

COURT OF APPEALS  
DELAWARE COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

GERLING & ASSOCIATES, INC.	:	JUDGES:
	:	
	:	Hon. John W. Wise, P.J.
Plaintiff-Appellant	:	Hon. Julie A. Edwards, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 09 CAG 06 0053
S & R SERVICES, INC.	:	
	:	
	:	
Defendant-Appellee	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Delaware Municipal Court  
Case No. 05CVF02141

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: September 29, 2009

APPEARANCES:

For Plaintiff-Appellant:

THAYNE D. GRAY  
50 North Sandusky Street  
Delaware, OH 43015

For Defendant-Appellee:

STEVEN E. HILLMAN  
425 Metro Place North, Suite 460  
Dublin, OH 43017

*Delaney, J.*

{¶1} Plaintiff-Appellant Gerling & Associates, Inc. appeals the May 4, 2009 judgment entry of the Delaware Municipal Court. Defendant-Appellee is S & R Services, Inc.

### **STATEMENT OF THE CASE AND THE FACTS**

{¶2} The underlying contract dispute between Appellant and Appellee has previously been before this Court in *Gerling & Assoc., Inc. v. S & R Services, Inc.*, Delaware App. No. 2008-CA-0054, 2009-Ohio-1897. The following facts gave rise to the previous appeal:

{¶3} “The matter was referred to a magistrate, who conducted a bench trial, and on June 23, 2008, entered a decision with findings of fact and conclusions of law. The magistrate found appellant [Gerling & Associates, Inc.] builds custom trucks for live remote television broadcasting in the United States and around the world. Each vehicle is designed and built to custom specifications to suit the unique requirements of each buyer. The trucks may vary in length from as little as 13 feet to more than 300 feet, depending on the needs and resources of the buyer.

{¶4} “After contracting with a buyer, appellant hires a consulting electronics engineer to design the technical systems of the truck including audio, video, intercom, input-output panels, rack elevations, satellite, and other systems according to the needs and desires of the buyer. Appellant’s technicians determine the size of the truck required for installation of the electronic equipment, and the consulting engineer confers with the buyer in order to develop a system design and determine the specific electronic components required for the system. The engineer submits “rack elevations” which

show where in each rack each component should be located, along with a highly detailed multi-page set of schematic drawings showing how all the electronic components interconnect.

{¶5} “Appellant’s technicians then obtain a road-ready box truck of the appropriate size equipped with nothing but a temporary driver’s seat. Appellant’s technicians build out the seating, lighting, racks, and environmental systems required for the vehicle. Some buyers acquire and install all the components in the truck after the appellant builds out the truck and racks, but in other cases, appellant acquires and installs all the required components according to the designs prepared by the consulting engineer.

{¶6} “After all the components are installed in the vehicle, the next construction phase is the ‘ring out,’ where all the connections, wires, and functions of each electric component and system of the vehicle are tested for proper installation and operation. Thereafter, the vehicle is ready for the client to use.

{¶7} “This case involves problems with trucks built pursuant to two separate contracts, the Earl Miller contract and the Kentucky State contract, for which appellant hired Appellee [S & R Services, Inc.] to be the consulting engineer. Appellant and appellee each argued it was the other party’s errors which caused the problems.

{¶8} “Appellee filed a counterclaim seeking additional compensation not originally in the written contracts, based on additional services. Appellee had previously granted certain discounts on the truck, as an unconditional accommodation to appellant. The magistrate found appellee could not recover the amount previously discounted.

{¶9} “On June 23, 2008 the magistrate filed his decision. In it, the magistrate made extensive findings of fact, concluded the preponderance of evidence did not support either party’s claims, and dismissed both the complaint and counterclaim.

{¶10} “On July 7, 2008, appellee filed a motion to extend the time to file its objections to the magistrate’s decision, and ultimately filed its objections on July 21, 2008.

{¶11} “On August 11, 2008, the trial court entered its judgment entry sustaining in part and overruling in part the objections to the magistrate’s decision. The court stated it had undertaken an independent review of the objected matters to determine whether the magistrate properly decided the factual issues and appropriately applied the law. The trial court discussed the evidence at some length, and concluded appellee should prevail on its counterclaim regarding both contracts.” Id. at ¶6-14.

{¶12} Appellant appealed the decision of the trial court. In its appeal, it raised four Assignments of Error. We affirmed the trial court’s decision in part, but reversed and remanded the matter to the trial court as to Appellant’s third Assignment of Error.

{¶13} Appellant argued in his third Assignment of Error that the trial court erred as a matter of law by considering matters outside the record in reviewing the magistrate’s decision regarding the Kentucky State contract. In our decision sustaining Appellant’s Assignment of Error, we stated:

{¶14} “The record contains a letter file stamped July 21, 2008, from Mr. Sherward, a non-lawyer representative of appellee. In the letter, Sherward advised the court he had reviewed the court’s record and found that certain documents and exhibits which had been presented to the magistrate, had been misplaced, misfiled, or removed

from the file. The letter further states while some of the evidence is intact, it is disorganized, so in order for the court to have a better understanding of Sherward's testimony, he submits the information in a better organized format.

{¶15} "Attached to the letter is a thick sheaf of documents including copies of e-mails, letters between the parties, invoices, and summaries of the work done. Certain of the documents have been highlighted and/or annotated.

{¶16} "The record does not indicate appellee filed a motion to supplement the record with the allegedly missing documents, nor did it serve a copy to opposing counsel. The trial court's opinion states: "\*\*\*\* Nothing in the portions of the record identified for me in the 7/21/08 objections 7/29/08 response supports [the magistrate's] finding, however, and I conclude based on the information presented to me by the parties following the issuance of the magistrate's decision that the defendant is entitled to be paid the contractually agreed rate.\*\*\*\*"

{¶17} "We find the trial court erred in accepting and reviewing the documents supplied after the magistrate's decision was issued. While Civ. R. 53 (D)(4)(b) permits a court to hear a previously referred matter and/or take additional evidence, ex parte materials may not be considered." Id. at ¶22-25.

{¶18} The matter was remanded to the trial court for further proceedings in accordance with the law and consistent with our opinion. On May 4, 2009, the trial court issued a judgment entry that addressed the issue remanded by this Court on April 20, 2009. The trial court stated that it reviewed the trial exhibits and the trial testimony referred to in Appellee's July 21, 2008 objections to the magistrate's decision. In its decision, the trial court sustained Appellee's objections and on the first and fourth

counts of Appellee's counterclaim. The trial court awarded judgment in favor of Appellee in the amount of \$3,850 on the Kentucky State contract.

{¶19} It is from this decision Appellant now appeals.

{¶20} Appellant raises one Assignment of Error:

{¶21} "THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT REFUSED TO FOLLOW THE INSTRUCTIONS OF THE APPELLATE COURT UPON REMAND."

{¶22} This case comes to us on the accelerated calendar. App. R. 11.1, which governs accelerated calendar cases, provides, in pertinent part:

{¶23} "(E) Determination and judgment on appeal. The appeal will be determined as provided by App. R. 11.1. It shall be sufficient compliance with App. R. 12(A) for the statement of the reason for the court's decision as to each error to be in brief and conclusory form. The decision may be by judgment entry in which case it will not be published in any form."

{¶24} One of the important purposes of accelerated calendar is to enable an appellate court to render a brief and conclusory decision more quickly than in a case on the regular calendar where the briefs, facts and legal issues are more complicated. *Crawford v. Eastland Shopping Mall Assn.* (1983), 11 Ohio App.3d 158.

{¶25} This appeal shall be considered in accordance with the aforementioned rules.

{¶26} Appellant argues that upon remand, the trial court erred when it entered judgment again for Appellee on the Kentucky State contract. Appellant states that pursuant to our April 20, 2009 decision, the trial court should have issued a new

decision granting judgment in favor of Appellee on only the Earl Miller contract, as this Court had affirmed that judgment on appeal. Appellant appears to argue that the trial court should not have revisited the issue of the Kentucky State contract because the trial court was prohibited from reviewing the improper material upon which its original judgment was based.

{¶27} A review of what was before this Court upon our reversal and remand of the trial court's August 11, 2008 judgment entry will clarify Appellant's argument. In its prior appeal of the trial court's August 11, 2008 judgment entry, Appellant raised the following as his third Assignment of Error:

{¶28} "III. THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT FOUND THAT THE RECORD DEVOID (sic) OF EVIDENCE AS TO THE 'RING OUT' WORK ON THE KENTUCKY STATE CONTRACT AND SEEMED TO RELY ON UNSWORN 'INFORMATION PRESENTED TO ME BY THE PARTIES FOLLOWING THE ISSUANCE OF THE MAGISTRATE'S DECISION.'" *Gerling & Assoc., Inc.* at ¶4.

{¶29} We sustained Appellant's third Assignment of Error and remanded the matter to the trial court as to the issue presented in Appellant's Assignment of Error – the Kentucky State contract, not the Earl Miller contract. As a Court of Appeals, this Court has the ability to enter final judgment pursuant to App.R. 12(B). In *Gerling & Assoc., Inc. v. S & R Services, Inc.*, Delaware App. No. 2008-CA-0054, 2009-Ohio-1897, we did not utilize App.R. 12(B) to enter judgment as to the third Assignment of Error, but rather reversed the judgment and remanded the matter to the trial court. Upon review of our previous opinion, we disagree with Appellant that "[t]his Appellate

court reversed the trial court as to the 'Kentucky State' and for that issue it was a final determination.”

{¶30} Pursuant to our remand, the trial court in its May 4, 2009 judgment entry reviewed again the Kentucky State contract controversy utilizing the evidence presented on the appropriate record, as opposed to the *ex parte* evidence provided by Appellee's representative. It reached the decision that Appellee was entitled to judgment on its counterclaim as to the Kentucky State contract. We find the trial court proceeded consistently with our April 20, 2009 Opinion and was in accordance with the law.

{¶31} Appellant has not raised any further arguments that the decision of the trial court to award judgment to Appellee on the Kentucky State contract was an abuse of discretion based upon the evidence presented on the record. We will not disturb a trial court's decision to adopt, reject, or modify a magistrate's decision absent an abuse of discretion. *Wade v. Wade* (1996), 113 Ohio App.3d 414, 419, 680 N.E.2d 1305.

{¶32} For these reasons, we overrule Appellant's sole Assignment of Error.

{¶33} The judgment of the Delaware Municipal Court is affirmed.

By: Delaney, J.

Wise, P.J. and

Edwards, J. concur.

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HON. PATRICIA A. DELANEY

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HON. JOHN W. WISE

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HON. JULIE A. EDWARDS

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO  
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Plaintiff-Appellant	:	
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-vs-	:	JUDGMENT ENTRY
	:	
S & R SERVICES, INC.	:	
	:	
	:	Case No. 09 CAG 06 0053
Defendant-Appellee	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Delaware County Municipal Court is affirmed. Costs assessed to Appellant.

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HON. PATRICIA A. DELANEY

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HON. JOHN W. WISE

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HON. JULIE A. EDWARDS