IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
May 17, 2023 Session

CITY OF BENTON v. GLENN AUSTIN WHITING

Appeal from the Circuit Court for Polk County
No. 2019-CV-29 Michael E. Jenne, Judge

No. E2022-01382-COA-R3-CV

Defendant/Appellant appealed a speeding ticket from Benton City Municipal Court to the Circuit Court for Polk County, Tennessee (the "circuit court"). The City of Benton (the "City") filed a motion for summary judgment which the circuit court granted on May 18, 2022. Defendant appeals and, discerning no error, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

KRISTI M. DAVIS, J., delivered the opinion of the Court, in which JOHN W. MCCLARTY and THOMAS R. FRIERSON, II, JJ., joined.

Van R. Irion, Knoxville, Tennessee, for the appellant, Glenn Whiting.

Sheridan C.F. Randolph, Cleveland, Tennessee, for the appellee, City of Benton, Tennessee.

OPINION

BACKGROUND

Defendant/Appellant Glenn Whiting received a speeding ticket in Benton, Tennessee on January 31, 2019. Benton City officer Jason Waters issued the ticket after clocking Defendant traveling fifty-five miles per hour in a forty mile per hour zone. A hearing was held in Benton City Court on March 18, 2019, at which Defendant was found guilty of speeding and assessed a fine. Defendant filed what he purported to be a notice of appeal to the circuit court on March 19, 2019. On April 1, 2019, a different notice of appeal on the correct form was filed. Defendant demanded a jury trial.

On October 13, 2021, the City filed a motion for summary judgment. Attached to the motion was a statement of undisputed material facts, as well as affidavits by Officer Waters and Sanna German, the clerk of the circuit court. Officer Waters claimed that he cited Defendant for speeding on January 31, 2019. He also claimed that at the hearing in city court on March 18, 2019, Defendant admitted to speeding in open court. The City also argued that Defendant was not entitled to a jury trial.

Defendant, proceeding pro se, responded to the motion, positing that "Plaintiff has intentionally lied to this court." Defendant further opined:

> Wherefore Defendant would request this case proceed with a jury trial or be sent back for Defendant to be able to have a fair trial by a judge that would be able to advise correctly the Defendant[']s right to trial. The fact that the cities hire attorneys to act as judges was one of the main reasons the Defendant wanted his case heard by an actual judge.

Defendant did not file, however, his own statement of undisputed material facts, nor did he file a competing affidavit. Along with his response to the motion for summary judgment, Defendant filed a "motion for continuance," asking for time to conduct discovery. Defendant wanted to depose witnesses and alleged that the City had not responded to discovery requests sent by Defendant. Nothing evidencing Defendant's claims was attached to this filing. In its reply, the City acknowledged that Defendant had attempted to send discovery requests but claimed that the City did not respond to said requests because they were not properly served.

The circuit court held a hearing on November 15, 2021, at which Defendant appeared pro se. On November 16, 2021, the circuit court entered an order granting the Defendant a continuance and ordering the City to respond to the discovery requests by December 16, 2021. Another hearing was set for February 18, 2022. The order also provides that the circuit court judge read Tennessee Rule of Civil Procedure 56 aloud to Defendant in open court. Trial was set for March 18, 2022.

At the next hearing, on February 18, 2022, Defendant appeared and wished to argue a motion to dismiss that he had not yet filed with the clerk. The circuit court reset the hearing to February 24, 2022, to allow Defendant time to file his motion.

On February 24, 2022, Defendant argued his motion to dismiss, which the circuit court denied. At the hearing, there was a dispute about whether the City had provided Defendant with the full video of the traffic stop at issue. In light of this dispute, the circuit court continued the trial, which was set for March 18, 2022, to May 19, 2022. The circuit court also ordered Defendant to take his depositions by May 2, 2022 and continued the City's motion for summary judgment.

The circuit court heard the City's motion on May 16, 2022, after which it entered an order granting said motion. The order provides that as of May 16, 2022, the Defendant "had still not demonstrated that the facts are disputed by citing to the record pursuant to Rule 56.03 of the [Tennessee Rules of Civil Procedure], and the Defendant still had not submitted an Affidavit demonstrating that the facts are disputed."

Defendant filed a motion to alter or amend on June 16, 2022, claiming as follows:

> Grounds for this motion are that this Court erred by entering said judgment where the plaintiff boar [sic] the full burden of proof and the defendant was prepared to, and requested to, present live testimony evidence raising a genuine issue of fact which would have negated plaintiff's motion for summary judgement; that the pro se defendant should have been given an opportunity to correct his procedurally-improper format for said responsive evidence, where said evidence clearly would negate the City's motion for summary judgement, and where said evidence could have been presented via defendant's sworn testimony at the hearing, and where the defendant requested to be sworn to give that testimony, but was denied such opportunity; and that the City had repeatedly failed to produce evidence properly requested by the defendant, thereby delaying the trial of this matter.

Defendant filed a declaration with this motion, claiming that he never admitted guilt at the March 18, 2019 city court hearing and that Officer Waters' statements about that hearing were incorrect. The declaration provides that it was prepared by attorney Van Irion.

The City filed a response, essentially claiming that Defendant's response to the motion for summary judgment was untimely. The City also filed a motion for sanctions, claiming that while Defendant signed and filed the motion to alter or amend, it was clearly drafted by attorney Irion.

The circuit court held a hearing on Defendant's motion to alter or amend on August 19, 2022 and entered an order denying same on August 29, 2022. The court reasoned that Defendant's declaration and response to the City's motion for summary judgment "came too late." While Defendant claimed in the motion to alter or amend that he should have been given the opportunity to give live testimony at the summary judgment hearing, the circuit court rejected this reasoning:

> Rule 56 does not provide for a party to "present live testimony" to oppose a Motion for Summary Judgment as alleged in the Defendant's Motion to Amend Judgment or in the Alternative to Set Aside Judgment.
>
> * * *

> In addition, the Defendant alleges in his Motion to Amend Judgment or in the Alternative to Set Aside Judgment that "he could have drafted a one-page declaration right there in Court [on May 16, 2022] and executed and filed it then and there" so as defeat the Motion for Summary Judgment. This position is not correct. Rule 56.04 clearly states that an adverse party such as the Defendant "may serve and file opposing affidavits not later than five (5) days before the hearing." This was not done.

The circuit court also denied the City's request for sanctions. Defendant appealed to this Court.

ISSUES

Defendant raises a single issue on appeal: whether the trial court erred in granting the City's motion for summary judgment when "there was uncertainty as to whether there may have been a dispute concerning material facts."

The City raises no additional issues in its posture as appellee.

DISCUSSION

This case was resolved by summary judgment. A trial court may grant summary judgment only if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04. The propriety of a trial court's summary judgment decision presents a question of law, which we review de novo with no presumption of correctness. *Kershaw v. Levy*, 583 S.W.3d 544, 547 (Tenn. 2019).

"The moving party has the ultimate burden of persuading the court that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law." *Martin v. Norfolk S. Ry. Co.*, 271 S.W.3d 76, 83 (Tenn. 2008). As our Supreme Court has instructed,

> when the moving party does not bear the burden of proof at trial, the moving party may satisfy its burden of production either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the nonmoving party's claim or defense.

Rye v. Women's Care Ctr. of Memphis, 477 S.W.3d 235, 264 (Tenn. 2015). "[I]f the moving party bears the burden of proof on the challenged claim at trial, that party must produce at the summary judgment stage evidence that, if uncontroverted at trial, would

entitle it to a directed verdict." *TWB Architects, Inc. v. Braxton, LLC*, 578 S.W.3d 879, 888 (Tenn. 2019) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986)).

When a party files and properly supports a motion for summary judgment as provided in Rule 56, "to survive summary judgment, the nonmoving party may not rest upon the mere allegations or denials of its pleading, but must respond, and by affidavits or one of the other means provided in Tennessee Rule 56, set forth specific facts . . . showing that there is a genuine issue for trial." *Rye*, 477 S.W.3d at 265 (internal quotation marks and brackets in original omitted). "Whether the nonmoving party is a plaintiff or a defendant—and whether or not the nonmoving party bears the burden of proof at trial on the challenged claim or defense—at the summary judgment stage, '[t]he nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party.'" *TWB Architects*, 578 S.W.3d at 889 (quoting *Rye*, 477 S.W.3d at 265).

Here, the circuit court found that Defendant did not comply with Rule 56 because

> [t]he Defendant did not demonstrate in his Response that the facts are disputed by citing to the record pursuant to Rule 56.03 of the Tennessee Rules of Civil Procedure, and the Defendant did not submit an Affidavit demonstrating that the facts are disputed pursuant to Rules 56.04 and 56.06 of the Tennessee Rules of Civil Procedure.

The record supports these conclusions. On appeal, Defendant does not argue that he complied with Rule 56 or properly responded to the City's motion. Rather, he asserts that the circuit court shirked its duty to balance the rights of Defendant as a pro se litigant against the requirements of Rule 56:

> It is understood that courts must balance its duties to pro se defendants and its duty to be a neutral observer and judge. *Burford*, 2021 Tenn.App.LEXIS 272 at *17; *citing City of La Vergne*, 216 Tenn.App.Lexis 778 (Tenn. Ct. App. Oct. 19, 2016); and *quoting Hessmer*, 138 S.W.3d at 903-4 (TN App. Middle Div 2003). However, the same Tennessee Courts have also established that courts should "give effect to the substance, rather than the form or terminology, of a pro se litigant's papers." *Id*. In the instant case it was clear at the time of the hearing that the defendant was competent and willing to testify, thereby negating the single fact asserted by the City. This is the substance of the challenged order. Yet the Circuit Court ignored said substance in favor of a procedural issue that would have been easily corrected. It appears that the defendant could have either testified in live court, or could have drafted a one-page declaration right there in court and executed and filed it then and there. Alternatively, the Court could have

granted the defendant[']s request for a continuance to file an affidavit and to give the City appropriate time to consider same.

It is true that "[p]arties who decide to represent themselves are entitled to fair and equal treatment by the courts." *Watson v. City of Jackson*, 448 S.W.3d 919, 926 (Tenn. Ct. App. 2014). Nonetheless, pro se litigants are not excused from complying with substantive and procedural rules of court, and Defendant's argument, in essence, is that he should get a second bite at the apple to comply with Rule 56. *See id.* ("The courts must not excuse pro se litigants from complying with the same substantive and procedural rules that represented parties are expected to observe."). And Defendant's claim that the circuit court should have allowed Defendant to bypass the requirements of Rule 56 and simply testify in open court as a response to the City's motion contravenes both the rule and clear directives from our Supreme Court. *See Rye*, 477 S.W.3d at 265 (quoting Tenn. R. Civ. P. 56.06) ("[T]o survive summary judgment, the nonmoving party 'may not rest upon the mere allegations or denials of [its] pleading,' but must respond, and by affidavits or one of the other means provided in Tennessee Rule 56, 'set forth specific facts' *at the summary judgment stage* 'showing that there is a genuine issue for trial.'").

Defendant claims that the circuit court should have granted him a continuance or allowed him to draft an affidavit the day of the hearing. However, adequate time for discovery had passed and the circuit court already had provided Defendant ample time to conduct same. *See id.* (citing Tenn. R. Civ. P. 56.04, 56.06) ("[A]fter adequate time for discovery has been provided, summary judgment should be granted if the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the existence of a genuine issue of material fact for trial.") The circuit court also had granted several continuances and even read Rule 56 aloud to Defendant in open court. Under all of these circumstances, Defendant's claim that he received unfair treatment as a pro se litigant is unpersuasive.

It is undisputed that Defendant did not come forward with a proper response to the City's motion, including his declaration, until after the circuit court entered its order granting the City summary judgment. Defendant filed his affidavit with his motion to alter or amend pursuant to Tennessee Rule of Civil Procedure 59.04. It is well-established, however, that motions to alter or amend may not be used to present new theories or arguments that were available prior to the final decree. *See Irvin v. Green Wise Homes, LLC*, No. M2019-02232-COA-R3-CV, 2021 WL 709782, at *11 (Tenn. Ct. App. Feb. 24, 2021), *appeal denied* (June 9, 2021) (collecting cases). The trial court correctly denied Defendant's motion, and we affirm the circuit court's ruling granting the City summary judgment.

CONCLUSION

The judgment of the Circuit Court for Polk County is affirmed. Costs on appeal are

taxed to the appellant, Glenn Austin Whiting, for which execution may issue if necessary.

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KRISTI M. DAVIS, JUDGE