

[Cite as *Lombardo v. Jeld-Wen, Inc.*, 2011-Ohio-622.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95515

MICHAEL R. LOMBARDO

PLAINTIFF-APPELLANT

vs.

JELD-WEN, INC.

DEFENDANT-APPELLEE

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Berea Municipal Court
Case No. 10 CVI 00438

BEFORE: Boyle, J., Rocco, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: February 10, 2011

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MARY J. BOYLE, J.:

{¶ 1} This case came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1.

{¶ 2} Plaintiff-appellant, Michael Lombardo, appeals from a judgment of the Berea Municipal Court, Small Claims Division, overruling Lombardo's objections to the magistrate's decision and granting judgment in favor of defendant-appellee, Jeld-Wen, Inc. For the reasons discussed below, we affirm.

Procedural History and Facts

{¶ 3} In his small claims complaint, Lombardo sought to recover the amount of money he paid for a Jeld-Wen fiberglass patio door plus the cost of installation, for a total of \$3,000. Lombardo alleged a breach of contract claim, asserting that the door was a faulty unit because, shortly after the door was installed, the door jambs were splitting. At trial, Jeld-Wen denied the allegations and countered that any defect in the unit arose out of Lombardo's failure to paint and properly caulk the door, which exempts Jeld-Wen from any liability under the warranty. The case was heard before a magistrate, who ultimately concluded that Lombardo failed to sustain his burden and granted judgment in favor of Jeld-Wen. Lombardo objected to the magistrate's decision but the trial court adopted the decision, entering judgment in favor of Jeld-Wen.

{¶ 4} Lombardo appeals, raising three assignments of error:

{¶ 5} "I. The magistrate committed prejudicial error by advising defendant on court rules and procedure in violation of court rules and by granting a continuance for a defendant to return with an attorney in violation of court rules and the appellant's right to due process by the 14th Amendment of the U.S. Constitution and by Article I, Section 16, of the Ohio Constitution.

{¶ 6} "II. The magistrate created the presumption of impropriety by engaging in ex-parte communications.

{¶ 7} "III. The magistrate failed to rule on the merits of the case by ignoring the

facts of the case concerning the timing of product failure.”

Grant of a Continuance

{¶ 8} In his first assignment of error, Lombardo argues that his rights to due process were violated and that he was unfairly prejudiced when (1) the magistrate advised Jeld-Wen’s representative, a non-attorney, that he should obtain counsel; and (2) the magistrate continued the case to allow Jeld-Wen to obtain counsel. We find no basis to conclude that Lombardo’s rights were prejudiced.

{¶ 9} Initially, we note that the record only reveals that a continuance was granted to allow Jeld-Wen to obtain counsel. It is well settled that “the decision whether to grant a continuance is within the sound discretion of the trial court.” *Hartt v. Munobe*, 67 Ohio St.3d 3, 9, 1993-Ohio-177, 615 N.E.2d 617. A reviewing court therefore should not reverse the trial court’s decision absent an abuse of discretion. *Id.* Here, we find no evidence that the trial court abused its discretion in continuing the trial for 30 days so that Jeld-Wen could obtain an attorney. Nor does Lombardo cite any authority that the grant of the continuance constituted an abuse of discretion. See App.R. 16(A)(7).

{¶ 10} As for Lombardo’s allegations of the magistrate rendering legal advice and commenting on the amount of the controversy, Lombardo has failed to cite to any reference in the record to support his claim. See App.R. 16(A)(3). Further, we have no record of the colloquy between the magistrate and Jeld-Wen’s representative that Lombardo now

complains as prejudicing his rights. Lombardo failed to file an App.R. 9(C) or (D) statement in support of this alleged error despite his responsibility to include all of the evidence in the appellate record so that the claimed error is demonstrated to the reviewing court. See *In re Guardianship of Muehrcke*, 8th Dist. Nos. 85087 and 85183, 2005-Ohio-2627.

{¶ 11} But regardless, even if the magistrate had advised Jeld-Wen’s representative to obtain an attorney, Lombardo fails to demonstrate or argue how he was prejudiced by such action. Moreover, it is within a trial court’s discretion to advise a litigant of the risks of proceeding pro se, and such a statement does not amount to improper legal advice. See *CAT-Rental Store v. Sparto*, 12th Dist. No. CA2001-08-024, 2002-Ohio-614.

{¶ 12} Accordingly, the first assignment of error is overruled.

Ex Parte Communications

{¶ 13} In his second assignment of error, Lombardo states that “[t]he magistrate created the presumption of impropriety by engaging in ex-parte communications.” Lombardo, however, has failed to comply with the appellate rules in support of this assignment of error. He again fails to cite to any reference in the record in support of this claim. See App.R. 16(A)(3). He further fails to raise any argument as to how he was prejudiced by the alleged ex parte communication or as to what relief he is seeking from this court. See App.R. (A)(7). To the extent that he is purporting to allege that the magistrate

was biased, we note that, aside from failing to demonstrate any bias by the magistrate, Lombardo never filed a motion to disqualify the magistrate with the trial court below. See Civ.R. 53(D)(6).

{¶ 14} The second assignment of error is overruled.

Manifest Weight of the Evidence

{¶ 15} In his final assignment of error, Lombardo essentially argues that the trial court's decision is against the manifest weight of the evidence. He contends that the magistrate failed to take into consideration his testimony and the evidence that he paid for a "correctly assembled door unit and received the exact opposite." Lombardo further argues that the magistrate found in Jeld-Wen's favor based on the erroneous belief that he failed to timely complain and that he failed to follow installation instructions.

{¶ 16} In *State v. Wilson*, 113 Ohio St.3d 382, 387, 2007-Ohio-2202, 865 N.E.2d 1264, the Ohio Supreme Court clarified the civil manifest weight of the evidence standard, stating the following:

{¶ 17} "[T]he civil manifest-weight-of-the-evidence standard was explained in *C.E. Morris Co. v. Foley Constr. Co.* [1978], 54 Ohio St.2d 279, 8 O.O.3d 261, 376 N.E.2d 578, syllabus ('Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence'). We have also recognized when reviewing a judgment

under a manifest-weight-of-the-evidence standard, a court has an obligation to presume that the findings of the trier of fact are correct. * * * This presumption arises because the trial judge [or finder-of-fact] had an opportunity ‘to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.’ * * * ‘A reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court. A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not.’” Id. at ¶24. (Internal citations omitted.)

{¶ 18} The magistrate found that Lombardo failed to establish by a preponderance of the evidence the allegations of the complaint. We find that competent, credible evidence exists that supports this conclusion. Although the parties disputed whether the door was defective from the time it left the factory floor, there was no dispute that Lombardo failed to paint the door. The record also contains an inspection report stating that the door had not been properly painted or caulked and Jeld-Wen offered photographs at trial in support of same. Further, Jeld-Wen’s representative, Mike Ferguson, testified at trial that Jeld-Wen denied Lombardo’s claim because the damage to the door was a result of “not being painted or caulked properly.” And under the warranty between Jeld-Wen and Lombardo, Jeld-Wen has no liability for damage to the door arising from improper finishing, i.e., failure to paint or

properly caulk the door. Based on this evidence, we cannot say that the trial court's decision is against the manifest weight of the evidence.

{¶ 19} Lombardo's final 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 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.

MARY J. BOYLE, JUDGE

KENNETH A. ROCCO, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR