[Cite as *Beck Energy Corp. v. Zurz*, 2015-Ohio-1626.]

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

BECK ENERGY CORP.	C.A. No. 27393
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
RICHARD ZURZ, JR., et al.	
Appellees	CASE No. CV 2013-10-5068

DECISION AND JOURNAL ENTRY

Dated: April 29, 2015

CANNON, Judge.

{¶1} Appellant, Beck Energy Corporation, appeals the May 8, 2014 judgment of the Summit County Court of Common Pleas granting summary judgment in favor of appellees, Attorneys James Peters, Richard Zurz, and Mark Ropchock, and their respective law firms, Slater & Zurz, LLP, Roetzel and Andress, LPA, and Peters Law Office Co., LPA. Based on the following, the decision of the trial court is hereby affirmed.

I.

{¶2} In 2012, Beck filed a complaint, assigned case No. CV 2012 01 0275, against Attorneys James Peters, Richard Zurz and Mark Ropchock and their respective law firms, Slater & Zurz, LLP, Roetzel and Andress, LPA, and Peters Law Office Co., LPA. These defendants had previously filed, on behalf of certain clients, a class action suit against Beck in Monroe County, Ohio, seeking a judicial determination as to the validity and enforceability of certain drilling leases between Beck and the members of the class, to wit: *Hupp, et al. v. Beck Energy*

Corporation, case No. 2011-345. In the 2012 complaint, Beck alleged tortious interference with contractual relations and defamation. The defendants moved for judgment on the pleadings, pursuant to Civ.R. 12(C). The trial judge converted that motion to a Civ.R. 56(C) motion for summary judgment. Before the trial court issued its judgment, Beck voluntarily dismissed the case.

{¶3} This appeal focuses on the re-filed complaint, assigned case No. CV 2013 10 5068, filed by appellant against the same aforementioned parties. In the re-filed complaint, appellant again alleged appellees engaged in tortious inference with contractual and business relations. Appellant also alleged civil conspiracy, defamation, and sought injunctive relief. The Ohio Supreme Court assigned the Honorable Virgil Sinclair, Jr., to preside over this matter.

{¶4} Appellees filed answers, and Appellees Zurz, Slater & Zurz, LLP, and Ropchock, filed a Civ.R. 12(C) motion for judgment on the pleadings. Appellees Peters and James Peters Law Offices subsequently filed a "Notice of Intent * * * to Adopt the Arguments Raised in the 12(C) Motion Filed on Behalf of Defendants Zurz and Ropchock." After being granted two separate extensions, appellant filed a memorandum opposing the motions to dismiss. Appellees Zurz and Peters filed replies in support of the pending Civ.R. 12(C) motions.

{¶5} Thereafter, the trial court issued an order converting the motion for judgment on the pleadings to a motion for summary judgment. Judge Tammy O'Brien signed this order for Judge Lee Sinclair.

{¶6} Appellees then submitted additional affidavits in support of the converted motions for summary judgment, to wit: the affidavit of Appellee Zurz and the affidavit of Appellee Ropchock.

{¶7} On April 25, 2014, appellant filed a motion for continuance pursuant to Civ.R. 56(F).[1] Although this motion is not part of the record on appeal, it is clear appellees filed memoranda in opposition to the motion to continue.

{¶8} In its judgment, dated May 8, 2014, the trial court stated, in part:

> On October 24, 2013 one day short of a year later Beck filed the instant matter based on the same facts and involving the same parties. Again all defendants filed a motion for a Rule 12(C) dismissal. The current assigned Judge likewise converted the matter to a Rule 56 motion and allowed all parties to supplement the record. On the date all further responses were due, Beck Energy filed a Motion to Continue to complete unspecified discovery. At this point the matter between the two filings has been pending as open litigation approximately seventeen months. The conversion to a Rule 56 motion could hardly be a surprise since it is exactly what happened in the earlier litigation. The motion to continue is denied.
>
> As to the merits of the motions this Court certainly could properly dismiss this matter under Rule 12 pursuant to the briefs as a matter of law. It was out of an abundance of caution that the Court converted the matter to a Motion for Summary Judgment.

{¶9} The trial court granted appellees' motions for summary judgment.

II.

ASSIGNMENT OF ERROR I

> THE TRIAL COURT ERRED IN CONVERTING DEFENDANTS'/APPELLEES' MOTIONS FOR JUDGMENT ON THE PLEADINGS TO MOTIONS FOR SUMMARY JUDGMENT.

{¶10} Under its first assignment of error, appellant argues the trial court erred in converting appellees' motions for judgment on the pleadings into motions for summary judgment. First, it asserts the trial court lacked authority to convert the Civ.R. 12(C) motions into motions for summary judgment because there is no cognizable mechanism that exists under

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[1.] The docket does not reflect this motion for a continuance was filed in the trial court. The trial court, however, did rule on such motion in its May 8, 2014 judgment. The motion for continuance is not part of the appellate record pursuant to this court's August 28, 2014 entry.

the civil rules to accomplish this. It further argues the judgment was not signed by the judge assigned to the case and thus failed to meet the mandates of Civ.R. 58(A).

{¶11} In support of his first argument, appellant cites this court's opinion in *Business Data Sys. v. Figetakis*, 9th Dist. Summit No. 22783, 2006-Ohio-1036. In that case, the appellee sought judgment on the pleadings on a counterclaim pursuant to Civ.R. 12(C). *Id.* at ¶ 5. The trial court granted the motion, and the appellant sought review. *Id.* In reversing the decision of the trial court, we recognized that "Civ.R. 12(C) clearly confines the trial court's analysis to the material allegations set forth in the pleadings and any attachments thereto, which the trial court must accept as true." *Id.* at ¶ 10. Despite this, however, the trial court "clearly" considered documents that originated two years after the pleadings were filed. *Id.* at ¶ 9. This court noted that the civil rules do not provide a means for converting a motion under Civ.R. 12(C) to one for summary judgment, but had proper notice been given by the court to the parties of its intention to convert the motion, thereby allowing the parties to prepare for the summary judgment exercise, the error may have been harmless pursuant to Civ.R. 61. *Id.* at ¶ 15-17.

{¶12} Appellant's reliance on *Figetakis* to support his argument is misplaced as the facts of *Figetakis* are readily distinguishable from those in the present case. Unlike the trial court in *Figetakis*, the trial court in this case expressly converted the motion for judgment on the pleadings into a motion for summary judgment; the parties were advised of this conversion by way of the April 9, 2014 order. This allowed the parties the opportunity to submit Civ.R. 56 evidentiary material, unlike the parties in *Figetakis,* who were not notified of the conversion or given an opportunity to supplement the pleadings with evidentiary material. In fact, the parties were afforded 16 days to submit Civ.R. 56 appropriate filings. Additionally, appellant failed to object to the procedure employed by the court.

{¶13} Civ.R. 61 provides, in relevant part: "The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." Here, appellant was given notice of the court's decision to convert the motions; it was also given a fair and reasonable opportunity to respond to the converted motions. As we discern no violations of appellant's substantial rights, any error in converting the motions was harmless as a matter of law.

{¶14} Next, appellant asserts the judgment converting the motions was improper because it was not signed by the judge assigned to the case; instead, it was signed by a different judge "for" the assigned judge. Appellant contends the different judge lacked authority to act in the case and signing the order ran afoul of Civ.R. 58(A).

{¶15} Civ.R. 58(A)(1) provides, in relevant part:

> Subject to the provisions of Rule 54(B), upon a general verdict of a jury, upon a decision announced, or upon the determination of a periodic payment plan, the court shall promptly cause the judgment to be prepared and, the court having signed it, the clerk shall thereupon enter it upon the journal. A judgment is effective only when entered by the clerk upon the journal.

{¶16} Civ.R. 58 clearly requires the court's signature on a judgment. Appellant, however, is requesting this court to engraft into Civ.R. 58 the requirement that a judgment bear the *assigned judge's* signature. We decline to do so.

{¶17} Although there is no record explanation of why a different judge signed the entry at issue, there is nothing to suggest appellant suffered prejudice due to this circumstance. This court, in a criminal context, has previously addressed this issue. In *State v. Tolbert*, 9th Dist. Summit No. 24958, 2010-Ohio-2864, Judge Burnham Unruh, the assigned judge, presided over the defendant's sentencing hearing and imposed a valid sentence on record. *Id.* at ¶ 45, 47. A separate judge, however, the Honorable Thomas Teodosio, signed the entry "'for'" Judge

Burnham Unruh. *Id.* at ¶ 47. In rejecting the appellant's argument that Judge Teodosio's signature invalidated the appellant's sentence, this court concluded the act of signing the entry for the assigned judge was merely a "ministerial act" where the entry mirrors the sentence properly pronounced on record. *Id.* Because the appellant could not show he was prejudiced by the unusual circumstance of Judge Teodosio's signature appearing on the entry, this court determined he "'"[had] not contradicted the presumption of regularity accorded all judicial proceedings."'" *Id.*, quoting *State v. Robb*, 88 Ohio St.3d 59, 87 (2000), quoting *State v. Hawkins*, 74 Ohio St.3d 530, 531 (1996).

{¶18} In this case, the assigned judge was apparently unable to sign the entry in question. Still, appellant does not contest that the entry was signed by the court. In light of *Tolbert*, we therefore conclude that the different judge signing the entry converting the motions was a ministerial action effectuated on the assigned judge's behalf. Without some evidence that this act somehow affected a substantial right or otherwise compromised the fairness of the proceedings below, appellant, like the appellant in *Tolbert*, has failed to overcome the presumption of regularity accorded all judicial proceedings. *Tolbert* at ¶ 47*; see also Fisher v. Lake Erie Homes*, 7th Dist. Mahoning No. 96 CA 34, 1998 WL 336942, *2 (June 22, 1998) (when a different judge signed an order, the court observed, "[c]ertainly, it is commonplace for judges in the Courts of Common Pleas to assist each other with respect to signing judgment entries on simple motions when the judge assigned to the case is not available").

{¶19} Appellant's first assignment of error is without merit.

ASSIGNMENT OF ERROR II

THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S/APPELLANT'S CIV.R. 56(F) MOTION FOR CONTINUANCE.

{¶20} Under the second assignment of error, appellant claims the trial court abused its discretion when it denied appellant's Civ.R. 56(F) motion requesting an order continuing the proceedings.

{¶21} Civ.R. 56(F) permits a trial court to allow additional discovery before having to oppose a motion for summary judgment "[s]hould it appear from the affidavits of a party opposing the motion for summary judgment that the party cannot for sufficient reasons stated present by affidavit facts essential to justify the party's opposition." Civ.R. 56(F).

{¶22} Regarding the burden one must overcome when filing such a motion, this court has stated:

> "A party seeking a Civ.R. 56(F) continuance has the burden of stating a factual basis and reasons why the party cannot present sufficient documentary evidence without a continuance." (Internal quotations and citations omitted.) *McPherson v. Goodyear Tire & Rubber Co.*, 9th Dist. Summit No. 21499, 2003-Ohio-7190, at ¶ 15. "Further, the party must do more than assert a general request; it must demonstrate that a continuance is warranted." (Internal quotations and citations omitted.) *Id.* * * * "[T]he affidavit requirement is no mere trifle. To obtain a continuance under Civ.R. 56(F), a party must file an affidavit that sets forth why it is unable to present sufficient facts to rebut a motion for summary judgment." (Internal quotations and citations omitted.) *King v. Rubber City Arches, L.L.C.*, 9th Dist. Summit No. 25498, 2011-Ohio-2240, ¶ 35.

Linnen Co., L.P.A. v. Roubic, 9th Dist. Summit No. 26494, 2013-Ohio-1022, ¶ 29.

{¶23} Although the trial court denied the motion to continue in its May 8, 2014 judgment entry, the motion to continue is not part of the record on appeal. In an August 28, 2014 judgment entry, this court denied appellant's motion to supplement the record with said motion to continue. This court noted that "the parties disagree as to whether the document to be supplemented was part of the trial court record and omitted by error or accident. * * * Accordingly, the issue of supplementation should be submitted to and settled by the trial court."

{¶24} Because appellant's second assignment of error requires an examination of the motion to continue, which is not part of the record, we are unable to review the assigned error. This court must therefore presume the regularity of the lower court's proceedings.

{¶25} Appellant's second assignment of error is without merit.

ASSIGNMENT OF ERROR III

THE TRIAL COURT ERRED IN GRANTING DEFENDANTS'/APPELLEES' MOTIONS FOR SUMMARY JUDGMENT.

{¶26} Although appellant frames the third assignment of error as a challenge to the court's granting of the motions for summary judgment, he has failed to assert a substantive argument in support of the assigned error. Instead, appellant merely rehashes his arguments advanced under the first and second assignments of error, which we have found to be without merit. Additionally, appellant has failed to include any citations to authorities or the record upon which he relies to support these contentions. *See* App.R. 16(A)(7). It is not this court's province or duty to make additional arguments on behalf of appellant.

{¶27} Accordingly, appellant's third assignment of error is without merit.

III.

{¶28} Based on the opinion of this court, the judgment of the Summit County Court of Common Pleas is hereby 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 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(C). 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.

TIMOTHY P. CANNON
FOR THE COURT

CARR, P. J.
MOORE, J.
CONCUR.

(Cannon, J., of the Eleventh District Court of Appeals, sitting by assignment.)

APPEARANCES:

CRAIG T. CONLEY, Attorney at Law, for Appellant.

JASON D. WINTER, HOLLY MARIE WILSON, and JULIAN T. EMERSON, Attorneys at Law, for Appellees.

ORVILLE L. REED, III, Attorney at Law, for Appellees.