

86-LW-2204 (10th)

John BUTERBAUGH, Plaintiff-Appellant,

v.

RCA ASSOCIATES, INC., et al., Defendants-Appellees.

No. 86 AP-267.
10th District Court of Appeals of Ohio, Franklin County.
Decided on August 19, 1986.

Appeal from the Franklin County Court of Common Pleas.

Glenn B. Redick, for appellant.

Lane, Alton & Horst, and John M. Alton, for appellees.

MARTIN, Judge.

This appeal arises from the trial court's sua sponte reconsideration of appellee Taylor Bookkeeping Services, Inc's., Civ.R. 12(B)(6) motion to dismiss for failure to state a claim which was treated as a Civ.R. 56 motion for summary judgment. The trial court, with a substitute judge sitting, originally overruled said Civ.R. 12(B)(6) motion on December 31, 1985, but on reconsideration, the assigned judge granted summary judgment to appellee on March 7, 1986.

Appellant assigns two errors:

"1. The trial court erred [sic] when it considered the motion of Taylor Bookkeeping Service to dismiss for failure to state a claim as a motion for summary judgment without properly advising counsel of the intended action.

"2. The trial court erred [sic] as a matter of law in sustaining the motion of Taylor Bookkeeping Service to dismiss plaintiff's complaint for failure to state a claim.

In assignment of error number one, appellant argues that it was error for the trial court to reconsider appellee's Civ.R. 12(B)(6) motion as one for Civ.R. 56 summary judgment without proper notice of this conversion. In addition, appellant asserts that discovery as to Taylor Bookkeeping had not been completed.

When a motion to dismiss for failure to state a claim is converted into one for summary judgment pursuant to Civ.R. 12(B), the trial court's intention to do so must be clearly indicated in the record and express notice provided to the parties. See, Fraternal Order of Police v. D'Amico (1982), 4 Ohio App.3d 15; Petrey v. Simon (1983), 4 Ohio St.3d 154. The record sub judice is silent as to any such "clear intention" of conversion or express notice. The so-called "notice of non-oral hearing," Loc.R. 25 of the Court of Common Pleas of Franklin County, General Division, was not sufficient in light of the facts of this case, to wit: appellee's motion to dismiss had already been heard and overruled on December 31, 1985. The reconsideration of same as one for summary judgment, Civ.R. 56, was not properly noticed to counsel.

Further, since discovery was not completed as between appellant and Taylor Bookkeeping, summary judgment was premature and improper. Civ.R. 56(F); Tucker v. Webb Corp. (1983), 4 Ohio St.3d 121.

Assignment of error number one is therefore sustained.

In assignment of error number two appellant contends the trial court was mistaken in concluding appellant's complaint failed, as a matter of law, to set forth a cause of action against appellee. The court agrees.

The remedy of summary judgment should be employed "cautiously," "sparingly," and with the "utmost care,"

keeping in mind the trial court's function in such a proceeding is not to try the sufficiency of issues of fact, but rather to determine whether triable issues of fact exist. See, Viock v. Stowe-Woodward Co. (1983), 13 Ohio App.3d 7; Napier v. Brown (1985), 24 Ohio App.3d 12.

Appellant's complaint sets forth several theories for recovery against Taylor Bookkeeping, including a statutory ground under R.C. 1707.43 and one for professional negligence. See, Haddon View Investment Co. v. Coopers & Lybrand (1982), 70 Ohio St.2d 154. The complaint adequately pleads causes of action against appellee. Whether or not they can be ultimately proven is left to the discovery process and evidence at trial.

Assignment of error number two is therefore sustained.

The judgment of the trial court is reversed and the cause remanded with instructions to reinstate Taylor Bookkeeping Services, Inc. as a party-defendant.

Judgment reversed and cause remanded with instructions.

MOYER, P.J., and WHITESIDE, J., concur.

MARTIN, J., of the Carroll County Common Pleas Court, sitting by assignment in the Tenth Appellate District.