

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Jack A. Thayer

Court of Appeals No. L-12-1145

Appellant/Cross-Appellee

Trial Court No. CI0200501011

v.

Dean Diver, et al.

DECISION AND JUDGMENT

Appellees/Cross-Appellants

Decided: January 10, 2014

* * * * *

Erik G. Chappell and Michael J. Podolsky, for appellant/cross-appellee.

Thomas A. Matuszak, for appellee/cross-appellant Dean Diver.

Karen L. Giffen, Kerin Lyn Kaminski and Kathleen Nitschke, for
appellee/cross-appellant KeyBank, N.A.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, which following a 12-day jury trial issued a verdict in favor of appellees, thereby dismissing appellant's underlying claims of breach of duty of good faith and fair dealing,

lender liability based upon instrumentality, and conspiracy. For the reasons set forth more fully below, this court affirms the judgment of the trial court.

{¶ 2} Appellant, Jack Thayer, sets forth the following two assignments of error:

No. 1: The Trial Court Erred When It Denied Thayer's Motion for Mistrial As A Result of Its Own Misconduct.

No. 2: The Trial Court Erred After Judge Bowman Recused Himself When It Failed To Conduct A De Novo Review Of Judge Bowman's Prior Rulings And When It Denied Thayer's Motion For New Trial.

{¶ 3} The following undisputed facts are relevant to this appeal. Jack Thayer and Dean Diver were shareholders and officers of the now defunct AVCA Corporation, a Maumee-based engineering firm which once employed 450 people and had its headquarters in Arrowhead Park. In 1995, when the company's fortunes remained viable, AVCA secured a \$5.5 million line of credit with a predecessor-in-interest of appellee KeyBank. In 1999, Thayer stepped down from his position at AVCA in exchange for a multimillion dollar separation package, resulting in total monthly payments to Thayer following his departure from the company of approximately \$62,000.

{¶ 4} By 2001, the company's fortunes had considerably waned. As a consequence of a precipitous decline in revenue and a loss of major clients, the once thriving company was on the brink of failure. In the context of these adverse company business trends and the accompanying substantial deterioration in the company's financial position, the situation rapidly became grave. Accordingly, AVCA and

KeyBank executed forbearance agreements. In accordance with the agreements, KeyBank consented to forbear initiating legal action against the company's collateral assets conditioned upon AVCA immediately suspending all non-business payments, such as the now unsustainable \$62,000 monthly payments to appellant.

{¶ 5} Unfortunately, all efforts to avert the failure of AVCA were unsuccessful. KeyBank, having significant exposure from the increasingly inevitable demise of AVCA, could no longer delay legal action. In July 2004, KeyBank was awarded a \$3,789,217.68 judgment against AVCA. AVCA was subsequently placed into receivership. A local receiver was appointed to oversee and manage the liquidation of the failed company.

{¶ 6} Although Thayer had tentatively conveyed an interest in acquiring the troubled company, he ultimately did not submit a bid. On August 30, 2004, AVCA was sold for \$600,000 to the Toledo-based architectural and engineering firm of S.S.O.E. Notably, Thayer did not object to the sale to S.S.O.E.

{¶ 7} For the sake of clarity and context, the record reflects that the underlying impetus fueling this case lies in Thayer's unproven contention that Diver and KeyBank somehow surreptitiously and unlawfully conspired in connection to the demise and sale of AVCA to the detriment of Thayer. In conjunction with this, the record similarly reflects that Thayer harbors malcontent regarding the fact that Diver secured employment with S.S.O.E. subsequent to its acquisition of the defunct AVCA.

{¶ 8} On January 3, 2005, Thayer filed suit alleging claims of breach of good faith and fair dealing, lender liability based upon instrumentality, and conspiracy against Diver

and KeyBank. In response, KeyBank counterclaimed on the basis of Thayer's prior execution of a personal guaranty of the debts owed by AVCA to KeyBank. On November 20, 2007, KeyBank successfully obtained a \$3,591,956.77 judgment against Thayer on the counterclaim and obtained a favorable summary judgment ruling on Thayer's claims. On May 1, 2009, this court affirmed the counterclaim judgment in KeyBank's favor and reversed and remanded Thayer's claims to the trial court to proceed to trial. *Thayer v. Diver*, 6th Dist. Lucas No. L-07-1415, 2009-Ohio-2053. Thus, this appeal arises from the jury verdict adverse to Thayer following the 12-day trial upon this court's past summary judgment reversal and remand.

{¶ 9} We note at the outset that Judge Gary Cook served as the trial judge in this matter for a 7-year period, from the time of the 2005 filing until the time of the 2012 trial. At the time of trial, Judge Cook had become unavailable and the matter was reassigned to Judge Bowman. On April 9, 2012, a contentious, protracted 12-day jury trial commenced. At the close of the trial, Judge Bowman denied oral motions for directed verdict on the part of both parties. In addition, appellant filed a motion for a mistrial summarily claiming that he had been prejudicially maltreated by the trial judge during the course of the trial. The motion was denied.

{¶ 10} Appellant sets forth a litany of allegations that he was subjected to prejudicial maltreatment by Judge Bowman such that a mistrial should have been granted. Appellant makes numerous, sweeping allegations such as, "Judge Bowman began to exhibit increasing hostility, bias, and prejudice toward Thayer and Thayer's

counsel in both words and demeanor in the presence of the jury.” Appellant’s conclusory allegations were ultimately not confined to Judge Bowman. Appellant similarly submitted claims of vast prejudicial judicial misconduct by Judge Gary Cook. Given such broad and serious allegations, we have carefully reviewed the record for any objective and compelling indicia in support of appellant’s claims.

{¶ 11} Appellant’s litany of allegations against both trial judges are consistently shown to be quite extensive in volume yet consistently lacking in merit. The ongoing theme is reflected in appellant’s contention that, “Thayer was left with one judge who lost all sense of judicial decorum exhibiting a biased, prejudiced demeanor resulting in his recusal, and another judge whose prior dismissal of Thayer’s claims had been reversed and was more interested in submitting the case to the jury.”

{¶ 12} We would note that appellant’s suggestion that Judge Bowman recused himself somehow based upon consideration of the merits of appellant’s allegations of judicial misconduct against him is disingenuous. Judge Bowman voluntarily stepped down of his own volition upon the unproven allegations being formally made to the Supreme Court of Ohio. The Supreme Court of Ohio made no determination on the merits of appellant’s claims.

{¶ 13} On April 20, 2012, following the close of appellant’s case, counsel for appellant conveyed to all involved that he intended to file an affidavit of prejudice against Judge Bowman with the Supreme Court of Ohio. Faced with an affidavit pending before the Supreme Court of Ohio setting forth numerous serious allegations of misconduct

against him that could take several weeks to resolve, Judge Bowman elected to voluntarily recuse himself so that the jury who had just concluded a complex 12-day trial could proceed to deliberations without further delay.

{¶ 14} The record shows that Judge Cook, who had presided over the case for many years, resumed his role at that juncture as a consequence of appellant's own course of action at the conclusion of the trial in filing an affidavit seeking the removal of Judge Bowman from the case by the Supreme Court of Ohio. Appellant's effort culminated in Judge Bowman voluntarily stepping aside. Interestingly, this development failed to appease appellant's opposition to his case, which was concluded and awaiting jury deliberations and verdict, from proceeding any further.

{¶ 15} Despite appellant's protestations that this matter has been drawn out as shown by his lamentation that his client must at last, "have his day in court once and for all," the record actually shows that appellant's own actions during the course of this case have contributed to its longevity. Rather than move forward following the substitution of trial judges, appellant nevertheless next moved for a new trial on the alleged basis that Judge Cook likewise could not properly conclude the trial. Judge Cook deferred on the motion and furnished time for opposing counsel to respond. Ultimately, on April 24, 2012, having not been persuaded by appellant's efforts to undo the matter and begin anew, the trial court permitted the case to proceed to verdict. The jury unanimously found in favor of appellees and against appellant on all claims.

{¶ 16} We would note that in stark contrast to appellant's characterizations of events in this case as demonstrating widespread prejudicial misconduct by the trial judges in this case, our review and consideration of record in this matter reflects that it contains no evidence reflecting prejudicial conduct on the part of either assigned trial judge.

{¶ 17} We also note that appellant opted not to challenge the legitimacy of the adverse, unanimous jury verdict on the merits of the substantive jury determination, but rather focuses this appeal upon appellant's own subjective characterizations of the conduct of the trial judges.

{¶ 18} In the first assignment of error, appellant asserts that the trial court erred in denying appellant's motion for a mistrial based upon appellant's allegations of judicial misconduct against Judge Bowman. It is well-established that whether or not to grant the extreme remedy of a mistrial lies well within the discretion of the trial court. This controlling principle that a disputed judgment on a motion for a mistrial must be granted great deference reflects an acknowledgment of the superior position of the trial court to ascertain whether anything has transpired in the courtroom so prejudicially undermining the proceedings as to warrant granting a mistrial. *State v. Rossbach*, 6th Dist. Lucas No. L-09-1300, 2011-Ohio-281, ¶ 40.

{¶ 19} We have carefully reviewed and considered the record of evidence in this matter, paying particular attention to those portions of the trial transcript upon which appellant relies as being demonstrative of prejudicial judicial misconduct. We do not

concur in appellant's characterizations of the trial proceedings or in his legal conclusions based upon those misplaced characterizations.

{¶ 20} We find that contrary to appellant's numerous unsupported claims that Judge Bowman engaged in judicial misconduct, either as a pattern or as isolated incidents, so as to prejudice and undermine the proceedings, the record reflects that the trial court actually went to considerable lengths to accommodate all parties and ensure the fairness of the proceedings.

{¶ 21} For example, appellant contends that a portion of the transcript during counsel for appellant's cross-examination of witness Philip reflects Judge Bowman's alleged bias and justifies declaration of a mistrial. Such claims are unfounded. Contrary to appellant's assertion that, "Judge Bowman repeatedly interrupted or blocked Thayer's counsel from questioning Philip," the record actually reflects that counsel for appellant extensively, systematically, and exhaustively cross-examined the witness without any improper judicial conduct. The record does reflect, as one would expect, various objections being made and being resolved both favorably and unfavorably during the cross-examination. There are no indicia of adverse, prejudicial treatment towards appellant.

{¶ 22} During another exchange upon which appellant heavily relies, the record shows that rather than mistreating appellant, the trial judge was reasonably attempting to clarify the question and illuminate the issue being pursued. Specifically, when counsel for appellant stated in response to a bench inquiry as to whether the issue being discussed

was how much Diver was paid that, “My specific question was do you know how much he was paid for transitioning the work,” the bench harmlessly inquired, “How is that different from what I said to you? Your question was how much was he paid?” In turn, counsel for appellant retorted to the bench, “Do I get the courtesy of a response?” Upon further clarification inquiry from the bench, counsel for appellant aggressively challenged the bench and contentiously proclaimed, “I think what you need to do is let me answer your question.”

{¶ 23} Despite appellant’s numerous subjective assertions that Judge Bowman improperly “interfered,” “blocked,” “angrily denied,” and otherwise subjected appellant to prejudicial maltreatment so as to warrant a mistrial, the record of evidence does not comport with appellant’s unilateral characterizations and the legal conclusions based upon those unsupported characterizations.

{¶ 24} The record reflects no words or actions by Judge Bowman during the course of his involvement in this matter that could reasonably be construed as prejudicial to appellant. We find that the trial court properly denied appellant’s motion for a mistrial. Appellant’s first assignment of error is found not well-taken.

{¶ 25} In appellant’s second assignment of error, he asserts that the trial court erred somehow in the course of Judge Cook’s resumption and completion of the trial in response to appellant’s own efforts to have Judge Bowman removed and replaced.

{¶ 26} Civ.R. 63(A) establishes:

If for any reason the judge before whom a jury trial has commenced is unable to proceed with the trial, another judge designated by the administrative judge, or in the case of a single-judge division by the chief justice of the supreme court, may proceed with and finish the trial upon certifying in the record that he has familiarized himself with the record of the trial; but if such other judge is satisfied that he cannot adequately familiarize himself with the record, he may in his discretion grant a new trial.

{¶ 27} Appellant's second assignment of error is premised upon the notion that Judge Cook somehow erred in declining appellant's baseless demand that Judge Cook undertake a de novo review of the entire trial record. There is simply no binding rules or precedent mandating that course of action.

{¶ 28} We do not concur in appellant's conclusion that, "Thayer's request that the trial court review the entire record is *in effect* what Ohio Civ.R. 63(A) calls for." (Emphasis added.) Appellant's sweeping interpretation suggesting that a de novo review in total of the proceedings is mandated in order for a judge to properly assume a case pursuant to Civ.R. 63(A) is not in any way required by the express language of the rule or mandated by precedent.

{¶ 29} We again emphasize as particularly relevant to this portion of appellant's argument that Judge Cook handled this matter in its entirety from its inception until the

time of trial, a seven-year period of intensive litigation of this matter. We note that the record reflects that subsequent to Judge Bowman's voluntary recusal in response to appellant's written demand for his disqualification filed with the Supreme Court of Ohio, Judge Cook expressly reiterated on the record that he had, "made all the pretrial rulings in this case and had assigned it only for trial specifically to Judge Bowman." In conjunction with this, Judge Cook further noted that he was, "the judge who did all the work up to the actual trial." There is ample evidence in the record, taken together in its entirety and considered in the context of this case, clearly constitutes sufficient familiarity on the part of Judge Cook so as to be deemed in compliance with the parameters of Civ.R. 63(A). Civ.R. 63(A) does not require de novo review of the trial record and it does not require the rote recitation of the precise language of the rule on the record so as to constitute compliance with the rule.

{¶ 30} We find that the record reflects that Judge Cook comported with Civ.R. 63(A) in the course of resuming his role as the trial judge in the case and thereafter concluding the case. We find appellant's second assignment of error not well-taken.

{¶ 31} Given our determinations affirming the disputed trial court judgments denying appellant's motions for a mistrial and for a new trial in this matter, the cross-assignment of error submitted by appellee/cross-appellant KeyBank conditioned upon this court finding in favor of appellant is moot. Lastly, we likewise find that our affirmation of the trial court judgment in favor of appellees and against appellant renders appellee/cross-appellant Diver's two conditional cross-assignments of error moot.

{¶ 32} Wherefore, we find that substantial justice has been done in this matter.

Contrary to appellant's broad claims against both trial judges, the record shows that the only potentially imprudent conduct and statements reflected in the record in this matter were not attributable to either trial judge. Appellant's assignments of error are not well-taken. The judgment of the Lucas County Court of Common Pleas is hereby affirmed. Appellant is hereby ordered to pay the costs of this appeal pursuant to App.R. 24. The conditional cross-appeal is found to be moot.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, J.

JUDGE

Thomas J. Osowik, J.

JUDGE

James D. Jensen, J.
CONCUR.

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
