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Larry Walls, Appellant v. Travel Centers of America, LLC, et al., Appellee

Court of Appeals No. WD-09-060

COURT OF APPEALS OF OHIO, SIXTH APPELLATE DISTRICT, WOOD COUNTY

2010 Ohio 801; 2010 Ohio App. LEXIS 656

March 5, 2010, Decided

PRIOR HISTORY: [**1]

Trial Court No. 08 CV 957.

DISPOSITION: JUDGMENT AFFIRMED.

COUNSEL: Joanna E. Baron, for appellant.

Phillip S. Heebsh, for appellee.

JUDGES: OSOWIK, P.J. Peter M. Handwork, J., Thomas J. Osowik, P.J., Keila D. Cosme, J., CONCUR.

OPINION BY: Thomas J. Osowik

OPINION

DECISION AND JUDGMENT

OSOWIK, P.J.

[*P1] This is an appeal from a judgment of the Wood County Common Pleas Court which granted summary judgment to appellee. For the reasons set forth more fully below, this court affirms the judgment of the trial court.

[*P2] On October 6, 2008, appellant filed suit against appellee claiming various damages stemming from allegations of invasion of privacy, intentional infliction of emotional distress, and intrusion of

seclusion. Appellant is a commercial truck driver whose customary practice was to stop at appellee's Wood County truck stop and avail himself of certain services offered at the facility.

[*P3] Appellant's practice while at the premises was to first refuel, then go inside and utilize the shower facilities, then after showering, and as specifically relevant to this case, directly proceed to a massage room operated by a lessee of appellee. Appellant would then fully undress in the presence of one of the foreign female workers staffing the massage room, [**2] and while in a voluntarily state of total undress receive massage services. The massage room consisted of partial walls, no ceiling, and two tables separated by a curtain. The massage room was essentially a partition setting owned and operated by a lessee of appellee set up within the truck stop.

[*P4] At the conclusion of one of appellant's massages, he observed a video monitoring system set up along a wall of the massage room. Appellant questioned a representative of appellee regarding the video system and was advised that the lessee who operates the massage room installed the system to deter theft from the room's cash box. Appellant conceded in testimony that the video camera was directed towards the vicinity of the cash box. Nevertheless, appellant claimed to be distraught by the possibility that video footage exists of him in a state of undress. Appellant concedes that there is no actual evidence any such footage exists or has been seen by

anyone.

[*P5] Appellant filed a motion for default judgment on November 24, 2008, premised upon appellee's failure to answer the complaint within the statutorily-mandated 28-day period. On November 26, 2008, appellee filed its answer to the complaint. Appellee's [**3] answer was submitted 15 days after the statutory deadline.

[*P6] On December 1, 2008, appellee filed a brief in opposition to appellant's motion for default judgment. Appellee successfully asserted excusable neglect as warranting its untimely answer. The trial court denied appellant's motion for default judgment on December 9, 2008.

[*P7] On March 31, 2009, appellee filed a motion for summary judgment. Appellant filed a brief in opposition. Appellee filed a reply brief in support of its motion for summary judgment. On June 24, 2009, the trial court granted appellee's motion for summary judgment. In support of its ruling, the trial court noted and emphasized the determinative fact that appellee did not own, operate, or control the video camera that is the basis of the claimed liability. In conjunction with this, the trial court noted that the record is devoid of any evidence that footage of appellant in a state of undress, the underlying basis of his claims, actually exists. For the reasons set forth below, this court affirms the judgment of the trial court.

[*P8] On appeal, appellant sets forth the following assignments of error:

[*P9] "I. Whether the trial court erred when it held appellant had not presented [**4] sufficient evidence that Appellee exerted sufficient control over the leased premises?

[*P10] "II. Whether the trial court erred when it granted appellee Travel-Center's [sic] of America LLC's motion for summary judgment?

[*P11] "III. Whether the Trial Court erred when it denied Appellant's Motion for Default Judgment?"

[*P12] As a preliminary matter, we note that appellant's first two assignments of error are grounded in a common legal premise. Both assignments stand for the assertion that a genuine issue of material fact exists regarding control of the leased space such that summary

judgment was not proper. Given their shared legal basis, these two assignments will be addressed simultaneously.

[*P13] The following undisputed facts are relevant to the issues raised on appeal. Appellant is a self-employed commercial truck driver. On June 10, 2008, appellant was a customer of the Travel Centers of America facility (hereinafter, "TCA") in [**5] Perrysburg, Ohio. Appellant patronized this truck stop regularly in the course of his travels. Appellant's routine practice at TCA was to refuel, then shower, then proceed to a leased massage room, undress in the presence of the assigned massage worker, and receive massage services.

[*P14] The massage space consisted of a one room partition-style space with no ceiling. Within the sparsely furnished massage room were two tables separated by a curtain, and a small desk where the cash box was stored. At the time of the incident, the premises making up the massage parlor had been leased by appellee to Steve Stump. Stump is not a party to this action.

[*P15] After refueling his truck and showering on June 10, 2008, appellant proceeded to the massage room, fully undressed in the presence of the massage worker, and was directed to a table. Appellant testified that the massage worker spoke little to no English, but that he nevertheless knew that she would not have furnished the desired massage services had he not fully undressed. Appellant further testified that either way he fails to wear underwear as a matter of practice.

[*P16] While dressing following the massage, appellant noticed a video camera on the wall [**6] approximately eight feet from the floor. Upon discovery of the video camera, appellant approached the TCA facility manager, Larry Ziegler, who indicated that the camera was put in place to monitor the cash box area to ensure against theft. Appellant conceded that the camera was plainly visible and was directed towards the cash box. Nevertheless, appellant claimed to suffer from serious concerns that there may be video footage of him in a state of undress. Appellant concedes that he has no evidence of any such video footage. Appellant concedes that he has not received any treatment or therapy services in connection with his concerns.

[*P17] On January 6, 2009, appellant filed a complaint in the Wood County Common Pleas Court seeking monetary damages in the amount of \$ 1 million, prefaced upon claims of an invasion of privacy,

intentional infliction of emotional distress, and intrusion of seclusion, all in connection with the possibility of video footage of appellant in a state of undress.

[*P18] The determinative question in this case is whether a genuine issue of material fact exists regarding whether appellee exercised sufficient control over the leased massage room and video camera directed at [**7] the room to conceivably be held liable for actionable damages claimed in connection with the video camera.

[*P19] Appellate court review of a trial court's summary judgment determination is conducted on a de novo basis, applying the same standard as that utilized by the trial court. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129, 572 N.E.2d 198; *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 1996 Ohio 336, 671 N.E.2d 241. Summary judgment will be granted when there remains no genuine issue of material fact and, when considering the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *Civ.R. 56(C)*.

[*P20] In the first two assignments of error, appellant claims the trial court erred in holding that appellant had not presented sufficient evidence of appellee's control over the leased premises to trigger a duty and potential liability. Thus, appellant argues that summary judgment in appellee's favor was improper.

[*P21] It is well settled that to establish actionable liability, a plaintiff must show the existence of a duty, a breach of the duty, and an injury proximately resulting therefrom. *Fed. Steel & Wire Corp. v. Ruhlin Constr. Co.* (1989), 45 Ohio St.3d 171, 173, 543 N.E.2d 769.

[*P22] [**8] The record is devoid of any evidence that video footage of appellant in a state of undress during his visits to the leased massage room at TCA exists or has been viewed by anyone. The record is devoid of any evidence and contains only unsupported conjecture that appellee exerted any control over the leased premises or over the anti-theft video camera observed therein by appellant. Without any such evidence, the requisite duty of appellee from which liability could be derived cannot be shown. As such, further analysis becomes moot.

[*P23] Therefore, appellant's contention that the trial court should have focused on his claimed injuries is

moot. The trial court did not err when it held that appellant did not present sufficient evidence that appellee exerted control over the leased premises.

[*P24] Based upon the foregoing, we find that even when construed most strongly in favor of appellant, reasonable minds could not differ from the trial court's conclusion. The trial court did not err when it granted appellee's motion for summary judgment. Appellant's first two assignments of error are found not well-taken.

[*P25] Appellant's final assignment of error claims that the trial court improperly denied appellant's [**9] motion for default judgment. In instances where a defendant fails to answer timely, the trial court may grant default judgment pursuant to *Civ.R. 55*, which states, in pertinent part, as follows:

[*P26] "(A) Entry of judgment. * * * When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided in these rules, the party entitled to a judgment by default shall apply in writing or orally to the court therefor.

[*P27] "(B) Setting aside default judgment. * * * If a judgment by default has been entered, the court may set it aside in accordance with *Rule 60(B)*."

[*P28] In conjunction with this, *Civ.R. 60(B)* states, in pertinent part:

[*P29] "(B) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud; etc. * * * On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect. * * * The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken."

[*P30] It is well settled in Ohio that [**10] the judicial preference should be to decide cases on their merits. *Baines v. Harwood* (1993), 87 Ohio App.3d 345, 622 N.E.2d 372. The court in *Reese v. Proppe* (1981), 3 Ohio App.3d 103, 3 Ohio B. 118, 443 N.E.2d 992, held that except in cases of "serious transgressions" by a party, indicating a "complete disregard" for court procedures, a court is generally limited in what sanction it may impose. The appellate court in *O'Gara, Hess & Eisenhardt*

Armoring Co. v. IEE Automotive USA, Inc. (Sept. 5, 2000), 12th Dist. No. CA2000-03-043, 2000 Ohio App. LEXIS 4012, has held that in upholding a trial court's decision to vacate a default judgment, "all of the surrounding facts and circumstances" must be considered and weighed against the interests of fairness and justice.

[*P31] Appellee stated that at the time of the filing it was not immediately certain that it owned the truck stop involved in this case. Appellee had previously acquired certain properties from Petro Stopping Centers. It had to be ascertained whether this property was part of that purchase.

[*P32] Once ownership was determined, appellee filed an answer approximately two weeks after the deadline. Appellee filed a brief in opposition to the motion for default judgment, citing excusable neglect for the late filing. [**11] On this basis, the trial court denied appellant's motion for default judgment.

[*P33] The record reflects that appellee filed its answer shortly after determining ownership of the property, and well within the one year limit enumerated

in *Civ.R. 60(B)*. Given these circumstances, we find that the trial court did not err in denying the motion for default judgment. Appellant's third assignment of error is found not well-taken.

[*P34] On consideration whereof, the judgment of the Wood County Common Pleas Court is affirmed. Appellant is ordered to pay 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.

Thomas J. Osowik, P.J.

Keila D. Cosme, J.

CONCUR.