[Cite as *Szigeti v. Loss Realty*, 2004-Ohio-1339.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Jim Szigeti

Appellant

v.

Loss Realty Group, et al.

Appellees

Court of Appeals No. L-03-1160

Trial Court No. CVF-02-09697

DECISION AND JUDGMENT ENTRY

Decided: March 19, 2004

* * * * *

George R. Royer, for appellant.

Peter Dewhurst, for appellees.

* * * * *

SINGER, J.

{¶1} This appeal comes to us from a summary judgment granted by the Toledo Municipal Court against appellant in a case seeking brokerage commission and other fees allegedly owed as a result of an agreement to sell real estate. Because we conclude that the trial court properly granted summary judgment, we affirm.

{¶2} Appellant, Jim Szigeti, is a licensed real estate broker. In May 2002, appellant filed suit against appellees, Beth Rose and Loss Realty Group ("Loss Realty"), alleging that, pursuant to a real estate transaction with Loss Realty, he was owed $2,500

in commission and $2,000 reimbursement of earnest money paid on behalf of his clients, Shane and Rachel Johnson. Loss Realty answered, denying any liability for any such fees.

{¶3} On September 23, 2002, appellees allegedly sent appellant the following: First Set of Interrogatories, First Request for Production of Documents, and First Set of Request for Admissions.

{¶4} On November 8, 2002, appellees filed a "Notice of Deemed Admissions" stating that since appellant had failed to respond to their request, the admissions were deemed admitted "as a matter of law." On November 19, 2002, appellant filed a response in opposition to appellees' notice, claiming that counsel for appellant had never received such request for admissions which had not been included in the packet of discovery request pleadings sent by appellees.

{¶5} On February 10, 2003, appellees filed a motion for summary judgment based, in part, upon facts deemed admitted in the unanswered request for admissions. Appellees also submitted Beth Rose's affidavit and deposition, as well as real estate documents showing the history of ownership of the property in question. On March 10, 2003, appellant responded in opposition to summary judgment, attaching Szigeti's affidavit in support. The affidavit directly contradicted some of the admissions.

{¶6} On May 12, 2003, the trial court granted summary judgment in favor of appellees. In addressing the deemed admissions, the court noted that appellant did not attach any discovery responses to his objection filed in November 2002. The court further noted that certificate of service on the pleadings sent by appellees listed all

discovery requests, including the Request for Admissions. Finally, the court noted that appellant had failed to respond to any of appellees' discovery requests, including the ones that counsel acknowledged receiving.

{¶7} Appellant now appeals from that judgment, setting forth the following three assignments of error:

{¶8} "Assignment of Error Number One: The trial court erred in granting summary judgment to the appellee.

{¶9} "Assignment of Error Number Two: The trial court erred in finding the appellant did not properly respond to appellee's request for admissions.

{¶10} "Assignment of Error Number Three: The court failed to promulgate findings of fact and conclusions of law as to why summary judgment was granted."

I.

{¶11} We will address appellant's assignments of error in reverse order. In his third assignment of error, appellant contends that the court was required to "promulgate findings of fact and conclusions of law as to why summary judgment was granted."

{¶12} Civ.R. 56 states that summary judgment "shall be rendered forthwith" if the evidence before the court shows 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." While delineating which facts the court finds undisputed may be helpful, nothing in Civ.R. 56 requires that such "findings" be included in the judgment entry. Moreover, since our review on appeal is de novo, we will determine which facts are undisputed and then apply any appropriate law.

{¶13} Accordingly, appellant's third assignment of error is not well-taken.

II.

{¶14} Appellant, in his second assignment of error, contends that the trial court erred in finding that appellant did not properly respond to the request for admissions.

{¶15} Civ.R. 36(A) pertains to requests for admission and provides, in part:

{¶16} "The [requested] matter is admitted unless, within a period designated in the request, not less than twenty-eight days after service thereof or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney. * * *" Thus, when a party fails to respond, without justification, to a properly served request for admissions, those matters to which the requests were addressed will be deemed admitted. Civ.R. 36; *Cleveland Trust Co. v. Willis* (1985), 20 Ohio St.3d 66, 67. Generally, in order to be considered on summary judgment, written admissions should be "timely filed" with the court. Civ.R. 56(C); *Kanu v. George Dev., Inc.*, 6th Dist. Nos. L-02-1140, L-02-1139, 2002Ohio-6356, ¶12; *Millistor v. Motorists Ins. Cos.* (Nov. 19, 1990), Ross App. No. 1657.

{¶17} Nevertheless, Civ.R. 36(B) further provides:

{¶18} "Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. * * * [T]he court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or

defense on the merits. * * *" Civ.R. 36(B). See, also, *Balson v. Dodds* (1980), 62 Ohio St.2d 287, 290. As noted by the Ohio Supreme Court, "this provision emphasizes the importance of having the action resolved on the merits, while at the same time assuring each party that justified reliance on an admission in preparation for trial will not operate to his prejudice." *Cleveland Trust Co.*, supra. Civ.R. 15(A) provides that leave of court "shall be freely given when justice so requires."

{¶19} When seeking to withdraw or amend admissions, a party need not necessarily file a written motion for withdrawal. *Balson*, supra, at fn 2. By contesting the truth of Civ.R. 36(A) admissions, for the purposes of summary judgment, a party may satisfy the requirement of Civ.R. 36(B) that the party move the trial court to withdraw or amend the admissions. Id. Nevertheless, if the withdrawal will not aid in presenting the merits of the case and the withdrawal will prejudice the party who obtained the admission, the court may deny the request to withdraw or amend the admissions. See Civ.R. 36(B). Decisions regarding the withdrawal of Civ.R. 36 admissions are within the sound discretion of the trial court. *Balson*, supra, at fn2; *Beechwoods, Inc. v. Hosfelt* (Oct. 9, 1979), Franklin No. 79AP-117 (denial of motion to withdraw admissions within discretion of court). Thus, absent a showing that the court's attitude was unreasonable, arbitrary, or unconscionable, no error will be found by a reviewing court. *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217, 219. See also, Mayflower *Transit, Inc. v. Commercial Trailer Co.* (Sept. 28, 2000), Franklin App. Nos. 99AP-1058, 99AP-1074.

{¶20} In this case, appellant contends that he responded to the request for admissions on January 10, 2003, two months after the notice of deemed admissions was

filed. Nothing in the record, however, confirms this contention. Until his response to summary judgment was filed in early March, appellant never informed the court of his alleged late response or the reason for such an additional lengthy delay. Appellees first requested the admissions in September 2002. While appellant claims he did not receive the request in the packet sent, he had notice of the request by way of the certification and then again in November, when appellees filed a copy of the admissions with its notice. Appellant took two additional months to respond and, according to the trial court, did not respond to the other two discovery requests as well. In our view, appellant's delay was unjustified and a hindrance to the legal process.

{¶21} Moreover, when reviewed under the Civ.R. 36 standard, we cannot say that withdrawal of the five admissions would have aided the merits of appellant's case. The only admission of any real import is that appellant was deemed not to have been the real estate broker for the Johnsons. The other four admissions are supported by other undisputed evidence in the record. Consequently, even presuming that appellant did act as the Johnson's broker for the initial transactions, such fact is not material to appellant's claims as there was no completion of a sale which would have been the basis of appellant's claim for payment of a commission. Therefore, we cannot say that the trial court abused its discretion in accepting the admissions based upon appellant's failure to timely provide answers.

{¶22} Accordingly, appellant's second assignment of error is not well-taken.

III.

{¶23} Appellant, in his first assignment of error, argues that the trial court erred in granting summary judgment in favor of appellees. We disagree.

{¶24} The standard of review of a grant or denial of summary judgment is the same for both a trial court and an appellate court. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129. Summary judgment will be granted if "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of facts, if any, *** show that there is no genuine issue as to any material fact" and, construing the evidence most strongly in favor of the non-moving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law." Civ.R. 56(C).

{¶25} Our review of the record, including the deposition of Beth Rose, various real estate documents, and affidavits filed by the parties, reveals the following undisputed facts. On July 6, 2000, appellee, Beth Rose, held an auction for real estate. Appellant was present at the auction and placed a bid of $69,000 on behalf of Shane and Rachel Johnson (at the time of the auction and purchase agreement, “Rachel Jenson”). This bid was below the reserve price, however, and was unacceptable to the seller, Donna Meyers. Appellant represented to Rose that he was a real estate agent representing the Johnsons. After the auction, appellant and Rose negotiated a purchase price of $110,000 for the property. Rose verbally agreed to pay a “finders fee” to appellant, contingent upon the completion of the sale. This agreement was never put into writing. An “auction purchase agreement” was executed between “Rachel Jenson” and Myers, who was represented by Rose and Loss Realty. On behalf of the Johnsons, appellant gave Rose an

earnest money check for $2,000. The Johnsons were unable, however, to secure financing for the property and the sale did not occur. Loss Realty executed a release from the purchase agreement and disbursed the $2,000 earnest money deposit to Rachel Johnson ("Jenson"). The release document indicates that Myers signed on September 26, 2000 and Johnson signed on October 9, 2000.

{¶26} In September 2000, Myers sold the property to a company called Midas Properties, which was owned by Lora Koralewski. Koralewski was a loan officer for a bank where the Johnsons had applied for but were denied a loan. Koralewski continued working with the Johnsons to facilitate their purchase of the property. The Johnsons ultimately signed a land contract with Midas to purchase the property for $113,000. Other than referring buyers for financing, Rose denied any connection or involvement by herself and Loss Realty with Midas Properties or the land contract purchase. Rose denied that any commission was ever charged or collected by Loss Realty in connection with the land contract.

{¶27} In this case, appellant claims that he is still owed his "commission" of $2,500 which was to be paid from Loss Realty's $10,000 commission from the initial sale agreement. The terms or amount of the commission agreement were never reduced to writing, but Beth Rose acknowledged that she did agree to pay appellant a "finders fee," contingent upon the completion of the sale. Appellant agrees that his commission was to be paid from the commission collected by Loss Realty from their contract of sale of the Myers property. He does not claim such commission was paid and no evidence was presented that a commission was, in fact, ever collected. The land contract transaction

did not involve Loss Realty. In addition, appellant has failed to establish any collusion or fraud by or any benefit to Beth Rose or Loss Realty in Myers' sale to Midas Properties or the subsequent land contract with the Johnsons. Therefore, even presuming that appellant was acting as the Johnsons' broker, the purchase pursuant to the Loss Realty agreement never took place. Since no commission was ever collected, appellees do not owe appellant any commission.

{¶28} Appellant also argues that even though appellees released Rachel Johnson from the purchase contracts, he did not waive his right to a commission. This argument is without merit because appellant did not represent Myers from whom the commission would be collected. Nothing was presented to show that such a commission would be payable in the absence of an actual sale pursuant to the auction purchase agreement. Again, since no commission was earned or paid, there was nothing to waive.

{¶29} Appellant also claims that he is owed $2,000 for the earnest money he paid on the Johnsons' behalf regarding the "auction agreement." The record contains a release which shows that the deposit was disbursed to Rachel Johnson, the buyer listed as "Rachel Jenson" on the original purchase contract. While it may be true that appellant never received this deposit, there is nothing to indicate that appellees did not, in fact, return this money to her. Thus, appellant's claim should be directed to Rachel Johnson, not Loss Realty or Beth Rose.

{¶30} Therefore, since no material facts remain in dispute and appellees are entitled to judgment as a matter of law, we conclude that summary judgment was

properly granted to appellees. Accordingly, appellant's first assignment of error is not well-taken.

{¶31} The judgment of the Toledo Municipal Court is affirmed. Court costs of this appeal are assessed to appellant.

JUDGMENT AFFIRMED.

Peter M. Handwork, P.J. _____
JUDGE

Richard W. Knepper, J. _____
JUDGE

Arlene Singer, J. _____
CONCUR.
JUDGE