[Cite as *Law Offices of James P. Connors v. Cohn*, 2009-Ohio-3228.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Law Offices of James P. Connors,	:	
Plaintiff-Appellee,	:	
		No. 08AP-1031
v.	:	(C.P.C. No. 06CVC09-12792)
Douglas Alan Cohn et al.,	:	(REGULAR CALENDAR)
Defendants-Appellants.	:	

D E C I S I O N

Rendered on June 30, 2009

Law Offices of James P. Connors, and *James P. Connors*, for appellee.

D. Peter Hochberg Co., L.P.A., and *D. Peter Hochberg*, for appellants.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Defendants-appellants, Douglas Alan Cohn ("Cohn"), Kathryn J. Cohn, H-Quotient, Inc. ("H-Quotient"), and Standard Holdings Group Ltd. ("Standard Holdings"), appeal from a judgment of the Franklin County Court of Common Pleas in favor of plaintiff-appellee, Law Offices of James P. Connors ("Connors"). For the following reasons, we affirm.

{¶2} On September 29, 2006, Connors filed suit against defendants. In his complaint, Connors alleged that he had performed legal work for Cohn and H-Quotient

from 2003 to 2005. According to Connors, Cohn agreed to pay a regular hourly rate and, in addition, promised to give Connors stock in H-Quotient and Standard Holdings as compensation for his services. However, Cohn neither paid Connors his fees nor issued the promised stock. Moreover, Cohn and H-Quotient allegedly began transferring assets to avoid making payment to Connors. Connors claimed that in one of these transfers, Cohn conveyed all interest in his Virginia residence to his wife, Kathryn Cohn, for no consideration. Based upon these allegations, Connors asserted claims for breach of contract, common law fraud and/or negligence, fraudulent conveyance, quantum meruit, promissory estoppel, and securities fraud.

{¶3} In the complaint, Connors listed 6601 Georgetown Pike in McLean, Virginia as the address for the Cohns and Standard Holdings. Connors alleged that the McLean address was the Cohns' residence and the location from which Standard Holdings conducted its business. Connors listed 8150 Leesburg Pike in Vienna, Virginia as H-Quotient's address.

{¶4} The Franklin County Clerk of Courts ("clerk") initially attempted to serve each defendant with a summons and complaint by certified mail. However, the United States Postal Service returned each envelope marked "unclaimed." Connors then requested that the clerk serve each defendant by ordinary mail. On November 22, 2006, the clerk complied with Connors' request. None of the ordinary mail envelopes were returned as undeliverable.

{¶5} When defendants failed to timely answer or otherwise respond to the complaint, Connors filed a motion for default judgment. Approximately one month later, defendants simultaneously filed a memorandum contra to Connors' motion and a motion

for leave to file an answer. In these filings, the Cohns alleged that they had moved out of their McLean residence in February 2006—approximately nine months before the clerk served them at that residence.[1] H-Quotient maintained that it no longer rented the premises located at the Vienna address.

{¶6} In his response to defendants' motion for leave to file an answer, Connors stated that the Cohns still owned the McLean residence, and he attached records from the Fairfax County, Virginia auditor dated September 30, 2006 that named Cohn as the owner of the McLean residence. Connors also contended that H-Quotient continued to advertise its Vienna office as its headquarters on its own website and listed the Vienna address with the Securities and Exchange Commission.

{¶7} On May 11, 2007, the trial court issued a decision and entry denying defendants' motion for leave to file an answer and granting Connors' motion for default judgment. The trial court then referred the case to a magistrate for a hearing on damages.

{¶8} After a two-day evidentiary hearing, the magistrate rendered a decision recommending that the trial court award Connors damages in the amount of $250,000, plus pre-judgment interest. Defendants filed objections to the magistrate's decision. Although defendants mostly objected to the magistrate's factual findings, they failed to timely file a transcript of the proceedings before the magistrate or an affidavit of evidence.[2] On October 22, 2008, the trial court issued a judgment entry in which it

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[1] After withdrawing from the case, defendants' previous attorney informed the trial court of the Cohns' Naples, Florida address. Apparently, the Cohns' February 2006 move took them from Virginia to Florida.

[2] Defendants filed a partial transcript of these proceedings on February 9, 2009—approximately nine months after they filed their objections and four months after the final judgment in this case.

rejected defendants' objections and adopted the magistrate's decision. Additionally, in accordance with its May 11, 2007 decision and the magistrate's recommendation, the trial court granted judgment against defendants in the amount of $250,000, plus pre-judgment interest accruing from March 1, 2005.

{¶9} Defendants now appeal from the October 22, 2008 judgment entry and assign the following errors:

> [1.] The trial court failed to assert or establish its jurisdictional venue when the Plaintiff's fees at issue concern a case in the U.S. Eastern District of Virginia, and when Defendants Douglas Cohn, Kathryn Cohn, and Standard Holdings Group, Ltd., have never resided or conducted business in Ohio, and Defendant H-Quotient, Inc., has never resided in Ohio.
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> [2.] The trial court abused its discretion by granting Plaintiff's claim of service by regular mail to an address where Defendants had not resided for more than a year and by failing to serve the defendants in Florida, where they resided and where service, in any event, by regular mail is not allowed.
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> [3.] The trial court abused its discretion by refusing to allow Defendants to answer the complaint or to file a counterclaim despite the fact that Defendants resided in Florida and service was sent to their property in Virginia, which was not the residence of Defendants Kathryn Cohn and Douglas Cohn.
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> [4.] The trial court erred by accepting Plaintiff's affidavit of service even though it was subsequently established in the Damages Hearing that Plaintiff repeatedly contradicted himself under oath. The Magistrate further erred, writing, "Defendants also raise the issue of Plaintiff's credibility. The examples cited by Defendants do not rebut evidence in support of Plaintiff's fees." The Magistrate does not refute the examples of Plaintiff's contradicted testimony given under oath during the Damages Hearing, and all contradictory testimony from a witness should be discounted.
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> [5.] The Magistrate erred in his Damages Hearing decision, writing that, "He [Connors] was retained on several

matters to represent or assist in representing Douglas Cohn and his company H-Quotient, Inc." This statement implied that this suit involved legal work for representation beyond work in the Rao case and related matters in Virginia, which it does not.

[6.] The Magistrate erred in his Damages Hearing decision, writing that, "He [Connors] was retained on several matters [to represent] or assist in representing Douglas Cohn and his company H-Quotient, Inc." H-Quotient, Inc. was a public company, not Mr. Cohn's company.

[7.] The Magistrate erred in his Damages Hearing decision, writing that Mr. Connors represented the Defendants "in US District and US Appeals courts in Ohio, Stark County State Court…," implying that this case concerns that work, which it does not.

[8.] The Magistrate erred by not accepting exhibits into evidence.

[9.] The Magistrate erred regarding the warranty deed that added Mrs. Cohn as an owner, writing "there was no consideration and Defendants have not maintained otherwise."

[10.] The Magistrate erred, writing "Mr. Cohn admitted at hearing and in prior correspondence that fees were owed," when in fact Mr. Cohn did not admit to owing fees at the hearing, and emails in March 2005 were for settlement purposes and did not constitute admissions, all of which was negated by Plaintiffs [sic] future actions. The Magistrate also wrote that "Defendant admitted to 'owing around $250,000' in March 2005."

[11.] The Magistrate erred by accepting without proof that Plaintiff performed work for Defendants after receiving a bond refund of $45,000, when, in fact, no further work was performed.

[12.] The Magistrate acknowledged "that there is some type of stock account, but there is no evidence as to what, if anything, has been paid from it." Yet, the burden was on Plaintiff, who had sole access to his stock account, to provide an accounting, and this he failed to do. The Magistrate erred when he failed to compel such an accounting from the

Plaintiff, without which it would be impossible to determine what had been paid to Plaintiff.

[13.] The Magistrate erred by stating that Defendants assured Plaintiff "that his fees would be paid."

[14.] The Magistrate erred, writing that "Defendant Cohn added his wife to the property shortly after Plaintiff was assured that his fees would be paid," with the clear implication that there was a correlation which was refuted by Mrs. Cohn at the Damages Hearing and not rebutted by Plaintiff: "You know the back of that property. It was sold. We were fulfilling a commitment that was done long before the Rao suit came in. I had nothing to do with the Rao suit."

[15.] The Magistrate erred by allowing Plaintiff to claim rights under quantum meruit, writing "that in the absence of a fee agreement, an attorney may still seek recovery under the theory of quantum meruit." However, the Plaintiff claimed the existence of a written fee agreement, which he never produced, and about which he clearly lied.

[16.] The Magistrate acknowledged that "Plaintiff has not detailed his efforts by offering a running account or detail of his bills…" The Magistrate erred in awarding fees in the absence of such accounting.

[17.] The Magistrate made no award for "Breach of Contract – Stock Subscription Agreements, Common Law Fraud and/or Negligence, Promissory Estoppel, Securities Fraud, and Breach of Settlement Agreements," yet these are contained in the Judgment Entry.

[18.] The Magistrate failed to address Defendants' objection to holding the March 12, 2008, Damages Hearing without the Defendants despite the fact that notice of the hearing was sent to the wrong address.

[19.] The Magistrate failed to address the fact that Standard Holdings Group, Inc. was never sent a bill or that any claim was ever made by Plaintiff against that entity.

[20.] The Magistrate failed to address the fact that Kathryn Cohn was never sent a bill by Plaintiff or that any claim was made against her prior to the suit.

> [21.] The Magistrate failed to address the disparate range of Plaintiff's fees from $185 per hour to $450 per hour even after it was shown that Plaintiff had attempted to coerce Defendants into paying the Plaintiff at an increased rate of $450 per hour just four days before trial. While this claim was dropped during the Damages Hearing, the attempted coercion by the Plaintiff was not addressed.

{¶10} As an initial matter, we note that Connors requests that this court dismiss this appeal because defendants' brief failed to comply with App.R. 16(A)(3) and Loc.R. 7(A)(3) of the Tenth District Court of Appeals. After Connors made this request, defendants filed an amended brief correcting the problems Connors complains of. Accordingly, we decline to dismiss this appeal.

{¶11} By defendants' first assignment of error, they argue that the trial court lacked personal jurisdiction over them because they do not reside in Ohio. Defendants, however, never raised this issue in the trial court. In the only argument that even remotely implicated personal jurisdiction, defendants maintained that service failed because the clerk directed service of process to locations that defendants no longer occupied. Thus, at best, defendants challenged the sufficiency of the service of process, not whether the long-arm statute and due process allowed the trial court to exercise personal jurisdiction over them.

{¶12} " 'Ordinarily, reviewing courts do not consider questions not presented to the court whose judgment is sought to be reversed.' " *State ex rel. Ohio Civ. Serv. Emp. Assn., AFSCME, Loc. 11, AFL-CIO v. State Emp. Relations Bd.*, 104 Ohio St.3d 122, 2004-Ohio-6363, ¶10, quoting *State ex rel. Quarto Mining Co. v. Foreman* (1997), 79 Ohio St.3d 78, 81. As defendants never argued before the trial court that their

nonresident status deprived that court of personal jurisdiction over them, they waived that argument on appeal. Accordingly, we overrule defendants' first assignment of error.

{¶13} By defendants' second assignment of error, they argue that Connors never achieved proper service of the Cohns because: (1) the Cohns had moved out of the McLean, Virginia residence at which they received service, and (2) Florida law does not allow service by ordinary mail. We find neither argument persuasive.

{¶14} Due process requires that service be " 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' " *Akron-Canton Regional Airport Auth. v. Swinehart* (1980), 62 Ohio St.2d 403, 406, quoting *Mullane v. Cent. Hanover Bank & Trust Co.* (1950), 339 U.S. 306, 314, 70 S.Ct. 652, 657. Consequently, a plaintiff must direct service to an address at which the plaintiff "reasonably calculates" the defendant will receive delivery. *Bonneville Towers Condominium Owners Assn., Inc. v. Andrews*, 8th Dist. No. 89838, 2008-Ohio-1833, ¶9 ("[A] complaint is to be served at an address where there is a reasonable expectation that service will be accomplished."); *Collins v. Robinson*, 2d Dist. No. 20954, 2006-Ohio-407, ¶5 ("A serving party must have a 'reasonable expectation' that the party being served will receive mail at the address to which the mail is sent."). "Service need not be made to the party's actual address so long as it is made to an address where there is a reasonable expectation that service will be delivered to the party." *United Home Fed. v. Rhonehouse* (1991), 76 Ohio App.3d 115, 143.

{¶15} In the case at bar, Connors testified in an affidavit attached to his motion for default judgment that the Cohns resided at 6601 Georgetown Pike in McLean, Virginia.

He further provided documentation showing that Cohn owned the McLean residence as of September 30, 2006. Although the Cohns alleged that they moved out of their McLean residence in February 2006, they did not deny that Cohn continued to own the residence. Given Cohn's ongoing ownership of the McLean residence, service to that residence was reasonably calculated to reach the Cohns and, thus, comported with due process.

{¶16} Next, defendants argue that service was improper because Connors did not accomplish service in accordance with Florida law. The Ohio Rules of Civil Procedure "prescribe the procedure to be followed in all courts of this state in the exercise of civil jurisdiction at law or in equity * * *." Civ.R. 1(A). Therefore, the Ohio Rules of Civil Procedure—not Florida rules or laws—dictate the appropriate procedure for service of a civil complaint filed in an Ohio court.

{¶17} Because neither of defendants' argument have merit, we overrule defendants' second assignment of error.

{¶18} By defendants' third assignment of error, they argue that the trial court erred in denying their Civ.R. 6(B)(2) motion for leave to file an answer.[3] We disagree.

{¶19} Pursuant to Civ.R. 6(B)(2), a trial court may extend the time for filing an answer if "upon motion made after the expiration of the specified [28-day] period," the defendant demonstrates that the failure to timely answer "was the result of excusable neglect." See *Miller v. Lint* (1980), 62 Ohio St.2d 209, 214; *Bank of New York v. Damsel*, 10th Dist. No. 00AP-46, 2006-Ohio-4071, ¶30-31. In determining whether the neglect in failing to file an answer is excusable, a court must consider all of the surrounding facts

[3] Defendants also claim that the trial court erred in denying them the opportunity to file a counterclaim. Defendants, however, never requested leave to file a counterclaim.

and circumstances. *Davis v. Immediate Med. Servs., Inc.*, 80 Ohio St.3d 10, 14, 1997-Ohio-363; *Marion Prod. Credit Assn. v. Cochran* (1988), 40 Ohio St.3d 265, 271. Neglect is inexcusable if a party's conduct falls substantially below what is reasonable. *Davis* at 14. Moreover, if a party could have prevented the circumstances from occurring, the neglect is not excusable. *Hasch v. Hasch*, 11th Dist. No. 2007-L-127, 2008-Ohio-1689, ¶26; *Reimund v. Reimund*, 3d Dist. No. 5-04-52, 2005-Ohio-2775, ¶16. As the grant or denial of a Civ.R. 6(B)(2) motion is within the trial court's discretion, an appellate court will only reverse the trial court's ruling on such a motion when the trial court abuses its discretion. *Cochran* at 271; *Damsel* at ¶31.

{¶20} In the case at bar, defendants argue that the Cohns' move to Florida excused their failure to timely answer the complaint. Although the Cohns no longer lived at their McLean, Virginia residence, they continued to own and receive mail at that property. The Cohns could have timely discovered and answered the complaint had they periodically checked the mail delivered to the McLean residence or requested that the United States Postal Service forward their mail to their Florida residence. Because the Cohns failed to take these reasonable steps to prevent their own tardiness, the trial court did not abuse its discretion in finding their neglect inexcusable. Accordingly, we overrule defendants' third assignment of error.

{¶21} Defendants' fourth, fifth, sixth, seventh, ninth, tenth, eleventh, thirteenth, fourteenth, nineteenth, twentieth, and twenty-first assignments of error all challenge the magistrate's factual findings. We cannot review any of these assignments of error because defendants failed to timely file a transcript or affidavit setting forth the evidence adduced in the hearing before the magistrate.

{¶22} Civ.R. 53(D)(3)(b) governs the procedure for filing objections to a magistrate's decision with the trial court. Pursuant to Civ.R. 53(D)(3)(b)(iii), an objecting party must support any objections to a magistrate's factual findings with a transcript of the proceedings before the magistrate or an affidavit of the evidence. The objecting party must file the transcript or affidavit with the trial court "within thirty days after filing objections unless the court extends the time in writing for preparation of the transcript or other good cause." Id.

{¶23} If an objecting party fails to submit a transcript or affidavit, the trial court must accept the magistrate's factual findings and limit its review to the magistrate's legal conclusions. *Ross v. Cockburn*, 10th Dist. No. 07AP-967, 2008-Ohio-3522, ¶5; *Farmers Mkt. Drive-In Shopping Centers, Inc. v. Magana*, 10th Dist. No. 06AP-532, ¶27-28. On appeal of a judgment rendered without the benefit of a transcript or affidavit, an appellate court only considers whether the trial court correctly applied the law to the facts as set forth in the magistrate's decision. *Ross* at ¶6; *Magana* at ¶29. Moreover, an appellate court will not expand the scope of its review even if the objecting party supplements the record on appeal with a transcript. The objecting party's failure to timely submit a transcript to the trial court precludes any consideration of the transcript on appeal. *Ross* at ¶6; *Harris v. Mapp*, 10th Dist. No. 05AP-1347, 2006-Ohio-5515, ¶7; *Baddour v. Rehab. Servs. Comm.*, 10th Dist. No. 04AP-1090, 2005-Ohio-5698, ¶25.

{¶24} In the case at bar, defendants filed objections to the magistrate's factual findings, but they failed to timely submit a transcript or affidavit of evidence. Although defendants ultimately filed a partial transcript with the trial court, they did so almost four

months after the trial court issued the final judgment in this case. Defendants then supplemented the appellate record with the belatedly-filed partial transcript.

{¶25} Despite the presence of the partial transcript in the record, we cannot use it to review any assignment of error challenging the magistrate's factual findings. Without the evidence necessary to evaluate the magistrate's factual findings, we must overrule defendants' fourth, fifth, sixth, seventh, ninth, tenth, eleventh, thirteenth, fourteenth, nineteenth, twentieth, and twenty-first assignments of error.

{¶26} By defendants' eighth assignment of error, they argue that the magistrate erred in denying the admission of certain documents. As we explained above, defendants' failure to timely file the transcript of the damages hearing precludes us from considering the transcript on appeal. Therefore, we cannot review either the proffered evidence or the magistrate's ruling on the admissibility of that evidence. With nothing to review, we must presume the regularity of the proceedings. *Davis v. Ford Motor Co.*, 10th Dist. No. 05AP-263, 2005-Ohio-4975, ¶18. See also *City of Columbus v. Flex Tech Professional Servs., Inc.*, 10th Dist. No. 04AP-417, 2004-Ohio-6255, ¶8 ("Because appellant failed to provide the trial court with a transcript, the trial court did not err * * * in finding that the magistrate did not err in * * * admitting exhibits that had not been disclosed by the city."). Accordingly, we overrule defendants' eighth assignment of error.

{¶27} Similarly, we must overrule defendants' twelfth assignment of error. By that assignment of error, defendants argue that the magistrate erred in not compelling Connors to produce an accounting of the H-Quotient stock he received in payment for legal services. However, absent a transcript, we cannot know whether defendants actually requested an accounting or, assuming the request was made, the substance of

the magistrate's ruling on that request. Presuming regularity, we must conclude that no error occurred.

{¶28} By defendants' fifteenth assignment of error, they argue that the magistrate erred in allowing Connors to recover under his quantum meruit claim. Defendants, however, fail to appreciate that the trial court granted a default judgment finding defendants liable on all of Connors' claims. Necessarily, then, Connors could recover damages for each claim, including his quantum meruit claim. Accordingly, we overrule defendants' fifteenth assignment of error.

{¶29} By defendants' sixteenth assignment of error, they argue that the magistrate erred in awarding Connors damages for his unpaid legal fees. As we stated above, our review of the trial court's adoption of the magistrate's decision is limited to examining whether the trial court correctly applied the law to the facts. Here, the law permits a lawyer to recover from a former client for any legal services rendered before discharge or withdrawal. *Columbus Bar Assn. v. Farmer*, 111 Ohio St.3d 137, 2006-Ohio-5342, ¶32; *Reid, Johnson, Downes, Andrachik & Wester v. Lansberry*, 68 Ohio St.3d 570, 574, 1994-Ohio-512. The magistrate found that Connors "expended considerable time in representing Defendants in various venues" and that Cohn admitted to owing "around $250,000" to Connors for his services. Magistrate's Decision, at 6. Given the law and the magistrate's factual findings, we conclude that the trial court did not err in adopting the magistrate's decision to award damages to Connors.

{¶30} By defendants' seventeenth assignment of error, they argue that the trial court erred in entering judgment against them on all of Connors' claims. We disagree.

{¶31} Defendants, again, appear to forget that the trial court entered a default judgment against them finding them liable on every claim. The magistrate then found that Connors only proved damages for his claims of breach of contract, quantum meruit, and fraudulent conveyance. Pursuant to both its grant of default judgment and its adoption of the magistrate's recommended damages award, the trial court properly granted judgment on all claims in the amount of $250,000. Accordingly, we overrule defendants' seventeenth assignment of error.

{¶32} By defendants' eighteenth assignment of error, they argue that the magistrate erred in not addressing their request to continue the March 12, 2008 damages hearing. In fact, the magistrate did address the request. In his decision, the magistrate noted that a day before the March 12 hearing, Cohn contacted the magistrate and told him that he was unable to attend the hearing. The magistrate also stated that he held a conference call with Connors, Cohn, and Kathryn Cohn on March 12, during which the Cohns orally moved for a continuance and he denied their motion.

{¶33} In their argument on appeal, defendants contend that they had insufficient notice of the March 12 hearing because the clerk mailed notice of that hearing to the Cohns' Virginia address. The record belies defendants' contention. The February 20, 2008 "Magistrate's Notice of Final Continuance of Hearing" sets the hearing for March 12 and directs a copy of the notice be sent to defendants at the Cohns' Florida address. Accordingly, we overrule defendants' eighteenth assignment of error.

{¶34} For the foregoing reasons, we overrule defendants' 21 assignments of error, and we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN and McGRATH, JJ., concur.