

[Cite as *Owensby v. Fresenius Dialysis Unit*, 2005-Ohio-6467.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Gary Owensby,	:	
Plaintiff-Appellant,	:	
v.	:	No. 04AP-1382
Fresenius Dialysis Unit et al.,	:	(C.P.C. No. 02CVA-10-10862)
Defendants-Appellees.	:	(REGULAR CALENDAR)

O P I N I O N

Rendered on December 6, 2005

Gary Owensby, pro se.

Kegler, Brown, Hill & Ritter, Thomas W. Hill and Traci A. McGuire, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

McCORMAC, J.

{¶1} On October 2, 2002, plaintiff-appellant, Gary Owensby, proceeding pro se, filed a one-page complaint in the Franklin County Court of Common Pleas against defendants-appellees, Fresenius Dialysis Unit ("Fresenius"), Dr. William Bay, and Janet Hanson, alleging that appellees, without provocation or adequate justification, terminated his contract with Fresenius for life-sustaining dialysis treatments. In his brief complaint, appellant alleged breach of contract, tortious interference of a contract, purposeful discrimination based on race, intentional discrimination based on gender, intentional

discrimination based on disability, and intentional and negligent infliction of emotional distress.

{¶2} Appellees answered and counterclaimed, denying any allegations of tortious conduct along with various affirmative defenses. In the counterclaim of Fresenius, they alleged that appellant breached his contract to pay them for dialysis treatments and further alleged that appellant's insurance company, Medical Mutual, issued checks for payment for services which appellant failed to remit to Fresenius.

{¶3} On July 23, 2004, appellees moved the court for summary judgment against appellant on all claims made by him alleging that there is no genuine issue as to any material fact and that appellees are entitled to judgment as a matter of law.

{¶4} Upon motion of appellant, the trial court continued the trial date of September 28, 2004, until November 29, 2004, to allow appellant a chance to respond to the summary judgment motion.

{¶5} On November 30, 2004, the trial court granted the motion of appellees for summary judgment as to appellant's claims on the basis that the depositions and affidavits submitted by appellees showed there was no genuine issues of material fact as to any of the claims asserted by appellant and that appellees were entitled to judgment as a matter of law. In the trial court's decision, the trial court pointed out that appellant had failed to file any materials in opposition to the motion for summary judgment that were in any way in compliance with the requirements of Civ.R. 56. The only response of appellant to the motion for summary judgment was totally inadequate as the only materials produced were by an unknown person on or about September 30, 2004, hand delivering two folders to the court's chambers. No certificate of service accompanied

either folder nor were the folders served upon the opposing party. As the trial court pointed out, a party who chooses to represent himself must also accept the results of his own mistakes and/or omissions.

{¶6} The trial court rendered a judgment that it designated as a final entry terminating the case, meaning that it resolved all outstanding legal issues between all parties to the case; however, summary judgment was not sought in regard to the counterclaim and it was never decided by the trial court. Thus, there was only a partial summary judgment rendered.

{¶7} Appellant appeals, asserting the following assignment of error:

Trial court erred when it dismissed Appellant's case because appellant neglected to send a response to summary judgement to Appellee.

{¶8} The first issue before this court is the matter of subject-matter jurisdiction. While that was not raised by either party, it was raised sua sponte by the court during oral argument. At that time, appellees' counsel stated that it would rather have the case decided on the merits and that they would forgo any right to judgment on the unpaid part of the medical bills rendered by Fresenius to appellant. Appellant made no objection. For this reason, the court will proceed to decide the merits of summary judgment rendered in favor of appellees against appellant on his claims.

{¶9} Appellant's assignment of error in regard to the refusal of the trial court to consider the materials enclosed in the folder as a proper response under Civ.R. 56 to the factual basis to appellees' motion for summary judgment is overruled. Those materials were neither properly filed nor properly served upon the opposing party. Moreover, they were not in affidavit form or in a form that meets the requirements of Civ.R. 56(C). As

the trial court noted, the fact that appellant chose, against advice of the court, to proceed pro se does not justify a court bending the rules far beyond a reasonable basis to accommodate a pro se party. We find no error in the trial court refusing to consider the materials contained in the two folders delivered to the trial court but not filed or served upon the opposing party.

{¶10} The trial court then analyzed the documents including appellant's deposition that were properly filed by appellees and found that reasonable minds could not differ as to any material facts and that, construing them most favorably to appellant, the party opposing the motion for summary judgment, appellees were entitled to judgment on all claims asserted by appellant.

{¶11} There is no specific assignment of error concerning the merits of the summary judgment decision. However, that claim of error is implied as appellant stated that the papers in the two file folders, which were not considered, would demonstrate a genuine issue of fact as to part or all of his claims. The concluding part of appellant's appellate brief states, as follows: "The merits of this case are such that a summary judgement is not appropriate."

{¶12} In the court of appeals, summary judgment is considered de novo. As the trial court pointed out, there is no default summary judgment. Thus, proceeding de novo, we will analyze the merits of summary judgment. In doing so, we will consider only the materials properly filed by appellees. In light of the fact that appellant has given the court no guidance in his brief, and has basically admitted in his deposition perhaps unintentionally, that there is no legal basis for any of his claims except breach of contract for terminating him from dialysis treatment from Fresenius, that is the only claim we will

consider. We find that the trial court correctly analyzed the pertinent issues and law in regard to the various discrimination claims and the claim for intentional or negligent infliction of emotional distress. Independently, we agree with the trial court's reasons for granting partial summary judgment in regard to each of these claims.

{¶13} The only remaining claim for us to consider is breach of contract.

{¶14} At the time of trial, appellant was a 45-year-old male who was diagnosed with instage renal failure in 1983. He started dialysis soon thereafter and continued on dialysis treatment at various facilities. In 2001, appellant was a patient at Fresenius where he was receiving periodic dialysis. When he entered Fresenius as a patient, Fresenius provided him with a policy manual outlining patient rights and responsibilities. As pertinent, this manual provides, as follows: "Patients have the right to continue to dialyze at the facility and not be transferred or discharged against their will except in an emergency, for failure to follow the facility's policies and procedures; for the welfare of other patients, or for nonpayment of fees." As to patient responsibilities, the manual provides, as follows: "It is the responsibility of the patient to comply with facility rules and regulations which have been developed to protect the patients, ensure safety, and afford quality care to all patients. * * * The patient has the responsibility to treat staff members, other patients, and physicians with courtesy and respect."

{¶15} In appellees' motion for summary judgment and in the dismissal of appellant as a patient, appellees relied only upon the claim that "Owensby repeatedly failed to fulfill his obligations of the Patient Rights and Responsibilities Policy and failed to treat staff members, other patients and physicians with courtesy and respect." While there are other issues such as non-payment of fees to be considered in a trial on the merits, those

issues were not asserted in appellees' motion for partial summary judgment. We will consider only the reason addressed by appellees in their summary judgment motion.

{¶16} Appellees submitted substantial evidence by way of affidavits regarding their allegation that they were entitled to discharge appellant from their dialysis facility on the basis of the breach of the previously quoted portion of the rule concerning patient's responsibilities. The substance of these allegations, via affidavits of Fresenius staff, are that appellant regularly exhibited abusive behavior toward staff members and other patients by interfering with medical care being provided at the facility, with the claim that, for these reasons, Dr. Bay, the medical director, appropriately decided to terminate appellant as a patient at Fresenius.

{¶17} The trial court in its decision properly pointed out there is no "default" summary judgment under Ohio law. *Maust v. Palmer* (1994), 94 Ohio App.3d 764. A trial court must examine all appropriate materials filed by the parties before ruling on a motion for summary judgment. *Murphy v. Reynoldsburg* (1992), 62 Ohio St.3d 356.

{¶18} In analyzing the materials which were properly submitted, pursuant to Civ.R. 56(C), the trial court considered the testimony by appellees' witnesses, together with portions of appellant's deposition, which indicated discharge for his alleged abusive conduct was shown to be a fact with no reasonable basis for disagreement. However, the trial court failed to consider the portion of appellant's deposition where appellant vigorously asserted under oath that his conduct had in no way been disruptive or abusive. In no part of his deposition did he deviate from this position. This testimony of appellant is sufficient to constitute a genuine issue of material fact regarding his behavior. The fact that appellees had more witnesses and more testimony and submitted all the Civ.R.

56(C) evidence, including appellant's deposition to refute other claims, does not negate the genuine issue of material fact as to whether appellant violated the rules of the facility as far as his conduct is concerned. Appellant's sworn deposition testimony presents a jury question on this issue, particularly since appellees' witnesses were generally working for appellee and arguably not impartial witnesses. Of course at trial there may be other witnesses who support appellant's version of his behavior toward staff and other patients, some of which are referred to in the improperly submitted folders

{¶19} The trial court erred in rendering summary judgment in regard to the contract issue, albeit for a different reason than the one specifically contained in the assignment of error.

{¶20} Appellant's assignment of error is sustained as to the breach of contract claim only. The judgment of the Franklin County Court of Common Pleas is affirmed in part and reversed in part, and this case is remanded to that court to enter judgment rendering partial summary judgment for appellees on all claims except the discharge claim based upon breach of contract by Fresenius. The entry should include a dismissal of appellees' counterclaim. Upon remand, Fresenius may, if it chooses, proceed to offer evidence concerning all asserted defenses.

*Judgment affirmed in part and reversed in part;
cause remanded with instructions.*

BRYANT and SADLER, JJ., concur.

McCORMAC, J., retired of the Tenth Appellate District,
assigned to active duty under authority of Section 6(C), Article
IV, Ohio Constitution.
