[Cite as *Don Mould's Plantation, Inc. v. Kest Property Mgt. Group, L.L.C.*, 2010-Ohio-2608.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94279

DON MOULD'S PLANTATION, INC.

PLAINTIFF-APPELLEE

vs.

KEST PROPERTY MANAGEMENT GROUP, LLC

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Shaker Heights Municipal Court
Small Claims Division
Case No. 09 CVI 00896

BEFORE: McMonagle, J., Rocco, P.J., and Dyke, J.

RELEASED: June 10, 2010

JOURNALIZED:

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CHRISTINE T. McMONAGLE, J.:

{¶ 1} This is an appeal from the trial court's judgment overruling the objections of defendant-appellant, Kest Property Management Group, LLC, to the amended magistrate's decision, which entered judgment for plaintiff-appellee, Don Mould's Plantation, Inc., against Kest. We affirm.

{¶ 2} Mould's Plantation filed suit against Kest for judgment upon unpaid invoices. After a hearing before a magistrate, the magistrate entered a decision for Mould's against Kest. Upon Kest's request, the magistrate entered an amended magistrate's decision with findings of fact and conclusions of law.

{¶ 3} In the amended decision, the magistrate found that Kest did not disclose that it was acting as an agent of Amherst Shopping Center Development LLC when it contracted with Mould's for landscaping and other services. The decision noted that an agent who does not disclose the existence of the agency nor the identity of the principal to the third party with whom it is dealing is personally liable in contractual dealings with third parties. *Dunn v. Westlake* (1991), 61 Ohio St.3d 102, 573 N.E.2d 84; *Sommer v. French* (1996), 115 Ohio App.3d 101, 104, 684 N.E.2d 739. Accordingly, the magistrate entered judgment for Mould's against Kest in the amount of

$1,903.44 with interest at 5% per annum from December 10, 2008, plus court costs.

{¶ 4} Subsequently, Kest filed objections to the magistrate's amended decision. Kest did not file a copy of the trial transcript with its objections. Instead, it filed the affidavit of Kest's president, Bennett S. Kest. Mr. Kest averred that he was filing his affidavit to supplement the findings of fact elicited in the amended magistrate's decision because "a transcript of this hearing is unavailable." Thereafter, the court overruled Kest's objections and adopted the magistrate's decision, finding that "the objections are not well taken. The objections address factual issues, yet no transcript was filed by defendant even though a recording of the proceedings exist." Kest appeals from this judgment.

{¶ 5} In its first assignment of error, Kest argues that the trial court erred in adopting the magistrate's amended decision because the evidence adduced at the hearing indicated that Mould's knew that Kest was acting as the principal's disclosed agent. In its second assignment of error, Kest argues that the trial court erred in not considering the merits of its objections to the magistrate's amended decision because it supported its objections with an evidentiary affidavit. Neither argument is persuasive.

{¶ 6} With respect to Kest's failure to file a transcript of the proceedings with its objections, Civ.R. 53(D)(3)(b)(iii) states that "[a]n

objection to a factual finding * * * 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."

{¶ 7} Bennett Kest's assertion in his affidavit that he was filing an evidentiary affidavit because a transcript was unavailable is obviously not true, as Kest filed a transcript of the hearing with the record on appeal. Thus, a transcript was available if Kest had chosen to have one prepared at the time it filed its objections. As the transcript was available, the affidavit of evidence was not the proper means by which to challenge the factual findings of the magistrate. See Evid.R. 53(D)(3)(b)(iii).

{¶ 8} On appeal, however, Kest contends that it filed an evidentiary affidavit instead of the transcript "in an effort to save on the costs of litigating this matter." It contends this was acceptable procedure, and refers us to *Chaney v. East* (1994), 97 Ohio App.3d 431, 435, 646 N.E.2d 1138, wherein this court stated that "to avoid the expense of filing a complete verbatim transcript in a small claims proceeding, the party objecting to the report of a referee may file an affidavit of the evidence presented at the hearing to support its objections to the report and recommendations of a referee." Kest's reference to *Chaney* is not helpful.

{¶ 9} First, neither Civ.R. 53(E) nor *Pappenhagen v. Payne* (1988), 48 Ohio App.3d 176, 549 N.E.2d 208, cited in *Chaney,* stand for the proposition

that a party may file an affidavit, even where a transcript is available, in order to avoid the expense of having the transcript prepared. Civ.R. 53(E) specifically provides that an affidavit of the evidence may be supplied only if a transcript of the hearing is unavailable. A transcript is not "unavailable" simply because an appellant elects for financial reasons not to obtain one. *Csongei v. Csongei* (July 30, 1997), 9th Dist. No. 18143.

{¶ 10} Likewise, *Pappenhagen* makes no mention whatsoever of filing an evidentiary affidavit to avoid the expense of procuring a transcript. Instead, citing Civ.R. 53(E), the *Pappenhagen* court correctly stated that "[a] party who objects to the factual findings of a referee is required to support the objection with excerpts from the hearing transcript or with an affidavit if no transcript is available." Id. at 178. The court stated further that where an affidavit is utilized, the affidavit must contain all the relevant evidence on the disputed finding, instead of just the evidence the objecting party believes was disregarded. Id. Because the affidavit submitted in *Pappenhagen* was not a complete account of the evidence presented at the hearing, the court held that the trial court was not obliged to reject the referee's finding to which the appellant objected.

{¶ 11} Kest's reference to *Chaney*'s pronouncement that a party may file an affidavit to avoid the expense of procuring a transcript is also not helpful because the court's statement was merely dicta. Unlike in this case, an

affidavit instead of a transcript was acceptable in *Chaney* because there was no verbatim recording of the hearing before the referee. Id. at 433. Because an affidavit was acceptable, there was no need for the *Chaney* court to address the propriety of the filing of an affidavit instead of a transcript. Hence, the court's statement that a party may file an affidavit instead of a transcript in order to avoid the expense of procuring a transcript was merely dicta without any precedential value or effect. See, e.g., *Kemp v. Matthews* (1962), 89 Ohio L.Abs. 524, 183 N.E.2d 259.

{¶ 12} Here, despite Bennett Kest's averment that he was filing an evidentiary affidavit instead of a transcript because the transcript was unavailable, it is apparent from Kest's filing of the transcript on appeal that a transcript was indeed available. Where a party objecting to a magistrate's report fails to provide the trial court with the evidence and documents by which the court could make a finding independent of the report, appellate review of the trial court's judgment is limited to whether the court abused its discretion in adopting the magistrate's report, i.e., whether the trial court's application of the law to its factual findings was an abuse of discretion.[1] *State ex rel. Duncan v. Chippewa Twp. Trustees* (1995), 73 Ohio St.3d 728, 730, 654 N.E.2d 1254; *Southworth v. Southworth*, 8th Dist. No. 80704,

[1]"Abuse of discretion" implies that the court's attitude was unreasonable, arbitrary or unconscionable. *Landis v. Grange Mut. Ins. Co.*, 82 Ohio St.3d 339, 342, 1998-Ohio-387, 695 N.E.2d 1140.

2003-Ohio-4, ¶8. Further, the appellate court is precluded from considering the transcript of the hearing submitted with the appellate record. *State ex rel. Duncan* at 730.

{¶ 13} We find no abuse of discretion here. The magistrate found that Kest contracted with Mould's, did not disclose its principal to Mould's, and did not tell Mould's that the principal would be responsible for paying all bills. Further, the magistrate found that Mould's representative, who testified that the agency relationship had never been disclosed, was more credible than Kest's representative, who testified that Mould's was aware of the agency relationship. To preclude personal liability, the agent must disclose not only his principal, but also the agency relationship. *Sommer*, supra at 104. Because Kest did not disclose the agency relationship nor the principal, the trial court did not err in adopting the magistrate's decision finding Kest liable for the unpaid invoices.

{¶ 14} Appellant's assignments of error are overruled and the judgment of the trial court is 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 said 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.

CHRISTINE T. McMONAGLE, JUDGE

KENNETH A. ROCCO, P.J., and
ANN DYKE, J., CONCUR