

COURT OF APPEALS
MORGAN COUNTY, OHIO
FIFTH APPELLATE DISTRICT

BILLY J. BATTLE

Plaintiff-Appellant

-vs-

JUDGE DAN FAVREAU, ET AL.

Defendant-Appellee

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. Sheila G. Farmer, J.

Hon. Patricia A. Delaney, J.

Case No. 14AP0008

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Morgan County Court of
Common Pleas, Case No. 13CV0042

JUDGMENT:

Reversed and Remanded

DATE OF JUDGMENT ENTRY:

February 17, 2015

APPEARANCES:

For Plaintiff-Appellant

For Defendant-Appellee

BILLY J. BATTLE, PRO SE
S.C.C. Inmate #A617-868
5900 B.I.S. Road
Lancaster, Ohio 43130

LINDA L. WOEBER
BRIAN M. SPIESS
Montgomery, Rennie & Jonson
36 East Seventh Street, Suite 2100
Cincinnati, Ohio 45202

Hoffman, P.J.

{¶1} Plaintiff-appellant Billy Battle appeals the August 22, 2014 Judgment Entry entered by the Morgan County Court of Common Pleas granting summary judgment in favor of Defendant-appellee Dan W. Favreau.

STATEMENT OF THE PROCEEDINGS¹

{¶2} On March 18, 2013, Appellant commenced the within action filing a complaint in the Morgan County Court of Common Pleas against Appellee Dan W. Favreau.

{¶3} On September 4, 2013, the trial court dismissed the second, fourth, fifth and sixth claims for relief, ordering only the first and third claims for defamation and intentional infliction of emotional distress to proceed.

{¶4} On November 24, 2013, Appellant filed an interlocutory appeal, which appeal was subsequently dismissed by this Court on May 19, 2014. *Battle v. Favreau*, Morgan App. No. 13AP0004, 2014-Ohio-2170.

{¶5} On June 9, 2014, via Journal Entry, the trial court ordered the parties could file motions for summary judgment on or before July 25, 2104.

{¶6} On June 30, 2014, Appellant filed a Notice of Date and Time of Depositions of Witnesses Upon Written Questions, scheduling a date as August 15, 2014. On July 14, 2014, Appellant issued subpoenas for all witnesses listed.

{¶7} Appellee filed a motion for summary judgment on July 25, 2014. Appellee also filed a motion to quash the subpoenas for the witnesses listed in the July 14, 2014 notice.

¹ A rendition of the underlying facts is unnecessary for the resolution of this appeal.

{¶18} On August 4, 2014, Appellant filed a memorandum contra the motion to quash appearance subpoenas.

{¶19} On August 11, 2014, the trial court imposed a deadline of August 11, 2014 for Appellant to respond to Appellee's motion for summary judgment filed on July 25, 2014. The trial court further granted Appellee's motion to quash the appearance subpoenas.²

{¶10} Via Judgment Entry of August 22, 2014, the trial court granted summary judgment in favor of Appellee. On August 28, 2014, the trial court dismissed the complaint herein.

{¶11} Appellant assigns as error:

{¶12} "I. TRIAL COURT ERRED BY REFUSING TO GIVE APPELLANT A FAIR OPPORTUNITY TO RESPOND TO APPELLEE'S MOTION FOR SUMMARY JUDGMENT AS TRIAL COURT FILED DECISION AND NOTICE ORDERING APPELLANT'S RESPONSE DUE BY AUGUST 11, 2014 ON AUGUST 11, 2014, THUS PRECLUDING ANY TIMELY RESPONSE BY APPELLANT TO APPELLEE'S MOTION FOR SUMMARY JUDGMENT."

{¶13} Upon review of the record herein, the trial court ordered the parties could file motions for summary judgment on or before July 25, 2014. The trial court did not impose a deadline for responsive pleadings, nor did the trial court set a date for an oral or non-oral hearing on Appellee's motion for summary judgment.

{¶14} Ohio Civil Rule 56(C) governs motions for summary judgment, providing,

(C) Motion and proceedings

² Appellant does not separately assign as error the trial court's granting of the motion to quash.

The motion shall be served at least fourteen days before the time fixed for hearing. The adverse party, prior to the day of hearing, may serve and file opposing affidavits. 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 as to any 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 most 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. (Emphasis added.)

{¶15} Civil Rule 56 does not provide a fixed time for response; rather, states the opposing party has until the date *prior to the day of hearing* to serve and file opposing affidavits. Here, the trial court ordered Appellant to respond to the motion for summary judgment on the same date as the order, without having set the motion for hearing. The

rule requires the trial court set a date for hearing. As such, we find the trial court's order violates the fundamental notion of due process.³

{¶16} Accordingly, the judgment of the Morgan County Court of Common Pleas is reversed, and the matter remanded to the trial court for further proceedings in accordance with the law and this opinion.

By: Hoffman, P.J.

Farmer, J. and

Delaney, J. concur

³ Appellee essentially responds because summary judgment on the merits is inevitable based upon the evidence submitted and the law governing immunity, any procedural error is harmless. We find such argument is proverbially putting the cart before the horse.

