

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

JAMES R. EUBANK

C. A. No. 09CA009575

Appellant

v.

ELLEN L. MARDOIAN

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 08CV157974

Appellee

DECISION AND JOURNAL ENTRY

Dated: February 8, 2010

CARR, Judge.

{¶1} Appellant, James Eubank, appeals the judgment of the Lorain County Court of Common Pleas, which granted appellee Ellen Mardoian’s motion to dismiss. This Court affirms.

I.

{¶2} On August 5, 2008, Eubank filed a complaint against Mardoian and the estates of his parents, Russell and Edna Eubank (collectively “Mardoian”). Although he does not label his claims, he appears to have alleged elements of conversion, fraud, and/or breach of contract. Moreover, he speaks of embezzlement in subsequent filings with the court. Mardoian moved for leave to plead, and the trial court granted an extension until February 9, 2009. On January 12, 2009, Eubank filed a motion for default judgment which the trial court denied because it had granted Mardoian an extension of time in which to answer or otherwise file a responsive pleading.

{¶3} On February 6, 2009, Eubank filed an amended complaint. On February 9, 2009, Mardoian filed a motion to dismiss the original complaint for failure to state a claim pursuant to Civ.R. 12(B)(6) and for lack of jurisdiction pursuant to Civ.R. 12(B)(1), or in the alternative, a motion for a more definite statement. Eubank filed a memorandum in opposition to the motion to dismiss, in part arguing that Mardoian did not respond to the amended complaint.

{¶4} On March 4, 2009, Eubank filed a motion for summary judgment. On March 6, 2009, Mardoian filed a motion for leave to file an amended motion to dismiss instante. She appended the affidavit of her attorney who averred that the defendants had not been served with the amended complaint and that counsel only obtained a copy of the amended complaint from the clerk's office. The trial court granted Mardoian leave to file the amended motion to dismiss.

{¶5} The trial court directed Mardoian to respond to Eubank's motion for summary judgment by March 25, 2009. Mardoian moved to extend time in which to respond until after the completion of discovery. The trial court granted the motion for extension of time.

{¶6} On April 6, 2009, the trial court issued a journal entry granting Mardoian's amended motion to dismiss for failure to state a claim pursuant to Civ.R. 12(B)(6). The trial court further concluded that Eubank's pending motions were, therefore, rendered moot. Eubank filed a timely appeal, raising one assignment of error for review.

II.

ASSIGNMENT OF ERROR

“THE TRIAL COURT ERRED AS A MATTER OF LAW DENYING APPELLANT THE RIGHT TO DUE PROCESS AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS U.S.C.A. AND ARTICLE I OF THE OHIO CONSTITUTION WHEN IT ABUSED ITS DISCRETION BY DISMISSING APPELLANT'S COMPLAINT WITHOUT EVEN GIVING APPELLANT THE OPPORTUNITY TO [] PRESENT EVIDENCE IN SUPPORT OF HIS COMPLAINT.”

{¶7} Eubank argues that the trial court erred by granting Mardoian's motion to dismiss for failure to state a claim pursuant to Civ.R. 12(B)(6) because it considered evidence or materials outside the complaint. This Court disagrees.

{¶8} As a preliminary matter, this Court notes that Mardoian moved to dismiss Eubank's appeal for failure to comply with the requirements of App.R. 12 and 16. The motion is not well taken and is denied. Accordingly, this Court will consider the merits of Eubank's appeal.

{¶9} Eubank does not argue that the trial court erred by granting Mardoian's motion to dismiss on substantive grounds. Accordingly, this Court does not review the propriety of the judgment on those grounds. Rather, Eubank argues that the trial court erred by granting the motion to dismiss upon consideration of evidence and materials outside of the complaint without converting the motion to dismiss into a motion for summary judgment and affording the parties the opportunity to present pertinent materials in accordance with Civ.R. 56.

{¶10} Civ.R. 12(B) provides in pertinent part:

"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 are 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."

{¶11} Eubank asserts that the trial court considered "the information and facts from a previous sworn affidavit used in probate court in Arizona, and appended to Appellee Mardoian's motion to dismiss." There is an affidavit appended to Mardoian's amended motion to dismiss. The affidavit does not address any matters in support of the substantive arguments in the motion to dismiss. Rather, the affidavit of counsel addresses the argument in support of Mardoian's

motion that she be allowed to file the amended motion to dismiss instanter because Eubank failed to serve her with a copy of the amended complaint. Accordingly, the trial court did not consider any evidence or materials outside the complaint when ruling on Mardoian's motion to dismiss for failure to state a claim pursuant to Civ.R. 12(B)(6). Because the motion to dismiss did not contain materials outside the complaint going to the merits of the motion, the trial court was not mandated to treat the motion as a motion for summary judgment or afford the parties the opportunity to present pertinent evidence in compliance with Civ.R. 56.

{¶12} Eubank argues that, because Mardoian had requested an extension of time to respond to his motion for summary judgment, she somehow forfeited her ability to pursue dismissal of the complaint pursuant to Civ.R. 12(B)(6). Eubank cites no authority for his argument that a plaintiff's motion for summary judgment supplants a defendant's motion to dismiss pursuant to Civ.R. 12(B)(6), properly filed prior to answering the complaint. The trial court's granting of an extension of time in which Mardoian could respond to Eubank's motion for summary judgment merely allowed the trial court to manage its docket in the event it denied Mardoian's motion to dismiss. It did not remove the motion to dismiss from the court's consideration. Eubank's assignment of error is overruled.

III.

{¶13} Eubank's sole assignment of error is overruled. The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, 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 Appellant.

DONNA J. CARR
FOR THE COURT

DICKINSON, P. J.
BELFANCE, J.
CONCUR

APPEARANCES:

JAMES R. EUBANK, pro se, Appellant.

ROBERT B. WELTMAN, HENRY J. GEHA, III, and MATTHEW BURG, Attorneys at Law,
for Appellee.