

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

MARK T. CLUCAS, SR.

C.A. No. 27433

Appellant

v.

RT. 80 EXPRESS, INC.

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV-2013-06-3150

Appellee

DECISION AND JOURNAL ENTRY

Dated: July 15, 2015

WHITMORE, Judge.

{¶1} Appellant, Mark T. Clucas, Sr., appeals from the judgment of the Summit County Court of Common Pleas, granting summary judgment to Appellee, Rt. 80 Express, Inc. This Court reverses.

I

{¶2} Rt. 80 Express, Inc. hired Clucas as a truck driver in February 2008. In July 2009, Clucas was involved in a traffic accident while driving a truck for Rt. 80 Express, Inc. Following the accident, Rt. 80 Express, Inc. required that Clucas submit to a drug test. The test results showed a concentration of 24 nanograms per milliliter of THCA, a marijuana metabolite, in his urine. Rt. 80 Express, Inc. terminated Clucas' employment on August 7, 2009 citing a positive drug test as the reason.

{¶3} Thereafter, Clucas filed the current suit against Rt. 80 Express, Inc. The caption of the complaint states that it is for “[w]rongful [t]ermination” and “[b]reach of [c]ontract.” In the body of the complaint, Clucas states:

This action is brought pursuant to the provisions of the Ohio Civil Rights Act, O.R.C. sec. 4112.02, and O.R.C. sec. 4112.99, as well as pursuant to common law principles of tort and public policy, including wrongful termination of employment pursuant to *Greeley vs. Miami Valley Maintenance Contrs.*, (1990), 49 Ohio St.3d 228, 531 N.E. 2d 981 and its progeny.

He further claims that Rt. 80 Express, Inc. wrongfully terminated him because they treated his drug test result as positive when it should have “been deemed as a negative test.” In addition, he alleges:

[Rt. 80 Express, Inc.] wrongfully terminated [Clucas’] employment in retaliation for his having asserted his rights to a full accounting of the wages, expenses and monies due to him from [Rt. 80 Express, Inc.] as a result of his employment with [Rt. 80 Express, Inc.] and as a result of [Rt. 80 Express, Inc.’s] breach of contract with [Clucas] regarding those wages, expenses and monies owed by them to [him].

{¶4} Rt. 80 Express, Inc. moved for summary judgment on Clucas’ “sole cause of action for ‘wrongful termination’ for ‘asserting his rights to a full accounting of all wages, expenses and monies owed to him by [Rt. 80 Express, Inc.] as a result of his employment with [Rt. 80 Express, Inc.]’” Rt. 80 Express, Inc. asserted that it terminated Clucas because it has a zero tolerance policy concerning alcohol and drugs, Clucas’ drug test was positive, and he admitted that he had used marijuana. Rt. 80 Express, Inc. further argued that Clucas had not presented “any case in which an Ohio court found that public policy created a right to an accounting for expenses.”

{¶5} Clucas filed a brief in opposition to the motion for summary judgment wherein he alleged, for the first time in this case, that Rt. 80 Express, Inc. did not follow its Alcohol and

Controlled Substance Testing Handbook (“Handbook”) before it terminated him. Clucas quotes the following provision from the Handbook:

RT. 80 EXPRESS, INC. is required by the alcohol and drug ruling to provide a driver with an opportunity for treatment. A driver must be referred to a substance abuse professional (SAP). RT. 80 EXPRESS, INC. however does not have to pay for rehabilitation or hold a job open for the driver after a violation has been made. How these issues are handled depends upon RT. 80 EXPRESS, INC.’s alcohol and drug policy.

Clucas argued that Rt. 80 Express, Inc. did not comply with this policy because it failed to refer him to a substance abuse professional. Clucas requested the trial court deny Rt. 80 Express, Inc.’s motion for summary judgment and “allow [Clucas] to proceed on his claims for wrongful termination and breach of contract.”

{¶6} The trial court granted summary judgment in favor of Rt. 80 Express, Inc. The court did not state that its judgment was limited to the claim for wrongful discharge in violation of public policy, nor did it include Civ.R. 54(B) language indicating it was deciding fewer than all of the claims in its entry.

{¶7} Clucas now appeals raising one assignment of error for our review.

II

Assignment of Error

THE TRIAL COURT ERRED IN GRANTING APPELLEES’ MOTION FOR SUMMARY JUDGMENT.

{¶8} In his sole assignment of error, Clucas argues that there were genuine issues of material fact precluding summary judgment, including whether Rt. 80 Express, Inc. had breached an alleged contract with him. According to Clucas, “[b]oth [Rt. 80 Express, Inc.] and the trial court were focused on the issue of Ohio’s not having a public policy regarding an accounting. They completely ignored the breach of contract language [] in the complaint.” Because Rt. 80

Express, Inc. did not move for summary judgment regarding the alleged contract claim, we must reverse the trial court.

{¶9} We review a decision granting summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). In order for summary judgment to be granted, it must be determined that:

(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc., 50 Ohio St.2d 317, 327 (1977). The moving party bears the initial burden of informing the trial court of the basis for the motion and pointing to the parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293 (1996). Once this initial burden is met, the non-moving party bears the reciprocal burden of identifying specific facts demonstrating a genuine issue for trial. *Id.* at 293.

{¶10} A court does not have authority to grant summary judgment “in the absence of motion or argument *on a particular claim.*” (Emphasis added.) *Bindra v. Fuening*, 9th Dist. Summit No. 26489, 2013-Ohio-5722, ¶ 24, quoting *Miller v. Pennitech Industrial Tools, Inc.*, 9th Dist. Medina No. 2356-M, 1995 WL 230894, *6. “Where no motion has been filed * * * no conclusion, favorable or adverse, is properly available upon which to base an order for summary judgment.” *Marshall v. Aaron*, 15 Ohio St.3d 48, 50 (1984); *see also Bowen v. Kil-Kare, Inc.*, 63 Ohio St.3d 84, 94 (where parties had not moved for summary judgment on certain claims they were not entitled to summary judgment on those claims).

{¶11} Although somewhat inartfully drafted, Clucas’ complaint arguably raises three causes of action, namely (1) wrongful termination in violation of public policy; (2) breach of

contract; and (3) violations of the Ohio Civil Rights Act. In the caption, Clucas identifies the complaint as being based on “[w]rongful termination” and “[b]reach of [c]ontract.” In the first numbered paragraph, he alleges:

This action is brought pursuant to the provisions of the Ohio Civil Rights Act, O.R.C. sec. 4112.02, and O.R.C. sec. 4112.99, as well as pursuant to common law principles of tort and public policy, including the wrongful termination of employment pursuant to *Greeley vs. Miami Valley Maintenance Contrs.*, (1990), 49 Ohio St.3d 228, 532 N.E. 2d 981 and its progeny.

Greeley established that “a cause of action for wrongful discharge in violation of public policy may be brought in tort.” 49 Ohio St.3d at paragraph three of the syllabus. Later in the complaint, Clucas alleges a “breach of contract [] regarding [] wages, expenses and monies owed by [Rt. 80 Express, Inc.] to [him].”

{¶12} Rt. 80 Express, Inc. moved for summary judgment on Clucas’ “*sole cause of action* for ‘wrongful termination’” in violation of public policy. (Emphasis added.) Rt. 80 Express, Inc. did not move for summary judgment on the breach of contract or civil rights claims. In his opposition brief, Clucas requested that the summary judgment motion be denied and that he be allowed “to proceed on his claims for wrongful termination *and breach of contract.*” (Emphasis added.) While focusing its discussion on the alleged wrongful termination in violation of public policy, the trial court ruled that “[s]ummary [j]udgment is hereby entered in favor of [Rt. 80 Express, Inc.] and against [Clucas].” By fully granting summary judgment to Rt. 80 Express, Inc., the trial court effectively dismissed all the claims asserted by Clucas.

{¶13} On appeal, Rt. 80 Express, Inc. continues to assert that Clucas brought a “single claim” namely “termination in violation of public policy.” Rt. 80 Express, Inc. argues that Clucas is raising his breach of contract claims for the first time on appeal. Clucas responds by directing us to the caption of the complaint listing “[w]rongful [t]ermination” and “[b]reach of

[c]ontract.” In addition, Clucas directs us to language in the body of the complaint alleging “[Rt. 80 Express, Inc.’s] breach of contract with [Clucas] regarding [] wages, expenses and monies owed by [Rt. 80 Express, Inc.] to [him].” Thus, Clucas did raise a breach of contract claim in his complaint.

{¶14} We find that this action must be reversed because the trial court effectively granted summary judgment to Rt. 80 Express, Inc. on the contract claim raised in the complaint without Rt. 80 Express, Inc. moving for summary judgment on that claim. Yet, we must caution that Clucas cannot use his response to the summary judgment motion or his brief to this Court to broaden his claims beyond what he pled in his complaint. *See Scassa v. Dye*, 7th Dist. Carroll No. 02CA00779, 2003-Ohio-3480, ¶ 26-27 (a plaintiff cannot raise new claims and theories of recovery in opposition to summary judgment).

{¶15} In his complaint, Clucas alleged:

[Rt. 80 Express, Inc.] wrongfully terminated [Clucas’] employment in retaliation for his having asserted his rights to a full accounting of the wages, expenses and monies due to him from [Rt. 80 Express, Inc.] as a result of his employment with [Rt. 80 Express, Inc.] and as a result of [Rt. 80 Express, Inc.’s] breach of contract with [Clucas] regarding those wages, expenses and monies owed by them to [him].

The complaint does not reference the Handbook or allege that Rt. 80 Express, Inc. failed to follow its policies when terminating him. Consequently, Clucas did not plead any claims based on those allegations.

{¶16} Nonetheless, the trial court improperly granted summary judgment on the entire complaint. Rt. 80 Express, Inc. moved for summary judgment solely on the claim of wrongful termination in violation of public policy. Clucas had also raised claims for breach of contract

“regarding [] wages, expenses and monies owed” and violations of the Ohio Civil Rights Act¹ in his complaint. The trial court erred in dismissing those claims because Rt. 80 Express, Inc. had not moved for summary judgment on them.

{¶17} In rendering our decision, we express no opinion on the merits of any of Clucas’ claims. While the trial court dismissed the entire complaint, it is not clear whether the trial court was cognizant that there were multiple claims asserted. The complaint was inartfully drafted and the defendant’s motion for summary judgment asserted that there was a “sole cause of action.” Ordinarily, when there are multiple claims, the trial court may certify a decision on fewer than all of those claims to the appellate court through Civ.R. 54(B). When certifying a case under Civ.R. 54(B), “the trial court makes what is essentially a factual determination – whether an interlocutory appeal is consistent with the interest of sound judicial administration.” *Wisintainer v. Elcen Power Strut Co.*, 67 Ohio St.3d 352 (1993), paragraph one of the syllabus. Although the instant case does not involve a decision on fewer than all of the claims, we are disinclined to address the claims piecemeal when the trial court may have acted inadvertently in dismissing the additional claims.

{¶18} We hold simply that the trial court lacked the authority to fully grant summary judgment to Rt. 80 Express, Inc. when it had only moved for summary judgment on the wrongful termination in violation of public policy claim. On this basis, Clucas’ assignment of error is sustained.

¹ Neither party addresses the Ohio Civil Rights Act in their respective summary judgment filings in the trial court or on appeal to this Court.

III

{¶19} Clucas' sole assignment of error is sustained. The judgment of the Summit County Court of Common Pleas is reversed and this matter is 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 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 Appellee.

BETH WHITMORE
FOR THE COURT

CARR, J.
CONCURS.

HENSAL, P.J.

CONCURRING IN PART, DISSENTING IN PART SAYING:

{¶20} As the majority notes, Mr. Clucas pleaded more than one cause of action in his complaint. However, Rt. 80 Express only moved for summary judgment on one of those causes of action. Nevertheless, the trial court awarded summary judgment on Mr. Clucas' complaint in its entirety. Thus, I concur in the majority's reversal of the award of summary judgment as it relates to the causes of action in Mr. Clucas' complaint on which Rt. 80 Express did not move for summary judgment because a trial court may not grant summary judgment on grounds not moved.

{¶21} However, Rt. 80 Express did move for summary judgment on Mr. Clucas' wrongful discharge in violation of public policy claim, meaning the claim was properly before the trial court and, therefore, the trial court's decision on the claim is properly before us on this appeal. Thus, I believe that it is appropriate to reach the merits of the claim. To that end, I would affirm the trial court's award of summary judgment on Mr. Clucas' wrongful discharge in violation of public policy claim because Mr. Clucas never articulated upon what basis he was claiming a violation of public policy. *See Dohme v. Eurand Am., Inc.*, 130 Ohio St.3d 168, 2011-Ohio-4609, syllabus (“[A] terminated employee must articulate a clear public policy by citation of specific provisions in the federal or state constitution, federal or state statutes, administrative rules and regulations, or common law.”). Accordingly, I dissent from the majority's reversal of summary judgment on Mr. Clucas' wrongful discharge in violation of public policy claim.

APPEARANCES:

WILLIAM S. DERKIN, Attorney at Law, for Appellant.
NEIL E. KLINGSHIRN, Attorney at Law, for Appellee.