[Cite as *Sarasota Beach House Trust v. Sterling Homes, L.L.C.*, 2026-Ohio-4708.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

SARASOTA BEACH HOUSE TRUST,	:	APPEAL NO. C-260181 TRIAL NO. A-2302560
EDWARD L. DELAET, TRUSTEE,	:	
REBECCA KRAVITZ DELAET,	:	
and	:	*JUDGMENT ENTRY*
DAVID E. DELAET,	:	
Plaintiffs-Appellants,	:	
vs.	:	
STERLING HOMES, LLC,	:	
Defendant-Appellee,	:	
and	:	
LAWYERS TITLE OF CINCINNATI, INC.,	:	
Defendant.	:	

This cause was heard upon the appeal, the record, the briefs, and arguments.

For the reasons set forth in the Opinion filed this date, the judgment of the trial court is reversed and the cause is remanded.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty, and orders that costs be taxed under App.R. 24.

The court further orders that (1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and (2) the mandate be sent to the trial court for execution under App.R. 27.

To the clerk:

Enter upon the journal of the court on 11/25/2026.

Pursuant to App.R. 30, the clerk is directed to send all parties, or their counsel if represented, a copy of the court's judgment and note such action on the docket.

By:_____
Administrative Judge

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EDWARD L. DELAET, TRUSTEE,	:	
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and	:	
DAVID DELAET,	:	*O P I N I O N*
Plaintiffs-Appellants,	:	
vs.	:	
STERLING HOMES, LLC.,	:	
Defendant-Appellee,	:	
and	:	
LAWYERS TITLE OF CINCINNATI, INC.,	:	
Defendant.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: November 25, 2026

Smyth & Mullins, LLC, and *Robert M. Smyth,* for Plaintiffs-Appellants,

Manley Burke, LPA, Emily Cooney Couch and *Sean P. Callan*, for Defendant-Appellee.

KINSLEY, Presiding Judge.

{¶1} At issue in this case is whether a defendant can successfully move for summary judgment by simply alleging—without showing—that the plaintiff lacks proof of a necessary element of its cause of action. We hold, as many courts have before us, that it cannot. Rather, because the moving party bears the initial burden to demonstrate the absence of the element with affirmative evidence, a conclusory and unsupported allegation about the plaintiff's absence of proof is plainly not enough to justify summary judgment. *See Dresher v. Burt*, 75 Ohio St.3d 280, 292-293 (1996) ("a moving party does not discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case").

{¶2} That is all that defendant-appellee Sterling Homes, LLC ("Sterling") offered when it moved for partial summary judgment on the claims filed against it by plaintiffs-appellants Sarasota Beach House Trust, Edward L. DeLaet, Trustee, Rebecca Kravitz DeLaet, and David DeLaet (together "the DeLaets"): an unproven allegation that the DeLaets had no evidence of damage. Absent affirmative evidence that the DeLaets could not prove their case, which Sterling failed to present, that allegation was insufficient to carry Sterling's Civ.R. 56 burden as the moving party. The trial court accordingly erred in awarding partial summary judgment to Sterling on the DeLaets' claims. We reverse the trial court's judgment.

Background

{¶3} On January 16, 2023, the DeLaets sued Sterling and Lawyers Title of Cincinnati, Inc.[1] for issues arising from Sterling's construction of the DeLaets' new

[1] Although it is a defendant in the action below, Lawyers Title of Cincinnati, Inc. is not a party to this appeal.

luxury home. According to the DeLaets' complaint, Sterling delayed construction for several months and then delivered a home riddled with defects. During a final walk-through with Sterling's property manager, the DeLaets noted approximately 40 items in need of repair. Rather than postpone the closing, the parties agreed to escrow $37,275 until Sterling addressed the more significant structural problems with the home. As of the time the complaint was filed, the DeLaets alleged that many of the necessary repairs had not been made.

{¶4} The complaint alleged four causes of action: (1) breach of the parties' construction contract, (2) breach of the parties' escrow agreement, (3) violation of the Home Construction Service Suppliers Act, and (4) violation of the Consumer Sales Practices Act. As remedies for these claims, the DeLaets sought monetary damages and attorney fees.

{¶5} Sterling answered the DeLaets' complaint and counterclaimed for breach of contract and indemnification, alleging that it had substantially completed the repairs that were the subject of the escrow agreement.[2]

{¶6} The trial court then issued a case-management order, in which it established deadlines for the disclosure of the parties' expert witnesses and required all discovery to be completed by August 9, 2024. Trial was scheduled for December 4, 2024.

{¶7} Twenty-one days after the August 9, 2024 discovery deadline expired, the DeLaets moved to amend the scheduling order to allow additional time for discovery. As grounds for the motion, the DeLaets represented that they were in the process of responding to pending discovery requests from Sterling but had not

[2] Sterling also counterclaimed for bad faith and attorney fees, but those counterclaims were dismissed by the trial court.

completed the responses, that Sterling had objected to most of their discovery requests and document production leaving more discovery to be obtained, and that their counsel was busy with a probate court matter.

{¶8} Sterling opposed the DeLaets' requested extension. In its response, Sterling asserted that it had responded to the DeLaets' discovery requests on March 14, 2024, nearly six months earlier, without any subsequent action from the DeLaets. Sterling also alleged that the DeLaets had not produced any discovery during the discovery period.

{¶9} Replying to these contentions, the DeLaets contested Sterling's representation that it had complied with the DeLaets' discovery demands. Rather, the DeLaets asserted that Sterling had objected to every single interrogatory, had withheld numerous documents in response to requests for production, and had failed to provide evidence that it had completed the agreed-upon home repairs. The DeLaets also emphasized that an expert witness retained by Sterling had opined that the residence was defective.

{¶10} With the DeLaets' request to extend the discovery period still pending, Sterling filed a motion for partial summary judgment as to the DeLaets' claims, arguing that the DeLaets had failed to produce any evidence that they had been financially damaged by the condition of the home. Sterling supported its contention by pointing to the DeLaets' alleged discovery abuses. According to Sterling, both parties had served written discovery requests; Sterling responded, but the DeLaets did not. Sterling contended that the DeLaets' failure to comply with discovery meant that they could not prove that they suffered any financial damage from Sterling's alleged breaches.

{¶11} None of Sterling's contentions were proven by actual evidence. For

example, as to Sterling's assertion that the DeLaets did not respond to its discovery requests, Sterling submitted no affidavit, transcript, pleading, or stipulation proving that point. Sterling also presented no evidence to document that it had timely responded to the DeLaets' discovery demand. Rather, Sterling merely described the status of the parties' exchange of discovery in its motion. In the end, Sterling supported its request for partial summary judgment with a single document: a blank copy of its discovery requests. The discovery requests were electronically signed by Sterling's counsel but were otherwise unauthenticated.

{¶12} The DeLaets responded to Sterling's partial summary judgment motion in two separate ways. First, the DeLaets moved for additional time to conduct discovery under Civ.R. 56(F) before responding in substance to the motion. Second, the DeLaets filed a memorandum in opposition to summary judgment. Both filings argued that the DeLaets needed to obtain additional discovery from Sterling's expert. But the DeLaets did not explain how any information they hoped to obtain from the expert would demonstrate their own financial damage, nor did they address Sterling's contention that they had failed to respond to Sterling's discovery requests.

{¶13} The DeLaets supported their Civ.R. 56(F) motion and their partial summary judgment response with identical affidavits from David and Rebecca DeLaet. In their affidavits, the DeLaets described two significant leaks that occurred at their home during the summer of 2024. They attributed the first to improper bathroom tiling and the second to incorrectly sealed pipes in the wall. As to damages, their affidavits contained a single conclusory sentence: "We have suffered financial damages, and continue to suffer damages, which exceed $40,000.00."

{¶14} On October 10, 2024, the trial court denied both the DeLaets' motion for additional time to conduct discovery and their Civ.R. 56(F) motion. In its entry,

the trial court questioned why the DeLaets waited until three weeks after the close of discovery to seek an extension. The trial court also criticized the timing of the DeLaets' attack on the adequacy of Sterling's discovery responses, noting that Sterling had submitted its discovery to the DeLaets six months earlier.

{¶15} On November 12, 2024, the trial court granted Sterling's motion for partial summary judgment. In doing so, it concluded that the DeLaets had not refuted Sterling's claim that they failed to timely respond to discovery. Noting that Civ.R. 37(B)(2)(b)[3] permits the court to exclude evidence when a party fails to obey an order compelling discovery, the trial court determined that the DeLaets had not presented any evidence of damage during the discovery period and therefore could not present any such evidence in opposition to Sterling's summary judgment motion.

{¶16} The DeLaets then moved the trial court to reconsider its partial summary judgment decision. Attached to their motion for reconsideration were a number of exhibits, including estimates and invoices for repairs to their home, that ostensibly established the amount of their financial damage. Sterling moved to strike the documents, pointing out that they were both created and disclosed far beyond the August 9, 2024 discovery deadline. The trial court denied both Sterling's motion to strike and the DeLaets' motion for reconsideration.

{¶17} On April 14, 2026, Sterling dismissed its counterclaims against the DeLaets.

{¶18} The DeLaets appealed.

Analysis

{¶19} On appeal, the DeLaets raise three assignments of error, the first and

[3] The trial court's order cites Civ.R. 27(B)(2)(b), rather than Civ.R. 37(B)(2)(b). We assume this was a typographical error.

second of which pertain to the trial court's partial summary judgment order and the third of which challenges the trial court's denial of the DeLaet's motion for reconsideration. The second assignment of error is dispositive of the appeal, so we address it first.

A. Summary Judgment

{¶20} In their second assignment of error, the DeLaets challenge whether Sterling met its initial summary judgment burden to establish the absence of damages. As the moving party, Sterling had the initial burden to present evidence from the record that demonstrated it was entitled to summary judgment. *See Dresher*, 75 Ohio St.3d at 292-293. The DeLaets argue that Sterling cannot merely allege or argue the absence of evidence but must instead specifically point to affirmative evidence that establishes the absence of damages. We agree with the DeLaets that Sterling failed to meet its initial burden under Civ.R. 56, which precludes partial summary judgment in its favor.

{¶21} The court of appeals reviews a trial court's summary judgment decision de novo. *Al Neyer, LLC v. Westfield Ins. Co.*, 2020-Ohio-5417, ¶ 13 (1st Dist.). Summary judgment is proper under Civ.R. 56(C) where (1) no genuine issue of material fact remains, (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 construing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *Id.* at ¶ 14; Civ.R. 56(C).

{¶22} The moving party has the initial burden of informing the court of the basis for the motion and identifying the portions of the record that set forth specific facts demonstrating entitlement to summary judgment. *Al Neyer* at ¶ 15. Pursuant to

Civ.R. 56(C), it may meet this burden by relying on "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any." *Walker v. Hodge*, 2008-Ohio-6828, ¶ 10-12 (1st Dist.). "While the movant is not necessarily obligated to place any of these evidentiary materials in the record, the evidence must be in the record or the motion cannot succeed." *Dresher* at 293. In other words, the only way a moving party can meet its initial summary judgment burden is by presenting evidence that complies with Civ.R. 56(C). *Bohl v. Travelers Ins. Group*, 2005-Ohio-963, ¶ 16 (4th Dist.).

{¶23} In attempting to meet its burden, a moving party is strictly limited to the types of documents identified by Civ.R. 56(C). *Walker* at ¶ 12. To introduce other forms of evidence at the summary judgment stage, the movant must incorporate the evidence by reference into a properly framed affidavit. *Kemba Fin. Credit Union v. Leeper*, 2026-Ohio-1060, ¶ 18 (10th Dist.).

{¶24} In the absence of evidence that complies with Civ.R. 56(C), a moving party cannot meet its initial summary judgment burden by nakedly asserting that the opposing party has no evidence to prove its claim. *Dresher*, 75 Ohio St.3d at 293. If the moving party fails to meet its initial burden, summary judgment is not appropriate. *Al Neyer*, 2020-Ohio-5417, at ¶ 15 (1st Dist.).

{¶25} Applying these principles here, Sterling failed to meet its initial summary judgment burden. That failure began when Sterling did not support its partial summary judgment motion with summary judgment-quality evidence under Civ.R. 56(C). In arguing that the DeLaets lacked evidence of damage, Sterling neither introduced nor relied on any pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, or written factual stipulations that appeared in the record. To the contrary, the only evidence Sterling submitted was

an unauthenticated copy of its discovery requests, which is insufficient to comply with Civ.R. 56(C). *See Gingo v. Hanak*, 2026-Ohio-1452, ¶ 46-47 (8th Dist.) (holding that a copy of the first page of a party's discovery requests is not summary judgment-quality evidence under Civ.R. 56(C)). Without any evidence supporting its position, Sterling simply did not meet its summary judgment burden. *See Bohl*, 2005-Ohio-963, at ¶ 16 (4th Dist.); *Vahila v. Hall*, 77 Ohio St.3d 421, 428-430 (1997).

{¶26} Even if we were to accept Sterling's unauthenticated discovery requests as compliant with Civ.R. 56(C), we would still conclude that Sterling failed to satisfy its initial burden, as no evidence proves—and no law supports—the absence of the DeLaets' damages at this stage. At most, Sterling established that it served the DeLaets with discovery requests seeking information about their economic damages. But no pleading, deposition, answer to an interrogatory, written admission, affidavit, transcript of evidence, or written factual stipulation established that the DeLaets were late in submitting their discovery responses. Even if it had, that lack of response, in and of itself, did not affirmatively prove that the DeLaets were not damaged by Sterling's alleged shoddy workmanship. All the lack of a response proved is that the DeLaets were dilatory in communicating.

{¶27} Moreover, and going one step further, the mere failure to timely respond to discovery requests does not, standing alone, warrant sanctions under Civ.R. 37(B)(2)(b). *See HK New Plan Exchange Property Owner II, LLC v. Hamilton Cty. Bd. of Revision*, 2009-Ohio-3546, ¶ 18 (noting that a party must generally violate a court order for Civ.R. 37 sanctions to apply). Rather, to exclude evidence as a discovery sanction, the trial court must first have issued an order compelling discovery. *Gulbrandsen v. Summit Acres, Inc.*, 2016-Ohio-1550, ¶ 35 (4th Dist.) ("before a court may sanction a party under Civ.R. 37 for failing 'to obey an order to

provide or permit discovery,' the court must have actually issued an order to provide or permit discovery"). No such order was issued here. Thus, there was no basis for the trial court to grant summary judgment as a discovery sanction. *See Shaeffer v. FC Industries*, 2023-Ohio-3732, ¶ 21 (2d Dist.) ("a motion for summary judgment is not the proper mechanism to resolve a discovery dispute").

{¶28} The trial court's summary judgment decision was therefore in error. Sterling did not meet its initial burden to produce or rely on evidence in the record that complied with Civ.R. 56(C) but instead merely concluded that the DeLaets could not establish the essential element of damages. As a result, Sterling was not entitled to partial summary judgment.

{¶29} We appreciate the trial court's frustration with the DeLaets' lack of diligence below. The DeLaets sought a discovery extension after the deadline expired, submitted summary judgment responses that were nonresponsive to the question of damages, and waited until their motion for reconsideration to present invoices and estimates that were never previously made a part of the record. In addition, Sterling's counsel has represented in a signed pleading that the DeLaets did not respond to discovery requests, and we do not doubt her veracity. Nothing in our opinion should be interpreted to limit the trial court's authority to respond to these actions. On remand, the trial court may issue appropriate orders managing the introduction of evidence and the parties' conduct consistent with the Ohio Civil Rules.

{¶30} We sustain the DeLaet's second assignment of error, reverse the trial court's judgment granting partial summary judgment to Sterling, and remand the cause to the trial court.

Conclusion

{¶31} Because Sterling failed to meet its initial burden under Civ.R. 56, the

trial court erred in granting Sterling's partial summary judgment motion. Accordingly, the judgment of the trial court is reversed, and the cause is remanded for further proceedings consistent with this opinion. This disposition renders the DeLaets' first and third assignments of error moot, and we decline to address them.

Judgment reversed and cause remanded.

BOCK and **NESTOR, JJ.,** concur.