[Cite as *Schoenlein v. Price,* 2015-Ohio-1981.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

BROCK SCHOENLEIN, et al.	:	
	:	
Plaintiffs-Appellees	:	Appellate Case No. 26377
	:	
v.	:	Trial Court Case No. 2013-CV-3786
	:	
RONALD PRICE	:	(Civil appeal from Montgomery
	:	County Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 22nd day of May, 2015.

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HALL, J.

{¶ 1} Ronald Price appeals pro se from the trial court's entry of judgment against him on plaintiff-appellees' complaint alleging breach of contract, fraud in the inducement, and violations of the Ohio Consumer Sales Practices Act in connection with a home inspection he performed.

{¶ 2} The record reflects that appellees Brock Schoenlein and Kate Bowling sued Price in June 2013, alleging that they had hired him to inspect a home they later purchased from Edward and Ida Marvel in Centerville, Ohio.[1] According to the complaint, Price failed to discover a number of substantial defects in the home. (Doc. #1). In July 2013, Judge Steven Dankof, who had been assigned to the case, requested that it be transferred to a visiting judge because Schoenlein and Bowling were local attorneys who regularly practiced in Montgomery County Common Pleas Court. (Doc. #12). Administrative Judge Michael Tucker granted the request, and the Ohio Supreme Court assigned visiting Judge Charles Wittenberg to the case. (Doc. #17). Price proceeded to file a pro se answer and counterclaims alleging frivolous conduct and defamation. (Doc. #13). Schoenlein and Bowling moved to dismiss the counterclaims under Civ.R. 12(B)(6). (Doc. #14). The trial court sustained the motion with regard to frivolous conduct under Civ.R. 11. It overruled the motion, however, insofar as the counterclaim alleged frivolous conduct under R.C. 2323.51. Finally, the trial court sustained the motion with regard to defamation. (Doc. #15).

{¶ 3} In September 2013, Price moved to dismiss Schoenlein as a party to the lawsuit. He argued that there was no basis, "contractual or otherwise," for Schoenlein to

[1] Although the complaint also named the Marvels as defendants, Schoenlein and Bowling later voluntarily dismissed the claims against them with prejudice. (Doc. #44).

pursue any claim against him, apparently because only Bowling had signed the home-inspection contract. (Doc. #18). Schoenlein opposed the motion and filed a motion to compel discovery and for an order deeming matters admitted. (Doc. #22, 23). The trial court overruled Price's motion to dismiss. (Doc. #25). It sustained the motion to compel and gave Price a deadline to answer interrogatories and requests for admissions and to produce documents. (Doc. #26). After that deadline passed, Schoenlein filed a motion to show cause and for an order deeming matters admitted. (Doc. #27). The trial court subsequently filed an order deeming admitted the matters addressed in Schoenlein's request for admissions. It also set a March 24, 2014 show-cause hearing regarding Price's failure to respond to discovery requests as ordered. (Doc. #29).

{¶ 4} Price did not appear at the show-cause hearing. The trial court found him in contempt and imposed sanctions. (Doc. #32). It also entered judgment in favor of Schoenlein and Bowling on the claims in their complaint, granted them leave to move for summary judgment on damages, and dismissed Price's remaining counterclaim. (*Id*.). The day after the hearing, Price filed a "motion for extension of time" in which he requested sixty days "to address all issues in this case." (Doc. #30). In support, he asserted that he had been "incapacitated, in severe pain, and essentially immobilized for most of December 2013 and January 2014." He also asserted that he had undergone back surgery on January 30, 2014. The trial court denied the request for an extension, noting that Price (1) had not notified the court at any time prior to the show-cause hearing about any medical condition or impairment and (2) had not provided verification of his claimed lengthy incapacitation. (Doc. #35).

{¶ 5} On April 7, 2014, Schoenlein and Bowling moved for summary judgment on the issue of damages. (Doc. #34). In their motion, they argued that all material facts had been established conclusively due to Price's failure to answer requests for admissions and failure to comply with the trial court's discovery orders. Price responded by filing an April 18, 2014 Civ.R. 60(B)(1) "motion to vacate orders and judgments." (Doc. #36). Alternatively, he urged the trial court to treat the motion as one for reconsideration. (Doc. #38). The trial court overruled the motion, finding no basis to vacate or to reconsider. (Doc. #41). Thereafter, the Ohio Supreme Court withdrew visiting Judge Wittenberg's assignment without explanation effective May 21, 2014. The assignment was reinstated on June 4, 2014. (Doc. #42, 46). In the interim, Price moved for a twenty-one-day extension of time to respond to the pending summary judgment motion on damages. (Doc. #43). The trial court granted the extension. (Doc. #47).

{¶ 6} Instead of timely responding to the summary judgment motion, Price filed a "renewed motion to vacate orders and judgments." (Doc. #48). The trial court overruled the motion, again finding no basis to vacate or reconsider its prior rulings. (Doc. #50). Price responded to this decision by filing an affidavit of bias and prejudice against visiting Judge Wittenberg in Montgomery County Common Pleas and in the Ohio Supreme Court. (Doc. #51, 54). He also moved for an extension of time to respond to the motion for summary judgment on damages until after resolution of the "bias and prejudice" issue. (Doc. #52). The Ohio Supreme Court denied Price relief and allowed the case to proceed before visiting Judge Wittenberg, who then granted Price another extension of time to respond to the summary judgment motion. (Doc. #57, 58). Price did not timely respond. Instead, he filed an "objection, protest and reply," arguing among other things a lack of

jurisdiction and judicial bias. (Doc. #63). The trial court took note of Price's objection and protest (Doc. #65), while awaiting his summary judgment response, which never came. On August 7, 2014, after the final extension of time had expired, the trial court found no genuine issue of material fact on the issue of damages. It found Schoenlein and Bowling entitled to damages in the amount of $31,035. It found no merit in Price's claim that Schoenlein and Bowling had engaged in frivolous conduct and denied his motion for damages. (Doc. #66). On August 8, 2014, the trial court entered judgment for Schoenlein and Bowling for $31,035. It entered a separate judgment for them in the amount of $960, which represented attorney fees incurred in connection with the discovery dispute. Finally, the trial court formally dismissed Price's counterclaims with prejudice. (Doc. #68).

{¶ 7} On August 15, 2014, Price filed an affidavit claiming he "had not received service of at least twenty five (25) documents that were allegedly served" on him. (Doc. #72). Thereafter, on September 5, 2014, Price filed a timely notice of appeal.[2] (Doc. #73).

{¶ 8} In the first two of his eleven assignments of error, Price contends the Ohio Supreme Court erred in assigning and later reassigning Judge Wittenberg, a visiting judge from outside of Montgomery County, to his case. He argues that the assignment and reassignment were unconstitutional. In his third and fourth assignments of error, Price claims the Ohio Supreme Court erred in "backdating" the effective date of Judge Wittenberg's assignment and in granting Judge Dankof's request to have the case transferred to a visiting judge. We note, however, that this court cannot correct alleged

[2] On appeal, Schoenlein and Bowling urge us to strike Price's pro se appellate brief for non-compliance with various portions of the Ohio Rules of Appellate Procedure. Without addressing the violations they allege, we find Price's brief adequate to allow us to conduct effective appellate review. Therefore, in the exercise of our discretion, we decline to strike the brief.

errors made by the Ohio Supreme Court. *State v. Hooks*, 2d Dist. Montgomery Nos. CA 16978, CA 17007, 1998 WL 754574, *36 (Oct. 30, 1998). Accordingly, the first four assignments of error are overruled.

{¶ 9} In his fifth assignment of error, Price contends the trial court erred in overruling his motion to dismiss Schoenlein as a plaintiff. Price's argument is as follows:

> The trial court concluded that Brock Schoenlein is beneficiary of the contract entered into by Plaintiff Kate Bowling and Defendant. Plaintiff's [sic] made no allegation, in their complaint, that alleged Plaintiff Brock Schoenlein is a beneficiary of said contract. Plaintiff's complaint must allege that Brock Schoenlein is a beneficiary of said contract to make a valid claim. Simply making his claim afterwards is void for vagueness. Otherwise Aunts, Uncles, kids in the future, ad nauseam, could claim an interest as a beneficiary.
>
> Plaintiff Brock Schoenlein did not call, or request an inspection, did not sign the contract, was not present at the time of the inspection, or have any contact with Defendant until almost a year later, when he schemed to get a free ride on alleged problems by suing Defendant.
>
> Plaintiff Brock Schoenlein made no consideration for his alleged status as a beneficiary of the contract exhibited by Plaintiff's [sic]. The agreed cost of the inspection to be done by Defendant was paid for entirely by Plaintiff Kate Bowling.

(Appellant's brief at 6).

{¶ 10} In overruling Price's motion to dismiss Schoenlein as a party, the trial court noted that the motion substantively addressed only the breach-of-contract claim. (Doc. #25 at 1). The trial court then reasoned:

> The complaint herein alleges that prior to purchasing property from co-defendants Edward Marvel and Ida Marvel, "[p]laintiffs hired R.K. Price to inspect the property." The complaint further alleges that Price failed to perform a complete inspection under the contract and failed to disclose defects existing at the property. Attached to the complaint and marked as Exhibit 1, is a document which includes a "Pre-Inspection Agreement." Such agreement is signed by Ron Price as the company representative, and Kate Bowling as the customer.
>
> In reviewing the complaint in a light most favorable to Schoenlein, the factual allegation is that both plaintiffs hired Price to inspect the property, even though only one of them signed the contract. Such averment is sufficient to overcome a motion to dismiss under Civ.R. 12(B)(6). Whether Schoenlein is a party to the contract may be dependent upon the proof of facts and better suited to a motion for summary judgment.
>
> Moreover, plaintiffs have set forth allegations demonstrating that Schoenlein may be an intended beneficiary if it is determined that the contract is between only Price and Bowling. In their complaint, plaintiffs have averred that they jointly hired Price, and that Price agreed to inspect the property "for the purpose of alerting Plaintiffs [Schoenlein and Bowling] to major deficiencies in the condition of the property." In construing these

> allegations most favorably for Schoenlein, plaintiffs may have set forth circumstances indicating that Schoenlein is a beneficiary of the promised performance."

(Id. at 2-3).

{¶ 11} Upon review, we see no error in the trial court's denial of Price's motion to dismiss Schoenlein. As the trial court recognized, the complaint alleged that the "Plaintiffs" had hired Price to conduct a home inspection and that Price had agreed to inspect the property "for the purpose of alerting Plaintiffs to major deficiencies[.]" (Doc. #1 at 4). The trial court correctly recognized that the complaint's language left open the possibility that Schoenlein, who did not sign the written home-inspection agreement, could have had an oral contract with Price or could have been an intended third-party beneficiary under the terms of the agreement Bowling signed. Consequently, the trial court properly denied the motion to dismiss. The fifth assignment of error is overruled.

{¶ 12} In his sixth assignment of error, Price contends the trial court erred in "not making allowance" for his "medical conditions." He argues that the trial court should not have made adverse rulings against him without proper consideration of the fact that he was "completely incapacitated" from late November 2013 until mid-April 2014 as a result of severe and chronic back problems, that was under the care of a doctor beginning in December 2013, and that he underwent surgery in January 2014. Price asserts that he advised the trial court of these circumstances "in letters and documents" from a physician.

{¶ 13} The record reflects that Price first advised the trial court of health-related issues in his March 25, 2014 motion "to address all issues." (Doc. #30). Notably, Price filed this motion one day *after* the trial court had held a show-cause hearing concerning its

ignored discovery orders and its imposition of sanctions. In the motion, Price claimed incapacitation and immobilization for most of December 2013 and January 2014. In support, he included an unauthenticated letter purportedly from a physician named Kelly Sims. The March 10, 2014 letter, however, fell far short of corroborating the existence of any debilitating medical condition. It simply stated: "Ronald Price was seen in our office today and will remain under the care of Dr. Bernstein. Ronald is currently unable to sit or stand for long periods of time. He will be seen in 2 months to be reevaluated and Dr. Bernstein will consider lifting restrictions. If you have any questions please feel free to call." (*Id*.). On its face, this letter provided no justification for Price's failure to provide discovery, to respond to the motion to compel discovery, or to inform the trial court of his alleged medical problems before discovery sanctions were imposed. In fact, we find no evidence, anywhere, corroborating Price's claim of long-term incapacitation. But even if his claim is true, it was not unreasonable for the trial court to conclude that he could and should have brought the issue to its attention sooner. In September 2013, well before Price's claimed incapacitation, the trial court had filed a pretrial order establishing deadlines for discovery and other things. (Doc. #19). Schoenlein also filed his motion to compel discovery on November 11, 2013, two months before Price's apparent surgery in January 2014. The trial court acted well within its discretion in finding no justification for Price to ignore the case, disregard court orders without explanation, and fail to advise anyone about his situation.

{¶ 14} We note that Price mentioned his medical issues a second time in his April 18, 2014 "motion to vacate orders and judgments" under Civ.R. 60(B)(1) and his alternative motion for reconsideration. (Doc. #36, 38). He argued that his debilitating

condition had prevented him from defending the case, attending hearings, or complying with discovery orders. In support, he resubmitted the same letter from physician Sims quoted above. He also provided his own letter stating: (1) that he had been under a doctor's care since November 2013, (2) that he had undergone surgery on January 31, 2014, and (3) that he went home eight days later on pain medication and severely restricted in his activities. In the letter, Price stated that he had been unable to defend the lawsuit "in a timely manner, to the fullest extent possible," and that he had been "severely incapacitated." (*Id*.). Although the letter was not notarized, Price's memorandum purported to "certify, under penalty of perjury," that the facts in the letter were true. (Doc. #36 at 3).

{¶ 15} Once again, we are unpersuaded that the trial court erred in declining to vacate or modify its prior rulings based on Price's claimed incapacitation.[3] As set forth above, the letter from Dr. Sims did not corroborate a claim of lengthy and near-total incapacitation. Although Price's own letter accompanying his motion did purport to explain his circumstances, it was unsworn and had no evidentiary value. On appeal, Price claims the trial court should have credited the letter because his memorandum certified, under penalty of perjury, that the letter was true. According to Price, this certification gave the letter the force of an affidavit pursuant to 28 U.S.C. 1746(2). We disagree. The Ohio Supreme Court explicitly has rejected reliance, in state-court proceedings, on unsworn statements made under penalty of perjury pursuant to the federal statute. *Toledo Bar Assn. v. Neller*, 102 Ohio St.3d 1234, 2004-Ohio-2895, 809 N.E.2d 1152, ¶ 10-22. In Ohio

[3] Because the trial court's prior rulings remained interlocutory at the time of Price's motion, we question whether a motion to vacate under Civ.R. 60(B) was a proper procedural vehicle to challenge them.

state courts, such a statement is not a valid substitute for a sworn affidavit. *Id*. Moreover, even if we accept Price's claims as true, the trial court reasonably found no basis for vacating or reconsidering its prior rulings. In overruling Price's motion, the trial court explained:

> Upon review of Price's motion and his reply brief, the Court does not find sufficient grounds to reconsider or vacate its prior order. Initially, the Court notes that Price's exhibits consist of his own unverified statement and an unsworn, hearsay letter signed by an unknown individual. Price states in his reply brief that his statement is "certified under penalty of perjury," but his statement is not in the form of an affidavit in that it has not been sworn or otherwise affirmed before a notary public.
>
> Even considering these exhibits as evidence, they do not provide a justifiable excuse for Price's willful disregard of this case and of the outstanding discovery. Price was served with plaintiffs' discovery requests on August 16, 2013, and after nine months has yet to make any effort to answer them. The Court, in effect, overruled his objection when it denied his motion to dismiss plaintiff Schoenlein on November 26, 2013. When he still ignored the discovery, the Court granted plaintiffs' motion to compel. Still, Price failed to respond and finally a hearing was set with notice to Price that he may be subject to a default judgment.
>
> Even though Price did not respond to the motion to show cause or attend the hearing and is now asking the Court to reconsider the sanction imposed for ignoring the Order to compel, he has still not yet provided the

> discovery or indicated in any way that he is ready to do so. He asserts that because of his medical condition, "[a]ll of the documents that I was unable to respond to were a total overload and impossible for me to address." However, the interrogatories, request for production of documents and requests for admissions served upon Price were not burdensome or overbearing. There were seventeen interrogatories, many of which sought personal identification and history relating to Price. Likewise, the eleven requests for production related to documents easily available to or attainable by him. If Price needed more time to answer the discovery requests he could have easily filed such a request. While he claims an illness prevented him from attending to this case, he never made any attempt to contact the Court or opposing counsel to seek continuances or at least notify anyone of his situation. Instead, he simply ignored the Court, opposing counsel and the legal process and did nothing until the sanction of default was entered.
>
> Considering the foregoing, the Court does not find Price's request to reconsider its prior order or to relieve him from the judgment should be granted.

(Doc. #41 at 3-4).

{¶ 16} Having reviewed the trial court's ruling, we see no abuse of discretion. The trial court's ruling reflects a sound reasoning process and the sound exercise of its discretion. It relied on Price's lack of evidence to support his claimed incapacitation and his disregard of the legal proceedings by ignoring court orders and failing to notify anyone

about his medical condition in a timely fashion. The sixth assignment of error is overruled.

{¶ 17} In his seventh, eighth, and ninth assignments of error, Price challenges the trial court's March 26, 2014 order entering judgment against him as a sanction for discovery violations, dismissing his counterclaim, and ordering him to pay attorney fees. (Doc. #32). His only argument is that he was incapacitated when he engaged in the conduct precipitating the order—namely his failure to appear, failure to comply with discovery requests, and failure to comply with an order compelling discovery.

{¶ 18} Again, however, we note that Price's claimed health issues were not brought to the trial court's attention before the show-cause hearing that preceded the sanctions. The trial court subsequently considered those issues after they were disclosed and reasonably found that they did not justify Price's previously unexplained non-participation in the case. We see no abuse of discretion in the discovery-related sanctions the trial court imposed. They were authorized by Civ.R. 37, and the trial court acted within its discretion in finding them appropriate. The seventh, eighth, and ninth assignments of error are overruled.

{¶ 19} In his tenth assignment of error, Price contends the trial court erred in not serving him with copies of filings even after he complained. In his eleventh assignment of error, he claims the trial court's final judgment is voidable because he "received no service of time extension." In support of his assertion about not being served with filings, Price states:

> Defendant submitted an affidavit to the Clerk of Courts on August 15, 2014, stating that he had not received service on 25 documents, allegedly served by the Court.

> Defendant has discussed this problem with Postal inspectors, who have stated that failure of the U.S. Mail, over 20 times or more is an impossibility. The Clerk stated that the responsibility for service is the Court. Court personnel stated that documents for service go directly to the mail room and then to the post office.
>
> The failure of service to Defendant is no accident. This is deliberate on the part of a corrupt system to thwart and deny Defendant the ability to defend.
>
> Claiming that mail was sent to the post office when it was not, and providing a false tracking number may constitute mail fraud.
>
> Postal Inspectors are currently investigating why numerous pieces of mail were allegedly delivered to the Post Office, by the Montgomery County Common Pleas Court but not received by Ronald Price.
>
> Defendant reserves the right to supplement this Brief to include the results of the Postal Inspectors' investigation, when completed, if necessary.

(Appellant's Brief at 7-8).

{¶ 20} Upon review, we see no basis for reversal due to alleged non-receipt of filings. Nothing in the record prior to the trial court's final judgment reflects any problem with service. Nor did Price raise the issue on the record before final judgment was entered. Instead, he raised the issue in a post-judgment affidavit filed one week after final judgment. (Doc. #72). Therein, Price averred: "I have not received service of at least twenty five (25) documents that were allegedly served, to me, from the Clerk of Courts of

the Montgomery County, Ohio (see attached docket with highlights of documents allegedly served, but not received)." (*Id*.).

{¶ 21} Because Price raised the service issue in a post-judgment filing it is not properly before us in this appeal from the trial court's final judgment in favor of Schoenlein and Bowling. We note too that the allegations in his appellate brief are largely based on hearsay and involve matters outside the record. A potential way for Price to raise the service issue is through a Civ.R. 60(B) motion in the trial court. *See*, *e.g.*, *UBS Real Estate Securities, Inc. v. Teague*, 191 Ohio App.3d 189, 2010-Ohio-5634, 945 N.E.2d 573, ¶ 36 (2d Dist.) (observing that a lack of notice due to failure to receive service potentially can constitute grounds for relief under Civ.R. 60(B)). The tenth and eleventh assignments of error are overruled.

{¶ 22} The judgment of the Montgomery County Common Pleas Court is affirmed.

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FAIN, J., and DONOVAN, J., concur.

Copies mailed to:

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Hon. Charles S. Wittenberg