

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Shawn K. Brust,	:	
Plaintiff-Appellant,	:	
v.	:	No. 15AP-488 (C.P.C. No. 14CV-13459)
Franklin County Sheriff's Office et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on December 8, 2015

Shawn K. Brust, pro se.

Ron O'Brien, Prosecuting Attorney, and *Jeffrey C. Rogers*, for appellees.

APPEAL from the Franklin County Court of Common Pleas

DORRIAN, J.

{¶ 1} Plaintiff-appellant, Shawn K. Brust ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas granting a motion to dismiss filed by defendants-appellees, Franklin County Sheriff's Office and Sheriff Zach Scott ("appellees"). Because we conclude that the trial court erred by converting appellees' motion to dismiss into a motion for summary judgment without notifying the parties, and by holding that appellant failed to provide an affidavit describing his prior civil actions against government entities or employees, we reverse.

{¶ 2} This matter involves a complaint filed by appellant seeking the return of his vehicle and its contents, which appellant asserts have been impounded by appellees since appellant's arrest in August 1997. Appellant offers an extensive history of this impoundment; however, because we find that this appeal turns on a procedural issue, we need not fully recount that history here. In brief, appellant asserts that his vehicle and

certain tools contained therein were seized and impounded following his arrest on a charge of aggravated murder, and have remained in appellees' custody since that time. After appellant filed his complaint, appellees filed a motion to dismiss the complaint, asserting that it failed to state a claim upon which relief could be granted. Appellees' motion included a copy of an October 31, 2014 letter purporting to notify appellant that his vehicle was immediately available for pickup ("appellees' Exhibit A").

{¶ 3} The trial court issued a judgment granting appellees' motion to dismiss, concluding that appellant's complaint failed to state a claim upon which relief could be granted. The trial court also concluded that appellant failed to comply with the procedural requirements imposed by R.C. 2969.25(A).

{¶ 4} Appellant appeals from the trial court's judgment, assigning two errors for this court's review:

[I.] THE TRIAL COURT ERRED IN GRANTING DEFENDANT-APPELLEES' FRANKLIN COUNTY SHERIFF'S OFFICE AND SHERIFF ZACH SCOTT'S MOTION TO DISMISS THE PLAINTIFF-APPELLANT'S COMPLAINT FOR FAILURE TO STATE A CLAIM UNDER OHIO RULES OF CIVIL PROCEDURE, CIV.R. 12(B)(6) BY CONSIDERING EVIDENCE SUBMITTED BY THE DEFENDANT-APPELLEE OUTSIDE OF THE COMPLAINT.

[II.] THE TRIAL COURT ERRED TO THE PREJUDICE OF THE PLAINTIFF-APPELLANT IN IT'S [sic] *SUA SPONTE* DISMISSAL OF THE PLAINTIFF-APPELLANT'S COMPLAINT FOR PURPORTED NON-COMPLIANCE OF THE FILING REQUIREMENTS OF OHIO REVISED CODE, § 2969.25(A).

{¶ 5} Appellant asserts in his first assignment of error that the trial court erred by granting appellees' motion to dismiss because the trial court relied on evidence outside the complaint. We review de novo a trial court's dismissal of a complaint pursuant to Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted. *Modern Office Methods, Inc. v. Ohio State Univ.*, 10th Dist. No. 11AP-1012, 2012-Ohio-3587, ¶ 9. Under the de novo standard, we independently review the record and afford no deference to the trial court's decision. *State v. Ramage*, 10th Dist. No. 11AP-822, 2012-Ohio-3381, ¶ 6.

{¶ 6} A trial court may consider only the statements and facts contained in the pleadings in ruling on a motion for failure to state a claim upon which relief can be granted and may not consider or rely on evidence outside the complaint. *Powell v. Vorys, Sater, Seymour & Pease*, 131 Ohio App.3d 681, 684 (10th Dist.1998). "When a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleading and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56." Civ.R. 12(B). The rules specify that "[a]ll parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56." Civ.R. 12(B). The Supreme Court of Ohio has held that, under this provision, "[a] court must notify all parties when it converts a motion to dismiss for failure to state a claim into a motion for summary judgment." *Petrey v. Simon*, 4 Ohio St.3d 154 (1983), paragraph one of the syllabus.

{¶ 7} When a motion to dismiss presents materials outside the pleadings, the trial court may either exclude the extraneous materials from consideration or it may treat the motion as a motion for summary judgment. *Powell* at 684. "However, a trial court may not, on its own motion, convert a Civ.R. 12(B)(6) motion to dismiss to a motion for summary judgment and thus dispose of it without giving notice to the parties of its intent to do so and fully complying with Civ.R. 12(B) and Civ.R. 56 in its considerations." *Id.* at 684-85. "Failure to notify the parties that the court is converting a Civ.R. 12(B)(6) motion to dismiss into one for summary judgment is, itself, reversible error." *Id.* at 685, citing *State ex rel. Boggs v. Springfield Local School Dist. Bd. of Edn.*, 72 Ohio St.3d 94, 96 (1995). *See also Eichenberger v. Woodlands Assisted Living Residence, LLC*, 10th Dist. No. 12AP-987, 2013-Ohio-4057, ¶ 19 ("A trial court may not, however, sua sponte convert a Civ.R. 12(B)(6) motion to dismiss into a motion for summary judgment and dispose of it without giving notice to the parties of its intent to do so.").

{¶ 8} Appellant asserts that the trial court erred by considering appellees' Exhibit A in granting the motion to dismiss. Appellant further argues that, if the trial court converted appellees' motion to dismiss into a motion for summary judgment, it erred by failing to notify the parties that it was treating the motion to dismiss as a motion for summary judgment.

{¶ 9} Appellees contend that dismissal was warranted because the facts as set forth in the pleadings demonstrate that appellant abandoned his property. However, appellees also appear to implicitly concede that the trial court may have converted their motion to dismiss into a motion for summary judgment. In their brief on appeal, appellees assert that "the Trial Court had the option to consider Appellees' Exhibit A when ruling and, if relied on, Appellees' motion should have been converted to a motion for summary judgment under Civ.R. 56." (Appellees' Brief, 18.)

{¶ 10} The trial court's decision granting the motion to dismiss expressly relied on appellees' Exhibit A and quoted directly from that document. By considering appellees' Exhibit A, which was outside the pleadings, the trial court effectively converted appellees' motion to dismiss for failure to state a claim upon which relief could be granted into a motion for summary judgment. There is no indication in the record that the trial court notified the parties of its intention to convert the motion to dismiss to a motion for summary judgment. Failure to notify the parties that the court was treating the motion to dismiss as a motion for summary judgment constituted reversible error. *Powell* at 685.

{¶ 11} Accordingly, we sustain appellant's first assignment of error.

{¶ 12} Appellant asserts in his second assignment of error that the trial court erred by dismissing his complaint on the alternative basis that he failed to file an affidavit of prior civil actions. R.C. 2969.25(A) provides that, when an inmate commences a civil action or appeal against a government entity or employee, he must file an affidavit with the court describing each civil action or appeal of a civil action that he has filed in the previous five years. "The requirements of R.C. 2969.25 are mandatory, and failure to comply with them subjects an inmate's action to dismissal." *State ex rel. White v. Bechtel*, 99 Ohio St.3d 11, 2003-Ohio-2262, ¶ 5. The trial court concluded that it was required to dismiss the complaint because appellant, who is presently incarcerated, failed to comply with the mandatory requirements of R.C. 2969.25(A).

{¶ 13} Appellant claims that the trial court erred because he included with his complaint an affidavit providing the information required under R.C. 2969.25(A). Appellees concede that appellant appears to have complied with R.C. 2969.25(A). The record reflects that an affidavit from appellant was attached to his complaint declaring, in relevant part, that he had not filed any civil actions in the previous five years. Thus, the

trial court erred by dismissing appellant's complaint for failure to comply with R.C. 2969.25(A).

{¶ 14} Accordingly, we sustain appellant's second assignment of error.

{¶ 15} For the foregoing reasons, appellant's two assignments of error are sustained, and the judgment of the Franklin County Court of Common Pleas is reversed, and this cause is remanded to that court for further proceedings in accordance with law and consistent with this decision.

Judgment reversed and cause remanded.

TYACK and KLATT, JJ., concur.
