

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

SHIRLEY REIGLES, ADMINISTRATOR OF THE ESTATE OF FRANK C. ORLANDO,	:	O P I N I O N
	:	
Plaintiff-Appellee,	:	
	:	CASE NO. 2009-L-139
- vs -	:	
JOANNE L. URBAN,	:	
	:	
Defendant-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Probate Division, Case No. 08 CV 0043.

Judgment: Affirmed in part, reversed in part, and remanded.

J. Michael Drain, 21801 Lakeshore Boulevard, Euclid, OH 44123 (For Plaintiff-Appellee).

Gary H. Levine, The Brownhoist Building, 4403 St. Clair Avenue, Cleveland, OH 44023 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Joanne L. Urban, appeals from the Lake County Court of Common Pleas, Probate Division's entry of summary judgment in favor of appellee, Shirley Reigles. For the reasons discussed in this opinion, we affirm in part, reverse in part, and remand the matter for further proceedings.

{¶2} On April 10, 2008, appellee, the appointed administrator of the Estate of Frank Orlando, filed a complaint alleging appellant concealed, embezzled, and, by means of undue influence, converted various items of intangible personal property and real property belonging to Orlando for her own use. Various motions were subsequently filed, e.g., appellee's motion for default judgment; appellant's motion for leave to file her answer instant; appellant's motion for leave to file third-party complaint; appellant's motion to disqualify appellee's counsel. None of these motions, however, were ruled upon.

{¶3} Between late January, 2009 and mid-April, 2009, appellee, through counsel, filed multiple motions for discovery which were apparently ignored. As a result, on April 15, 2009, the trial court granted appellee's motion to compel, ordering appellant to "post bond to any outstanding discovery requests propounded by Plaintiff herein within two weeks of the entry of this order." Appellant complied and, appellee subsequently filed a motion for summary judgment together with various exhibits to support her position that she was entitled to judgment as a matter of law.

{¶4} On August 31, 2009, the trial court issued a "notice of hearing" to consider appellee's motion for summary judgment. The court ordered that "[a] non-oral hearing on the motion shall be held on September 10, 2009 ***. The motion will be considered on the documents, without presence of counsel or parties ***."

{¶5} On September 10, 2009, the date on which the non-oral hearing was scheduled to take place, appellant filed a motion for enlargement of time to file her brief in opposition to appellee's motion for summary judgment. In support, counsel for appellant stated he had not yet received certain important discovery materials he had

previously subpoenaed. Counsel's motion was not supported by affidavit as required by Civ.R. 56(F). The trial court subsequently overruled the motion, pointing out that "[d]efendant had approximately 45 days from when the Plaintiff filed the Motion for Summary Judgment until the Court set the matter for a non-oral hearing. Defendant had an additional ten days after the hearing was set. Defendant did not file the Motion for Enlargement of Time until the day of hearing."

{¶6} On September 17, 2009, the trial court entered summary judgment in appellee's favor. On October 19, 2009, appellant perfected a timely appeal with this court. On October 28, 2009, appellant filed a "motion for reconsideration" in the trial court, asking the court to reconsider its decision overruling her motion for extension of time as well as its decision awarding appellee summary judgment. Appellant accompanied the dual motion with a brief in opposition to the motion for summary judgment which the trial court had previously granted. The trial court later overruled the motion for reconsideration on procedural grounds.

{¶7} In support of her appeal, appellant asserts two assignments of error, which we shall address out of order. Her second assignment of error asserts:

{¶8} "The trial court committed prejudicial error in overruling Defendant-Appellant's motion for enlargement of time to file [her] brief in opposition to Plaintiff-Appellee's motion for summary judgment."

{¶9} Under this assignment of error, appellant contends the trial court abused its discretion in overruling her motion for enlargement of time where she had made no prior requests for extensions and she asserted a legitimate basis for seeking additional

time to respond. Regardless of these points, appellant's failure to adhere to the mandates of Civ.R. 56 in seeking the extension is fatal to her argument.

{¶10} Under Civ.R. 56(C), a court shall award summary judgment if the affidavits or any other evidentiary materials submitted in support of that motion demonstrate that no genuine issues of material fact exist. Appellee's motion was supported by evidence in the form of bank records produced during discovery. Appellant did not file a timely memorandum in opposition, but, instead, moved the court for additional time to complete discovery of her own. The motion, however, did not include an affidavit supporting the necessity of the information being sought. Civ.R. 56(F) provides:

{¶11} "Should it appear from the *affidavits* of a party opposing the motion for summary judgment that the party cannot for sufficient reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just." (Emphasis added.)

{¶12} Courts, including this one, have held that *the* remedy for a party who must respond to a summary judgment motion before he or she has completed adequate discovery is a motion under Civ.R. 56(F). *Alexander v. Tullis*, 11th Dist. No. 2005-P-0031, 2006-Ohio-1454, at ¶22. *Morantz v. Ortiz*, 10th Dist. No. 07AP-597, 2008-Ohio-1046, at ¶20; *Hankins v. Cecil*, 4th Dist. No. 08CA1, 2008-Ohio-5275, at ¶8; *MacConnell v. Safeco Property*, 2d Dist. No. 21147, 2006-Ohio-2910, at ¶51. Civ.R. 56(F) permits "a party the opportunity to request additional time to obtain, through discovery, the facts necessary to adequately oppose a motion for summary judgment." *Morantz*, *supra*.

{¶13} Appellant could have timely responded to appellee's motion for summary judgment by outlining and supporting by affidavit the discovery which would have been beneficial to her case pursuant to Civ.R. 56(F). Instead, appellant simply moved the court for a two-week extension (on the day the non-oral hearing was scheduled to proceed) alleging she had not received certain subpoenaed bank records as of date of the motion. Although she attached a copy of the outstanding subpoena to the motion, she failed to support her claim of the alleged discovery impasse with an affidavit. "Mere allegations requesting a continuance or deferral of action for the purpose of discovery are not sufficient reasons why a party cannot present affidavits in opposition to the motion for summary judgment." *Gates Mills Invest. Co. v. Pepper Pike* (1978), 59 Ohio App.2d 155, 169. Because appellant failed to meet the requirements of Civ.R. 56(F) in seeking the extension, we hold the trial court acted within its sound discretion in overruling the motion. See, e.g., *Tekavec v. Sears, Roebuck & Co.* (Sept. 29, 1994), 8th Dist. No. 65506, 1994 Ohio App. LEXIS 4489, *12.

{¶14} Appellant's second assignment of error is overruled.

{¶15} Appellant's first assigned error reads:

{¶16} "The trial court committed prejudicial error in granting Plaintiff-Appellee's Motion for Summary Judgment when there were genuine issues of material fact remaining to be litigated and Plaintiff is not entitled to judgment as a matter of law."

{¶17} Summary judgment is appropriate only if the moving party can establish both that there are no genuine issues as to any material fact and that the movant is entitled to judgment as a matter of law. See Civ.R. 56(C). In ruling on such a motion, the court is required to construe the evidence in the light most favorable to the opposing

or non-moving party. *Id.* Under Civ.R. 56(E), however, if the non-moving party does not respond to a motion for summary judgment by demonstrating that there are genuine issues of material fact in dispute, the court must grant summary judgment if it is appropriate.

{¶18} Appellant asserts the trial court erred in granting appellee's motion for summary judgment because the motion was based upon counsel's commentary pertaining to appellant's credibility as well as an inaccurate statement of the law surrounding a transfer of real property.

{¶19} With respect to the first issue, appellee did, in her motion, make statements pertaining to appellant's credibility. Nevertheless, the statements were premised upon patent inconsistencies between the evidence appellee submitted in support of summary judgment and appellant's testimony during her deposition. During her deposition, appellant categorically denied depositing any of Frank Orlando's personal funds into her personal bank account. Canceled checks and deposit slips obtained during discovery, however, revealed appellant's testimony was false. Copies of various bank records demonstrated that appellant had deposited multiple checks issued to Frank Orlando from various sources into her personal account. This evidence was legally adequate to meet appellee's initial burden of proof on summary judgment as it demonstrates an absence of genuine issues of material fact pertaining to her cause of action. We recognize that arguments directed at the persuasiveness or weight of the evidence cannot be considered during the summary judgment exercise. See, e.g., *Huff v. FirstEnergy Corp.*, 11th Dist. No. 2009-T-0080, 2010-Ohio-1456, at ¶37. Here, however, nothing indicates the trial court weighed the evidence in arriving at its

decision. Thus, appellee's comments, while unnecessary and not fodder for consideration on summary judgment, were inconsequential.

{¶20} Next, appellant claims the trial court erred in granting appellee's motion for summary judgment because, despite appellee's insistence, Mr. Orlando's estranged wife's signature was not necessary to legally transfer the real property at issue in this case. In her own words, appellant contends "[t]he failure of Frank Orlando to obtain a signature from his estranged wife does not invalidate the transfer but rather *** subject[s] the property to a dower right per R.C. 2103.02."

{¶21} Because of a mistake in the trial court's decision, appellant's argument is premature. Specifically, the trial court's order includes an analytical error which precludes entry of summary judgment as to the real property transfer. In her motion for summary judgment, appellee asked the court to (1) declare the real estate transfer "illegal" and "void" because the decedent's estranged wife failed to execute the deed and (2) order appellant to return \$78,985.12, the proceeds from the sale of the real property, to the decedent's estate.¹ After considering the motion and the evidence supporting the claims, the trial court ordered:

{¶22} "**** that [appellant] shall return \$139,961.81 to [appellee]; shall return the personal property belonging to the Estate of Frank C. Orlando to [appellee]; and shall transfer all right, title, and interest acquired in and to the real property known as 2872 Cardinal Lane, Willoughby Hills, Ohio 44092 to the Estate of Frank C. Orlando."

{¶23} The foregoing order is problematic because, in its current form, it operates

1. In total, appellee asked the court to order appellant to surrender \$139,961.81: \$47,669.21, the proceeds from the decedent's 401K account; \$13,307.48, the proceeds from social security disability checks; and \$78,985.12, the proceeds from the sale of the real property.

to unjustly enrich the decedent's estate to the prejudice of appellant. If the transfer was void, appellant must surrender all right and title in the property, but she should not be required to return the \$78,985.12. If the transfer is not void, appellant must surrender the \$78,985.12, but not all rights and title in the property.

{¶24} Also, if the trial court determines, as a matter of law, the transfer was not a legal nullity, the issue of the decedent's estranged wife's right to dower (and its effect on the status of the subject property's title) must be considered. Appellant is correct that the decedent's estranged wife arguably enjoyed a vested dower right at the moment the decedent acquired the property. See, e.g., *State v. Thrower* (1991), 81 Ohio App.3d 15, 19. Such a right, however, would have been inchoate and contingent. A dower right does not become an actual property interest unless and until: (1) the decedent dies; (2) while the two were still married; and (3) neither the decedent nor his estranged wife engaged in adulterous cohabitation, unless the adultery is condoned by the injured consort. See R.C. 2103.02 and 2103.05; see, also, *Thrower*, supra. Furthermore, a dower interest exists only to the extent the estranged wife had not relinquished it. R.C. 2103.02. *Thrower*, supra. The record lacks sufficient evidence to support the conclusion that the real property is subject to the dower right of the decedent's estranged wife. If the court on remand determines the transfer is valid, however, further proceedings will be necessary to resolve this question.

{¶25} Given the foregoing analysis, the trial court's granting of summary judgment as to the real estate was improper as there remain genuine issues of material fact requiring the trial court's attention. As it relates to the proceeds from decedent's 401K and social security disability checks, however, the trial court's entry awarding

summary judgment was proper. Thus, appellant's first assignment of error is sustained only as it relates to the real estate.

{¶26} For the reasons discussed in this opinion, the decision of the Lake County Court of Common Pleas, Probate Division, is affirmed in part, reversed in part, and the matter is remanded for further proceedings.

TIMOTHY P. CANNON, J., concurs,

COLLEEN MARY O'TOOLE, J., concurs in part, dissents in part with Concurring/Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., concurs in part, dissents in part with Concurring/Dissenting Opinion.

{¶27} I respectfully dissent with regard to appellant's second assignment of error, in which the majority contends that the trial court did not err by overruling her motion for enlargement of time to file her brief in opposition to appellee's motion for summary judgment.

{¶28} Ohio is a notice pleading state. "Under Civ.R. 56(F), '(a) party who seeks a continuance for further discovery is not required to specify what facts he hopes to discover, especially where the facts are in the control of the party moving for summary judgment.' *Doriott v. MVHE, Inc.*, 2nd Dist. No. 20040, 2004-Ohio-867, at ¶41. 'However, the court must be convinced that there is a likelihood of discovering some such facts.' *Id.* Lack of diligence in pursuing discovery by the party moving under Civ.R. 56(F) militates against grant of a delay. *Id.* Generally, however, the trial court

should exercise its discretion in favor of a party seeking further time for discovery under Civ.R. 56(F). [*King v. Zell*] [(Dec. 31, 1998), 11th Dist. No. 97-T-0186, 1998 Ohio App. LEXIS 6364,] at *10.” *Drake Constr. Co. v. Kemper House Mentor, Inc.*, 170 Ohio App.3d 19, 2007-Ohio-120, at ¶29.

{¶29} Here, appellant moved the trial court for a two-week extension alleging she had not received certain subpoenaed bank records as of the date of the motion. This writer stresses that appellant attached a copy of the outstanding subpoena to the motion. I believe appellant met the requirements of Civ.R. 56(F) in seeking the extension and that the trial court erred by overruling her motion. Thus, I disagree with the majority.

{¶30} However, I concur with the majority with respect to appellant’s first assignment of error in that prior to receiving the discovery in the second assignment of error, the factual determinations that the trial court needs to make to determine the motion for summary judgment are not present in the record and as such, this issue is not ripe for review before our court. However, given the factual difficulties enumerated in the majority decision, I believe this case needs to be remanded for further determination by the trial court.

{¶31} For the foregoing reasons, I concur in part and dissent in part.