[Cite as *Gee How Oak Tin Assn. v. Chang Yick, Inc.*, 2007-Ohio-6199.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 89228

GEE HOW OAK TIN ASSOCIATION

PLAINTIFF-APPELLEE

vs.

CHANG YICK, INC.

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cleveland Municipal Court
Case No. 2005-CVG-14087

BEFORE: Celebrezze, A.J., Dyke, J., and Boyle, J.

RELEASED: November 21, 2007

JOURNALIZED:

[Cite as *Gee How Oak Tin Assn. v. Chang Yick, Inc.*, 2007-Ohio-6199.]

ATTORNEY FOR APPELLANT

Sam A. Zingale
700 Rockefeller Building
614 Superior Avenue, N.W.
Cleveland, Ohio 44113-1318

ATTORNEY FOR APPELLEE

David M. Leneghan
200 Treeworth Boulevard
Suite 200
Broadview Heights, Ohio 44147

[Cite as *Gee How Oak Tin Assn. v. Chang Yick, Inc.*, 2007-Ohio-6199.]
FRANK D. CELEBREZZE, JR., A.J.:

{¶ 1} Appellant Chang Yick, Inc. ("the tenant") appeals the trial court's ruling in favor of Gee How Oak Tin Association ("the landlord"). After a thorough review of the arguments, and for the reasons set forth below, we affirm.

{¶ 2} The facts that gave rise to this appeal began on September 11, 2002 when the landlord and the tenant entered into a 20-year commercial lease, to begin October 1, 2002. The lease stated that the first month's rent was not due until the restaurant opened for business; however, the lease also stated that the tenant could renovate the premises without charge for 120 days. The lease stated that the tenant had the sole responsibility to pay taxes to the landlord on a monthly basis; however, it also stated that the landlord was to timely pay all real estate taxes.

{¶ 3} On June 3, 2005, the landlord filed a complaint in forcible entry and detainer and for damages against the tenant because the tenant had failed to pay rent and property taxes. Paragraph six of the complaint alleged that "on or about May 23, 2005" the landlord served the tenant with a three-day notice to vacate. The landlord attached a copy of a notice, which was dated April 25, 2005 and signed by Gee How Oak Tin's president, Ray Chan.

{¶ 4} On June 22, 2005, the tenant filed an answer in which he denied the allegation contained within paragraph six. Additionally, the tenant alleged three counterclaims, including breach of contract, fraudulent misrepresentation, and a request for declaratory judgment. In his first counterclaim, the tenant claimed that

the landlord breached his right to quiet enjoyment. In the second counterclaim, the tenant alleged that the landlord misrepresented the date rent payments were to begin and the fact that the landlord would pay the real estate taxes. Finally, the claim for declaratory judgment asked the court to resolve the controversies regarding when the tenant was required to start making rent payments and which party was required to pay taxes.

{¶ 5} On August 11, 2005, the landlord filed his answer to the counterclaim. On April 28, 2006, the landlord filed a combined motion for summary judgment on the declaratory issues and a brief in support of the declaratory action.

{¶ 6} The magistrate held a hearing on the request for declaratory judgment on May 8, 2006. His findings of fact included the statement that "plaintiff served defendant a notice to vacate on April 25, 2005." The magistrate's conclusions of law stated that the tenant's rental obligation began when the restaurant opened and that the tenant was liable for all property taxes as of October 1, 2002. On May 25, 2006, the trial court approved and confirmed the magistrate's decision.

{¶ 7} A bench trial began on May 25, 2006. The landlord called one witness (Chan) and offered three exhibits. Chan testified that he did not serve the three-day notice and did not know who did. A copy of the three-day notice was never introduced at trial. The magistrate's June 9, 2006 decision, which awarded judgment in favor of the landlord, was journalized on June 26, 2006. The magistrate's decision states, at paragraph 13, "plaintiff served defendant a notice to

vacate on or about April 25, 2005." The tenant argues that this statement is erroneous because the landlord never provided any evidence that such notice was served. The trial court's June 26, 2006 journal entry approved the magistrate's decision in favor of plaintiff.

{¶ 8} On July 7, 2006, the tenant filed objections to the magistrate's June 9, 2006 decision. On December 26, 2006, the trial court denied the tenant's objections. On January 3, 2007, the tenant filed an appeal. On January 25, 2007, this court dismissed as untimely the tenant's appeal of the eviction order as entered by the trial court on June 26, 2006 and held that the trial court's June 26, 2006 order was final and appealable at the time it was journalized. However, this court's January 26, 2007 journal entry allowed the appeal as to the trial court's December 26, 2006 order, which denied the tenant's objections to the June 9, 2006 magistrate's decision.

{¶ 9} The tenant brings this appeal, asserting one assignment of error for our review.

{¶ 10} "I. The trial court erred in granting judgment for plaintiff on count I and count II of the complaint."

{¶ 11} The tenant argues that the trial court erred when it granted judgment in favor of the landlord. More specifically, he contends that the magistrate erroneously

found that the landlord had provided the required three-day notice. We find this argument to be without merit.

{¶ 12} Initially we note that, in this appeal, we are only reviewing the trial court's December 26, 2006 journal entry, in which the trial court denied the tenant's objections to the magistrate's June 9, 2006 decision. The tenant's appeal of the eviction, as entered by the trial court on June 26, 2006, has been dismissed by this court as untimely.

{¶ 13} Under R.C. 1923.04, "a party desiring to commence an action under this chapter *shall notify* the adverse party to leave the premises, for the possession of which the action is about to be brought, *three or more days* before beginning the action, by certified mail ***, or by handing a written copy of the notice to the defendant in person, or by leaving it at [his] usual place of abode or at the premises from which the defendant is sought to be evicted." (Emphasis added.) Further, this court has held that the three-day notice to vacate is mandatory. *Associated Estates Corp. v. Bartell* (Feb. 25, 1985), Cuyahoga App. No. 48618.

{¶ 14} The tenant objected that the landlord failed to serve a three-day notice to vacate and that, accordingly, the judgment in favor of the landlord should be overturned. In its December 26, 2006 journal entry, the trial court explicitly denied the tenant's objections to the magistrate's decision for the following reasons.

{¶ 15} The case was tried in two parts. On May 8, 2006, a hearing on the tenant's counterclaim for declaratory judgment took place. Findings from that

hearing were journalized on May 25, 2006. On May 25, 2006, a trial on the forcible entry and detainer was held. Findings were journalized on June 26, 2006.

{¶ 16} It was at the first hearing, journalized on May 25, 2006, that the magistrate found that "plaintiff served defendant a notice to vacate on April 25, 2005." Under Civ.R. 53(D)(3)(b)(I), "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 the fourteen-day period as permitted by Civ.R. 53(D)(4)(e)(I)."

{¶ 17} In its December 26, 2006 journal entry, the trial court found, and we agree, that the tenant did not make a timely objection to the magistrate's finding that the landlord had properly served the tenant with the notice to vacate.

{¶ 18} Under Civ.R. 53(D)(3)(a)(iii), "a magistrate's decision shall indicate conspicuously that a party shall not assign as error on appeal the court's adoption of any finding of fact or conclusion of law unless the party has objected to that finding or conclusion under this rule." Further, the Ohio Supreme Court has held, in *State ex rel. Booher v. Honda of Am. Mfg., Inc.* (2000), 88 Ohio St.3d 52, 53-54, 723 N.E.2d 571, that a party may not raise any error on appeal regarding a finding of fact or conclusion of law by a magistrate, unless he has timely objected to that finding or conclusion. The magistrate's May 25, 2006 decision clearly indicates the above noted rule of procedure.

{¶ 19} Clearly, the tenant failed to timely object to the magistrate's findings; therefore, he waives that issue on appeal. Further, while "in *criminal* cases 'plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court,' Crim.R. 52(B), no analogous provision exists in the Rules of *Civil* Procedure. *** [I]n a civil case, reviewing courts must proceed with the utmost caution, limiting the doctrine strictly to those extremely rare cases where exceptional circumstances require its application to prevent a manifest miscarriage of justice, and [to prevent] a material adverse effect on the character of, *** judicial proceedings." *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, 121, 679 N.E.2d 1099.

{¶ 20} We find that failure to object to the magistrate's decision does not warrant the claim of plain error. Further, as the trial court found in its December 26, 2006 judgment entry, we find that the tenant did not offer any evidence at the hearing that the notice was not served; the tenant only contends that Chan did not personally serve notice.

{¶ 21} Therefore, we find that, because the tenant failed to timely object to the magistrate's May 25, 2006 decision, he has waived his right to appeal that issue. The magistrate's finding that the three-day notice had been served remains a finding of fact. Therefore, the trial court's December 26, 2006 denial of the tenant's objections to the magistrate's decision was appropriate. Appellant's assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cleveland Municipal Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., ADMINISTRATIVE JUDGE

MARY J. BOYLE, J., CONCURS;
ANN DYKE, J., CONCURS IN JUDGMENT ONLY.