

[Cite as *H.L.S. Bonding Co. v. Fox*, 2004-Ohio-547.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

H.L.S. Bonding Company,	:	
Plaintiff-Appellee,	:	
v.	:	No. 03AP-150 (C.P.C. No. 02CVH-03-2789)
Woodrow L. Fox, Sr. et al.,	:	(REGULAR CALENDAR)
Defendants-Appellants.	:	

O P I N I O N

Rendered on February 3, 2004

Baker & Hostetler, LLP, Barry H. Wolinetz and David C. Levine, for appellee.

John W. Waddy, Jr., for appellant.

APPEAL from the Franklin County Court of Common Pleas.

WATSON, J.

{¶1} Defendant-appellant Woodrow L. Fox, Sr. (hereinafter "defendant" or "appellant") appeals from the judgment entry of the Franklin County Court of Common Pleas adopting in part and modifying in part the decision of the magistrate. For the reasons which follow, we affirm the judgment of the trial court.

{¶2} Plaintiff-appellee H.L.S. Bonding Company (hereinafter "plaintiff" or "appellee") is a bail bond company in Franklin County, Ohio. In 1992, plaintiff hired

defendant as a bondsman. In 1993, defendant signed a non-compete agreement (hereinafter "non-compete agreement")¹ with plaintiff prohibiting him from competing in the bail bond business within a radius of 75 miles from Columbus, Ohio, for a period of five years after termination of his employment with plaintiff.

{¶3} In late 2001, defendant began his own bonding business. By letter dated February 21, 2002, defendant resigned his position effective February 25, 2002. Defendant did not return to work for plaintiff after February 21, 2002.

{¶4} On March 12, 2002, plaintiff commenced this action seeking temporary and permanent injunctive relief to enforce the non-compete agreement. On the same day, plaintiff filed a motion for a temporary restraining order, which the trial court granted. The trial court referred the matter to a magistrate for a permanent injunction hearing.

{¶5} The magistrate held a trial on plaintiff's request for permanent injunctive relief on August 19, 20 and 21, 2002. On August 30, 2002, the magistrate issued his decision recommending an injunction with modifications of the non-compete agreement. Specifically, the magistrate modified the term of restriction to one year and allowed defendant to write bonds in federal court or outside a radius of 50 miles from Columbus, Ohio, immediately.

{¶6} On September 5, 2002, the trial court issued a decision adopting the magistrate's decision. On September 13, 2002, defendant and plaintiff filed objections to the magistrate's decision. The trial court, upon reviewing the magistrate's decision and

¹ Plaintiff maintained defendant executed a 1997 non-compete agreement which prohibited him from competing in the bail bond business within a radius of 50 miles from Columbus, Ohio, for a period of three years after termination of his employment with plaintiff. However, the magistrate concluded, by a preponderance of the evidence, defendant did not execute the 1997 non-compete agreement.

the parties' objections, on January 22, 2003, adopted the magistrate's decision but modified it to include a three-year prohibition against competing with plaintiff. A transcript of the hearing before the magistrate was not filed with the trial court at the time of the January 22, 2003 entry.

{¶7} Defendant timely appeals and asserts the following assignments of error:

I. The Trial Court erred as a matter of law by failing to rule on the written objections filed by the parties contrary to Civ.R. 53(E)(4)(b).

II. The Trial Court erred as a matter of law by modifying the Decision of the Magistrate, dated August 30, 2002, to include the three (3) year prohibition against competing with the Appellee in writing bonds within a fifty (50) mile radius of Columbus without reviewing the transcript of the trial proceeding held before the Magistrate.

III. The Trial Court erred and abused its discretion by modifying the Decision of the Magistrate, dated August 30, 2002, without reviewing the transcript of the trial proceeding held before the Magistrate.

{¶8} Appellant's first assignment of error contends the trial court erred in failing to rule on his September 13, 2002 objections. Appellant maintains the trial court's statement that it reviewed the objections of the parties fails to comply with the requirements of Civ.R. 53(E)(4)(b). In response, appellee argues, while the trial court did not explicitly state it ruled on appellant's objections, the effect of the trial court's judgment was to overrule appellant's objections. As such, the trial court fulfilled its obligation to rule on any objections.

{¶9} Civ.R. 53(E)(4)(b) states, in relevant part, "[t]he court shall rule on any objections." As argued by appellant, and agreed to by appellee, the trial court did not explicitly rule on appellant's objections. However, " '[w]here the court fails to rule on an

objection or motion, it will be presumed that the court overruled the objection or motion.' " *Shaffer v. Shaffer* (1996), 109 Ohio App.3d 205, 212, citing *Solon v. Solon Baptist Temple, Inc.* (1982), 8 Ohio App.3d 347. Thus, the trial court's silence in addressing appellant's objections presumes the objections were overruled when it entered judgment disposing of appellant's objections.

{¶10} Accordingly, appellant's first assignment of error is not well-taken, and is overruled.

{¶11} As appellant's second and third assignments of error are related, they will be addressed together. Appellant contends the trial court erred in modifying the magistrate's decision without reviewing the transcript of the proceedings before the magistrate. Appellant argues the trial court was unable to review the objections of the parties or modify the magistrate's decision without the transcript of the hearing before the magistrate.

{¶12} In response, appellee asserts the trial court's failure to review the transcript is the direct result of appellant's failure to adhere to the requirements of Civ.R. 53(E)(3)(b). As the trial court did not have the transcript, it did not abuse its discretion by basing its review solely on the magistrate's decision. Finally, appellee maintains the transcript of the hearing before the magistrate may not be considered as it was not before the trial court.

{¶13} Civ.R. 53(E)(3)(b)² states, in pertinent part:

Any objection to a finding of fact shall be supported by a transcript of all the evidence submitted to the magistrate

² Civ.R. 53(E) was amended effective July 1, 2003, after the filing of the briefs in this matter. Accordingly, we will refer to the previous version of Civ.R. 53(E) in this opinion.

relevant to that fact or an affidavit of that evidence if a transcript is not available.

Accordingly, the burden for providing a transcript or affidavit is upon the objecting party. *Walther v. Newsome*, Portage App. No. 2002-P-0019, 2003-Ohio-4723, at ¶20. The "[f]ailure to provide an acceptable record to the trial court allows the trial court to disregard any objections to factual matters which have been challenged." *Roblyn M. v. Robert C.* (Nov. 16, 2001), Wood App. No. WD-01-029. Further, it precludes a party from asserting on appeal factual determinations. *Walther*, supra, citing *Yancey v. Haehn* (Mar. 3, 2000), Geauga App. No. 99-G-2210.

{¶14} Accordingly, an appellate court's review is limited to whether the trial court abused its discretion in applying the law to its factual findings and the appellate court is prohibited from considering the transcript submitted with the appellate record. *State ex rel. Duncan v. Cheppewa Twp. Trustees* (1995), 73 Ohio St.3d 728, 730. An abuse of discretion implies that the trial court acted in an unreasonable, arbitrary or unconscionable manner. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. When applying the abuse of discretion standard, a reviewing court may not substitute its judgment for that of the trial court. *In re Jane Doe 1* (1991), 57 Ohio St.3d 135, 137-138.

{¶15} In the instant action, we find the transcript was not filed with the trial court. Accordingly, the trial court was allowed to disregard appellant's objections which challenged factual matters. Thus, the trial court did not err in ruling on the objections without reviewing the transcript of the hearing before the magistrate.

{¶16} Furthermore, the failure to provide the transcript bars appellant from asserting factual determinations on appeal. As such, we are precluded from considering

the transcript of the hearing and, instead, must review the trial court's adoption and modification of the magistrate's decision only for an abuse of discretion.

{¶17} Appellant contends the trial court abused its discretion in modifying the magistrate's recommendation of a one-year restriction to a three-year restriction. An agreement not to compete is enforceable only to the extent it (1) is necessary to protect appellee's legitimate interest; (2) does not impose undue hardship on appellant; and (3) is not adverse to public interest. *Rogers v. Runfol & Associates, Inc.* (1991), 57 Ohio St.3d 5. As to public interest, the trial court concluded the balance of harm to the public at large was not a significant consideration. Instead, the trial court focused on the balance of harm between the litigants. In conducting the weighing process, the trial court considered the nature of the bond writing business, the financial affect on both parties and the impact upon appellee's business of establishing a precedent by not enforcing appellant's non-compete agreement. Accordingly, based upon the law and the factual findings, we find the trial court did not abuse its discretion by modifying the magistrate's recommendation of a one year restriction and imposing a three-year restriction.

{¶18} Therefore, appellant's second and third assignments of error are not well-taken, and are overruled.

{¶19} For the foregoing reasons, appellant's assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

LAZARUS, P.J., and BROWN, J., concur.
