

Gwin, P.J.

{¶1} Appellant appeals the May 13, 2014 judgment entry of the Guernsey County Court of Common Pleas granting summary judgment to appellee.

Facts & Procedural History

{¶2} On June 22, 2012, appellee Richard L. Duncan, as Trustee of the Kali R. Spirtos Trust, filed a complaint against Robert Shugert (“Shugert”) and appellant Michael Maag for breach of fiduciary duty, fraudulent misrepresentation, and fraudulent inducement. Appellee alleged in the complaint that when appellee sold a vacant tract of land (184.015 acres), appellant, the real estate broker, arranged for Shugert to purchase the land without disclosing to appellee the value of the mineral rights or Shugert’s alleged intent to exploit these mineral rights. Appellant filed a pro se answer on July 31, 2012. In March 2013, the trial court allowed appellee to amend his complaint with regards to Shugert.

{¶3} On November 4, 2013, appellee and Shugert filed a joint motion to move the case to the inactive docket due to settlement discussions. The trial court granted the motion on November 7, 2013. On December 19, 2013, appellee filed a notice of dismissal as to Shugert only after a settlement was reached between the parties. On December 20, 2013, appellee filed a motion to reactivate case as to appellant, which the trial court granted on December 23, 2013.

{¶4} Appellee filed a motion to have admissions deemed admitted on March 12, 2014 for discovery that was served on appellant on September 24, 2012. Also on March 12, 2014, the trial court held a pre-trial at which appellant appeared pro se. Pursuant to the magistrate’s order filed the day after the pre-trial, appellant was to have

until March 19, 2014 to respond to the motion to have admissions admitted, or, if appellant retained counsel and his counsel filed a notice of appearance, until March 26, 2014 to respond to the motion to have admissions deemed admitted. In addition, the magistrate set a dispositive motion deadline of April 4, 2014, appellant's response date of April 18, 2014, a reply date of April 25, 2014, and a non-oral hearing date of May 2, 2014. The magistrate's order was sent to appellant at his address of record.

{¶5} Attorney Richard Brooks ("Brooks") filed a notice of appearance as counsel for appellant on March 18, 2014. However, neither appellant nor Brooks filed a response to appellee's motion to have admissions deemed admitted. On March 28, 2014, the magistrate issued an order granting appellee's motion to have admissions deemed admitted. Accordingly, appellant admitted the following:

(1) [Appellant] has a financial, business, and agency relationship to Shugert to represent him in the capacity of an authorized and real estate sales agent regarding the sale, lease, purchase, or transfer of real property.

(2) [Appellant] was specifically seeking land for the purpose of oil, gas, or mineral rights, sales, or leases on behalf of Shugert as his real estate agent. * * *

(4) [Appellant] was aware that the representation made to appellee by Shugert and/or yourself was that the Birmingham land was being purchased solely for the use of pasture for cattle or other livestock.

(5) [Appellant] was aware that he had a continuing duty and obligation to correct any misrepresentations, omissions, or false statements made of

which he was aware and that would materially affect the transactions and that his silence is an affirmative adoption of any known misrepresentation, omission, or false statement.

(6) That because of the misrepresentation, omission, or false statement made to appellee, the price of the land was materially affected.

(7) [Appellant] had a fiduciary duty to appellee in the capacity of their real estate sales agent that those duties to the sellers include: loyalty, obedience, disclosure, confidentiality, reasonable care and diligent and accounting, per Ohio law.

(8) That [appellant] did breach his fiduciary duties owed to appellee in the Shugert/Spirtos trust real estate transaction by failing to identify your relationship with Shugert while acting as a dual agent for the transaction and against seller's best interest.

{¶6} Appellee filed a motion for summary judgment on April 3, 2014 as to breach of fiduciary duty, fraudulent misrepresentation, and fraudulent inducement. Appellee attached to his motion for summary judgment the affidavit of Kali Spirtos, the affidavit of Faith Morter ("Morter"), Shugert's deposition transcripts, a HUD Statement, purchase contract, memorandum of oil and gas lease, and gas deed. The documents were authenticated either by Spirtos or Morter. The magistrate issued an order on April 4, 2014, again providing appellant with a response date of April 18, 2014 and establishing a non-oral hearing on the motion for summary judgment on May 2, 2014. Brooks filed a motion to withdraw as counsel for appellant on April 11, 2014, which the trial court granted. Appellant did not file a response to appellee's motion for summary

judgment. The trial court granted appellee's motion for summary judgment on May 7, 2014 and ordered appellee to submit a proposed entry. On May 13, 2014, the trial court issued a final judgment entry granting appellee's motion for summary judgment and finding that: appellant breached his fiduciary duty to appellee by intentionally misrepresenting the true value of the property by concealing from appellee payments appellant received from Shugert and by persuading appellee to sell the property for less than the true value, causing damages of \$1,206,100; appellant fraudulently misrepresented and concealed from appellee the true value of the property, causing appellee to reasonably rely upon said statements and sell the property for less than its \$2,116,000 true value; and appellant fraudulently induced appellee to sell the property for less than its \$2,116,000 true value, causing damages of \$1,206,100. The trial court granted summary judgment to appellee in the amount of \$1,206,000 plus interest and costs.

{¶7} Appellant appeals the May 13, 2014 judgment entry of the Guernsey County Court of Common Pleas and assigns the following as error:

{¶8} "1. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE APPELLEE IN THE AMOUNT OF \$1,206,100.00."

Summary Judgment

{¶9} Civ.R. 56 states, in pertinent part:

Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue of material fact and that

the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed mostly strongly in the party's favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

{¶10} A trial court should not enter a summary judgment if it appears a material fact is genuinely disputed, nor if, construing the allegations most favorably towards the non-moving party, reasonable minds could draw different conclusions from the undisputed facts. *Hounshell v. Am. States Ins. Co.*, 67 Ohio St.2d 427, 424 N.E.2d 311 (1981). The court may not resolve any ambiguities in the evidence presented. *Inland Refuse Transfer Co. v. Browning-Ferris Inds. of Ohio, Inc.*, 15 Ohio St.3d 321, 474 N.E.2d 271 (1984). A fact is material if it affects the outcome of the case under the applicable substantive law. *Russell v. Interim Personnel, Inc.*, 135 Ohio App.3d 301, 733 N.E.2d 1186 (6th Dist. 1999).

{¶11} When reviewing a trial court's decision to grant summary judgment, an appellate court applies the same standard used by the trial court. *Smiddy v. The Wedding Party, Inc.*, 30 Ohio St.3d 35, 506 N.E.2d 212 (1987). This means we review

the matter de novo. *Doe v. Shaffer*, 90 Ohio St.3d 388, 2000-Ohio-186, 738 N.E.2d 1243.

{¶12} The party moving for summary judgment bears the initial burden of informing the trial court of the basis of the motion and identifying the portions of the record which demonstrates absence of a genuine issue of fact on a material element of the non-moving party's claim. *Drescher v. Burt*, 75 Ohio St.3d 280, 662 N.E.2d 264 (1996). Once the moving party meets its initial burden, the burden shifts to the non-moving party to set forth specific facts demonstrating a genuine issue of material fact does exist. *Id.* The non-moving party may not rest upon the allegations and denials in the pleadings, but instead must submit some evidentiary materials showing a genuine dispute over material facts. *Henkle v. Henkle*, 75 Ohio App.3d 732, 600 N.E.2d 791 (12th Dist. 1991).

I.

{¶13} Appellant argues the trial court erred in granting summary judgment because there is a disputed fact as to damages due to appellee's failure to submit Rule 56 evidence of damages. We disagree.

{¶14} In order to establish claims of breach of fiduciary duty, fraudulent misrepresentation, and fraudulent inducement, a party must establish injury or damages. *Morgan v. Ramby*, 12th Dist. Nos. CA2010-10-095 and CA2010-10-101, 2012-Ohio-763; *Gaines v. Preterm-Cleveland, Inc.*, 33 Ohio St.3d 54, 514 N.E.2d 709 (1987); *Mussivand v. David*, 45 Ohio St.3d 314, 544 N.E.2d 265 (1989). Appellee asserted in his motion for summary judgment that the damage amount was the value of the tract's mineral rights (\$2,116,100) comprised of the amount for the leasing and

eventual sale of property's mineral rights by Shugert, minus the amount Shugert paid for the property (\$460,037) and Shugert's settlement amount (\$450,000). In support of his motion for summary judgment and claim for damages, appellee submitted the following Rule 56 evidence: an affidavit of Kali Spirtos and documents authenticated by Spirtos including a purchase agreement and HUD statement, appellant's admissions, the deposition of Shurgert, including testimony regarding his lease of the mineral rights of the property, and documents authenticated by Morter, which included a memorandum of paid up oil and gas lease and oil and gas deed from Shugert to Bounty Minerals, LLC. Upon review of the Civil Rule 56 evidence, we find appellee met their initial burden of informing the trial court of the basis of the motion and identifying the portions of the record which demonstrate an absence of a genuine issue on the material elements of appellee's claims, including injury and/or damages. Appellant, in failing to respond to appellee's motion for summary judgment, did not submit any Civil Rule 56 evidence or set forth specific facts demonstrating a genuine issue of material fact exists as to the amount of damages. Accordingly, the trial court did not err in granting summary judgment as there are no disputed facts.

{¶15} Appellant argues the trial court erred as a matter of law in failing to allow him sufficient time to respond to the motion for summary judgment. Appellant contends the trial court unilaterally shortened the response time for the summary judgment and left appellant only four days to respond to the motion after allowing Brooks to withdraw from representing appellant.

{¶16} Civil Rule 56(C) provides that a summary judgment motion "shall be served at least fourteen days before the time fixed for hearing." In scheduling orders on

March 13th and April 4th, the trial court set a response date of April 18, 2014 to the motion filed on April 3, 2014 and set a non-oral hearing for May 2, 2014. Accordingly, the trial court complied with the fourteen day requirement of Civ.R. 56 in its scheduling order.

{¶17} Additionally, despite the withdrawal of appellant's counsel, appellant himself was aware of the response date to the motion. Appellant appeared at a March 12th scheduling pre-trial at which the response date and non-oral hearing date were established. Further, appellant was sent a copy of the March 13th magistrate's order containing the response date and non-oral hearing date at his address of record. Additionally, the April 4th magistrate's order again setting the response date to the motion for summary judgment for April 18, 2014 and the non-oral hearing date for May 2, 2014 was sent to appellant at his address of record. Appellant did not object to the magistrate's cut-off date, nor did he file a motion pursuant to Civil Rule 56(F) to notify the trial court he was unable to meet the cut-off date either prior to the response date or in the fourteen days between the response date and the non-oral hearing. Accordingly, the trial court did not err in failing to allow appellant sufficient time to respond to the motion for summary judgment.

{¶18} Appellant also argues that the trial court erred as a matter of law in granting appellee's motion for summary judgment because the certificate of service attached to the motion for summary judgment was undated and thus the trial court should not have accepted it for filing.

{¶19} Civil Rule 5(D) provides, in part, that "[p]apers filed with the court shall not be considered until proof of service is endorsed thereon or separately filed. The proof

of service shall state the date and manner of service and shall be signed in accordance with Civ.R. 11.” Civil Rule 5 protects the due process rights of the litigants by assuring notice of pleadings and motions to the parties. *Jackson v. Auto Specialties of Canton*, 5th Dist. Stark No. 2001CA00156, 2001-Ohio-1965.

{¶20} We first note that appellant did not object to the trial court accepting the motion for summary judgment for filing by either filing a response to the motion for summary judgment or by filing a motion to strike the motion for summary judgment. Appellant’s failure to raise such issue in a response to the motion for summary judgment or in a motion to strike in the trial court results in a waiver of their right to raise such issue on appeal. *Potts v. Safeco Ins. Co.*, 5th Dist. Richland No. 2009CA0083, 2010-Ohio-2042.

{¶21} Additionally, in addressing appellant’s claim that the trial court erred in granting summary judgment due to the lack of date on the certificate of service, we must be mindful of the “* * * elementary proposition of law that an appellant, in order to secure reversal of a judgment against him, must not only show some error but must also show that the error was prejudicial to him.” *Wachovia Mortgage Corp. v. Aleshire*, 5th Dist. Licking No. 09 CA 4, 2009-Ohio-5097. Appellant fails to show that he has been prejudiced. In this case, the cover sheet submitted with the motion for summary filed by appellee indicates the motion was sent on April 2. Further, the April 4th magistrate’s order specifically states that appellee filed a motion for summary judgment against appellant and set appellant’s response date to the motion for summary judgment and a non-oral hearing. This magistrate’s order was sent both to Brooks, appellant’s attorney, and to appellant himself at his address of record. Appellant does

not allege that service was not effected or that he did not receive notice of the filing of the motion for summary judgment. *Harleman v. Harleman*, 2nd Dist. Montgomery Nos. 24704, 24722, 2012-Ohio-205. Accordingly, appellant has shown no prejudice.

{¶22} Based upon the foregoing, we overrule appellant's assignment of error. The May 13, 2014 judgment entry of the Guernsey County Court of Common Pleas is affirmed.