

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

PETER RESTIVO

C.A. No. 25CA012273

Appellant

v.

GEORGIA PROPERTIES LTD.

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 23 CV 210893

Appellee

DECISION AND JOURNAL ENTRY

Dated: August 17, 2026

STEVENSON, Judge.

{¶1} Plaintiff-Appellant Peter Restivo (“Restivo”) appeals from the order of the Lorain County Court of Common Pleas granting Defendant-Appellee Georgia Properties, Ltd.’s (“Georgia”) motion for summary judgment. For the reasons set forth below, this Court affirms.

I.

{¶2} Restivo filed suit against Rustom Khouri (“Khouri”), Caravon Golf Company, Ltd. (“Caravon”), Carnegie Residential Development Corp. (“CRDC”) and Georgia (collectively the “Defendants”) for breach of contract, tortious interference, unjust enrichment, accounting, and fraud. Defendants moved to strike the complaint on the ground that the majority of the claims were duplicative of claims already pending in two other related cases. The motion was granted as to all the claims except those against Georgia as Georgia was not a party in the other cases. The matter continued between Restivo and Georgia, and Georgia moved for summary judgment. The

court granted the motion and Restivo timely appealed. He sets forth seven assignments of error for our review.

II.

PROCEDURAL BACKGROUND AND HISTORY

{¶3} The two other related cases relevant to this appeal are *CRDC v. Restivo*, Lorain C.P. No. 21CV203137 (“First Case”) and *Restivo v. Khouri, et.al.*, Lorain C.P. No. 22CV20779 (“Second Case”). The suit that gave rise to this appeal will hereafter be referred to as the “Third Case.” We note preliminarily that the record in the First and Second Cases was not provided as part of the record on appeal in the within Third Case. Therefore, the below factual and procedural outline is based on the undisputed facts and procedure set forth by both parties in their merit briefs and the record in this case.

{¶4} In the First Case, CRDC filed suit against Restivo on April 1, 2021, for recording of a fraudulent affidavit to clarify title against CRDC’s property. Restivo answered and counterclaimed for commissions that he claimed he was owed and for fraud. Upon CRDC’s motion, the claim for commissions was dismissed. CRDC amended its complaint to add parties and claims related to Restivo’s avoidance of contractual and fiduciary obligations to CRDC and for breach of contract. Restivo answered and amended his counterclaim and CRDC moved to dismiss. In response, Restivo requested to amend both his answer and counterclaim. He also filed a third-party complaint against Khouri and Caravon alleging breach of contract. The court permitted Restivo’s second amended counterclaim but dismissed the third-party complaint. CRDC moved to dismiss the second amended counterclaim which the court granted in part as to Restivo’s claim for commissions, leaving the non-commissions claims pending. Those claims were pending as of the filing of the Third Case.

{¶5} After being denied his third-party complaint against Khouri and Caravon in the First Case, Restivo filed a complaint against Khouri and Caravon in the Second Case on December 29, 2022, for breach of contract, tortious interference, promissory estoppel, unjust enrichment, fraud, and accounting. Khouri and Caravon moved to dismiss the complaint. In response, Restivo amended his complaint, adding CRDC and Georgia as defendants and asserting additional claims. In August 2023, the court struck the amended complaint as improperly filed without leave. Restivo voluntarily dismissed the case on January 30, 2024.

{¶6} The Third Case was filed on December 4, 2023, almost a month prior to Restivo's voluntary dismissal of the Second Case. On July 22, 2024, Restivo moved under Civ.R. 56(F) for additional time to conduct discovery before opposing Georgia's motion for summary judgment. Georgia opposed the motion and the trial court granted Restivo until November 1, 2024, to conduct discovery and respond. Despite Restivo's failure to respond or request a further extension of time, on January 13, 2025, the court sua sponte granted Restivo until February 1, 2025, to oppose Georgia's motion. On March 17, 2025, six weeks after the response deadline, Restivo again moved under Civ.R. 56(F) for more time to conduct discovery to oppose Georgia's motion for summary judgment. On April 15, 2025, the court granted Georgia's motion for summary judgment.

{¶7} Restivo's assignments of error will be addressed out of order and in a consolidated fashion for ease of analysis.

III.

ASSIGNMENT OF ERROR NO. 3:

THE LOWER COURT ERRED WHEN IT GRANTED THE MOTION TO STRIKE THE COMPLAINT, SINCE THE PRINCIPLE OF ABATEMENT IS RAISED BY AN ANSWER OR A MOTION TO DISMISS PURSUANT TO CIVIL RULE 12(B)(6) IF THE PRIOR ACTION CLEARLY APPEARS ON THE FACE OF THE COMPLAINT.

{¶8} In their motion, the Defendants asked the trial court to strike Restivo’s complaint “pursuant to Civ.R. 12(F)” based on the redundancy of his claims and duplicative litigation.

{¶9} Civ.R. 12(F) states that,

[u]pon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within twenty-eight days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient claim or defense or any *redundant*, immaterial, impertinent, or scandalous matter.

(Emphasis added.).

{¶10} In partially granting the motion to strike, the trial court reasoned that the Third Case duplicated claims previously brought by Restivo in the First Case against CRDC and in the Second Case against Caravon and Khouri, and that all those earlier claims were still pending as of December 4, 2023, when the Third Case was filed. Specifically, the court found that “the new legal action appears to be another attempt [by Restivo] to collect Khouri, Caravon, CRDC, and Georgia into one legal action even [though] two other cases between the parties are already pending covering the same commercial matters.”

{¶11} “The determination of a motion to strike is within the court’s broad discretion.” *State ex rel. Ebbing v. Ricketts*, 2012-Ohio-4699, ¶ 13. “A court’s ruling on a motion to strike will not be reversed on appeal absent an abuse of discretion.” *Id.* A decision constitutes an abuse of discretion when it is “unreasonable, arbitrary, or unconscionable.” *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶12} The gravamen of Restivo’s argument on appeal is that Civ.R. 12(F) was not the proper procedural vehicle to dismiss his claims against CRDC, Khouri, and Caravon. His argument is premised upon the application of the principle of abatement; that is, if at the time of the commencement of a second action between parties there is a pending suit between the same

parties for the same cause of action, the pendency of the prior suit is a defense to the second action, and must be asserted as a defense unless the first cause of action was alleged on the face of the second suit. *See Weil v. Guerin*, 42 Ohio St. 299, paragraphs one and two of the syllabus (1984). Based on that premise, Restivo maintains that in the Third Case, no facts pertaining to the First and Second Cases appear conclusively on the face of the complaint, and Defendants did not assert a defense of abatement by way of an answer or motion to dismiss under Civ.R. 12(B)(6). Therefore, the trial court erred in granting the motion to strike. In support, Restivo relies on *Smith v. Findlay*, 12 Ohio Dec. Rep. 334 (1855), *Schmuck v. Crum & S. Mfg.*, 1905 WL 1304 (Jan. 1, 1905), *Spence v. Union Cent. L. Ins. Co.*, 40 Ohio St. 517 (1884), paragraph two of the syllabus, *State ex rel. Mayne v. Dunn*, 69 N.E. 2d 421, syllabus (1946), and *State ex rel. McHenry v. Calhoun*, 87 Ohio App. 1, 4 (8th Dist. 1950).

{¶13} The cases that Restivo relies upon in support of his argument predate the adoption of the Ohio Rules of Civil Procedure and do not address a Civ.R. 12(F) motion to strike. Civ.R. 12(F) is presently the appropriate vehicle for requesting that matters be struck from a pleading due to “any insufficient claim or defense or any redundant, immaterial, impertinent, or scandalous matter.” Civ.R. 12(F); *In re Moore*, 14 Ohio App.3d 264, paragraph two of the syllabus (10th Dist. 1984) (“If a complaint contains redundant or immaterial matter, the proper procedure is a motion to strike pursuant to Civ.R. 12(F)”). Restivo acknowledged this in his brief in opposition to the Defendants’ motion to strike and even cited the seminal Ohio Supreme Court case of *State ex rel. Neff v. Corrigan*, 75 Ohio St.3d 12 (1996) in defense of the motion.

{¶14} In *Neff*, the defendants’ Civ.R. 12(F) motion to strike attacked the sufficiency of plaintiff’s complaint in its entirety. In upholding the trial court’s order striking the complaint, the *Neff* Court stated as follows:

While an insufficient complaint may be subject to a Civ.R. 12(F) motion to strike, these motions should not be used as a substitute for a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted. *Instead, a Civ.R. 12(B)(6) motion to dismiss is directed to the entire pleading, whereas a Civ.R. 12(F) motion to strike based on insufficiency of a claim should only be used to attack individual claims which are not dispositive of the entire action.* Nevertheless, a trial court's erroneous use of Civ.R. 12(F) in lieu of Civ.R. 12(B)(6) where the issue is sufficiency of an entire complaint does not constitute reversible error based on a mere misdesignation of the appropriate motion, since the question of sufficiency is adequately raised. *However, the better practice is to use a Civ.R. 12(B)(6) motion, rather than a Civ.R. 12(F) motion, where the sufficiency of the entire complaint is at issue.*

(Emphasis added.) (Internal citations omitted.) *Neff* at 14-15 (1996). We applied this standard in *May v. Donich Neurosurgery and Spine, L.L.C.*, 2019-Ohio-4246 (9th Dist.), emphasizing in particular the distinction between a Civ.R. 12(B)(6) motion to dismiss and Civ.R. 12(F):

“*matters raised by [a motion to strike] are classified as ‘objections’ rather than as ‘defenses.’*” 1970 Staff Notes 6,7, Civ.R. 12 (E),(F). A party may move the court to strike an *insufficient portion* of a pleading pursuant to Civ.R. 12(F) A Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted is directed to the *entire pleading* whereas a Civ.R. 12(F) motion to strike is directed at insufficient *claims* or pleadings *not dispositive of the entire action*.

(Emphasis added.) *Id.* at ¶ 17, citing *Neff* at 14; *see also Phillips v. Thompson*, 2021-Ohio-4500, ¶ 10 (9th Dist.).

{¶15} Thus, Civ.R. 12(B)(6) motions to dismiss are best directed towards challenging the *entire* pleading and Civ.R. 12(F) motions to strike are best used for challenging *individual claims* that do not dispose of the entire action. Here, the court did not strike the entire complaint, only the claims against Khouri, CRDC, and Caravon, leaving Georgia’s claim intact for further proceedings. Thus, even if we were to agree with Restivo that striking an entire pleading via Civ.R. 12(F) is inappropriate, that is not what occurred in this case despite any “misdesignation” of the motion by Defendants in seeking to strike the entire complaint. *Neff* at 15. This is consistent with the purpose of a Civ.R. 12(F) motion to strike; *i.e.*, to dismiss “claims or pleadings not

dispositive of the entire action.” *May* at ¶ 17; *Neff* at 14-15. Also, while the Defendants in the Third Case challenged Restivo’s complaint on the basis of redundancy as opposed to insufficiency, which was the issue in *Neff* and *May*, the operation of Civ.R. 12(F) is not limited to insufficient claims, but also includes “any *redundant*, immaterial, impertinent, or scandalous matter.” (Emphasis added.) All of those grounds are subsumed by Civ.R. 12(F).

{¶16} Accordingly, based on the foregoing, the trial court did not abuse its discretion in striking all but Restivo’s claims against Georgia under Civ.R. 12(F). Restivo’s third assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 1:

THE LOWER COURT ERRED WHEN IT GRANTED THE MOTION TO STRIKE THE COMPLAINT, SINCE THE PRINCIPLE OF ABATEMENT DID NOT APPLY DUE TO THE FACT THAT ANY PRIOR ACTION INVOLVING THE SAME PARTIES AND THEIR CLAIMS WAS DISMISSED AND NOT PENDING WHEN THE MOTION TO STRIKE WAS GRANTED.

ASSIGNMENT OF ERROR NO. 2:

THE LOWER COURT ERRED WHEN IT GRANTED THE MOTION TO STRIKE THE COMPLAINT SINCE THE PRINCIPLE OF ABATEMENT DID NOT APPLY DUE TO THE FACT THAT ANY PRIOR ACTION DID NOT CONTAIN THE SAME CLAIMS AND SAME PARTIES IN THE SECOND ACTION.

{¶17} As in his third assignment of error, Restivo’s first and second assignments of error are premised upon the principle of abatement, and in support he relies on the same cases as well as other cases dating back to the late 19th and early 20th centuries that pre-date the adoption of Civ.R. 12(F). Having determined that Defendants properly sought relief under Civ.R. 12(F) and abatement is no longer the appropriate procedural mechanism for seeking to strike pleadings or portions thereof, to the extent Restivo’s arguments rely on the principle of abatement, they are not well taken.

{¶18} In his first assignment of error, Restivo argues that the trial court erred in granting the motion to strike because the Second Case was dismissed on January 30, 2024, and therefore, was not pending on March 28, 2024, when the court ruled on the motion to strike. That argument is based on the principle of abatement which, according to Restivo, determines pendency based on when the plea of abatement in the second case was “adjudicated[,]” or in the context of this case, when the court ruled on the motion to strike. As that argument is based on the principle of abatement, it is overruled.

{¶19} Restivo does not challenge the court’s findings in support of its ruling; *i.e.*, that the Second and Third Cases involved the same claims and parties and thus the Third Case is redundant and duplicative; that the Third Case was filed on December 4, 2023; and that the Second Case was voluntarily dismissed on January 30, 2024, and thus was still in progress when the Third Case was filed. He cites no relevant legal authorities construing Civ.R. 12(F) stating that the trial court’s analysis of the motion based on these facts constitutes an abuse of discretion. Accordingly, Restivo’s first assignment of error is overruled.

{¶20} In his second assignment of error, Restivo argues that the claims in the Third Case did not arise from the same transaction or occurrence as the First Case and involved different parties and claims, and therefore, the First Case does not operate as an abatement upon the Third Case. Restivo does not dispute that the First Case is still pending. Again, to the extent that he relies on the principle of abatement, his argument is overruled. Even if we were inclined to agree with Restivo that the principle of abatement applied, our resolution of his assignment of error would require review of the record in the First Case, specifically the claims, parties, and factual allegations, to determine if they are different from the Third Case. As previously noted, that record was not provided to this Court. “The obligation to ensure that the record on appeal contains all matters

necessary to allow this Court to resolve the issues on appeal lies with the appellant.” *State v. Daniel*, 2014-Ohio-5112, ¶ 5 (9th Dist.). “We have consistently held that, where the appellant has failed to provide a complete record to facilitate appellate review, this Court is compelled to presume regularity in the proceedings below and affirm the trial court’s judgment.” *Id.* Because the record in the First Case is not part of the record on appeal to allow us to compare the claims in the First and Third cases, we can only presume regularity in the trial court proceedings and affirm its judgment.

{¶21} Accordingly, based on the foregoing, Restivo’s first and second assignments of error are overruled.

ASSIGNMENT OF ERROR NO. 4:

THE LOWER COURT ERRED WHEN IT DENIED [RESTIVO’S] MOTION FOR EXTENSION OF TIME TO FILE PURSUANT TO CIV.R. 56(F) AN EXTENSION OF TIME TO FILE A BRIEF IN OPPOSITION TO THE MOTION FOR SUMMARY JUDGMENT AS UNTIMELY SINCE THE LOWER COURT SET A BRIEFING SCHEDULE CONTRARY TO CIVIL RULE 6(C)(1) WHICH ALLOWS A MINIMUM OF TWENTY-EIGHT (28) DAYS TO FILE A RESPONSE.

ASSIGNMENT OF ERROR NO. 5:

THE LOWER COURT ERRED WHEN IT DENIED [RESTIVO’S] MOTION FOR EXTENSION OF TIME TO FILE PURSUANT TO CIVIL RULE 56(F) A BRIEF IN OPPOSITION TO THE MOTION FOR SUMMARY JUDGMENT PRIOR TO ANY SUBSTANTIAL COURT DISCOVERY PLAN.

ASSIGNMENT OF ERROR NO. 6:

THE LOWER COURT ERRED WHEN IT DENIED [RESTIVO’S] MOTION FOR EXTENSION OF TIME TO FILE PURSUANT TO CIVIL RULE 56(F) AN EXTENSION OF TIME TO FILE A BRIEF IN OPPOSITION TO THE MOTION FOR SUMMARY JUDGMENT SINCE NO SUBSTANTIAL DISREGARD OF THE JUDICIAL SYSTEM IS PRESENT.

ASSIGNMENT OF ERROR NO. 7:

THE LOWER COURT ERRED WHEN IT DENIED [RESTIVO’S] MOTION FOR EXTENSION OF TIME TO FILE PURSUANT TO CIVIL RULE 56(F) AN EXTENSION OF TIME TO FILE A BRIEF IN OPPOSITION TO THE MOTION FOR SUMMARY JUDGMENT SINCE [RESTIVO] TIMELY OR PROPERLY FILED SUCH EXTENSION PURSUANT TO CIVIL RULE 6(B)(1) OR 6(B)(2) AND CASES SHOULD BE DETERMINED UPON THE MERITS AND NOT UPON PLEADING TECHNICALITIES.

{¶22} In his fourth through seventh assignments of error Restivo sets forth the following challenges to the trial court’s denial of his motion for extension of time under Civ.R. 56(F) to respond to Georgia’s motion for summary judgment. He argues: (1) the court ordered a response brief due less than 28 days from its order setting the briefing schedule in contravention of Civ.R. 56 and Civ.R. 6(C)(1); (2) the court had no discovery plan, *i.e.*, made no discovery schedule, no expert reports schedule, and no final pretrial/trial dates; (3) Restivo did not demonstrate a flagrant, substantial disregard for court rules that would justify a dismissal on procedural grounds; and (4) a fundamental tenet of judicial review in Ohio is that courts should decide cases on the merits.

{¶23} The trial court initially granted Restivo until November 1, 2024, to conduct discovery and respond to Georgia’s motion for summary judgment. That deadline passed without a response from Restivo. On January 13, 2025, the court sua sponte granted him a further extension of time, until February 1, 2025, to oppose the motion. Restivo waited another six weeks, until March 17, 2025, which was well past the deadline, to request another extension of time. The court granted Georgia’s motion for summary judgment on April 15, 2025. Restivo’s motion requesting another extension of time was presumably denied. *Matus v. Jacts Group, LLC*, 2018-Ohio-1439, ¶ 14 (9th Dist.), quoting *Canfield v. Columbia Gas Transm., LLC*, 2016-Ohio-5662, ¶ 20 (9th Dist.) (“[g]enerally, when a trial court fails to rule on a motion . . . [it] will be considered denied for purposes of appellate review.”).

{¶24} The purpose of obtaining a continuance under Civ.R. 56(F) is to obtain “sufficient facts to rebut a motion for summary judgment.” *Cessna v. Lone Star Steakhouse & Saloon of Ohio, Inc.*, 2001 WL 1379451, *4 (9th Dist. Nov. 7, 2001). “If a party . . . does not, in their response to a summary judgment motion, show prejudice resulting from failure to receive the discovery requested, that party fails to preserve the issue for appeal.” *Tripp v. Beverly Ent.-Ohio, Inc.* 2003-Ohio-6821, ¶ 69 (9th Dist.). “The application of Civ.R. 56(F) is discretionary; therefore, a trial court's denial of such a motion shall not be reversed absent an abuse of discretion.” *Galland v. Meridia Health Sys., Inc.*, 2004-Ohio-1416, ¶ 6 (9th Dist.).

{¶25} Restivo does not attempt to show this Court how he was prejudiced by the court’s denial of his motion for an extension of time as he was required to do. Summary judgment was granted in favor of Georgia and against Restivo on Restivo’s claims, leaving no claims in the action for further adjudication. The claims against the other defendants were previously struck from the case. Restivo did not assign as error that the trial court improperly granted summary judgment in favor of Georgia without first granting him a continuance under Civ.R. 56(F) and that if he had obtained “sufficient facts to rebut [Georgia’s] motion for summary judgment” he would likely have prevailed. *Cessna* at *4. He does not allege what information he wanted to discover, just that the court denied his motion for technical deficiencies rather than ruling on the merits. His challenge is limited solely to the alleged procedural unfairness of the trial court’s denial of his request for a further continuance without explaining how that denial prejudiced him and prevented him from obtaining discovery favorable to his case on summary judgment. As Restivo did not meet his burden of showing prejudice to his ability to rebut the motion for summary judgment because of the trial court’s ruling, we cannot conclude that the trial court abused its discretion in denying him a continuance. *Tripp* at ¶ 69.

{¶26} Moreover, even if we could consider the merits of Restivo’s argument, we could not say that the court abused its discretion in denying him a continuance as he was given an additional four and a half months to respond after the initial additional response period, yet he did not file a response nor state in his untimely motion for a further continuance why he did not timely respond and what information he wished to discover that would have allowed him to successfully rebut Georgia’s motion for summary judgment.

{¶27} For all the above reasons, Restivo’s fourth through seventh assignments of error are without merit and overruled.

III.

{¶28} Based on the foregoing, Restivo’s assignments of error are overruled. The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

SCOT STEVENSON
FOR THE COURT

HENSAL, P. J.
SUTTON, J.
CONCUR.

APPEARANCES:

GERALD W. PHILLIPS, Attorney at Law, for Appellant.

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