[Cite as *Hazelwood Assn., Inc. v. Helfrich*, 2010-Ohio-2871.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

HAZELWOOD ASSOCIATION, INC.	:	JUDGES:
	:	
	:	Hon. Julie A. Edwards, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 09 CA 0119
JAMES HELFRICH	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Licking County Municipal Court, Case No. 08-CVI-2753

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: June 16, 2010

APPEARANCES:

For Appellant:

JAMES HELFRICH (Pro se)
P.O. Box 921
Pataskala, OH 43062

For Appellee:

DAVID DYE
P.O. Box 395
Grove City, OH 43123

Delaney, J.

{¶1} Defendant-Appellant James Helfrich appeals the September 8, 2009 decision of the Licking County Municipal Court. Plaintiff-Appellee is Hazelwood Association, Inc.

STATEMENT OF THE FACTS AND THE CASE

{¶2} Appellee is an Ohio not-for-profit corporation, formed in accordance with the provisions of the deed restrictions for the Hazelwood Subdivision located in Licking County, Ohio. Appellee functions as the Homeowner's Association for the subdivision.

{¶3} The deed restrictions encumber all lots within the Hazelwood Subdivision. The deed restrictions provide that all owners of lots in the Hazelwood Subdivision are required to be members of the Homeowner's Association, and as members, are required to pay annual assessments in the amount of $175.00 to Appellee. The annual assessment is to be paid within thirty days of issuance, or the balance is subject to late fees and interest. The deed restrictions further state that the homeowner is responsible for costs of collection and/or reasonable attorney's fees to collect on a delinquent account.

{¶4} In 2006, Appellant contacted Appellee's business manager, PSAM, Ltd. and asked that it send him information regarding the Hazelwood Subdivision. Appellant gave PSAM a P.O. Box address for his personal mailing address to which it was to send the information.

{¶5} On January 23, 2007, Appellant purchased property located at 1312 Harold Stewart Parkway, Pataskala, Ohio. The property is within the Hazelwood Subdivision and subject to the deed restrictions stated above. When Appellant

purchased the property, he was aware of the deed restrictions. Appellant does not personally reside at the property, but rather utilizes it as investment property.

{¶6} On April 6, 2007, PSAM issued the 2007 invoice for the annual Homeowner's Association dues in the amount of $175.00. PSAM, Ltd. mailed the invoice to Appellant utilizing the mailing address of the property located in the Hazelwood Subdivision. At the time of the mailing of the invoice, the property was vacant. PSAM used regular mail to mail the invoice. The mailed invoice did not return to PSAM as undeliverable or vacant.

{¶7} The 2007 invoice remained unpaid for a period of more than 30 days after the date it was issued. In June 2007, PSAM, Ltd. mailed a second invoice to Appellant's Hazelwood Subdivision property. The June 2007 invoice included notice that Appellant was charged a late fee and interest because of the non-payment of the 2007 annual assessment, with a total amount of $202.92. The June 2007 invoice did not return as undeliverable or vacant.

{¶8} Appellant received the June 2007 invoice. He contacted PSAM, Ltd. by telephone and asked that the late fee and interest be waived because the invoices were not sent to his personal mailing address.

{¶9} On June 20, 2007, Appellant issued a check to Appellee for $163.97. In the memo line of the check, Appellant wrote, "1312 Harold Stewart Dues paid in full 2007." PSAM cashed the check. Appellant also attached a letter to the check that stated,

{¶10} "Dear PSAM, On 6-19-07 I spoke with Lisa Spires. Spires confirmed that the bills were being sent to 1312 Harold Stewart not the address of billing record. I

don't live there. The statement of 6-6-07 charges me 25.00 + 2.92 late fees for a mistake your company is responsible for. Also, I purchased the property on Jan. 23, 07 which fees were to be brought current. 175.00 dues ÷ 365 day of year x 342 ownership 2007 = 163.97."

{¶11} On June 27, 2007, PSAM issued a revised invoice to Appellant (utilizing Appellant's personal mailing address). The invoice stated that Appellant owed a balance of $38.95. The statement included a handwritten note from Kathy Bolin, a PSAM employee in the Accounting and Legal Department. The note stated, "As Lisa told you – these charges are your responsibility and will remain on your account. Please contact us if you have questions."

{¶12} Appellant wrote PSAM a letter on July 1, 2007, disputing the June 27, 2007 invoice. The letter stated in pertinent part:

{¶13} "I am in receipt of your statement of June 27th, 2007, and your comments. No, you are absolutely wrong, Lisa did not tell me that the charges are my responsibility and will remain on my account. Lisa confirmed to me that you were sending the bill to 1312 Harold Stewart Parkway. I informed Lisa that I did not live there, and therefore, you were in the wrong in sending me a bill which now includes a late charge to an address for which was not my address of record."

{¶14} In February 2008, Appellee issued its 2008 annual assessment to Appellant. The invoice showed the 2008 assessment of $175.00 and an unpaid prior balance with accruing interest. The total amount of the 2008 invoice was $216.97. The 2008 invoice was sent to Appellant's personal mailing address.

{¶15} On March 1, 2008, Appellant issued a check to Appellee in the amount of $175.00. In the memo line of the check, Appellant wrote, “Paid in Full 1312 Harold Stewart.”

{¶16} Appellee refused to accept the tender of the 2008 check and returned it to Appellant. Appellee returned the check with a note that stated that the 2008 check would not be accepted as “payment in full” because it did not pay Appellant’s account in full.

{¶17} On November 4, 2008, Appellee filed a small claims action against Appellant. In the complaint, Appellee stated that Appellant owed $278.38 for unpaid Homeowner’s Association dues. Appellee also demanded $500.00 in attorney’s fees, plus court costs.

{¶18} The matter was heard before the magistrate on March 12, 2009. On March 18, 2009, the magistrate filed a Magistrate’s Decision finding in favor of Appellee in the amount of $778.38, plus interest at the statutory rate.

{¶19} Appellant filed a Request for Findings of Fact and Conclusions of Law. The parties filed their proposed findings of fact and conclusions of law. On May 7, 2009, the magistrate filed his Findings of Fact and Conclusions of Law, again finding in favor of Appellee.

{¶20} On May 14, 2009, Appellant filed his Objection to the Magistrate’s Decision utilizing a form provided by the Licking County Municipal Court, Small Claims Division. The form states in part, “Attached is a statement of the specific grounds on which I object, and the transcript and / or affidavit to support my objections.” Appellant

attached his affidavit in support of his objections to the Magistrate's Decision. Appellant also filed a Request for New Hearing and/or Oral Argument.

{¶21} The trial court overruled Appellant's objections to the Magistrate's Decision on June 12, 2009. In its judgment entry, the trial court found that Appellant was required to file a transcript of the magistrate's hearing pursuant to Civ.R. 53, and because Appellant failed to do so, the trial court was required to accept the magistrate's findings of fact. The trial court further denied Appellant's Request for New Hearing and/or Oral Argument.

{¶22} Appellant filed a motion on June 22, 2009, to set aside the June 12, 2009 judgment entry. Appellant argued that the form provided by the Licking County Municipal Court, Small Claims Division for objecting to a Magistrate's Decision specifically stated that Appellant could attach a transcript and/or an affidavit. The trial court granted Appellant's motion and granted Appellant seven days to provide a transcript at Appellant's cost.

{¶23} Appellant provided the transcript to the trial court. On September 8, 2009, the trial court issued a judgment entry adopting the Magistrate's Decision of May 7, 2009.

{¶24} It is from this judgment Appellant now appeals.

ASSIGNMENTS OF ERROR

{¶25} Appellant raises seven Assignments of Error:

{¶26} "I. THE TRIAL COURT ERRED WHEN IT FAILED TO CONSIDER ACCORD AND SATISFACTION AS AN AFFIRMATIVE DEFENSE.

{¶27} "II. THE TRIAL COURT ERRED WHEN IT FAILED TO ALLOW EVIDENCE INTO THE RECORD.

{¶28} "III. THE TRIAL COURT ERRED WHEN IT PLACED A BURDEN OF PROOF ON A NON-MOVING PARTY.

{¶29} "IV. THE TRIAL COURT ERRED WHEN IT FAILED TO FOLLOW ITS OWN LOCAL RULES.

{¶30} "V. THE MAGISTRATE FAILED TO CONSIDER EVIDENCE IN THE RECORD.

{¶31} "VI. THE MAGISTRATE ERRED WHEN IT FAILED TO CONSIDER EVIDENCE IN THE RECORD THAT DEFENDANT TIMELY PAID ALL AMOUNTS DUE.

{¶32} "VII. THE MAGISTRATE ERRED WHEN IT GRANTED ATTORNEY'S FEES OF $500 WHEN THERE WAS NOT ONE SHRED OF TESTIMONY ON THE REASONABLENESS OR EXPENSES INCURRED. MOREOVER, IT GRANTED ATTORNEY'S FEES WITHOUT A HEARING REGARDING THE ISSUE."

I., II.

{¶33} Appellant argues in his first Assignment of Error that the trial court erred when it failed to consider accord and satisfaction as Appellant's affirmative defense to the debt. We also consider Appellant's second Assignment of Error as it is related to the first.

{¶34} A valid accord and satisfaction may be asserted as an affirmative defense to a claim for monetary damages. *Osborne v. McCalla,* 5th Dist. No. 2006CA00253, 2007-Ohio-3887, ¶20 citing *Allen v. R.G. Indus. Supply,* 66 Ohio St.3d 229, 231, 1993-

Ohio-43, 611 N.E.2d 794. When a defendant attempts to rely on the affirmative defense of an accord and satisfaction, three elements must be met. Id. The defendant must show the presence of an accord, i.e., an offer and acceptance. The defendant must next show that the accord was actually executed or carried out. Finally, the defendant must demonstrate that the accord and satisfaction was supported by some form of consideration. Id. at 231-232.

{¶35} The Ohio Supreme Court has further recognized two safeguards that must be present for there to be a valid accord and satisfaction: "'[1] there must be a good-faith dispute about the debt and [2] the creditor must have reasonable notice that the check is intended to be in full satisfaction of the debt.'" Id. at 232, citing *AFC Interiors v. DiCello* (1989), 46 Ohio St.3d 1, 12, 544 N.E.2d 869.

{¶36} While we find there was a good faith dispute about the debt, upon the consideration of the evidence before the trial court, we agree that Appellant failed to establish accord and satisfaction of the disputed debt. As stated above, the first element that Appellant must establish is that there was an accord between the parties. The record shows as follows.

{¶37} The June 2007 invoice stated that Appellant owed the Homeowner's Association dues, a late fee, and interest. Appellant testified that after he belatedly obtained the June 2007 invoice, he contacted PSAM to dispute the charges. He testified that he spoke with Lisa Spires, an employee within the Accounting Department at PSAM. Appellant testified that he entered into an oral agreement with Lisa Spires to accept less than full payment of the 2007 invoice, i.e., the accord.

{¶38} Appellant submitted a check in the amount of $163.97 to Appellee on June 20, 2007, in response to the June 2007 invoice. As stated above, Appellant also attached a letter to his check, stating that he confirmed with Lisa Spires that the bills were sent to the Hazelwood Subdivision property address. He further wrote that he calculated the amount owed was $163.97. Appellant argues that by writing, "Dues paid in full 2007" on his June 2007 check, there was accord and satisfaction when Appellee cashed his check, therefore barring Appellee's claim for monetary damages.

{¶39} At trial, Kathy Bolin testified as to PSAM's contact with Appellant about the disputed charges on the June 2007 invoice. Appellant presented as Defendant's Exhibit 2, PSAM's notes from the conversation PSAM had with Appellant. On June 19, 2007, Lisa Spires made the following record:

{¶40} "Jim called about invoice we sent with late fees/fin charges on it. Thought we were charging him for prior owner (HUD's) charges. Says that he had letter where we were to write this off. Explained to him that we did write off the portion of the dues from the prior owner, and that this was his responsibility. He says that we should pro-rate him from Feb because he purchased home in Feb of this year. Gave him closing date of 1/23 from auditor, and explained that this should have been taken care of at his closing, etc. Also tried to tell me that he isn't responsible for late fees because we sent the invoice to property address and not his PO box. Explained our process, and that we send to property address unless contacted and told otherwise (he says that he didn't know how to contact us with this info (above note from Dec says that he called us before closing for information) – also explained tracking process. He disagrees with our

processes, and will only pay what he thinks he owes (2007 dues less 23 days for January, and no late fees). * * *."[1]

{¶41} On June 27, 2007, PSAMsent Appellant a revised invoice with a handwritten note from Kathy Bolin that stated that late charges and interest were Appellant's responsibility and would remain on Appellant's account.

{¶42} In contravention of the purported conversation Appellant had with PSAM, Appellant attempted to enter into the record tape recordings he made of his June 2007 conversation with PSAM. He states that such evidence would support his argument that an oral agreement was reached and that there was accord and satisfaction of the disputed debt. Appellee objected to the presentation of the tape-recorded conversations at the trial, arguing that it would be used to show the representative's understanding of the legal concept of accord and satisfaction. The magistrate sustained the objection. Appellant did not move to proffer the tape recordings into the record to preserve the matter for appeal. Appellant testified as to his recollection of the conversations he had with the PSAM representative.

{¶43} The admission or exclusion of evidence rests within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, 31 OBR 375, 510 N.E.2d 343. A reviewing court must not disturb a trial court's evidentiary ruling unless the ruling is found to be an abuse of discretion. Id., citing *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 16 O.O.3d 169, 404 N.E.2d 144. An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary,

[1] Lisa Spires was not called as a witness. Appellant did not object to Kathy Bolin testifying to Spires' record and in fact questioned Bolin as to the record. We therefore find any hearsay objection to be waived.

or unconscionable. *Adams* at 157, 16 O.O.3d 169, 404 N.E.2d 144.

{¶44} While we find such evidence could have gone to the matter of whether there was an agreement between PSAM and Appellant to accept less than the full amount for the June 2007 invoice, we do not have the evidence before us to reach any conclusion. Appellant failed to proffer the contents of the tape recordings on the record and therefore failed to make his record to preserve the matter for appeal.

{¶45} Based on Appellant's handwritten memo on his June 2007 check, the magistrate determined in his conclusions of law that the June 2007 check constituted an accord and satisfaction as to the amount of *dues* that Appellant owed. Appellant did not reference in his memo the late fee and interest charges that were also included in the June 2007 invoice.

{¶46} The record shows that there was a good faith dispute about the debt owed by Appellant. However, we find the record demonstrates that Appellant's memo on the June 2007 check did not give Appellee reasonable notice that Appellant's check was intended to be full satisfaction of the debt that included the Homeowner's Association dues, late fees, and interest. Evidence was presented from both parties as to their understanding of the disputed debt and whether there was an oral agreement to remove the late charge and interest. As a reviewing court, we neither weigh the evidence nor judge the credibility of witnesses. Our role is to determine whether there is relevant, competent, and credible evidence upon which the fact finder could base its judgment. *Cross Truck v. Jeffries* (Feb. 10, 1982), Stark App. No. CA-5758. In this matter, the trial court determined that Appellant failed to establish the affirmative

defense of accord and satisfaction as to the late charges and interest and we find there was competent and credible evidence to support the same.

{¶47} We find the magistrate considered Appellant's argument as to accord and satisfaction and reached the correct conclusion that there was only partial satisfaction of the debt.

{¶48} Appellant's first and second Assignments of Error are overruled.

III., V., VI.

{¶49} We will address Appellant's third, fifth, and sixth Assignments of Error together as they are interrelated. Appellant argues in his third Assignment of Error that the trial court impermissibly put the burden of proof on Appellant, the defendant in the case. Appellant's fifth and sixth Assignment of Errors set forth the argument that the trial court failed to consider all the evidence in the record.

{¶50} An appellate court will not reverse a trial court's judgment so long as it is supported by any competent, credible evidence going to all of the essential elements of the case. *C.E. Morris Co. Foley Construction* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578. "A reviewing court does not decide whether it would have come to the same conclusion as the trial court. Rather, we are required to uphold the judgment so long as the record, as a whole, contains some evidence from which the trier of fact could have reached its ultimate conclusions." *Hooten Equipment Co. v. Trimat, Inc.,* 4th Dist. No. 03CA16, 2004-Ohio-1128, ¶ 7. We are to defer to the findings of the trier of fact because in a bench trial the trial judge is best able to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in weighing

the credibility of the testimony. *Seasons Coal Company, Inc. v. City of Cleveland* (1984), 10 Ohio St.3d 77, 461 N.E.2d 1273.

{¶51} Appellant's arguments hinge on the mailing address to which Appellee mailed the April 2007 and June 2008 invoices. Appellant states that Appellee should have used Appellant's personal mailing address to mail information to Appellant, rather than to the Hazelwood Subdivision property, which was vacant. Appellant argues that he should not have been charged late fees or interest because Appellee mailed the invoices to the incorrect address.

{¶52} The testimony at the hearing showed that it was customary for PSAM to use the property addresses within the Hazelwood Subdivision for the mailing of Homeowner's Association dues invoices. Appellee used regular mail to mail the invoices and the mail was not returned to Appellee as undeliverable or vacant.

{¶53} Appellant did give PSAM his personal mailing address – but in 2006 before Appellant took ownership of the Hazelwood Subdivision property and only so that PSAM, Ltd. could send Appellant information regarding the property. There was no evidence to show that Appellant contacted PSAM or Appellee after he purchased the property to give them his correct mailing address. Appellant was able to get the June 2007 invoice, but Appellant could not answer as to how he received it.

{¶54} Based on the evidence presented, we find there was competent and credible evidence for which the trial court to base its decision that Appellant is liable, as the property owner, for the late fees and interest.

IV.

{¶55} Appellant argues in his fourth Assignment of Error that the trial court erred when it ignored its own rules of procedure. Appellant refers to the form provided by the Licking County Municipal Court, Small Claims Division that permits a party to file objections to a Magistrate's Decision by attaching a transcript and/or an affidavit. Appellant in this matter filed an affidavit when he objected to the Magistrate's Decision. The trial court, in overruling Appellant's objections, admonished Appellant for not filing a transcript of the hearing before the magistrate, as required by Civ.R. 53. Appellant moved for relief of the judgment, citing the language of the provided form. The trial court vacated its judgment and permitted Appellant to file a transcript of the hearing.

{¶56} Based on those facts, we find any prejudice suffered by Appellant to be harmless and remedied by the trial court.

{¶57} We will note that Civ.R. 53(D)(3)(b)(iii) states: "*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."

{¶58} Appellant's fourth Assignment of Error is overruled.

VII.

{¶59} Appellant argues in his final Assignment of Error that the trial court improperly awarded attorneys' fees to Appellee in the amount of $500.00.

{¶60} The deed restrictions for the Hazelwood Subdivision state the following:

{¶61} "Liability for Unpaid Assessments. Each Assessment or installment of an Assessment, together with interest thereon and any costs of collection, including reasonable attorney's fees shall become the personal obligation of the Owner(s) beginning on the date the Assessment or installment thereof becomes due and payable."

{¶62} At the magistrate's hearing, Kathy Bolin, an employee with PSAM, testified as to the attorney's fees accrued in this case. She stated that Appellee's attorney in this case agreed to charge Appellee a maximum fee of $500.00 for which to litigate this matter. Appellant cross-examined Bolin as to the legal fees and court costs generated in the case.

{¶63} The magistrate determined that the evidence established that the legal fees generated in the case were $500.00 and the legal fees charged to file the suit and to pursue collection through the trial were reasonable.

{¶64} Upon review of Appellant's Objections to the Magistrate's Decision, we find that Appellant failed to object to the magistrate's determination of attorney's fees. When a party fails to file objections to a magistrate's decision, Civ.R. 53(D)(3)(b)(iv) provides that "a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion * * * unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b)." *Postel v. Koksal*, 5th Dist. No. 08-COA-0002, 2009-Ohio-252, ¶25.

{¶65} However, we note that authority exists in Ohio law for the proposition that Appellant's failure to object to the Magistrate's Decision on this issue does not bar appellate review of "plain error." *In re Lemon,* 5th Dist. No. 2002 CA 00098, 2002-Ohio-

6263. The doctrine of plain error is limited to exceptionally rare cases in which the error, left unobjected to at the trial court, "rises to the level of challenging the legitimacy of the underlying judicial process itself." See *Goldfuss v. Davidson,* 79 Ohio St.3d 116, 122, 1997-Ohio-401, 679 N.E.2d 1099.

{¶66} Upon review of the evidence in this case, we do not find plain error in the determination of reasonable attorneys' fees to be $500.00.

{¶67} Appellant's seventh Assignment of Error is overruled.

{¶68} The judgment of the Licking County Municipal Court is affirmed.

By: Delaney, J.

Edwards, P.J. and

Wise, J. concur.

HON. PATRICIA A. DELANEY

HON. JULIE A. EDWARDS

HON. JOHN W. WISE

PAD:kgb

[Cite as *Hazelwood Assn., Inc. v. Helfrich*, 2010-Ohio-2871.]

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FIFTH APPELLATE DISTRICT

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	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
JAMES HELFRICH	:	
	:	
	:	Case No. 09 CA 0119
Defendant-Appellant	:	

For the reasons stated in our accompanying Opinion on file, the judgment of the Licking County Municipal Court is affirmed. Costs assessed to Appellant.

HON. PATRICIA A. DELANEY

HON. JULIE A. EDWARDS

HON. JOHN W. WISE