

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101827

BLUE WATER BIN MANAGEMENT, INC.

PLAINTIFF-APPELLANT

vs.

**ADVANCED AUTO AND
TOWING SERVICE, INC., ET AL.**

DEFENDANTS-APPELLEES

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-808630

BEFORE: E.T. Gallagher, J., E.A. Gallagher, P.J., and Laster Mays, J.

RELEASED AND JOURNALIZED: March 26, 2015

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EILEEN T. GALLAGHER, J.:

{¶1} This cause came to be heard on the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1. Plaintiff-appellant, Blue Water Bin Management Inc. (“Blue Water”), appeals from the trial court’s order granting summary judgment in favor of defendants-appellees, Advanced Auto and Towing Services Inc. (“Advanced Auto”) and Ohio Mills Corporation (“Ohio Mills”) (collectively “appellees”). Blue Water assigns the following errors for our review:

1. The trial court erred in granting summary judgment to the defendants because they failed to submit evidence or identify any evidence in the record in support of their arguments, failing to meet their burden for summary judgment.
2. The trial court erred in granting summary judgment to the defendants because the evidence submitted by the plaintiff demonstrated that there are genuine issues of material fact.

{¶2} We find merit to the appeal, reverse the trial court’s judgment, and remand the case to the trial court for further proceedings.

I. Factual and Procedural History

{¶3} Blue Water and Ohio Mills are for-profit businesses who compete in the donated clothing-resale business. Both companies place donation bins in the parking lots of various local businesses to collect donated items. They sell the donations and give a portion of the proceeds to local charities.

{¶4} Blue Water filed a complaint for conversion against Old Mills and Advanced Auto for allegedly removing their donation bins and replacing them with their own bins. According to the complaint, Old Mills hired Advanced Auto to remove Blue Water’s bins, and Advanced Auto refused to release the bins until Blue Water paid towing and storage fees. After Advanced Auto had accumulated numerous bins, Blue Water was forced to negotiate for the release of some of the bins in order to collect donations for its ongoing business.

{¶5} Appellees answered the complaint and filed a counterclaim, alleging that Blue Water filed the complaint to intimidate them and gain a competitive advantage in the donated clothing business. In their prayer for relief, they requested only that “Plaintiff’s Complaint be dismissed and judgment entered in favor of the Defendants on their counterclaim at Plaintiff’s cost.” Appellees made no request for money damages.

{¶6} Following discovery, both parties moved for summary judgment. The trial court granted summary judgment in appellees’ favor and denied Blue Water’s motion for summary judgment. Blue Water now appeals the trial court’s decision on summary judgment.

II. Law and Analysis

{¶7} In its first assignment of error, Blue Water argues the trial court erred in granting summary judgment to the appellees because they failed to meet their burden of demonstrating the absence of any genuine issue of material fact. In its second assignment of error, Blue Water argues the trial court erred in granting summary judgment to the appellees because genuine issues of material fact exist. We discuss these assigned errors together because they involve the same analysis.

A. Standard of Review

{¶8} We review an appeal from summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). The party moving for summary judgment bears the burden of demonstrating the absence of any genuine issue of material fact as to the essential elements of the case with evidence of the type listed in Civ.R. 56(C). *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). Civ.R. 56(C) states, in relevant part:

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.

{¶9} Summary judgment is appropriate when, after construing the evidence in a light most favorable to the party against whom the motion is made, (1) there is no genuine issue as to any material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) 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. *Id. Zivich v. Mentor Soccer Club*, 82 Ohio St.3d 367, 369-370, 696 N.E.2d 201 (1998).

B. Conversion

{¶10} The trial court granted summary judgment in favor of appellees on Blue Water's conversion claim. Conversion is the "wrongful exercise of dominion over property to the exclusion of the rights of the owner, or withholding it from his possession under a claim inconsistent with his rights." *State ex rel. Toma v. Corrigan*, 92 Ohio St.3d 589, 592, 752 N.E.2d 281 (2001). To prevail on a conversion claim, a plaintiff must demonstrate (1) plaintiff's ownership or right to possession of the property at the time of conversion; (2) defendant's conversion by a wrongful act or disposition of plaintiff's property rights; and (3) damages. *Dream Makers v. Marshek*, 8th Dist. Cuyahoga No. 81249, 2002-Ohio-7069, ¶ 19.

{¶11} Where conversion is premised on the unlawful retention of property, the plaintiff must establish "(1) he or she demanded the return of the property from the possessor after the possessor exerted dominion or control over the property, and (2) that the possessor refused to

deliver the property to its rightful owner.” *Tabar v. Charlie’s Towing Serv.*, 97 Ohio App.3d 423, 427-428, 646 N.E.2d 1132 (8th Dist.1994).

{¶12} It is undisputed that Advanced Auto took possession of Blue Water’s donation bins, Blue Water demanded the return of its property, and Advanced Auto refused to return the bins until Blue Water paid towing and storage fees. It is also undisputed that Blue Water sustained damages in the form of towing and storage fees. Appellees argued in their summary judgment motion that Blue Water was not entitled to summary judgment because their removal and storage of Blue Water’s property was authorized and lawful.

{¶13} Blue Water argues the trial court erred in granting summary judgment to appellees because they provided no evidentiary support for their motion. As previously stated, the moving party carries an initial burden of setting forth evidence of specific facts that demonstrate its entitlement to summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280 at 292-293, 662 N.E.2d 264. The moving party cannot discharge this burden by simply making conclusory assertions that the nonmoving party cannot prove its case. *Id.* at 293. The moving party must point to specific evidence of the type listed in Civ.R. 56(C) to demonstrate that the nonmoving party has insufficient evidence to support its claims. *Id.* If the moving party fails to meet this burden, summary judgment is inappropriate. *Id.* On the other hand, if the moving party meets this burden, summary judgment is appropriate, but only if the nonmoving party fails to present evidence of specific facts establishing the existence of a genuine issue of material fact for trial. *Id.*

{¶14} Appellees’ summary judgment motion is filled with conclusory assertions but devoid of any evidence of the type listed in Civ.R. 56(C). For example, appellees accuse Blue Water of placing donation bins in local parking lots “without any authority,” but they offer no

evidence from the third-party property owners to prove that Blue Water lacked permission to place its bins on their lots. Appellees asserted in their summary judgment motion, without any evidence or legal authority:

There is no possible basis for any claims against [Old Mills] to proceed. There are no allegations that [Ohio Mills] is in possession of any of the bins. There are no allegations that [Old Mills] removed any of the bins from the locations where they were improperly placed. It appears that Plaintiff's claims against Old Mills are that they facilitated the removal of bins from [sic] location where Plaintiff lacked authority to be present. While [Old Mills'] conduct may not be properly characterized as "good citizen" behavior, it in [sic] neither illegal, nor actionable. There is no conversion or even hint of the same, and the claims against [Old Mills] must be dismissed.

(Appellees' motion for summary judgment at 2.)

{¶15} By contrast, Blue Water supported its brief in opposition and motion for summary judgment with deposition testimony. Jay Levan ("Levan"), a former employee of Ohio Mills, admitted that he hired Advanced Auto to remove Blue Water's bins from commercial parking lots. (Levan tr. at 13, 18.) Johnny Dunlap ("Dunlap"), the principal and owner of Advanced Auto, admitted that he had at least 20 of Blue Water's donation bins at his impound lot at the time of his deposition. (Dunlap tr. at 20.) Appellees even admitted in their joint answer that they removed and retained Blue Water's bins, and that Blue Water demanded that they be returned. (Answer at ¶ 6.) Thus, the record contains evidence and an admission that appellees took possession of, and withheld, Blue Water's property.

{¶16} Appellees argued in their summary judgment motion, as they do on appeal, that they were legally entitled to remove Blue Water's bins because Blue Water's bins were not permitted in the parking lots owned by third-parties. Levan testified that he obtained fax authorizations from the property owners, and that the property owners signed the authorizations giving him permission to remove Blue Water's bins from their property.

{¶17} However, Advanced Auto admittedly possessed over 20 Blue Water bins, and Old Mills only produced three fax authorizations, two of which had no signatures. The authorization forms that were produced indicate that Old Mills and Advanced Auto only had authorization to remove the bins “if [they were] not removed within 72 hours.” Levan admitted that Old Mills knew Blue Water owned the bins, but never gave Blue Water advance notice that its bins were going to be towed because “[t]hat wasn’t part of the protocol.”¹ (Levan tr. at 26.) Dunlap testified that he “took it for granted” that Levan contacted Blue Water and obtained authorization before his company towed the bins away. (Dunlap tr. at 18.) Therefore, there is a genuine issue of material fact as to whether appellees had authorization to remove and store Blue Water’s bins, and the trial court erred in granting summary judgment in favor of appellees.

{¶18} Accordingly, the first and second assignments of error are sustained.

III. Conclusion

{¶19} The trial court erred in granting summary judgment to appellees where there was a genuine issue of material fact as to the second element of Blue Water’s conversion claim, i.e., whether appellees were authorized to remove and detain Blue Water’s donation bins from other people’s properties.

{¶20} Judgment reversed and case remanded for further proceedings.

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

¹ According to the protocol, however, Old Mills waited 90 days from the removal date before asking the property owner if it could place its own bins on their property. Levan explained that Old Mills wanted to give the property owner the impression that it was not seeking removal of other companies’ bins in order to replace them with their own. (Tr. 27.) In the meanwhile, Old Mills maintained records of all the locations where bins were removed in order to solicit those locations for their own donation bins after 90 days had passed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the common pleas 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.

EILEEN T. GALLAGHER, JUDGE

EILEEN A. GALLAGHER, P.J., and
ANITA LASTER MAYS, J., CONCUR