

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

The Huntington National Bank, :
 :
Plaintiff-Appellee, :
 :
v. : No. 12AP-994
 : (C.P.C. No. 12CV-001129)
Bywood, Inc., et al., : (REGULAR CALENDAR)
 :
Defendants-Appellants. :

D E C I S I O N

Rendered on June 28, 2013

Jody Michelle Oster, for appellee.

Law Office of Brian M. Garvine, LLC, and Brian M. Garvine,
for appellant.

APPEAL from the Franklin County Court of Common Pleas

DORRIAN, J.

{¶ 1} Defendants-appellants, Bywood, Inc. ("Bywood") and Ashraf Ettayem ("Ettayem") (collectively "appellants"), appeal from a decision of the Franklin County Court of Common Pleas granting summary judgment in favor of plaintiff-appellee, The Huntington National Bank ("appellee"). Because we conclude that the trial court did not err by denying appellants' request for a continuance under Civ.R. 56(F) and ruling on the motion for summary judgment, we affirm.

{¶ 2} Bywood applied for and received a business overdraft protection loan and a business credit line loan from appellee in 2007. At the same time, Ettayem executed a guaranty, pursuant to which he guaranteed prompt payment of all Bywood's obligations

to appellee, including the business overdraft protection loan and the business credit line loan. In January 2012, appellee filed a complaint in the Franklin County Court of Common Pleas, asserting that Bywood breached its contractual obligations with respect to the business overdraft protection loan and the business credit line loan. Appellee further asserted that Ettayem was liable for the amounts Bywood owed under those loans pursuant to the guaranty. On October 9, 2012, appellee filed a motion for summary judgment against Bywood and Ettayem on four of the seven counts asserted in appellee's complaint. Appellants responded by filing a memorandum in opposition, requesting that the trial court deny summary judgment or, in the alternative, grant a continuance under Civ.R. 56(F) for appellants to undertake discovery sufficient to oppose summary judgment. On November 20, 2012, the trial court issued an order granting appellee's motion for summary judgment, finding that appellee was entitled to judgment as a matter of law.

{¶ 3} Appellants appeal from the trial court's order, assigning a single error for this court's review:

THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT'S [sic] BYWOOD INC. AND ASHRAF ETTAYEM IN ORDERING SUMMARY JUDGMENT IN FAVOR OF APPELLEE HUNTINGTON NATIONAL BANK ON APPELLEE'S COMPLAINT ON CONTRACTS AND GUARANTY.

{¶ 4} Appellants' sole assignment of error is phrased as a challenge to the trial court's grant of summary judgment. However, the arguments in appellants' brief focus exclusively on the trial court's denial of their request for a continuance to conduct discovery under Civ.R. 56(F). App.R. 16(A)(7) provides that an appellant's brief must include an "argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions." An appellate court may disregard an assignment of error presented for review if a party fails to argue the assignment separately in its brief. *Wells v. Michael*, 10th Dist. No. 05AP-1353, 2006-Ohio-5871, ¶ 18. To the extent that appellants sought to argue under the first assignment of error that the trial court erred in granting summary judgment because appellee did not establish that there were no genuine issues of material fact and that it

was entitled to judgment as a matter of law, we disregard such a claim because appellants failed to expressly assert it in their brief. Appellants' brief focused solely on an argument that the trial court erred by granting summary judgment because appellants were entitled to additional time to conduct discovery and respond to the motion for summary judgment pursuant to their request for a continuance under Civ.R. 56(F).

{¶ 5} With respect to their Civ.R. 56(F) request, appellants note that, although the trial court granted summary judgment, it did not expressly rule on their continuance request. Generally, when a trial court enters judgment without expressly ruling on a pending motion, it is presumed that the court overruled the motion. *Perpetual Fed. Sav. Bank v. TDS2 Prop. Mgmt., LLC*, 10th Dist. No. 09AP-285, 2009-Ohio-6774, ¶ 9. This court and other appellate courts regularly apply this presumption in cases where a trial court grants summary judgment without expressly ruling on a pending Civ.R. 56(F) motion. *Id.* at ¶ 9. Accordingly, we conclude that the trial court effectively denied appellants' Civ.R. 56(F) motion when it granted summary judgment in favor of appellee.

{¶ 6} We review a trial court's ruling on a Civ.R. 56(F) motion for abuse of discretion. *Glimcher v. Reinhorn*, 68 Ohio App.3d 131, 138 (10th Dist.1991). An abuse of discretion occurs where a trial court's decision is "unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 7} "Civ.R. 56(F) provides a method by which a party may seek a continuance on a motion for summary judgment so that he may obtain affidavits opposing the motion or conduct discovery relevant to it." *Glimcher* at 137. A party must support its request for a continuance under Civ.R. 56(F) with an affidavit establishing a factual basis and reasons why it cannot present facts essential to oppose summary judgment. *Id.* at 138. " 'Mere allegations requesting a continuance or deferral of action for the purpose of discovery are not sufficient reasons why a party cannot present affidavits in opposition to the motion for summary judgment.' " *Id.*, quoting *Gates Mills Invest. Co. v. Pepper Pike*, 59 Ohio App.2d 155 (8th Dist.1978), at paragraph two of the syllabus. The party seeking relief under Civ.R. 56(F) bears the burden of demonstrating that a continuance is warranted. *Id.*

{¶ 8} Appellants supported their continuance request with an affidavit from their counsel. In the affidavit, appellants' counsel stated that he had reason to doubt

some of the inferences and statements made in the affidavit provided in support of appellee's motion for summary judgment and asserted that these statements possibly were not based on the affiant's personal knowledge. Appellant also stated that he had not pursued discovery in the case because he believed that the parties would seek to resolve all issues in this case and other tangentially related cases through mediation. In effect, appellants' continuance request and supporting affidavit explained why appellants had not conducted discovery and asserted that discovery would be necessary to oppose summary judgment. However, "[s]imply requesting a continuance in order to conduct discovery is not a sufficient explanation for why a party cannot present affidavits in opposition to the motion for summary judgment." *Jefferson Golf & Country Club v. Leonard*, 10th Dist. No. 11AP-434, 2011-Ohio-6829, ¶ 42. Further, we note that appellee filed its motion for summary judgment on October 9, 2012, but the discovery cutoff date in the case schedule was November 16, 2012. In their request for a continuance, appellants failed to explain why they could not obtain adequate discovery before the discovery cutoff date.

{¶ 9} In their brief on appeal, appellants assert that they planned to depose the individual whose affidavit was provided in support of appellee's motion for summary judgment. Appellants claim that this deposition was necessary because that individual may not have personally processed certain documents relevant to the case. Appellants also assert that they sought to determine how and when certain handwritten notations were placed on those documents. Appellant did not raise these arguments before the trial court in support of their continuance request, and we decline to consider them on appeal. *See Camp v. Star Leasing Co.*, 10th Dist. No. 11AP-977, 2012-Ohio-3650, ¶ 66 ("Generally, a party waives the right to raise on appeal an argument it could have raised, but did not, in earlier proceedings.").

{¶ 10} After reviewing appellants' continuance request and supporting affidavit, we conclude that appellants failed to demonstrate to the trial court a sufficient factual basis and reasons to explain why they could not present facts essential to oppose summary judgment. The trial court did not abuse its discretion by implicitly denying appellants' request and proceeding to rule on the motion for summary judgment.

{¶ 11} For the foregoing reasons, we overrule appellants' assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN and SADLER, JJ., concur.
