

[Cite as *Landa v. Campuseai, Inc.*, 2016-Ohio-298.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103013

BRIAN LANDA

PLAINTIFF-APPELLEE

vs.

CAMPUSEAI, INC.

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-802633

BEFORE: Boyle, J., E.A. Gallagher, P.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: January 28, 2016

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MARY J. BOYLE, J.:

{¶1} Defendant-appellant, CampusEAI, Inc., appeals from a judgment denying its motion to stay and compel arbitration. CampusEAI raises two assignments of error for our review:

1. The trial court erred by denying CampusEAI's motion to stay and compel arbitration, because the employment agreement contained a mandatory and enforceable arbitration clause.
2. The trial court erred by entering judgment without jurisdiction and contrary to Civ.R. 63(B) when a successor judge — who did not try the case — entered judgment even though his predecessor — who tried the case — did not file findings of fact and conclusions of law.

{¶2} After review, we find no merit to CampusEAI's arguments, and affirm the judgment of the trial court.

I. Procedural History and Factual Background

{¶3} In March 2013, plaintiff-appellee, Brian Landa, filed a complaint against CampusEAI, alleging that CampusEAI terminated him without reasonable cause in violation of the parties' employment agreement. In May 2013, CampusEAI moved to stay the proceedings and compel arbitration. The trial court denied CampusEAI's motion in June 2013.

{¶4} The matter proceeded to a bench trial in March 2014. At trial, four witnesses testified for CampusEAI: (1) Anjli Chopra (via videotape), the executive director of CampusEAI and the person who made the decision to fire Landa; (2) Michael Dore, ConnectWise administrator (CampusEAI's time-keeping system); (3) Scott Gallagher, an information technology employee at CampusEAI who worked with Landa

on a project called Xorcom; and (4) Landa on cross-examination. Landa also testified in his case-in-chief.

{¶5} On September 20, 2012, Landa and CampusEAI entered into an employment agreement from September 20, 2012 to September 20, 2014. Landa was hired as a network analyst for CampusEAI. Under the employment agreement, Landa could only be terminated for: (1) reasonable cause, (2) refusal to adequately perform duties of employment, or (3) failure or refusal to adhere to terms of the agreement or to the reasonable policies and regulations established by the employer. CampusEAI terminated Landa on January 16, 2013. CampusEAI bore the burden of proving that it terminated Landa pursuant to the agreement.

{¶6} Anjali Chopra testified that she made the decision to terminate Landa for only two reasons: (1) his deficient time entries, and (2) his failure to deliver on the Xorcom project. Chopra indicated that she made the decision to terminate Landa based upon the recommendation of Naresh Bishnoi, who informed her that Landa failed to deliver on the Xorcom project. But Chopra could not state what Landa did wrong on the Xorcom project or how he failed to deliver. Bishnoi did not testify.

{¶7} Regarding Landa's time deficiencies, Chopra reviewed documents on a computer as she was testifying, but had not given the documents to Landa to view as she was explaining it. Landa objected, claiming that he could not effectively cross-examine her without having the documents.¹

¹The facts from Chopra's testimony are gleaned from the parties' briefs and the trial

{¶8} Dore stated that he performed audits in the company's timekeeping system, Connect-Wise. Dore explained that every employee must take an online class when they start working at CampusEAI that teaches the employee how to input his or her time in Connect-Wise. Dore explained that CampusEAI uses this system to bill its customers, as well as keeps track of its internal costs.

{¶9} In mid-December, Dore stated that he conducted a random audit of Landa's time entries. He discovered that beginning on November 10, 2012, Landa started to enter his time improperly. CampusEAI entered Landa's purported time entries from the time he started employment until the day he was fired into evidence. But the date of the document was September 13, 2013, nine months after Landa had been terminated. Dore did not enter his audit of Landa's time entries into evidence.

{¶10} Dore stated that he told Michael DeJohn, general counsel for CampusEAI, about Landa's deficient time entries. DeJohn is the one who actually told Landa that he was being fired. DeJohn, however, said (in his deposition, which was entered into evidence) that no one reported Landa's time deficiencies to him.

{¶11} Scott Gallagher testified that he worked with Landa on the Xorcom project. He believed that Landa was the lead person on the project. Gallagher could not say anything that Landa did wrong on the project, but did think that Landa "washed his hands" of the project toward the end of it. When asked why he thought that, he said

transcript. We note, however, that Chopra's actual testimony is not in the trial transcript. Chopra was in India at the time of trial. She testified via videotape recorded a few days before trial. The videotape is not in evidence on appeal.

because Landa would have Gallagher answer any questions that people had about the project, rather than answer them himself. On cross-examination, however, Gallagher admitted that as lead on the project, Landa could delegate the questions to him.

{¶12} Landa testified that he was hired mainly to work on Shorter University's computer networking issues, but then he also began working on projects at Naropa University, Sofia University, and Raritan Valley Community College. In addition to those projects, Landa stated that he simultaneously worked on the Xorcom project beginning sometime in October 2012. Landa stated that no one ever gave him a project plan regarding Xorcom, or ever told him that there was a deadline on the Xorcom project.

Landa further stated that no one ever told him that he had done something wrong on the project. Landa entered chains of email into evidence, showing that he had been working on the Xorcom project just two days before he was fired.

{¶13} As for delegating work to Gallagher, Landa explained that he only delegated questions to Gallagher that involved issues of Gallagher's expertise; Landa said that Gallagher was better equipped to answer those questions. Landa denied that he had "washed his hands" of the project, stating that he did not delegate all questions to Gallagher.

{¶14} Regarding his time entries, Landa explained that he was off site, working at Raritan Valley in New Jersey, from mid-November to mid-December. While at Raritan, he said that he kept track of his projects by entering his time in a different system because there were no time codes in Connect-Wise for the Raritan Valley project (something Dore

admitted). Landa said that no one ever told him that he was entering his time wrong. According to Dore's and DeJohn's testimony, the time sheets are reviewed by an employee's supervisor every week; if not, the employee would not get paid. DeJohn further stated that if Landa's time sheet had been rejected, he should have had a chance to correct it and resubmit it. Landa said that his time sheet was approved every week.

{¶15} At the close of the trial, Landa filed a motion for Civ.R. 52 statement of findings of fact and conclusions of law. Both parties submitted closing arguments and proposed findings of fact and conclusions of law. In August 2014, a successor judge, who had indefinitely taken over the assigned judge's docket because of the assigned judge's unavailability, granted Landa's Civ.R. 52 motion, finding it to be unopposed.

{¶16} On November 10, 2014, the successor judge entered judgment in favor of Landa, finding that CampusEAI failed to establish that it terminated Landa with reasonable cause as required by the employment agreement. On November 12, 2014, CampusEAI moved for a new trial. On April 9, 2015, the trial court denied CampusEAI's motion for a new trial. CampusEAI filed its notice of appeal on May 8, 2015, indicating that it was appealing the trial court's November 10, 2014 and April 9, 2015 judgment entries.

II. Motion to Stay

{¶17} In its first assignment of error, CampusEAI argues that the trial court erred when it denied its motion to stay the proceedings and compel arbitration. We do not

reach the merits of this argument, however, because CampusEAI did not file an appeal from the court's denial of his motion within 30 days as required by App.R. 4.

{¶18} R.C. 2711.02(C) states that “an order under division (B) of this section that grants or denies a stay of a trial of any action pending arbitration * * * is a final order * * * [.]” App.R. 4(A) requires a party to file a notice of appeal within 30 days of the entry of the order being appealed. Once the court either grants or denies a stay pending arbitration, the order becomes final and must be appealed if the party intends to challenge the court's decision. *Fazio v. Gruttadauria*, 8th Dist. Cuyahoga No. 90562, 2008-Ohio-4586, ¶ 20, citing *Schmidt v. Bankers Title & Escrow Agency, Inc.*, 8th Dist. Cuyahoga No. 88847, 2007-Ohio-3924, ¶ 11.

{¶19} The trial court denied CampusEAI's motion to stay in June 2013. CampusEAI did not appeal that decision within 30 days as required by App.R. 4(A). Thus, CampusEAI's has waived this issue for purposes of appeal.

{¶20} Further, in its notice of appeal, CampusEAI did not specify that it was appealing the June 2013 entry. Rather, it indicated that it was appealing the trial court's November 10, 2014 judgment in favor of Landa and the April 9, 2015 judgment denying its motion for a new trial. App.R. 3(D) states in pertinent part that “[t]he notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken.” As we stated in *TJX Cos. v. Hall*, 183 Ohio App.3d 236, 2009-Ohio-3372, 916 N.E.2d 862 (8th Dist.), this court has “consistently declined jurisdiction to review a

judgment or order that is not designated in the notice of appeal.” *Id.* at ¶ 43, citing *Robinson v. Allstate Ins. Co.*, 8th Dist. Cuyahoga No. 84666, 2004-Ohio-7032 (and a string of other Eighth District cases).

{¶21} Accordingly, for both of these reasons, we overrule CampusEAI’s first assignment of error.

III. Civ.R. 63(B)

{¶22} In its second assignment of error, CampusEAI argues that the successor judge did not have jurisdiction to enter judgment on the case under Civ.R. 63(B) because the judge did not preside over the trial, and the originally assigned judge never issued findings of fact before he left the bench. CampusEAI maintains that because the successor judge did not view the witnesses, he could not make credibility determinations to properly issue findings of fact.

{¶23} Civ.R. 63(B), disability of a judge after verdict or findings, states:

If for any reason the judge before whom an action has been tried is unable to perform the duties to be performed by the court after a verdict is returned or findings of fact and conclusions of law are filed, 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 perform those duties; but if such other judge is satisfied that he cannot perform those duties, he may in his discretion grant a new trial.

{¶24} The successor judge can finish the remaining matters in a case without conducting a new trial unless, however, the successor judge believes that he or she “cannot perform those duties.” *Id.* Under this rule, a successor judge can exercise the same powers and has a right to act on every case as fully as his or her predecessor could

have done. *Witt v. Akron Express, Inc.*, 159 Ohio App.3d 164, 2004-Ohio-6837, 823 N.E.2d 473, ¶ 14 (4th Dist.), citing *Lance v. Slusher*, 74 Ohio App. 361, 59 N.E.2d 57 (1st Dist.1944).

{¶25} Civ.R. 63(B) places the decision to grant or deny a new trial entirely within the discretion of the successor judge. *Adkins v. Adkins*, 43 Ohio App.3d 95, 100, 539 N.E.2d 686 (4th Dist.1988). In *Adkins*, the court explained the successor judge's discretion under Civ.R. 63(B) as follows:

While it is always desirable to have the factfinder personally observe the witnesses whose credibility he or she is called upon to determine, considerations of judicial economy may weigh against the additional delay and expense represented by a new trial. Civ.R. 63(B) leaves it to the trial court to balance these factors along with any other relevant factors in exercising its discretion whether to order a new trial.

{¶26} Where credibility is a factor, however, this court, as well as others, has held that a “successor judge cannot render a judgment on the transcript when witness credibility is a factor.” *Vergon v. Vergon*, 87 Ohio App.3d 639, 643, 622 N.E.2d 1111 (8th Dist.1993). *See also Kvinta v. Kvinta*, 10th Dist. Franklin No. 99AP-508, 2000 Ohio App. LEXIS 607 (Feb. 22, 2000) (no error where “[c]redibility was not an issue”); *Stychno v. Stychno*, 11th Dist. Trumbull No. 97-T-0003, 1998 Ohio App. LEXIS 3749 (Aug. 14, 1998) (no abuse of discretion in failing to hold a new hearing where no “crucial issues of credibility”); *Myers v. Wild Wilderness Raceway, L.L.C.*, 181 Ohio App.3d 221, 2009-Ohio-874, 908 N.E.2d 950 ¶ 33 (4th Dist.) (no error where “none of the modifications that the successor judge made to the * * * judgment dealt with matters that depended on assessing the weight and credibility of testimony”).

{¶27} Thus, in this case, we must determine whether the trial court abused its discretion when it issued findings of fact and conclusions of law when it was not the judge who presided over the trial.

IV. Analysis

{¶28} After making 33 findings of fact, the trial court issued its conclusions of law. It concluded that “defendant’s termination of plaintiff was not in compliance with the terms of the employment agreement.” In reaching this conclusion, the trial court explained:

1. The Employment Agreement, at paragraph 4, provided that Plaintiff’s employment could only be terminated for: 1) reasonable cause; 2) refusal to adequately perform duties of employment; or 3) failure or refusal to adhere to terms of the Employment Agreement or to the reasonable policies and regulations established by employer (i.e., handbook policies/procedures);
2. Defendant presented no evidence of the terms, provisions, procedures and policies of any employee handbook. Defendant did not offer into evidence any handbook or corporate policies. Accordingly, this Court concludes that there is no evidence proving that Plaintiff failed or refused to adhere to the terms of the Employment Agreement or to the reasonable policies and regulations established by Defendant.
3. Additionally, Defendant failed to present any evidence that plaintiff “refused” to adequately perform his duties. Therefore, this Court concludes that there is no evidence proving that Plaintiff “refused” to adequately perform his duties.

{¶29} In determining that “defendant did not have reasonable cause to terminate plaintiff,” the trial court made the following conclusions:

1. According to Defendant, Plaintiff was terminated for two reasons: 1) deficiencies in entering time; and 2) failure to “deliver” the Xorcom Project. Anjali Chopra, who made the decision to terminate Plaintiff, presented no

evidence as to what Plaintiff did improperly or wrong with regard to the Xorcom project. Specifically, no evidence was presented to show:

- a. Plaintiff's job duties with regard to the Xorcom project or the time frame to perform on the project;
- b. Plaintiff was given notice of inadequate performance on the Xorcom project;
- c. Plaintiff was given a plan to follow with regard to the Xorcom project and failed to follow it; or,
- d. Plaintiff was disciplined for any shortcomings with the project.

The only reason provided by Ms. Chopra for Plaintiff's termination was Plaintiff's failure to "deliver," without an explanation of the term "deliver."

Therefore, this Court concludes that terminating Plaintiff because he failed to "deliver" the Xorcom project is not reasonable or just cause for termination.

{¶30} Regarding Landa's "deficient time entries," the court concluded:

a. [T]he only evidence presented as to Plaintiff's time entries is Defendant's Exhibit 2, which is an unauthenticated summary of time entries dated September 13, 2013, nine months after Plaintiff's termination. It was established through Plaintiff's testimony that Plaintiff never saw these alleged time entries until his deposition on January 31, 2014. The description of "work role" on the time entries did not match Plaintiff's work role. Plaintiff is certain that when he entered time his "work role" was entitled network analyst. Plaintiff is also certain that the summaries do not reflect various detail fields and file attachments that he remembers entering along with his time to show the work he was doing. Thus, there is doubt as to the authenticity and trustworthiness of Defendant's Exhibit 2;

b. [T]he credibility of Defendant's Exhibit 2 is further reduced since Anjali Chopra failed to have a copy of the exhibit to authenticate and answer questions about on cross-examination during trial. No evidence was presented as to the time entries Ms. Chopra actually reviewed in making the decision to terminate Plaintiff on January 16, 2013;

c. [O]n January 16, 2013, Michael DeJohn never informed Plaintiff when he terminated him that the reason for the termination was the failure to

correctly enter time. Mr. DeJohn told Plaintiff he was being terminated for “performance.” Michael Dore, however, testified he told Mr. DeJohn in mid-December 2012 that Plaintiff had deficiencies in his time entries and he did an audit of Plaintiff’s time to show Mr. DeJohn. Yet, this audit was never introduced into evidence. To the contrary, Mr. DeJohn avers that he knew nothing about any time entry problems. In fact, in mid-December 2012, Mr. DeJohn was praising Plaintiff’s job performance;

d. [I]n February 2013, in response to inquiries from the Office of Unemployment Compensation as to the reason for Plaintiff’s termination, Defendant failed to present any evidence to the OOUC of deficient time entries by Plaintiff. Mysteriously, on the same day that the discovery period ends in this case, September 13, 2013, Defendants suddenly produce a summary of allegedly deficient time entries also dated September 13, 2013. However, not one single document from the time period that Plaintiff was an employee was entered into evidence to show that Plaintiff incorrectly entered his time;

e. [E]ven if Defendant’s Exhibit 2 is assumed to be credible, the fact remains that Plaintiff’s time entries were approved by a time approver. No evidence was presented that the time approver ever rejected Plaintiff’s time entries. This is crucial because Mr. DeJohn testified that if Plaintiff’s time entries would have been rejected as deficient or improper he would have had an opportunity to correct and re-submit the questionable entries. There is no evidence that this ever happened. Plaintiff was never warned by anyone that he was incorrectly entering his time. Plaintiff was never told he was violating any handbook provisions or procedures. Plaintiff was trained to enter time into Connect-Wise, but this training was for general use of the system which he knew. He never received specific training on what codes to use for Defendant and its customers. Plaintiff simply was never given an opportunity to defend himself or given due process; and,

f. [T]he evidence shows that three other Defendant employees were also deficient in entering their time; Mr. DeJohn testified in deposition that they, like Plaintiff, had training, so they were expected to know how to bill their time correctly. But unlike Plaintiff, they were only disciplined and not terminated. Mr. DeJohn failed to attend the trial and testify. No evidence was present to show that Plaintiff’s time entry deficiencies were worse than the other three employees who were not terminated.

Based on the foregoing, this Court concludes that the evidence is insufficient to prove that terminating Plaintiff for deficient time entries was reasonable or just cause for his termination. Furthermore, this Court concludes that record is devoid of any evidence that justifies Plaintiff's dismissal for reasonable or just cause. As such, this Court concludes that Defendant failed to demonstrate reasonable cause for Plaintiff's termination. Therefore, Defendant is liable for Plaintiff's wrongful discharge.

{¶31} CampusEAI argues that the trial court's findings depended on credibility assessments. Specifically, it points to three instances where it argues that credibility was at issue: (1) Landa testified that he did not receive any training "specifically showing him how to enter his time and no notice that he had mis-entered his time," but Michael Dore testified that Landa received training on how to bill his time; (2) Landa denied that he failed to perform his work, but Anjali Chopra, executive director of CampusEAI, testified that he "failed to deliver a project called 'Xorcom'"; and (3) the witnesses also differed on what "deliver" the project meant, what the project required, and when CampusEAI required the project.

{¶32} After review, however, we disagree with CampusEAI that these instances amount to differences in "crucial issues of credibility." *See Stychno*, 11th Dist. Trumbull No. 97-T-0003, 1998 Ohio App. LEXIS 3749. Even assuming that CampusEAI is correct that these three instances amount to credibility assessments, they were not material to the trial court's judgment. Regarding the first instance as to what training Landa received on entering his time, Landa and Dore's testimonies do not conflict; Dore testified that Landa received the training on Connect-Wise when he first started at CampusEAI. But Landa does not dispute this. Indeed, Landa acknowledged

that he may have received the initial training on Connect-Wise. Landa explained, however, that he already knew how to use Connect-Wise, but he said that he never received specific training on how to enter time in Connect-Wise using CampusEAI's specific charge codes and functions. Although Dore did not believe Landa that he did not know how to do it, Dore's and Landa's statements do not conflict.

{¶33} Moreover, Dore's testimony does not change the fact that the trial court concluded that the time documents at issue were suspect because they were printed nine months after Landa was terminated. Further, the trial court noted that even assuming the time documents were credible, it did not change the fact that Landa's time sheets were always approved by his supervisor. Thus, even assuming that Dore's and Landa's testimony conflicted, it was not material to the trial court's ultimate conclusions of law regarding this issue.

{¶34} As to the second and third instances of witness credibility according to CampusEAI — regarding Landa's job performance on the project Xorcom, the parties' differences on what the “delivering” the project meant, and what the project actually required — we find that the differences in Landa's and Chopra's testimony are irrelevant to the trial court's holding. Chopra may have testified that Landa “failed to deliver” on Xorcom, but the trial court concluded that Chopra never explained what she meant by “deliver.” Thus, credibility was not an issue regarding Landa's and Chopra's conflicting testimony on this issue.

{¶35} Under the agreement, CampusEAI could only terminate Landa for three reasons: (1) reasonable cause; (2) refusal to adequately perform duties of employment; or (3) failure or refusal to adhere to the terms of the employment agreement or to the reasonable policies and regulations established by the employer. The successor judge in this case concluded that CampusEAI did not meet that burden based on its consideration “of all the testimony, exhibits, and evidence” that were submitted during the trial presided over by the original judge. After review, we conclude that it did not abuse its discretion in entering judgment for Landa because — as it indicated — it could do so by considering the testimony, exhibits, and evidence during the trial without making crucial credibility determinations.

{¶36} CampusEAI’s second assignment of error is overruled.

{¶37} Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas 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

EILEEN A. GALLAGHER, P.J., and

FRANK D. CELEBREZZE, JR., J., CONCUR