

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

ADMIN NET TECH, LLC,

Plaintiff-Appellant,

v.

ALBERT M. BLEGGI, MD, LLC, ET AL.,

Defendants-Appellees.

OPINION AND JUDGMENT ENTRY
Case No. 21 MA 0082

Civil Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2020 CV 00924

BEFORE:

David A. D'Apolito, Cheryl L. Waite, Carol Ann Robb, Judges.

JUDGMENT:

Reversed, Vacated, and Remanded.

Atty. Edward T. Saadi, Edward T. Saadi, LLC, 970 Windham Court, Suite 7, Boardman, Ohio 44512, for Plaintiff-Appellant and

Atty. Richard G. Zellers, 3695 Boardman-Canfield Road, Building B, Suite 300, Canfield, Ohio 44406, for Defendants-Appellees.

Dated: May 3, 2022

D’Apolito, J.

{¶1} Appellant, Admin Net Tech, LLC, appeals from the January 27, 2021 judgment of the Mahoning County Court of Common Pleas granting Appellees’, Richard G. Zellers and Richard G. Zellers & Associates, Inc. (together “Zellers”), Civ.R. 12(B)(6) motions to dismiss for failure to state a claim. Because the trial court considered materials outside the complaint without converting the motions to dismiss to motions for summary judgment, the court erred in dismissing this case. Thus, we reverse and vacate the trial court’s judgment and remand the matter for further proceedings.

FACTS AND PROCEDURAL HISTORY

{¶2} Appellant is a provider of IT products and services. On September 24, 2015, Appellant sued Medical Imaging Diagnostics, LLC (“MID”) in the Mahoning County Court of Common Pleas, Case No. 2015 CV 2551, for breach of contract. On June 3, 2016, MID sold its assets to RPJ Liberty Enterprises, LLC (“RPJ”) for \$75,000. However, none of the purchase price was actually paid to MID. Rather, the funds were diverted to other parties associated with MID, namely, Albert M. Bleggi, MD, LLC (“Bleggi”), Roy Palumbo (“Palumbo”), Pasquale Colatruglio, and Zellers. On May 9, 2017, Appellant was granted summary judgment against MID for \$17,449.96.

{¶3} In May 2020, Appellant filed the instant action for fraudulent transfer, preferential transfer, and civil conspiracy against the recipients of the funds and others involved with MID.¹

{¶4} On August 27, 2020, Zellers (two defendants who received part of the \$75,000) filed motions to dismiss for failure to state a claim. Richard G. Zellers & Associates, Inc.’s motion to dismiss included a request for sanctions.² The motions to dismiss allege that no fraudulent transfers occurred because Zellers purportedly took

¹ On February 25, 2021, Appellant voluntarily dismissed without prejudice pursuant to Civ.R. 41(A)(1) all defendants except Zellers.

² On August 20, 2021, the trial court denied without prejudice the request for sanctions.

funds in good faith, for reasonably equivalent value, and contemporaneously pursuant to R.C. 1336.08(A) and 1336.03, and because the assets which MID sold to RPJ were purportedly encumbered by liens which excludes them from the definition of “assets” pursuant to R.C. 1336.01(B). The motions to dismiss also allege that Appellant’s preferential transfer claim is time-barred. The motions rely on matters outside the pleadings, namely, two affidavits (from Bleggi and Palumbo), a cancelled check, and two purported Notices of Federal Tax Lien.

{¶15} On September 28, 2020, Appellant filed an “Opposition To (1) Motion To Dismiss And For Sanctions Filed By Defendant Richard G. Zellers And Associates, Inc. And (2) Motion To Dismiss Of Richard G. Zellers And Motion Under Civil Rule 56(F) For An Enlargement Of Time.” Appellant stressed that Zellers presented with their motions materials outside the pleadings (two affidavits (from Bleggi and Palumbo), a cancelled check, and two purported Notices of Federal Tax Lien). Thus, Appellant requested an enlargement of time under Civ.R. 56(F) to respond so that discovery could be conducted, expecting that the trial court would treat the motions to dismiss as motions for summary judgment. Several briefs in opposition and in support were filed.

{¶16} On January 27, 2021, the trial court granted Zellers’ motions to dismiss. (Appendix A). In its judgment, the court referenced and relied on matters outside the pleadings which Zellers attached to the motions.³ The court did not convert the motions to dismiss to motions for summary judgment. The court also did not rule upon Appellant’s Civ.R. 56(F) motion. Rather, the court granted Zellers’ motions to dismiss, dismissing all of Appellant’s claims, without providing Appellant the opportunity to conduct discovery, i.e., Appellant was deprived of the opportunity to depose Bleggi and Palumbo and was deprived of any opportunity to challenge the authenticity of the notices or to investigate the extent to which they were previously paid.

{¶17} Appellant appeals the trial court’s January 27, 2021 judgment and raises four assignments of error for this court’s review.

³ On February 2, 2021, Appellant filed a motion for reconsideration. Numerous related briefs were filed by the parties. On February 25, 2021, the trial court denied Appellant’s motion for reconsideration without explanation. (Appendix B).

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ERRED IN GRANTING APPELLEES' MOTIONS TO DISMISS WITHOUT CONVERTING THEM INTO MOTIONS FOR SUMMARY JUDGMENT AND GIVING AT LEAST 14 DAYS' NOTICE OF SUCH CONVERSION.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT ERRED IN GRANTING APPELLEES' MOTIONS TO DISMISS WITHOUT GRANTING APPELLANT'S MOTION UNDER RULE 56(F) FOR AN ENLARGEMENT OF TIME, THEREBY DEPRIVING APPELLANT OF ANY OPPORTUNITY TO CONDUCT DISCOVERY.

ASSIGNMENT OF ERROR NO. 3

THE TRIAL COURT ERRED IN CONCLUDING THAT THE PURPORTED TAX LIENS PRECLUDE APPELLANT'S FRAUDULENT TRANSFER CLAIMS.

ASSIGNMENT OF ERROR NO. 4

THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S PREFERENTIAL TRANSFER AND CONSPIRACY CLAIMS.

{¶8} In order to determine whether the trial court improperly granted the motions to dismiss, we must initially review the procedural requirements pursuant to Civ.R. 12(B)(6). See *Rose v. Cochran*, 4th Dist. Ross No. 11CA3243, 2012-Ohio-1729, ¶ 10.

"A Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted tests only the legal sufficiency of the complaint." *Youngstown Edn. Assn. v. Kimble*, 2016-Ohio-1481, 63 N.E.3d 649, ¶ 11 (7th Dist.), citing *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 605 N.E.2d 378 (1992).

When reviewing a Civ.R. 12(B)(6) motion, “the court must accept the factual allegations contained in the complaint as true and draw all reasonable inferences from these facts in favor of the plaintiff.” *Kimble, supra*, at ¶ 11, citing *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). In order to grant a Civ.R. 12(B)(6) motion, “it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery.” *O’Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 327 N.E.2d 753 (1975), syllabus. However, “[i]f there is a set of facts consistent with the complaint that would allow for recovery, the court must not grant the motion to dismiss.” *Kimble, supra*, at ¶ 11, citing *York v. Ohio State Hwy. Patrol*, 60 Ohio St.3d 143, 144, 573 N.E.2d 1063 (1991).

A Civ.R. 12(B)(6) claim is reviewed de novo. *Ford v. Baska*, 2017-Ohio-4424, 93 N.E.3d 195, ¶ 6 (7th Dist.), citing *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5.

O’Bradovich v. Hess Ohio Devs., LLC, 7th Dist. Jefferson No. 20 JE 0007, 2021-Ohio-1287, ¶ 8-10.

Civ.R. 12(B) states: “When a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleading and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. Provided however, that the court shall consider only such matters outside the pleadings as are specifically enumerated in Rule 56. All parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56.” “It is the court’s responsibility either to disregard extraneous material or to convert a motion to dismiss into a motion for summary judgment when additional materials are submitted.” *Keller v. Columbus*, 100 Ohio St.3d 192, 2003-Ohio-5599, 797 N.E.2d 964, ¶ 18. Moreover, “courts cannot rely on evidence or allegations outside the complaint to determine a Civ.R. 12(B)(6) motion.” [*State ex rel.*] *Fuqua [v. Alexander]*, 79 Ohio St.3d 206, 207]. It is error to do so. *Id.* Where a trial

court chooses to consider materials outside the pleadings, the court must convert the motion to dismiss into a motion for summary judgment, notify all parties and give them a reasonable opportunity to present all materials made pertinent to such a motion by Rule 56. Civ.R. 12(B); *State ex rel. The [V] Cos. v. Marshall*, 81 Ohio St .3d 467, 470, 692 N.E.2d 198 (1998).

Rose, supra, at ¶ 11.

{¶9} As stated, Zellers’ motions to dismiss rely on matters outside the pleadings. On September 28, 2020, Appellant filed an “Opposition To (1) Motion To Dismiss And For Sanctions Filed By Defendant Richard G. Zellers And Associates, Inc. And (2) Motion To Dismiss Of Richard G. Zellers And Motion Under Civil Rule 56(F) For An Enlargement Of Time.” Appellant stressed that Zellers presented with their motions materials outside the pleadings (two affidavits (from Bleggi and Palumbo), a cancelled check, and two purported Notices of Federal Tax Lien). Thus, Appellant requested an enlargement of time under Civ.R. 56(F) to respond so that discovery could be conducted, expecting that the trial court would treat the motions to dismiss as motions for summary judgment. Nevertheless, the court did not rule upon Appellant’s Civ.R. 56(F) motion and did not convert the motions to dismiss to motions for summary judgment. Rather, the court referenced and relied on matters outside the pleadings (two affidavits, a check, and two tax liens) and granted Zellers’ motions to dismiss, without providing Appellant a reasonable opportunity to conduct discovery. (Appendix A)

{¶10} The trial court was required by Civ.R. 12(B) to either exclude the evidence beyond that contained in the complaint or convert the motions to dismiss to motions for summary judgment and give Appellant at least 14 days’ notice of the conversion. See *Rose, supra*, at ¶ 12; *Park v. Acierno*, 160 Ohio App.3d 117, 2005-Ohio-1332, ¶ 30 (7th Dist.); *Scardina v. Ghannam*, 7th Dist. Mahoning No. 04-MA-81, 2005-Ohio-3315, ¶ 16. However, the trial court did neither. Accordingly, the trial court improperly dismissed the case.⁴ See *Rose* at ¶ 13.

⁴ As the trial court failed to follow the procedural requirements under Civ.R. 12(B), and this Court reverses, vacates, and remands on those procedural grounds, we take no position on the merits of Appellant’s remaining arguments. See *Savoy v. Kramer*, 9th Dist. Summit No. 27418, 2015-Ohio-437, ¶ 12.

CONCLUSION

{¶11} For the foregoing reasons, the January 27, 2021 judgment of the Mahoning County Court of Common Pleas granting Appellees' Civ.R. 12(B)(6) motions to dismiss is reversed and vacated and the matter remanded for further proceedings consistent with this Opinion.

Waite, J., concurs.

Robb, J., concurs.

For the reasons stated in the Opinion rendered herein, it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is reversed and vacated. We hereby remand this matter to the trial court for further proceedings according to law and consistent with this Court's Opinion. Costs to be taxed against the Appellees.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.