[Cite as *Gates v. Praul*, 2010-Ohio-2062.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Jeffrey C. Gates,	:	
Plaintiff-Appellant,	:	
v.	:	
		No. 09AP-123
Bruce H. Praul et al.,	:	(C.P.C. No. 04CVH-08-8614)
Defendants-Appellees.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on May 11, 2010

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

Kagay, Albert, Diehl & Groeber, and *Jeffrey D. Swick*, for appellees.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Plaintiff-appellant, Jeffrey C. Gates ("appellant"), appeals from the judgment of the Franklin County Court of Common Pleas, entered in favor of defendants-appellees, Bruce H. Praul ("Praul"), on appellant's claims for breach of contract, an accounting, constructive trust, winding up of the partnership, and conversion, and in favor of defendants-appellees, Artistic Green Inc. ("AGI"), on its counterclaims for breach of an oral contract, conversion, and replevin, and on an order of possession and pre-judgment

interest. Because the judgment from which appellant has appealed is not a final appealable order, we dismiss this appeal for lack of jurisdiction.

{¶2} This matter involves a dispute between appellant and Praul as to the nature of their business relationship. At trial, appellant asserted that he and Praul were partners in a business called AGI, which provided tree and lawn care services. Praul, however, disputed the existence of a partnership and asserted that he was the sole owner and shareholder of AGI, while appellant was simply a trusted employee. At AGI, appellant focused on tree and shrub care, while Praul concentrated on lawn care services.

{¶3} Both appellant and Praul agree they stopped working together and parted amicably in January or February 2003. As a result of this separation, they distributed the various pieces of equipment used in their business. Appellant took the equipment used for tree and shrub care, while Praul retained the equipment used for lawn care services. In addition, appellant and Praul each took the equipment they had individually owned prior to the start of their business relationship. Appellant also assumed liability for a truck that was purchased by AGI. At the time of the split, Praul contends he negotiated an agreement with appellant whereby appellant agreed to make payments of $1,000 per month for 20 months in exchange for the tree and shrub care equipment. Appellant, however, denies that such an agreement was ever made.

{¶4} Several months after the split, in approximately November 2003, appellant approached Praul about two snow plows that had been purchased during the time period when appellant and Praul were working together. Appellant claims the snow plows were purchased for the purpose of being used with the truck appellant had brought with him to AGI, and also with the truck for which appellant later assumed liability. Appellant submits he contacted Praul to obtain the snow plows and that Praul refused to give him the snow

plows, claiming he had already sold them. Following this dispute, appellant filed the instant action.

{¶5} This case was eventually tried to the court before a magistrate of the Franklin County Court of Common Pleas. After hearing the testimony of appellant and Praul, as well as several other witnesses, the magistrate determined that AGI was not a partnership between appellant and Praul. The magistrate found that any partnership agreement was required to be in writing in order to comply with the Statute of Frauds. Finding no written partnership agreement existed, the magistrate further found appellant failed to prove the existence of a contract which stated the essential terms with reasonable certainty. In addition, the magistrate determined the doctrine of promissory estoppel was inapplicable because appellant had not detrimentally relied upon the alleged oral partnership agreement. Therefore, the magistrate found Praul was the sole owner and shareholder of AGI and appellant had only been an employee of AGI during the relevant time period until their relationship terminated. As a result, the magistrate recommended dismissal of appellant's breach of contract claim, as well as his claims for an accounting, constructive trust and winding up of the partnership, and conversion.[1]

{¶6} The magistrate also determined that several pieces of equipment, including two spray tanks, a ladder, a chipper, and two chain saws, which were in the possession of appellant, were owned by AGI. The magistrate further found that the snow plows at issue, which were not currently in the possession of appellant or Praul, also belonged to AGI. While the magistrate found Praul's testimony asserting that appellant had agreed to

[1] Appellant's conversion action was based upon his claim that the snow plows were his property and that Praul refused to release them.

pay $20,000 in exchange for the equipment[2] was more credible than appellant's claim that he never agreed to pay anything for the equipment, the magistrate also found that such an agreement, which was not in writing, violated the Statute of Frauds. Therefore, the magistrate declined to find in favor of AGI on its counterclaim for breach of an alleged oral contract. However, the magistrate did find in favor of AGI on its counterclaims for conversion and replevin regarding the above referenced equipment. Additionally, the magistrate determined AGI's motion for order of possession was now moot.

{¶7} Appellant and appellees Praul and AGI (collectively "appellees") both filed timely objections to the magistrate's decision. Appellees argued the magistrate erred in sua sponte applying the Statute of Frauds to both oral agreements when neither side pled the Statute of Frauds as a defense. As a result, appellees argued all parties waived the Statute of Frauds as an affirmative defense. Appellees also argued the magistrate erred in failing to grant relief on AGI's claim for replevin and in finding AGI's motion for an order of possession to be moot. Additionally, appellees asserted the magistrate erred in failing to award interest on AGI's judgment.

{¶8} Appellant also filed numerous objections. The most relevant objections alleged the magistrate erred by: (1) failing to recognize that appellant filed a reply to appellees' counterclaims, albeit in a municipal court filing, rather than a common pleas court filing; (2) failing to consider or decide appellant's breach of contract claim; (3) failing to consider or address the evidence regarding appellant's claim that a partnership existed and failing to apply the correct legal standard; (4) excluding relevant and admissible evidence; (5) granting judgment to AGI by "default" and on claims not presented at or

[2] The magistrate determined that the equipment involved in this negotiation included the spray tanks, a ladder, a chipper, and the chain saws. However, the snow plows were not part of the agreement.

during trial; and (6) allowing the filing of and making a decision on a post-trial motion for replevin.

{¶9} Prior to ruling on the objections, the trial judge heard oral arguments on the objections. On January 7, 2009, the trial judge issued a decision and entry sustaining in part and overruling in part the objections to the magistrate's decision. Specifically, the trial judge overruled all of appellant's objections and granted appellees' objections with respect to the application of the Statute of Frauds to the oral agreement between the parties regarding the equipment. The trial judge found the magistrate improperly applied the Statute of Frauds sua sponte, since the parties' failure to raise it as an affirmative defense caused it to be waived. As a result, the trial judge determined an oral agreement did exist between the parties and that appellant had agreed to purchase the tree and shrub care equipment for $20,000.

{¶10} The trial judge also found that its entry dated January 4, 2008, which granted AGI an order of possession, effectively and properly acted to overrule the segment of the magistrate's decision which found the request for an order of possession to be moot. Therefore, the trial judge sustained AGI's objection on this point. In addition, the trial judge determined that appellees' objection regarding the failure to award interest was premature, since the magistrate's decision was not a final judgment. However, the trial judge then awarded interest, to be computed with a starting date of March 1, 2003. The trial judge further noted that AGI was not entitled to double recovery and that the award for damages would be reduced by the value of any seized property.

{¶11} Following the issuance of this decision and entry by the trial court, appellant filed a notice of appeal asserting the following assignments of error for our review:

> I. THE TRIAL COURT ERRED BY FINDING THAT A CONTRACT EXISTED FOR THE SALE AND PURCHASE OF ASSETS.
>
> II. THE TRIAL COURT ERRED BY APPARENTLY FINDING FOR APPELLEES ON THE COUNTERCLAIMS FOR REPLEVIN AND CONVERSION.
>
> III. THE APPELLEES WAIVED AND ABANDONED THE COUNTERCLAIMS BY NOT PROSECUTING THEM AT TRIAL.
>
> IV. THE TRIAL COURT ERRED BY GRANTING PREJUDGMENT INTEREST.

{¶12} An appellate court has jurisdiction to review and affirm, modify, or reverse judgments or final orders of the trial courts within its district. See Section 3(B)(2), Article IV, Ohio Constitution; See also R.C. 2505.02 and *Fertec, LLC v. BBC&M Engineering, Inc*., 10th Dist. No. 08AP-998, 2009-Ohio-5246. As an appellate court, we are permitted to review judgments only when we are presented with an order that is both final and appealable, as defined by R.C. 2505.02. *Salata v. Vallas*, 159 Ohio App.3d 108, 2004-Ohio-6037, ¶17. If the parties themselves fail to raise the issue of whether or not a judgment constitutes a final appealable order, we must raise the issue sua sponte. *Whitaker-Merrell Co. v. Geupel Const. Co*. (1972), 29 Ohio St.2d 184, 186.[3]

{¶13} The judgment at issue comes before us as a result of a common pleas trial court judge ruling on objections filed in response to a magistrate's decision issued following a bench trial. Thus, the trial court is bound to follow Civ.R. 53, which governs magistrate's decisions.

[3] During oral argument, the court raised the issue of whether the trial court's January 7, 2009 decision and entry was a final appealable order and counsel were both given an opportunity to present their arguments on the issue.

{¶14} "When a trial court has assigned a matter to a magistrate and the parties have filed objections to the magistrate's decision, the trial court's judgment entry should address those objections, take one of the actions listed in Civ.R. 53(E)(4)(b)[4], and, if the court intends to dispose of the case in its entirety, the trial court must affirmatively state the relief being afforded to the parties." *In re Dayton*, 7th Dist. No. 02 JE 20, 2003-Ohio-1240, ¶9.

{¶15} Under Civ.R. 53(D)(4)(b), "[w]hether or not objections are timely filed, a court may adopt or reject a magistrate's decision in whole or in part, with or without modification. A court may hear a previously-referred matter, take additional evidence, or return a matter to a magistrate."

{¶16} "In order for a judgment to be final and appealable, a trial court cannot merely adopt a magistrate's decision; it must enter its own judgment that sets forth 'the outcome of the dispute and the remedy provided.' " *Miller v. McStay*, 9th Dist. No. C.A. 22918, 2006-Ohio-2282, ¶4, quoting *Harkai v. Scherba Industries, Inc*. (2000), 136 Ohio App.3d 211, 218. A trial court must enter its own independent judgment, disposing of the matters at issue between the parties so that the parties know of their rights and obligations by referring only to the document known as the "judgment entry." *Conrad v. Conrad*, 9th Dist. No. C.A. 21394, 2003-Ohio-2712, ¶4.

{¶17} Additionally, " '[t]he content of the judgment must be definite enough to be susceptible to further enforcement and provide sufficient information to enable the parties to understand the outcome of the case.' " *Harkai* at 216, quoting *Walker v. Walker* (Aug. 5, 1987), 9th Dist. No. 12978. " 'It is fundamental that the trial court employ diction

[4] Following an amendment, the referenced actions are now located in Civ.R. 53(D)(4)(b).

which should include * * * operative, action-like and conclusionary verbiage * * *. ' " *Harkai* at 216, quoting *In re Michael* (1991), 71 Ohio App.3d 727, 730. Moreover, a "judgment" must be distinguished from a "decision." While a decision announces what the judgment shall be, the judgment entry orders the relief unequivocally. *Harkai* at 216, citing *St. Vincent Charity Hosp. v. Mintz* (1987), 33 Ohio St.3d 121, 123.

{¶18} Here, while the trial court ruled on the objections raised by both appellant and appellees, the trial judge failed to adopt or reject the magistrate's decision in whole or in part, with or without modification, as an order of the court. The trial court appears to have reviewed certain factual findings of the magistrate, and, in an effort to conduct an independent review, agreed with some of those factual findings based upon certain testimony or evidence, but the trial court did not clearly adopt or reject, with or without modification, the magistrate's decision, in whole or in part, as an order of the court.

{¶19} Furthermore, the trial court also failed to independently enter its own judgment or to employ "judgment" language. The trial court failed to reduce the damages at issue to an amount certain with respect to any off-set regarding the value of the seized property. Additionally, although the trial court's January 7, 2009 decision and entry awards interest in this case, it fails to state upon what amount this interest is granted, given the potential off-set. As a result, the trial court's entry fails to provide sufficient information to unequivocally inform the parties of their obligations and of the final outcome of the case, and thus, it is not enforceable.

{¶20} Based upon the foregoing, we do not have jurisdiction to consider appellant's assignments of error because he has not appealed from a final appealable order. Accordingly, the appeal is dismissed for lack of jurisdiction.

Appeal dismissed.

BRYANT and SADLER, JJ., concur.

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