

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

AJ AMATORE & CO.,

Plaintiff-Appellee,

v.

ANGELICA SEBASTIANI et al.,

Defendants-Appellant.

OPINION AND JUDGMENT ENTRY **Case No. 18 MA 0137**

Civil Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 16 CV 878

BEFORE:

Carol Ann Robb, Gene Donofrio, Cheryl L. Waite, Judges.

JUDGMENT:

Affirmed.

Atty. Gary J. Rosati, Rosati Law Office, LLC, 860 Boardman-Canfield Rd., Suite 103, Boardman, Ohio 44512, for Plaintiff-Appellee and

Atty. Christopher A. Maruca, *Atty. Anthony P. Celo*, The Maruca Law Firm, LLC, 201 East Commerce Street, Suite 316, Youngstown, Ohio 44503, for Defendants-Appellant.

Dated: November 6, 2019

Robb, J.

{¶1} Defendants-Appellant Sebastiani Trucking appeals the decision of the Mahoning County Common Pleas Court awarding Plaintiff-Appellee AJ Amatore & Co. damages in the amount of \$26,030.00. Appellant assigns two errors in this appeal. It contends the trial court erred when it failed to determine if Appellee performed the amount of work claimed in the invoices. Second, it contends the trial court's decision is against the manifest weight of the evidence as to the determination that Appellee was entitled to the full amount of time it billed Appellant for the alleged work performed. For the reasons expressed below, the arguments lack merit. The verdict is affirmed.

Statement of the Facts and Case

{¶2} Appellant retained Appellee in 2011 for accounting and tax work. Tr. 94. The services included filing tax returns for 2009 and 2010 because Appellant had not filed returns for those years. Tr. 94. Appellee prepared and filed tax returns on behalf of Appellant for 2009 through 2014. Tr. 23, 94. However, Appellant was delinquent in its payments for the services; Appellant allegedly owed Appellee \$59,353.00.

{¶3} Appellant received a delinquent tax notice from the IRS in 2016 regarding the 2014 tax return that was allegedly filed by Appellee. Appellant hired a new accountant to prepare and correctly file that return.

{¶4} In March 2016, Appellee filed a complaint against Appellant for money damages in Mahoning County Common Pleas asserting breach of contract on an account of services and unjust enrichment.¹ 3/22/16 Complaint. Following a motion for a more definite statement and an order to mediate, Appellant filed an answer and counterclaim. 12/15/16 Answer and Counterclaim. The counterclaim asserted breach of contract and fraud; Appellant asserted Appellee failed to file or to properly file the 2014 tax returns thereby causing it to incur damages.² This failure is the basis for the breach of contract and fraud claims.

¹ The complaint also contained a count against Angelica Sebastiani in her personal capacity. That count was dismissed by the court and no appeal was filed based on that dismissal.

² The counterclaim also asserted a fraud cause of action based on Appellee representing to Appellant that it had hired an attorney for Appellant for a cause of action against Huntington Bank. The action was never filed. Appellant believed it had a cause of action against Huntington Bank that would have prevailed and the misrepresentations that an action had been filed caused the statute of limitations to run and it lost the right to sue for damages. A directed verdict for Appellee was granted on that claim because Appellant failed to demonstrate that the cause of action would have prevailed and failed to show the amount of damages incurred. The directed verdict decision was not appealed.

{¶5} Mediation failed and Appellee filed a motion for partial summary judgment. 2/1/18 Motion for Partial Summary Judgment. Appellant responded claiming there were genuine issues of material fact. 2/16/18 Response to Summary Judgment Motion. The trial court agreed and denied the motion for summary judgment. 3/20/18 J.E. Following that decision, the trial court vacated the denial of summary judgment and recused itself due to a potential conflict of interest. 4/18/18 J.E. A visiting judge was then appointed to the case.

{¶6} In October 2018, the motion for partial summary judgment was denied by the appointed judge. 10/16/18 J.E.

{¶7} The case proceeded to a bench trial on November 6, 2018. The trial court found in favor of both parties. As for Appellee's claim of breach of contract, the trial court reasoned:

The Court initially finds that the Plaintiff and Defendant entered into an agreement for the preparation of taxes for Sebastiani Trucking, Inc. The Court further finds that the Defendant did not object to the manner in which the billing was presented over a period of four years. The evidence shows that the Defendant became excessively in arrears of payment, but from 6/8/11 to 11/25/15 paid \$20,638 but was credited with only \$10,525; that therefore it is entitled to an additional credit of \$10,113. So the initial calculation is that the Plaintiff billed for \$69,888 and the Defendant remitted \$20,638 leaving an initial balance of \$49,250.

11/14/18 J.E.

{¶8} On the counterclaim, the trial court found that Appellee failed to properly file the 2014 tax return causing Appellant damages in the amount of \$3,570.00, which were the fees for the new accountant. 11/14/18 J.E. The court also found that Appellant was overcharged for the accounting services for the 2014 tax return since it was prepared and filed improperly. 11/14/18 J.E. The fees for the 2014 tax return were \$12,150.00. Exhibit A. Per expert testimony, the overcharge was \$4,500.00. Therefore, the trial court found Appellant was entitled to a credit of \$7,650.00. 11/14/18 J.E. The court also found that as part of the agreement between Appellant and Appellee, Appellee was supposed to file the Commercial Activity Tax. 11/14/18 J.E. Appellee failed to file that tax during its retention as Appellant's accountant, and as a result, Appellant incurred interest and a

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penalty in the amount of \$12,000.00. 11/14/18 J.E. Accordingly, in total, the trial court credited Appellant \$23,220.00. 11/14/18 J.E.

{¶9} The trial court subtracted the credited amount from the remaining initial balance of \$49,250.00 and rendered judgment for Appellee in the amount of \$26,030.00. 11/14/18 J.E.

{¶10} Appellant timely appealed from that decision.

First Assignment of Error

“The trial court committed an error of law and abused its discretion by not examining if Appellee performed the amount of work it claimed in its invoices.”

{¶11} Appellant argues that in order to prove damages for breach of contract, Appellee had to prove the specific amount of damages. Appellant contends Appellee did not prove that it performed the work it claimed in the invoices that were submitted as evidence. It claims Appellee inflated its invoices above and beyond the actual hours it worked.

{¶12} Appellee counters, arguing the trial court followed the principle of “account stated.” Under this principle, an account given by the creditor or service provider to the debtor or person receiving the service, and not objected to in a reasonable time becomes an account stated. An account stated is prima facie evidence of its correctness and a party seeking to set it aside must do so on the grounds of mistake or fraud. Thus, Appellee contends it was not required to prove how much time was spent on bookkeeping or accounting work. It was Appellant’s obligation to demonstrate it was incorrect. The Appellant contends that it did prove it was incorrect for the 2014 tax return because the trial court did find Appellant was overcharged for that service, i.e., mistake in charging.

{¶13} In its reply, Appellant argues this is not a case of “account stated” because the invoices presented do not meet the stringent requirements for an “account stated.” In other words, the invoices do not meet the level of reliability for an “account stated.”

{¶14} Multiple appellate districts have stated that in order to establish a prima facie case for money owed on an account, the following information must be affirmatively shown:

An account must show the name of the party charged and contain: (1) a beginning balance (zero, or a sum that can qualify as an account stated, or some other provable sum); (2) listed items, or an item, dated and identifiable

by number or otherwise, representing charges, or debits, and credits; and (3) summarization by means of a running or developing balance, or an arrangement of beginning balance and items which permits the calculation of the amount claimed to be due.

Midland Funding LLC v. Coleman, 6th Dist. Lucas No. L-18-1095, 2019-Ohio-432, ¶ 15, quoting *Gabriele v. Reagan*, 57 Ohio App.3d 84, 87, 566 N.E.2d 684 (12th Dist.1988). See also *Citibank, N.A. v. Hine*, 4th Dist. Ross No. 17CA3624, 2019-Ohio-464, ¶ 29; *Brown v. Columbus Stamping & Mfg. Co.*, 9 Ohio App.2d 123, 223 N.E.2d 373 (10th Dist.1967).

{¶15} The *Brown* court did state “[a] series of copies of invoices does not constitute an account.” *Brown* at 125. However, *Brown* was decided based on R.C. 2309.32 which has been replaced by Civ.R. 10(D). The Tenth Appellate District has explained that since Civ.R. 10(D)’s replacement of R.C. 2309.02, the standards of what constitutes an account have been altered. *Equable Ascent Fin., L.L.C. v. Christian*, 10th Dist. Franklin No. 10AP-1120, 196 Ohio App.3d 34, 2011-Ohio-3791, 962 N.E.2d 322, ¶ 17. It has clarified the account requirements indicating it is not necessary that every transaction between the parties are included. *Johncol, Inc. v. Cardinal Concession Services, L.L.C.*, 10th Dist. Franklin No. 17AP-337, 2017-Ohio-9031, 101 N.E.3d 1014, ¶ 18. Also, the account does not necessarily have to start at zero, but must show debits and credits. *Id.* Furthermore, a copy of a ledger sheet or an accounts receivable record, will ordinarily meet the requirements of an account. *Id.* In relaxing the standards, the Tenth District has explained that “compliance with Civ.R. 10(D)(1) can be achieved by attaching documents that do not strictly constitute a statement of account.” *Hudson & Keyse, L.L.C. v. Carson*, 10th Dist. Franklin No. 07AP-936, 2008-Ohio-2570, 2008 WL 2221968, ¶ 15.

{¶16} Here, the evidence submitted at trial constitute an account per Civ.R. 10(D) standards. The invoices are numbered, dated, and indicated Appellant was being billed. Although the services are not itemized, the invoices list the services and the total amount owed for the service. Some of the invoices do show payments made. Also, submitted at trial was a spreadsheet showing invoices and payments. Exhibit H. This item shows the invoice number, date, original amount, payment applied, and current total. Exhibit H. It also includes a separate payment spreadsheet showing the date of payments and how

much was paid. Exhibit H. However, the invoices and spreadsheet do not show all payments; the trial court determined, given Appellant's evidence, that Appellant paid other payments for approximately \$10,000.00 that were not shown on the invoices. It is noted that Appellant does not argue Appellee failed to comply with Civ.R. 10(D), which requires an action on an account to have the account attached to the complaint. Regardless, these items meet the requirements of an account.

{¶17} That said, an account stated is different from an account; an “account stated” requires “an agreement between parties, express or implied, based upon an account balanced and rendered.” *Starr Fireworks, Inc. v. Midwest Fireworks Mfg. Co., Inc.*, 11th Dist. Portage No. 96-P-0198, 1997 WL 184767 (Apr. 4, 1997), quoting *Rudolph Bros. v. Husat*, 187 N.E.2d 190, 25 O.O.2d 376 (7th Dist.1961). See also *HHL Group, Inc. v. Ken's Auto Serv. Ctr., Inc.*, 9th Dist. Medina No. 10CA0021-M, 2011-Ohio-1153, ¶ 18 (“An account stated properly exists only where accounts have been examined and the balance admitted as the true balance between the parties, without having been paid.”). The Second Appellate District has explained:

{¶18} An account stated exists:

only where accounts have been examined and the balance admitted as the true balance between the parties, without having been paid. In other words, an account stated is based upon an assent to its correctness. This assent may be expressed or implied from the circumstances. *Id.* at 202, Section 26.

Creditrust Corp. v. Richard, 2d Dist. Clark No. 99-CA-94, 2000 WL 896265 (July 7, 2000).

{¶19} Assent to the correctness of the balance may occur from the failure to object within a reasonable time to the bill. *Id.* (“An account rendered by one person to another and not objected to by the latter within a reasonable time becomes an account stated. It becomes the duty of the one to whom the account is thus rendered to examine the same within a reasonable time and object if he or she disputes its correctness.”). However, it has also been held that the failure to object to the accuracy of billings by the party owing money on an account does not necessarily create an “account stated.” *Starr Fireworks, Inc.*, citing *Blanchester Lumber & Supply, Inc. v. Coleman*, 69 Ohio App.3d 263, 266, 590 N.E.2d 770 (12th Dist.1990). The Ninth Appellate District has stated that if “the acknowledgment or admission is qualified, and not absolute, or if there is but an

admission that something is due, without specifying how much * * * there is no account stated.” *HHL Group, Inc. v. Ken’s Auto Serv. Ctr., Inc.*, at ¶ 18.

{¶20} Here, the trial court found that the parties entered into a contract for preparation of taxes for Appellant. 11/14/18 J.E. It found that for over a four year period, Appellant did not object to the manner in which the bill was presented. However, it also found that Appellant was not credited for the correct amount of payments. The trial court also found that for the 2014 taxes, Appellant was overcharged. Thus, the trial court used the invoices submitted by Appellee of the charges for 2011 through 2014 owed. It then subtracted the additional credit of payments and the overcharge for 2014 and issued judgment in favor of Appellees for the remaining amount.

{¶21} In its judgment entry, the trial court does not specifically indicate it was using the principle of account stated to hold that the billed for charges were an account stated. Furthermore, the principal of account stated was not explicitly argued to the trial court.

{¶22} Therefore, the issue before this court is not whether the elements of account stated are present. Rather, the issue is whether the trial court’s determination that Appellee was entitled to payment for work performed is against the manifest weight of the evidence.

{¶23} Judgments supported by competent, credible evidence going to the material elements of the case will not be disturbed as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus. Weight of the evidence concerns the inclination of the greater amount of credible evidence offered at trial to support one side of the issue over the other; it relates to persuasion and the effect of the evidence in inducing belief. *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 12, 19 (applying *Thompkins* to civil cases), citing *State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997). In conducting a manifest weight of the evidence review, the reviewing court weighs the evidence and all reasonable inferences to be drawn therefrom, considers the credibility of witnesses, and determines whether in resolving evidentiary conflicts, the fact-finder clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed. *Thompkins* at 387.

{¶24} In the case at hand, the trial court as the trier of fact heard testimony from Angelica Sebastiani that Appellant received the invoices. Tr. 26. Anthony Amatore testified that every year Appellee was retained to file taxes for Appellant, Appellee would

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receive 2 or more banker's boxes full of paper from Appellant that contained information for that year's taxes. Tr. 94. He contended and his assistant confirmed that they had to organize the information in the boxes and input the information into QuickBooks. Tr. 104-108, 174. Amatore also testified that when the firm was retained Appellant was behind two years in filing taxes. Tr. 94. He claimed the invoices accurately reflected the time spent. Testimony also indicated Appellee performed more than tax services for Appellant; it helped Appellant obtain a loan when a judgment was rendered against it.

{¶25} Appellant's current accountant testified that based on his experience in filing taxes for Appellant for three years, the amount on the invoices sent by Appellee does not reflect what he would expect Appellant to be billed. Tr. 264. He indicated that even though he bills at a higher rate for his accounting services and at the same rate as Appellee for bookkeeping services, his bills to Appellant were a half or a third of what was presented in the bills Appellee sent to Appellant. Tr. 264- 265. However, he did testify on cross that it would not be fair to perform a job and not be paid for the amount of time it took to complete the job. Tr. 269.

{¶26} The testimony and evidence does not indicate that Appellant objected to the amount owed for 2009, 2010, 2011, 2012, and 2013 accounting services. Instead, the evidence indicates Appellee talked to Appellant about paying the money owed and indicated it would not perform any more services unless there was a promise to pay. Tr. 106. Appellee contends Appellant promised to pay. Tr. 106.

{¶27} In its judgment entry, the trial court found that Appellant did not object to the billing for over a four year period. 11/14/18 J.E. The failure to object to invoices and to make partial payments over a four year period is evidence of assent to the amount owed on the bills. Appellant continued to use Appellee's services for this period rather than retaining a new accountant and there was a promise to pay. If Appellant had believed it was being continuously overcharged for services, it would be logical that rather than partially paying and purportedly agreeing to bring its account up-to-date on the amount owed, it would have objected to the amount or retained a new accounting firm. The trial court's determination that Appellee was entitled to the amount billed for the years other than 2014 was supported by some competent credible evidence.

{¶28} It is noted Appellant focuses some of its arguments under this assignment of error on the shredded time sheets. The testimony at trial indicated that only a few of the time sheets were destroyed close in time to when the complaint was filed. Those time
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sheets were for the tax year 2014. The trial court clearly found that Appellant was overcharged for the 2014 tax year. Therefore, those time sheets were of no consequence. Furthermore, Appellee did indicate that it destroys its time sheets every six months. There was no evidence to indicate Appellee purposely destroyed the time sheets so it could not be shown that it inflated its bills.

{¶29} For the above stated reasons, this assignment of error is meritless.

Second Assignment of Error

“The trial court’s ruling relating to the amount of time billed for by Appellee was against the manifest weight of the evidence.”

{¶30} Appellant asserts the trial court’s decision to use the \$69,888.00 calculation for the charge for four years of taxes is unsupported by the evidence. This argument is similar to the argument raised in the first assignment of error claiming that the invoices were dramatically inflated, entirely unjustified, and unreasonable. Appellant sets forth its own formula to argue the total bill for the 2011-2014 tax returns should be \$14,832.50 and this court should re-compute the damages amount using that total and to ultimately enter judgment in its favor in the amount of \$29,025.50.

{¶31} Appellee counters, arguing all the evidence was before the court and it could determine the credibility of the evidence. There is no case law indicating the trial court was required to estimate or impute evidence and that the failure to do so would render the judgment against the manifest weight of the evidence. Appellee indicates Appellant’s argument is essentially that the trial court’s decision was incorrect and this court should substitute the judgment it wants for the one entered by the trial court.

{¶32} At the outset it is noted that Appellant claims the \$69,888.00 is only for four years of return preparation. That is incorrect. That sum was for six years of return preparation – 2009 through 2014. The 2009 and 2010 tax returns were filed late because Appellee was not retained until 2011 after taxes were due.

{¶33} As explained above, judgments supported by competent, credible evidence going to the material elements of the case will not be disturbed as being against the manifest weight of the evidence. *C.E. Morris Co.*, 54 Ohio St.2d 279, syllabus. In conducting a manifest weight of the evidence review, the reviewing court weighs the evidence and all reasonable inferences to be drawn therefrom, considers the credibility of witnesses, and determines whether in resolving evidentiary conflicts, the fact-finder

clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed. *Thompkins* at 387.

{¶34} “In weighing the evidence, the court of appeals must always be mindful of the presumption in favor of the finder of fact.” *Eastley* at ¶ 21, citing *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn. 3 (if the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the judgment). The trier of fact occupies the best position from which to weigh the evidence and judge the witnesses' credibility by observing their gestures, voice inflections, and demeanor. *Seasons Coal Co.* at 80.

{¶35} Appellant's entire argument admits that the issue in this assignment of error is credibility; Appellant consistently maintains the owners of Appellee showed at trial that they were incredible and their testimony concerning the invoices could not be believed.

{¶36} The trial court had evidence before it that the bills were inflated if the bills were solely for accounting services. It also had evidence that the bills were accurate and the bills included more than accounting services. Furthermore, there is no indication Appellant objected to the bills. As stated above, the trier of fact is in the best position to determine credibility. This court will not second-guess the trial court in assessing the credibility of the witnesses. *Dimmerling v. Dimmerling*, 7th Dist. Noble No. 18 NO 0460, 2019-Ohio-2710, ¶ 65. Therefore, we cannot find that the trial court's decision is against the manifest weight of the evidence. There is some competent credible evidence to support the trial court's decision. This assignment of error is meritless.

Conclusion

{¶37} Both assignments of error are meritless. The trial court's decision is affirmed.

Donofrio, J., concurs.

Waite, P.J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.