[Cite as *Resch v. Roy*, 2009-Ohio-2458.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

TIM RESCH	C. A. No. 24481
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
MICHAEL ROY	BARBERTON MUNICIPAL COURT COUNTY OF SUMMIT, OHIO
Appellee	CASE No. 08 CVF 1563

DECISION AND JOURNAL ENTRY

Dated: May 27, 2009

CARR, Judge.

{¶1} Appellant, Tim Resch, appeals the judgment of the Barberton Municipal Court, which granted Appellee, Michael Roy's, motion to dismiss. This Court reverses.

I.

{¶2} On June 24, 2008, Mr. Resch filed a complaint against Mr. Roy for breach of (oral) contract and fraud. On July 21, 2008, Mr. Roy filed a motion to strike and/or stay Mr. Resch's request for admissions and request for production of documents, as well as a motion for a protective order. The same day, Mr. Roy filed a separate motion to dismiss pursuant to Civ.R. 12(B)(6). Mr. Roy appended four exhibits, including his affidavit, to his motion to dismiss. As grounds for his motion to dismiss, Mr. Roy argued that: (1) Mr. Resch has sued the wrong party, (2) the goods were sold "as is," thereby rendering meritless the claim that the goods did not work, and (3) venue is improper.

{¶3} On October 2, 2008, Mr. Resch filed a reply in opposition to the motion to dismiss, arguing, first, that the trial court could not consider anything outside of the pleadings in consideration of a motion to dismiss pursuant to Civ.R. 12(B)(6); second, that the trial court must give notice to the parties if it intended to convert the motion to dismiss into a motion for summary judgment; and, third, that in the event of conversion the documents attached to the motion to dismiss did not constitute proper evidentiary materials pursuant to Civ.R. 56(C). In the same document, Mr. Resch replied in opposition to the motion to strike and/or stay the discovery requests and to the motion for a protective order. Still in the same document, he moved for sanctions. The trial court scheduled a hearing on the motion to dismiss.

{¶4} On October 8, 2008, the trial court issued a journal entry granting the motion to dismiss on one of the grounds. Mr. Resch filed a timely appeal, raising one assignment of error for review.

ASSIGNMENT OF ERROR

> "THE TRIAL COURT ERRED IN GRANTING A DISMISSAL OF THE COMPLAINT UPON APPELLEE'S MOTION MADE UNDER [CIV.R.] 12(B)(6) BECAUSE THE TRIAL COURT LOOKED AT MATERIALS OUTSIDE THE PLEADINGS IN MAKING ITS RULING."

{¶5} Mr. Resch argues that the trial court erred in granting Mr. Roy's motion to dismiss pursuant to Civ.R. 12(B)(6) because it improperly considered evidence outside the pleadings. This Court agrees.

{¶6} Civ.R. 12(B)(6) permits a defendant to assert the defense that the complaint fails to state a claim upon which relief can be granted. The rule expressly states:

> "When a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleading and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. Provided, however, that the court shall consider only such matters outside the pleadings as specifically enumerated in

> Rule 56. All parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56."

{¶7} Civ.R. 56(C) allows the trial court to consider only "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any" in determining whether there exist no genuine issues of material fact so that the moving party is entitled to judgment as a matter of law. The rule expressly proscribes: "No evidence or stipulation may be considered except as stated in this rule." Id.

{¶8} Attached to Mr. Roy's motion to dismiss were the following exhibits: (1) a copy of a purported partial email to "Mike" from eBay Customer Support regarding problems he was having with the buyer of item number 120109845486; (2) a copy of a document purportedly obtained through an internet search of the Florida Department of State, Division of Corporations, which concludes "Note: This is not official record. See documents if question or conflict[;]" (3) a copy of an affidavit executed by Michael Roy; and (4) a copy of a purported letter from Mr. Resch's counsel to Mr. Roy's counsel.

{¶9} In its October 8, 2008 order, the trial court denied the motion to dismiss for lack of venue for the reason that the transaction was conducted on eBay and the goods were advertised nationwide. The complaint makes no mention of how the sales transaction was conducted. Accordingly, the trial court relied on the first exhibit attached to the motion to dismiss to reach its conclusion. The trial court further denied the motion to dismiss as premised on a lack of merit of the fraudulent sale claim upon finding that "[t]he issue of the sale is a factual issue[.]" Finally, the trial court sustained the motion to dismiss the complaint for having been filed against an improper party upon finding that the goods had been listed for sale on eBay by American Surplus & Repair, Inc., and that Mr. Roy was not involved in the transaction in a personal capacity. Accordingly, the trial court relied on the second exhibit, which listed Mr. Roy

as the president of American Surplus & Repair, Inc., and the third exhibit, Mr. Roy's affidavit in which he averred that his involvement in the transaction with Mr. Resch was on behalf of American Surplus & Repair, Inc. in his capacity as a corporate officer.

{¶10} The Ohio Supreme Court, in applying and construing Civ.R. 12(B) and 56(C), held that a trial court has an obligation to notify all parties, "at least fourteen days before the time fixed for hearing," that the court has converted a motion to dismiss for failure to state a claim into a motion for summary judgment. *Petrey v. Simon* (1983), 4 Ohio St.3d 154, paragraph two of the syllabus. The high court reasoned: "The risk of judgment on the merits is a severe consequence. Parties deserve a reasonable opportunity to demonstrate whether a genuine issue of fact exists." Id. at 156.

{¶11} Mr. Roy admits that the trial court did not formally notify the parties that it was converting the motion to dismiss into a motion for summary judgment. He argues that Mr. Resch must have been aware that Civ.R. 12(B) mandates that a trial court treat a motion to dismiss which presents matters outside the record as a motion for summary judgment. Mr. Resch indicated his clear understanding of the rule in his opposition to the motion to dismiss, further noting that the trial court must give notice of its intent to convert the motion and, moreover, noting that Mr. Roy's attachments did not constitute the types of evidentiary matters which the trial court was permitted to consider in determining whether to grant a motion for summary judgment.

{¶12} In this case, the trial court failed to notify the parties as required that it had converted the motion to dismiss into a motion for summary judgment. The only notice issued by the trial court was an order, scheduling a hearing expressly on the motion to dismiss. Furthermore, the trial court expressly granted Mr. Roy's "motion to dismiss" effectively as

though it was a motion for summary judgment without labeling it as such. Accordingly, the trial court erred by considering matters outside the pleadings in its ruling on Mr. Roy's motion to dismiss pursuant to Civ.R. 12(B)(6).

{¶13} Mr. Roy further argues that the trial court's failure to provide notice of its conversion of the motion to dismiss into a motion for summary judgment was harmless error. Civ.R. 61 provides, in relevant part, that no error or defect in a ruling is ground for disturbing a judgment unless that would be inconsistent with substantial justice. In fact, any errors or defects which do not affect a substantial right of the parties must be disregarded. Id. Mr. Roy cites *State ex rel. The V Cos. v. Marshall* (1998), 81 Ohio St.3d 467, 471, for the proposition that the trial court's failure to notify the parties of its conversion may be excused as harmless error. The *Marshall* court, however, concluded that the lower court's failure to notify was harmless error on the grounds of invited error and the fact that the opposing party filed its own motion for summary judgment, which was ultimately dispositive and presented Marshall the opportunity to respond with appropriate Civ.R. 56(C) evidence. Id.

{¶14} In this case, Mr. Resch did not invite the error. It was Mr. Roy who presented matters outside the pleadings in support of his motion to dismiss. Furthermore, Mr. Resch objected to the presentation of such matters by Mr. Roy, asserted that the trial court must give notice of any intent to convert the motion, and further argued that Mr. Roy's attachments did not comport with the limitations on evidentiary materials in Civ.R. 56(C). Mr. Roy correctly asserts that Mr. Resch attached his affidavit to his October 2, 2008 replies and motion for sanctions. Mr. Resch clearly articulated, however, that he was attaching his affidavit in support of his motion for sanctions. In his opposition to the motion to dismiss, he demanded notice of the trial court's intent to convert the motion to dismiss into a motion for summary judgment "so we may

file an affidavit as in a summary judgment motion." Accordingly, Mr. Roy's argument that Mr. Resch invited the trial court's error is not well taken.

{¶15} Furthermore, unlike in *Marshall*, there was no supplemental motion for summary judgment properly filed in this case. Accordingly, Mr. Resch had no notice and was deprived of the substantial right to present evidence in support of his allegations in an attempt to avoid the risk of the severe consequence of judgment on the merits. See *Petrey*, 4 Ohio St.3d at 156.

{¶16} The trial court erred by considering Mr. Roy's motion to dismiss pursuant to Civ.R. 12(B)(6) as though it were a motion for summary judgment without notifying the parties of its intent to convert the motion and according them the opportunity to present proper evidence as delineated in Civ.R. 56(C). Mr. Resch's assignment of error is sustained.

III.

{¶17} Mr. Resch's sole assignment of error is sustained. The judgment of the Barberton Municipal Court is reversed, and the cause remanded for further proceedings consistent with this opinion.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Barberton Municipal Court, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

DONNA J. CARR
FOR THE COURT

WHITMORE, J.
DICKINSON, P. J.
CONCUR

APPEARANCES:

WILLIAM LOVE, II, Attorney at Law, for Appellant.

IAN H. RODIER, Attorney at Law, for Appellee.