[Cite as *Jain v. Ehle Morrison Group, Inc.*, 2009-Ohio-3471.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92522

MOHAN JAIN, ET AL.

PLAINTIFFS-APPELLANTS

vs.

EHLE MORRISON GROUP, INC., ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-655551

BEFORE: Dyke, J., Rocco, P.J., and Jones, J.

RELEASED: July 16, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

ANN DYKE, J.:

{¶ 1} Plaintiffs Mohan Jain and Taranga Development, Inc. appeal from the order of the trial court that granted summary judgment to defendants Ehle Morrison Group ("Ehle Morrison"), Fred Ehle, Bruce Morrison, and Fifth Third Bank, N.A. ("Fifth Third"). For the reasons set forth below, we affirm.

{¶ 2} Plaintiffs first filed this action against Fifth Third, Ehle Morrison Group, and other defendants in 2006. In that action, defendants served requests for admissions and other discovery requests to plaintiffs. Plaintiffs did not respond to discovery, and later dismissed the action without prejudice.

{¶ 3} On April 7, 2008, plaintiffs refiled this action, alleging that defendant, Fred Ehle, contacted him "with respect to the sale of certain property in Bath Township, owned by Plaintiffs." Plaintiffs further alleged that they subsequently discovered that Ehle Morrison was acting as an agent for Fifth Third and that as a result of the deceptive actions of defendants, plaintiffs have been unable to sell the Bath Township property. Plaintiffs set forth claims for negligence, negligent and/or intentional misrepresentation, breach of fiduciary duty, breach of duty of good faith and fair dealing.

{¶ 4} Defendants denied liability and on May 27, 2008, again served interrogatories and requests for admissions to plaintiffs. On August 20, 2008, Fifth Third filed a motion to dismiss for failure to prosecute, and noted that plaintiffs had

not responded to the discovery requests. In relevant part, the admissions to which plaintiffs did not respond included the following:

{¶ 5} "9. Admit that the Fifth Third Defendants have not entered into any written agreements with either Plaintiff which would form the basis for Plaintiffs' complaint.

{¶ 6} "* * *

{¶ 7} "11. Admit that the Ehle Morrison Group Inc. Defendants have not entered into any written agreements with either Plaintiff which would form the basis for Plaintiffs' complaint.

{¶ 8} "* * *

{¶ 9} "13. Admit that Fred Ehle has never transacted business with either of the Plaintiffs in his individual capacity.

{¶ 10} "* * *

{¶ 11} "15. Admit that Bruce Morrison has never transacted business with either of the Plaintiffs in his individual capacity.

{¶ 12} "* * *

{¶ 13} "17. Admit that the Fifth Third Defendants have not entered into any oral contracts with either Plaintiff which would form the basis for Plaintiffs' complaint.

{¶ 14} "* * *

{¶ 15} "20. Admit that the Ehle Morrison Group Inc. Defendants have not entered into any oral contracts with either Plaintiff which would form the basis for Plaintiffs' complaint.

{¶ 16} "* * *

{¶ 17} "24. Admit that none of the Defendants negligently failed to follow customary and usual skills and procedures as alleged in paragraph 14 of your complaint.

{¶ 18} "* * *

{¶ 19} "28. Admit that Defendants did not enter into a relationship of trust and confidence with Plaintiffs.

{¶ 20} "* * *

{¶ 21} "34. Admit that none of the Defendants had a fiduciary relationship with Plaintiffs.

{¶ 22} "* * *

{¶ 23} "40. Admit that none of the Defendants were involved in a civil conspiracy against Plaintiffs.

{¶ 24} "* * *

{¶ 25} "43. Admit that there is no contract between Defendants and Plaintiffs as alleged in paragraph 32 of your complaint."

{¶ 26} Also, on August 20, 2008, defendants filed a joint motion for summary judgment. In support of the motion, defendants filed the unanswered requests for admissions from the first action, which were substantially the same as the unanswered requests for admissions from this refiled action. Defendants also incorporated by reference the motions for summary judgment from their prior action, which argued that unanswered requests for admissions are deemed admitted and

that included the affidavit of Robert Rutt of Fifth Third Bank. In relevant part, Rutt averred that Fifth Third received a judgment against plaintiffs and three other individuals in connection with a commercial mortgage loan; that the present amount of the judgment, following foreclosure, is $969,864.54; that Fifth Third hired Ehle Morrison to advertise the commercial property prior to a foreclosure sale, and had authority to "negotiate a workout arrangement" with Taranga Development; and that Ehle Morrison was unable to reach an agreement, and the note and loan were subsequently sold to Pramco IV, LLC.

{¶ 27} Plaintiffs filed a brief in opposition to the motion for summary judgment in which they asserted that the request for admissions cited by the movants were from the prior action and therefore could not be used in the pending matter under Civ.R. 36(B). The trial court subsequently granted defendants' joint motion for summary judgment and plaintiffs now appeal, and assign the following error for our review:

{¶ 28} "The trial court erred in granting defendants' motion for summary judgment."

{¶ 29} We review the grant of summary judgment de novo using the same standards as the trial court. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm* (1995), 73 Ohio St.3d 107, 108, 652 N.E.2d 684.

{¶ 30} Within this assignment of error, plaintiffs assert that the trial court erred in granting defendants' motion for summary judgment, since the evidence offered in support of the motion was filed in the original action.

{¶ 31} A trial court may not grant a motion for summary judgment unless the evidence before the court demonstrates that: (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. See, e.g., *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429-30, 674 N.E.2d 1164, 1171.

{¶ 32} The burden of showing that no genuine issue exists as to any material fact falls upon the moving party in requesting summary judgment. Id., citing *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46, 47. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. *Vahila v. Hall,* supra.

{¶ 33} In responding to a motion for summary judgment, the nonmoving party may not rest on "unsupported allegations in the pleadings." Civ.R. 56(E); *Harless v. Willis Day Warehousing Co.,* supra. Rather, Civ.R. 56 requires the nonmoving party to respond with competent evidence that demonstrates the existence of a genuine issue of material fact for trial. *Vahila v. Hall,* supra. Summary judgment, if appropriate, shall be entered against the non-moving party. *Jackson v. Alert Fire & Safety Equip., Inc.* (1991), 58 Ohio St.3d 48, 52, 567 N.E.2d 1027, 1031.

{¶ 34} Plaintiffs correctly note that pursuant to Civ.R. 36, "[a] party may serve upon any other party a written request for the admission, for purposes of the pending action only," and "[a]ny admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against the party in any other proceeding."

{¶ 35} However, this misses the point of defendants' joint motion for summary judgment, which is that substantially the same matters were set forth in the request for admissions filed in this case as were filed in the first action. This second request for admissions was not answered, and is therefore deemed admitted. See *WUPW TV-36 v. Direct Results Marketing, Inc*. (1990), 70 Ohio App.3d. 710, 717, 591 N.E.2d 1345. Moreover, as this request is part of the trial court record, the trial court could rely upon it in this matter, and the trial court did not abuse its discretion by considering the admissions in reaching its decision. *Auto Owners Ins. v. Foxfire Golf Club, Inc.,* Pickaway App. No. 05CA37, 2007-Ohio-1101; Civ.R. 5(D). Moreover, plaintiffs failed to present any evidence to demonstrate the existence of a genuine issue of material fact for trial.

{¶ 36} The assignment of error is without merit.

Judgment affirmed.

It is ordered that appellees recover from appellants their costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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ANN DYKE, JUDGE

KENNETH A. ROCCO, P.J., and
LARRY A. JONES, J., CONCUR