

[Cite as *Belovich v. Crowley*, 2021-Ohio-2039.]

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

BARBARA A. BELOVICH, :
 :
 Plaintiff-Appellee, :
 : No. 109523
 v. :
 :
 ELLEN CONDREN CROWLEY, ET AL., :
 :
 Defendants-Appellants. :
 :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: June 17, 2021

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-14-833275

Appearances:

Kronenberg + Belovich Law, L.L.C., and Jacob A. H. Kronenberg, *for appellee* Barbara A. Belovich.

Lawrence R. Hupertz, *for appellees* Peter M. Castleman and Sloane Castleman.

Gallagher Sharp, L.L.P., and Clark D. Rice, *for appellants* Ellen Condren Crowley n.k.a. Ellen Catherine Condren and Ellen Catherine Condren, Trustee of the Ellen Catherine Condren Revocable Living Trust.

EMANUELLA D. GROVES, J.:

{¶ 1} Appellants, Ellen Condren Crowley n.k.a. Ellen Catherine Condren (“Condren”) and the Ellen Catherine Condren Revocable Living Trust (“Condren Trust”), appeal the trial court’s judgment granting appellee, Barbara Belovich’s (“Belovich”) foreclosure against property titled to Condren and the Condren Trust (“the Condren defendants”). Additionally, the trial court ruled against the Condren defendants in favor of Peter and Sloane Castleman (“Castlemans”), the mortgagees of the property, finding they were owed \$104,386 plus interest and an additional \$88,766 on a revolving line of credit loan agreement. For the reasons that follow, we affirm the trial court’s judgment.

Procedural History and Factual Background

{¶ 2} Belovich was appointed guardian ad litem and legal counsel for Condren’s children in the divorce between Condren and her former husband, Charles Crowley. Belovich was awarded fees by the domestic relations court for services rendered in the amounts of \$15,830 plus interest on July 1, 2011, and \$11,195 plus interest on March 12, 2013.

{¶ 3} Pursuant to the divorce decree, Condren received title to the marital home on Calverton Road in Shaker Heights, which she transferred to the Condren Trust. Subsequently, the Condren Trust took title to a property located on Bell Tower Court in Chagrin Falls, Ohio. The Castlemans were mortgagees to both properties. The property on Calverton was sold to a third party for which the Castlemans granted a partial release of that lien. The Bell Tower property was

Condren's primary residence. In addition to the mortgage between them, the Castlemans also funded a revolving line of credit for Condren.

{¶ 4} On September 4, 2014, having failed to receive payment from Condren for her services, Belovich obtained judgments from the common pleas court for the amounts owed to her and placed liens on the Bell Tower property.

{¶ 5} On September 24, 2014, Belovich filed a complaint alleging fraudulent conveyance, fraud, and foreclosure against Condren, the Condren Trust, and the Castlemans.¹ The initial attempt to serve Condren and the Condren Trust failed. On November 7, 2014, Belovich perfected service on the Condren defendants by certified mail. The receipt was "signed by other."

{¶ 6} The Castlemans filed an answer and a crossclaim alleging that the Condren defendants were in default on the mortgage and the revolving line of credit agreement.

{¶ 7} The Condren defendants in answer to the complaint, filed a crossclaim for abuse of process.

{¶ 8} The Condren defendants filed a motion for summary judgment, which the Castlemans joined on Belovich's claims of fraudulent conveyance and fraud. The trial court denied the motion finding that the motion did not include an affidavit or other admissible Civ.R. 56(C) evidence. The Condren defendants did not appeal that decision.

¹ Subsequently, additional lienholders intervened or were added to the case. For ease of reference, we will only discuss those parties relevant to this appeal.

{¶ 9} Belovich later amended her complaint alleging fraudulent conveyance, fraud, and foreclosure on the part of the Condren defendants and listing the Castlemans, along with other lienholders, as persons with claims to the Bell Tower property.

{¶ 10} Belovich filed a motion for summary judgment on her complaint and also asked that the court acknowledge a “unity of interest” between Condren and the Condren Trust so that her claim could reach the Condren Trust’s assets. Belovich also moved to dismiss the Condren defendants’ crossclaim. The Condren defendants filed for summary judgment arguing that Belovich never perfected service and that the Condren Trust took possession of the property long before Belovich’s claims ripened. The Castlemans filed for summary judgment against the Condren defendants on their crossclaim arguing that the Condren defendants breached their open-ended mortgage contract and the revolving line of credit agreement with the Castlemans and that the Castlemans were entitled to judgment as a matter of law.

{¶ 11} The court granted Belovich’s motion for summary judgment as to the foreclosure and granted the motion to dismiss the Condren defendants’ crossclaim. The court also found that the property in a revocable trust was subject to the claims of the settlor’s debtors. Under R.C. 5801.01(S), a “[s]ettlor” is “a person * * * [who] creates or contributes property to, a trust * * *.” Therefore, Belovich could recover from both Condren defendants. However, the court found that because Belovich could reach into the trust, she could not prove she was damaged when Condren

transferred the property into the trust. Therefore, the court denied Belovich's motion for summary judgment as to the fraudulent conveyance and fraud counts.

{¶ 12} The trial court denied the Condren defendants' motion for summary judgment finding that service was perfected on November 7, 2014, and all subsequent amended complaints were served properly pursuant to Civ.R. 5.

{¶ 13} The trial court granted the Castleman's motion for summary judgment finding that the Condren defendants breached the terms of their agreements with the Castleman's. The court was unable to determine damages and, therefore, referred that matter to a magistrate for further deliberation.

{¶ 14} The Condren defendants filed a notice of appeal; however, that appeal was dismissed, sua sponte, because damages had not yet been determined and there was no final appealable order.

{¶ 15} On remand, the magistrate held two hearings on the issue of damages owed the Castleman's. The first hearing was held on October 4, 2018. The case was continued to November 1, 2018, for conclusion. The Condren defendants filed a posthearing brief arguing that the Castleman's failed to prove their damages and also filed a motion to strike the Castleman's exhibits and cancel the November 1st hearing. The magistrate denied the motion and held the hearing.

{¶ 16} The magistrate awarded the Castleman's \$104,386 plus 4.15 percent interest on the promissory note and \$88,766 with no prejudgment interest on the revolving line of credit loan agreement. The Castleman's also requested attorney fees. The terms of the contract specified it was governed under Nevada law;

however, the magistrate determined that the law of Ohio governed the agreement. Because Ohio law does not permit the grant of attorney fees in this type of action, the request for attorney fees was denied.

{¶ 17} The Condren defendants filed objections to the magistrate's decision arguing that the decision was based on inadmissible hearsay evidence: specifically, unauthenticated bank statements and inadmissible rebuttal testimony. The trial court held a hearing on the objections. The Condren defendants reopened the issue of breach, arguing they did not breach the open-ended mortgage contract. The trial court determined that issue was moot because it had already been decided in its previous decision.

{¶ 18} The trial court also found that the record did not reflect that the Castlemans had rested their case after the first hearing. The court specifically noted that when asked, the Condren defendants did not present a transcript or any other evidence to show the Castlemans rested their case.

{¶ 19} However, the court did find that the bank statements were inadmissible hearsay under Evid.R. 803(6) and 901, and struck the statements from the record. Nevertheless, the court found that the testimony of the witnesses and other evidence supported the magistrate's findings as to damages.

{¶ 20} The trial court adopted the magistrate's decision. The Condren defendants appealed.

{¶ 21} The Condren defendants present the following assignments of error for our review:

Assignment of Error No. 1

The trial court erred to the prejudice of defendant-appellant Ellen Catherine Condren, trustee of the Ellen Catherine Condren Revocable Living Trust when it denied its motion for summary judgment asserting that plaintiff-appellee failed to perfect service or service of process.

Assignment of Error No. 2

The trial court and magistrate erred to the prejudice of defendants/appellants Ellen Catherine Condren, Trustee of the Ellen Condren Revocable Living Trust and Ellen Catherine Condren Crowley nka Ellen Catherine Condren when it entered judgment on the cross-claim of defendants/appellees Peter and Sloane Castlemen [sic] based upon inadmissible hearsay evidence and improper rebuttal testimony and evidence.

Law and Analysis

{¶ 22} In their first assignment of error, the Condren defendants argue that the trial court erred in denying their motion for summary judgment that asserted that Belovich failed to perfect service on them.

{¶ 23} As a preliminary matter, Civ.R. 12(B) requires a party to plead insufficiency of process in a responsive pleading to the claim for relief or in a motion. Civ.R. 12(B); *Joseph v. Lastoria*, 12th Dist. Clermont No. CA88-05-040, 1988 Ohio App. LEXIS 4323, 2 (Oct. 31, 1988). Pursuant to Civ.R. 12(H)(1), a party waives that defense if not raised by motion under the rule or included in a responsive pleading or in an amendment thereof. *Id.* A defendant can waive defects in service by participating in the litigation before filing the proper filing. *Id.* at 5. In *Joseph*, the court found that filing a request of production of documents the day before filing an answer alleging insufficiency of service waived a service challenge. The court found that “[b]y this action, appellee showed his clear intent to appear and defend on the

merits, thereby waiving his right to complain of insufficient service of process.” *Id.* at 5. The issue of sufficiency of service is not waived if the defendant chooses not to ask for a pretrial hearing on the issue. *Id.*

{¶ 24} The Condren defendants raised the issue of failure of service in their answer to the complaint filed on February 26, 2015. Therefore, they preserved the issue for review.

{¶ 25} We review a court’s ruling on a motion for summary judgment under a de novo standard of review. *Coleman v. Kaiser Permanente*, 8th Dist. Cuyahoga No. 84130, 2004-Ohio-5478, ¶ 8. Therefore, “we afford no deference to the trial court’s decision and independently review the record to determine whether the denial of summary judgment was appropriate.” *Id.*

{¶ 26} A trial court must grant a motion for summary judgment “when the moving party demonstrates that (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to, but one conclusion and that conclusion is adverse to the party against whom the motion for summary is made.” *Capella III L.L.C. v. Wilcox*, 190 Ohio App.3d 133, 2010-Ohio-4746, 940 N.E.2d 1026, ¶ 16 (10th Dist.), citing *Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, 821 N.E.2d 564. ¶ 6.

{¶ 27} “The burden of showing that no genuine issue of material fact exists falls on the party who moves for summary judgment.” *Sickles v. Jackson Cty. Hwy. Dept.*, 196 Ohio App.3d 703, 2011-Ohio-6102, 965 N.E.2d 330, ¶ 12 (4th Dist.), citing *Dresher v. Burt*, 75 Ohio St.3d 280, 294, 1996-Ohio 107, 662 N.E.2d 264. In order

to meet this burden, the moving party must reference “the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action” that demonstrate the nonmoving party has no evidence to support their claims. *Id.*, citing Civ.R. 56(C). Once the moving party has met their burden, the nonmoving party must respond with affidavits and/or set forth specific facts as provided in Civ.R. 56 showing there are genuine issues for trial. *Id.*, citing Civ.R. 56(E).

{¶ 28} In their motion for summary judgment, the Condren defendants argued that Belovich failed to perfect service within the time designated by the trial court and the time designated by rule.

{¶ 29} It is axiomatic that “[a] civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing upon a named defendant * * *.” *Holloway v. Gen. Hydraulic & Machine, Inc.*, 8th Dist. Cuyahoga No. 82294, 2003-Ohio-3965, ¶ 7, quoting Civ.R. 3(A). Civ.R. 4.1 sets forth the methods of service, including certified mail service, personal service, or residential service. *Id.* “[T]he duty to perfect service of process is upon the plaintiffs under the Civil Rules * * *.” *Id.*, quoting *Maryhew v. Yova*, 11 Ohio St.3d 154, 159, 464 N.E.2d 538 (1984).

{¶ 30} A review of the record in this case shows that certified mail was sent to the Bell Tower property in November 2014. A certified mail receipt was received by the court on November 7, 2014, and was “signed by other.”

{¶ 31} “There is a rebuttable presumption of proper service when the civil rules governing service are followed.” *Roscoe v. Delfraino*, 7th Dist. Mahoning No. 19 MA 0038, 2019-Ohio-5253, ¶ 25, citing *Draghin v. Issa*, 8th Dist. Cuyahoga No. 98890, 2013-Ohio-1898, ¶ 10. “Civ.R. 4.1(A) provides that service of process may be made by certified mail ‘evidenced by return receipt signed by any person * * *.’” *Matteo v. Principe*, 8th Dist. Cuyahoga No. 92894, 2010-Ohio-1204, ¶10, quoting Civ.R. 4.1(A).

{¶ 32} The presumption of proper service is “rebuttable by sufficient evidence.” *Id.* at ¶ 11, quoting *Rafalski v. Oates*, 17 Ohio App.3d 65, 66, 477 N.E.2d 1212 (8th Dist.1984).

{¶ 33} Condren did not present any evidence to rebut the presumption of proper service. She did not indicate that the complaint was sent to the wrong address, nor did she argue that the person who signed for the complaint was either unknown to her or unauthorized to sign for mail on her behalf.

{¶ 34} For the forgoing reasons, we overrule the first assignment of error.

{¶ 35} In the second assignment of error, the Condren defendants argue that the magistrate erred in finding damages for the Castlemans based on hearsay evidence and improper rebuttal testimony and that the trial court erred in adopting the magistrate’s decision.

{¶ 36} “[T]he trial court has the ultimate authority and responsibility over the magistrate’s findings and rulings.” *Ramsey v. Ramsey*, 10th Dist. Franklin No. 13AP-840, 2014-Ohio-1921, ¶ 16; citing *Sweeney v. Sweeney*, 10th Dist. Franklin

No. 06AP-251, 2006-Ohio-6988, ¶ 13, quoting *Hartt v. Munobe*, 67 Ohio St.3d 3, 5-6, 615 N.E.2d 617 (1993). “The trial court must undertake an independent review of the magistrate’s report to determine any errors.” *Id.*, citing *Hartt* at 5-6, citing *Normandy Place Assoc. v. Beyer*, 2 Ohio St.3d 102, 443 N.E.2d 161 (1982), paragraph two of the syllabus.

{¶ 37} The trial court does not review a magistrate’s decision in the same manner as an appellate court, rather “the trial court must conduct a de novo review of the facts and conclusions in the magistrate’s decision.” *Id.* at ¶ 17, citing *Sweeney* at ¶ 14, citing *DeSantis v. Soller*, 70 Ohio App.3d 226, 232, 590 N.E.2d 886 (10th Dist. 1990). “As the ultimate finder of fact, the trial court must make its own factual determinations through an independent analysis and should not adopt the magistrate’s findings unless the trial court fully agrees with them.” *Id.* at *id.*, citing *DeSantis*.

{¶ 38} We review the trial court’s decision to adopt a magistrate’s decision under an abuse of discretion standard. *Abbey v. Peavy*, 8th Dist. Cuyahoga No. 100893, 2014-Ohio-3921, ¶ 13. “The term ‘abuse of discretion’ means more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” *Lindhorst v. Elkadi*, 8th Dist. Cuyahoga No. 80162, 2002-Ohio-2385, ¶ 20, citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 39} Civ.R. 53 requires the trial court to “undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined

the factual issues and appropriately applied the law.” Civ.R. 53(D)(4)(d). “The appellate court must presume that a trial court has performed an independent review of the magistrate’s recommendations unless the appellant affirmatively demonstrates the contrary.” *Barrientos v. Barrientos*, 196 Ohio App.3d 570, 2011-Ohio-5734, 964 N.E.2d 492, ¶ 5 (3d Dist.), citing *Gilleo v. Gilleo*, 3d Dist. Mercer No. 10-10-07, 2010 Ohio 5191, ¶ 46.

{¶ 40} Condren alleges that the magistrate’s decision and, consequently, the trial court’s decision were based on inadmissible hearsay and improper rebuttal testimony. The trial court in this case held a hearing on Condren’s objections and additionally, wrote an opinion supporting its findings. Specifically, the court agreed with Condren that certain exhibits admitted into evidence were inadmissible hearsay under Evid.R. 803(6) and 901. The trial court found that even without that evidence, the magistrate’s findings were supported by other evidence presented at the hearing. Additionally, the trial court found that the record did not support Condren’s argument that the testimony at the second hearing was rebuttal testimony and specifically noted in its entry that Condren failed to provide any evidence to show otherwise.

{¶ 41} Condren failed to file a transcript or affidavit with her objections to the magistrate’s decision. She also failed to file a transcript in this court or submit a statement of testimony or evidence pursuant to App.R. 9(C) or (D). Under Civ.R. 53, any objection “to a factual finding * * * shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of

that evidence if a transcript is not available.” Civ.R. 53(D)(3)(b)(iii). “In the absence of a transcript, the trial court must accept the magistrate’s findings of fact and may only examine the legal conclusions drawn from those facts.” *Sanders v. Blue*, 8th Dist. Cuyahoga No. 102447, 2015-Ohio-4376, ¶ 27, citing *Wells Fargo Bank v. Rennert*, 8th Dist. Cuyahoga No. 101454, 2014-Ohio-5292, ¶ 13.

{¶ 42} On appeal, if a party failed to provide a transcript to the trial court as required in Civ.R. 53(D)(3)(b)(iii) when objecting to the decision of the magistrate, that party waives any appeal as to those findings other than plain error. *State ex rel. Pallone v. Ohio Court of Claims*, 143 Ohio St.3d 493, 2015-Ohio-2003, 39 N.E.3d 1220.

{¶ 43} “In appeals of civil cases, the plain error doctrine is not favored and may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself.” *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 679 N.E.2d 1099 (1997), syllabus.

{¶ 44} We cannot find plain error. There was evidence presented as to the agreement between the parties that the terms of the agreements defined breach to include failure to pay taxes and causing liens to be placed on the property and that Condren had failed to pay taxes and liens were placed on the property. There was also testimony about sums of money given to Condren via the line of credit. When asked about payments from the accounts, Condren indicated, “I’m not aware of this

at this moment in time” and “I don’t know.” Additionally, Condren testified that she received \$200 a week from Sean Condren. Sean Condren testified that he received money from the Castlemans that he paid to Condren. Condren testified that Sean and other family members paid for her expenses during that time. Condren also admitted that she had never made a repayment to the Castlemans other than the transfer of funds for the sale of the marital home in Shaker Heights. The Castlemans provided a document totaling the amount owed them by Condren, an accounting document prepared by Peter Castlemans’ office in the ordinary course of business. This document was admitted without objection and claimed a total of \$193,152 (\$104,386 on the mortgage plus \$88,766 on the line of credit) owed on principal plus interest of \$55,694.29.

{¶ 45} The trial court did not abuse its discretion in adopting the magistrate’s decision. To the contrary, the trial court did a thorough review of the magistrate’s decision, corrected it where necessary, and held a hearing to clarify other issues before ultimately adopting the decision.

{¶ 46} On this thorough record, plain error cannot be found.

{¶ 47} For the foregoing reasons, appellants’ second assignment of error is overruled.

{¶ 48} Judgment affirmed.

It is ordered that appellee recover from appellants 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 Cuyahoga County 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.

EMANUELLA D. GROVES, JUDGE

MICHELLE J. SHEEHAN, P.J., and
MARY EILEEN KILBANE, J., CONCUR