

Court of Claims of Ohio

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KEVIN B. GUNNELL

Plaintiff

v.

SECRETARY OF STATE

Defendant

Case No. 2014-00832

Judge Dale A. Crawford

ENTRY GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

{¶1} On March 6, 2015, Defendant filed a Motion to Dismiss pursuant to Civ.R. 12(B)(6). On March 27, 2015, Plaintiff filed what is construed as a memorandum in opposition to the Motion to Dismiss. On April 2, 2014, the Court sua sponte converted Defendant's Motion to Dismiss into a Motion for Summary Judgment, pursuant to Civ.R. 56(B). The parties were ordered to file additional briefs or evidence on or before April 17, 2015. No such additional briefs or evidence were filed by either party.

{¶2} The Motion for Summary Judgment is now before the Court for a non-oral hearing pursuant to L.C.C.R. 4(D).

{¶3} Under Civ.R. 56(C), summary judgment is proper "if the pleadings, depositions, answer to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Thus, in order to determine whether Defendant is entitled to judgment as a matter of law pursuant to Civ.R. 56(C), the Court must ascertain whether the evidentiary materials presented by Defendant show that there is no genuine issue as to any material fact involved in the case. In making this determination it is necessary to analyze the landmark Ohio Supreme Court decision

which addresses the “standards for granting summary judgment when the moving party asserts that the nonmoving party has no evidence to establish an essential element of the nonmoving party’s case.” *Dresher v. Burt*, 75 Ohio St.3d 280, 285, 1996-Ohio-107, 662 N.E.2d 264; see also *Saxton v. Navistar, Inc.*, 2013-Ohio-352, 986 N.E.2d 611, ¶ 7 (10th Dist.).

{¶4} In *Dresher*, the Ohio Supreme Court held:

{¶5} “[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party’s claim. * * * [T]he moving party bears the initial burden of demonstrating that there are no genuine issues of material fact concerning an essential element of the opponent’s case. To accomplish this, the movant must be able to point to evidentiary materials of the type listed in Civ.R. 56(C) that a court is to consider in rendering summary judgment. * * * The assertion must be backed by some evidence of the type listed in Civ.R. 56(C) which affirmatively shows that the nonmoving party has no evidence to support that party’s claims.” *Id.* at 292-293.

{¶6} In interpreting the United States Supreme Court decision in *Celotex v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986), the *Dresher* Court found no express or implied requirement in Civ.R. 56 that the moving party support its motion with affidavits or other similar materials negating the opponent’s claim. *Id.* at 291-292. Furthermore, the *Dresher* Court stated that it is not necessary that the nonmoving party produce evidence in a form that would be admissible at trial in order to avoid summary judgment. *Id.* at 289, quoting *Celotex, supra*. In sum, the *Dresher* Court held that the burden on the moving party may be discharged by “showing”—that is, pointing out to the Court— that there is an absence of evidence to support the nonmoving party’s case. *Id.*

{¶7} “If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied.” *Id.* at 293. If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden as outlined in Civ.R. 56(E):

{¶8} “When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon mere allegations or denials of his pleadings, but the party’s response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.”

{¶9} As set forth in the complaint, Plaintiff alleges that on multiple occasions between 2012 and 2014, Defendant wrongfully refused to accept documents that he presented for filing under the Ohio Uniform Commercial Code (UCC), R.C. Title 13. Plaintiff seeks a court order, pursuant to R.C. 111.24, requiring Defendant to accept the documents for filing.

{¶10} R.C. 111.24 states:

{¶11} “(A) Notwithstanding any other provision of the Revised Code, if a person presents a document to the secretary of state for filing or recording, the secretary of state may refuse to accept the document for filing or recording if the document is not required or authorized to be filed or recorded with the secretary of state or the secretary of state has reasonable cause to believe the document is materially false or fraudulent. This division does not create a duty upon the secretary of state to inspect, evaluate, or investigate a document that is presented for filing or recording.

{¶12} “(B) If the secretary of state, pursuant to division (A) of this section, refuses to accept a document for filing or recording, the person who presented the document to the secretary of state may commence an action in or apply for an order from the court of claims to require the secretary of state to accept the document for filing or recording.

If the court determines that the document is appropriate for filing or recording, it shall order the secretary of state to accept the document for that purpose.

{¶13} “(C) If the secretary of state, acting under this section in a manner that does not subject the secretary of state to personal liability under section 9.86 of the Revised Code, improperly refuses to accept a document for filing or recording, the secretary of state shall not be personally liable on account of the improper refusal and the sureties that issued the bond shall not have a right of subrogation against the secretary of state on account of a claim made on the secretary of state’s bond as a result of the improper refusal.”

{¶14} Defendant argues that the documents Plaintiff attempted to file are false and fraudulent, and are therefore not appropriate for filing. Defendant bases this contention on the fact that the persons named in the documents are public officials and are not debtors for purposes of UCC Article 9, nor have they authorized the filing of the documents at issue, as required by R.C. 1309.509(A)(1). Defendant asserts, on their face, these documents are unmistakably fraudulent and appear to have been filed in retaliation against public officials whom Plaintiff believe have allegedly wronged him.

{¶15} In response to Defendant’s Motion for Summary Judgment, Plaintiff provided no evidence whatsoever to suggest the existence of a valid “security agreement” making him a “secured party” with an interest in “collateral” belonging to the purported “debtors” identified in the rejected financing statements, as those terms are defined in R.C. 1309.102. Moreover, R.C. 1309.509 provides that a person is not entitled to file an initial financing statement without the authorization of the debtor. Plaintiff has provided no evidence from which this Court can infer any of the named “debtors” authorized the filing of these documents.

{¶16} Accordingly, reasonable minds can only conclude that the documents Plaintiff presented to Defendant were not “appropriate for filing,” within the meaning of

that term under R.C. 111.24. Therefore, as a matter of law, Plaintiff is not entitled to an order requiring Defendant to file the documents.

{¶17} Plaintiff claims that Defendant, employees of Defendant, and/or the individuals named in the rejected UCC documents, committed the felony offense of tampering with evidence under R.C. 2921.12. However, “[i]n the absence of a specific provision to the contrary, criminal statutes generally do not create a private cause of action, but give rise only to a right of prosecution by the state.” *George v. State*, 2010-Ohio-5262, ¶ 32 (10th Dist.). Also, “The Court of Claims does not have jurisdiction over any criminal matters against the state.” *Howard v. Supreme Court of Ohio*, 2005-Ohio-2130, ¶ 17 (10th Dist.). Accordingly, this claim must be dismissed.

{¶18} Likewise, Plaintiff’s claim that Defendant and his counsel have committed the misdemeanor offense of using a sham legal process, under R.C. 2921.52, must be dismissed. Inasmuch as R.C. 2921.52(E) establishes civil liability against those who participate in the sham legal process, Plaintiff has not provided any evidence from which this Court can infer any such violation occurred.

{¶19} Regarding Plaintiff’s claim that Defendant committed fraud against the Court, Plaintiff cites a case from the United States Court of Appeals for the First Circuit.

However, he provides no authority from which this Court can infer any such cause of action exists in the State of Ohio. Further, it is well-established that fraud must be alleged with particularity, pursuant to Civ.R. 9(B).

{¶20} Civ.R. 9(B) states:

{¶21} “In all averments of fraud * * * the circumstances constituting fraud * * * shall be stated with particularity.”

{¶22} To remain compliant with Civ.R. 9(B), the following must be asserted in the complaint: “(1) a false representation; (2) knowledge by the person making the representation that it is false; (3) the intent by the person making the representation to induce the other to rely on that representation; (4) rightful reliance by the other to his

detriment; (5) an injury as a result of the reliance.” *Korodi v. Minot*, 40 Ohio App.3d 1, 531 N.E.2d 318 (10th Dist.1987). Even construed in Plaintiff’s favor, his Complaint lacks the required particularity. Therefore, the fraud claim must be dismissed.

{¶23} To the extent that Plaintiff seeks a determination as to whether employees of Defendant are entitled to personal immunity, pursuant to R.C. 2743.02(F) and 9.86, the burden of proving that personal liability should be imposed upon a state employee rests with the Plaintiff. *Fisher v. Univ. of Cincinnati Med. Ctr.*, 10th Dist. Franklin No. 98AP-142 (Aug. 25, 1998). Here, no evidence has been presented from which a trier of fact could reasonably conclude that personal liability should be imposed upon any employee of Defendant.

{¶24} For the foregoing reasons, the Court concludes that there are no genuine issues of material fact and that Defendant is entitled to judgment as a matter of law. Accordingly, Defendant’s Motion for Summary Judgment is GRANTED, Plaintiff’s claims for criminal and constitutional violations are DISMISSED for lack of subject matter jurisdiction, and judgment is otherwise rendered in favor of Defendant. All previously scheduled events are VACATED. Court costs are assessed against Plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

DALE A. CRAWFORD
Judge

cc:

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