[Cite as *Smith-Evans v. Lavelle,* 2010-Ohio-1074.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Jessica Smith-Evans,	:	
Plaintiff-Appellant,	:	
		No. 09AP-787
v.	:	(C.P.C. No. 08CVC07-10814)
Lisa Lavelle et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on March 18, 2010

Jessica Smith-Evans, pro se; *Clark Law Office*, and *Toki Michelle Clark*, for appellant.

Squires, Sanders & Dempsey, L.L.P., Tara A. Aschenbrand and *Meghan E. Hill*, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} Plaintiff-appellant, Jessica Smith-Evans ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas that granted summary judgment in favor of defendants-appellees, Lisa Lavelle ("Lavelle") and Holly Smith ("Smith"). For the following reasons, we affirm.

{¶2} The following facts and procedural history are germane to this appeal. Appellant worked with appellees at CompDrug, Inc., an Ohio nonprofit corporation that provides comprehensive prevention, intervention, and treatment programs for individuals

with substance abuse problems. On July 28, 2008, appellant filed the instant action[1] against Lavelle and Smith, asserting claims for defamation and tortious interference with business practices. According to appellant's complaint, Lavelle "knowingly and maliciously filed a false complaint with the Counselor, Social Worker and Marriage & Family Therapist Board asserting that [appellant] was mentally impaired and could not professionally perform her job." (Complaint at 6.) Appellant's complaint also alleges that Smith "made false and defamatory statements to [appellant's] clients" and "knowingly and with malice made false verbal and written defaming statements to CompDrug administrators and clinical directors with the intent of having [appellant] terminated from [her] employment." (Complaint at 14-15.)

{¶3} Appellees moved for summary judgment on June 12, 2009, to which appellant responded on July 16, 2009. The trial court granted summary judgment in favor of appellees on July 17, 2009.

{¶4} Appellant appeals, assigning the following two assignments of error:

> ASSIGNMENT OF ERROR NO. 1:
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> A TRIAL COURT ERRS WHEN IT GRANTS A MOTION FOR SUMMARY JUDGMENT WHERE THE OPPOSING PARTY NEVER RECEIVES NOTICE OF THE MOTION, AND WAS NEVER SERVED.
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> ASSIGNMENT OF ERROR NO. 2:
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> A TRIAL COURT ERRS WHEN IT GRANTS A MOTION FOR SUMMARY JUDGMENT ON THE BASIS OF QUALIFIED IMMUNITY, WHERE GENUINE ISSUES OF ACTUAL MALACE EXIST.

[1] This case was a re-filed case.

{¶5} Because appellant's assignments of error are interrelated, we shall address them together. Appellant argues in her first assignment of error that she was not properly served with appellees' motion for summary judgment because it was sent to her old address, and, as such, she "was not aware of the summary judgment filing to timely submit her affidavit along with a memorandum contra." (Appellant's brief at 4.) In her second assignment of error, appellant contends that the facts of this case "tend to show that [appellees] made their statements with actual malice" and, thus, the trial court erred when it granted summary judgment in favor of appellees on the basis of qualified immunity. (Appellant's brief at 4-5.)

{¶6} An appellate court's review of summary judgment is conducted de novo. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588, citing *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. We apply the same standard as the trial court and conduct an independent review without deference to the trial court's determination. *Maust v. Bank One Columbus, N.A.* (1992), 83 Ohio App.3d 103, 107; *Brown*, at 711. We must affirm the trial court's judgment if any of the grounds the movant raised in the trial court support the judgment. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42.

{¶7} Summary judgment is appropriate only where (1) no genuine issue of material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion, that conclusion being adverse to the nonmoving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. A party seeking summary judgment "bears the initial responsibility of informing the trial

court of the basis for the motion, and identifying those portions of the record * * * which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 1996-Ohio-107.

{¶8} We begin by noting that on June 2, 2009, appellant notified the clerk of courts that her address had changed, and her filing reflected a Westerville address. There is no evidence in the record, however, that appellant apprised counsel for appellees of her change of address prior to the filing of appellees' motion on June 12, 2009. Indeed, counsel for appellees assert that they only became aware of appellant's change of address on June 22, 2009, during a hearing held before the trial court. It is axiomatic that appellant had an obligation to inform opposing counsel of her change of address at the time she notified the clerk of courts.

{¶9} Despite claiming on appeal that she "failed to receive notice that [appellees] had filed a motion for summary judgment," (appellant's brief at 3), the record clearly reflects that appellant filed a memorandum contra to appellees' motion on July 16, 2009. In her memorandum contra, appellant asserted that appellees purposefully served her at the wrong address, i.e, her Powell address, and did so with the intent to reduce her response time. Therein, appellant also stated that appellees' motion, which was mailed on June 12, 2009, did not "arrive at the wrong address until about a week after the posted date." (Exhibit 2 attached to appellees' brief.)

{¶10} Upon review, we find that appellant's assertions on appeal are completely inconsistent with the record before us. By appellant's own admission, appellees' motion for summary judgment was received at her Powell address a week after it was mailed. As such, appellant had approximately one week to file her response to appellees' motion

for summary judgment but failed to do so within the requisite time. Had appellant believed she needed additional time to respond, it was incumbent upon appellant to move the trial court for an extension of time. Appellant's admission, combined with her subsequent filing of a memorandum contra, supports a finding that appellant had both actual and constructive notice that appellees filed a motion for summary judgment.

{¶11} At oral argument, appellant's counsel attempted to reconcile the argument advanced by appellant on appeal, i.e., that she did not have notice that appellees filed a motion for summary judgment, with appellant's untimely filed memorandum contra, by representing to this court that appellant had "sensed that something needed to be filed" and it "just so happened that she labeled [her memorandum contra] properly." While we pass no judgment on whether appellant has the power of extrasensory perception, we find that counsel's representations to this court are wholly without merit.

{¶12} Although we do not reach the merits of the trial court's decision to grant summary judgment in favor of appellees, it is worthy to mention that although the trial court did not consider appellant's memorandum contra in ruling on appellees' motion for summary judgment, and, in fact, the court ultimately struck the same from the record, the court noted that it found appellant's memorandum contra "was otherwise insufficient to defeat [appellees'] motion for summary judgment." (Trial court entry dated July 17, 2009.) Upon review of the same, we agree with the trial court's finding.

{¶13} Accordingly, we overrule both of appellant's assignments of error and affirm the judgment of the Franklin County Court of Common Pleas.

{¶14} Lastly, we must address appellees' motion for an award of its reasonable attorney fees and expenses associated with this appeal. Pursuant to App.R. 23,

appellees have requested that this court impose these sanctions upon appellant and her counsel, jointly and severally.

{¶15} If a court of appeals determines that an appeal is frivolous, it may require the appellant or her attorney to pay the appellee's reasonable expenses, including attorney fees and costs. App.R. 23; *Burdge v. Supervalu Holdings, Inc*., 1st Dist. No. C-060194, 2007-Ohio-1318. A frivolous appeal under App.R. 23 is essentially one that presents no reasonable question for review. *Talbott v. Fountas* (1984), 16 Ohio App.3d 226. The purpose of sanctions under App.R. 23 is to compensate the non-appealing party for the expense of having to defend a spurious appeal and to help preserve the appellate calendar for cases worthy of consideration. *Frowine v. Hubbard* (Feb. 15, 2000), 10th Dist. No. 99AP-496, citing *Tessler v. Ayer* (1995), 108 Ohio App.3d 47, 58. An appeal need not be frivolous in its entirety to warrant an award of expenses under App.R. 23. See *Stuller v. Price*, 10th Dist. No. 03AP-30, 2003-Ohio-6826, ¶29 (awarding fees and costs where four of six assignments of error presented no reasonable questions for review).

{¶16} Having found appellant's arguments untenable, we grant appellees' App.R. 23 motion for an award of expenses. Accordingly, we reference the matter to a magistrate of this court for a determination of the amount of the costs and/or fees to be assessed against appellant and appellant's counsel.

Judgment affirmed; motion for award of expenses granted.

BRYANT and BROWN, JJ., concur.

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