

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

Sports Facilities Development II, Ltd.,	:	
	:	
Plaintiff-Appellant/ Cross-Appellee,	:	
	:	
v.	:	No. 10AP-591
	:	(C.P.C. No. 08CVH-11-16670)
Lane, Alton & Horst et al.,	:	
	:	(REGULAR CALENDAR)
Defendants-Appellees/ Cross-Appellants.	:	
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D E C I S I O N

Rendered on July 26, 2011

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*Adams, Babner & Gitlitz, LLC, Bret A. Adams and Joel H. Mirman*, for appellant.

*Freund, Freeze & Arnold, LPA, and Stephen V. Freeze*, for appellees.

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APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Plaintiff-appellant/cross-appellee, Sports Facilities Development II, Ltd. ("SFD" or "appellant"), appeals from the summary judgment granted by the Franklin County Court of Common Pleas in favor of defendants-appellees/cross-appellants, Lane, Alton & Horst ("Lane Alton" or "appellees"), Teri Rasmussen ("Rasmussen" or

"appellees"), Christopher Pettit ("Pettit" or "appellees"), and Hedco Hoop, LLC ("Hedco" or "appellees"). For the reasons that follow, we affirm the judgment of the trial court.

{¶2} In August 2006, SFD and Hedco entered into a commercial lease. In December 2006, Hedco defaulted on the terms of the lease by failing to make rental payments, which caused SFD to file an eviction action in the Franklin County Municipal Court on July 16, 2007 ("eviction action").

{¶3} Rasmussen and Pettit were employed by Lane Alton and provided legal representation for Hedco and its member, Hendrik van Deventer. Hedco filed an answer and counterclaims, which caused the eviction action to be removed to the Franklin County Court of Common Pleas. Hedco and SFD eventually settled the eviction action, but not before SFD incurred legal fees in prosecuting the eviction and defending the counterclaims.

{¶4} As a result, on November 20, 2008, SFD filed a complaint for abuse of process against Lane Alton, Rasmussen, Pettit, and Hedco. Appellees filed an answer and amended answer. They then filed a motion for judgment on the pleadings, which the trial court denied. They also filed a motion for summary judgment, which the trial court granted. Appellant has timely appealed and presents the following assignment of error:

The Franklin County Court of Common Pleas improperly granted summary judgment in favor of Appellee Lane[,] Alton [&] Horst.

At issue, therefore, is whether the trial court erred in granting summary judgment.

{¶5} Appellate review of summary judgment motions is de novo. *Helton v. Scioto Cty. Bd. Of Commrs.* (1997), 123 Ohio App.3d 158, 162. "When reviewing a trial court's ruling on summary judgment, the court of appeals conducts an independent

review of the record and stands in the shoes of the trial court." *Mergenthal v. Star Bank Corp.* (1997), 122 Ohio App.3d 100, 103. We must affirm the trial court's judgment if any of the grounds raised by the movant at the trial court are found to support it, even if the trial court failed to consider those grounds. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42.

{¶6} Summary judgment is proper only when the party moving for summary judgment demonstrates that: (1) no genuine issue of material fact exists; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds could 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 most strongly construed in that party's favor. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 183, 1997-Ohio-221.

{¶7} When seeking summary judgment on the ground that the nonmoving party cannot prove its case, the moving party bares 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 an essential element of the nonmoving party's claims. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. A moving party does not discharge this initial burden under Civ.R. 56 by simply making a conclusory allegation that the nonmoving party has no evidence to prove its case. *Id.* Rather, the moving party must affirmatively demonstrate by affidavit or other evidence allowed by Civ.R. 56(C) that the nonmoving party has no evidence to support its claims. *Id.* If the moving party meets this initial burden, then the nonmoving party has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the

nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party. *Id.*

{¶8} A claim for abuse of process requires a plaintiff to demonstrate: " '(1) that a legal proceeding has been set in motion in proper form and with probable cause; (2) that the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed; and (3) that direct damage has resulted from the wrongful use of process.' " *Robb v. Chagrin Lagoons Yacht Club, Inc.*, 75 Ohio St.3d 264, 270, 1996-Ohio-189, quoting *Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A.*, 68 Ohio St.3d 294, 298, 1994-Ohio-503.

{¶9} The arguments in this matter focus on the second element of the tort, or whether appellees used the eviction action to accomplish an ulterior purpose. With respect to this element, "the gist of the offense is found in the manner in which process is used." *Pierson v. Aaron's Rental*, 10th Dist. No. 10AP-245, 2010-Ohio-5443, ¶40. (Internal citations omitted.) The element is satisfied when the process is used as a threat to coerce or obtain a collateral advantage, which the court is itself generally powerless to grant. *Id.*, citing *Robb* at 271.

{¶10} Appellees presented evidence showing that appellant had no evidence supporting this portion of its claim. They cited the deposition testimony of Bret Adams, who testified as the corporate representative of SFD. (Tr. 111.) According to Mr. Adams, Lane Alton, Rasmussen, and Pettit merely defended Hedco throughout the eviction proceedings. (Tr. 92.) They simply made the eviction action more difficult and time consuming for SFD. (Tr. 92.) As such, appellees offered evidence showing that appellant had no evidence on element two of the tort.

{¶11} On the other side, Mr. Adams also offered his own conjecture regarding the positions advanced in the eviction action. In essence, Mr. Adams believed that Rasmussen and Pettit were advancing baseless claims in order to inflate their legal bills and burn through a retainer. (Tr. 74-77.) Because he had no factual basis supporting this belief, Mr. Adams expressed his intent to request Lane Alton's billing records. (Tr. 75.) However, he never made a formal request in this regard.

{¶12} In this appeal, appellant relies on the position that appellees withheld evidence from SFD, such that summary judgment should not have been granted. Again, however, appellant never presented a formal request for the evidence.<sup>1</sup> Nor was there a discovery motion filed with the trial court. Nor was there a Civ.R. 56(F) motion filed in response to appellees' motion for summary judgment. As a result, appellant cannot now claim error on the part of the trial court for having granted a properly supported summary judgment motion. See *Wells Fargo Bank, N.A. v. Sessley*, 188 Ohio App.3d 213, 2010-Ohio-2902, ¶18; see also *Moore v. Kroger Co.*, 10th Dist. No. 10AP-431, 2010-Ohio-5721, ¶23.

{¶13} Based upon the foregoing, we overrule appellant's sole assignment of error, which renders moot appellees' contingent cross-assignment of error. We accordingly affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed;  
contingent cross-assignment of error rendered moot.*

TYACK and DORRIAN, JJ., concur.

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<sup>1</sup> We also reject appellant's suggestion that the parties had informally agreed to exchange such evidence.