[Cite as *Swanson v. Maier*, 2015-Ohio-2141.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

TIMOTHY A. SWANSON	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff - Appellant	:	Hon. John W. Wise, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	
GEORGE T. MAIER	:	Case No. 2014CA00208
	:	
Defendant - Appellee	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Stark County Court of Common Pleas, Case No. 2014CV00436
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	June 1, 2015

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
CRAIG T. CONLEY 604 Huntington Plaza 220 Market Avenue South Canton, OH 44702	THOMAS L. ROSENBERG MICHAEL R. TRAVEN Roetzel & Andress, LPA 155 East Broad Street PNC Plaza, 12th Floor Columbus, OH 43215

Baldwin, J.

{¶1} Plaintiff- appellant Timothy A. Swanson appeals from the November 17, 2014 Entry of the Stark County Court of Common Pleas denying his Motion for Summary Judgment and finding in favor of defendant-appellee George T. Maier.

STATEMENT OF THE FACTS AND CASE

{¶2} In 2012, Michael A. McDonald was elected to the office of Stark County Sheriff. However, for health reasons, McDonald was unable to assume the office. The Stark County Commissioners, pursuant to R.C. 311.01 and 305.02(F), appointed appellant Timothy A. Swanson, who had retired as Sheriff in 2012, as acting Sheriff until the Stark County Democratic Central Committee ("DCC") could appoint a qualified person to hold the office under R.C. 305.02(B).

{¶3} On February 5, 2013, the DCC appointed appellee George T. Maier as Sheriff. Appellant then filed an original action in quo warranto in the Ohio Supreme Court, claiming that appellee did not meet the qualifications to assume the office of Sheriff and that appellant remained the acting Sheriff.

{¶4} Pursuant to an Opinion filed on November 6, 2013 in *State ex rel. Swanson v. Maier*, 137 Ohio St.3d 400, 2013-Ohio-4767, 999 N.E.2d 639, the Ohio Supreme Court granted a writ of quo warranto, finding that appellee did not meet the statutory qualifications to assume the office of Sheriff. The Ohio Supreme Court reinstated appellant as acting Sheriff until the DCC appointed a qualified person.

{¶5} Thereafter, on February 18, 2014, appellant filed a Verified Complaint against appellee. Appellant, in his complaint, alleged that appellee was "at all times relevant, a usurper to the public office of Sheriff of Stark County." Appellant alleged that

he was the rightful Sheriff during the period from February 5, 2013, the date of appellee's appointment, through November 6, 2013, the date of the Ohio Supreme Court decision, and sought damages under R.C. 2733.18 in the amount of $88,511.75. Such figure represented the salary and benefits received by appellee during such period.

{¶6} Appellee filed a Motion to Dismiss on March 21, 2014. The trial court, pursuant to an Order filed on May 30, 2014, denied such motion. Appellee then filed an answer to the complaint on June 17, 2014.

{¶7} Appellant filed a Motion for Summary Judgment on June 20, 2014. Appellee filed a memorandum in opposition to the same on October 16, 2014 and appellant filed a reply memorandum on October 20, 2014.

{¶8} As memorialized in an Entry filed on November 17, 2014, the trial court denied appellant's Motion for Summary Judgment and found in favor of appellee.

{¶9} Appellant filed a Notice of Appeal on November 21, 2014. On December 15, 2014, the trial court filed a Judgment Entry entering judgment in favor of appellee and against appellant.

{¶10} Appellant now raises the following assignments of error on appeal:

{¶11} THE TRIAL COURT ERRED IN DENYING, SUB SILENCIO, PLAINTIFF'S/APPELLANT'S MOTION TO STRIKE.

{¶12} THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S/APPELLANT'S MOTION FOR SUMMARY JUDGMENT.

{¶13} THE TRIAL COURT ERRED IN SUA SPONTE GRANTING JUDGMENT TO DEFENDANT/APPELLEE.

SUMMARY JUDGMENT STANDARD

{¶14} Civ.R. 56 states, in pertinent part:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers 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 of material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can 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 or stipulation construed mostly strongly in the party's favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

{¶15} A trial court should not enter a summary judgment if it appears a material fact is genuinely disputed, nor if, construing the allegations most favorably towards the non-moving party, reasonable minds could draw different conclusions from the undisputed facts. *Hounshell v. Am. States Ins. Co.,* 67 Ohio St.2d 427, 424 N.E.2d 311

(1981). The court may not resolve any ambiguities in the evidence presented. *Inland Refuse Transfer Co. v. Browning–Ferris Inds. of Ohio, Inc.,* 15 Ohio St.3d 321, 474 N.E .2d 271 (1984). A fact is material if it affects the outcome of the case under the applicable substantive law. *Russell v. Interim Personnel, Inc.,* 135 Ohio App.3d 301, 733 N.E.2d 1186 (6th Dist.1999).

{¶16} When reviewing a trial court's decision to grant summary judgment, an appellate court applies the same standard used by the trial court. *Smiddy v. The Wedding Party, Inc.,* 30 Ohio St.3d 35, 506 N.E.2d 212 (1987). This means we review the matter de novo. *Doe v. Shaffer,* 90 Ohio St.3d 388, 2000–Ohio–186, 738 N.E .2d 1243.

{¶17} The party moving for summary judgment bears the initial burden of informing the trial court of the basis of the motion and identifying the portions of the record which demonstrates absence of a genuine issue of fact on a material element of the non-moving party's claim. *Drescher v. Burt,* 75 Ohio St.3d 280, 1996-Ohio-107, 662 N.E.2d 264. Once the moving party meets its initial burden, the burden shifts to the nonmoving party to set forth specific facts demonstrating a genuine issue of material fact does exist. *Id.* The non-moving party may not rest upon the allegations and denials in the pleadings, but instead must submit some evidentiary materials showing a genuine dispute over material facts. *Henkle v. Henkle,* 75 Ohio App.3d 732, 600 N.E.2d 791 (12th Dist.1991).

I, II, III

{¶18} Because they are interrelated, we shall address appellant’s three assignments of error together.

{¶19} Appellant, in his first assignment of error, argues that the trial court erred in sub silencio denying appellant's motion to strike. Appellant, in his second assignment of error, argues that the trial court erred in denying his Motion for Summary Judgment while, in his third assignment of error, he maintains that the trial court erred in sua sponte granting judgment in favor of appellee.

{¶20} Appellant, in his October 20, 2014 reply memorandum, had argued that appellant's deposition testimony, which was filed with the court on October 16, 2014 in support of appellee's memorandum in opposition to appellant's Motion for Summary Judgment, should be stricken, because it was not a certified original signed and sealed by the Court Reporter pursuant to Civ.R. 30 and it was not used to contradict or impeach appellant's testimony pursuant to Civ.R. 32(A)(1). Appellant also argued that the deposition testimony was inadmissible evidence under Evid.R. 401, based on the Ohio Supreme Court decision in *State ex rel. Swanson v. Maier*, 137 Ohio St.3d 400, 2013-Ohio-4767, 999 N.E.2d 639. Appellant further requested that appellee's references, in his memorandum, to a You Tube video interview of appellant which was not authenticated should be stricken as inadmissible under Evid.R. 901 and/or 1002. Finally, appellant argued that appellee's affidavit and the attachments to the same, which were attached to appellee's memorandum in opposition to appellant's Motion for Summary Judgment, should be stricken as irrelevant.

{¶21} We concur with appellant that the trial court should not have considered appellant's deposition transcript, because it did not comply with Civ.R. 30(F). Civ.R. 30(F)(1) governs the filing of a deposition transcript with a trial court. Such rule provides, in relevant part, as follows: "Upon request of any party or order of the court

the officer shall transcribe the deposition. * * * The officer shall certify on the transcribed deposition that the witness was fully sworn or affirmed by the officer and that the transcribed deposition is a true record of the testimony given by the witness……" Uncertified and unsworn depositions are not the types of evidence permitted by Civ.R. 56(C). See *Trimble-Weber v. Weber*, 119 Ohio App.3d 402, 695 N.E.2d 344 (11th Dist 1997). "The trial court retains discretion to either consider or ignore improper Civ.R. 56 evidence, however, when there has not been any objection to the evidence.". *See Wallner v. Thorne,* 189 Ohio App.3d 161, 2010–Ohio–2146, 937 N.E.2d 1047, ¶ 18 (9th Dist.). See also *Trimble-Weber*, supra. In the case sub judice, the copy of appellant's deposition transcript included in the record is not certified. Appellant, in October 20, 2014 reply memorandum, objected to the same on such basis. We concur, therefore, that the trial court should not have considered the same.

{¶22} With respect to You Tube video of the interview, we find that there is no indication that the trial court relied on the same in rendering its decision.

{¶23} However, we find that the trial court did not err in considering appellee's affidavit, which was attached to his memorandum. Appellee, in his affidavit, stated, in relevant part, as follows:

> From February 6, 2013, until November 6, 2013, I fully and completely served and performed my duties and responsibilities as Sheriff of Stark County, Ohio.
>
> From February 6, 2013, until November 6, 2013, I honestly and in good faith believed that I was qualified to be the Sheriff of Stark County, Ohio pursuant to Ohio law.

From February 6, 2013 until November 6, 2013, I received a salary and benefits from the Stark County government in exchange for the performance of my duties as Sheriff of Stark County, Ohio.

I accepted and retained the salary and benefits I received from Stark County for my services as Stark County Sheriff in good faith and under color of law. In fact, I received copies of a letter from the State Auditor, Dave Yost, and Stark County Auditor, Alan Harold, stating that both the State and County Auditors had taken the position that I was operating under the color of law for purposes of my salary and benefits during the duration of the *Swanson* lawsuit.

Attached hereto as Exhibit B-1 is a true and accurate copy of a letter from the State Auditor, Dave Yost, in which he stated the State Auditor's position that, during the pendency of the *Swanson* lawsuit, it considered me to be operating under color of law for purposes (sic) the payment of my salary and benefits. I received a copy of this letter at or around the date on the letter, February 14, 2013.

Attached hereto as Exhibit B-2 is a true and accurate copy of a letter from the Stark County Auditor, Alan Harold, in which he stated the position of the County Auditor that it recognized me as the Stark County Sheriff during the

> pendency of the *Swanson* lawsuit as it relates to the payment of my salary and benefits. I received a copy of this letter at or around the date on the letter, February 14, 2013.

{¶24} Civ.R. 56(E), which sets forth the requirements for affidavits submitted on summary judgment, provides, in relevant part, as follows:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit.

{¶24} We find that appellee's affidavit was based on personal knowledge and set forth facts as would be admissible in evidence. We shall, therefore, determine whether or not the trial court erred in denying appellant's Motion for Summary Judgment and entering judgment in favor of appellee based on the affidavit alone.

{¶25} Appellant, in the case sub judice, seeks to recover damages under R.C. 2733.18. Such rule provides that "[w]ithin one year after the date of a judgment mentioned in section 2733.17 of the Revised Code, the person in whose favor the judgment is rendered may bring an action against the party ousted, and recover the damages he sustained by reason of such usurpation." Appellant specifically seeks to recover the salary paid to appellee based on the Ohio Supreme Court's November 6, 2013 decision.

{¶26} In *State, ex rel. Witten, v. Ferguson*, 148 Ohio St. 702, 710, 76 N.E.2d 886 (1947), the court held that "[i]t is a well established rule that, in the absence of statutory permission, salary which has been paid a de facto officer cannot be recovered by public authorities, where such officer, acting in good faith, actually rendered the services for which he was paid." We agree with appellant that he is not a public authority. However, we note that courts have cited *Witten* in refusing to allow taxpayers, who are not public authorities, to compel the return of compensation paid to de facto officers. See *State v. Zalesky,* 9th Dist. Lorain No. 3364, 1982 WL 5178 (Dec. 8, 1982). See also *County of Meigs ex rel. Andrew v. Bd. of Trustees of Olive Twp.*, 4th Dist. Meigs No. 382, 1987 WL 8850 (March 31, 1987). We find that the same reasoning should apply here. Thus, the issue becomes whether or not appellee was a de facto officer acting in good faith who actually rendered the services for which he was paid.

{¶27} The trial court, in the case sub judice, found that appellee served as de facto Sheriff in good faith and under color of law and performed the duties of Sheriff during the relevant period. "[W]here an officer holds the office and performs the duties thereof with the acquiescence of the public authorities and the public and has the reputation of being the officer he assumes to be and is dealt with as such, he is, in the eyes of the law, a *de facto* officer." *State ex rel. Witten v. Ferguson*, 148 Ohio St. 702, 710, 76 N.E.2d 886 (1947). "The law validates the acts of *de facto* officers as to the public and third persons on the ground that, although not officers *de jure,* they are, in virtue of the particular circumstances, officers in fact whose acts public policy requires should be considered valid." *State, ex rel. Paul, v. Russell,* 162 Ohio St. 254, 257, 122 N.E.2d 780 (1954). In *State v. Staten,* 25 Ohio St.2d 107, 267 N.E. 2d 122 (1971),

vacated in part on other grounds, 408 U.S. 938 (1972), the Ohio Supreme Court explained that "[t]he right of a de facto officer to hold office may not be questioned in a collateral proceeding to which he is not a party.... [U]ntil a de facto officer is properly challenged in a quo warranto proceeding and thereby removed from office, his actions are as valid as those of a de jure officer." *Id.* at 110.

{¶28} In the case sub judice, as noted by the trial court, appellee was acting as de facto Sheriff in good faith for the period from February 5, 2013 until November 6, 2013, the date of the Ohio Supreme Court decision, as evidenced by appellee's affidavit and the letters attached to the same. David Yost, the Auditor of the State of Ohio, in a letter to Alan Harold, the Stark County Auditor, dated February 14, 2013 stated that "the Auditor of State will take the position that Sheriff Maier is operating under color of law until the [Ohio Supreme] court rules on his qualifications. Accordingly, this office will not issue a finding for recovery or a finding for adjustment based on an otherwise properly certified payroll for the Sheriff or his Deputies during the pendency of the challenge to his qualifications for the reason of lack of qualifications." Alan Harold, in a letter also dated February 14, 2013, stated that based on such letter, "[e]ffective immediately, George Maier will be recognized by this office as the Stark County Sheriff."

{¶29} We find that appellee, acting as a de facto officer during the relevant period, actually performed the duties required of him as sheriff and was compensated accordingly. Appellee, in good faith, validly rendered the services during the relevant period for which he was paid. We find, on such basis, that the trial court did not err in overruling appellant's Motion for Summary Judgment, because there are no genuine issues of material fact.

{¶30} Appellant, in his third assignment of error, contends that the trial court erred in sua sponte granting judgment in favor of appellee when appellee did not file a Motion for Summary Judgment. "'While Civ.R. 56 does not ordinarily authorize courts to enter summary judgment in favor of a non-moving party, * * * an entry of summary judgment against the moving party does not prejudice his due process rights where all relevant evidence is before the court, no genuine issue as to any material fact exists, and the non-moving party is entitled to judgment as a matter of law.' " *State ex rel. J.J. Detweiler Ents., Inc. v. Warner,* 103 Ohio St.3d 99, 2004-Ohio-4659, 814 N.E.2d 482, ¶ 13, quoting *State ex rel. Cuyahoga Cty. Hosp. v. Ohio Bur. of Workers' Comp.*, 27 Ohio St.3d 25, 28, 500 N.E.2d 1370 (1986). As noted by the court in *Todd Dev. Co., Inc. v. Morgan,* 116 Ohio St.3d 461, 2008-Ohio-87, 880 N.E.2d 88 at paragraph 17:

> When a party moves for summary judgment, the nonmovant has an opportunity to respond, and the court has considered all the relevant evidence, the court may enter summary judgment against the moving party, despite the nonmoving party's failure to file its own motion for summary judgment. The reason for this exception is that the parties have had an opportunity to submit all evidence to the court, and the parties have notice that the court is considering summary judgment. As a result, neither party's due process rights are violated.

{¶28} Because all of the relevant evidence was before the trial court and no genuine issue of fact existed, we find that the trial court did not err in granting judgment in favor of appellee.

{¶31} Based on the foregoing, appellant's first assignment of error is sustained in part and overruled in part. Appellant's second and third assignments of error are overruled.

{¶32} Accordingly, the judgment of the Stark County Court of Common Pleas is affirmed.

By: Baldwin, J.

Gwin, P.J. and

Wise, J. concur.