[Cite as *6750 BMS, L.L.C. v. Drentlau*, 2016-Ohio-1385.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103409

6750 BMS, L.L.C.

PLAINTIFF-APPELLANT

vs.

KRIS DRENTLAU

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Parma Municipal Court
Case No. 14CVF02549

BEFORE: Boyle, J., Jones, A.J., and E.A. Gallagher, J.

RELEASED AND JOURNALIZED: March 31, 2016

ATTORNEY FOR APPELLANT

Kenneth J. Fisher
Kenneth J. Fisher Co., L.P.A.
2100 Terminal Tower
50 Public Square
Cleveland, Ohio 44113-2204

ATTORNEYS FOR APPELLEE

Matthew R. Kisil
Kisil Law Co., L.P.A.
7155 Pearl Road, Suite 202
Middleburgh Heights, Ohio 44130

Leigh S. Prugh
1395 W. Melrose Drive
Westlake, Ohio 44145-1077

MARY J. BOYLE, J.:

{¶1} Plaintiff-appellant, 6750 BMS, L.L.C. ("BMS"), appeals from the trial court's judgment granting summary judgment to defendant-appellee, Kris Drentlau. BMS raises two assignments of error for our review:

> 1. The Parma Municipal Court erred in denying appellant's motion to declare requests for admission propounded upon [appellee] Kris Drentlau admitted in accordance with Civ.R. 36(A)(1).
>
> 2. The Parma Municipal Court erred in granting appellee's motion for summary judgment where genuine issues of material fact exist.

{¶2} Finding no merit to BMS's appeal, we affirm the judgment of the trial court.

I. Procedural History and Factual Background

{¶3} In August 2014, BMS brought a complaint against Drentlau alleging one count of conversion. According to the complaint, BMS owns a self-storage unit located at 6750 Brookpark Road. In accordance with R.C. 5322.03, BMS advertised a sealed-bid auction for personal property contained in several of the storage units. Drentlau was the highest bidder for one of the units, which contained a Harley Davidson motorcycle. BMS contends that Drentlau had actual or constructive notice that the motorcycle was not included in the auction because the advertisement was limited to "household furniture, appliances, electronics, boxes of unknowns, clothing, and toys." BMS claims that Drentlau unlawfully removed and has retained possession of the motorcycle. BMS sent a formal letter to Drentlau requesting that he return the motorcycle. BMS filed this complaint after Drentlau did not respond to BMS's letter.

{¶4} Drentlau answered BMS's complaint, denying the conversion claim and asserting several affirmative defenses.

{¶5} On January 27, 2015, BMS submitted discovery requests to Drentlau, including its first set of interrogatories, requests for production of documents, and requests for admissions. On March 2, 2015, BMS filed a motion to declare its requests for admissions propounded upon Drentlau admitted in accordance with Civ.R. 36(A)(1).

{¶6} On March 4, 2015, Drentlau responded to BMS's motion to deem the admissions admitted, asserting that it did respond to BMS's request for admissions that same day (March 4) at an already scheduled pretrial conference. In his response, Drentlau asserted that although he was untimely in responding to BMS's request for admissions, he was only seven days late under Civ.R. 36. Drentlau further explained that accepting his late admissions would aid in deciding the case on its merits, and that BMS was not prejudiced by his delay.

{¶7} The trial court denied BMS's motion to declare its request for admissions admitted in April 2015.

{¶8} In May 2015, BMS moved for summary judgment, which the trial court denied. In July 2015, Drentlau moved for summary judgment, which the trial court granted. It is from this judgment that BMS appeals.

II. Civ.R. 36

{¶9} In its first assignment of error, BMS argues that the trial court erred when it denied its motion to declare its requests for admissions propounded upon Drentlau admitted pursuant to Civ.R. 36(A)(1).

{¶10} Civ.R. 36 contains procedures governing requests for admissions. Civ.R. 36(A) allows parties to serve written requests for admission "of the truth of any matters within the scope of Civ.R. 26(B) set forth in the request, that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request."

{¶11} Civ.R. 36(A)(1) provides:

> The matter is admitted unless, within a period designated in the request, not less than twenty-eight days after service of a printed copy of the request 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 the party's attorney.

{¶12} Civ.R. 36(B) provides:

> Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Civ.R. 16 governing modification of a pretrial order, the 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 the party in maintaining his action or defense on the merits.

{¶13} Because the rule is self-enforcing, the trial court has no discretion whether to deem the matters admitted. *Union Sav. Bank v. Litteral*, 2d Dist. Montgomery No. 25106, 2012-Ohio-5108, ¶ 12, citing *Ohio Bell Tel. Co. v. C-5 Constr., Inc.*, 2d Dist.

Montgomery No. 23792, 2010-Ohio-4762. If the requests are not answered by the deadline, they are automatically admitted, and the trial court must recognize them unless and until a party moves to have the admissions withdrawn. *Id*.

{¶14} In *Cleveland Trust Co. v. Willis*, 20 Ohio St.3d 66, 67, 485 N.E.2d 1052 (1985), the Supreme Court explained:

> The court may permit the withdrawal if it will aid in presenting the merits of the case and the party who obtained the admission fails to satisfy the court that withdrawal will prejudice him in maintaining his action. *Balson v. Dodds* (1980), 62 Ohio St. 2d 287 [405 N.E.2d 293], paragraph two of the syllabus. 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.

{¶15} It is within the trial court's discretion whether it will allow the withdrawal of admissions. *Szigeti v. Loss Realty Group*, 6th Dist. Lucas No. L-03-1160, 2004-Ohio-1339, ¶ 19. Further, whether to accept the filing of late responses to requests for admissions is also within the trial court's discretion. *Sandler v. Gossick*, 87 Ohio App.3d 372, 378, 622 N.E.2d 389 (8th Dist.1993), citing *Aetna Cas. & Sur. Co. v. Roland*, 47 Ohio App.3d 93, 547 N.E.2d 379 (10th Dist.1988).

{¶16} Drentlau did not respond to BMS's request for admissions by the 28-day deadline. Thus, the matters within BMS's requests for admissions were automatically admitted. We further recognize that Drentlau did not move to amend or withdraw the admissions pursuant to Civ.R. 36(B). The Ohio Supreme Court has recognized, however, that Civ.R. 36(B) neither requires a written motion to be filed nor specifies when such motion must be filed. *Balson* at fn. 2 ("the trial court could reasonably find

that, by contesting the truth of the Civ.R. 36(A) admissions for the purposes of summary judgment, appellee satisfied the requirement of Civ.R. 36(B) that she move the trial court to withdraw or amend these admissions"); *see also Cheek v. Granger Trucking*, 8th Dist. Cuyahoga No. 78805, 2001 Ohio App. LEXIS 4905 (Nov. 1, 2001) (no formal motion by party responding to request for admissions is needed so long as the court could find that the party was contesting the truth of the admissions). Thus, "the rule leaves such matters to the discretion of the trial court." *Balson* at *id.*

{¶17} We further note that BMS did not follow the proper procedure either because it moved to have the requests for admissions admitted after Drentlau did not timely respond. Again, BMS did not need to file such a motion because Civ.R. 36(A)(1) is self-enforcing. *Litteral*, 2d Dist. Montgomery No. 25106, 2012-Ohio-5108, at ¶ 12. By filing a response to BMS's motion to declare admissions admitted, as well as simultaneously responding to BMS's request for admissions — denying some admissions and answering that he lacked sufficient knowledge on the others — Drentlau essentially contested the truth of the matters admitted. Thus, the trial court could construe Drentlau's response as a motion to withdraw the admissions. As such, the trial court did not abuse its discretion in accepting Drentlau's late response and denying BMS's motion to deem the matters admitted. Essentially, by doing so, the trial court withdrew the admissions.

{¶18} We emphasize that the manner and specifics with which a trial court directs and controls discovery in its civil cases rests within the sound discretion of the trial

court. *State ex rel. V Cos. v. Marshall Cty. Aud.*, 81 Ohio St.3d 467, 469, 692 N.E.2d 198 (1998). Unless the trial court has abused its discretion, an appellate court will not disturb a trial court's decision in this regard. Under the circumstances in this case, we cannot say the trial court abused its discretion.

{¶19} BMS argues that Drentlau did not establish that his failure to timely respond was the result of "compelling circumstances." BMS cites to *Cleveland Trust Co.*, 20 Ohio St.3d 66, 485 N.E.2d 1052, in support of its argument that Drentlau was required to show "compelling circumstances" for his failure to timely respond. BMS is referring to the following paragraph in *Cleveland Trust*:

> Civ.R. 36 requires that when requests for admissions are filed by a party, the opposing party must timely respond either by objection or answer. Failure to respond at all to the requests will result in the requests becoming admissions. Under compelling circumstances, the court may allow untimely replies to avoid the admissions.

Id. at 67.

{¶20} The Supreme Court did not explain what it meant by "compelling circumstances." But it later explained that a court "may permit the withdrawal" of the admissions "if it will aid in presenting the merits of the case and the party who obtained the admission fails to satisfy the court that withdrawal will prejudice him in maintaining his action." *Id.* at 76, citing *Balson*, 62 Ohio St.2d 287, 405 N.E.2d 293, at paragraph two of the syllabus. Thus, the Supreme Court made clear that if the withdrawal of admissions will "aid in presenting the merits of the case" and the other party has not shown that it was prejudiced by the withdrawal, compelling circumstances exist. In

Cleveland Trust, the Supreme Court affirmed the trial court's decision denying the untimely party's request to withdraw the admissions when the party filed its motion to withdraw on the first day of trial. *Id.* at 68.

{¶21} BMS cites to four cases by this district: *Cheek*, 8th Dist. Cuyahoga No. 78805, 2001 Ohio App. LEXIS 4905; *Sandler*, 87 Ohio App.3d 372, 378, 622 N.E.2d 389; *Illum. Co. v. Riverside Raquet Club, Ltd.*, 165 Ohio App.3d 153, 2005-Ohio-5548, 845 N.E.2d 526 (8th Dist.); and *Garrick v. Greater Cleveland Regional Transit Auth.*, 8th Dist. Cuyahoga No. 99547, 2013-Ohio-5029, asserting that this court has required a party who files a motion to withdraw admissions to show compelling reasons as to why it did not timely respond to the request for admissions. We disagree that these cases stand for that absolute proposition. Moreover, we find it most significant that in all of these cases, this court *affirmed* the trial court's *discretionary* decision to either withdraw the admissions or not.

{¶22} In this case, Drentlau argued in his response to BMS's motion to deem the admissions admitted that denying BMS's motion would aid in deciding the merits of the case and that BMS was not prejudiced by such withdrawal. We agree. BMS cannot seriously maintain that it had already relied on Drentlau's admissions to its prejudice. The trial court was still scheduling regular pretrial conferences; in fact, there was a pretrial conference scheduled for March 4, 2015 (Drentlau's responses were due by February 25, 2015). And as of that time, there was no trial date set. Thus, the trial court did not abuse its discretion when it allowed Drentlau to submit late answers to

BMS's request for admissions, essentially withdrawing the admissions per Drentlau's request.

{¶23} Accordingly, we overrule BMS's first assignment of error.

III. Summary Judgment

{¶24} In its second assignment of error, BMS argues that genuine issues of material fact remain as to whether Drentlau was a purchaser in good faith under R.C. 5322.03(I)(2).

{¶25} An appellate court reviews a trial court's decision to grant summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). De novo review means that this court "uses the same standard that the trial court should have used, and we examine the evidence to determine if as a matter of law no genuine issues exist for trial." *Brewer v. Cleveland Bd. of Edn.*, 122 Ohio App.3d 378, 383, 701 N.E.2d 1023 (8th Dist.1997), citing *Dupler v. Mansfield Journal*, 64 Ohio St.2d 116, 119-120, 413 N.E.2d 1187 (1980). In other words, we review the trial court's decision without according the trial court any deference. *Brown v. Scioto Cty. Bd. of Commrs.*, 87 Ohio App.3d 704, 711, 622 N.E.2d 1153 (4th Dist.1993).

{¶26} Under Civ.R. 56(C), summary judgment is properly granted when (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. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46

(1976). If the moving party fails to satisfy its initial burden, "the motion for summary judgment must be denied." *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). But if the moving party satisfies "its initial burden, the nonmoving party then has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party." *Id.*

{¶27} Drentlau argues that he is entitled to judgment as a matter of law because BMS cannot succeed on its conversion claim. Drentlau contends that BMS cannot demonstrate the first element of conversion, i.e., ownership of or right to possess the motorcycle.

{¶28} The elements of a conversion claim include (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. If the defendant came into possession of the property lawfully, the plaintiff must prove two additional elements to establish conversion: (1) that the plaintiff demanded the return of the property after the defendant exercised dominion or control over the property; and (2) that the defendant refused to deliver the property to the plaintiff. *R&S Distrib., Inc. v. Hartge Smith Nonwovens, L.L.C.*, 1st Dist. Hamilton No. C-090100, 2010-Ohio-3992, ¶ 23. The measure of damages in a conversion action is the value of the converted

property at the time it was converted. *Tabar v. Charlie's Towing Serv.*, 97 Ohio App.3d 423, 427-428, 646 N.E.2d 1132 (8th Dist.1994).

{¶29} It is undisputed that BMS did not own the motorcycle that was in the storage unit. BMS argued in its opposition brief to Drentlau's summary judgment motion that it possessed a right to the motorcycle under R.C. 5322.02(A) because as the owner of the self-service storage facility, it held a lien against the occupant (renter) on the property stored in the unit, including the motorcycle. BMS appears to have abandoned this argument on appeal. Nonetheless, in deciding whether the trial court properly granted summary judgment to Drentlau, we will address this question, i.e., whether BMS had the right to possess the motorcycle by virtue of owning the self-service storage facility.

{¶30} R.C. 5322.02 provides:

> (A) The owner of a self-service storage facility has a lien against the occupant on the personal property stored pursuant to a rental agreement in any storage space at the self-service storage facility, or on the proceeds of the personal property subject to the defaulting occupant's rental agreement in the owner's possession, for rent, labor, or other charges in relation to the personal property that are specified in the rental agreement and that have become due and for expenses necessary for the preservation of the personal property or expenses reasonably incurred in the sale or other disposition of the personal property pursuant to law.

{¶31} "Personal property" under R.C. Chapter 5322 is defined as "money and every animate or inanimate tangible thing that is the subject of ownership, except anything forming part of a parcel of real estate, * * * and except anything that is an agricultural commodity[.]" R.C. 5322.01(E).

{¶32} R.C. 5322.02(A) further states that

> [t]he owner's lien provided for in this section is also effective against the following persons:
>
> (1) A person who has an unfiled security interest in the personal property, except that the owner's lien is not effective against a person who has a valid security interest in a motor vehicle or a valid security interest in a watercraft, whether or not the security interest in the motor vehicle or watercraft is filed;
>
> (2) A person who meets both of the following requirements:
>
> (a) The person has a legal interest in the personal property, a filed security interest in the personal property, or a valid security interest in the personal property that is a motor vehicle.
>
> (b) The person consents in writing to the storage of the personal property.

{¶33} It is clear that BMS had a lien against the occupant on the motorcycle because it was personal property contained within the storage unit (motorcycle is defined as a motor vehicle in several sections of the Ohio Revised Code). *See Horsely v. United Ohio Ins. Co.*, 58 Ohio St.3d 44, 567 N.E.2d 1004 (1991) (motorcycle is indeed a motor vehicle under R.C. 4501.01(B) and many Ohio appellate court decisions interpret it as such). Whether the lien was effective against persons who may have a valid security interest in the motorcycle is unknown, however, because BMS did not conduct a title search of the motorcycle before the sale.

{¶34} Even assuming, however, that BMS's lien was effective under R.C. 5322.02 against all persons who may have a valid security interest in the motorcycle, BMS did not follow the proper procedures under R.C. 5322.03 to properly enforce the lien. R.C. 5322.03 states that "[a]n owner's lien created by [R.C. 5322.02(A)] for a

claim that has become due *may be enforced only* as follows[.]" (Emphasis added.) The statute then sets forth an exhaustive list of notification, advertisement, and sale procedures that an owner of a self-service storage facility must follow before it can enforce its owner's lien against the occupant.

{¶35} Significant to this appeal is the procedure set forth in R.C. 5322.03(K), which provides:

> (1) If the property upon which the lien created under division (A) of this section is claimed is a motor vehicle or a watercraft, the owner shall have the motor vehicle or watercraft towed from the premises if any of the following circumstances applies:
>
> (a) The notice was delivered or sent pursuant to division (B) of this section to all persons holding a lien on the motor vehicle or watercraft, and thirty days have elapsed since the notice was delivered or sent without a response from any of those persons.
>
> (b) Rent and other charges related to the property remain unpaid or unsatisfied by the occupant for sixty days, and no lien holders have been identified.
>
> (c) The owner is planning to hold a sale at auction of the personal property that was stored in the self-service storage unit with that motor vehicle or watercraft, in which case the motor vehicle or watercraft shall be towed prior to the auction.

{¶36} BMS admitted that it did not identify any lienholders. Further, it is undisputed that BMS did not have the motorcycle towed from the unit prior to the auction. Nor did BMS follow all of the notification procedures in R.C. 5322.03, including under R.C. 5322.03(C)(3) (the notice did not include a description of the property that would be sold at the auction) and R.C. 5322.03(C)(6) (the notice includes a statement as to what would happen to the property if no one purchased it at the sale).

{¶37} Thus, because BMS did not follow the procedures set forth in R.C. 5322.03, it could not enforce its owner's lien against the occupant of the unit. If it could not enforce its owner's lien against the occupant, then it does not have a right to possess the motorcycle for purposes of the first element of a conversion claim.

{¶38} BMS argues that Drentlau was not a good faith purchaser under R.C. 5322.03(I)(2). Specifically, BMS contends that Drentlau, along with all other potential purchasers, were told before the auction that the motorcycle was not included in the sale. BMS states that the potential purchasers were also told that the motorcycle would be up for auction once it followed all proper legal procedures in notifying the lienholder of the motorcycle.

{¶39} In this case, Drentlau submitted the highest bid for the contents of the storage unit that contained the motorcycle. In his affidavit, Drentlau said that he received notice from BMS that he was the highest bidder and that he had 24 hours to remove the items from the storage unit. Drentlau removed all of the items from the unit, including the motorcycle. Drentlau asserts that while at the auction, he never heard mention that "certain items or the motorcycle were not included in the storage unit." Drentlau further states that when he was notified of his winning bid, he was not told that the motorcycle was excluded from the items that he was supposed to remove from the unit.

{¶40} R.C. 5322.03(I)(2) provides:

> A purchaser at auction in good faith * * * of the personal property sold to satisfy an owner's lien created by division (A) of section 5322.02 of the

> Revised Code takes the property free and clear of any rights of persons against whom the lien was valid, or any persons who had an interest in, or who held, any other lien against the property, despite noncompliance by the owner with the requirements of this section.

{¶41} R.C. 1301.201(B)(20) defines "good faith," as "honesty in fact and the observance of reasonable commercial standards of fair dealing." R.C. 1305.01(A)(7) defines "good faith" as "honesty in fact in the conduct or transaction concerned."

{¶42} The question, however, of whether Drentlau was a good faith purchaser would be relevant if Drentlau was sued by "persons against whom the lien was valid, or any persons who had an interest in, or who held, any other lien against the property." It has no bearing on the conversion claim in the present case.

{¶43} Accordingly, we find no merit to BMS's second assignment of error because the trial court properly granted summary judgment as a matter of law to Drentlau because no genuine issues of material fact remain.

{¶44} BMS's second assignment of error is overruled.

{¶45} 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

LARRY A. JONES, SR., A.J., and
EILEEN A. GALLAGHER, J., CONCUR