

[Cite as *Constr. Sys., Inc. v. Garlikov & Assoc., Inc.*, 2010-Ohio-3893.]
IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Construction Systems, Inc. et al.,	:	
Plaintiffs-Appellees,	:	
v.	:	No. 09AP-1134
Garlikov & Associates, Inc. et al.,	:	(C.P.C. No. 03CVH-02-01983)
Defendants-Appellants,	:	(REGULAR CALENDAR)
NBBJ [East Limited Partnership],	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on August 19, 2010

McFadden, Winner, Savage & Segerman, James S. Savage,
and *Douglas J. Segerman*, for plaintiffs-appellees.

Zeiger, Tigges & Little LLP, Marion H. Little, Jr., Kris
Banvard, and *Bradley T. Ferrell*, for defendants-appellants.

Luper Neidenthal & Logan, and *Luther L. Liggett, Jr.*, for
defendant-appellee.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Defendants-appellants, Garlikov & Associates, Inc. and Garlikov & Associates, LLC (collectively, "Garlikov"), appeal the Franklin County Court of Common Pleas' judgment in favor of plaintiffs-appellees, Construction Systems, Inc. ("CSI") and Colors, Inc. ("Colors"), and in favor of defendant-appellee, NBBJ East Limited Partnership ("NBBJ").¹ For the following reasons, we reverse and remand this matter to the trial court.

{¶2} Garlikov is a company engaged in the business of providing insurance services and products to high net-worth individuals and corporations. Since 1986, Garlikov has maintained its home office in the Huntington Center in Columbus, Ohio. After receiving notification in 2001 that a law firm had exercised an option to lease the space then occupied by Garlikov's offices on the 27th floor, Garlikov entered into a sublease with Huntington Bank for office space on the 33rd and 34th floors of the Huntington Center. The sublease contemplated that Garlikov would renovate and/or improve the portion of the leased premises it intended to occupy, and the sublease provided that Huntington would offer a limited cash allowance to offset the costs of improvement. Shortly after executing the sublease, Garlikov retained NBBJ as architect, owner's representative, and construction manager for the design and construction of its relocated office space ("the project"). CSI acted as the general trades contractor on the project, and Colors acted as the wall-covering contractor.

{¶3} As a result of problems and conflicts that arose during the course of the project, CSI and Colors filed a complaint for breach of contract against Garlikov and

¹ NBBJ East Limited Partnership is named simply "NBBJ" in the complaint and the trial court's judgment

NBBJ on February 20, 2003.² Garlikov & Associates, Inc. filed counterclaims for breach of contract and tortious interference with contractual relations against CSI, a counterclaim for breach of contract against Colors, and various cross-claims, including breach of contract, against NBBJ. In turn, NBBJ filed cross-claims against Garlikov for breach of contract, indemnification, and contribution. After numerous continuances, and pursuant to a stipulation filed in January 2006, the matter was tried to a magistrate over the course of several, non-consecutive weeks in 2006 and 2007. The magistrate issued a lengthy and detailed decision, containing findings of fact and conclusions of law, on December 31, 2008. The magistrate concluded that CSI, Colors, and NBBJ were each entitled to judgment in their favor on their claims against Garlikov, and Garlikov filed objections to the magistrate's decision. On November 9, 2009, the trial court struck Garlikov's objections to the magistrate's findings of fact, overruled Garlikov's objections to the magistrate's conclusions of law, and adopted the magistrate's decision in its entirety. On November 25, 2009, the trial court entered final judgment in favor of NBBJ in the amount of \$45,388, in favor of CSI in the amount of \$110,765, and in favor of Colors in the amount of \$33,550, non-inclusive of pre- and post-judgment interest. The court further rendered judgment, consistent with the magistrate's decision, in favor of CSI and Colors on Garlikov's counterclaims and in favor of NBBJ on Garlikov's cross-claims.

entry, despite NBBJ's assertion of its correct name in its answer.

² Another contractor, Mid-City Electrical Construction ("Mid-City"), was also a plaintiff, but all claims by or against Mid-City have been resolved, and Mid-City is no longer a party to this appeal.

{¶4} Garlikov filed a timely notice of appeal and presently raises the following assignments of error:

Appellants' First Assignment of Error: The Trial Court Erred In Striking and Otherwise Failing to Consider Garlikov's Objections to the Magistrate's Factual Findings.

Appellants' Second Assignment of Error: The Trial Court Erred In (a) Adopting the Magistrate's Decision in Favor of [NBBJ] and (b) Granting Judgment For NBBJ As Both Are Contrary to Law and Otherwise Against the Manifest Weight of The Evidence.

Appellants' Third Assignment of Error: The Trial Court Erred In (a) Adopting the Magistrate's Decision in Favor of [CSI and Colors] and (b) Granting Judgment For CSI And Colors As Both are Contrary to Law and Otherwise Against the Manifest Weight of The Evidence.

Appellants' Fourth Assignment of Error: Alternatively, The Trial Court Erred In Granting Any Relief Against Garlikov & Associates, LLC.

Appellants' Fifth Assignment of Error: Alternatively, The Trial Court Should Have Rejected The Magistrate's Decision In Its Entirety.

{¶5} Because it is dispositive, we begin our analysis with the first assignment of error, by which Garlikov argues that the trial court erred in striking Garlikov's objections to the magistrate's findings of fact. The crux of this assignment of error is the enforceability of a stipulation filed on January 19, 2006. Paragraph three of the stipulation states as follows:

[The parties] stipulate and agree that all findings of fact by the magistrate shall be final and shall not be subject to objection by the parties to the Court of Common Pleas; provided, however, that the parties retain and do not waive the right to appeal any of the magistrate's findings of fact to

the Tenth District Court of Appeals. In all other respects, the parties shall proceed in accordance with Civ.R. 53 with respect to the magistrate's decisions, which shall include the filing of objections to the magistrate's conclusions of law as required by Civ.R. 53.

The stipulation also included the parties' waiver of a jury trial in favor of a bench trial to one of two named magistrates.

{¶6} Based on the parties' stipulation, the trial court struck Garlikov's timely objections to the magistrate's findings of fact and ordered Garlikov to refile objections only to the magistrate's conclusions of law. The trial court subsequently noted that Garlikov's refiled objections, despite a new caption and minor revisions, were essentially identical to the original objections. On November 9, 2009, the trial court struck Garlikov's refiled objections to the magistrate's findings of fact, overruled Garlikov's refiled objections to the magistrate's conclusions of law, and adopted the magistrate's decision in its entirety.

{¶7} Civ.R. 53 governs proceedings before a magistrate, including the procedure for objecting to a magistrate's decision, and the trial court's duties in accepting or rejecting a magistrate's decision. When the parties executed their stipulation in January 2006, Civ.R. 53(E)(3) provided, in pertinent part, as follows:

(c) Objections to magistrate's findings of fact. If the parties stipulate in writing that the magistrate's findings of fact shall be final, they may object only to errors of law in the magistrate's decision. Any objection to a finding of fact shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that fact or an affidavit of that evidence if a transcript is not available.

(d) Waiver of right to assign adoption by court as error on appeal. A party shall not assign as error on appeal the court's adoption of any finding of fact or conclusion of law unless the party has objected to that finding or conclusion under this rule.

{¶8} On July 1, 2006, prior to the commencement of trial in this case, Civ.R. 53 was amended. The amended rule eliminated the provision in former Civ.R. 53(E)(3)(c) authorizing parties to stipulate to the finality of a magistrate's findings of fact. The amended rule states, in pertinent part, as follows:

(iii) Objection to magistrate's factual finding; transcript or affidavit. An objection to a factual finding, whether or not specifically designated as a finding of fact under Civ.R. 53(D)(3)(a)(ii), shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available. With leave of court, alternative technology or manner of reviewing the relevant evidence may be considered. The objecting party shall file the transcript or affidavit with the court within thirty days after filing objections unless the court extends the time in writing for preparation of the transcript or other good cause. If a party files timely objections prior to the date on which a transcript is prepared, the party may seek leave of court to supplement the objections.

(iv) Waiver of right to assign adoption by court as error on appeal. Except for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b).

Civ.R. 53(D)(3)(b)(iii) and (iv). The amendments to Civ.R. 53 neither altered the requirement that a trial court must rule on timely filed objections to a magistrate's decision nor the principle that a magistrate's decision is ineffective until adopted by the

trial court. See Former Civ.R. 53(E)(4)(a) and (b); Civ.R. 53(D)(4)(a) and (d). Although the amended rule is presumptively applicable to subsequent proceedings in cases pending as of July 1, 2006, former Civ.R. 53 remains applicable "to the extent that * * * application [of the amended rule] in a particular action pending when the amendments take effect would not be feasible or would work injustice." Civ.R. 86(CC).

{¶9} As it argued in the trial court, Garlikov maintains that amended Civ.R. 53 applies here and that the parties' stipulation was unenforceable because it is in direct conflict with the amended rule, which requires the actual filing of objections as a prerequisite to appellate review of the trial court's adoption of a magistrate's findings of fact and conclusions of law. In response, also reiterating arguments made in the trial court, appellees contend that permitting Garlikov to avoid the stipulation would deprive appellees of the benefit of their bargain in waiving a jury trial as part of the stipulation. Appellees also argue that the trial court's rejection of Garlikov's factual objections did not prejudice Garlikov because the magistrate's factual findings are subject to appellate review pursuant to the stipulation. The trial court agreed with appellees' assertion that permitting Garlikov to object to the magistrate's findings of fact, in contravention of the intent expressed in the parties' stipulation, would prejudice appellees and that application of amended Civ.R. 53 to invalidate the stipulation would, thus, be unjust. Accordingly, the court determined that former Civ.R. 53 applied and that, under that rule, the parties' stipulation precluded Garlikov's objections to the magistrate's factual findings.

{¶10} "[A] stipulation running directly contrary to the clear import of a rule of civil procedure should not be enforced." *Welsh v. Brown-Graves Lumber Co.* (1978), 58 Ohio App.2d 49, 52 (rejecting a stipulation that conflicted with Civ.R. 63(B)). The First District Court of Appeals recently rejected a stipulation by which the parties attempted to circumvent the essential requirements, under Civ.R. 53, that a trial court review and either adopt, modify or reject a magistrate's decision. See *Yantek v. Coach Builders Ltd., Inc.*, 1st Dist. No. C-060601, 2007-Ohio-5126. The stipulation at issue there provided that, after a jury trial before a magistrate, the trial court would sign a final judgment entry based on any verdict and any motion rulings by the magistrate and that the parties waived any objection to the magistrate presiding over the trial, but retained the right to appeal the substance of any of the magistrate's rulings. The First District held that the stipulation was not in compliance with Civ.R. 53 and noted, at ¶18, that permitting the stipulation "would allow parties to substitute magistrates' decisions for those of the trial court and would, in effect, permit direct appeal from a magistrate's decision."

{¶11} In *Hollobaugh v. D&V Trucking*, 7th Dist. No. 99 CA 303, 2001-Ohio-3265, the court similarly invalidated a stipulation by which the parties agreed that no objection would be made in the jury's presence with respect to evidence that was the subject of a failed motion in limine, despite the general rule that an objection at trial is necessary to preserve the admissibility question for purposes of appeal. The court stated, "[i]n essence, counsel * * * stipulate[d] that the normal procedure would not be followed in regard to the need for an objection. Under Ohio law, this type of stipulation is not

permissible." While the stipulation at issue there did not conflict with a rule of civil procedure, the court stated that "a stipulation cannot change the mode of proceeding in a trial and cannot change the application of the rules of evidence." *Id.*, citing 89 Ohio Jurisprudence 3d (1989) 111-12, 114-15, Trial, Sections 75, 77.

{¶12} Also instructive is *Calmes v. Goodyear Tire & Rubber Co.* (Dec. 20, 1989), 9th Dist. No. 13952, reversed, 61 Ohio St.3d 470, in which Goodyear argued to the Ninth District Court of Appeals that the trial court erred by entering judgment on a special verdict, despite the parties' agreement to the use of a special verdict. Although Goodyear maintained that Civ.R. 49 abolished the use of special verdicts and, thus, invalidated the jury's verdict, the Ninth District held that Goodyear waived the right to object to the special verdict by agreeing to its use. The Supreme Court of Ohio, however, disagreed. Although the Supreme Court determined that a new trial was warranted on other grounds, it stated, at 476, that "[t]he failure of the jury to return a general verdict warrant[ed] comment." The Supreme Court stated that both Civ.R. 49 and R.C. 2315.19(B) explicitly require a general verdict and that the trial court erred by not requesting a general verdict from the jury, despite any agreement amongst the parties to the contrary. Accordingly, the Supreme Court implicitly invalidated the parties' agreement that conflicted with the requirements of Civ.R. 49.

{¶13} The essence of Garlikov's argument is that the parties' stipulation conflicts with amended Civ.R. 53 because it purports to permit appellate review of the magistrate's findings of fact without objections to those findings in the trial court, whereas amended Civ.R. 53 requires objections as a prerequisite to appellate review

and does not permit a stipulation as to the finality of the magistrate's factual findings. We agree that the parties' stipulation runs directly contrary to amended Civ.R. 53 because that rule no longer provides for a stipulation as to the finality of a magistrate's findings of fact and also requires the filing of objections before a party is entitled to appeal the trial court's adoption of the magistrate's findings of fact or conclusions of law.

{¶14} We further conclude, however, that the stipulation is also contrary to the clear import of former Civ.R. 53. Although former Civ.R. 53 did permit stipulations as to the finality of a magistrate's factual findings, that rule nevertheless explicitly stated that "[a] party shall not assign as error on appeal the court's adoption of any finding of fact * * * unless the party has objected to that finding * * * under this rule." Former Civ.R. 53(E)(3)(d). Thus, contrary to the parties' stipulation, former Civ.R. 53 did not permit parties to stipulate that the magistrate's factual findings were final for purposes of review by the trial court, but were nevertheless subject to appellate review once adopted by the trial court. Rather, under that rule, the parties could either file objections to the magistrate's findings of fact in the trial court, and, thus, preserve appellate review of those findings, or the parties could stipulate that the magistrate's findings of fact were final, not only in the trial court but also for purposes of appellate review.

{¶15} The Seventh District Court of Appeals recognized this principle in *Visyak v. McGowan*, 7th Dist. No. 99-JE-11, 2000-Ohio-2663, in which it held that an appellant was not entitled to appeal the trial court's adoption of a magistrate's findings and recommendation where the appellant, in reliance on an agreement between counsel to waive the filing of objections in the trial court, did not object to the magistrate's findings.

Despite the parties' waiver of objections to the magistrate's decision, the appellate court held that the failure to timely file objections in the trial court constituted a waiver of any alleged error in either the magistrate's decision or in the trial court's adoption thereof.

{¶16} The Eighth District Court of Appeals similarly acknowledged this principle in *Cangemi v. Cangemi*, 8th Dist. No. 84678, 2005-Ohio-772. The Eighth District distinguished the unorthodox procedure ordered by the trial court in that case, based on an agreement by the parties, from proceedings before a magistrate under Civ.R. 53. The trial court order included an agreement that " '[t]he parties hereby waive any appeal rights provided by Ohio Civil Rule 53 [but] retain all rights of appeal to the Eighth District Court of Appeals.' " Id. at ¶12. The Eighth District explained, at ¶22, as follows:

* * * Civ.R. 53 contemplates that a magistrate's report will be filed with the clerk and served on the parties, that the parties will have an opportunity to object, and that the court will rule on those objections and either adopt, reject or modify the magistrate's order. While the parties can stipulate that the magistrate's findings of fact will be final, there is no provision allowing the parties to "waive" the trial court's obligation to review the magistrate's decision for errors of law and directly appeal any such errors to this court, as the parties attempted to do here. Quite the opposite, if a party fails to object, he or she may not appeal from the trial court's adoption of a finding of fact or conclusion of law.

The stipulation in that case went further than the stipulation here, in that it attempted to obviate not only the need for objections to the magistrate's findings of fact, but also to the magistrate's conclusions of law. Nevertheless, despite recognizing the stipulation provision in former Civ.R. 53 with respect to a magistrate's findings of fact, the court stated that a party may not avoid the necessity of objections in the trial court as a

prerequisite to appellate review of either a magistrate's findings of fact or conclusions of law.

{¶17} Both versions of Civ.R. 53 provide that, in the absence of objections to the magistrate's findings of fact in the trial court, an appellate court will not review the trial court's adoption of the magistrate's findings. Accordingly, even if we were to conclude that former Civ.R. 53 applies and that the parties were entitled to stipulate that the magistrate's findings of fact were final and not subject to objections in the trial court, the parties were not entitled to also stipulate that, despite the absence of review by the trial court, the magistrate's findings of fact would be subject to review on appeal. Therefore, the parties' attempt, via their stipulation, to preserve appellate review of the magistrate's findings of fact, while forgoing the trial court's review of those findings, conflicts with the clear import of Civ.R. 53 and was improper.

{¶18} Having concluded that the parties' stipulation was improper, the question resolves to that of the proper remedy. One possible remedy is to proceed, as the parties suggest, to review appellant's assignments of error. The difficulty of doing so, however, reveals itself when we consider the appropriate standard for that review.

{¶19} Civ.R. 53 requires a trial court, when faced with objections to a magistrate's decision, to conduct an independent review of the magistrate's findings of fact and conclusions of law. *Schultz v. Wurdlow*, 10th Dist. No. 09AP-301, 2010-Ohio-1140, ¶11; Civ.R. 53(D)(4)(d). Our review on appeal is different. We review a trial court's adoption, denial or modification of a magistrate's decision for an abuse of

discretion. *O'Connor v. O'Connor*, 10th Dist. No. 07AP-248, ¶7, citing *State ex rel. Duncan v. Chippewa Twp. Trustees* (1995), 73 Ohio St.3d 728.

{¶20} Here, however, the trial court exercised no discretion with respect to the facts of the case. Rather, the court stated that, because of the stipulation, "the Court is unable to make an independent *de novo* determination regarding the facts in this matter." We cannot review a decision for an abuse of discretion if no discretion has been exercised.

{¶21} Appellees do not suggest that, in the absence of appellate review, we should enforce the first prong of paragraph three independently. In fact, the parties stipulated that the magistrate's findings of fact would not be subject to objection in the trial court "*provided*, however, that the parties retain and do not waive the right to appeal any of the magistrate's findings of fact to the Tenth District Court of Appeals." (Emphasis added.) Having concluded that appellate review is impossible under these circumstances, we further conclude that paragraph three of the stipulation as a whole is unenforceable. In the absence of an enforceable stipulation, the trial court had no legitimate basis for striking Garlikov's objections. Therefore, we sustain Garlikov's first assignment of error and conclude that the proper remedy is to remand this matter to the trial court to rule on Garlikov's properly filed objections to the magistrate's findings of fact and, if necessitated by those rulings, to reconsider Garlikov's objections to the magistrate's conclusions of law.

{¶22} Because Garlikov's remaining assignments of error depend on the magistrate's findings of fact, which the trial court must review on remand, those

assignments of error are now moot. In conclusion, we sustain Garlikov's first assignment of error and render moot Garlikov's second, third, fourth, and fifth assignments of error. We reverse the judgment of the Franklin County Court of Common Pleas and remand this matter to that court for rulings on Garlikov's objections to the magistrate's decision.

Judgment reversed and cause remanded.

BRYANT and KLATT, JJ., concur.
