

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
FULTON COUNTY

Jeremy Kerr

Court of Appeals No. F-10-019

Appellant

Trial Court No. 09CV000359

v.

Michael Iozzo, et al.

DECISION AND JUDGMENT

Appellees

Decided: April 15, 2011

* * * * *

Jeremy Kerr, pro se.

W. David Arnold and Jason M. Van Dam, for appellees.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Fulton County Court of Common Pleas, which granted summary judgment to appellee. For the reasons set forth below, this court affirms the judgment of the trial court.

{¶ 2} Appellant, Jeremy Kerr, sets forth the following the sole assignment of error:

{¶ 3} "THE TRIAL COURT ERRORED [SIC] TO THE PREJUDICE OF THE APPELLANT BY GRANTING APPELLE'S [SIC] MOTION FOR SUMMARY JUDGMENT."

{¶ 4} The following undisputed facts are relevant to the issues raised on appeal. This case stems from a 2006 construction dispute between the parties. On June 6, 2006, appellant, a construction contractor, executed a written contract with appellee, owner of a manufacturing facility, pursuant to which appellant served as the general contractor for the construction of an addition to be constructed as part of an expansion of appellee's facility in Swanton, Ohio.

{¶ 5} During the course of construction, appellee became concerned regarding appellant's frequent requests for payments prior to the deadlines set forth in the payment schedule delineated in the contract. Appellee subsequently discovered that appellant was failing to tender payments to the material suppliers and subcontractors involved with the project despite appellee's advance payments. Accordingly, appellee advised appellant that further payments would be tendered directly to the parties owed.

{¶ 6} In October 2006, appellant ceased all activity at the construction site, breached the construction contract, and left the project unfinished. This necessitated that appellee retain an alternative contractor to complete the project, incurring expenses in excess of the original contract price.

{¶ 7} On June 1, 2007, appellee filed suit against appellant for breach of the construction contract and fraud. On June 6, 2007, the clerk notified counsel for appellee that the certified mail service of the complaint and summons to appellant was returned as "not deliverable." On July 6, 2007, counsel for appellee had appellant alternatively served via regular mail as provided for in Civ.R. 4.6(D). Ordinary mail service was never returned with an endorsement showing failure of delivery.

{¶ 8} On August 7, 2007, appellant and his counsel met with appellee and his counsel to discuss settlement options. During the meeting, discussions transpired regarding specific potential settlement options, including a proposal to execute a promissory note and structured payments to satisfy appellant's liability to appellee. Ultimately, the case was not settled. No counterclaim was ever filed by appellant. Appellant now obtusely claims to have never been notified of the very litigation for which he directly participated in a settlement conference.

{¶ 9} On December 14, 2007, appellee moved for a default judgment. On December 18, 2007, the trial court granted default judgment to appellee. On October 19, 2009, approximately a week after appellant was released from serving a term of incarceration for criminal convictions arising out of the same incident underlying this matter, appellant filed suit against appellee.

{¶ 10} On June 10, 2010, appellee moved for summary judgment against appellant. In support, appellee asserted that appellant failed to file a compulsory counterclaim in the original action as mandated by Civ.R. 13(A). In addition, appellee

asserted both compliance with the service requirements of Civ.R. 4.6(D) and simultaneously asserted that appellant had actual notice of the original action. The actual notice claim was evidenced by an affidavit from counsel for appellee regarding the settlement conference in which appellant was present and participated in during the course of that action.

{¶ 11} On June 30, 2010, the trial court granted summary judgment to appellee. In the summary judgment determination, the trial court emphasized the ample evidence of actual notice to appellant of the original case. This appeal ensued.

{¶ 12} An appellate court reviews the trial court's summary judgment determination on a de novo basis, applying the same standard as utilized by the trial court. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129; *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Summary judgment is granted when there remains no genuine issue of material fact and, when considering the evidence strongly in favor of the nonmoving party, reasonable minds can only conclude the moving party is entitled to judgment as a matter of law. Civ.R. 56(C).

{¶ 13} In support of his position, appellant places determinative reliance upon his unilateral claim of no service of the 2007 action. Civ.R. 4.6(D) establishes how service is to be effectuated in scenarios where service by certified mail is not successful. It requires counsel to submit a written request for ordinary mail service, evidenced by a certificate of mailing. It provides that if ordinary mailing is returned as undeliverable, the clerk must notify counsel for the serving party. The record of evidence in this manner reflects full

compliance with Civ.R. 4.6(D). The alternative service via ordinary mail was not returned as undelivered.

{¶ 14} In conjunction with the above, the record of evidence establishes that appellant had actual notice of the suit. Counsel for appellee furnished a clear and unambiguous affidavit setting forth that appellant and counsel for appellant were not only aware of the pending litigation but also actually participated in a settlement conference during which specific settlement proposals were discussed.

{¶ 15} By contrast, neither appellant nor his counsel submitted opposing affidavits denying the settlement conference. Given appellant's failure to rebut the clear evidence of actual notice, the trial court may properly presume effective service to have occurred. *Kapszukiewicz v. Samuel*, 6th Dist. No. L-06-1206, 2007-Ohio-2152.

{¶ 16} Pursuant to Civ.R. 13(A), a counterclaim arising out of the same transaction or occurrence that is the subject matter of the action shall be put forth by the opposing party during pleading. We find that the record of evidence demonstrates that appellant failed to comply with Civ.R. 13(A). In conjunction with this, we find that the record of evidence demonstrates that appellee complied with Civ.R. 4.6(D) and that appellant had actual notice of the action. In consideration of these facts and circumstances, we find that the record of evidence demonstrates that there remains no genuine issue material fact in this matter necessitating trial court resolution. As such, we find appellant's sole assignment of error not well-taken.

{¶ 17} Wherefore, the judgment of the Fulton County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

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