[Cite as *Arnold v. Geneva*, 2023-Ohio-2643.]

IN THE COURT OF APPEALS OF OHIO
ELEVENTH APPELLATE DISTRICT
ASHTABULA COUNTY

JAMES D. ARNOLD a.k.a. DAN ARNOLD, Plaintiff-Appellant, - vs - CITY OF GENEVA, Defendant-Appellee.	**CASE NO. 2022-A-0119** Civil Appeal from the Court of Common Pleas Trial Court No. 2021 CV 00376

O P I N I O N

Decided: July 31, 2023
Judgment: Affirmed

Natalie F. Grubb and *Mark E. Owens*, Grubb & Associates, LPA, 437 West Lafayette Road, Suite 260-A, Medina, OH 44256 (For Plaintiff-Appellant).

Gary L. Pasqualone, Geneva City Solicitor, 302 South Broadway, Geneva, OH 44041 (For Defendant-Appellee).

JOHN J. EKLUND, P.J.

{¶1} Appellant, James Arnold, appeals the Ashtabula County Court of Common Pleas' judgments finding that Appellee, the City of Geneva, complied with Appellant's public records request within a reasonable time, and denying his subsequent motion under Civ.R. 60(B). After a review of the record and applicable case law, we affirm the trial court's judgment.

{¶2} Appellant's first two assignments assert that the trial court erred in its July 15, 2022 judgment entry by adopting the magistrate's decision (1) finding that Appellee

had made a good faith effort to comply with the public records request within a reasonable amount of time and (2) denying his request for statutory damages and attorney's fees. The July 15, 2022 judgment entry was a final appealable order.

{¶3} "[A] party who wishes to appeal from an order that is final upon its entry shall file the notice of appeal required by App.R. 3 within 30 days of that entry." App.R. 4(A)(1).

{¶4} Appellant had until August 14, 2022 to appeal from the July 15, 2022 judgment. He did not. Instead, Appellant filed this appeal within 30 days after the trial court denied his Civ.R. 60(B) motion on November 28, 2022. "It is well settled that a Civ.R. 60(B) motion for relief from judgment is not a substitute for a timely perfected appeal." *Mamula v. Mamula*, 11th Dist. Trumbull No. 2005-T-0148, 2006-Ohio-4176, ¶ 30. Appellant's first and second assignments, which challenge the July 15, 2022 judgment entry, are therefore untimely and not properly before us.

{¶5} We will proceed to address Appellant's third assignment of error.

{¶6} On April 27, 2021, Appellant made a request to Appellee for public records pursuant to R.C. 149.43, the Ohio Public Records Act ("the Act"). He sought: the complete personnel files of Scott Vanderlind, Roger Wilt, James Arnold, and Jennifer Cecil; and "all documents Ms. Cecil prepared, reviewed, and sent out in regard to James Arnold." After receiving the request on April 27, 2021, Appellee, through its human resources director, replied confirming receipt of the request.

{¶7} As of July 21, 2021, the request had not been satisfied, Appellee had not further communicated with Appellant, and Appellant reiterated his request through a "follow-up" email, to which Appellee replied.

{¶8} On September 1, 2021, Appellant filed a petition for a writ of mandamus, petitioning the court to order Appellee to "immediately produce the records sought" in its April 27, 2021 request.

{¶9} On September 24, 2021, Appellee delivered a letter to Appellant, by certified mail, purporting to enclose a flash drive with copies of the personnel files. On September 27, 2021, Appellant, through counsel's office manager, signed for the certified letter. The parties disagree on whether the delivery included a flash drive. Appellee's attorney asserted that he personally sent the flash drive with the letter to Appellant. Appellant says it was not enclosed.

{¶10} On September 30, 2021, Appellee filed a response to Appellant's petition, stating that it had produced the documents, and that the delayed response was "due to cyber problems."

{¶11} On November 29, 2021, the court held a status conference off-the-record. At the hearing on the petition's merits, held on January 13, 2022, the magistrate noted that at the November status conference, Appellant had told Appellee that he had not received the flash drive. Appellant then agreed to "resend" it. On December 22, 2021, Appellee sent the flash drive to Appellant, who received it on December 28, 2021.

{¶12} On January 13, 2022, the court, through a magistrate, held a hearing on Appellant's petition. The parties told the court that the requested personnel files had been produced. However, "all documents Ms. Cecil prepared, reviewed, and sent out in regard to James Arnold" had not been produced. Appellee's counsel explained that the second set of documents were not produced because "the whole system, computer system at Geneva City was hacked by professionals and the email system went down. We still don't

have emails in Geneva City. * * * So it's my understanding that there was [sic] no emails available * * *." The court acknowledged that it "was aware" of the city's cyber problems over the "summer or even in the spring" because "some" of the court's criminal cases had been continued because the City of Geneva Police Department was unable to access their files and records.

{¶13} Appellant argued that notwithstanding Appellee's difficulty accessing emails, the documents that were produced were not produced within a reasonable time, entitling him to an award of statutory damages. Appellant also requested the court to order Appellee to pay his reasonable attorney's fees. On January 18, 2022, the court ordered both parties to file any additional exhibits or affidavits for the court to consider before rendering its judgment within thirty days. The court specifically asked Appellee to provide affidavits regarding the extent of the cyber security attack and the dates of the attack including when the technology professionals restored cyber access.

{¶14} Appellant presented an affidavit of Monique George, Appellant's counsel's office manager. She testified that Appellee's September 24, 2021 letter did not include a flash drive.

{¶15} On February 2, 2022, Appellant deposed Roger Wilt, the city's police chief. Chief Wilt testified that the police department had "lost all of their IT things" in June or July 2021, and that the department only received their email addresses back in October or November 2021. Chief Wilt testified that he did not have access to his old emails and that the requested personnel files were stored as hard copies and not electronically. He stated that he did not receive his computer back until September or October 2021.

{¶16} Pursuant to the court's request for additional information, Appellee filed an affidavit of Joseph Varckette, the City Manager for the City of Geneva. Mr. Varckette testified that the city "experienced an encryption attack on July 16, 2021." He also testified that the city mailed a flash drive to Appellant's counsel on September 24, 2021 and again on December 22, 2021.

{¶17} On April 4, 2022, the magistrate filed his decision, stating: "Respondent City of Geneva made a good faith effort to comply with the public records request within a reasonable time, which took longer than anticipated as a result of the data breach security incident. The delay was not intentional." Appellant objected to the magistrate's decision. The court denied Appellant's objections and, on July 15, 2022, adopted the magistrate's decision.

{¶18} On August 11, 2022, Appellant filed a "motion for reconsideration" or, in the alternative, a Civ.R. 60(B) motion to vacate the court's July 15, 2022 judgment. Appellant moved on the sole basis that there was newly discovered evidence contradicting the magistrate's findings. In support of its motion, Appellant filed the June 1, 2022 deposition of Stewart Dowd, the city's information technology professional. Mr. Dowd stated that he learned of a potential data leak in June 2021 and disconnected the city's computers. He stated that the police department's computers were "brought back on-line" three or four days after the cyber security breach in June 2021. He explained that restoring the data was still an "ongoing process," but that email access was restored in approximately August. Mr. Dowd stated that some police department personnel had "limited license access" to email through separate email systems. On November 28, 2022, the court denied Appellant's motion.

{¶19} Third assignment of error: "The trial court abused its discretion in denying Appellant's motion for reconsideration or, in the alternative, motion to vacate judgment."

{¶20} Appellant's motion was essentially a Civ.R. 60(B) motion and we will analyze it accordingly.

{¶21} The decision to grant or deny a Civ.R. 60(B) motion is entrusted to the sound discretion of the trial court. *MCS Acquisition Corp. v. Gilpin*, 11th Dist. Geauga No. 2011-G-3037, 2012-Ohio-3018, ¶ 20.

{¶22} Civ.R. 60(B) provides in relevant part: "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for * * * (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B)."

{¶23} Appellant asserts that the "newly discovered evidence" was Stewart Dowd's deposition stating that computers were brought back on-line approximately three or four days after the cyber security attack.

{¶24} Fundamentally, Mr. Dowd's deposition was not "newly discovered evidence." "Newly discovered evidence" is evidence which was "already in existence at the time of the trial, but the moving party was excusably unaware of it." *Gaul v. Gaul*, 11th Dist. Ashtabula No. 2011–A–0065, 2012–Ohio–4005, ¶ 21. Appellant was aware of the content of Mr. Dowd's June 1, 2022 deposition prior to the court's judgment on July 15, 2022. This renders Mr. Dowd's deposition testimony not "newly discovered evidence."

{¶25} Moreover, Mr. Dowd's statement that computers were brought back on-line approximately three or four days after the cyber security attack is unavailing to Appellant's

case. Mr. Dowd's testimony also demonstrated that restoring full computer access was an "ongoing process" and that police department employees had only a "limited license access" to email through a separate email system. Chief Wilt's deposition revealed that city employees did not have access to their prior emails. The trial court's denying Appellant's motion was neither unreasonable nor contradicted by the record.

{¶26} Considering the evidence, the court did not abuse its discretion in denying Appellant's motion.

{¶27} Appellant's third assignment of error is without merit.

{¶28} The judgment of the Ashtabula County Court of Common Pleas is affirmed.

MARY JANE TRAPP, J.,

EUGENE A. LUCCI, J.,

concur.