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NO. 70694-2-1

WASHINGTON STATE COURT OF APPEALS
DIVISION I

GEORGE R. AYDELOTTE,

Plaintiff/Appellant,

v.

TOWN OF SKYKOMISH, et al.,

Defendants/Appellees.

2014 MAY -5 PM 12:24
COURT OF APPEALS
STATE OF WASHINGTON

**APPEAL FROM KING COUNTY SUPERIOR COURT CAUSE NO.
11-2-08284-9 SEA**

**APPELLEES TOWN OF SKYKOMISH, ET AL.'S
RESPONSE BRIEF**

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I. INTRODUCTION

The Trial Court properly dismissed the Plaintiff's cause of action on Defendants' Summary Judgment Motion as there was no legal basis for the claims asserted against the Defendants and the Plaintiff failed to provide the court with any evidence creating a genuine issue of material fact necessary for trial.

II. ASSIGNMENT OF ERROR

1. The Trial Court Properly Denied the Plaintiff's Motion to Amend as it was Untimely.
2. The Trial Court properly dismissed the Plaintiff's case on summary judgment as Plaintiff failed to submit any evidence creating a question of fact precluding summary judgment dismissal.
3. The Trial Court properly denied the Plaintiff's request to file responses to the Defendants' Request for Admissions.
4. The Trial Court properly excluded the untimely Declaration of the Plaintiff.

III. STATEMENT OF THE CASE

The Plaintiff/Appellant filed his Complaint alleging three causes of action:

- 1. Removal of his garage;**
- 2. Improper agreement to a conditional point of compliance;**
- 3. Placement of institutional controls on the Plaintiff's property.**
(CP 107-110)

During discovery, Defendants sent Plaintiff a set of Requests for Admissions pursuant to CR 36. This set of Requests for Admissions was mailed on October 5, 2012. (CP 114-124). On January 18, 2013, Defendants filed a Motion to Compel Answers to Interrogatories and requesting the Requests for Admissions be deemed admitted. (CP 111-113). The Plaintiff did not file any responses to the Defendants' Motion to Compel. On February 8, 2013, the Trial Court granted the Defendants' Motion to Compel and an order that the Plaintiff's failure to respond to Defendants' Requests for Admissions, the Responses would be deemed Admitted. (CP 125-126).

On May 3, 2013, Defendants filed a Motion for Summary Judgment Dismissal of the Plaintiff's case. The Motion was noted for June 7, 2013. The Plaintiff did not respond to Defendants' Motion for Summary Judgment but, at the hearing on June 7, 2013, the Trial Court continued the hearing until June 25, 2013 (RP Pg. 2-3). In response to Defendants' Motion for Summary Judgment, the Plaintiff only submitted the Declaration of Plaintiff regarding Motion for Summary Judgment. (CP

Pg. 52-67). This Declaration failed to address the legal causes of action pled in the Plaintiff's Complaint.

On June 25, 2013, the Trial Court heard argument on Defendants' Motion for Summary Judgment. The Trial Court dismissed the Plaintiff's case and denied his Motion to Amend as untimely and procedurally improper. The Trial Court also refused to consider the untimely submission of Plaintiff's Second Declaration submitted on June 24, 2013, in violation of the Court's Briefing Schedule.

IV. ARGUMENT

This Court should affirm the Trial Court's dismissal of the Plaintiff's case, as the Plaintiff did not submit sufficient evidence to defeat Defendants' Motion for Summary Judgment.

A. The Trial Court Properly Held the Requests for Admissions to the Plaintiff were Deemed Admitted.

Defendants properly served the Plaintiff with the First Requests for Admissions on October 5, 2012. CR 36(a) states:

The matter is admitted unless, within 30 days after service of the requests, or within such shorter or longer time as the Court may allow, the party to whom the requests is directly serves upon the party requesting the admission a written answer or objection addressed to the matter...

CR 36(a)

A pro se plaintiff, like Mr. Aydelotte, is held to the same standard as an attorney when prosecuting his case pro se. Westberg v. All-Purpose Structures, Inc., 86 Wn. App. 405, 411 (1997). In this case, no response was submitted by the Plaintiff. Defendants filed a Motion to Compel which was unopposed by the Plaintiff. The Trial Court, pursuant to CR 36, ordered that the Admissions submitted to the Plaintiff were deemed admitted based upon his failure to respond. (CP 125-126).

The Plaintiff has offered this Court no legal authority that the Trial Court improperly entered the Order to Compel. In fact, the Plaintiff has not designated the Order on Defendants' Motion to Compel as an order he is allegedly appealing in this matter, as required by RAP 5.3(a)(3). The Trial Court properly deemed the Admissions admitted and this Court should affirm the Trial Court's Order.

B. The Trial Court Properly Did Not Consider the Plaintiff's Untimely Submissions on Summary Judgment.

The Trial Court properly refused to consider the Plaintiff's Second Declaration submitted in response to Defendants' Motion for Summary Judgment. This Declaration was allegedly filed the day before the hearing and service had not been effectuated upon the Defendants. Moreover, the Court was unaware of the filing. At the original summary judgment hearing on June 7, 2013, the Plaintiff had filed no response. The Trial

Court continued the hearing to allow a response from the Plaintiff. At argument, the Trial Court ruled:

So there has been allusion to a subsequent Declaration apparently filed yesterday, but that was obviously in direct violation of the Court's last order. You will recall we were here on June 7, 2012 – excuse me, 2013, and the Court bent over backwards in order to give the Plaintiff additional opportunity to respond which he did.

Now, apparently, he filed something yesterday – which hasn't made it's way to the Court's attention yet – in direct violation of the Briefing Schedule which was designed to give him another chance, a chance the Court didn't need to give; but the Court, in fairness, wanted to give him that additional chance to respond. Of course, the Court would have been entirely within the rules in order to grant the motion on the other day, that is on June 7, but I wanted to give the Plaintiff a chance at least to respond substantively and he failed to do so, other than filing this Declaration on June 12.

(RP 9, Lns. 8-24)

The Trial Court's evidentiary rulings on summary judgment are reviewed de novo. Folsom v. Burger King, 135 Wn. 2d 658, 663 (1998). King County Local Rules also authorize the Court not to consider an untimely filing without imposing terms. LCR 7(b)(4)(G). The Trial Court gave the Plaintiff two opportunities to file a response timely to Defendants' Motion for Summary Judgment. But the Plaintiff failed to do so. The Trial Court's decision to exclude the untimely submission is not an abuse of discretion and this Court should affirm the Trial Court's

Order¹, not considering this untimely submission.

C. The Plaintiff's Motion to Amend was Properly Denied.

The Trial Court properly denied the Plaintiff's Motion to Amend. The Plaintiff failed to properly file, serve and note his motion before the Trial Court. King County Local Rules require a party to serve and file all motions no later than six days before the date the party wishes the motion to be served. LCR 7(b)(4)(A). The Plaintiff also was required to file a note for motion. LCR 7(b)(5)(A).

The Plaintiff failed to comply with the procedural requirements of filing and serving the motion. No notice was provided to the Defendants or the Court of the Plaintiff's desire to have the motion heard and argued. The Trial Court properly denied the Plaintiff's motion as it was not procedurally proper and did not provide the requisite notice to either the Court or to the Defendants. This Court should affirm the Trial Court's decision to deny the Plaintiff's Motion to Amend.

D. The Trial Court Properly Dismissed the Plaintiff's Complaint on Summary Judgment.

The Plaintiff failed to submit any evidence in response to the Defendants' Motion for Summary Judgment. As a result, the Plaintiff's

¹ The additional declaration has no information relevant to the Plaintiff's causes of action alleged in his Complaint.

Complaint was properly dismissed by the Trial Court. This Court will review summary judgment dismissal de novo. Folsom, 135 Wn. 2d at 663.

Two of the Plaintiff's causes of action are not recognized in the State of Washington. The Plaintiff alleged that the Town of Skykomish agreed to a conditional point of compliance during the environmental cleanup and placed institutional controls on his property. (CP 107-110). Washington does not recognize an independent cause of action for either of these claims. All of the agreements and terms of the environmental cleanup were contained in the Consent Decree entered by the King County Superior Court in the State of Washington v. BNSF Railway Company, King Co. Cause No. 07-2-32672-9 SEA. (CP 127-167). The Plaintiff provided the Trial Court with no legal authority that there were recognized causes of action against the Defendants. Moreover, all cleanup standards were confirmed by the consent decree entered between the State and BNSF. Since Washington does not recognize a cause of action for these claims and the Plaintiff offered no evidence to support these claims, the Trial Court properly dismissed these two causes of action.

The last cause of action alleged by the Plaintiff was the destruction of his garage. The Plaintiff's garage was built on the Town right-of-way. A municipality right-of-way is not subject to adverse possession. Kiely v. Graves, 173 Wn. 2d 926, 935-36 (2012) ("a party may not claim adverse

possession of property held or controlled by a municipality for public use.”) and RCW 7.28.090. The Plaintiff at summary judgment did not provide this Court with any law facts contradicting the Town of Skykomish’s allegation that the garage was constructed on the Town’s right-of-way or that, as a result, the Town had the right to remove the garage.

In response to a motion for summary judgment, it is incumbent upon the non-moving party to submit evidence creating a question of fact. The motion will be granted only if, after viewing the pleadings, depositions, admissions and affidavits and all reasonable inferences that may be drawn in the light most favorable to the non-moving party, it can be stated as a matter of law that (1) there is no genuine issue as to any material fact, (2) all reasonable persons can reach only one conclusion, and (3) the moving party is entitled to judgment. LaPlante v. State, 85 Wn.2d 154, 159 (1975). A material fact is a fact upon which the outcome of the litigation depends. Morris v. McNicol, 83 Wn.2d 491, 494-95 (1974).

The burden is on the moving party for summary judgment to demonstrate that there is no genuine dispute as to any material fact and all reasonable inferences from the evidence must be resolved against him. Barber v. Banker’s Life & Cas. Co., 81 Wn.2d 140, 142 (1971).

Moreover, the facts required by CR 56(e), are evidentiary in nature, and ultimate facts or conclusion of facts are insufficient. Grimwood v. Puget Sound, 110 Wn.2d 355, 359-60 (1988). A nonmoving party in a summary judgment may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value; for after the moving party submits adequate affidavits, the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists. Seven Gables v. MGM/UA Entertainment, 106 Wn.2d 1, 13 (1986).

After the Trial Court continued the summary judgment hearing, the Plaintiff submitted a declaration. (CP 52-67). This declaration does not contain any facts responsive to the Defendants' Motion for Summary Judgment. The Plaintiff's further reliance upon Conley v. Gibson, 35 U.S. 41 (1957) is misplaced, as the Conley Court is referring to a motion to dismiss under Rule 12(b)(6), not a summary judgment motion and lcr 7 . Moreover, the Conley case has subsequently been reversed by the U.S. Supreme Court in Bell Atlantic Corp. v. Purombly, 550 U.S. 544 (2007).

The Plaintiff's Response and Appeal do not contain any facts that would preclude summary judgment dismissal in this matter. In fact, the Plaintiff's argument in this matter is simply "I think the Town of

Skykomish wronged me and I want my day in court.” This argument was expressly rejected by the Court in Seven Gables, 106 Wn. 2d at 13. Moreover, the Court’s Order deeming the Requests for Admissions admitted resolved summary judgment in this matter as these Requests for Admissions resolved any allegations of a factual dispute. The Plaintiff admitted that the garage was built on a Town of Skykomish right-of-way, that the Town of Skykomish allowed the Plaintiff and his attorney to dispute this claim and that the Town of Skykomish had the right to remove his garage from the right-of-way.

Therefore, this Court should affirm the Trial Court’s dismissal of the Plaintiff’s Complaint on summary judgment, as there were no genuine issues of material fact precluding summary judgment dismissal.

V. CONCLUSION

This Court should affirm the Trial Court’s dismissal of the Plaintiff’s Complaint, as the Plaintiff has submitted no argument that the Trial Court’s decision was in error requiring a reversal.

RESPECTFULLY SUBMITTED this 2nd day of May, 2014.

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CERTIFICATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on May 2, 2014, I mailed by United States Postal Service the foregoing to the following party:

George R. Aydelotte
5145 Jefferson Place
Oak Harbor, WA 98277

Signed at Wenatchee, Washington on May 2, 2014.


Francesca Hansen, Legal Assistant