

IN THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
TRUMBULL COUNTY, OHIO

FILED  
COURT OF APPEALS

APR 13 2020

TRUMBULL COUNTY, OH  
KAREN INFANTE ALLEN, CLERK

JOSEPH DUGAN, : OPINION  
Relator-Appellant, :  
- vs - : CASE NO. 2019-T-0073  
VILLAGE OF McDONALD, :  
Respondent-Appellee. :

Civil Appeal from the Trumbull County Court of Common Pleas.  
Case No. 2018 CV 001373.

Judgment: Affirmed.

*Donald Gallick*, The Law Office of Donald Gallick LLC, 190 North Union Street, Suite 102, Akron, OH 44304 (For Relator-Appellant).

*Douglas W. Ross, Daniel Daniluk, LLC*, 1129 Niles-Cortland Road, SE, Warren, OH 44484 (For Respondent-Appellee).

TIMOTHY P. CANNON, P.J.

{¶1} Relator-appellant, Joseph Dugan (“Dugan”), appeals from the judgment entry issued by the Trumbull County Court of Common Pleas on September 19, 2019, granting the motion for summary judgment filed by respondent-appellee, the Village of McDonald (“the Village”). The judgment is affirmed.

{¶2} Dugan sent a public records request to the Village on April 10, 2018, seeking (1) minutes of the Village’s Service Committee meetings occurring between January 1, 2016, and December 31, 2017; and (2) Committee studies and reports

conducted during 2016 regarding the water rate increase effective January 2017. Dugan asked the Village to provide the documents either in written form to his mailing address or in digital format to his email address.

{¶3} On July 30, 2018, Dugan filed a complaint for mandamus against the Village under the Ohio Public Records Act, alleging the Village failed to produce the requested public records without explanation. Dugan also alleged the Village may have destroyed the requested documents, in violation of the Ohio Revised Code. The complaint further alleged that the Village “is required to conduct studies and draft reports pursuant to Village of McDonald Ordinance 3142-13, passed on December 4, 2013.” Dugan neither attached a copy of this ordinance to the complaint nor recited any language from said ordinance.

{¶4} The Village answered on September 26, 2018. The Village denied the allegations and stated Ordinance 3142-13 speaks for itself. It recited a portion of the ordinance as relevant to Dugan’s allegations, but the parties have not stipulated to its accuracy.

{¶5} The Village stated the requests in Dugan’s April 10, 2018 letter were redundant and duplicative requests from his prior public records requests. The Village acknowledged receipt of the request by letter sent via email on April 12, 2018. According to the Village, it responded to the nonduplicative requests on April 18, 2018, electronically, with a letter and delivery of records. The Village further stated that no “water rate committee study” ever existed and denied withholding or destroying any public records.

{¶6} On July 26, 2019, the Village filed a motion for summary judgment on the basis that it has produced all public records that are, or ever were, available in response to Dugan's public records requests regarding the 2017 water rate increase.

{¶7} The Village attached to its motion the affidavit of Robin DeBow ("DeBow"), the Village's former fiscal officer. DeBow averred she was responsible for responding to public records requests made to the Village, including those made by Dugan. DeBow affirmed, to her personal knowledge, that the Village produced to Dugan all available public records responsive to his request letter of April 10, 2018, as well as Dugan's previous letters of February 15, 2017, and December 7, 2016. She averred that no records were lost or destroyed by the Village and that the Mayor of the Village was not involved in responding to public records requests. With regard to the specific requests in Dugan's April 10, 2018 letter, DeBow averred the following:

All available public records concerning the Village's Service Committee Meetings between January 1, 2016 and December 31, 2017 were produced with the Village Solicitor's April 18, 2018 letter \*\*\*. Regarding the water rate issue, the Village did not create or maintain a specific public record that is a "2016 Committee study or report regarding the water rate increase."

{¶8} DeBow averred that, as the Village's former Fiscal Officer, she has personal knowledge of, was provided copies of, and/or participated in providing the following correspondence and documents, all of which were attached as Exhibits A-I:

- First public records request made by Dugan concerning the water rate increase (December 7, 2016)
- Email from the Village Administrator, with attached documents, in response to Dugan's first request (January 6, 2017)
- Second public records request made by Dugan concerning the water rate increase (February 15, 2017)

- Letter sent via email from the Village Solicitor, with attached documents, in response to Dugan's second request (March 1, 2017)
- Notice of Filing of Complaint filed by Dugan against the Village in the Ohio Court of Claims concerning his public records requests (January 11, 2018)
- Third public records request made by Dugan concerning the water rate increase, which was sent after Dugan dismissed his Court of Claims case (April 10, 2018)
- Acknowledgment letter sent via email from the Village Solicitor with regard to Dugan's third request (April 12, 2018)
- Letter sent via email from the Village Solicitor, with attached documents, in response to Dugan's third request (April 18, 2018)
- Letter from Dugan to the Village regarding his public records request (May 1, 2018)
- Letter from the Village Solicitor, with an attached document, in response to Dugan's letter (May 9, 2018)

{¶9} In its motion for summary judgment, the Village stated it “never created nor maintained a public record that is a ‘2016 Committee Study or Report regarding the water rate increase effective January 2017.’” The Village explained how the documents it had produced were responsive to Dugan’s request for minutes of the Service Committee meetings occurring between January 1, 2016, and December 31, 2017:

For the Court’s understanding, the Village’s governing body is a Village Council, comprised of 6 elected councilmembers. Village Council meets at a public meeting twice a month (except during June, July and August when Council meets only once). At the Council meetings, which are open to the public, Council discusses and officially acts on Village business.<sup>18</sup> Typically, on the Tuesday before the first monthly Council meeting, the Village Committees meet at a public meeting. The Village has four Committees: (1) a Safety Committee, (2) a Parks and Buildings Committee, (3) a Service Committee, and (4) a Finance Committee – each of which is comprised of 3 Council Members. Generally, the Committees discuss issues and Village business, but takes no official action.

Relator, in his April 10, 2018 letter, requested the Service Committee meeting minutes for a two year period. In response, via letter dated April 18, 2018, the Village produced all available public records regarding this request.<sup>19</sup> Attached to April 18, 2018 letter are (i) the Council Meeting minutes for January, 2016 through November, 2016 and (ii) Committee Meeting minutes from December, 2016 through December, of 2017. For a period of time up until December, 2016, minutes of the Village Committee meetings, including the Service Committee meetings, were contained in the Committee Reports section of the Council meeting minutes.<sup>20</sup> These are the public records the Village maintained for this time period in response to Relator's request. The Village can only produce public records that exist, the Village has done so, and the Village has nothing further to produce.

<sup>18</sup> Since late 2016, Relator has been a frequent attendee of Village Council and Committee meetings.

<sup>19</sup> DeBow Affidavit, Respondent's Exhibit G.

<sup>20</sup> See Respondent's Exhibit G.

{¶10} The Committee Reports section of the Council Meeting Minutes for the regular meeting held November 2, 2016, reflects as follows:

**Finance & Capital Improvement** Mr. Seitz stated tonight's finance report will be given by Mr. Lewis. Mr. Lewis stated they met last evening and had a lengthy discussion regarding the 2017 budget. A line item in the budget has been removed in order not to operate in the red. The water fund is operating at a \$140,000 negative balance. We don't like to do it but it is necessary to raise the water rates.

It was moved by Mr. Lewis, seconded by Mr. Seitz to authorize the Solicitor to prepare the necessary legislation to adjust the water rates.

Discussion: Mayor said he appreciates Council's proactive approach. He appreciates the VA looking into things. He has been diligent in trying to curtail some of our water losses and adjust and control our fixed costs and keeping our rates low. This is a direct reflection of the natural course of inflation and the economy.

Mr. Lewis stated even with the rate increases we will be in the bottom 25% in Trumbull County and the bottom 15% in Mahoning and Trumbull County.

Solicitor Ross stated that living in Canfield even with your increases I would love to pay your water rates. That is my perspective from someone who pays a different rate for a different area.

Roll call:

Mr. Lewis – aye  
Mr. O'Brien – aye  
Mr. Puckett – aye

Mr. Seitz – aye  
Mr. Harvey – aye  
Mr. Klase – aye

Motion carried.

{¶11} The Council Committee Meeting minutes of December 6, 2016 provide:

“Finance: Mr. Lewis began the meeting at 6:34 p.m. and discussed the amended budget. This is a bare bones temporary budget with no capital improvements for next year. They are trying to stop the bleeding in the general fund. They also discussed the increase in the water rates that is necessary as soon as possible because they are running in the red. There will be a first reading on Wednesday and an emergency reading on December 22. The meeting ended at 6:48 p.m.”

{¶12} Dugan deposed the Village’s mayor but did not reference the transcript of the deposition in a brief in opposition or any other filing. Rather, Dugan responded to the Village’s motion with a one-page “Affidavit Contra Summary Judgment.” Dugan averred that the Village had not sent him any of the public records he requested in his April 10, 2018 letter. He further averred, “I have seen a records log in the Village’s central files list stating that these minutes either are in the possession of, or were in the possession of at one time, the Village; nevertheless, these minutes have never been produced, nor has any written document been produced by the Village stating that these minutes were lost, missing, or destroyed.”

{¶13} The Village filed a reply in support of its motion, maintaining that it had produced to Dugan all public records that actually exist and that neither Dugan’s

affidavit nor anything else in the case refutes DeBow's affidavit or raises a genuine issue of material fact to the contrary. The Village further noted that Dugan chose not to depose DeBow, the person actually responsible for and having knowledge of the Village's public records, requests, and responses. Rather, Dugan chose to depose the mayor, who "is not the keeper of Village public records, does not get involved in public records requests, and does not respond to public records requests for the Village. \* \* \*

At his deposition, [the mayor] clearly testified to the same."

{¶14} The trial court granted the Village's motion and entered summary judgment in favor of the Village on September 19, 2019.

{¶15} From this entry, Dugan raises one assignment of error for our review:

{¶16} "The trial court's order granting summary judgment must be vacated as it contains no legal authority nor any legal reasoning and because the affidavits and deposition show a genuine issue of material fact."

{¶17} "In order to obtain summary judgment, the movant must show that (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion when viewing evidence in favor of the nonmoving party, and that conclusion is adverse to the nonmoving party." *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). This court reviews an order granting summary judgment de novo. *Doe v. Shaffer*, 90 Ohio St.3d 388, 390 (2000).

{¶18} Dugan's first argument is that the trial court deprived this court of the opportunity to provide "meaningful review" on appeal by failing to provide any legal authority or legal reasoning in its judgment entry. We disagree.

{¶19} “Civ.R. 56(C) places a mandatory duty on a trial court to thoroughly examine all appropriate materials filed by the parties before ruling on a motion for summary judgment.” *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356 (1992), syllabus. “Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Civ.R. 56(C).

{¶20} The trial court determined the Village was entitled to judgment as a matter of law. Thus, the issue on appeal is whether there is a genuine issue as to any material fact with regard to Dugan’s claim that the Village failed to produce public records responsive to his request.

{¶21} The trial court’s entry provides, in relevant part, as follows:

According to the DeBow affidavit submitted with the motion, “\*\*\* the Village produced to Mr. Dugan all available public records responsive to Mr. Dugan’s December 7, 2016, February 15, 2017, and April 10, 2018 public records request letters. No records were lost or destroyed by the Village.”

DeBow further averred the following with specific regard to the April 10, 2018 request: “All available public records concerning the Village’s Service Committee Meetings between January 1, 2016 and December 31, 2017 were produced with the Village Solicitor’s April 18, 2018 letter \*\*\*. Regarding the water rate issue, the Village did not create or maintain a specific public record that is a ‘2016 Committee study or report regarding the water rate increase.’”

Dugan avers the Village has not “\*\*\* sent me any public records I requested \*\*\*.” However, the evidence submitted by the Village starkly contradicts the Dugan assertion. The Village attached not only the DeBow affidavit, but also the communications sent to Dugan with the attached public records. This includes an April 12, 2018 letter from Atty. Ross acknowledging receipt of the public

records request as well as an April 18, 2018 letter attaching the requested public records responsive to that request.

There is no evidence before this Court to suggest the Village failed to respond to the Dugan public records request other than the Dugan unsupported affidavit. There is no evidence before this Court to suggest the Village unlawfully destroyed public records. To the contrary, the only evidence before this Court indicates the Village timely complied with the Dugan public records request and produced all responsive documents.

Accordingly, the Court finds there are no genuine issues of material fact. The Village timely complied with the Dugan public records request. There is no evidence to support the Dugan claim for destruction of public records.

{¶22} The trial court's entry includes sufficient detail as to the basis for its decision and for this court to conclude that the trial court complied with its duty under Civ.R. 56(C). While the trial court did not cite to any legal authority, the legal reasoning is implicit in the trial court's entry: Dugan failed to meet his burden on summary judgment to demonstrate a genuine issue as to any material fact because the only evidence presented to the court was contrary to Dugan's claim.

{¶23} The trial court has not deprived this court of a meaningful de novo review.

{¶24} Summary judgment is a burden-shifting exercise. Initially, the moving party must point to evidentiary materials to show there are no genuine issues of material fact and it is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293 (1996). If the moving party meets this burden, a reciprocal burden is placed on the nonmoving party. *Id.* at 293. The nonmovant "may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." *Id.*, quoting Civ.R. 56(E).

{¶25} “Relators in mandamus cases must prove their entitlement to the writ by clear and convincing evidence.” *State ex rel. Doner v. Zody*, 130 Ohio St.3d 446, 2011-Ohio-6117, paragraph three of the syllabus (citations omitted). “[I]n general, providing the requested records to the relator in a public-records mandamus case renders the mandamus claim moot.” *State ex rel. Toledo Blade Co. v. Seneca Cty. Bd. of Commrs.*, 120 Ohio St.3d 372, 2008-Ohio-6253, ¶43, citing *State ex rel. Toledo Blade Co. v. Ohio Bur. of Workers’ Comp.*, 106 Ohio St.3d 113, 2005-Ohio-6549, ¶16. Additionally, when the records sought do not exist, respondents “have no duty under R.C. 149.43 to create new records by searching for and compiling information from existing records.” *State ex rel. White v. Goldsberry*, 85 Ohio St.3d 153, 154 (1999) (citations omitted). “In other words, a compilation of information must already exist in public records before access to it will be ordered.” *State ex rel. Kerner v. State Teachers Retirement Bd.*, 82 Ohio St.3d 273, 274 (1998) (citations omitted).

{¶26} Dugan argues the trial court erred in granting summary judgment to the Village because the affidavits and deposition show a genuine issue of material fact. He acknowledges that the Village provided him with meeting minutes from January 2016 through December 2017. Dugan contends, however, that a genuine issue of material fact exists regarding his request for the committee studies and reports on the water rate increase.

{¶27} The Village, in its motion, asserted that no such public records exist or were ever created, and that it is not required to create new records in order to respond to a public records request. DeBow, the former fiscal officer, averred as follows: “Regarding the water rate issue, the Village did not create or maintain a specific public record that is a ‘2016 Committee study or report regarding the water rate increase.’”

Incorporated into DeBow's affidavit are exhibits that reflect the following items have been provided to Dugan in response to his multiple requests regarding the water rate increase:

- copies of certain Village Ordinances with minutes from council and committee meetings
- "data reflecting need to increase water rates"
- "financial month end reports"
- "2017 Water Rate Calculation Notes and attached Water Loss Reports 2012-2016"
- "Water Department Expenditures 2009-2016"
- "Water Revenue vs. Expense" and "Sewer Revenue vs. Expense" for the years 2010-2014

{¶28} Also incorporated into DeBow's affidavit are correspondence between Dugan and the Village from May 2018. On May 1, Dugan sent a letter to the Village. He wrote: "Your reply to my April 10, 2018 subject request for specified public records does not satisfy the vast majority of that request. \* \* \* Provide those documents within 14 days of this letter or litigation will commence with the filing of a complaint in common pleas court."

{¶29} On May 9, the Village Solicitor responded by letter. He wrote, in part:

Regarding your request for documents concerning the water rate increase, this issue was the subject of your December 7, 2016 public records request and February 15, 2017 "amplification letter", both of which the Village has responded to and both of which were the subject of your public records lawsuit [in the Ohio Court of Claims], which case is dismissed. Nonetheless, in response to your May 1, 2018 letter, the Village additionally produces the attached document [the "Water Revenue vs. Expense" and "Sewer Revenue vs. Expense" charts]. While not a "Committee study", the Village produces it nonetheless as relevant to your requests, as they can be interpreted. At this time, the Village has complied with

your requests and provided you with all public records. I cannot communicate that to you in any clearer fashion.

{¶30} The Village clearly met its burden on summary judgment to show the absence of a genuine issue of material fact. The Village's evidence establishes that it produced to Dugan all available and existing public records responsive to his request.

{¶31} In his affidavit contra, Dugan averred "the Village has not sent me any public records I requested in my April 10, 2018 request." However, he sets forth no specific facts in support of this allegation as it pertains to the request for committee studies or reports regarding the water rate increase. On appeal, Dugan continues to argue that summary judgment in favor of the Village is precluded because it allegedly violated McDonald Ordinance 3142-13. Dugan claims said ordinance requires the Village to have conducted studies and drafted reports regarding the water rate increase. However, Dugan did not provide the trial court with the language of this ordinance nor have the parties stipulated to any provision of the ordinance. This court has not been able to independently verify the contents of said ordinance.

{¶32} Even if the ordinance was properly before us in the record, Dugan's argument that the Village violated an ordinance requiring a study before increasing the water rate is irrelevant to Dugan's public records request. Whether a violation of a Village ordinance occurred and whether certain documents should exist is not pertinent to whether Dugan can succeed on this complaint for mandamus. Even assuming, merely for the sake of argument, that certain documents should exist, the Village cannot produce documents that do not exist.

{¶33} Dugan's only other factual averment in his affidavit relates solely to his request for minutes from the Village committee meeting: "I have seen a records log in

the Village's central files list stating that these minutes either are in the possession of, or were in the possession of at one time, the Village." He appears to believe that the minutes he received from the Village are not the minutes referred to in the Village's central files. Dugan sets forth absolutely no specific facts or evidence to support this belief.

{¶34} Dugan also takes issue with the fact that the trial court's order granting summary judgment makes no mention of the mayor's deposition. To this, we note that Dugan also made no mention of the mayor's deposition in his affidavit contra nor was it relied on by the Village in its motion.

{¶35} Dugan did not meet his reciprocal burden on summary judgment to set forth specific facts showing that there is a genuine issue for trial. Accordingly, it was appropriate for summary judgment to be entered in favor of the Village.

{¶36} The trial court did not err in granting the Village's motion for summary judgment. Dugan's sole assignment of error is without merit.

{¶37} The judgment of the Trumbull County Court of Common Pleas is affirmed.

THOMAS R. WRIGHT, J.,

MARY JANE TRAPP, J.,

concur.