[Cite as *Fields v. Zanesville Police Dept.*, 2023-Ohio-2988.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

GERALD D. FIELDS, Plaintiff - Appellant -vs- ZANESVILLE POLICE DEPT., et al., Defendant - Appellees	: : : : : : : : :	JUDGES: Hon. W. Scott Gwin, P.J. Hon. Craig R. Baldwin, J. Hon. Andrew J. King, J. Case No. CT2023-0021 O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Muskingum County Court of Common Pleas, Case No. CH2021-0053
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	August 25, 2023

APPEARANCES:

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Baldwin, J.

{¶1} Appellant Gerald D. Fields appeals the trial court's decisions denying his motion for summary judgment and granting the motions for summary judgment of appellees Zanesville Police Department and the County of Muskingum.

STATEMENT OF THE FACTS AND THE CASE

{¶2} In February of 2019, the appellant was indicted on several counts, including counts for trafficking in drugs for both cocaine and marijuana. Each of the counts had a forfeiture specification with regard to, *inter alia*, $7,700.00 in cash seized from a pillowcase during a search of appellant's residence.

{¶3} The record in this case indicates that during the criminal trial the appellant called Misty Roe, his girlfriend at the time, to testify on his behalf. Ms. Roe testified as follows with regard to the seized funds:

Q: Okay. There was three bundles of U.S. currency located in a pillowcase. Are you aware of that?

A: Yeah.

Q: Whose pillow - -

A: Mine.

Q: - - and pillowcase was that?

A: My pillowcase.

Q: Do you sleep on it?

A: Yes, sir.

Q: What's that money from?

A: It was from my checks, and I just got my tax money back.

{¶4} While Ms. Roe further testified that the money was jointly hers and the appellant's, the record before this Court shows that she did not waver in her testimony that the money was derived solely from her checks and her tax return.

{¶5} On June 5, 2019, the jury found the appellant guilty of drug possession, drug trafficking, and the illegal manufacture of drugs. However, with regard to the forfeiture specifications, the jury verdict form stated: "We, the jury, find that the Seven Thousand Seven Hundred ($7,700.00) in lawful U.S. Currency IS NOT subject to forfeiture to the State of Ohio." (Emphasis original.) The appellees argue that, based upon the jury form and the jury's refusal to find the money subject to forfeiture despite the appellant's guilt, the jury did not believe that the money belonged to the appellant, but rather, believed that it belonged to Ms. Roe.

{¶6} On June 6, 2019, the trial court issued a judgment entry finding the appellant guilty of possession of drugs (cocaine), possession of drugs (marijuana), trafficking in cocaine, trafficking in marijuana, and illegal manufacture of drugs (cocaine). Additionally, the judgment entry specifically provided that "the jury found the seven thousand seven hundred dollars ($7,700) was not subject to forfeiture to the State of Ohio."

{¶7} The appellant filed a direct appeal challenging his conviction and sentence, and this court affirmed the decision in *State v. Fields*, 5th Dist. Muskingum No. CT2019-0073, 2020-Ohio-3995. The State of Ohio did not file a cross-appeal with regard to the jury's finding that the $7,700.00 seized from appellant's home was not subject to forfeiture.

{¶8} In November and December of 2019, the appellant filed a motion for return of property and a motion for judgment on the pleadings in the criminal matter. Additionally,

he filed a motion to release and return “unlawfully held property” in July of 2020. The trial court denied all three of the appellant's motions on September 21, 2020, none of which the appellant appealed.

{¶9} On September 28, 2020, the appellant filed a complaint/petition for a writ of mandamus against the trial court judge, the Muskingum County Court of Common Pleas, and the Zanesville Police Department requesting that this Court order the trial court judge and/or the Zanesville Police Department to release to his agent the $7,700.00 in cash. The trial court judge, the Muskingum County Court of Common Pleas, and the Zanesville Police Department filed a motion to dismiss the appellant's petition based upon the sole argument that the appellant was not entitled to a writ of mandamus because he had an adequate remedy at law - appealing the decisions of the trial court denying his motions to return property.

{¶10} In *Fields v. Cottrill*, 5th Dist. Muskingum No. CT2020-0046, 2020-Ohio-5163, this Court granted the motion to dismiss the mandamus petition. However, we did not find persuasive or adopt the reasoning advanced by the respondents that the appellant's adequate remedy at law was to appeal the decisions of the trial court denying his motions to return property. Rather, we held that “Fields has an adequate remedy at law that precludes the issuance of a writ of mandamus. This adequate remedy is an action in replevin.” *Id.* at ¶6. We based our determination upon this Court's holding in *State v. Young*, 5th Dist. Richland No. CA-2810, 1991 WL 87203 (May 3, 1991), which held that a trial court does not have jurisdiction to hear a defendant's motion to return property after the judgment of conviction and sentence, and that, in order to reclaim possession of property, the defendant's proper remedy was to file an action in replevin, stating that

"when the police seized appellant's property, they effectively became bailees of the property and remain as such unless and until [appellant] commence[s] a forfeiture proceeding * * *." *Id.* at 1. We also cited in our mandamus decision the Ohio Supreme Court case of *State ex rel. Johnson v. Kral*, 153 Ohio St.3d 231, 2018-Ohio-2382, 103 N.E.3d 814, in which the Supreme Court affirmed the court of appeals' dismissal of a complaint for writ of mandamus and found that the relator had an adequate remedy at law for the return of property held by the Toledo Police Department, which was filing an action for replevin. *Id.* at ¶5.

{¶11} On March 5, 2021, the appellant commenced the current action in replevin by filing a motion for order of possession and affidavit in support of motion for order of possession against appellees. On March 12, 2021, the appellees filed a joint motion for summary judgment, arguing that they were entitled to summary judgment because the appellant's replevin complaint was barred by the doctrine of res judicata since he failed to appeal the trial court's judgment entries in the criminal matter denying his motions for return of property. The appellant filed a reply in opposition to the motion for summary judgment.

{¶12} The trial court issued a judgment entry on June 4, 2021, granting the appellees' motion for summary judgment and dismissing the appellant's replevin complaint, specifically finding that the doctrine of res judicata prevented the appellant from collaterally attacking the decision of the trial court in a replevin action because he failed to appeal the decisions of the trial court denying his prior motions for return of property.

{¶13} The appellant appealed the June 4, 2021, judgment entry, arguing that the trial court erred in applying res judicata to bar his replevin claim when no judgment had been rendered regarding the $7,700.00. On November 2, 2021, we reversed the trial court's decision, finding that it erred in granting summary judgment on the basis of res judicata, and remanded the case to the trial court to address and rule on any motions and arguments by the parties.

{¶14} On November 30, 2021, the appellant filed a motion for leave to amend complaint instanter to substitute the County of Muskingum as a defendant in place of Dennis M. Haddox, and to add a claim for conversion to the replevin action. The trial court did not rule upon the motion for leave to amend.

{¶15} On December 13, 2021, the appellant filed a motion for an order of possession seeking an order from the trial court that the appellees be directed to deliver the full $7,700.00 to his agent, Bonny Mummy. The appellant attached an affidavit to his motion for an order of possession in which he, *inter alia*, attested that he had a 100% interest in the monies. The trial court did not rule on the motion for an order of possession.

{¶16} The appellant also filed a motion for summary judgment on December 13, 2021, in which he argued that he was entitled to possession of the $7,700.00, and to which he only attached unauthenticated copies of computer printouts that allegedly established his damages. The appellant failed to attach any evidentiary quality materials to his motion for summary judgment as required by Civ.R. 56(C).

{¶17} The appellees both filed briefs in opposition to the appellant's motion for summary judgment, and also filed their own respective motions for summary judgment. Briefs in opposition and reply briefs in support were filed by all parties.

{¶18} On April 6, 2022, the trial court issued a journal entry scheduling the matter for a bench trial on June 23, 2022. The appellant did not file a motion with the trial court requesting transport to the court for purposes of attending the trial, nor did he file a motion to appear for the trial via electronic means. On June 24, 2022, the trial court issued a journal entry stating that the bench trial went forward as scheduled, that counsel for the appellees appeared, and that the appellant failed to appear. The trial court stated further that the parties had until August 31, 2022 to present written arguments regarding their position, and that all parties would have thirty days within which to file a response. The appellant filed a brief on July 28, 2022, regarding his replevin and conversion claims, to which he attached a copy of the journal entry from his criminal case denying his motion for return of property, and an unauthenticated copy of an inspection report from the City of Zanesville setting forth various code violations for his real property, which he argued he cannot remedy due to the appellees' refusal to return the $7,700.00 to his agent. The appellees filed briefs in response.

{¶19} On March 22, 2023, the trial court issued three separate judgment entries; two judgment entries granted the motions for summary judgment filed by the appellees, and the third judgment entry denied the appellant's motion for summary judgment.

{¶20} The appellant filed a timely appeal in which he sets forth the following sole assignment of error:

{¶21} "I. THE TRIAL COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANTS, BECAUSE THERE REMAINS A GENUINE ISSUE OF MATERIAL FACT AND THEY WERE NOT ENTITLED TO SUCH AS A MATTER OF LAW."

{¶22} The appellant submits that the trial court erred in denying his motion for summary judgment and in granting the appellees' motions for summary judgment.

STANDARD OF REVIEW

{¶23} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc*. (1987), 30 Ohio St.3d 35, 36, 506 N.E.2d 212. Accordingly, this Court reviews a trial court's award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241.

{¶24} Civ. R. 56(C) 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 as to any material fact and that the moving party is entitled to judgment as a matter of law ... A summary judgment shall not be rendered unless it appears from such 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 most strongly in the party's favor." Thus, summary judgment may be granted only after the trial court determines that: 1) no genuine issues as to any material fact remain 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 such 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, 364 N.E.2d 267 (1977).

{¶25} As this Court recently stated in *Infield v. Westfield Ins. Co.*, 5th Dist. Muskingum No. CT2022-0055, 2023-Ohio-1199: "It is well established that the party seeking summary judgment bears the burden of demonstrating no issues of material fact exist for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 330, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The standard for granting summary judgment is delineated in *Dresher v. Burt*, 75 Ohio St.3d 280 at 293, 662 N.E.2d 264 (1996): "* * * a party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion the nonmoving party has no evidence to prove its case. Rather, the moving party must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) which affirmatively demonstrates the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. However, if the moving party has satisfied its initial burden, the nonmoving party then has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party." The record on summary judgment must be viewed in the light most favorable to the opposing party.

Williams v. First United Church of Christ, 37 Ohio St.2d 150, 309 N.E.2d 924 (1974)." *Id.* at ¶ 21.

ANALYSIS

{¶26} The appellant argues that this Court should reverse the decisions of the trial court denying his motion for summary judgment and granting the appellees' motions for summary judgment, and remand the matter to the trial court with instructions for a rescheduled one-day bench trial at which the appellant's presence be ordered. We disagree.

{¶27} Replevin was addressed by this Court in *Lillibridge v. Pica*, 5th Dist. Coshocton No. 2020CA0012, 2021-Ohio-1480:

> . . . "In Ohio, replevin is solely a statutory remedy." *America Rents v. Crawley*, 77 Ohio App.3d 801, 603 N.E.2d 1079 (10th Dist. 1991). "Replevin is "[a]n action whereby the owner or person entitled to a repossession of goods or chattels may recover those goods or chattels from one who * * * wrongfully detains [them]." *Davis v. Springfield Police Dept.*, 2nd Dist. Clark No. 2003-CA-44, 2004-Ohio-1164. The action is "strictly a possessory action, and it lies only in behalf of one entitled to possession against one having, at the time the suit is begun, actual or constructive possession and control of the property." *Black v. Cleveland*, 58 Ohio App.2d 29, 387 N.E.2d 1388 (8th Dist. 978).
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> The plaintiff in a replevin action is required to "prove that he is entitled to possession of the property and that, at the time the [suit] was filed, the

defendant had actual or constructive possession and control of [it]." *Mulhollen v. Angel*, 10th Dist. Franklin No. 03AP-1218, 2005-Ohio-578.

Id. at ¶35-36. Thus, as a threshold matter, the appellant is initially required to prove that he was entitled to possession of the $7,700.00.

{¶28} The case progressed before the trial court, and motions for summary judgment were filed. The trial court granted the appellees' motions based upon res judicata, but this Court held that res judicata did not apply, reversed and remanded, and ordered the trial court to address and rule on any motions and arguments by the parties. Upon remand, additional dispositive motion briefing was submitted, and the trial court scheduled the matter for a one-day bench trial. The appellant did not move the trial court to issue an order to convey him to the court for the bench trial, nor did he request an order authorizing him to participate in the bench trial by Zoom, Microsoft Teams or some other electronic means. The appellant simply failed to attend the bench trial. As such, he waived his right to have a "rescheduled" bench trial as he has requested.

{¶29} The matter thereafter proceeded based upon the briefs. The appellant, however, failed to establish for purposes of summary judgment that he was entitled to the subject $7,700.00. Instead, he brazenly asserted that he possessed a 100% ownership interest in the monies, but failed to support this argument in his motion for summary judgment with evidentiary quality materials as required by Civ.R. 56(C), which provides that a summary judgment shall not be rendered unless it appears from pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, or written stipulations of fact, and only from such 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.

{¶30} The appellant failed to attach any evidentiary quality materials to his motion for summary judgment. The appellees attached copies of pertinent transcripts of the trial testimony of Ms. Roe in which she testified under oath that the $7,700.00 found in the pillowcase was her money, sourced from her checks and her tax return. The appellant failed to attach to his motion for summary judgment any evidence of the type set forth in Civ.R. 56(C) in support of his argument, instead attaching unauthenticated copies of computer printouts of bills he claimed to have incurred for the upkeep of his house. The trial court did not err in denying his motion for summary judgment and granting the summary judgment motions of the appellees.

{¶31} Furthermore, although we are not required to consider the affidavit the appellant attached to his motion for an order of possession in our summary judgment analysis, doing so does not alter our conclusion. The appellant's affidavit lacks corroboration and is self-serving, and is therefore insufficient to overcome the appellees' motions for summary judgment. As recently held by this Court:

> In *Patterson v. Licking Twp.*, 5th Dist. Licking No. 17-CA-3, 2017-Ohio-5803, ¶ 16, this Court, citing *Bank of New York v. Bobo*, 4th Dist. Athens No. 14CA22, 2015-Ohio-4601, 50 N.E.3d 229, held:
>
> A self-serving affidavit that is not corroborated by any evidence is insufficient to establish the existence of an issue of material fact. *Wells Fargo Bank v. Blough*, 4th Dist. Washington No. 08CA49, 2009-Ohio-3672, 2009 WL 2220065, ¶ 18; *Deutsche Bank Natl. Trust Co. v. Doucet*, 10th

> Dist. Franklin No. 07AP-453, 2008-Ohio-589, 2008 WL 384234, ¶ 13 ("We also find that Doucet's self-serving affidavit, which was not corroborated by any evidence, is insufficient to establish the existence of material issues of fact."). " 'To conclude otherwise would enable the nonmoving party to avoid summary judgment in every case, crippling the use of Civ.R. 56 as a means to facilitate the early assessment of the merits of claims, pre-trial dismissal of meritless claims and defining and narrowing issues for trial.' " [Internal quotations omitted.] *Blough* at ¶ 18, quoting *McPherson v. Goodyear Tire & Rubber Co.*, 9th Dist. Summit No. 21499, 2003-Ohio-7190, 2003 WL 23094976, ¶ 36.
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> "In Ohio, a moving party's contradictory affidavit cannot be used to obtain a summary judgment." *Sims v. Coley*, 5th Dist. Licking App. No. 18 CA 00007, 2018-Ohio-3703, ¶24.

Baker v. City of Mansfield, 5th Dist. Richland No. 20 CA 77, 2021-Ohio-2476, at ¶¶ 45-46. See, also, *Combs v. Spence,* 5th Dist. Licking No. 2006CA0034, 2007-Ohio-2210, at ¶21 ("…a party's unsupported and self-serving assertions offered by personal affidavit and without corroborating evidentiary materials will not be sufficient to demonstrate a material issue of fact precluding summary judgment.") The appellant failed to establish that a genuine issue of material fact existed regarding whether he was entitled to possession of the subject monies, which the first hurdle of his replevin claim. As such, summary judgment in favor of the appellees was appropriate.

{¶32} Finally, the appellant's conversion claim is not properly before this Court. The appellant's initial pleadings contained only an action for replevin. On remand, the

appellant filed a motion for leave to file an amended complaint instanter to, *inter alia*, add a claim for conversion. The trial court did not rule on the motion for leave to file instanter.

{¶33} A trial court's failure to rule on a motion creates a presumption that the trial court overruled the motion. Furthermore, when a trial court enters judgment prior to ruling on a pending motion, that motion is considered to have been implicitly denied. *Byrd v. Frush,* 5th Dist. Licking No. 13-CA-10, 2013-Ohio-3682, at ¶40. Since the trial court never ruled on the appellant's motion for leave to file amended complaint instanter, it was implicitly denied, and the conversion claim was never properly before the court. The appellant did not appeal the denial of his motion for leave to amend instanter to set forth a claim for conversion, the time for which has now passed, and the issue of conversion is therefore not properly before this Court.

CONCLUSION

{¶34} Based upon the foregoing, the appellant's assignment of error is overruled, and the judgment of the Muskingum County Court of Common Pleas is hereby affirmed.

By: Baldwin, J.

Gwin, P.J. and

King, J. concur.