

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

William Cargile, III,	:	
Plaintiff-Appellant,	:	
William Cargile Contractor II, Inc.,	:	No. 11AP-743
Plaintiff-Appellee,	:	(Ct. of Cl. No. 2009-01140)
v.	:	(REGULAR CALENDAR)
Ohio Department of Administrative Services,	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on June 5, 2012

William C. Wilkinson, for plaintiff-appellant.

Michael DeWine, Attorney General, and *Christopher P. Conomy*, for defendant-appellee.

APPEAL from the Court of Claims of Ohio

KLATT, J.

{¶ 1} Plaintiff-appellant, William Cargile, III, appeals a judgment of the Court of Claims of Ohio in favor of defendant-appellee, the Ohio Department of Administrative Services ("DAS"). For the following reasons, we affirm.

{¶ 2} Cargile and his wife are the sole shareholders of William Cargile Contractor II, Inc. ("Cargile Inc."). Cargile Inc. is a minority business enterprise ("MBE"). In 1996, Cargile and Cargile Inc. ("plaintiffs"), entered into an agreement with DAS to settle an action that plaintiffs had filed against DAS in the United States District Court for the Southern District of Ohio, Eastern Division. In that action, plaintiffs had asserted that

DAS had illegally expanded the eligibility for MBE certification to include Asian-Indians. The settlement agreement states:

DAS agrees that [Cargile and Cargile Inc.] will have full opportunity to compete for and bid upon public projects, and that all DAS contracts let by bid will be awarded to the lowest responsive and responsible bidder as required by R.C. 9.312.

{¶ 3} On January 7, 2009, Cargile and Cargile Inc. filed the instant action, alleging that DAS breached the 1996 settlement agreement. Plaintiffs originally filed this action on February 21, 2007, but voluntarily dismissed it on August 11, 2008. Because plaintiffs refiled their action within one year of the voluntary dismissal, their action was timely under the Saving Statute, R.C. 2305.19.

{¶ 4} Plaintiffs' action proceeded to a liability trial before a magistrate. Applying the two-year statute of limitations that governs actions filed in the Court of Claims, the magistrate excluded evidence of alleged breaches of the settlement agreement that occurred before February 21, 2005. Plaintiffs presented documentary evidence that, subsequent to February 21, 2005, Cargile Inc. submitted three bids for state projects. Cargile Inc. submitted two of these bids to Ohio State University ("OSU"), which administers its own projects. Cargile Inc. submitted the third bid to the Ohio School Facilities Commission ("OSFC"), which like OSU, administers its own projects. Plaintiffs introduced copies of the bid documents for these three projects as exhibits M1 through M3.

{¶ 5} DAS retains records of all the unsuccessful bidders on state projects that it administers. According to a DAS witness who searched through those records, Cargile Inc. did not submit any bids for DAS-administered projects from 2001 to 2009.

{¶ 6} In her May 27, 2011 decision, the magistrate concluded:

[P]laintiff has failed to prove by a preponderance of the evidence that [DAS] committed a breach of the 1996 settlement agreement. Although plaintiff provided evidence that it submitted bids for projects managed by OSU and OSFC, plaintiff brought forth no evidence that it submitted any bids to [DAS] or that [DAS] rejected any of plaintiff's bids from February 21, 2005, to the date of trial. Moreover, plaintiff presented no evidence to support a claim that it was prevented from bidding on any of the projects shown in Plaintiffs' Exhibits M1-3, or that any of those projects were not

awarded to the lowest responsive and responsible bidder. In short, plaintiff has failed to prove a prima facie case of breach of contract.

Magistrate Decision, at 4. Based on plaintiffs' failure to carry their burden of proof, the magistrate recommended judgment in DAS' favor.

{¶ 7} Plaintiffs filed objections to the magistrate's decision on June 9, 2011. DAS responded. On August 1, 2011, the trial court issued a judgment overruling plaintiffs' objections and adopting the magistrate's decision and recommendation. Two weeks after entry of the judgment, plaintiffs filed a transcript of the proceedings before the magistrate with the trial court.

{¶ 8} Cargile now appeals the August 1, 2011 judgment, and he assigns the following error:

The trial court erred when it approved the Magistrate's Report and Recommendation finding that Plaintiffs failed to meet its [sic] burden of proving a breach of the parties' settlement agreement.

{¶ 9} Initially, we must address DAS' motion to strike the trial transcript from the appellate record. Pursuant to Civ.R. 53(D)(3)(b)(iii), a party objecting to a magistrate's factual findings must support its objections with a transcript or an affidavit of evidence. The objecting party must file the transcript or affidavit with the trial court within 30 days after filing its objections. *Id.* If the objecting party does not timely comply with Civ.R. 53(D)(3)(b)(iii) and, instead, files a transcript or affidavit after the trial court rules on the objections, an appellate court cannot consider the transcript or affidavit. *League of United Latin Am. Citizens v. Kasich*, 10th Dist. No. 10AP-639, 2012-Ohio-947, ¶ 23; *Taylor v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 11AP-385, 2011-Ohio-6060, ¶ 10; *Wallace v. Grafton Corr. Inst.*, 10th Dist. No. 11AP-304, 2011-Ohio-5661, ¶ 5. Here, plaintiffs belatedly filed the trial transcript after the 30-day window elapsed and after the trial court entered judgment. Therefore, we grant DAS' motion to strike, and we will disregard the trial transcript when considering Cargile's arguments. *See Taylor* at ¶ 10 (granting a motion to strike under similar circumstances).

{¶ 10} The absence of a transcript or affidavit of evidence restricts the scope of review at both the trial court and appellate levels. When an objecting party fails to timely

file a transcript or affidavit, a trial court must accept the magistrate's findings of fact and limit its review to the magistrate's legal conclusions. *Snider v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 11AP-965, 2012-Ohio-1665, ¶ 8; *Lesh v. Moloney*, 10th Dist. No. 11AP-353, 2011-Ohio-6565, ¶ 11; *Wallace* at ¶ 5. 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 set forth in the magistrate's decision. *Id.*

{¶ 11} By his assignment of error, Cargile first challenges the application of the two-year statute of limitations to his action. Cargile alleges that the 15-year statute of limitations that applies to written contracts, set forth in R.C. 2305.06, should instead govern his action. We disagree.

{¶ 12} Pursuant to R.C. 2743.16(A), "civil actions against the state permitted by sections 2743.01 to 2743.20 of the Revised Code shall be commenced no later than two years after the date of accrual of the cause of action or within any shorter period that is applicable to similar suits between private parties." The General Assembly "clearly intended for [the] two-year limitation period [set forth in R.C. 2743.16(A)] to take precedence over all other statutes of limitation in the Revised Code at large." *Simmons v. Ohio Rehab. Servs. Comm.*, 10th Dist. No. 098AP-1034, 2010-Ohio-1590, ¶ 6; *see also Grenga v. Youngstown State Univ.*, 10th Dist. No. 11AP-165, 2011-Ohio-5621, ¶ 17; *Windsor House, Inc. v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 09AP-584, 2010-Ohio-257, ¶ 20. Therefore, the longest limitations period applicable to actions in the Court of Claims is two years. *Grenga* at ¶ 18.

{¶ 13} Here, Cargile first filed his breach of contract action on February 21, 2007. We thus conclude that the trial court did not err in limiting Cargile's action to alleged breaches of the settlement agreement that occurred subsequent to February 21, 2005.

{¶ 14} Cargile next argues that the trial court erred in overruling his objection to the magistrate's exclusion of documents related to a bid Cargile Inc. submitted to OSFC on June 1, 2001. The admission or exclusion of evidence is within the discretion of the trial court, and thus, an appellate court will not reverse an evidentiary ruling absent a showing of an abuse of discretion. *Banford v. Aldrich Chem. Co., Inc.*, 126 Ohio St.3d 210, 2010-Ohio-2470, ¶ 38. Here, because the bid at issue occurred prior to February 21,

2005, the two-year statute of limitations barred any claim arising from the submittal and consideration of that bid. Accordingly, we find no error in the trial court's ruling.

{¶ 15} Cargile also attacks the exclusion of evidence pre-dating the 1996 settlement agreement. Without a transcript to provide us context, we cannot review either the proffered evidence or the magistrate's rulings on the admissibility of that evidence. Accordingly, we must presume regularity and conclude that the trial court did not err in overruling Cargile's objection to the exclusion of the pre-1996 evidence. *See Lamp v. Linton*, 5th Dist. No. 2011-CA-06, 2011-Ohio-6111, ¶ 44 (holding that a trial court did not err in upholding a magistrate's evidentiary rulings where the objecting party failed to file a transcript or affidavit of evidence); *Law Offices of James P. Connors v. Cohn*, 10th Dist. No. 08AP-1031, 2009-Ohio-3228, ¶ 26 (same).

{¶ 16} Finally, Cargile argues that the trial court erred in accepting the magistrate's conclusion that the settlement agreement did not apply to the bids Cargile Inc. submitted to OSU and OSFC. Even if we agreed with this argument, we could not reverse the trial court's judgment. The magistrate found that plaintiffs failed to prove a breach of the 1996 settlement agreement for two reasons: (1) because plaintiffs did not produce any evidence that Cargile Inc. submitted any bids to DAS, or that DAS rejected any bids from Cargile Inc., and (2) because plaintiffs did not produce any evidence they were prevented from submitting the bids reflected in exhibits M1 through M3, or that OSU or OSFC did not award the projects at issue to the lowest responsive and responsible bidder. Thus, even if we interpreted the settlement agreement to bind all state entities, and not just DAS, we must still conclude that plaintiffs failed to establish that either OSU or OSFC violated the settlement agreement in their treatment of Cargile Inc.'s bids. Accordingly, we do not find any error in the trial court's ruling that plaintiffs failed to prove their case.

{¶ 17} Having rejected each of Cargile's arguments, we overrule the sole assignment of error, and we affirm the judgment of the Court of Claims of Ohio.

*Motion to strike granted;
judgment affirmed.*

BROWN, P.J., and BRYANT, J., concur.
