

STATE OF OHIO)
)ss:
COUNTY OF WAYNE)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

RED FERRIS CHEVROLET, INC.

C.A. No. 07CA0072

Appellant

v.

KENNETH S. AYLSWORTH

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF WAYNE, OHIO
CASE No. 07-CV-0384

Appellee

DECISION AND JOURNAL ENTRY

Dated: September 29, 2008

CARR, Presiding Judge.

{¶1} Appellant, Red Ferris Chevrolet, Inc., appeals from a judgment issued by the Wayne County Court of Common Pleas against appellee, Kenneth S. Aylsworth. This Court affirms.

I.

{¶2} On May 30, 2007, Red Ferris Chevrolet, Inc., (“the dealership”) initiated an action against Kenneth S. Aylsworth, seeking damages in regard to Mr. Aylsworth’s purchase of a 2000 GMC K3500 truck from the dealership. The complaint alleged that a check in the amount of \$11,436.88, issued by Mr. Aylsworth in payment for the vehicle, was dishonored due to insufficient funds, and that a demand for payment was unsuccessful. The dealership sought judgment in the amount of \$11,436.88 on contract claims, and, alternatively, for liquidated damages in the amount of \$34,310.67, pursuant to R.C. 2307.61, based on a claim that Mr. Aylsworth issued the check with intent to defraud and with knowledge that the check would be

dishonored, thus committing a theft offense. Mr. Aylsworth failed to respond to the complaint, and the dealership ultimately sought a default judgment. Following a hearing on the motion, the trial court entered judgment for the dealership in the amount of \$11,436.88. The trial court denied the dealership's request for \$34,310.67 in liquidated damages. The dealership appeals and assigns three errors for review.

II.

ASSIGNMENT OF ERROR I

“THE TRIAL COURT ERRED, AS A MATTER OF LAW, WHEN IT FAILED TO AWARD STATUTORILY MANDATED LIQUIDATED DAMAGES, DESPITE THE FACT THAT RED FERRIS PROVED ALL ELEMENTS NECESSARY TO SUBSTANTIATE ITS CLAIMS AND WARRANT A LIQUIDATED DAMAGES REMEDY.”

ASSIGNMENT OF ERROR II

“THE TRIAL COURT ERRED, AS A MATTER OF LAW, WHEN IT DETERMINED THAT IT COULD NOT RELY SOLELY ON THE PLEADINGS AND DOCUMENTS ATTACHED THERETO TO DETERMINE, AS THE TRIER OF FACT, THAT A CRIMINAL ACT OR THEFT OFFENSE OCCURRED.”

ASSIGNMENT OF ERROR III

“THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO AWARD LIQUIDATED DAMAGES.”

{¶3} The central issue raised by the dealership's three assignments of error is whether the trial court was required, pursuant to R.C. 2307.61 and in light of the dealership's prayer for treble damages as liquidated damages, to award three times the value of the check to the dealership. The dealership asserts that the trial court was so obligated and that the trial court erred in failing to so order. For the following reasons, this Court concludes that the trial court did not abuse its discretion or otherwise err in declining to award treble damages.

{¶4} This case requires the interpretation and application of R.C. 2307.61 and R.C. 2307.60. Appellate courts consider an appeal from a trial court’s interpretation and application of a statute de novo. *Builder v. Empire Mgt. Group*, 9th Dist. No. 22376, 2005-Ohio-2144, at ¶12. See, also, *State v. Hiatt* (1997), 120 Ohio App.3d 247, 254.

{¶5} R.C. 2307.61 recognizes the availability of civil actions for victims of theft. *Estate Planning Legal Services, P.C. v. Cox*, 12th Dist. Nos. CA2006-11-140, CA2006-12-141, 2008-Ohio-2258, at ¶10. Specifically, R.C. 2307.61(A) provides that a property owner may bring a civil action to recover damages from one who “commits a theft offense * * * involving the owner’s property[.]” The statute provides that such an action must be brought pursuant to R.C. 2307.60(A), which, in turn, requires that the injury must be the result of “a criminal act.”

{¶6} R.C. 2307.61 sets out a range of damages which an aggrieved property owner may seek for claims that satisfy this statute. It provides that an injured property owner may seek compensatory damages plus liquidated damages in amounts that correlate to the value of the damaged property: \$50 for property worth \$50 or less; \$100 for property worth more than \$50, but not more than \$100; and \$150 for property worth more than \$150. R.C. 2307.61(A)(1)(a)(i)-(iii). Alternatively, the statute provides that the property owner may seek liquidated damages of either \$200 or “[t]hree times the value of the property[.]” whichever is greater. R.C. 2307.61(A)(1)(b)(i) and (ii). Accordingly, if this statute is otherwise applicable, the dealership could seek liquidated damages of either \$150 or \$34,310.67 – an extraordinarily broad range of potential damages.

{¶7} The dealership won a judgment in the trial court for damages equal to the amount of the check issued in payment for the vehicle. Now on appeal, the dealership challenges the failure of the trial court to award liquidated damages pursuant to R.C. 2307.61. The dealership

argues that this case comes within the framework of R.C. 2307.61, that it has proved Mr. Aylsworth committed a criminal act, and that, therefore, the trial court is obligated to award treble damages to the dealership.

{¶8} As stated above, R.C. 2307.61 is premised on R.C. 2307.60(A), which requires injury “by a criminal act.” R.C. 2307.60(A)(1). See, also, *Riley v. Supervalu Holdings, Inc.*, 1st Dist. No. C-040668, 2005-Ohio-6996, at ¶22 (acknowledging that R.C. 2307.60 requires proof of an injury by a criminal act before damages may be recovered). R.C. 2307.61(A) refines this requirement and applies only where there has been willful damage to or theft of the owner’s property. In Ohio, passing a bad check is considered to be a theft offense. R.C. 2913.01(K)(1). The offense of passing a bad check is statutorily defined as follows:

“No person, *with purpose to defraud*, shall issue or transfer or cause to be issued or transferred a check or other negotiable instrument, *knowing that it will be dishonored* or knowing that a person has ordered or will order stop payment on the check or other negotiable instrument.” R.C. 2913.11(B).

A person who issues a check “is presumed to know that it will be dishonored” if the “liability of the drawer * * * is not discharged by payment or satisfaction within ten days after receiving notice of [proper] dishonor.” R.C. 2913.11(C)(2). The dealership contends that knowledge of dishonor is established by Mr. Aylsworth’s failure to timely discharge the liability, and further contends that “purpose to defraud” is established by the unanswered allegation in its civil complaint.

{¶9} The dealership correctly points out that, according to R.C. 2307.61(G)(1), neither a guilty plea nor a criminal conviction is a precondition to a determination by the trial court that the owner’s property was “willfully damaged or that a theft offense involving the owner’s property has been committed[.]” The trial court, however, must nevertheless determine that there has been an injury “by a criminal act.”

{¶10} In its July 27, 2007 motion for default judgment, Red Ferris specifically sought judgment in the amount of \$34,310.67, “without a hearing since, pursuant to Rule 55(A) of the Ohio Rules of Civil Procedure, no evidence is necessary to determine the amount owed to Plaintiff.” Nevertheless, the trial court set the matter for hearing six weeks later, on September 11, 2007. The matter was heard on the particular question of “whether or not to award [Red Ferris] three times the value of the check that [Mr. Aylsworth] executed when he purchased the vehicle in question.” (Tr. 2).

{¶11} At the hearing, the trial judge specifically inquired whether the dealership had sought a court order to require Mr. Aylsworth to return the vehicle and whether Mr. Aylsworth had been charged, investigated or indicted for this matter. Based on the responses to those inquiries, the record demonstrates that Red Ferris had not sought an order requiring Mr. Aylsworth to return the vehicle, even though the dealership had a right to repossess it, and, furthermore, that Mr. Aylsworth had not been charged, investigated or indicted for this matter. The trial judge then concluded: “I don’t know that it’s a criminal act without more.” The trial judge failed to find that there was evidence to support a conclusion that Mr. Aylsworth committed a criminal act. The judge, therefore, declined to award treble damages and indicated that the dealership could still repossess the car and refer the matter to the prosecutor’s office for prosecution.

{¶12} The dealership acknowledges that it is for the trial court to determine whether the complaining party proved all the elements necessary to warrant damages, i.e. that its property was the subject of a criminal act, and specifically, of a theft offense. The dealership asserts, however, that the trial court erred in failing to find that a criminal act occurred, and maintains that the trial court relied only on the fact that Mr. Aylsworth had not admitted guilt nor had he

been convicted of a crime. It claims that such a conclusion contravenes the language of R.C. 2307.61(G) and that the trial court abused its discretion in so doing.

{¶13} In making this claim, the dealership relies upon the inquiries made by the trial judge. This argument, however, misrepresents the substance of those inquiries. Significantly, the trial judge did not ask whether Mr. Aylsworth had pled guilty or whether he had been convicted of a crime; rather, the trial judge inquired as to whether the dealership was entitled to repossess the vehicle or had sought an order to repossess the vehicle and whether Mr. Aylsworth had been charged, investigated or indicted in this matter. These are facts which the trial judge was entitled to consider in evaluating whether a criminal act had actually taken place. The fact that none of these things had occurred could properly inform the judge's decision that there was no criminal act.

{¶14} Moreover, the record contains additional significant information that the trial judge was entitled to consider. First, the record demonstrates that this case is grounded on a default judgment and the dealership asked the trial court to presume criminal mens rea, i.e. purpose to defraud, from the failure of Mr. Aylsworth to respond to a civil complaint. Second, the dishonored check was from E.A. Construction, Inc., the Retail Buyers Order reveals that the purchaser was E.A. Construction, Inc., and there is no evidence in the record of any relationship between Mr. Aylsworth and E.A. Construction, Inc. Third, the dealership delivered the vehicle on the day of sale to Mr. Aylsworth in return for a non-certified check from E.A Construction, Inc. for \$11,436.88, a matter that raises more questions than it answers. In the absence of a finding that a criminal act has taken place, R.C. 2307.61 is not applicable and there is no basis for an award of treble damages.

{¶15} The dealership has not demonstrated that the trial court erred or abused its discretion in denying treble damages to the dealership pursuant to R.C. 2307.61. The dealership's three assignments of error are overruled.

III.

{¶16} The dealership's three assignments of error are overruled. The judgment of the Wayne County Court of Common Pleas is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Wayne, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

DONNA J. CARR
FOR THE COURT

SLABY, J.
CONCURS

MOORE, J.
DISSENTS, SAYING:

{¶17} I respectfully dissent from the judgment of the majority affirming the trial court’s decision. This civil action was brought by Red Ferris to recover damages pursuant to R.C. 2307.61. The complaint alleged all of the essential elements for recovery. Aylsworth, while properly served, failed to file an answer. When the case was called before the trial court for hearing, the task for the court as framed by the majority was “to determine that there has been an injury ‘by a criminal act.’” I would find that 1) the trial court did not determine whether there was proof of a criminal act, 2) the trial court misinterpreted R.C. 2307.60, and 3) in the event it was necessary to determine the truth of an averment by evidence, the trial court abused its discretion in failing to hold a hearing under Civ.R. 55(A).

{¶18} First, it is clear that the legislature did not intend “criminal act” to amount to a criminal conviction that requires proof beyond a reasonable doubt. Had the legislature intended such a requirement for purposes of R.C. 2307.61, it would have used the words “criminal conviction” in R.C. 2307.60. Further, as Red Ferris pointed out below, R.C. 2307.61(G)(1) specifically states that “the trier of fact may determine that *** a theft offense involving the owner’s property has been committed, *whether or not any person has pleaded guilty to or has been convicted of any criminal offense* or has been adjudicated a delinquent child in relation to any act involving the owner’s property.” (Emphasis added.)

{¶19} The trial court’s colloquy with counsel for Red Ferris focused not on whether a criminal act was established according to the definition of the relevant statute, but rather whether Red Ferris availed itself of other remedies, and whether the matter had been investigated or referred for criminal action. Not only are the latter matters irrelevant, they do not address, nor

did the trial court articulate, the key issue of whether Red Ferris properly alleged matters which if proven would support a verdict based upon R.C. 2307.61.

{¶20} The key issue is whether a criminal act occurred. R.C. 2307.61(A) points to R.C. 2913.01 for a definition of “theft offense.” R.C. 2913.01 includes a violation of R.C. 2913.11 in its definition of “theft offense.” R.C. 2913.11 states

“(B) No person, with purpose to defraud, shall issue or transfer or cause to be issued or transferred a check or other negotiable instrument, knowing that it will be dishonored or knowing that a person has ordered or will order stop payment on the check or other negotiable instrument.

“(C) For purposes of this section, a person who issues or transfers a check or other negotiable instrument is presumed to know that it will be dishonored if either of the following occurs:

“***

“(2) The check or other negotiable instrument was properly refused payment for insufficient funds upon presentment within thirty days after issue or the stated date, whichever is later, and the liability of the drawer, indorser, or any party who may be liable thereon is not discharged by payment or satisfaction within ten days after receiving notice of dishonor.”

{¶21} It is clear that these statutes, R.C. 2307.60, R.C. 2307.61, R.C. 2913.01, and R.C. 2913.11, must be read in conjunction. The majority opinion does not consider the implications that R.C. 2913.01 and R.C. 2913.11 have on the definition of a “criminal act” under R.C. 2307.60.

{¶22} In its opinion, the majority states that the trial court did not abuse its discretion in declining to award treble damages. It then lists factors that it concludes “informed the trial judge’s decision that there was no criminal act”. I see no evidence in the record that the trial court determined that Red Ferris did not establish a criminal act in this case. Rather, I read the following colloquy, along with the trial court’s subsequent decision not to award treble damages, to mean that the trial court believed that nothing less than a guilty plea or finding of guilty could

satisfy the definition of a “criminal act,” even though the evidence might show that such a criminal act had occurred.

“THE COURT: Was Mr. Aylsworth charged, investigated, indicted for this matter?

“[RED FERRIS’ ATTORNEY]: I don’t believe so. But I believe there’s case law which says there’s no requirement that there be a criminal—that there be a finding of—a guilty plea or a finding of guilt.”

“THE COURT: *I don’t know that it’s a criminal act without more.* I don’t know whether or not the evidence would support a finding of that nature.”

{¶23} The majority reads this same passage as a finding by the trial court that Red Ferris had not shown that a criminal act had occurred. As I read this passage differently, I disagree with the majority.

{¶24} Secondly, as I view the colloquy set forth above, the trial court erred in its interpretation of R.C. 2307.60 by imposing a duty upon Red Ferris to prove the theft offense by a criminal conviction or guilty plea. This position does not comport with R.C. 2307.61(G)(1). Therefore I disagree with the majority’s position that the trial court properly applied the law to the facts of this case.

{¶25} Finally, I would point out that this case was determined upon default judgment. Therefore, a review of Civ.R. 55 is essential to our consideration of this case.

{¶26} Civ.R. 55(A) states, in pertinent part;

“If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages *or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall when applicable accord a right of trial by jury to the parties.*” (Emphasis added.)

{¶27} A trial court’s decision to grant default judgment is reviewed under an abuse of discretion standard. *National City Bank v. Shuman*, 9th Dist. No. 21484, 2003-Ohio-6116, at ¶6.

An abuse of discretion is more than an error of judgment, but instead connotes “perversity of will, passion, prejudice, partiality, or moral delinquency.” *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. Under this standard, an appellate court may not substitute its judgment for that of the trial court. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶28} In its complaint, Red Ferris alleged, in part, that on February 26, 2007, Aylsworth presented Red Ferris a check for payment for a vehicle. Red Ferris further alleged that upon presentment, the check was dishonored due to insufficient funds. Finally, Red Ferris alleged that after notification of the bank’s dishonor of the draft, Aylsworth failed to make good on the debt, giving rise to a statutory presumption of an intention not to pay. Therefore, Red Ferris has pled facts that would lead to a finding that Aylsworth intended to pass a bad check under R.C. 2913.11(B) and (C)(2), which amounts to a theft offense under R.C. 2913.01. This in turn leads to a finding of a theft offense under R.C. 2307.61(A). Consequently, a civil action for a violation of R.C. 2307.61 was properly brought under R.C. 2307.60.

{¶29} Civ.R. 55 grants the trial court the discretion to hold a hearing to “determine the amount of damages or to establish the truth of any averment by evidence[.]” I believe that, in the instant case, the trial court should have held an evidentiary hearing to allow Red Ferris to present its arguments and evidence as to whether Aylsworth committed a “criminal act.” While a short hearing was held on September 11, 2007, it appears that this hearing focused on whether alternative remedies were available to Red Ferris, not evidence in support of Red Ferris’ averments that Aylsworth committed a criminal act as alleged in count 7 of the complaint.

{¶30} Aylsworth failed to respond to Red Ferris’ complaint. It is because of this failure that Red Ferris was deprived of an opportunity to present evidence with regard to Aylsworth’s criminal act as alleged in count 7 of its complaint. Yet, by failing to hold a hearing so that Red

Ferris could prove the averments in its complaint, the trial court's judgment serves to reward Aylsworth for defaulting on his answer. I would find that public policy favors allowing Red Ferris the opportunity to present argument and evidence on this issue. Accordingly, I would find that the trial court abused its discretion in not holding a hearing on this issue. Therefore, I would reverse and remand with instruction to hold a hearing under Civ.R. 55 to determine whether the evidence supports Red Ferris' contention that Aylsworth committed a "criminal act."

APPEARANCES:

DAVID J. WIGHAM and LUCAS K. PALMER, Attorneys at Law, for Appellant.

KENNETH S. AYLSWORTH, pro se, Appellee.