

[Cite as *Maguire v. Natl. City Bank*, 2009-Ohio-4405.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

JOHN MAGUIRE	:	
	:	Appellate Case No. 23140
Plaintiff-Appellant	:	
	:	Trial Court Case No. 07-CV-2017
v.	:	
	:	(Civil Appeal from
NATIONAL CITY BANK, et al.	:	Common Pleas Court)
	:	
Defendant-Appellees	:	
	:	

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OPINION

Rendered on the 28th day of August, 2009.

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JOHN MAGUIRE, 215 McDaniels Street, Apartment 410, Dayton, Ohio 45405
Plaintiff-Appellant, *pro se*

ADAM C. SHERMAN, Atty. Reg. #0076850, Vorys, Sater, Seymour and Pease LLP,
221 East Fourth Street, Suite 2000, Cincinnati, Ohio 45202
Attorney for Defendant-Appellees

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PER CURIAM:

{¶ 1} Plaintiff-appellant John Maguire appeals from a summary judgment rendered against him on his claims for breach of contract and civil fraud against defendant-appellee National City Bank. Maguire contends that the trial court erred by rendering summary judgment while discovery remained pending. He further contends that the trial court improperly disregarded an affidavit that he submitted in

opposition to National City Bank's motion for summary judgment. Finally, Maguire claims that the trial court's decision to render summary judgment is not supported by the evidence.

{¶ 2} We conclude that the trial court did not abuse its discretion by implicitly overruling Maguire's motion to compel, since he failed to comply with the provisions of Civ.R. 37(E). We further conclude that even if the trial court abused its discretion by disregarding Maguire's sworn statement, any error in this regard is harmless, since our review of the document demonstrates Maguire's affidavit, had it been considered by the trial court, would not have changed the result in this case. Finally, we conclude that the record does not demonstrate the existence of any genuine issue of fact that would preclude summary judgment. Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 3} In 2007 Maguire filed this action against National City Bank for damages arising from an alleged breach of contract, wrongful eviction and theft of property. The trial court dismissed the action, and Maguire appealed. We held that the trial court did not err by dismissing the claims for wrongful eviction and theft of property. *Maguire v. National City Bank*, Montgomery App. No. 22168, 2007-Ohio-4570. But we reversed the trial court's decision dismissing the claim for breach of contract. *Id.*, ¶ 19.

{¶ 4} On remand, Maguire filed an amended complaint, as well as a second amended complaint, in which he added a claim for civil fraud against National City

Bank. Maguire's claims for breach of contract and fraud stem from his attempt to purchase a residence located at 2243 Titus Avenue in Dayton. In 2003, the subject property was owned by Lyle Wheeler, who leased it to Maguire. At some point, Wheeler became unemployed and on June 9, 2003, notified National City Bank, the holder of a mortgage deed to the property, that he was unable to make payments on the mortgage loan.

{¶ 5} The facts relevant hereto are gleaned from the record, the affidavit of Patricia Herman, an employee of the Bank in its Loss Mitigation Department as well as the "statement" filed by Maguire in opposition to the motion for summary judgment.

{¶ 6} According to Maguire's complaint and brief, Wheeler apparently agreed to sell the property to Maguire for an amount less than the balance owing on the mortgage.¹ However there is no documentary evidence, nor any averment in Maguire's statement, to support the existence of a written contract for the sale of the subject property.

{¶ 7} Maguire wrote a letter to National City Bank in which he offered to "purchase [the] trust deed for \$28,000 case." In the letter he also noted that it was his responsibility to "negotiate for the Grant Deed with Lyle Wheeler." National City Bank informed Maguire that it would not sell the mortgage or loan documents. The Bank did indicate that it would agree to a "short sale" of the property; meaning that the Bank agreed to accept less than the actual principal amount owed on the loan as

¹ It appears from the record that the principal amount of the mortgage loan was \$58,000.

payment in full. National City Bank then sent a letter to Wheeler indicating that it would accept the sum of \$34,500 in exchange for the release of the mortgage and note. The letter also indicated that the mortgage payment from the sale of the property needed to be received by the Bank no later than August 9, 2003.

{¶ 8} In September, 2003, Maguire opened a “closing account” with a title company and demanded that National City Bank agree to close on the contract. Maguire was arrested on October 1, 2003 “by federal authorities on matters unrelated to the short sale contract.”

{¶ 9} The closing did not occur and the Bank did not receive any monies on the deadline date.

{¶ 10} Subsequently, Wheeler requested approval of a short sale for the sum of \$32,000, which was agreed to by the Bank. Wheeler sold the property to a different individual, and the Bank was paid the sum of \$32,000 in November, 2003.

{¶ 11} As noted above, Maguire brought this action against the Bank in 2007. National City Bank filed a motion for summary judgment on September 11, 2008, more than a year after we rendered our prior judgment in this action. In its motion, the Bank argued that Maguire had failed to demonstrate the existence of a contract or any evidence of fraud. Maguire filed a memorandum in opposition to the motion for summary judgment, to which he attached a document styled as “Statement of John Maguire.” In its reply brief, National City Bank noted that Maguire’s statement was not sworn or notarized, and urged the trial court to disregard it. Thereafter, Maguire re-filed the statement in affidavit form.

{¶ 12} The trial court rendered summary judgment in favor of National City

Bank on November 13, 2008. From this judgment, Maguire appeals.

II

{¶ 13} Maguire’s First Assignment of Error states as follows:

{¶ 14} “THE COURT COMMITTED ERROR WHEN IT GRANTED SUMMARY JUDGMENT TO THE DEFENDANT WHILE THE DEFENDANT WAS IN VIOLATION OF RULES OF DISCOVERY AND THE PLAINTIFF HAD A MOTION TO COMPEL DISCOVERY PENDING.”

{¶ 15} Maguire claims that a motion to compel discovery was pending at the time the trial court rendered summary judgment against him, and that the trial court therefore erred by entering judgment.

{¶ 16} Initially we note that there is no indication in the record that the trial court ruled on these motions. Therefore, we assume the trial court overruled them. *Roth v. Roth*, Cuyahoga App. No. 89141, 2008-Ohio-927, ¶65.

{¶ 17} Trial courts have “broad discretion over discovery matters.” *State ex rel. Citizens for Open, Responsive & Accountable Govt. v. Register*, 116 Ohio St.3d 88, 2007-Ohio-5542, at ¶ 18. Thus, absent an abuse of that discretion, an appellate court will not reverse a decision of the trial court regarding discovery. An abuse of discretion “implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 18} Pursuant to Civ.R. 37(E) Maguire was required, before filing a motion to compel, to make a reasonable effort to resolve any discovery issues with National City Bank. Furthermore, under this rule, a motion to compel must be accompanied

by a statement reciting the efforts made by counsel to resolve the matter. Maguire's motion did not comply with the procedural requirements of Civ.R. 37.

{¶ 19} Moreover, we note that Maguire did not seek discovery from the Bank until August 29, 2008, almost a year after we rendered our prior judgment in this cause. Furthermore, both the discovery requests and the motion to compel were filed after both parties had fully briefed the issues for summary judgment. Neither in his motion to compel, nor otherwise, did Maguire seek an extension of time to respond to the motion for summary judgment, as permitted by Civ.R. 56(F), nor does he make any allegation that he was unable to respond adequately to the motion for summary judgment without the requested discovery.

{¶ 20} We conclude that the trial court did not abuse its discretion by failing to consider the merits of Maguire's motion prior to overruling it. See, *Roth*, supra at 66; *Deutsch Bank Nat. Trust Co. v. Doucet*, Franklin App. No. 07AP-453, 2008-Ohio-589, ¶ 20.

{¶ 21} The First Assignment of Error is overruled.

III

{¶ 22} Maguire's Second Assignment of Error is as follows:

{¶ 23} "THE COURT COMMITTED ERROR WHEN IT REFUSED TO ACCEPT THE PLAINTIFF'S SWORN AFFIDAVIT AS EVIDENCE IN DEFENSE OF THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT."

{¶ 24} Maguire contends that the trial court erred by disregarding the statement he filed in support of his memorandum in opposition of National City

Bank's motion for summary judgment.

{¶ 25} Maguire's statement, attached to his response to the Bank's motion for summary judgment, was not sworn or notarized. National City Bank, in its reply to Maguire's memorandum, made note of this irregularity. Thereafter, Maguire re-submitted, without seeking leave of court, the statement with a notary seal. The trial court expressly declined to consider the statement.

{¶ 26} Given our resolution of the Third Assignment of Error set forth in Part IV, below, we conclude that this argument has been rendered moot. Even if we were to conclude that the trial court should have considered Maguire's statement, its error in failing to have done so is harmless, since we conclude that the contents of the statement do not affect the outcome of the case. From our review of the statement, we conclude that Maguire failed to demonstrate the existence of a genuine issue of material fact.

{¶ 27} Maguire's Second Assignment of Error is overruled.

IV

{¶ 28} Maguire's Third Assignment of Error provides as follows:

{¶ 29} "THE COURT COMMITTED ERROR WHEN IT GRANTED THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BASED UPON INSUFFICIENT EVIDENCE."

{¶ 30} Maguire contends that the evidence does not support the trial court's decision to render summary judgment against him.

{¶ 31} "The appropriateness of rendering a summary judgment hinges upon

the tripartite demonstration: (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor.” *Harless v. Willis Day Warehousing Inc.* (1978), 54 Ohio St.2d 64, 66; Civ. R. 56(C).

{¶ 32} The party seeking summary judgment initially bears the burden of informing the trial court of the basis for the motion and identifying portions of the record demonstrating an absence of genuine issues of material fact as to the essential elements of the nonmoving party's claims. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. The moving party may not fulfill its initial burden simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case. *Id.* Rather, the moving party must support its motion by pointing to some evidence of the type set forth in Civ.R. 56(C) affirmatively demonstrating that the nonmoving party has no evidence to support the nonmoving party's claims. *Id.*

{¶ 33} If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. *Id.* However, once the moving party satisfies its initial burden, the nonmoving party bears the burden of offering specific facts demonstrating a genuine issue for trial. *Id.* The nonmoving party may not rest upon the mere allegations and denials in the pleadings but instead must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. *Id.*; Civ.R. 56(E).

{¶ 34} National City Bank filed its motion for summary judgment asserting that

it did not have the authority to sell Wheeler's property, that it did not purport to have that authority, and that Maguire failed to prove the existence of a written contract for the sale of the property. Maguire opposed the motion, relying upon his written statement as evidence of the existence of material facts that should be presented to a jury. According to Maguire, National City Bank breached the contract it made for the sale of the property, and acted fraudulently by causing him to believe that it would honor that contract. He claims that the Bank was aware of the federal investigation into Maguire's alleged criminal conduct, and that the Bank's "knowledge and cooperation in the federal investigation" was the cause of the breach of the short-sale contract and the fraud committed by the Bank.

{¶ 35} Contrary to Maguire's assertions, there is no evidence to indicate that National City Bank held itself out as being capable of agreeing to the sale of the property, which it did not own. The Bank's evidence, and Maguire's own statement, show that, at most, National City Bank agreed to accept a payment less than the amount owed on the mortgage; in other words, it agreed that it would accept a short sale. Even if we construe the evidence as showing that the Bank entered into the short sale agreement with Maguire, rather than with Wheeler, there is nothing in the record to demonstrate that it breached that contract, which was necessarily contingent upon the assent of the owner, Wheeler. To the contrary, the record demonstrates that the Bank agreed to the short sale, but that Wheeler eventually sold the property to an individual other than Maguire. Furthermore, the record is devoid of any evidence demonstrating that National City Bank acted to interfere with the sale of the property from Wheeler to Maguire.

{¶ 36} The record does not support a finding that National City Bank breached any contract existing between it and Maguire, or that it acted fraudulently in connection with the sale of the residence. Maguire's statement does not establish the existence of any issue of fact that would preclude summary judgment. Therefore, we conclude that the trial court did not err in rendering summary judgment against Maguire.

{¶ 37} The Third Assignment of Error is overruled.

V

{¶ 38} All of Maguire's assignments of error having been overruled, the judgment of the trial court is Affirmed.

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DONOVAN, P.J., BROGAN, J., and FAIN, J., concur.

Copies mailed to:

John Maguire
Adam C. Sherman
Hon. Mary Lynn Wiseman