

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Kelvin Lovett,	:	
	:	
Plaintiff-Appellant,	:	No. 12AP-537
	:	(Ct. of Cl. No. 2011-13311)
v.	:	
	:	(REGULAR CALENDAR)
Southern Ohio Correctional Facility,	:	
	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on April 4, 2013

Kelvin Lovett, pro se.

*Michael DeWine, Attorney General, Amy S. Brown and
Daniel B. Forsythe, for appellee.*

APPEAL from the Court of Claims of Ohio

BRYANT, J.

{¶ 1} Plaintiff-appellant, Kelvin Lovett, appeals from a judgment of the Court of Claims of Ohio granting the Civ.R. 56 summary judgment motion of defendant-appellee, the Southern Ohio Correctional Facility ("SOCF") and denying plaintiff's motion to compel discovery. Because the Court of Claims did not err in (1) refusing to accept plaintiff's written statement as an affidavit, (2) granting summary judgment to SOCF, and (3) denying plaintiff's motion to compel discovery, we affirm.

I. Facts and Procedural History

{¶ 2} On December 28, 2011, plaintiff, an inmate incarcerated at SOCF, filed a complaint against SOCF, alleging, as relevant here, that Corrections Officer Matthew Brown assaulted him with pepper spray on September 19, 2011. After filing an answer denying the allegation, SOCF filed a Civ.R. 56 motion for summary judgment on April 30, 2012, contending plaintiff's assault claim amounted to an allegation that Officer Brown

used excessive force. SOCF asserted the evidence clearly demonstrated Officer Brown acted properly in his role as a corrections officer and used only "that force which reasonably appears to be necessary under all the circumstances surrounding the incident." (R. 30, Motion for Summary Judgment, at 7, citing Ohio Adm.Code 5120-9-01(B)(3).) In support, SOCF submitted affidavits from several corrections officers, including Officer Brown.

{¶ 3} On May 10, 2012, plaintiff filed a combined motion for an order to compel discovery and for an extension of time in which to respond to SOCF's motion. Plaintiff filed another combined motion on May 11, 2012 to withdraw his motion for an extension of time and to modify his motion for an order to compel; with the motion he included a response to SOCF's motion for summary judgment and an un-notarized written statement labeled "Affidavit." After SOCF replied, the Court of Claims issued an entry on June 11, 2012, granting SOCF's motion for summary judgment and denying plaintiff's modified motion to compel discovery.

II. Assignments of Error

{¶ 4} Plaintiff appeals assigning three errors:

[I.] The evidence is above and beyond. RIB audio, Use of Force report did contain video footage. Several document[s] that give credibility to my allegations.

[II.] I was unable to get my affidavit notari[z]ed, due to a dispute with the paralegal. I provided documents showing this. I did use 28 U.S.C. Section 1746 to certify the document.

[III.] The belate [sic] lie by C/O Brown, and the fact that he lied on record that directly involves this incident, then nothing he said can [be] believed.

For ease of discussion, we address plaintiff's assignments of error out of order.

III. Second Assignment of Error - Admissibility of Plaintiff's Affidavit

{¶ 5} Plaintiff's second assignment of error contends the Court of Claims erred in refusing to consider his written statement made pursuant to 28 U.S.C. 1746. Asserting he was unable to obtain the necessary notarization for his written statement because of a disagreement with the prison notary, plaintiff invoked 28 U.S.C. 1746 and "declare[d] under penalty under laws of the United States of America that the forgoing [sic] is true

and Correct." (R. 36, "Affidavit.") He contends the statement is sufficient to satisfy Civ.R. 56's requirement for an affidavit.

{¶ 6} "An affidavit is a written declaration under oath" that may be made "before any person authorized to administer oaths." R.C. 2319.02; 2319.04. *See also State ex rel. Ditmars v. McSweeney*, 94 Ohio St.3d 472, 475 (2002), quoting Black's Law Dictionary 58 (7th Ed.1999) (applying the ordinary meaning of the word and determining "an 'affidavit' is a 'voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths.' "). The statute plaintiff relies on, 28 U.S.C. 1746, is a federal law allowing a party to substitute an affidavit with an "unsworn * * * statement[] in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form: * * * 'I declare (or certify, verify, or state) under penalty of perjury * * * that the foregoing is true and correct. Executed on (date). (Signature).'

{¶ 7} The statute, however, is unavailable to plaintiff in state court proceedings in Ohio. "That language in [28 U.S.C. 1746] indicates that Congress intended to change *federal* law but leave the states free to set their own policies concerning affidavits." (Emphasis sic.) *Toledo Bar Assn. v. Neller*, 102 Ohio St.3d 1234, 2004-Ohio-2895, ¶ 19. Noting Ohio's "longstanding insistence" that "only a written declaration made under oath before a proper officer qualifies as an 'affidavit,'" *Neller* held that because Ohio has never enacted a provision recognizing the legal validity of unsworn declarations made under penalty of perjury, a written statement containing a 28 U.S.C. 1746 declaration does not replace an affidavit in Ohio. *Id.* at ¶ 24. *See also Disciplinary Counsel v. Squire*, 130 Ohio St.3d 368, 2011-Ohio-5578, ¶ 45, fn. 3 (reaffirming that "Ohio has never recognized that these unsworn declarations [made pursuant to 28 U.S.C. 1746] may serve as a substitute for a valid affidavit"); *State ex rel. Easley v. Burke*, 10th Dist. No. 12AP-486, 2012-Ohio-4548, ¶ 7, 11 (noting an un-notarized document "is * * * not truly an affidavit").

{¶ 8} Although plaintiff contends on appeal that he could not get his statement notarized because of a conflict with the prison notary, he does not point to any authority indicating Ohio recognizes such an excuse. To the contrary, this court applied *Neller's* reasoning to conclude an inmate's document asserting verification, pursuant to 28 U.S.C. 1746, was not a sufficient substitute for a notarized affidavit, even though the inmate

contended he was having "difficulty in having a document notarized in prison." *Watley v. Ohio Adult Parole Auth.*, 10th Dist. No. 05AP-1195, 2006-Ohio-2745, ¶ 7. Moreover, although not dispositive of plaintiff's contentions, the record indicates plaintiff complained to SOCF administrators that the prison notary was "being disrespectful and unprofessional," the administrators, after interviewing the notary and reviewing the written communications between the notary and plaintiff, concluded plaintiff's claims were baseless. (R. 43, Disposition of Grievance, at 2.)

{¶ 9} The Court of Claims thus did not err in refusing to consider plaintiff's written statement to be an affidavit absent the necessary notarization. Plaintiff's second assignment of error is overruled.

IV. First and Third Assignments of Error - Summary Judgment, Motion to Compel Discovery, and Witness Credibility

{¶ 10} Although the exact nature of plaintiff's first assignment of error is difficult to discern, plaintiff appears to argue that the Court of Claims erred in granting summary judgment to SOCF and denying his modified motion to compel discovery. Plaintiff's third assignment of error, challenging Officer Brown's credibility, stems from plaintiff's assumptions regarding the contents of documents he requested in his modified motion to compel.

A. Summary Judgment

{¶ 11} Plaintiff challenges the Court of Claims' decision granting SOCF's motion for summary judgment, asserting that his "complaint should be reinstated, and move forward with a trial." (R. 43, "Statement of Assignments of Error," at 2.)

{¶ 12} 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).

{¶ 13} 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).

{¶ 14} Plaintiff's complaint alleged Officer Brown assaulted him by spraying him with pepper spray. In a civil action, an assault is "the willful threat or attempt to harm or touch another offensively, which threat or attempt reasonably places the other in fear of such contact." *Stafford v. Columbus Bonding Ctr.*, 177 Ohio App.3d 799, 2008-Ohio-3948, ¶ 15 (10th Dist.), citing *Smith v. John Deere Co.*, 83 Ohio App.3d 398, 406 (10th Dist.1993). A defendant who commits an act fitting the legal definition of "assault" may claim exemption from liability by raising an affirmative defense of excuse or justification; one such justification is that the otherwise wrongful conduct was done in the exercise of lawful authority. *Id.* Here, SOCF acknowledges Officer Brown sprayed plaintiff with pepper spray but contends "the use of force was justified and lawful" pursuant to Officer Brown's role as a prison corrections officer. (Appellee's brief, at 5.)

{¶ 15} SOCF's summary judgment motion thus asserted "it was necessary to use force against Mr. Lovett to control or subdue him after he refused to obey Officer Brown's direct orders to be restrained in handcuffs and return to his prison cell and after he spit at Officer Brown." (R. 30, at 7.) To support its contentions, SOCF attached to its motion several affidavits and the investigation packet SOCF staff compiled following the September 19, 2011 incident.

{¶ 16} Officer Brown's affidavit attested that his altercation with plaintiff started when plaintiff refused to exit the prison shower area and return to his cell. Officer Brown

stated plaintiff then ignored "several direct orders to put on handcuffs and go back to his cell," instead stating to Officer Brown, "Fuck you, I ain't cuffing up," and "You're a Bitch." Finally, Officer Brown attested that plaintiff spit at him, leading Officer Brown to "administer[] a short burst of mace * * * [a]s a result of Mr. Lovett's disobedience of my direct orders and spitting at me." (R. 30, Motion for Summary Judgment, exhibit B.)

{¶ 17} Corrections Officer C. O'Connor's affidavit stated he witnessed the exchange between Officer Brown and plaintiff, plaintiff was being "extremely disrespectful," and Officer Brown administered a "short burst of mace" in response to plaintiff's refusing to obey orders and spitting at Officer Brown. O'Connor further stated that, in his opinion, Officer Brown "used the least amount of force necessary to control Mr. Lovett's actions during the September 19, 2011 incident" and "followed all internal rules and policies regarding inmate use of force." (R. 30, Motion for Summary Judgment, exhibit C.)

{¶ 18} In their affidavits, both Officers Brown and O'Connor authenticated attached copies of their conduct and incident reports completed on September 19, 2011, and the use of force statements that the use of force committee took on November 14, 2011. The earlier statements provided accounts consistent with the officers' affidavits.

{¶ 19} Corrections Lieutenant S. Workman also submitted an affidavit. The substance of the affidavit asserted that his inquiry supported the two corrections officers' accounts of the events surrounding Officer Brown's use of force. Workman further stated that the prison medical staff examined plaintiff after the incident and determined "no medical treatment was necessary and instead told Mr. Lovett to allow the air to dissipate the effect of the mace." (R. 30, Motion for Summary Judgment, exhibit D.) Finally, Workman authenticated attached documents pertaining to his internal investigation of the incident and averred that the investigation revealed "that the force used by Officer Brown was justified and that he used the least amount of force necessary to control Mr. Lovett's actions during the September 19, 2011 incident." (R. 30, Motion for Summary Judgment, exhibit D.)

{¶ 20} SOCF thus provided sufficient evidence to demonstrate Officer Brown's actions fit within the Ohio Administrative Code provisions allowing for some degree of force to gain plaintiff's compliance with prison rules and regulations. The evidence further supports SOCF's assertion that Officer Brown used only the force reasonably necessary

under all the circumstances surrounding the incident. *See also Miller v. Ohio Dept. of Rehab & Corr.*, 10th Dist. No. 12AP-12, 2012-Ohio-3382, ¶ 14 (concluding, where an inmate "became combative, refused to walk, and refused to obey direct orders," the corrections officers' use of "a short burst" of pepper spray "was justified and lawful pursuant to Ohio Adm.Code 5120-9-01(C)(2)(c)"). Accordingly, SOCF satisfied its initial burden as the moving party requesting summary judgment, and the burden shifted to plaintiff to demonstrate a genuine issue of material fact requiring resolution pursuant to trial. *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 115 (1988).

{¶ 21} The written statement plaintiff submitted on May 11, 2012 did not constitute an affidavit since it was not notarized. Although plaintiff's Court of Claims pleadings disputed SOCF staff members' accounts of events, "[t]he nonmoving party may not rest upon the mere allegations and denials in the pleadings but instead must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact." *Reywal Co. Ltd. Partnership v. Dublin*, 188 Ohio App.3d 1, 2010-Ohio-3013, ¶ 9 (10th Dist.), citing Civ.R. 56(E); *Henkle v. Henkle*, 75 Ohio App.3d 732, 735 (12th Dist.1991). Since plaintiff presented no evidence to the Court of Claims to support his assertions, SOCF's evidence remained undisputed. Accordingly, the Court of Claims properly granted SOCF's motion for summary judgment on plaintiff's assault claim.

B. Motion to Compel Discovery

{¶ 22} Plaintiff's first assignment of error may be understood also to challenge some aspect of the discovery process, as he asserts he was not able to procure documents "that give credibility to [his] allegations." (Appellant's brief, at 3.) Plaintiff's brief on appeal does not mention directly the Court of Claims' decision denying his modified motion to compel discovery, but in a document entitled "Statement of Assignments of Error" that he submitted to the Court of Claims prior to filing his brief on appeal, he claims "[d]iscovery in this matter was wrongly denied." (R. 43, "Statement of Assignments of Error" (filed as the Notice of Appeal), at 2.) Although not presented properly, we, in the interest of justice, address plaintiff's assertion that the Court of Claims erred in denying him discovery.

{¶ 23} Plaintiff's original "Motion for an Order Compelling Discovery" requested four documents or types of documents: (1) written statements and reports made by prison

employees regarding the September 19, 2011 incident; (2) "all conduct reports, incident reports[,] RIB hearing reports[,] Audio/Video, 'Use of Force report' "; (3) "any and all records without any redaction, employment and misconduct reports, and any disciplinary action taken regarding Correction Officer Matthew Brown"; and (4) Officer Brown's time sheets from "9/19/11 to 10/21/11." (R. 34, Combined Motion, at 1-2.) Plaintiff's "Motion to Modify Motion to Compel," filed the next day, stated that SOCF had "suppl[i]ed plaintiff with [the documents requested in] paragraph[s] 1, and 2. Still Plaintiff is without 3, and 4." (R. 36, at 1.) Thus, according to plaintiff's modified motion to compel discovery, the discovery requests still outstanding related solely to Officer Brown's employment records and time sheets for the month following the incident.

{¶ 24} On May 21, 2012, SOCF filed a memorandum opposing plaintiff's request, stating that plaintiff's request at paragraph 3 was "overly broad and unduly burdensome" and that both paragraphs 3 and 4 sought "documents that are irrelevant, confidential, privileged and that cannot be disclosed for security reasons. Moreover, [these requests are] not reasonably calculated to lead to the discovery of admissible evidence." (R. 38, at 1-2.) SOCF further averred, "Without waiving theses objections, Correctional Officer Matthew Brown has never been disciplined with regard to inmates." (R. 38, at 2, citing Affidavit of Lisa Haynes at ¶ 3.)

{¶ 25} As part of its June 11, 2012 judgment entry, the Court of Claims denied plaintiff's motion for an order to compel discovery of "Brown's employment and disciplinary records, and time sheets." (R. 42.) The court relied on SOCF's assertions that the requested documents were not subject to discovery "on the grounds of relevance and institutional security." (R. 42.)

1. Materials Related to the Incident and Subsequent Investigation

{¶ 26} Despite his statement to the Court of Claims in his May 11, 2012 motion that SOCF "supplied plaintiff with paragraph 1 and 2" materials, on appeal plaintiff's assignment of error mentions only items requested in those paragraphs, including "RIB audio" or "video footage." (R. 36, Appellant's brief, at 3.) " '[I]ssues not initially raised in the trial court may not be raised for the first time on appeal.' " *Amare v. Chellena Food Express, Inc.*, 10th Dist. No. 08AP-678, 2009-Ohio-147, ¶ 14, quoting *Ohio Civ. Rights Comm. v. Triangle Real Estate Servs., Inc.*, 10th Dist. No. 06AP-157, 2007-Ohio-1809,

¶ 11. Since plaintiff represented to the Court of Claims that SOCF had supplied the evidence he now claims is outstanding, his assertion on appeal is not well-taken.

2. Materials Related to Officer Brown and His Credibility

{¶ 27} Plaintiff does not mention Officer Brown's employment and disciplinary records or his time sheets in his first assignment of error; rather, he cites in his "Statement of Assignments of Error" document submitted to the Court of Claims on June 15, 2012 the requested time sheets as an example of "[d]iscovery in this matter" being "wrongly denied." (R. 43, at 2.) Plaintiff's third assignment of error challenges Officer Brown's credibility based on plaintiff's assumptions regarding what these documents would have revealed had the Court of Claims granted his modified motion to compel discovery. (Appellant's brief, at 4.)

{¶ 28} "A trial court enjoys considerable discretion in the regulation of discovery matters." *Callander v. Callander*, 10th Dist. No. 07AP-746, 2008-Ohio-2305, ¶ 43, citing *Akers v. Ohio State Univ. Med. Ctr.*, 10th Dist. No. 04AP-575, 2005-Ohio-5160, ¶ 7, citing *Manofsky v. Goodyear Tire & Rubber Co.*, 69 Ohio App.3d 663, 668 (9th Dist.1990). Civ.R. 26(B)(1). "In exercising its discretion in a discovery matter, the court balances the relevancy of the discovery request, the requesting party's need for the discovery, and the hardship upon the party from whom the discovery was requested." *Stegawski v. Cleveland Anesthesia Group, Inc.*, 37 Ohio App.3d 78, 85 (8th Dist.1987).

{¶ 29} Plaintiff set forth no compelling argument to demonstrate the Court of Claims abused its discretion in denying his request for Officer Brown's employment and disciplinary records and his time sheets for the month after the incident. As plaintiff acknowledged in his modified motion to compel discovery, SOCF provided him with the documents in its possession relating to the September 19, 2011 incident. The evidence at issue, pursuant to plaintiff's modified motion to compel, did not pertain directly to the alleged assault; instead, plaintiff speculated the subject documents might support his argument challenging "C/O Brown's credibility" as a general matter. (R. 43, at 2.) Plaintiff contended he required Officer Brown's employment records to substantiate his "belief that [Officer Brown] has been disciplined for this incident or similar incidents." (R. 34, Combined Motion, at 3.)

{¶ 30} Plaintiff next claimed the time sheets from September 19 to October 21, 2011 would impeach Officer Brown's credibility by showing he was actually present at work on days when he allegedly told the Rules Infraction Board he could not meet with the board to discuss the subject incident because he was on vacation. On appeal, plaintiff's third assignment of error builds off of this perceived "lie by C/O Brown," arguing that since Officer Brown "lied on record that directly involves this incident, then nothing he said can [be] believed." (Appellant's brief, at 4.)

{¶ 31} With its response to plaintiff's modified motion to compel discovery, SOCF submitted Labor Relations Officer Lisa Haynes's affidavit, in which Haynes averred Officer Brown "had no disciplinary records with regard to inmates." Since SOCF's evidence addressed plaintiff's speculation, the Court of Claims arguably could conclude the information in those records was not relevant to plaintiff's assault claim, even as it relates to Officer Brown's credibility. (R. 38.)

{¶ 32} Moreover, even if we assume Officer Brown had a disciplinary record or made such comments to the Rules Infraction Board, the Court of Claims did not abuse its discretion in denying plaintiff's motion to compel discovery where the court simultaneously decided to grant summary judgment based on plaintiff's failure to meet his reciprocal burden to present evidence demonstrating a genuine issue of material fact regarding the prime issue, the assault. Even had plaintiff obtained the requested documents and they revealed a discrepancy in Officer Brown's statements, SOCF's evidence regarding the events surrounding the subject use of force still would be undisputed and, therefore, merit summary judgment.

{¶ 33} Given the combination of factors, the Court of Claims could reasonably deny plaintiff's motion based upon the court's determination that any information ascertained from the documents had no bearing on its disposition of plaintiff's assault claim. Civ.R. 61 (stating that a trial court's error provides a basis for reversal only if the error is materially prejudicial, affecting a substantial right of the complaining party); *Theobald v. Univ. of Cincinnati*, 160 Ohio App.3d 342, 2005-Ohio-1510, ¶ 17 (10th Dist.) (holding that where avoidance of an alleged error would not have changed the case's outcome, then "the error neither materially prejudices the complaining party nor affects a substantial right of the complaining party").

{¶ 34} Accordingly, the Court of Claims did not abuse its discretion in denying plaintiff's modified motion to compel discovery.

C. Civ.R. 56(F) Motion

{¶ 35} As a final matter, to the extent plaintiff's assignment of error 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-597, 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.

{¶ 36} Plaintiff failed to comply with Civ.R. 56(F) and avail himself of the remedies Civ.R. 56(F) provides; his status as a pro se litigant does not excuse him "from complying with the same rules with which those represented parties must comply." *Rarden v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 12AP-225, 2012-Ohio-5667, ¶ 34, citing *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).

{¶ 37} Accordingly, plaintiff's first and third assignments of error are overruled.

V. Disposition

{¶ 38} Having overruled plaintiff's three assignments of error, we affirm the judgment of the Court of Claims of Ohio.

Judgment affirmed.

TYACK and McCORMAC, JJ., concur.

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