

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

BRYON FREES

Plaintiff-Appellee

V.

ITT TECHNICAL SCHOOL

Defendant-Appellant

Appellate Case No. 23777

Trial Court Case No. 09CVI00885

(Civil Appeal from Vandalia
Municipal Court)

OPINION

Rendered on the 29th day of October, 2010.

BRYON FREES, 614 South Union Street, Troy, Ohio 45373
Plaintiff-Appellant, *pro se*

TIMOTHY G. PEPPER, Atty. Reg. #0071076, Taft Stettinius & Hollister LLP, 110
North Main Street, Suite 900, Dayton, Ohio 45402-1786
Attorney for Defendant-Appellee

FAIN, J.

{¶ 1} Plaintiff-appellant Byron Frees appeals, pro se, from a judgment rendered against him on the action he brought in small claims against defendant-appellee ITT Technical School. Frees contends that the trial court erred by not permitting a key witness to testify at trial, and erred as a matter of law regarding the application of the statute of limitations. Frees also contends that the

trial court abused its discretion by denying his objections to the magistrate's decision, and erred to his prejudice as a matter of law under R.C. 2305.06. Frees further contends that the trial court's judgment is against the manifest weight of the evidence. Finally, Frees makes an obscure argument that the trial court abused its discretion by not "filing" a timely motion to quash or modify a subpoena order.

{¶ 2} Because Frees failed to provide the trial court with a transcript or proper affidavit of the proceedings before the magistrate, our review is limited to whether the trial court correctly applied the law to the facts set forth in the magistrate's decision. We conclude that the trial court correctly held that Frees failed to prove his claim against ITT, and correctly retained the court's position as a neutral adjudicator, rather than becoming an advocate on Frees's behalf. Because we conclude that Frees's claim suffers from a failure of proof, necessitating judgment in ITT's favor, we find it unnecessary to address the statute of limitations issues. Finally, Frees waived the right to complain about failure of delivery of a subpoena, because the record, as presented, contains no indication that Frees requested a continuance of the trial. Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 3} In early June of 2009, Byron Frees filed a small claims complaint against ITT in Vandalia Municipal Court. Frees's complaint stated as follows: "They made a mistake on my promissory note charging me more for their program." Frees asked for judgment against ITT in the amount of \$3,000.

{¶ 4} The case was initially referred to mediation, and was then tried before a

magistrate in mid-August 2009. After hearing the testimony and reviewing exhibits, the magistrate filed a decision containing a statement of the case and findings of fact. The magistrate noted that Frees had attended ITT from March 1994 until March 1995, having submitted his enrollment agreement to ITT on February 7, 1994. Frees claimed that ITT had charged him \$12,609, and that he understood the program cost would be \$9,274. Frees contended that ITT owed him the difference between these two figures. Frees based his contention on the fact that he had been garnished by the United States Department of Education for several years regarding the same debt.

{¶ 5} The magistrate noted that ITT's representative had testified that the \$9,274 program cost was an estimated cost, and that the actual cost of attendance would be approximately \$12,609. The representative also testified that ITT had received \$6,000 toward this cost from Frees's student loans.

{¶ 6} The magistrate concluded that ITT had provided services to Frees, as requested by Frees, and that Frees failed to submit evidence that ITT did not provide the services. The magistrate also rejected Frees's claim that ITT was responsible for a collection agency's attempt to be reimbursed for student loans obtained from the Department of Education and/or the USA Group Loan Services. Accordingly, the magistrate held that Frees' action was barred by the fifteen-year statute of limitations for written contracts. The magistrate additionally held that Frees had failed to sustain his burden of proof against ITT.

{¶ 7} Frees filed objections to the magistrate's decision in September 2009, but did not file a transcript of the hearing before the magistrate. In addition, Frees filed a second document in October 2009, entitled "Objection's [sic] to Magistrate's Report

Decision.” On the last page of this document, which is not notarized or signed, Frees stated that he had declined to provide a transcript of the hearing. Frees further stated that: “This is my affidavit.”

{¶ 8} In November 2009, the trial court issued a final decision and judgment entry overruling Frees’s objections. The court stated that it would limit its review to the conclusions of law made by the magistrate, because Frees had failed to file a transcript or a properly executed affidavit. The court concluded that sufficient facts on the face of the magistrate’s decision supported the conclusions in the decision, and that the face of the decision did not reflect errors of law. The court, therefore, adopted the magistrate’s decision and rendered judgment in favor of ITT.

{¶ 9} Frees appeals from the judgment of the trial court.

II

{¶ 10} Frees has filed six assignments of error. We will consider the assignments of error out of order. Frees’s Fifth Assignment of Error is as follows:

{¶ 11} “THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT’S OBJECTIONS TO A MAGISTRATE REPORT DECISION BECAUSE IT WAS NOT NOTARIZED BY APPELLANT.”

{¶ 12} Under this assignment of error, Frees contends that he hand-delivered his “affidavit” to the clerk in a timely manner, and that the clerk accepted it. Frees contends that he should have been notified of the document’s non-compliance, and that the trial court abused its discretion when it rejected the document.

{¶ 13} Before addressing this argument, we note the following requirements for

filing objections to magistrate's reports, as outlined in Civ. R. 53(D)(3)(b):

{¶ 14} "(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.

{¶ 15} "(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)."

{¶ 16} We have held that "the mandates which these provisions impose waive any error assigned on appeal with respect to the trial court's judgment overruling objections to the magistrate's decision when the objections were not supported by a transcript of the proceedings before the magistrate at which evidence relevant to the error assigned on appeal was introduced." *Daniel v. Daniel*, Miami App. No. 2005CA9, 2006-Ohio- 411, ¶ 18.

{¶ 17} In the case before us, the magistrate's decision informed Frees of the

transcript requirement. Frees's comments also reveal that he was aware of the need to file a transcript or an affidavit. Frees failed to comply with the rules. Furthermore, Frees's designation of his second round of objections as an "affidavit" is ineffective, because the document failed to comply with legal requirements for affidavits.

{¶ 18} "An affidavit is a written declaration under oath, made without notice to the adverse party." R.C. 2913.02. The Supreme Court of Ohio has held that "[a]n affidavit must appear, on its face, to have been taken before the proper officer and in compliance with all legal requisites. A paper purporting to be an affidavit, but not to have been sworn to before an officer, is not an affidavit." *In re Disqualification of Pokorny* (1992), 74 Ohio St.3d 1238 (citation omitted). Accord, *Pollock v. Brigano* (1998), 130 Ohio App.3d 505, 509.

{¶ 19} We also reject the contention that the trial court should have notified Frees of his document's non-compliance with requirements for affidavits. Frees was a pro se litigant, but pro se litigants " 'are presumed to have knowledge of the law and legal procedures and * * * are held to the same standard as litigants who are represented by counsel.' " *State ex rel. Fuller v. Mengel*, 100 Ohio St.3d 352, 2003-Ohio-6448, ¶ 10 (citation omitted). Pro se litigants are also bound by procedural and substantive errors of their own making. *Richardson v. Indus. Comm.*, Montgomery App. No. 22797, 2009-Ohio-2548, ¶ 26. Because Frees failed to provide the trial court with appropriate factual materials, Frees waived error regarding the magistrate's factual findings and legal conclusions.¹

¹A transcript of the magistrate's hearing was filed in the trial court after Frees filed his notice of appeal. We are precluded from considering that transcript, because

{¶ 20} Frees argues that the clerk of the trial court should have rejected his non-complying affidavit and should have informed him of its deficiencies. We are aware of no statute, rule, or regulation imposing upon clerks of court the duty to review documents submitted to the clerk for filing to determine their legal sufficiency. Because many court filings are subject to timeliness requirements, we have encouraged our clerks of court to accept documents for filing despite any perceived deficiencies.

{¶ 21} We have held that:

{¶ 22} “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. * * * 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.” *In re Estate of Lucas*, Montgomery App. No. 23088, 2009-Ohio-6392, ¶ 32 (citation omitted).

{¶ 23} In the case before us, the trial court accepted the magistrate's factual findings, and concluded that there were no errors of law on the face of the decision. Our review reveals that the court correctly applied the law to the alternate theory supporting the magistrate's decision.

{¶ 24} As an alternate basis for rendering judgment in favor of ITT, the magistrate held that Frees had failed to prove his case against ITT by a preponderance of the evidence. The magistrate noted that it had an opportunity to review the exhibits

the trial court had no access to it when ruling on the objections. *Daniel*, 2006-Ohio- 411, ¶ 13. We can consider the exhibits, however, because they are in the record, and the trial court specifically stated, in overruling the objections to the magistrate's report, that it had reviewed the exhibits.

as well as hear the testimony of the witnesses, including the credibility of each witness.

{¶ 25} Frees's claim against ITT was for breach of contract. In order to establish a breach of contract, the plaintiff must prove " 'the existence of a contract, performance by the plaintiff, breach by the defendant and resulting damage to the plaintiff.' " *Winner Brothers, L.L.C. v. Seitz Elec., Inc.*, 182 Ohio App.3d 388, 2009-Ohio-2316, ¶ 31 (citation omitted).

{¶ 26} The magistrate noted that ITT had provided services to Frees, and that there was no evidence that Frees failed to receive the promised services. Frees stated that his understanding of the program cost was \$9,274, and that he believed he had been charged \$12,609 by ITT. Frees's \$3,000 damage claim was based on the difference between these amounts.

{¶ 27} The magistrate observed, however, that \$9,274 was the estimated cost for the program, and that \$12,609 was the actual cost of attendance. According to ITT, it had received about \$6,000 toward the cost of attendance from the loan secured by the promissory note. The magistrate concluded that Frees was attempting to hold ITT responsible for student loans obtained through the Department of Education, which were in collection status. The magistrate noted that there was no indication that the claim against ITT had any connection to these loans; in fact, at the time the suit against ITT was being tried, Frees also had a suit pending in the United States District Court against the collection agency that had attempted to collect the debt owed to the Department of Education. The federal lawsuit was based on circumstances identical to those involved in the small claims action.

{¶ 28} In light of the facts listed in the magistrate's decision, which we must

accept, the trial court did not commit legal error in concluding that Frees failed to establish its claim against ITT. Frees failed to prove his claim that ITT had breached the contract by making a mistake on the promissory note.

{¶ 29} Because the alternate theory of judgment is fatal to Frees's claims, the issue of whether the magistrate and trial court correctly applied the statute of limitations is moot.

{¶ 30} Frees's Fifth Assignment of Error is overruled.

III

{¶ 31} Frees's Fourth Assignment of Error is as follows:

{¶ 32} "WHETHER THE TRIAL COURT ERRED TO THE PREJUDICE OF BYRON FREES, AS A MATTER OF LAW TO THE STATUTE OF LIMITATIONS."

{¶ 33} Under this assignment of error, Frees contends that equitable tolling should be applied to prevent unjust enrichment. In this regard, Frees contends that he did not receive a copy of the promissory note.

{¶ 34} "The doctrine of equitable tolling may be employed to prohibit inequitable use of the statute of limitations. * * * Fraudulent concealment may be used as grounds for equitable tolling. * * * To invoke the doctrine of fraudulent concealment as a ground for equitable tolling, an appellant must show: (1) that appellee engaged in a course of conduct to conceal evidence of the alleged wrongdoing; and (2) that appellant failed to discover the facts giving rise to the claim despite the exercise of due diligence. * * *

{¶ 35} "Equitable tolling is only available in compelling cases which justify a departure from established procedure." *Sharp v. Ohio Civil Rights Comm.*, Mahoning

App. No. 04 MA 116, 2005-Ohio-1119, ¶ 10-11 (citations omitted).

{¶ 36} Because Frees failed to file a transcript or affidavit, we can consider only whether the trial court committed an error of law. The magistrate's decision did not refer to evidence of equitable tolling, nor did the magistrate suggest that ITT had in any way concealed the promissory note or other relevant documents from Frees. In view of the lack of such findings, the trial court did not err in failing to apply equitable tolling. Furthermore, to the extent this assignment of error relates to the statute of limitations issue, it is moot.

{¶ 37} Frees's Fourth Assignment of Error is overruled.

IV

{¶ 38} Frees's First Assignment of Error is as follows:

{¶ 39} "THE TRIAL COURT COMMITTED PLAIN ERROR OR ABUSE [SIC] ITS DISCRETION WHEN PLAINTIFF-APPELLANT WAS NOT ALLOWED TO SUBMIT OR CALL ALYCE BELL, A QUALIFIED KEY WITNESS TO TESTIFY AT TRIAL."

{¶ 40} Under this assignment of error, Frees contends that the magistrate erred by refusing to allow him to call Alyce Bell to testify. Frees claims that Bell was the Financial Aid Coordinator for a job training program. This fact, however, is not in the record.

{¶ 41} The trial court record indicates that notice of the trial date was filed on July 17, 2009, approximately one month before the August 17, 2009 trial date. Frees filed a praecipe and summons on August 3, 2009, directed to Alyce Bell, at an address in Troy, Ohio. On August 6, 2009, the clerk issued a subpoena, and sent the subpoena to the

Miami County Sheriff's Department for service. The Miami County Sheriff received the subpoena on August 10, 2009, but did not apparently file a return of service until August 20, 2009, which was after the trial occurred. At that time, the Sheriff's office indicated that it had been unable to contact the witness within the time allowed.

{¶ 42} Because the transcript of the hearing is not before us, we do not know what, if anything, transpired at the hearing regarding the subpoena. However, Frees would have had the option of requesting a continuance if the witness truly were critical to his case. There is nothing in the record to indicate that Frees requested a continuance upon learning that the witness had not been served. See *Allin v. Hartzell Propeller, Inc.*, 161 Ohio App.3d 358, 2005-Ohio-2751.

{¶ 43} In *Allin*, the plaintiff properly requested a subpoena, but the witness failed to appear because the clerk did not forward the witness fee that the plaintiff had tendered to the clerk. We concluded that Civ. R. 45(B) does not impose an obligation on litigants to exercise due diligence to ensure that service is complete and that witnesses will appear. *Id.* at ¶ 13. Nonetheless, we concluded that the plaintiff was not deprived of a fair trial, because he did not ask for a continuance in order to properly serve the witness. *Id.* at ¶ 17. We stated that:

{¶ 44} "A movant may not obtain relief pursuant to Civ.R. 59(A)(1) for an irregularity in the proceedings when the movant could reasonably have avoided the prejudice that the irregularity caused. Allin's failure to seek a continuance in order to properly serve Baird waives his right to complain that the irregularity chargeable to the court that resulted in Baird's nonappearance prevented him from having a fair trial, which is the standard Civ.R. 59(A)(1) imposes." *Id.*

{¶ 45} Unlike *Allin*, the clerk in the case before us did not commit an irregularity that is chargeable to the court. The irregularity, if any, was on the part of the Sheriff's office. The clerk forwarded the subpoena to the Sheriff in ample time for service to be made, and the record does not indicate why the Sheriff could not effect service within the time permitted. Even if an irregularity had occurred, however, there is no evidence that Frees requested a continuance. Frees, therefore, has waived the right to complain about the failure to effect delivery of a subpoena.

{¶ 46} Frees's First Assignment of Error is overruled.

V

{¶ 47} Frees's Second Assignment of Error is as follows:

{¶ 48} "THE TRIAL COURT ABUSE [SIC] ITS DISCRETION UNDER THE OHIO RULES OF CIVIL PROCEDURE FOR NOT FILING A TIMELY MOTION TO QUASH OR MODIFY A SUBPOENA ORDER, WHICH FAILS TO ALLOW REASONABLE TIME TO COMPLY."

{¶ 49} To the extent that this assignment of error can be understood, Frees appears to contend that the magistrate should have "filed" a motion to quash or modify the subpoena order, because the order failed to allow reasonable time to comply. However, as noted, the order did allow reasonable time for service.

{¶ 50} Furthermore, the court, whether operating through a magistrate or trial judge, does not advocate on behalf of litigants, nor does the court generally act without having received requests from a party. If the trial court issued orders *sua sponte*, "serious questions would exist as to whether it had abandoned its neutral posture in the

litigation and become an advocate.” *Matter of Estate of Nibert* (April 27, 1987), Madison App. No. CA86-05-012, 1987 WL 10359, * 6.

{¶ 51} Frees’s Second Assignment of Error is overruled.

VI

{¶ 52} Frees’s Third Assignment of Error is as follows:

{¶ 53} “WHETHER THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT, BYRON FREES, AS A MATTER OF LAW TO O.R.C. 2305.06.”

{¶ 54} To the extent this assignment of error can be deciphered, Frees appears to contend that ITT should bear the risk of Frees’s failure to file within the time allowed by the statute of limitations in R.C. 2305.06. This argument is based on Frees’s contention that ITT is responsible for making a mistake in the promissory note, or was guilty of civil conspiracy or fraud.

{¶ 55} The magistrate’s decision and the trial court’s adoption of the decision do not mention mistake, civil conspiracy, or fraud. Because the transcript is not before us, we cannot conclude that the trial court erred as a matter of law in failing to shift the burden to ITT. This would be similar to applying equitable tolling, and there is simply no evidence before us that would support such a theory. Moreover, as we noted, the magistrate and trial court correctly applied the law with regard to the alternate theory of judgment. Accordingly, to the extent this assignment of error relates to the statute of limitations issue, it is moot.

{¶ 56} Frees’s Third Assignment of Error is overruled.

VI

{¶ 57} Frees's Sixth Assignment of Error is as follows:

{¶ 58} "THE TRIAL COURT ERRED IN GRANTING JUDGMENT IN FAVOR OF APPELLEE IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 59} Under this assignment of error, Frees contends that the trial court's decision is against the manifest weight of the evidence. The matters Frees discusses are related to facts that support his claim and that were allegedly elicited during the magistrate's hearing. Because Frees failed to provide a transcript for the trial court to review, we consider only "whether the trial court correctly applied the law to the facts as set forth in the magistrate's decision." *Lucas*, 2009-Ohio-6392, ¶ 32. In considering whether a judgment is against the manifest weight of the evidence, we will not reverse a judgment that is "'supported by some competent, credible evidence going to all the essential elements of the case.'" *Gevedon v. Ivey*, 172 Ohio App.3d 567, 2007-Ohio-2970, ¶ 54, quoting from *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279.

{¶ 60} After reviewing the available record, and considering our discussion of the prior assignments of error, we conclude that the trial court judgment is not against the manifest weight of the evidence.

{¶ 61} Frees's Sixth Assignment of Error is overruled.

VII

{¶ 62} All of Frees's assignments of error having been overruled, or having been overruled as moot, the judgment of the trial court is Affirmed.

.....

FROELICH and OSOWIK, JJ., concur.

(Hon. Thomas J. Osowik, Sixth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

Bryon Frees
Timothy G. Pepper
Hon. Cynthia M. Heck