[Cite as *N. Eagle, Inc. v. Kosas*, 2009-Ohio-4042.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92358

NORTHERN EAGLE, INC.

PLAINTIFF-APPELLEE

vs.

MATEI KOSAS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cleveland Municipal Court
Case No. 2007 CVF 024343

BEFORE: Boyle, J., Stewart, P.J., and Sweeney, J.

RELEASED: August 13, 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).

MARY J. BOYLE, J.:

{¶ 1} Defendant-appellant, Matei Kosas, appeals from an order granting summary judgment to plaintiff-appellee, Northern Eagle, Inc. ("Northern Eagle"). Finding no merit to the appeal, we affirm.

{¶ 2} In October 2007, Northern Eagle filed a complaint against Kosas claiming that Kosas owed it $2,504.23 for work performed on Kosas's large commercial truck. Northern Eagle attached a "Customer Quick Report" to the complaint, showing Kosas's account and payment information. Kosas answered the complaint, denying all allegations, except he admitted that he did engage in business with Northern Eagle. He also asserted the following affirmative defenses: 1) that he paid $1,000 toward his account that had not been credited; 2) that his original quote for the work done was only $1,600; 3) that he did not have a contract with Northern Eagle for the remaining sum; and 4) that the "amount and nature of the charges above $1,600 are absolutely outrageous, uncalled for, and invalid."

{¶ 3} The trial court held a pretrial on April 14, 2008. Both parties appeared with counsel. The trial court ordered that all discovery was to be completed by May 30, 2008, and that all dispositive motions were due on June 6. Trial was set for August 11, 2008.

{¶ 4} On May 29, 2008, Kosas's attorney moved to withdraw as counsel. In an affidavit attached to her motion, she stated that Kosas retained her in April

2008 and that she attended a pretrial on his behalf on April 14. She then explained that between April 22, 2008 and May 28, 2008, she called Kosas approximately eight times, leaving messages each time, in order to fulfill pretrial discovery obligations, but Kosas never returned her calls. On June 11, 2008, the trial court granted her motion to withdraw as counsel.

{¶ 5} On July 15, 2008, Northern Eagle filed a motion to deem requested admissions admitted. It asserted that it had sent a request for admissions to Kosas on April 28, 2008, but that Kosas never responded to its request. The trial court granted the motion. Essentially, by not responding to Northern Eagle's discovery request, Kosas admitted that Northern Eagle completed work done for Kosas, as he had authorized them to do, and that he owed it the amount demanded.

{¶ 6} On July 31, 2008, Northern Eagle moved for summary judgment. Mark Trimble, owner of Northern Eagle, stated in an affidavit that Northern Eagle repaired Kosas's commercial tractor, which he explained was the "front component of a 16 wheel tractor-trailer." The work included repair to the clutch on the truck. Northern Eagle attached an invoice, which Trimble verified as a true and accurate copy, showing the work completed on Kosas's truck, as well as the amount charged for labor and parts. The same "Customer Quick Report" was also attached, showing the amount Kosas had paid Northern Eagle and the amount he still owed on the account.

{¶ 7} Kosas did not respond to Northern Eagle's summary judgment motion. On August 28, 2008, the trial court granted the motion. Kosas later appeared, either on August 28 or the following day, stating that he "wished to respond to the motion." Thus, at Kosas's request, the trial court set aside its previous order granting summary judgment and "reset hearing on the motion until September 15, 2008."

{¶ 8} On October 10, 2008, the trial court again granted Northern Eagle's summary judgment motion. In its entry, the trial court stated that it held a hearing on September 15, 2008, and that Northern Eagle was present with counsel, and Kosas was present without counsel, "but had a friend with him to help with communications." The trial court further stated, "Defendant's native language is Romanian. He was able to communicate with the court in broken English." The court indicated that it asked Kosas if he wanted to proceed without counsel and he informed the court that it was "his choice to continue without counsel and he did not wish to pay an attorney."

{¶ 9} The trial court stated, "Defendant confirmed that he had received all motions in the mail. He confirmed that he had made no written responses. Defendant asserted that he had not authorized or agreed to the services, the values of which are the subject of this case. He had no documentary evidence. He stated further that there were no additional witnesses to provide information about this case."

{¶ 10} The trial court, considering the information admitted, as well as documentary evidence attached to Northern Eagle's summary judgment motion, granted the motion, finding that Kosas owed Northern Eagle $2,504.23 plus 8 percent interest per the statutory rate.

{¶ 11} It is from this judgment that Kosas appeals, raising three assignments of error for our review:

{¶ 12} "[1.] The trial court erred to the prejudice of the appellant-defendant when it granted summary judgment for the plaintiff-appellee when per the court record it was clear that A) the appellant could not speak English[;] B) per the record the appellant had defenses that were not considered by the trial court and were for a jury to determine denying appellant due process of law under the 14th Amendment.

{¶ 13} "[2.] The trial court erred to the prejudice of the appellant when it ordered interest at 8% when the contract did not call for same violating the Ohio statutory rate per [R.C.] 1343.03 et seq.

{¶ 14} "[3.] The trial court erred when it allowed the appellant's attorney to withdraw when it did not follow the code of professional responsibility, Ohio rules or local rules for attorney withdrawal resulting in prejudicial error and violating the aplt's Ohio & U.S. constitutional rights, 1st, 5th[,] 6th applicable to aplt via the 14th amendment to the US Constitution."

{¶ 15} In his first assignment of error, Kosas contends that the trial court erred when it granted Northern Eagle's summary judgment motion.

{¶ 16} We review an appeal from summary judgment under a de novo standard. *Baiko v. Mays* (2000), 140 Ohio App.3d 1, 10. Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate. *Northeast Ohio Apartment Assn. v. Cuyahoga Cty. Bd. of Commrs.* (1997), 121 Ohio App.3d 188, 192. Civ.R. 56(C) provides that before summary judgment may be granted, a court must determine 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 the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the nonmoving party." *State ex rel. Duganitz v. Ohio Adult Parole Auth.* (1996), 77 Ohio St.3d 190, 191.

{¶ 17} The moving party carries an initial burden of setting forth specific facts that demonstrate his or her entitlement to summary judgment. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-293. If the movant fails to meet this burden, summary judgment is not appropriate, but if the movant does meet

this burden, summary judgment will be appropriate only if the nonmovant fails to establish the existence of a genuine issue of material fact. Id. at 293.

{¶ 18} Kosas argues that he was not given "an opportunity to be heard" because he "did not understand English." He further argues that since he appeared at the hearing on the motion and informed the trial court that he did not authorize the services, that his testimony at least created a question of fact that should have defeated summary judgment.

{¶ 19} The trial court indicated in its journal entry that Kosas communicated to the court in broken English. The trial court even included Kosas's statements that he made to the court regarding his claim that he did not authorize the work done on the truck. The court further incorporated Kosas's acknowledgment that he had received all motions in the mail and that he had confirmed that he had not responded to the motions. Indeed, we find that based on the record before this court, the trial court had no problem understanding Kosas's "broken English."[1]

{¶ 20} We further find, based on the record before us, that the trial court did not err when it granted Northern Eagle summary judgment.

{¶ 21} Civ.R. 36(A) provides in part that "[a] party may serve upon any other party a written request for the admission * * * of the truth of any matters * * *."

[1] There is no transcript from the hearing on appeal. "When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm." *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199.

"The 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 * * *."

{¶ 22} When a party fails to timely respond to requests for admissions under Civ.R. 36, the admissions become facts of record that the court must recognize. *Cleveland Trust Co. v. Willis* (1985), 20 Ohio St.3d 66, 67. "A request for admission can be used to establish a fact, even if it goes to the heart of the case." Id. "The rule is self-enforcing, and the trial court has no discretion whether to deem the matters admitted. If the requests are not answered, they are admitted and conclusively established, and the trial court must recognize them as so." *Martin v. Martin*, 179 Ohio App.3d 805, 2008-Ohio-6336, _15.

{¶ 23} Here, the trial court set a discovery deadline of May 30, 2008. Northern Eagle sent request for admissions to Kosas on April 28. Kosas never responded. His attorney informed the court that she could not fulfill pretrial discovery obligations because Kosas had not returned approximately eight of her phone calls over a five-week period. The trial court properly granted Northern Eagle's motion to deem admitted the fact that Northern Eagle performed work for Kosas on his truck, which he had authorized it to do, and that Kosas owed Northern Eagle the amount demanded.

{¶ 24} Accordingly, we find that the trial court did not err when it relied on the admissions to grant summary judgment. Moreover, Northern Eagle attached evidence, authenticated by its owner, which established that it performed work on Kosas's truck that amounted to $3,504.27, that Kosas paid $1,000 towards that amount, and that he still owed $2,504.27 on the balance remaining.

{¶ 25} Kosas did not respond to Northern Eagle's summary judgment motion. The Civil Rules state that once the moving party has presented evidence to support its motion for summary judgment, the nonmoving party may "not rest upon the mere allegations or denials of the * * * pleadings, but * * * must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E); *Drescher v. Burt* (1996), 75 Ohio St.3d 280. Kosas claims his testimony that he did not authorize the work established a genuine issue of material fact. We disagree.

{¶ 26} Kosas's testimony was not sufficient to overcome summary judgment. Kosas's testimony is analogous to a self-serving affidavit. "Generally, a party's unsupported and self-serving assertions, offered by way of affidavit, standing alone and without corroborating materials under Civ.R. 56, will not be sufficient to demonstrate material issues of fact. Otherwise, a party could avoid summary judgment under all circumstances solely by simply submitting such a self-serving affidavit containing nothing more than bare contradictions of the evidence offered

by the moving party." *Davis v. Cleveland*, 8th Dist. No. 83665, 2004-Ohio-662 (citation omitted).

{¶ 27} Accordingly, because Kosas did not offer any evidence sufficient to establish a genuine issue of material fact, and because Northern Eagle demonstrated that no factual dispute remained as to the amount Kosas owes it, the trial court properly granted summary judgment to Northern Eagle. Kosas's first assignment of error is overruled.

{¶ 28} In his second assignment of error, Kosas argues that the trial court erred when it assigned the statutory rate of interest at 8 percent. We disagree.

{¶ 29} In relevant part, R.C. 1343.03(A) states that "when money becomes due and payable upon any * * * note * * *, and upon all judgments * * * of any judicial tribunal for the payment of money arising out of * * * contract or other transaction, the creditor is entitled to [statutory] interest * * *, unless a written contract provides a different rate of interest in relation to the money that becomes due and payable, in which case the creditor is entitled to interest at the rate provided in that contract." The statutory rate set forth in R.C. 1343.03(A) is simply a default rate to be charged should the parties not contract otherwise. See *Ohio Valley Mall Co. v. Fashion Gallery, Inc.* (1998), 129 Ohio App.3d 700, 704.

{¶ 30} Here, there was no evidence that the parties agreed to an interest rate different than that of the statutory rate. Thus, without evidence that the parties had agreed to a different interest rate, the trial court did not err when it

applied the statutory rate of 8%. Kosas's second assignment of error is overruled.

{¶ 31} In his third assignment of error, Kosas maintains that the trial court erred when it permitted his attorney to withdraw. We disagree.

{¶ 32} It is within the discretion of the trial court to grant or deny a motion to withdraw. *State v. Deal* (1969), 17 Ohio St.2d 17. An abuse of discretion connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. Accordingly, a trial court's decision to grant a motion to withdraw will not be reversed on appeal absent an abuse of discretion. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Before a trial court grants such a motion, however, it has a duty to ensure that the mandates of the Rules of Professional Conduct are followed. *Wilson v. Wilson*, 154 Ohio App.3d 454, 797 N.E.2d 990, 2003-Ohio-4474, ¶ 5 (discussing former DR 2-110 under the Code of Professional Responsibility).[2] The failure of a trial court to do so is reversible error. Id., citing *Bennett v. Bennett* (1993), 86 Ohio App.3d 343.

[2] Kosas cites to DR 2-110 of the Code of Professional Responsibility. On February 1, 2007, however, the Ohio Rules of Professional Conduct replaced the former Ohio Code of Professional Responsibility. The Rules of Professional Conduct govern any conduct of Ohio lawyers occurring on or after this date.

{¶ 33} Rule 1.16 of the Rules of Professional Conduct sets forth the rules an attorney must follow when terminating representation.[3] Rule 1.16(b) sets forth when an attorney may withdraw from representation of a client. If any of the following apply, then an attorney may withdraw:

{¶ 34} "(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

{¶ 35} "(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is illegal or fraudulent;

{¶ 36} "(3) the client has used the lawyer's services to perpetrate a crime or fraud;

{¶ 37} "(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

{¶ 38} "(5) the client fails substantially to fulfill an obligation, financial or otherwise, to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

{¶ 39} "(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client;

{¶ 40} "(7) the client gives informed consent to termination of the representation;

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[3]Rule 1.16 correlates to the former DR 2-110, which set forth "Withdrawal from employment."

{¶ 41} "(8) the lawyer sells the law practice in accordance with Rule 1.17;

{¶ 42} "(9) other good cause for withdrawal exists."

{¶ 43} Here, Kosas's attorney stated in her motion to withdraw that she had attempted to contact Kosas eight times by telephone from April 22 to May 28, 2008, leaving a message each time. Kosas never returned any of her phone calls. Kosas's attorney filed the motion to withdraw on May 29, 2008 because she was not able to fulfill her pretrial discovery obligations. We find that the reasons set forth by Kosas's attorney in support of her motion to withdraw, which are supported by the record herein, are sufficient to warrant her permissive withdrawal as Kosas's counsel pursuant to Rule 1.16(b)(1), (5), and (6).

{¶ 44} Moreover, the next hearing in the case was not scheduled until July 28, 2008, with the trial scheduled for August 11, 2008. When the trial court granted the motion, it continued the final pretrial and trial date. Therefore, Kosas had ample opportunity to obtain new counsel.

{¶ 45} Accordingly, the trial court did not abuse its discretion when it granted Kosas's attorney's motion to withdraw as counsel. Kosas's third assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court 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.

MARY J. BOYLE, JUDGE

MELODY J. STEWART, P.J., and
JAMES J. SWEENEY, J., CONCUR