

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ADAMS COUNTY

RANDY T. BRODT,	:	
	:	
Plaintiff-Appellee,	:	Case No. 09CA884
	:	
vs.	:	Released: February 12, 2010
	:	
STEVE OGG,	:	<u>DECISION AND JUDGMENT</u>
	:	<u>ENTRY</u>
Defendant-Appellant.	:	

APPEARANCES:

Patrick L. Gregory, Bethel, Ohio, for Defendant-Appellant.

Charles H. Wilson, Jr., West Union, Ohio, for Plaintiff-Appellee.

Per Curiam:

{¶1} Defendant-Appellant, Steve Ogg, appeals the decision of the Adams County Court of Common Pleas dismissing his motion for summary judgment against Plaintiff-Appellee, Randy T. Brodt. Because there are no genuine issues of material fact regarding Appellant's immunity from liability, reasonable minds can come to but one conclusion, and Appellant is entitled to judgment as a matter of law, the trial court erred in denying his motion for summary judgment. Accordingly, we sustain Appellant's assignment of error and reverse the decision of the trial court.

I. Facts

{¶2} The case currently under appeal arises out of a prior, separate proceeding. In January 2005, the village of West Union passed an ordinance imposing a municipal income tax. The ordinance required employers to withhold and remit their employees' income tax to the village; it also made corporate officers vicariously liable and subject to third-degree misdemeanor criminal charges for failing to do so. Apparently believing the ordinance to be invalid, Appellee Randy Brodt, president and CEO of Adams County Building and Loan, did not withhold and remit employee taxes as the ordinance required.

{¶3} Appellant Steve Ogg, in his capacity as West Union's Tax Commissioner, filed a complaint in the Mayor's Court against Brodt for violating the ordinance. Brodt demanded a jury trial and the case was transferred to County Court. Prior to trial, Cecelia Potts, solicitor for West Union, entered a nolle prosequi on the original complaint. Ogg then filed thirteen separate complaints against Brodt in the Mayor's Court, each complaint again alleging a failure to withhold and remit taxes. The complaints were transferred to the Court of Common Pleas and the matter proceeded to trial. By separate verdicts, the jury found Brodt guilty on all thirteen complaints.

{¶4} Brodt appealed the decision and we considered the matter in *West Union v. Brodt*, 171 Ohio App.3d 434, 2007-Ohio-2742, 870 N.E.2d 1235. Determining there was insufficient evidence to convict, we found in favor of Brodt, reversed his conviction and ordered his release. Following our decision, Brodt filed the present action against Ogg, alleging Ogg had instituted criminal proceedings against him with malice and without probable cause.

{¶5} After Ogg answered Brodt's complaint, both parties moved for summary judgment. The trial court denied both motions. Ogg then filed a motion to reconsider his motion for summary judgment which the trial court again denied. Following the trial court's decision, Ogg timely filed the current appeal.

II. Assignments of Error

- I. WHETHER ADVICE OF COUNSEL IS A COMPLETE DEFENSE TO MALICIOUS PROSECUTION.
- II. WHETHER AS TAX COMMISSIONER, DEFENDANT-APPELLANT MR. OGG IS IMMUNE FROM A CHARGE OF MALICIOUS PROSECUTION WHEN FILING COMPLAINTS AGAINST NON-COMPLIANT PERSONS WITHIN THE SCOPE OF HIS AUTHORITY AS TAX COMMISSIONER.

III. Final Appealable Order

{¶6} Before an appellate court may consider the merits of an appeal, it must first determine whether the decision in question constitutes a

final appealable order. Under Ohio law, if an order is not final and appealable, appellate courts have no jurisdiction to review it. *General Accident Insurance Co. v. Insurance Co. of North America* (1989), 44 Ohio St.3d 17, 20, 540 N.E.2d 266. Even if the parties do not address the lack of a final appealable order, the reviewing court must raise the issue sua sponte. *Englefield v. Corcoran*, 4th Dist. No. 06CA2906, 2007-Ohio-1807, at ¶24; *Whitaker-Merrell Co. v. Geupel Construction Co.* (1972), 29 Ohio St.2d 184, 186, 58 O.O.2d 399, 280 N.E.2d 922.

{¶7} Ordinarily, a denial of a motion for summary judgment does not constitute a final appealable order. *Celebrezze v. Netzley* (1990), 51 Ohio St.3d 89, 90, 554 N.E.2d 1292; *Essman v. Portsmouth*, 4th Dist. No. 08CA3244, 2009-Ohio-3367, at ¶10. “The denial of a motion for summary judgment generally is considered an interlocutory order not subject to immediate appeal.” *Stevens v. Ackman*, 91 Ohio St.3d 182, 2001-Ohio-249, 743 N.E.2d 901, at 186.

{¶8} In the case sub judice, the trial court denied both parties’ motions for summary judgment. Ordinarily such ruling would not constitute a final appealable order. However, the basis of Ogg’s motion is that he is immune from liability because he was acting under his authority as an employee of a political subdivision. “An order that denies a political

subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability as provided in this chapter or any other provision of the law is a final order.” R.C. 2744.02(C). See, also, *Sullivan v. Anderson Twp.*, 122 Ohio St.3d 83, 2009-Ohio-1971, 909 N.E.2d 88, at ¶13; *Essman* at ¶10. Accordingly, the trial court’s denial of Ogg’s motion for summary judgment in the case sub judice is a final appealable order and we proceed to the merits of the case.

IV. Standard of Review

{¶9} Appellate courts must conduct a de novo review when reviewing a trial court’s summary judgment decision. *Doe v. Shaffer*, 90 Ohio St.3d 388, 390, 2000-Ohio-186, 738 N.E.2d 1243; *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241. As such, an appellate court reviews the trial court’s decision independently and without deference to the trial court’s determination. *Brown v. Scioto Board of Commissioners* (1993), 87 Ohio App.3d 704, 711, 622 N.E.2d 1153.

{¶10} A trial court may grant a motion for summary judgment only when 1) the moving party demonstrates there is no genuine issue of material fact; 2) reasonable minds can come to only one conclusion, after the evidence is construed most strongly in the nonmoving party's favor, and that conclusion is adverse to the opposing party; 3) and the moving party is

entitled to judgment as a matter of law. Civ.R. 56; see, also, *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 146; *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

{¶11} “[T]he moving party bears the initial burden of demonstrating that there are no genuine issues of material fact concerning an essential element of the opponent's case. To accomplish this, the movant must be able to point to evidentiary materials of the type listed in Civ.R. 56(C) * * *.” *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292, 1996-Ohio-107, 662 N.E.2d 264. These materials include “the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any.” *Id.* at 293; quoting Civ.R. 56(C). “ * * * [O]nce the movant supports his or her motion with appropriate evidentiary materials, the nonmoving party ‘may not rest upon mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.’” *Foster v. Jackson Cty. Broadcasting, Inc.*, 4th Dist. No. 07CA4, 2008-Ohio-70, at ¶11, quoting Civ.R. 56(E).

V. Second Assignment of Error

{¶12} To facilitate our review, we take the assignments of error out of order and first address Ogg’s argument that the trial court should have granted summary judgment in his favor on the basis of immunity.

{¶13} Brodt’s complaint states that Ogg acted maliciously and without probable cause in initiating criminal proceedings against him for failing to comply with the municipal tax ordinance. Ordinarily, under R.C. 2744.03, an employee of a political subdivision is immune from civil actions seeking “* * * to recover damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function * * * .” R.C. 2744.03(A). However, that immunity is subject to several exceptions. Under R.C. 2744.03(A)(6)(b), the employee is immune from liability unless “[t]he employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner[.]”

{¶14} In his motion for summary judgment, Ogg asserts that, because he was acting within his authority as Tax Commissioner for the Village of West Union when he initiated criminal proceedings against Brodt, he is immune from liability under R.C. 2744.03(A). Brodt counters the argument by asserting that Ogg acted maliciously and, thus, under

2744.03(A)(6)(b), he may be found liable. As Ogg moved for summary judgment on the basis of his alleged immunity, it is he who bears the initial burden of demonstrating that there are no genuine issues of material fact regarding such immunity.

{¶15} In an affidavit in support of his motion for summary judgment, Ogg presented the following evidence: he was the Tax Commissioner for the Village of West Union at all relevant times; as Tax Commissioner, he had authority to prosecute non-compliant persons; and the complaint he filed against Brodt was authorized by the Village of West Union. Further, it is undisputed that Brodt did not withhold and submit employee taxes as required by the new ordinance.

{¶16} Accordingly, Ogg provided evidence that he was an employee of a political subdivision, that he was acting in connection with a governmental or proprietary function, and that he acted directly under the authority of the political subdivision. For purposes of summary judgment, the evidence related above establishes that Ogg was acting within the scope of his authority as Tax Commissioner in filing the complaint against Brodt. Thus, he satisfies his initial burden of proof that there are no genuine issues of material fact regarding his immunity from civil suit under R.C.

2744.03(A). Accordingly, the burden of demonstrating a genuine issue of material fact shifts to Brodt.

{¶17} Brodt states that Ogg may be held liable because of the exception to immunity provided by R.C. 2744.03(A)(6)(b). Thus, under that section, to defeat Ogg's motion for summary judgment, Brodt must provide evidence demonstrating that Ogg acted maliciously, in bad faith or in a wanton and reckless manner. Under Civ.R. 56(C), evidentiary materials include pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact. However, because Brodt provides no such evidence, he fails to show there is a genuine issue of material fact to be litigated.

{¶18} Brodt's argument appears to be that Ogg acted maliciously solely by filing thirteen separate complaints after Potts decided to nolle prosequi the original complaint. However, Ogg's entire argument amounts to no more than a conclusory statement. He presents no evidence, by affidavit or other evidentiary material, to support the conclusion. As previously noted, Ogg presented evidence that he was simply fulfilling his role as Tax Commissioner in filing a complaint against Brodt. Brodt provides no counter evidence establishing that such action was malicious.

{¶19} The non-moving party may not avoid summary judgment simply by contradicting the moving party. See, e.g., *Wells Fargo Bank v. Blough*, 4th Dist. No. 08CA49, 2009-Ohio-3672, at ¶18. Instead, the non-moving party must present evidentiary materials, of the type listed in Civ.R. 56(C), demonstrating a genuine issue of material fact. In his motion for summary judgment, Ogg presented evidence establishing his immunity from liability under R.C. 2744.03(A). Beyond mere conclusory statements, Brodt does not present specific facts demonstrating that Ogg acted maliciously.

{¶20} Accordingly, Ogg has demonstrated that there is no genuine issue of material fact left to be litigated regarding his immunity from Brodt's civil suit. Further, after construing the evidence most strongly in Brodt's favor, reasonable minds can come to only one conclusion, and Ogg is entitled to judgment as a matter of law. As such, Ogg's assignment of error is well taken.

VI. Conclusion

{¶21} For the foregoing reasons, we sustain Ogg's assignment of error and reverse the decision of the trial court. Because Ogg met his evidentiary burden by establishing that there are no genuine issues of material fact as to his immunity, and because Brodt failed to present any evidence that Ogg acted maliciously, Ogg is entitled to immunity under R.C.

2744.03(A). Accordingly, the trial court erred in denying Ogg's motion for summary judgment. As Ogg's second assignment of error is dispositive, his first assignment of error is rendered moot.

JUDGMENT REVERSED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE REVERSED and that the Appellant recover of Appellee costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Adams County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

McFarland, P. J., Harsha, J. & Abele, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Judge Matthew W. McFarland
Presiding Judge

BY: _____
Judge William H. Harsha

BY: _____
Judge Peter B. Abele

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.