STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Todd A. Hicks, Defendant Below,
Petitioner

vs) No. 11-0923 (Fayette County 09-C-273)

Brickstreet Mutual Insurance Company,
Plaintiff Below, Respondent

FILED
March 12, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Todd A. Hicks, by counsel James W. Keenan, appeals the circuit court's order granting summary judgment in favor of the respondent. This appeal was timely perfected by counsel, with petitioner's appendix accompanying the petition. Brickstreet Mutual Insurance Company ("Brickstreet"), by counsel Arnold J. Janicker, has filed its response.

This Court has considered the parties' briefs and the appendix on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the appendix on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the appendix presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

Respondent Brickstreet filed suit against petitioner in October of 2009, alleging that petitioner owes $30,189 in premiums for workers' compensation insurance provided by Brickstreet. Petitioner answered the complaint, admitting that he had received workers' compensation insurance from Brickstreet but not admitting that he owed the $30,189. Respondent Brickstreet served written discovery on the petitioner in January of 2010. In May of 2010, Respondent Brickstreet substituted counsel, and petitioner's counsel was suffering from a medical condition. Thus, in July of 2010, counsel for both the petitioner and the respondent jointly requested a continuance of the scheduled October 14, 2010, trial date, which was granted. On October 14, 2010, a status hearing was held, at which time petitioner's counsel indicated that the surgeries required for his condition had been completed, and he was undergoing physical therapy. Petitioner's counsel also indicated that he would be able to resume regular duties on December 1, 2010. On October 25, 2010, a new scheduling order was entered which ordered the disclosure of all fact witnesses by November 21, 2010, set the discovery deadline for January 14, 2011, and set the dispositive motion deadline for January 21, 2011. The trial was scheduled for February of 2011.

On November 5, 2010, Respondent Brickstreet served petitioner with a second set of written discovery requests, including requests for admission. One of the requests for admission stated: "[a]dmit that you currently owe BrickStreet Mutual Insurance Company $30,189 in unpaid workers' compensation insurance premiums." At that time, petitioner had yet to respond to the discovery requests of January of 2010. By letter dated November 15, 2010, respondent's counsel extended the deadline for the January requests until December 8, 2010, so that both the first and second sets of discovery were due on the same date. After petitioner's responses were not received by the respondent by December 8, 2010, counsel for the respondent contacted petitioner's counsel to inquire as to the status of the responses. Respondent's counsel indicates that petitioner's counsel told him that the responses would be received the following week. Respondent's counsel followed this conversation up with a letter dated December 15, 2010. Responses to the discovery were still not received, and in a final attempt to obtain this discovery without intervention by the circuit court, respondent's counsel, by letter dated December 27, 2010, requested petitioner's fact witness disclosure and responses to discovery be served no later than December 30, 2010.

On January 3, 2011, Respondent Brickstreet filed a motion for summary judgment and in the alternative, a motion to compel petitioner's fact witness disclosure and responses to discovery. Petitioner did not respond in writing to either motion, and did not issue his fact witness disclosure or responses to discovery until the date of the scheduled hearing, which was January 13, 2011. No records were produced as petitioner has closed his business, and fact witnesses were disclosed for the first time on this date. Petitioner's only defense at the hearing was that counsel was debilitated from a medical condition from February of 2010 until December 1, 2010. He indicates that counsel attempted to complete discovery but failed. Respondent notes that he gave petitioner an extra month to complete the requests prior to filing his motion. The circuit court noted during the hearing that it sympathized with petitioner, but "there should be something done by counsel . . . to advise the Court, . . . for relief, not to answer within the time periods required by Rule 36 [of the West Virginia Rules of Civil Procedure]." The circuit court found that Rule 36 is clear and the matter of how much petitioner owed Brickstreet is deemed admitted since petitioner never asked for additional time. Respondent's motion for summary judgment was granted.

Petitioner appeals the circuit court's grant of summary judgment in favor of the respondent. This Court reviews a circuit court's entry of summary judgment under a *de novo* standard of review. Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). In conducting a *de novo* review, this Court applies the same standard for granting summary judgment that a circuit court must apply. *United Bank, Inc. v. Blosser,* 218 W.Va. 378, 383, 624 S.E.2d 815, 820 (2005). Further, "[s]ummary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syl. Pt. 2, *Williams v. Precision Coil, Inc.,* 194 W.Va. 52, 459 S.E.2d 329 (1995). "'[T]he party opposing summary judgment must satisfy the burden of proof by offering more than a mere 'scintilla of evidence' and must produce evidence sufficient for a reasonable jury to find in a nonmoving party's favor.' *Anderson [v. Liberty Lobby, Inc.]*, 477 U.S. [242] at 252, 106 S.Ct. [2505] at 2512, 91 L.E.2d [202] at 214 [1986]." *Williams*, 194 W.Va. at 60, 459 S.E.2d at 337.

On appeal, petitioner argues that he filed his discovery responses prior to the January 14, 2011 discovery deadline. He also alleges that the granting of summary judgment prior to the discovery completion date is precipitous. Petitioner seeks remand of his case.

Respondent Brickstreet argues that as a matter of law, it is entitled to summary judgment since petitioner failed to respond to the requests for admission even after he was given extensions of time, and therefore the issue of how much petitioner owed Brickstreet is no longer a genuine issue of material fact in dispute. Respondent argues that there is no statute, rule or case law that requires the lower court to wait to grant summary judgment until the expiration of the discovery deadline, and in this matter summary judgment was only granted one day prior to the discovery deadline. In the present case, there was no issue of fact in dispute, and petitioner did not oppose the summary judgment motion claiming a genuine issue of material fact.

This Court has found that "[a] failure to respond to a request for admissions under Rule 36 of the West Virginia Rules of Civil Procedure will be deemed to be an admission of the matters set forth in the request." Syl. Pt. 2, *Checker Leasing, Inc. v. Sorbello* , 181 W.Va. 199, 382 S.E.2d 36 (1989). In the present matter, although counsel for the petitioner had health issues throughout the case, when he appeared at the October 14, 2010, hearing, he indicated that he would be working at full capacity by December 1, 2010. Further, after the discovery requests were filed, petitioner never indicated that he could not comply with the applicable deadlines. Even when contacted repeatedly by counsel for the respondent, he failed to indicate that he could not respond, and never sought relief from the circuit court. The circuit court indicated that it had sympathy for petitioner's counsel, but that the case had been pending for over a year at that time. This Court finds no error deeming the requests for admission to be admitted.

As to the grant of summary judgment, this Court has found as a general rule, summary judgment is appropriate only after the parties have had adequate time to conduct discovery, and granting a motion for summary judgment before the completion of discovery is precipitous. *Bd. of Educ. of the Cnty of Ohio v. Van Buren & Firestone, Architects, Inc.* 165 W.Va. 140, 144, 267 S.E.2d 440, 443 (1980). However, in order to defeat a motion for summary judgment, the petitioner must rehabilitate the evidence attacked by the Respondent; produce additional evidence showing the existence of a genuine issue for trial; or submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure. *See*, Syl. Pt. 3, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995). *Williams* states that:

> A nonmoving party cannot avoid summary judgment merely by asserting that the moving party is lying. Rather, Rule 56 requires a nonmoving party to produce specific facts that cast doubt on a moving party's claims or raise significant issues of credibility. The nonmoving party is required to make this showing because he is the only one entitled to the benefit of all *reasonable* or *justifiable* inferences when confronted with a motion for summary judgment. Inferences and opinions must be grounded on more than flights of fancy, speculations, hunches, intuition or rumors.

194 W.Va. 61, at n.14, 459 S.E.2d at 338, n.14 (emphasis in original). Pursuant to *Crum v. Equity Inns, Inc.*, this Court stated that:

> An opponent of a summary judgment motion requesting a continuance for further discovery need not follow the exact letter of Rule 56(f) of the West Virginia Rules of Civil Procedure in order to obtain it. *Elliott v. Schoolcraft*, 213 W.Va. at 73, 576 S.E.2d at 800. However, at a minimum, the party making an informal Rule 56(f) motion must satisfy four requirements. It should (1) articulate some plausible basis for the party's belief that specified "discoverable" material facts likely exist which have not yet become accessible to the party; (2) demonstrate some realistic prospect that the material facts can be obtained within a reasonable additional time period; (3) demonstrate that the material facts will, if obtained, suffice to engender an issue both genuine and material; and (4) demonstrate good cause for failure to have conducted the discovery earlier. *Id.*

224 W.Va. 246, 254, 685 S.E.2d 219, 227 (2009). In the present case, the petitioner's failure to respond to the discovery requests means that petitioner has admitted that he obtained workers' compensation insurance and has admitted that the amount in question owed to Brickstreet is $30,189. The motion for summary judgment was only granted one day prior to the discovery deadline; thus, petitioner has not shown the need for additional discovery in this matter and has not shown any genuine issue of material fact. This Court finds no error in the circuit court's order granting summary judgment in favor of the respondent.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: March 12, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Thomas E. McHugh

NOT PARTICIPATING:

Justice Margaret L. Workman