

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

Keith D. Williams

Court of Appeals No. L-13-1036

Appellant

Trial Court No. CI0201204895

v.

Robert Townsend

DECISION AND JUDGMENT

Appellee

Decided: November 1, 2013

* * * * *

Rebecca L. West-Estell, for appellant.

Milton E. Pommeranz, for appellee.

* * * * *

YARBROUGH, J.

I. Introduction

{¶1} Appellant, Keith Williams, appeals the judgment of the Lucas County Court of Common Pleas, awarding summary judgment in favor of appellee, Robert Townsend. We affirm.

A. Factual and Procedural Background

{¶2} Williams and Townsend are coworkers for the City of Toledo. During the summer of 2012, Townsend sought a civil anti-stalking protection order based on Williams' allegedly threatening actions. The trial court granted a temporary protection order, but, after a hearing on the issue, ultimately denied the civil anti-stalking protection order.

{¶3} Thereafter, Williams initiated the present matter when he filed a pro se complaint for intentional infliction of emotional distress, negligent infliction of emotional distress, and defamation. Following Townsend's answer, Williams served his first set of interrogatories and requests for admission. Townsend then served his first set of interrogatories, requests for production of documents, and requests for admission, and responded to Williams' first set of interrogatories and requests for admission. On November 20, 2012, Williams filed his responses and objections to Townsend's discovery requests. Also on that day, the trial court set an initial pretrial for January 11, 2013.¹

{¶4} On December 26, 2012, Townsend moved for summary judgment as to all of Williams' claims. In support, he attached affidavits from himself and Richard Bush, an apparent witness to some of the alleged threats. On January 3, 2013, Williams served his second set of interrogatories, to which Townsend responded on February 1, 2013. Townsend's response was filed one day after Williams moved for an extension of time to

¹ The parties indicate in their briefs that the pretrial never occurred.

respond to Townsend's motion for summary judgment. However, the trial court never ruled on Williams' January 31, 2013 motion for an extension of time. Instead, on February 8, 2013, the court granted Townsend's motion for summary judgment, and dismissed the case.

B. Assignments of Error

{¶5} Williams has timely appealed, and now asserts two assignments of error:

I. The trial court erred in granting summary judgment where discovery had not been completed.

II. The trial court abused its discretion in granting summary judgment where appellant requested additional time for discovery; especially when there had been no discover [sic] schedule established by the trial court.

II. Analysis

{¶6} Williams' assignments of error are interrelated and will be addressed together. Notably, Williams does not contest the merits of the trial court's award of summary judgment. Therefore, our review will be limited to the procedural aspects of the judgment.

{¶7} In that regard, Civ.R. 56(B) provides,

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or

without supporting affidavits for a summary judgment in the party's favor as to all or any part of the claim, counterclaim, cross-claim, or declaratory judgment action. If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court.

{¶8} Here, the case had been set for pretrial on January 11, 2013. Thus, Townsend could file his motion for summary judgment at any time, even before the completion of discovery, but only with leave of court. However, Townsend did not seek leave to file his motion, and the trial court did not grant such leave. “Nevertheless, the decision to entertain a summary judgment motion, regardless of whether a required leave of court has been granted under Civ.R. 56([B]), is within the sound discretion of the trial court.” *Kott Ents., Inc. v. Brady*, 6th Dist. Lucas No. L-03-1342, 2004-Ohio-7160, ¶ 44; *Indermill v. United Savs.*, 5 Ohio App.3d 243, 451 N.E.2d 538 (9th Dist.1982), paragraph one of the syllabus.

{¶9} Williams argues that the trial court abused its discretion by granting summary judgment without affording him an opportunity to complete discovery, thereby preventing him from being able to properly respond to Townsend's motion. Because Williams failed to comply in two ways with the procedures for seeking additional time to respond, we disagree.

{¶10} First, Williams failed to comply with Civ.R. 56(F), which “permits a party opposing summary judgment to seek a continuance to pursue further discovery in order to

develop its opposition to the motion.”² *Cook v. Toledo Hosp.*, 169 Ohio App.3d 180, 2006-Ohio-5278, 862 N.E.2d 181, ¶ 42 (6th Dist.). Pursuant to this provision, the party seeking a continuance must “submit an affidavit stating the reasons justifying an extension.” *Id.* “When no affidavit is presented in support of a motion for extension under Civ.R. 56(F), a court may not grant an extension pursuant thereto.” *Id.*, citing *Vilardo v. Sheets*, 12th Dist. Clermont No. CA2005-09-091, 2006-Ohio-3473, ¶ 29. Here, Williams’ motion did not include an affidavit in support. On appeal, Williams argues that his motion can be construed as an affidavit because it was signed by himself, pro se. However, his motion was not sworn before anyone authorized to give oaths, and is thus not a valid affidavit. *State ex rel. Coulverson v. Ohio Adult Parole Auth.*, 62 Ohio St.3d 12, 14, 577 N.E.2d 352 (1991).

{¶11} Second, Williams did not move for an extension within the time allowed by rule. Civ.R. 6(B) provides that a court, in its discretion, may grant an extension of time to respond to a motion if the request for extension is made during the period allowed for response. If the request for extension is made after such period, the court may grant an extension “where the failure to act was the result of excusable neglect.” Civ.R. 6(B). Pursuant to Loc.R. 5.04(D) of the Court of Common Pleas of Lucas County, General Division, a party has 14 days after service to file a memorandum in opposition to any

² Civ.R. 56(F) provides, “Should it appear from the affidavits of a party opposing the motion for summary judgment that the party cannot for sufficient reasons stated present by affidavit facts essential to justify the party’s opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.”

motion. Here, the motion for summary judgment was filed on December 26, 2012.

Williams did not move for an extension until January 31, 2013, well beyond the 14-day limit. Because he did not timely move for an extension, Williams was required to demonstrate that his failure to do so was the result of excusable neglect. However, Williams did not attempt to make any such demonstration.

{¶12} In sum, while the civil rules permit a defending party to move for summary judgment at any time, they also allow a non-movant to seek additional time to complete discovery in order to be able to properly respond to the motion for summary judgment. Such a motion, though, must be made within the time allowed for response, and must contain an affidavit stating the reasons justifying an extension. Here, Williams failed to do either. Therefore, the trial court did not abuse its discretion when it did not grant Williams' motion for an extension and ruled on the motion for summary judgment.

{¶13} Accordingly, Williams' assignments of error are not well-taken.

III. Conclusion

{¶14} For the foregoing reasons, the judgment of the Lucas County Court of Common Pleas is affirmed. Williams is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

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A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See also 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.