[Cite as *Barker Invests., L.L.C. v. Cleveland Plating, L.L.C.*, 2019-Ohio-2435.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

BARKER INVESTMENTS, L.L.C., :

Plaintiff-Appellant, :

No. 107367

v. :

CLEVELAND PLATING, L.L.C., :

Defendant-Appellee. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: June 20, 2019

Civil Appeal from the Cleveland Municipal Court
Housing Division
Case No. 2017 CVG 015219

Appearances:

Roetzel & Andress, L.P.A., Timothy B. Pettorini, and Lucas K. Palmer, *for appellant*.

Koehler Fitzgerald, L.L.C., and Christine M. Cooper, *for appellee*.

SEAN C. GALLAGHER, J.:

{¶ 1} Plaintiff-appellant Barker Investments, L.L.C. ("Barker"), appeals the judgment of the Cleveland Municipal Court, Housing Division, that entered judgment for defendant-appellee Cleveland Plating, L.L.C. ("Cleveland Plating"), on

the plaintiff's complaint for forcible entry and detainer. Upon review, we affirm the decision of the trial court.

{¶ 2} On October 19, 2017, Barker filed a complaint for forcible entry and detainer against Cleveland Plating. Barker claimed that Cleveland Plating had executed a sham lease for a commercial premises owned by Barker, that no person had authority to execute the lease on behalf of Barker, and that the lease was invalid. Barker also claimed that even if the lease were determined to be valid and enforceable, Cleveland Plating breached the lease by nonpayment of rent. Barker sought an order of restitution granting Barker possession of the premises and ordering Cleveland Plating to vacate the premises.

{¶ 3} During the course of proceedings, J.P. Morgan Chase Bank, N.A. ("Chase"), filed a motion seeking to intervene in the action, claiming that it had filed a foreclosure action regarding the property. The trial court denied the motion as untimely.[1]

{¶ 4} The case proceeded to trial. The magistrate issued a decision on May 31, 2018, that included detailed findings of fact and conclusions of law.

{¶ 5} The magistrate found in favor of Cleveland Plating on the claim that the lease was invalid. Magistrate's decision ¶ 77. The magistrate found that Benjamin Dagley, the owner of Barker and Barker Products Company, which were

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[1] We note that in the foreclosure action, *J.P. Morgan Chase Bank, N.A. v. Barker Invests., L.L.C.*, Cuyahoga C.P. No. CV-17-890592, a magistrate's decision was issued on May 16, 2019, that found in favor of Chase and issued a decree of foreclosure. Although it would appear this action may become moot upon a final judgment entry in that case, neither party has moved to stay or to dismiss this appeal.

referred to jointly as "Barker" and run together as one business operation, had clothed Elba Wade with authority to bind the companies by Dagley's words and his deeds. Magistrate's decision ¶ 68-75. The magistrate found that Dagley told Wade he was president and in charge of the "business," and that Dagley, who remained absent from the business, held Wade out as having authority to bind the companies as part of a resolution of the companies' debts to Chase. Magistrate's decision ¶ 72-75. The magistrate determined that the elements of apparent authority were satisfied, that Dagley had vested Wade with apparent authority to "do the deal," and that Wade had authority to sign the 2015 lease on behalf of Barker. Magistrate's decision ¶ 74-77.

{¶ 6} The magistrate also found in favor of Cleveland Plating on the claim for possession for nonpayment of rent. Magistrate's decision ¶ 79. The magistrate determined that Dagley accepted a check for $5,000 in March 2017, which was the exact amount due under the lease at the time the payment was made, and the magistrate rejected the argument that this was a settlement, as opposed to rent. Magistrate's decision ¶ 78. Additionally, the magistrate found that Dagley accepted a rent payment for April 2017 by holding a separate $200 rent check without communication to Cleveland Plating, and thereby waived the three-day notice served at the end of March 2017. Magistrate's decision ¶ 79.

{¶ 7} The magistrate's decision included a notice that any objections were required to be filed within 14 days, even if the trial court provisionally adopted the decision before that time, and that a party may not assign an error on appeal unless

timely and specific objections are made as required by Civ.R. 53(E)(3). The trial court approved the magistrate's decision and entered judgment in favor of Cleveland Plating on May 31, 2018. No objections to the magistrate's decision were filed.

{¶ 8} Barker has appealed the judgment of the trial court.

{¶ 9} Under its first assignment of error, Barker claims the trial court erred in finding Elba Wade had apparent authority to execute the lease because Barker derived no benefit from the lease. Barker argues that Wade acted for his own benefit and as an employee of Cleveland Plating in signing the lease. Barker states the terms of the lease provide for a rent of $200 per month with a ten-year term that can be extended another ten years without an increase in rent, which results in a loss to Barker when subtracting the rent from the real estate taxes Barker is obligated to pay. Barker takes issue with the trial court's determination that a variance in terms might be expected because "the Lease was intended to fill a gap until the foreclosure was completed." Nonetheless, the trial court determined that Wade was clothed with apparent authority to bind Barker and that "the Lease appears valid when taken in the context of the actors' ultimate work out of the debts of Dagley's companies."

{¶ 10} Barker claims under its second assignment of error that the trial court's determination that Wade had authority to execute the lease and its decision to deny eviction is against the manifest weight of the evidence. The magistrate made numerous findings that supported its determination. Finally, under the third assignment of error, Barker claims that the trial court's finding that the $5,000 payment constituted payment of rent is against the manifest weight of the evidence.

Barker argues that this was intended to be a partial payment to temporarily cease Dagley's use of self-help actions, and that if the payment had been for rent, it would have been sent to Chase. As determined by the trial court, this amount was the exact amount due under the lease at the time the payment was made and was a logical resolution to the attempted self-help.

{¶ 11} Initially, we must recognize that Barker did not file any objections to the magistrate's decision. As indicated by the Supreme Court of Ohio, "Civ.R. 53(D)(3)(a)(iii) specifically prohibits a party from 'assign[ing] as error on appeal the court's adoption of any finding of fact or legal conclusion, * * * unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).'" *State ex rel. Johnson v. Ryan*, 127 Ohio St.3d 267, 2010-Ohio-5676, 939 N.E.2d 146, ¶ 3. Additionally, Civ.R. 53(D)(3)(b)(iv) instructs that the failure to so object results in a waiver of the right to assign adoption by the court as an error on appeal, except for a claim of plain error. In civil cases, plain error is limited "strictly to those extremely rare cases where exceptional circumstances require its application to prevent a manifest miscarriage of justice, and where the error complained of, if left uncorrected, would have a material adverse effect on the character of, and public confidence in, judicial proceedings." *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 121, 1997-Ohio-401, 679 N.E.2d 1099.

{¶ 12} Insofar as an App.R. 9(C) statement has been submitted, we recognize that "[i]n cases initially heard in the trial court by a magistrate, a party may use [an App.R. 9(C) statement] in lieu of a transcript if the error assigned on

appeal relates solely to a legal conclusion." However, with regard to a challenge to factual findings to which no objections were filed, the fact that a party supplies a statement under App.R. 9(C) is of no consequence since appellate review of those findings is precluded. *State ex rel. Pallone v. Ohio Court of Claims*, 143 Ohio St.3d 493, 2015-Ohio-2003, 39 N.E.3d 1220, ¶ 11-13, citing App.R. 9(C)(2) and Staff Notes to July 1, 2013 Amendment to App.R. 9(C)(2).

{¶ 13} Because Barker did not timely and specifically object to any factual finding or legal conclusion in the magistrate's decision as required by Civ.R. 53(D)(3)(b), Barker has waived the right to appellate review of all but plain error. Barker has not argued, much less demonstrated, any plain error in this matter. As provided under Civ.R. 53(D)(4)(c), "[i]f no timely objections are filed, the court may adopt a magistrate's decision, unless it determines that there is an error of law or other defect evident on the face of the magistrate's decision." Upon our review, we find that there is no error of law or other defect evident on the face of the magistrate's decision and that there was no plain error in the trial court's adoption of the magistrate's decision. This is not the exceptional case in which the plain-error doctrine may be applied.

{¶ 14} 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.

SEAN C. GALLAGHER, JUDGE

EILEEN T. GALLAGHER, P.J., and
LARRY A. JONES, SR., J., CONCUR