[Cite as *Natl. City Bank v. Eagleson* , 2008-Ohio-4097.]

COURT OF APPEALS
GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

NATIONAL CITY BANK Plaintiff-Appellee -vs- CLIFFORD H. EAGLESON Defendant-Appellant	JUDGES: Hon. William B. Hoffman, P.J. Hon. W. Scott Gwin, J. Hon. Julie A. Edwards, J. Case No. 07CA000036 O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Cambridge Municipal Court, Civil Case No. 06CVF00716
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	August 11, 2008

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
MONETTE W. COPE Weltman, Weinberg & Reis Co., LPA 175 South Third Street, Suite 900 Columbus, Ohio 43215-5134	CLIFFORD H. EAGLESON, PRO SE 59775 Country Club Road Byesville, Ohio 43723

Hoffman, P.J.

{¶1} Defendant-appellant Clifford H. Eagleson appeals the August 3, 2007 Judgment Entry of the Cambridge Municipal Court entering judgment in favor of Plaintiff-appellee National City Bank in the amount of $8,230.27, with interest.

STATEMENT OF THE FACTS AND CASE

{¶2} On February 20, 2004, Appellant borrowed $8,950.00 from National City Bank. The promissory note executed by Appellant provided Appellant would repay the money owed in forty-eight monthly payments. Appellant made his last payment on February 7, 2005. Appellant submits he tendered payment in full with an "international money order which is payable through the internet", but the payment was dishonored. Appellant admits he did not pay any sum of money to obtain the money order. The amount due on the note as of July 25, 2007 was $8,389.70.

{¶3} On November 27, 2006, National City Bank filed a complaint against Appellant for the outstanding balance on the promissory note. On December 18, 2006, Appellant filed an answer.

{¶4} The matter proceeded to a bench trial on July 26, 2007. Following the bench trial, the magistrate issued a decision in favor of National City Bank. Appellant did not request findings of fact or conclusions of law, nor did he file objections to the magistrate's decision. On August 3, 2007, the trial court adopted the magistrate's decision.

{¶5} Appellant now assigns as error:

{¶6} "I. THE LOWER COURT ERRED IN AWARDING JUDGMENT IN FAVOR OF PLAINTIFF/APPELLEE AS PLAINTIFF/APPELLEE DID NOT MEET ITS BURDEN OF PROOF THAT THE ALLEGED DEBT HAD NOT BEEN DISCHARGED."

{¶7} Ohio Civil Rule 53(D) states:

{¶8} "(b) *Objections to magistrate's decision*.

{¶9} *(i) Time for filing*. A party may file written objections to a magistrate's decision within fourteen days of the filing of the decision, whether or not the court has adopted the decision during that fourteen-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. If a party makes a timely request for findings of fact and conclusions of law, the time for filing objections begins to run when the magistrate files a decision that includes findings of fact and conclusions of law.

{¶10} "* * *

{¶11} "*(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)."

{¶12} As noted above in the statement of the facts and case, Appellant did not object to the magistrate's decision. Neither did Appellant request findings of fact and/or conclusions of law. Accordingly, pursuant to Civ.R. 53, Appellant has waived his right to assign error to the trial court's judgment.

{¶13} Payment of the amount owed is an affirmative defense which must be proved by the Appellant. *Asset Acceptance Corp. v. Proctor* (2004), 156 Ohio App.3d 60. At trial, National City presented witness testimony the "international money order" was rejected as payment of the amount owed. Appellant did not introduce evidence as to the "international money order," and conceded he did not pay any funds for the same.

{¶14} Appellant's sole assignment of error is overruled.

By: Hoffman, P.J.

Edwards, J. concurs

Gwin, J. dissents

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

_____
HON. W. SCOTT GWIN

s/ Julie A. Edwards
HON. JULIE A. EDWARDS

Gwin, J., dissenting

{¶15} On July 1, 2003, Civ. R. 53 (D)(3) was amended to provide:

{¶16} "(iii Form; filing and service of magistrate's decision. *** A magistrate's decision shall indicate conspicuously that 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 timely and specifically objects to that factual finding or legal conclusion as required by Civ. R. 53 (D)(3)(b)."

{¶17} The 2003 Staff Notes appended to the Rule set out the reason Civ. R. 53 was amended. "It was suggested to the Rules Advisory Committee that **the waiver rule ***sometimes surprised counsel and pro se litigants because they did not expect to be required to object to a finding of fact or conclusion of law in a magistrate's decision in order to assign its adoption by the trial court as error on appeal.***It was further suggested that counsel or a pro se litigant was particularly likely to be surprised by the waiver rule***if a trial court*** adopted a magistrate's decision prior to expiration of the fourteen days permitted for the filing of objections.*****[T}he amendment *** requires the [magistrate's] decision *** provide a conspicuous warning ***" (emphasis added.)

{¶18} The magistrate to whom the matter was referred issued a general decision on August 2, 2007. Neither party here requested findings of fact and conclusion of law. The magistrate's decision does not contain the required warning of the waiver rule.

{¶19} The trial court entered judgment on the magistrate's decision the day after it was issued. The judgment entry states it is a final appealable order and also states:

"The Court determines that there is no error of law or other defect on the face of the Magistrate's Decision." This finding is patently incorrect. The magistrate's decision is defective on its face as a matter of law.

{¶20} In *OSI Funding Corporation v. Huth,* Tuscarawas App. No. 06AP120069, 2007-Ohio-5292, this court held a trial court should not approve and adopt a magistrate's decision if it lacks the mandatory language. We reasoned:

{¶21} "The instant action represents the exact scenario which prompted the Rules Advisory Committee to recommend the amendment. *** The language is mandatory and the absence of this language from the Magistrate's Decision warrants reversal of the trial court's approval and adoption of such." *Huth*, paragraph 28.

{¶22} Here the magistrate did not include the mandatory language. While the trial court was required to state its judgment was a final appealable order, this language in the entry only one day later may have led appellant to believe his next step must be an appeal to this court. Now we add our own "gotcha" by enforcing the waiver rule rather than addressing the underlying problem, because appellant did not assign this as error before us. These circumstances are exactly what the Rules Advisory Committee and the Ohio Supreme Court tried to prevent.

{¶23} I would hold the trial court erred as a matter of law in approving and adopting the magistrate's decision because it did not comply with the Rule. I would reverse the court's decision.

s/ W. Scott Gwin

HON. W. SCOTT GWIN

IN THE COURT OF APPEALS FOR GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

NATIONAL CITY BANK	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
CLIFFORD H. EAGLESON	:	
	:	
Defendant-Appellant	:	Case No. 07CA000036

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Cambridge Municipal Court is affirmed. Costs assessed to Appellant.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

HON. W. SCOTT GWIN

s/ Julie A. Edwards
HON. JULIE A. EDWARDS