

COURT OF APPEALS  
GUERNSEY COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

LOUIS LIU	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
	:	Hon. John W. Wise, J.
Plaintiff-Appellant	:	Hon. Andrew J. King, J.
	:	
-vs-	:	
	:	Case No. 24CA000004
KATRINA TALLARICO	:	
	:	
Defendant-Appellee	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Guernsey County Court of  
Common Pleas, Case No.23CV000085

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: October 11, 2024

APPEARANCES:

For Plaintiff-Appellant

For Defendant-Appellee

MILES D. FRIES  
320 Main Street, Box 190  
Zanesville, OH 43702-0190

DAVID A. ISON  
10348 Sawmill Road, Box 1108  
Powell, OH 43065-1108

*Gwin, P.J.*

{¶1} Plaintiff-appellant Louis Liu ["Liu"] appeals the January 18, 2024 entry of the Guernsey County Court of Common Pleas granting appellee, Katrina Tallarico, Executor of the Estate of Lou Ann Tallarico, deceased's ["the Estate"], motion for summary judgment and denying his cross-motion for summary judgement.

*Facts and Procedural History*

*The Divorce*

{¶2} Liu was married to Lou Ann Tallarico-Liu on May 7, 2005. The parties filed for divorce on April 27, 2020.

{¶3} On April 29, 2021, a magistrate's decision was filed wherein the magistrate found, as relevant to this appeal, that Liu had no interest in the Sugar Grove property but that he was entitled to \$20,557.53 for his portion of the reduction of the mortgage. *Liu v. Tallarico-Liu*, 2022-Ohio-1088, ¶ 18 (5<sup>th</sup> Dist.). [*Liu, I*]. Also, on April 29, 2021, a Judgment Entry and Order Adopting the Magistrate's Decision was filed. 2022-Ohio-1088, ¶ 20.

{¶4} On May 13, 2021, Liu filed a Civil Rule 53 Objection to the magistrate's decision. By Judgment Entry filed August 20, 2021, the trial court overruled the objections and reaffirmed its adoption and approval of the magistrate's decision. *Id.* at ¶ 21-22.

{¶5} Liu filed his Notice of Appeal on September 17, 2021. A Verified Motion for Show Cause Order and Other Relief was filed on October 28, 2021. The motion requested the Court issue a Writ of Possession to the Sheriff of Guernsey County, Ohio, directing the Sheriff to cause the removal of Plaintiff, Louis S. Liu, from the Defendant's real property located at 4890 Sugar Grove Road, Cambridge, Ohio. The motion indicated that

Wife intended to sell the property as soon as she could clean up the property from Liu's stay. By Judgment Entry filed November 1, 2021, the trial judge stayed proceedings on the motion noting that an appeal was pending.

{¶6} On appeal, this Court affirmed the trial court's designation of the Sugar Grove property as separate property of the Wife, because competent, credible evidence supported the trial court's decision. 2022-Ohio-1088, ¶ 40. Our decision was filed March 31, 2022.

{¶7} A Verified Motion for Show Cause Order and Other Relief was filed on April 20, 2022. The motion requested the court issue a Writ of Possession to the Sheriff of Guernsey County, Ohio, directing the Sheriff to cause the removal of Plaintiff, Louis S. Liu, from the Defendant's real property located at 4890 Sugar Grove Road, Cambridge, Ohio. The trial judge scheduled a hearing on the motion for June 30, 2022. Lou Ann Tallarico passed away on June 17, 2022. On June 24, 2022, a Suggestion of Death was filed. By Judgment Entry filed June 27, 2022, the trial judge dismissed the Verified Motion for Show Cause Order and Other Relief filed April 20, 2022, and canceled the show cause hearing.

*Claim against the Estate*

{¶8} On March 8, 2023, Liu filed a complaint in Guernsey County Court of Common Pleas, Case Number 23CV000085. In his complaint, Liu alleged that he presented a claim against the Estate of his late wife on December 15, 2022 for \$20,557.53, which he claimed was awarded him in the divorce. Liu alleged his claim was rejected. Liu demanded judgement for the amount plus interest at the statutory rate, attorney fees and costs.

{¶9} Liu's claim is based upon the following provisions in the Divorce Decree,

6. Having found that the antenuptial agreement is valid and enforceable and that the increase in value is due to the influx of Wife's premarital income, Husband has no interest in the real estate at 4890 Sugar Grove, Cambridge, Ohio, except as set forth on paragraph 7 below. Husband [Louis Liu] is ORDERED to move from the real estate within 30 days of the date of this Entry unless other arraignments (sic) are made with Wife [Lou Ann Tallarico-Liu] in writing. Husband is further ORDERED not to damage or otherwise diminish the value of the real property.

7. Wife is Ordered to [pay] Husband \$20,557.53 for his portion of the reduction of the mortgage within 30 days of his vacating the real estate.

{¶10} The Estate filed an Answer on April 11, 2023. [Docket Entry No. 8].

{¶11} On May 2, 2023, the Estate served upon Liu certain requests for admissions along with other discovery requests. Liu was requested to answer the requests for admissions on or before June 1, 2023. [Docket Entry No. 9].

{¶12} Having received no responses to the discovery, the Estate's attorney sought to confer with counsel for Liu pursuant to letters dated June 14, 2023 and July 6, 2023. The June 14, 2023 letter included the statement, "Per the civil rules, the requests for admissions are deemed admitted." See, *Defendant's Memorandum in Support of Motion for Summary Judgment*, filed October 4, 2023 at Exhibit C and Exhibit D. [Docket Entry No. 19].

{¶13} On October 4, 2023, the Estate filed a Motion for Summary Judgment and Memorandum in Support of Summary Judgment. [Docket Entries 18 and 19]. By

Judgment Entry filed October 5, 2023, the trial judge scheduled a non-oral hearing on the motion for November 17, 2023. [Docket Entry No. 21]. By Judgment Entry filed October 26, 2023, the trial judge set the discovery cut-off for January 5, 2024. [Docket Entry No. 24].

{¶14} By Judgment Entry filed November 3, 2023, the trial judge granted Liu's motion for an extension of time and gave Liu until November 15, 2023 to respond to the motion for summary judgment.

{¶15} On November 15, 2023, Liu filed a Memorandum Contra the Estate's Motion for Summary Judgment and Cross Motion for Summary Judgment. [Docket Entry 31]. The Estate filed a reply in support of its motion for summary judgment on November 21, 2023. [Docket Entry No. 35]. The Estate filed a memorandum contra to Liu's Motion for Summary Judgment on November 29, 2023. [Docket Entry No. 36].

{¶16} On January 18, 2024, the trial judge overruled Liu's motion for summary judgment and granted the Estate's motion for summary judgement finding that Liu has never vacated the real estate and continues to live there today after his brother bought the property from the Estate.

*Assignment of Error*

{¶17} Liu raises one Assignment of Error.

{¶18} "I. THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT IN FAVOR OF APPELLEE RESULTS IN A FORFEITURE, WHICH IS DISFAVORED BY OHIO LAW."

*Law and analysis*

{¶19} Liu argues that he did not move out of the home because his ex-wife had agreed to sell the house to him. He further claims the divorce decree is ambiguous as to whether his vacating the premises is a condition precedent to the payment, or a timing provision which does not depend on when he moves out of the residence. Liu claims he was entitled to be paid whether or not he ever vacated the premises.

**Standard of Review**

{¶20} Appellate review of summary-judgment decisions is de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996); *Tera, L.L.C. v. Rice Drilling D, L.L.C.*, 2024-Ohio-1945, ¶10.

{¶21} Pursuant to Civ.R. 56(C), summary judgment is appropriate only where: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party. *Tokles & Son, Inc. v. Midwestern Indemn. Co.* 65 Ohio St.3d 621(1992), *citing Harless v. Wilis Day Warehousing Co.*, 54 Ohio St.2d 64, 65–66(1978). *Accord, Wickham v. Wickham*, 2015-Ohio-4136, ¶26.

{¶22} In *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996), the Supreme Court held that the moving party seeking summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record before the trial court that demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. The evidence must be in the record or the motion cannot succeed. The moving party cannot discharge its initial

burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case but must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) that affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden outlined in the last sentence of Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial. If the nonmoving party fails to do so, summary judgment, if appropriate shall be entered against the nonmoving party. *Wickham*, ¶ 26.

{¶23} The record on summary judgment must be viewed in the light most favorable to the opposing party. *Williams v. First United Church of Christ*, 37 Ohio St.2d 150, 151-152(1974); *United State v. Diebold*, 369 U.S. 654, 655 (1962).

**Issue for appellate review:** *Whether, after reviewing this matter in a light most favorable to the non-moving party, summary judgment in favor of the Estate is appropriate.*

{¶24} In *Liu, I*, Liu argued the trial court erred in its determination regarding the division of the equity as to the Sugar Grove property. *Liu, I*, ¶ 25. This Court found,

Based on the testimony evidence presented by Appellee and the lack of any evidence presented by Appellant, the court found that the Sugar Grove property was separate, pre-marital property belonging to Appellee, and that Appellant had no interest in same. The court went on

to find that \$41,115.06 of marital funds were used to pay the mortgage and ordered Appellee to pay \$20,557 for his share of those payments.

...

Because competent, credible evidence supports the trial court's designation of the Sugar Grove property as separate property, we find Appellant's sole assignment of error not well-taken and overrule same.

*Liu, I*, ¶ 38; 40.

{¶25} Thus, no issue of fact exists concerning the ownership of the Sugar Grove property. Liu had no right, title or interest in the property. Liu had no legal right to remain on the property beyond thirty days.

{¶26} Liu has not challenged the trial judge's determination that, pursuant to Civ. R 36 (A)(1), because Liu failed to answer the Requests for Admissions, the Requests are deemed admitted. Therefore, Liu admits that he did not move from the subject premises after April 29, 2021. (*Defendant's Discovery Plan*, filed July 12, 2023, at Exhibit A, *Request for Admission No. 5*). [*Request for Admissions*"]. Liu admits that he refused to allow his ex-wife to enter the property to retrieve her personal property and household goods. [*Request for Admissions No. 8*]. Liu refused to grant access to the representative of the Estate so that estate property could be retrieved. [*Request for Admissions No. 9*]. Liu further admits that he had no legal right to reside in the Sugar Grove property between May 30, 2021 and August 29, 2022. [*Request for Admissions No. 11*]. Liu admits that he has remained in the home rent free since April 29, 2021. [*Request for Admissions No. 10*].



{¶27} The materials submitted by Liu in support of his motion for Summary Judgment established that the first evidence of any negotiation between the parties regarding purchasing the subject property is a letter dated June 28, 2022. A subsequent letter dated June 30, 2022 advised Liu, among other things, “per instructions given me, you will find a 30-day notice to vacate to be served by [A.C.]”

{¶28} The divorce decree is clear and unambiguous. The divorce decree provided that Wife was to pay Liu “within 30 days of his vacating the real estate.” The judge ordered Liu to leave the premises within 30 days “unless other arraignments (sic) are made with Wife [Lou Ann Tallarico-Liu] in writing.” Thus, it is apparent that the divorce decree provided that the matter would be settled within 60 days, i.e. Liu moves within 30 days, Wife pays Liu within 30 days of his vacating the premises. If the trial judge had intended Liu be paid without regard to whether he vacated the premises within 30 days, the language employed in the entry would not have been necessary. The judge would have simply ordered the Wife to pay Liu within 30 days of the filing of the final decree of divorce. The decree clearly and unambiguously conditions payment to Liu on his moving out of the premises within 30 days.

{¶29} Liu’s forfeiture and waiver arguments are unavailing. In the case at bar, we are not construing a contract freely entered into between two parties of equal bargaining power. Rather, we are construing an order by the Court of Common Pleas entered in a contested divorce action.

{¶30} Nowhere does there appear in the record before us any evidence of an intention by the Wife to repudiate or waive the 30-day requirement for Liu to vacate the premises. In fact, the evidence in the record points to the exact opposite. Wife

filed a show cause motion requesting a Writ of Possession on April 20, 2022, nearly one year after Liu was to have vacated the premises. Evidence concerning Liu's attempt to negotiate a purchase of the residence establish that such negotiations did not occur until June, 2022. Liu admits that he had no legal right to remain on the premises after May 30, 2021. Liu did not purchase the property. Therefore, Liu retained a benefit belonging to the Estate by living rent free on the premises from May 30, 2021. Accordingly, no forfeiture occurred.

{¶31} Liu carried the keys to his own destiny. He could either vacate the premises within 30 days as was ordered by the trial judge, or he could enter into a written agreement with his Wife that permitted him to remain beyond 30 days. Liu admits that he has never left the premises. Liu presented nothing of evidentiary quality to establish a written agreement with Wife to remain on the premises after May 30, 2021. Put simply, by disregarding the trial judge's order, Liu waived his claim to the \$20,557 by choosing, instead, to remain on the premises rent free from May 30, 2021.

{¶32} Viewing the evidence in a light most favorable to Liu, we find there are no genuine issues of material fact, and reasonable minds could come to but one conclusion in favor of the Estate. Because all of the relevant evidence was before the trial court and no genuine issue of fact existed, we find that the trial judge did not err in overruling Liu's motion for summary judgment and granting summary judgment in favor of appellee.

{¶33} The judgment of the Guernsey County Court of Common Pleas is affirmed.

By Gwin, P.J.,

Wise, J., and

King, J., concur