, scheduled a non-oral hearing on the motions for February 8, 2012, at which time the motions would be considered on the documents. Accompanying the motions were the affidavits of Loesche and Burton.

{¶ 9} Loesche's affidavit stated that, at the time of the incident described in plaintiff's complaint, ODRC employed her full time as a case manager at the Warren Correctional Institution in Lebanon, Ohio where she also was responsible for implementing the 4-Paws prison program. She stated she, in that role, was responsible for selecting qualified inmates to participate in this program and was required to adhere to certain criteria in the selection process. According to her affidavit, plaintiff was ineligible to participate in the program due to his past offenses.

{¶ 10} The affidavit further stated that, although he was ineligible, plaintiff continued to handle dogs in violation of the institutional rules. Pursuant to her duties, she averred, she informed specific officers that plaintiff was not eligible for the dog program and should no longer be handling dogs. Her affidavit, however, stated she never told the officers plaintiff was convicted of raping a 13-year-old girl and made no untrue statement about plaintiff or his past criminal convictions. She lastly averred that any statements made about plaintiff's ineligibility were made in good faith and with a reasonable belief they were true, and she made them as part of her role as facilitator for the program and with the interest of properly implementing the program.

{¶ 11} Burton's affidavit similarly stated he made no untrue statement about plaintiff in the conduct report and believed plaintiff violated inmate rules when Burton

drafted the conduct report. He, too, averred he drafted the report in good faith and without malice.

C. Plaintiff's Response and the Court's Decision

{¶ 12} Plaintiff filed his response to ODRC's summary judgment motions on January 30, 2012. Plaintiff first argued ODRC was not entitled to any relief under Civ.R. 56 because it failed to request leave from the court to file its motions when a trial date had been set. Plaintiff further contended ODRC's claim that plaintiff could not prevail was "[n]onsense" since ODRC had no idea what evidence plaintiff had against it. (Memorandum contra, at 2.)

{¶ 13} With his response involving Loesche, plaintiff attached a document entitled "Affidavit" to which plaintiff noted he swore under penalty of perjury; the document is not notarized. In it, plaintiff stated he was an inmate and Loesche was an employee with ODRC at the time of the incidents specified in the complaint. The document said Loesche told several officers and inmates that plaintiff should not handle any dogs because he was convicted of raping a 13-year-old girl. The following paragraph of the document stated: "That is not true, I have never been charged or convicted of a Rape case in my life." ("Affidavit," at ¶ 6.) The document further asserted ODRC policies did not prevent him from handling staff dogs and Loesche's statements to the contrary were negligent and not made in good faith. Plaintiff's final paragraph stated that because he was in isolation, he could not obtain any affidavits from any witnesses.

{¶ 14} Similarly, attached to his memorandum opposing Burton's summary judgment motion is plaintiff's "Affidavit," sworn to but not notarized. The document stated that after the dispute over the dogs, plaintiff commented to Burton: "Oh. Are we going to Play by the Rules today burton." ("Affidavit," at ¶ 8.) According to the document, Burton then motioned for plaintiff to come to him, placed plaintiff on the wall, handcuffed him, and sent him to isolation. The document said a shift supervisor investigated the incident and let plaintiff out of isolation two hours later. Plaintiff's final paragraph stated that because he was in isolation, he could not obtain any affidavits from any witnesses.

{¶ 15} In responding to plaintiff's memorandum opposing its summary judgment motions, ODRC pointed to Civ.R. 56(F) and contended plaintiff's argument failed for two reasons: he failed to present facts through a properly notarized affidavit, and his

contention that he could not obtain affidavits to support his memorandum was false and misleading.

{¶ 16} To support the latter reason, ODRC attached the affidavit of J. Maggard, a sergeant charged with overseeing inmates in segregation. According to his affidavit, Maggard conducted weekly rounds of all inmates in segregation to check on them; he stated that, since he is a notary and had the ability to notarize an affidavit or document, he could provide notary services to an inmate in segregation. Pointing to other options available to inmates in segregation, ODRC contended plaintiff's failure to supply the required evidentiary materials under Civ.R. 56 was not a sufficient reason to deny ODRC's summary judgment motions. Plaintiff responded with a document from a fellow inmate, Russell Luther, entitled "Affidavit." In it, Luther stated that "for the most Part * * * Everything sergant [sic] Maggard claimed in his Affidavit is false and feel that he Should be charged with Perjury as defined in O.R.C. 2921.11(A)[.] A felony of The Third Degree." (Luther "Affidavit," at ¶ 5.) Luther's statement, as those of plaintiff, lacked notarization.

{¶ 17} On February 22 and March 2, 2012, the Court of Claims filed entries granting ODRC's summary judgment motions. After defining defamation, the court turned to the affidavits of Loesche and Burton. In opposition to ODRC's motions, the court noted, plaintiff filed what purports to be his own affidavit, but the document is not sworn and notarized and therefore is not a proper affidavit. Acknowledging plaintiff's contention that he was unable to have documents notarized or to obtain affidavits because he was in isolation, the court pointed to the affidavit of Maggard who stated that he regularly made rounds and made himself available to notarize documents for inmates housed in an isolation unit, but plaintiff never requested he notarize any documents either in prison or through the kite system.

{¶ 18} Given Loesche's and Burton's undisputed affidavit testimony, the Court of Claims determined neither Loesche nor Burton uttered the allegedly defamatory statements. With that, the court concluded no genuine issues of material fact remained for trial and granted ODRC's summary judgment motions.

{¶ 19} Plaintiff filed notices of appeal on March 12, 2012 from the court's final judgments granting summary judgment; on the same day, he filed motions "to Arrest

Judgment Pursuant to Civ.R. 60(B)." The Court of Claims treated the motions as motions for reconsideration and denied them.

II. Assignments of Error

{¶ 20} On appeal, plaintiff assigns two errors:

FIRST ASSIGNMENT OF ERROR

THE TRIAL COURT ERRORED [sic] WHEN IT GRANTED DEFENDANT'S MOTION FOR SUMMARY JUDGMENT WHEN DEFENDANT FAILED TO COMPLY WITH THE PROCEDURES SET FORTH IN CIVIL RULE 56.

SECOND ASSIGNMENT OF ERROR

THE TRIAL COURT ERRORED [sic] WHEN IT DENIED PLAINTIFF/APPELLANT'S MOTION FOR RECONSIDERATION.

{¶ 21} An appellate court's review of summary judgment is conducted under a *de novo* standard. *Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41 (9th Dist.1995); *Koos v. Cent. Ohio Cellular, Inc.*, 94 Ohio App.3d 579, 588 (8th Dist.1994). Summary judgment is proper only when the party moving for summary judgment demonstrates: (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in its favor. Civ.R. 56; *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181 (1997).

{¶ 22} Pursuant to Civ.R. 56(C), the moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record demonstrating the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). The moving party, however, cannot discharge its initial burden under this rule with a conclusory assertion that the non-moving party has no evidence to prove its case; the moving party must point specifically to evidence of a type listed in Civ.R. 56(C), affirmatively demonstrating that the non-moving party has no evidence to support the non-moving party's claims. *Id.*; *Vahila v. Hall*, 77 Ohio St.3d 421 (1997). Once the moving party discharges its initial burden, summary judgment is

appropriate if the non-moving party does not respond, by affidavit or as otherwise provided in Civ.R. 56, with specific facts showing that a genuine issue exists for trial. *Dresher* at 293; *Vahila* at 430; Civ.R. 56(E).

III. First Assignment of Error - Summary Judgment under Civ.R. 56

{¶ 23} Plaintiff presents three issues under his first assignment of error: (1) whether ODRC could seek summary judgment without first requesting leave from the Court of Claims, (2) whether the Court of Claims erred in granting summary judgment to ODRC when ODRC did not demonstrate any specific evidence to support the motion, and (3) whether the Court of Claims erred in concluding affidavits were necessary to respond to ODRC's summary judgment motions.

A. Leave of Court

{¶ 24} Plaintiff initially contends ODRC could not file summary judgment motions without leave of court. Plaintiff correctly cites Civ.R. 56(A), which provides that "[a] party may move for summary judgment at any time after the expiration of the time permitted under these rules for a responsive motion or pleading by the adverse party, or after service of a motion for summary judgment by the adverse party." *Id.* The rule, however, limits such motions by providing that "[i]f the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court." *Id.*; *see also* Civ.R. 56(B) (providing that "[i]f the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court").

{¶ 25} Here, the Court of Claims early in the case set a case management schedule. Pursuant to that schedule, trial was set for April 12, 2012. The schedule also specified that any dispositive motions should be filed on or before January 12, 2012. ODRC filed its summary judgment motions on January 11, 2012. Where, as here, a trial court sets a deadline to file dispositive motions, the court implicitly grants leave to file such motions before that deadline, even if the court has established a trial date. *Stark v. Govt. Accounting Solutions, Inc.*, 10th Dist. No. 08AP-987, 2009-Ohio-5201, ¶ 36. Although anything filed after January 12, 2012 would have required leave of court, ODRC filed within the parameters the Court of Claims established and thus complied with the Ohio Civil Rules; no leave of court was necessary.

B. Specific Evidence Supporting Summary Judgment

{¶ 26} Plaintiff next contends that because plaintiff had not responded to ODRC's discovery requests, ODRC had no idea what plaintiff's evidence would be and could not appropriately refute plaintiff's contentions. Plaintiff cites Civ.R. 56(C), which states that "[s]ummary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

{¶ 27} "To establish defamation, the plaintiff must show (1) that a false statement of fact was made, (2) that the statement was defamatory, (3) that the statement was published, (4) that the plaintiff suffered injury as a proximate result of the publication, and (5) that the defendant acted with the required degree of fault in publishing the statement." *Pollock v. Rashid*, 117 Ohio App.3d 361, 368 (1st Dist.1996).

{¶ 28} ODRC chose to refute plaintiff's allegations of defamation by showing that the statements made were not false. Accordingly, Loesche in her affidavit averred, "I have not made any untrue statement about Mr. Rarden or his past criminal convictions." (Affidavit, at ¶ 11.) Similarly, Burton's affidavit stated that he "did not make any untrue statements about Mr. Rarden in the August 4, 2011 Conduct Report." (Affidavit, at ¶ 17.) ODRC thus was not forced to rely on plaintiff's responses to ODRC's discovery requests to support its summary judgment motions on plaintiff's defamation claims. Rather than rely on any potential admissions that might result from plaintiff's responses to ODRC's discovery requests, ODRC relied on the affidavits of its employees, the ones who plaintiff alleged defamed him.

{¶ 29} Faced with those averments, plaintiff was required to respond with evidence admissible under Civ.R. 56(C) that created a genuine issue of material fact in that regard. Although plaintiff responded with what purported to be an affidavit, it was not notarized and therefore did not qualify as an affidavit or any other form of evidence permitted under Civ.R. 56(C). Plaintiff attempted to counter the deficiency by suggesting he was unable to obtain the necessary notarization for his affidavit. ODRC, however, presented affidavit evidence to the contrary, to which plaintiff responded with a document that failed to delineate what portion of Maggard's affidavit was false. The Court of Claims did

not err in refusing to consider the documents plaintiff submitted in opposing ODRC's summary judgment motions.

{¶ 30} In the end, the Court of Claims was faced with affidavits from Loesche and Burton undermining plaintiff's defamation claim by clearly stating they made no false statement about plaintiff. Plaintiff failed to respond with the necessary evidence to create a genuine issue of material fact. The Court of Claims properly granted ODRC's summary judgment motions.

C. Plaintiff's Need for Affidavit Evidence

{¶ 31} Plaintiff's third issue under his first assignment of error asserts the Court of Claims wrongly concluded plaintiff needed affidavit evidence to respond to ODRC's summary judgment motions. Plaintiff, in essence, contends ODRC's summary judgment motions simply asserted plaintiff had no evidence to support his cases. Plaintiff argues such is insufficient under *Dresher* to support ODRC's summary judgment motions and shift the burden to plaintiff to present evidence creating a genuine issue of material fact for trial.

{¶ 32} Contrary to plaintiff's contentions, ODRC presented evidence apart from pointing to plaintiff's lack of evidence; it supplied the affidavits of Loesche and Burton. In doing so, it refuted plaintiff's defamation claim and forced plaintiff to come forward with evidence demonstrating that a genuine issue of material fact remained to be litigated. Civ.R. 56(C) does not permit a party to meet that burden with mere statements but requires deposition testimony, affidavits or other items listed in the rule. Plaintiff failed to respond with such evidence and thus failed to create a genuine issue of material fact for trial.

{¶ 33} To the extent plaintiff contends he lacked adequate discovery opportunity to prepare for summary judgment, "[t]he remedy for a party that must respond to a motion for summary judgment prior to completion of adequate discovery is to file a motion, pursuant to Civ.R. 56(F), seeking to have the trial court stay ruling on the motion pending completion of the required discovery." *BMI Fed. Credit Union v. Burkitt*, 10th Dist. No. 09AP-1024, 2010-Ohio-3027, ¶ 17, citing *Morantz v. Ortiz*, 10th Dist. No. 07AP-587, 2008-Ohio-1046. When a party fails to file a motion pursuant to Civ.R. 56(F), that party fails to preserve its right on appeal, and a trial court does not err in determining the

summary judgment motion. *Taylor v. XRG, Inc.*, 10th Dist. No. 06AP-839, 2007-Ohio-3209, ¶ 17.

{¶ 34} Plaintiff failed to comply with Civ.R. 56(F); nor does his status as a pro se litigant excuse him from complying with the same rules with which those represented parties must comply. *See Hardy v. Belmont Corr. Inst.*, 10th Dist. No. 06AP-116, 2006-Ohio-3316, ¶ 9, citing *Sabouri v. Ohio Dept. of Job & Family Servs.*, 145 Ohio App.3d 651, 654 (10th Dist.2001). Because plaintiff did not avail himself of the remedies Civ.R. 56(F) provides, any discovery he lacked does not present a basis to reverse the Court of Claims' judgments.

{¶ 35} Accordingly, plaintiff's first assignment of error is overruled.

IV. Second Assignment of Error - Motion for Reconsideration

{¶ 36} After the Court of Claims entered judgments for ODRC pursuant to ODRC's summary judgment motions, plaintiff filed in the Court of Claims in each case a "Motion to Arrest Judgment Pursuant to Civ.R. 60(B)." In the motions, plaintiff asked the Court of Claims to reconsider its entry granting ODRC's summary judgment motions, citing Civ.R. 60(B) in support. Plaintiff posited two reasons the court should reconsider its decisions: (1) ODRC served discovery requests on plaintiff that were not answered at the time of ODRC's summary judgment motions, thereby divesting the court of the authority or jurisdiction to grant ODRC's summary judgment motions, and (2) ODRC failed to seek leave of court before filing its summary judgment motions.

{¶ 37} To the extent plaintiff sought reconsideration, his motions fail. A motion for reconsideration filed after a final judgment is considered a legal nullity. *Pitts v. Ohio Dept. of Transp.*, 67 Ohio St.2d 378 (1981), paragraph one of the syllabus; *Wiltz v. Clark Schaefer Hackett & Co.*, 10th Dist. No. 11AP-64, 2011-Ohio-5616, ¶ 37.

{¶ 38} Moreover, to the extent plaintiff sought review under Civ.R. 60(B), the Court of Claims lacked jurisdiction. Immediately after filing his motions pursuant to Civ.R. 60(B), plaintiff filed the notices of appeal. In doing so, plaintiff divested the Court of Claims of jurisdiction to consider his Civ.R. 60(B) motions. *Howard v. Catholic Social Servs. of Cuyahoga Cty., Inc.*, 70 Ohio St.3d 141, 147 (1994). Although the Court of Claims actually ruled on plaintiff's motions, it lacked jurisdiction to do so. After termination of

these appeals, the Court of Claims may rule on plaintiff's motions, from which judgments plaintiff will have a right to appeal.

{¶ 39} Plaintiff's second assignment of error is overruled.

V. Disposition

{¶ 40} Having overruled both of plaintiff's assigned errors, we affirm the judgments of the Court of Claims of Ohio.

Judgments affirmed.

TYACK and FRENCH, JJ., concur.
