

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

JOHN SOLIDAY FINANCIAL GROUP,
LLC

C.A. No. 24407

Appellee

v.

VALERIE L. ROBART

Appellant

APPEAL FROM JUDGMENT
ENTERED IN THE
CUYAHOGA FALLS MUNICIPAL
COURT
COUNTY OF SUMMIT, OHIO
CASE No. 2008 CVF 0011

DECISION AND JOURNAL ENTRY

Dated: May 27, 2009

CARR, Judge.

{¶1} Appellant, Valerie Robart, appeals the judgment of the Cuyahoga Falls Municipal Court. This Court affirms, in part, and reverses, in part.

I.

{¶2} On October 4, 1994, Robart opened a credit card account with Metris Bank. After the account ultimately reached a balance of \$6,805.59, the account was in default and was charged off. The obligation was purchased by Appellee John Soliday Financial Group, LLC (“Soliday Financial”) on June 13, 2007. Soliday Financial brought an action against Robart on January 2, 2008, in the Cuyahoga Falls Municipal Court. The complaint alleged Soliday Financial was owed a principal sum of \$6,805.59, plus an accrued interest in the amount of \$4,460.65, for a total amount owed of \$11,266.24, plus future interest of 23.90%.

{¶3} Certified mail service was returned unclaimed on February 7, 2008. The record indicates ordinary mail service was perfected on February 25, 2008. There is a dispute between the parties as to whether an answer was filed. An unsigned letter was filed by Robart on March 24, 2008, the last possible day to comply with Civ.R. 12(A)(1). The letter stated that any credit card charges had been paid in full or settled in full and denied any charges or debts alleged in the complaint. The Clerk of Courts, the magistrate and the trial court judge who adopted the magistrate's decision treated this letter as a pro se answer to the complaint. While Robart denied that the letter was an answer to the complaint, she never attempted to file a different answer and she treated the letter as an answer when she filed a motion for leave to amend the answer with affirmative defenses. Soliday Financial filed a notice of service of discovery on April 3, 2008, stating that a request for admissions and request for production of documents had been sent to Robart on April 1, 2008. The record indicates Robart did not respond to this discovery request.

{¶4} On May 23, 2008, Soliday Financial filed a motion for summary judgment. The matter was set for hearing on June 11, 2008. Neither party appeared at the hearing. On June 25, 2008, Robart filed a motion to dismiss along with a motion for leave to obtain an extension of time. Both motions were subsequently denied. The magistrate's decision granting Soliday Financial's motion for summary judgment was filed on July 15, 2008. On July 29, 2008, Robart filed a timely objection to the magistrate's decision. On that same day, the trial court approved a nunc pro tunc entry which changed the amount of damages awarded in the magistrate's decision from \$4,460.65 to \$6,805.59. By trial court order filed on August 12, 2008, Robart's objections were overruled and the magistrate's decision was sustained. The amount of damages awarded in the trial court's order reflected the figure stated in the nunc pro tunc entry.

{¶5} Robart has raised ten assignments of error. This Court consolidates the first nine assignments of error to facilitate review.

II.

ASSIGNMENT OF ERROR I

“JOHN SOLIDAY FINANCIAL GROUP LLC. FAILED TO SUPPLY TO APPELLANT THE NAME AND ADDRESS OF THE ORIGINAL CREDITOR.”

ASSIGNMENT OF ERROR II

“JOHN SOLIDAY FINANCIAL GROUP LLC. FAILED TO VALIDATE THE DEBT TO THE APPELLANT.”

ASSIGNMENT OF ERROR III

“JOHN SOLIDAY FINANCIAL GROUP LLC. THROUGH THE COURTS HAD A SUMMONS DELIVERED TO THE APPELLANT ALONG WITH A COPY OF AN ALLEGED DEBT OWED TO THEM.”

ASSIGNMENT OF ERROR IV

“JOHN SOLIDAY FINANCIAL GROUP LLC. FAILED TO CEASE ALL COLLECTION ACTIONS UNTIL VALIDATION.”

ASSIGNMENT OF ERROR V

“JOHN SOLIDAY FINANCIAL GROUP LLC. FAILED TO SEND AN ELECTRONIC COPY OF THE REQUEST FOR ADMISSIONS BY EITHER COMPUTER DISK OR BY ELECTRONIC MAIL OR BY OTHER MEANS AGREED UPON BY BOTH PARTIES[.]”

ASSIGNMENT OF ERROR VI

“JOHN SOLIDAY FINANCIAL GROUP LLC. FILED A MOTION FOR SUMMARY JUDGMENT ALONG WITH A COPY OF FAILURE TO RESPOND TO REQUEST FOR ADMISSIONS ON THE SAME DAY THAT THE APPELLANT WOULD HAVE RECEIVED HER REQUEST FOR ADMISSIONS IN THE MAIL AND NOT ALLOTING HER THE 28 DAYS TIME TO RESPOND.”

ASSIGNMENT OF ERROR VII

“BEFORE THE COURTS ACCEPTED THE REQUEST FOR ADMISSIONS, THE COURT SHOULD HAVE GIVEN SOME TYPE OF WARNING TO THE APPELLANT THAT SINCE NOT RESPONDING TO THE REQUEST FOR ADMISSION IS AN ADMISSIONS TO THE QUESTIONS, WHEN THE APPELLANT IS ACTING PRO SE.” [sic]

ASSIGNMENT OF ERROR VIII

“[THE] TRIAL COURT [ERRED] BY ACCEPTING THE RESPONSE TO ADMISSIONS FROM THE APPELLEE BEFORE A VALIDATION OF THE DEBT WAS EVER SENT TO THE APPELLANT.”

ASSIGNMENT OF ERROR IX

“THE TRIAL COURTS [ERRED IN] APPROV[ING] THE MOTION FOR SUMMARY JUDGMENT BASED ON THE SUBMISSION FROM THE APPELLEE THAT THE UNSIGNED RESPONSE TO ADMISSION IS THE SAME AS ADMITTED, WHEN IN FACT, THE APPELLANT RECEIVED THE RESPONSE TO ADMISSION ON THE SAME DATE THE APPELLEE SUBMITTED TO THE COURTS AN UNANSWERED COPY OF THE RESPONSE TO ADMISSIONS WHICH HE STATED WAS FROM THE APPELLANT IS DEEMED ADMITTED. THE APPELLEE SHOULD NOT HAVE SUBMITTED TO THE COURTS THE RESPONSE TO ADMISSIONS IN SUPPORT OF THE MOTION FOR SUMMARY JUDGMENT KNOWING THAT THE RESPONSE TO ADMISSIONS WAS A FALSIFIED DOCUMENT IN ORDER TO GIVE SUPPORT TO HIS SUMMARY JUDGMENT AND TO OBTAIN A JUDGMENT AGAINST THE APPELLANT.” [sic]

{¶6} On July 15, 2008, the magistrate issued a decision, including findings of fact and conclusions of law, granting summary judgment in favor of Soliday Financial. Robart filed three objections to the magistrate’s decision. On August 12, 2008, the trial court affirmed the magistrate’s decision.

{¶7} Under Civ.R. 53(D)(3)(b)(iv):

“[e]xcept for a claim of plain error, a party shall not assign as a error on appeal the court’s adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ. R. 53(D)(3)(a)(ii), unless the party had objected to that finding or conclusion as required by Civ. R. 53(D)(3)(b).”

{¶8} Furthermore, Civ.R. 53(D)(3)(b)(ii) provides: “An objection to a magistrate’s decision shall be specific and state with particularity all grounds for objection.”

{¶9} Robart has not raised plain error on appeal. The first nine assignments of error which have been raised by Robart fall outside the scope of the objections which were raised to the magistrate's decision. Robart raised three timely objections to the magistrate's decision. First, Robart alleged she never received service of process or filed an answer to the complaint, as well as insufficiency of process. Second, Robart objected to the magistrate considering her motions out of the chronological order in which she filed them. Third, Robart objected to the magistrate's acceptance of an unsigned letter as an answer to the complaint.

{¶10} The first, second, fifth and eighth assignments of error take issue with the discovery process. The specific procedural matters raised in these assignments of error were not mentioned in Robart's objections to the magistrate's decision.

{¶11} The third assignment of error alleges that the attachment of an invoice to the complaint rendered service ineffective. While Robart objected on the grounds that she was never served with a copy of the complaint, no objection was on the grounds that the attachment of an invoice rendered service ineffective.

{¶12} The fourth assignment of error alleged that Soliday Financial failed to cease all collection actions until validation. While this might have been an affirmative defense had it been raised in the answer, there was no mention of a validation issue in the answer or in the objections to the magistrate's decision.

{¶13} The sixth and ninth assignments of error stem from Robart's allegation that she did not have adequate time to respond to a request for admission because Soliday Financial filed a motion of summary judgment along with a copy of the failure to respond to request for admission on the same day that Robart received her request for admission in the mail. In her objections to the magistrate's decision, Robart made no mention of an issue involving Civ.R.

36(A)(1), which sets a minimum time frame of twenty-eight days to respond to a request for admission.

{¶14} In the seventh assignment of error, Robart contends that, as a pro se litigant, she should have received some guidance from the court as to the consequences of failing to respond to a request for admission. In her objections to the magistrate's decision, Robart made no mention of any errors by the magistrate relating to her decision to act as a pro se litigant.

{¶15} Because Robart did not specifically object to the findings in the magistrate's decision set forth in the first nine assignments of error, those claims have been forfeited and may not be raised on appeal. *Stefano & Assoc., Inc. v. Global Lending Grp., Inc.*, 9th Dist. No. 23799, 2008-Ohio-177, at ¶18. The first nine assignments of error are overruled.

ASSIGNMENT OF ERROR X

“THE TRIAL COURT [ERRED] WHEN THE MAGISTRATE MADE HIS INITIAL RULING ON THIS CASE ON JULY 15[,] 2008, IN FAVOR OF THE APPELLEE, THE APPELLANT FILED FOR A STAY FOR APPEAL AND WAS GRANTED WITHOUT A SUPERSEDEAS BOND, THEN THE APPELLEE FILED A MOTION IN CONTRA IN REFERENCE TO THE SUPERSEDEAS BOND, THE COURTS DECIDED TO GIVE THE APPELLANT 10 DAYS TO RESPOND WHICH SHE DID. THE COURT IGNORED THE APPELLANT'S RESPONSE WHICH WAS TIMELY FILED AND CHANGED ITS RULING TO REQUIRING THE APPELLANT TO FILE A SUPERSEDEAS BOND, WHICH THE COURT HAS THE ABILITY TO DO, BUT ALSO INCREASING THE DEBT OWED TO THE APPELLEE FROM \$4,460.65 TO \$6,805.59, PLUS INTEREST AT THE RATE OF 8% PER ANNUM FROM THE DATE OF JUDGMENT WITHOUT JUST REASONING.” [sic]

{¶16} Robart's tenth assignment of error alleges that the trial court increased the debt owed to Soliday Financial from \$4,460.65 to \$6,805.59, plus an interest rate of 8% per annum from the date of judgment without just reasoning. This Court agrees.

{¶17} The complaint in this case alleged Soliday Financial was owed “the principal sum of \$6,805.59, plus accrued interest of \$4,460.65, for a total amount owed of \$11,266.24, plus

future interest at 23.90% and Defendant(s) is/are in default of his/her/their obligation to pay said balance.”

{¶18} In addressing the issue of damages, the magistrate’s decision stated, “The un rebutted affidavit incorporated by reference into and appended to Plaintiff’s motion and the supporting materials related thereto, and the unanswered requests for admissions, indicate Defendant owes Plaintiff \$4,460.55 [sic] on the subject account.” In the final paragraph of the decision, the magistrate stated, “it is my recommendation that Plaintiff’s Motion for Summary Judgment be granted and that Plaintiff be awarded judgment in the amount of \$4,460.65, plus court costs, plus interest at a rate of 8% per annum from date of judgment.”

{¶19} The magistrate’s decision was issued on July 15, 2008. On July 29, 2008, Robart filed timely objections to the magistrate’s decision. Soliday Financial did not file any formal objections. However, Soliday Financial made a filing with the trial court which was labeled “NUNC PRO TUNC ENTRY.” The filing stated:

“Now comes Plaintiff, by and through counsel, and hereby respectfully requests the Court correct the Journal Entry filed on or about July 15, 2008. Plaintiff submits the proper amount of the judgment should be for the principal sum of \$6,805.59 plus interest at 8.00% per annum from the date of judgment plus costs of this action.

“Plaintiff has now corrected this error and enclosed said Entry in which the correct amount of the judgment and interest is shown. Plaintiff submits that the correction of the record is needed to more easily liquidate the balance due on the judgment previously rendered by this Court[.]”

{¶20} On July 29, 2008, this filing itself was signed by a trial court judge. The trial court judge who signed the filing was not the same judge who would later sign the trial court’s order adopting and approving the magistrate’s decision. The record indicates the clerk of courts recognized the filing, which was signed by the judge, as an approved nunc pro tunc entry.

{¶21} The trial court adopted the magistrate’s decision on August 12, 2008. In adopting the magistrate’s decision, the trial court’s order stated, “The Decision of the Magistrate is adopted and approved. Summary Judgment is granted in favor of the plaintiff in the amount of \$6,805.59, plus interest at the rate of 8% per annum from the date of the judgment.” In adopting and approving the magistrate’s decision, the trial court specified a different amount of damages than that which was stated in the magistrate’s decision. The trial court adopted the amount of damages specified in the nunc pro tunc entry.

{¶22} The trial court improperly utilized the nunc pro tunc entry when it adopted the magistrate’s decision. “Although courts possess inherent authority to correct clerical errors in judgment entries so that the record speaks the truth, nunc pro tunc entries are limited in proper use to reflecting what the court actually decided, not what the court might have or should have decided.” (internal quotations omitted.) *State ex rel Cruzado. v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, at ¶19, citing *State ex rel. Mayer v. Henson*, 97 Ohio St.3d 276, 2002-Ohio-6323, at ¶14. Nunc pro tunc entries should be limited to the correction of clerical errors. “The term ‘clerical mistake’ refers to a mistake or omission, mechanical in nature and apparent on the record, which does not involve a legal decision or judgment.” *State v. Brown* (2000), 136 Ohio App.3d 816, 819-820. Here, the difference between the amount of damages in the magistrate’s decision and the amount of damages stated in the nunc pro tunc entry cannot be viewed as a mere clerical error. The magistrate’s decision made references to the figure of \$4,460.65 as the proper amount of damages on two separate occasions. Nothing in the text of the magistrate’s decision indicated that the magistrate reached a decision that the figure of \$6,805.59 should be the amount of damages awarded in the case. Therefore, it cannot be said that the amount of damages recommended by the magistrate was a clerical error.

{¶23} If Soliday Financial believed it had a legal right to a different amount of damages than what was specified in the magistrate's decision, counsel for Soliday Financial should have filed a formal objection with the trial court. The figure which appeared in the magistrate's decision reflected the accrued interest alleged in the complaint. The figure which appeared in the nunc pro tunc entry reflected the principal sum figure alleged in the complaint as well as the principal sum figure sworn to in the affidavit appended to the motion for summary judgment. A timely objection stating that a greater amount of damages was owed to Soliday Financial would have triggered a review of the magistrate's recommendation of damages by the trial court. In ruling on this objection, the trial court could have modified the magistrate's decision. However, Soliday Financial declined the opportunity to file a timely objection to the magistrate's decision.

{¶24} In adopting and approving the magistrate's decision, the trial court improperly utilized the nunc pro tunc entry and specified an amount of damages different from the amount of damages recommended in the magistrate's decision. Robart's tenth assignment of error is sustained.

III.

{¶25} Robart's first nine assignments of error are overruled. Robart's tenth assignment of error is sustained. The judgment of the Cuyahoga Falls Municipal Court is affirmed, in part, and reversed, in part, and remanded for further proceedings consistent with this decision.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Stow Municipal Court, County of Summit, 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 Appellee.

DONNA J. CARR
FOR THE COURT

MOORE, P. J.
BELFANCE, J.
CONCUR

APPEARANCES:

VALERIE ROBART, pro se, Appellant.

FREDERICK STRATMANN, Attorney at Law, for Appellee.