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COURT OF CLAIMS
OF OHIO

IN THE COURT OF CLAIMS OF OHIO

2015 MAY 18 PM 2:52

TRANSAMERICA BUILDING
CO., INC.

Plaintiff,

v.

OHIO SCHOOL FACILITIES
COMMISSION

Defendant.

Case No. 2013-00349

Judge McGrath

Referee Samuel Wampler

**STATE OF OHIO'S 54(B) MOTION
FOR REVISION/RECONSIDERATION
FROM ORDER/JUDGMENT**

Now comes the State of Ohio which moves pursuant to Ohio Rule 54(B) for revision/reconsideration of the Order/Judgment severing the Architect and Construction Manager from Plaintiff-Contractor's lawsuit.

The support for this Motion is contained in the accompanying Memorandum in Support.

Respectfully submitted,

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Ohio Attorney General



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MEMORANDUM IN SUPPORT

I. INTRODUCTION.

Plaintiff-Contractor seeks to double its low-bid, lump sum contract to build twelve new dormitories on the State of Ohio's campus for the Deaf and Blind. Plaintiff is basing its claim on bad plans from the architect and poor scheduling from the construction manager. And yet, when the State of Ohio successfully added the architect and construction manager to this lawsuit so that they could defend themselves, Plaintiff moved to sever them.

Plaintiff-Contractor's Motion to Sever was initially denied by the referee. Plaintiff-Contractor did not properly and timely move to set aside this decision. Subsequently, the referee allowed Plaintiff-Contractor to file the same motion for severance a second time. The State of Ohio seeks revision/reconsideration from the order and judgment entry from this Court reversing its prior decision and granting severance of the architect and construction manager from Plaintiff-Contractor's construction claims lawsuit.

II. PLAINTIFF CONTRACTOR DID NOT PROPERLY AND TIMELY MOVE TO SET ASIDE THE REFEREE'S ORDER DENYING SEVERANCE.

This Court recently issued a decision and entry holding that if a party took exception to the referee's order, it would have to move to set aside that order, within ten days, pursuant to Civ.R. 53(D)(2)(b). (See Entry of April 17th attached as Exh. A).

On January 28th, the referee in this case issued an order denying Plaintiff-Contractor's Motion to Sever the architect and construction manager from this case. (See Order attached as Exhibit B). Pursuant to Ohio Civ.R. 53(D)(2)(b), Plaintiff had ten days to move to set aside this order. What they did instead is wait fourteen days and filed objections to this order. (See Plaintiff's February 11th pleading attached as Exh. C to this Motion). Failure to timely move to

set aside a magistrate's order results in waiver of that issue. *J&B Fleet Indus. Supply, Inc. v. Miller*, 7th Dist. No. 09 MA 173, 2011-Ohio-3165, ¶ 32 (attached as Exhibit F)

Thus, Plaintiff-Contractor never properly and timely moved to challenge the referee's order denying severance. Therefore, that order still stands. There was no basis for Plaintiff-Contractor to file the same Motion for Severance again. There was no basis for the referee to consider such motion or for this Court to affirm the referee's reversal of his decision not to sever the architect and construction manager, from this case.

III. RULE 54(B) RELIEF.

Ohio Civ.R. 54(B) states in pertinent part:

In the absence of a determination that there is no just reason for delay, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties, shall not terminate the action as to any of the claims or parties, and **the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.**

(Bold added)

As this referee noted in its order of May 18, 2015 Order denying the State of Ohio's

60(B) Motion:

Interlocutory orders are subject to revision (reconsideration) any time prior to entry of judgment adjudicating the claims and the rights and liabilities of all the parties.

"Civ.R. 54(B) allows for a reconsideration or rehearing of interlocutory orders. The rule, when discussing interlocutory orders, states, in pertinent part, that they are "subject to revision at any time before the entry of judgment adjudicating the claims and the rights and liabilities of all the parties." Therefore, a motion for reconsideration would be the proper procedural vehicle for obtaining relief after interlocutory orders."

Pitts v. Ohio Dep't of Transp., 67 Ohio St. 2d 378, 379 (Ohio 1981).

As interlocutory orders, such judgments are “subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.” Civ.R. 54(B). Accordingly, a plaintiff may file a motion for reconsideration challenging a trial court’s interlocutory order granting summary judgment to one of the multiple defendants. (citing Pitts)

Further, when presented with such a motion for reconsideration, a trial court may alter or reverse its earlier decision.

Perritt v. Nationwide Mut. Ins. Co., 2004-Ohio-4706, P10 (Ohio Ct.App., Franklin County Sept. 7, 2004)

Attached to this Motion at Exh. D is a “severance timeline” that the State of Ohio used in its oral motions this morning prior to the start of this trial. The Court can see that the referee initially ordered on January 28, 2015, that there would be no severance of the architect and construction manager from this case. Transamerica, instead of doing what was required by Civ.R. 53(D)(2)(b) and moving to set aside the magistrate’s order within ten days waited fourteen days and filed objections. They then filed the same Motion on February 17th. Not having done what was required pursuant to Civ.R. 53 to preserve their challenge to the referee’s order, they couldn’t simply file the same motion again. That eviscerated the mandatory language of Civ.R. 53. Neither the referee nor the Court can override the requirements of a Civil Rule promulgated by the Supreme Court. The Court also doesn’t have the authority to change a party’s pleadings, in this case Transamerica’s objections and convert them into a renewed or second Motion for Severance. (See Entry of March 24, 2015). Thus, everything that happened after Transamerica failed to properly and timely challenge the referee’s order denying severance

was a nullity. The referee's Order and this Court's Entry granting severance is voidable and in fact, void.

Failure to comply with Civ.R. 53 renders voidable any resulting judgment. *State ex rel. Leshner v. Kainrad*, 65 Ohio St.2d 68, 71, 417 N.E.2d 1382 (1981)(citing *Eisenberg v. Peyton*, 56 Ohio App.2d 144, 150-152, 381 N.E.2d 1136 (8th Dist. 1978)(holding that the judgment is void when the failure to comply with Civ.R. 53 is correctly identified and raised by a party)). Accordingly, neither the Referee nor the Court can override the requirements of a Civil Rule, like Civ.R. 53, promulgated by the Ohio Supreme Court.

The Court also doesn't have the authority to change a party's pleadings, in this case Transamerica's objections, and convert them into a renewed or second Motion for Severance to bypass the requirements of Civ.R. 53. *See, e.g., Cunnane-Gygli v. MacDougal*, 11th Dist. No. 2004-G-2597, 2005-Ohio-3258, ¶ 31 (attached as Exhibit E); *Constr. Sys., Inc. v. Garlikov & Assoc., Inc.*, 10th Dist. No. 09AP-1134, ¶¶ 9-16 (discussing applicable law, including where a party failed to timely comply with Civ.R. 53, and holding that the parties' stipulation in contravention of the requirements in Civ.R. 53 is essentially a nullity)(attached as Exhibit G). Thus, everything that happened after Transamerica failed to properly and timely challenge the referee's order denying severance was a nullity.

In *Cunnane-Gygli, supra*, the Eleventh District Court of Appeals faced a substantially similar situation. In that case, a magistrate denied, by order, an oral motion. The Court of Appeals held that order then required the party on the losing end of the magistrate's order to file a motion to set it aside. Having failed to do that, they were not entitled to file, as Transamerica did in this case, a second motion for the same relief.

{¶ 31} Here, we construe the magistrate's denial of appellant's oral motion as an "order necessary to regulate the proceedings." Therefore, appellant was required

to file a motion to set aside the magistrate's order. In lieu of doing so, appellant filed a second motion for attorney fees to the court, who denied the same. In our view, appellant was not entitled to a hearing on his motion for attorney fees, and in an effort to obtain the fees, counsel used inappropriate procedural channels to vindicate his claim. Under the circumstances, we find appellant's contentions without merit.

Cunnane-Gygli, ¶ 31 (Attached at Exh. E).

In its 60(B) Order, the magistrate criticizes the State of Ohio for failing to timely move to set aside his order granting severance. However, that would be an objection to an order and ultimately an Entry from the Court which is a nullity given the initial failure of Transamerica to properly and timely object to the denial of severance. In other words, the State of Ohio's failure to subsequently object to that which the Court never had the authority to consider and enter in the first place does not excuse Transamerica's failure to properly preserve the issue following the initial order denying severance on January 28, 2015.

Even if there was such a waiver, as the referee pointed out in his order denying the State's 60(B) Motion, plain error is not waived. And that is what we have in this case. It was plain error for the Court to allow Transamerica to file the same Motion for Severance when they had not properly preserved their right to challenge the referee's initial order denying severance by timely filing a motion to set it aside.

Certainly the outcome would be no different if we were talking about objections that needed to be made to a magistrate's decision pursuant to Ohio Civ.R. 53(D)(3)(b). Certainly no one could argue or hold that a party's failure to timely file objections to a magistrate's decision would allow that party to re-file the same motion that was the basis for the magistrate's decision. Whether it's orders or decisions, there needs to be finality to both. A party is not entitled to keep filing the same motion under the Civil Rules until the magistrate or Court rules in their favor.

IV. CONCLUSION.

The architect and construction manager were properly added to this case. Plaintiff-Contractor is basing its claim on bad plans from the architect and poor scheduling by the construction manager. These parties need to be part of the trial in this case in order to defend themselves and in order for the State of Ohio to not pay more than its proportionate share.

Once the referee overruled Plaintiff-Contractor's motion to sever these parties, and Plaintiff-Contractor failed to properly and timely set aside this order, Plaintiff was not permitted to file the same motion again and there could be no further reconsideration of this order by either the referee or this Court.

Thus, this Court should reinstate the referee's January 28, 2015, order denying severance and vacate this Court's Entry of April 17, 2015 affirming the referee's March 24, 2015 Order granting severance and allow this case to proceed to trial with both the third and fourth party Defendants.¹

Respectfully submitted,

MICHAEL DEWINE
Ohio Attorney General

¹ Both the architect and construction manager filed fourth party claims against their respective consultants.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *State Of Ohio's 54(B) Motion for Revision/Reconsideration From Order/Judgment* was sent by electronic mail, this 18th day of May, 2015 to:

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**TRANSAMERICA BUILDING
COMPANY, INC.**

Plaintiff/Counter Defendant

v.

**OHIO SCHOOL FACILITIES
COMMISSION, etc.**

Defendant/Counter
Plaintiff/Third-Party
Plaintiff/Counter Defendant

v.

**LEND LEASE (US) CONSTRUCTION,
INC.**

Third-Party Defendant/Counter
Plaintiff/Fourth-Party Plaintiff

and

STEED HAMMOND PAUL INC., etc.

Third-Party
Defendant/Fourth-Party Plaintiff

v.

BERARDI PARTNERS, INC., et al.

Fourth-Party Defendants

Case No. 2013-00349

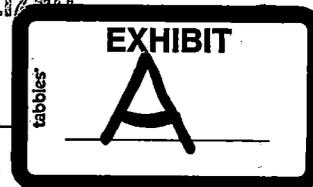
Judge Patrick M. McGrath
Referee Samuel Wampler

ENTRY

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On April 7, 2015, defendant/counter plaintiff/third-party plaintiff/counter defendant,
Ohio School Facilities Commission (OSFC), filed Objections to Referee's Granting

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ENTRY

of TransAmerica's Motion to Sever. On April 8, 2015, plaintiff/counter defendant, TransAmerica Building Company, Inc. (TA), filed a response.

OSFC's objections relate to an order (as opposed to a decision) of the magistrate. Specifically, the March 24, 2015 order to separate the trial of OSFC's claims from the trial of TA's complaint and OFSC's counterclaim. Pursuant to Civ.R. 53(D)(2)(a)(i), a magistrate "may enter orders without judicial approval if necessary to regulate the proceedings and if not dispositive of a claim or defense of a party." The order in question was for the purpose of regulating the proceedings and did not dispose of any claim or defense of a party. As such, and considering a decision has yet to be rendered, the court interprets OSFC's objections as a motion to set aside the magistrate's order, pursuant to Civ.R. 53(D)(2)(b).

Civ.R. 53(D)(2)(b) states in pertinent part:

"Any party may file a motion with the court to set aside a magistrate's order. The motion shall state the moving party's reasons with particularity and shall be filed not later than ten days after the magistrate's order is filed."

OSFC's motion was filed fourteen (14) days after the magistrate's order was filed. It is therefore not timely.

Even so, upon review of the file, it is the court's finding that the referee was correct in his analysis of the issues and application of the law. Accordingly, the motion to set aside is DENIED.



PATRICK M. MCGRATH
Judge

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ENTRY

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TRANSAMERICA BUILDING
COMPANY, INC.

Plaintiff/Counter Defendant

v.

OHIO SCHOOL FACILITIES
COMMISSION, etc.

Defendant/Counter Plaintiff

Case No. 2013-00349

Referee Samuel Wampler

ORDER OF THE REFEREE

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On December 30, 2014, defendant, Ohio School Facilities Commission ("OSFC"), filed its motion for leave to file a third-party complaint *instanter* ("Motion") pursuant to Civ.R. 15(A), supported by its memorandum of law and argument.¹ On January 9, 2015, plaintiff, TransAmerica Building Company, Inc. ("TA"), filed its memorandum contra ("Brief in Opp.") supported by its memorandum of law and argument.² On January 20, 2015, OSFC filed its reply *instanter*.³

OSFC's Motion. The third-party complaint is limited to indemnification for damages and costs which may be awarded to TA and does not seek any additional relief from the third-party defendants. It does not seek to amend OSFC's pleading, but instead seeks relief from third parties based on an alleged right of indemnification. *See State Farm Mut. Auto Ins. Co. v. Charlton*, 41 Ohio App. 2d 107 (10th Dist.1974). The issue of indemnification between OSFC and the third-party defendants will not unduly burden TA

¹Technically, the motion is not to amend or supplement pleadings under Civ.R. 15, but instead is a motion under Civ.R. 14(A), as leave to file the third-party complaint was brought more than 14 days after OSFC filed its original answer. Because TA did not object to the motion on this basis, the court considers OSFC's motion as brought pursuant to Civ.R. 14(A).

²TA included a motion for separate trial of the third-party claims in the event OSFC's motion to file its third-party complaint was granted.

³In its reply, OSFC also included its opposition to TA's motion for separate trial of the third-party claims. OSFC's motion for leave to file a reply *instanter* is GRANTED.

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EXHIBIT
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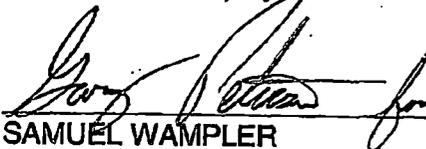
Case No. 2013-00349

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ORDER

in its trial of this action. To the contrary, TA's recovery will depend upon proving the actions or inactions of third-party defendants during the course of the project and how those actions or inactions caused TA damages. The relief sought by the third-party complaint does not introduce any new causes of action or issues in the underlying action. Therefore, OSFC's motion for leave to file a third-party complaint is GRANTED. The clerk is directed to detach the third-party complaint from the motion and process the third-party complaint in the normal course.

TA's Motion. Plaintiff's Brief in Opp. includes a motion to order a separate trial of the third-party claims in the event OSFC's motion to file its third-party complaint is granted. TA contends that Civ.R. 14(A) mandates a separate trial of third-party claims upon a motion of any plaintiff, provided those claims are brought by the third-party plaintiff against its agent. OSFC contends that TA failed to submit any evidence or legal support for the proposition that either of the third-party defendants were agents of OSFC. On the basis of the record before the court regarding the agency as asserted by TA without reference to any evidence or authority in support thereof, the motion pursuant to Civ.R. 14(A) for a separate trial of the third-party claims is DENIED, without prejudice.


SAMUEL WAMPLER
Referee

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OF OHIO

IN THE COURT OF CLAIMS OF OHIO

TRANSAMERICA BUILDING COMPANY, :
INC., :

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Case No. 2013-00349

Plaintiff, :

Judge McGrath

v. :

Referee Wampler

OHIO SCHOOL FACILITIES :
COMMISSION, nka Ohio Facilities :
Construction Commission, :

ORIGINAL

Defendant. :

**PLAINTIFF TRANSAMERICA BUILDING COMPANY, INC.'S OBJECTIONS TO THE
REFEREE'S DECISION DENYING TRANSAMERICA'S MOTION TO SEPARATE**

Plaintiff TransAmerica Building Company, Inc. ("TransAmerica") hereby submits its objections to the Referee's decision to deny TransAmerica's Motion to Separate the third-party claims of Ohio School Facilities Commission ("OSFC") brought against Steed Hammond Paul, Inc. ("SHP"), the OSFC's project architect, and Lend Lease (US) Inc. ("Lend Lease"), the OSFC's construction manager/advisor. The Referee denied TransAmerica's Motion to Separate, reasoning that since TransAmerica's prior Motion did not "reference [] any evidence or authority in support," TransAmerica's Motion should be denied "without prejudice." *Id.* (underlining added).

TransAmerica hereby objects to the Referee's decision, setting forth additional evidence from key Project records and documents which prove an agency relationship existed between the OSFC, as principal, and SHP and Lend Lease, as its agents, at all times relevant to this dispute. Upon review of this evidence, the Referee should grant TransAmerica's Motion to Separate and issue an Order separating the OSFC's third-party claims from TransAmerica's claims brought against the OSFC.

ON COMPUTER

EXHIBIT
C

I. **Argument.**

The principles of agency are well-established in Ohio:

An agency relationship can be established under one of any several distinct agency theories. An agency can be shown by: (1) actual or express authority of the principal; (2) the actual implied authority of the principal; (3) the apparent authority of the agent, also referred to as agency by estoppel; and (4) ratification of the unauthorized acts of a person or agent by the principal.¹

At a minimum, SHP and Lend Lease were granted "express authority" to act as on behalf of the OSFC as its agents.²

A. **The Contract Documents Provided Both SHP and Lend Lease With Authority to Act as "Agents" of the OSFC.**

Express authority is that authority which is directly granted to or conferred upon the agent or employee in express terms by the principal, and it extends only to such powers as the principal gives the agent in direct terms.³

Here, SHP and Lend Lease were granted "express authority" to act on behalf of the OSFC as its agents through both the Project's General Conditions and through SHP and Lend Lease's independent contracts with the OSFC. Those same documents demonstrate that the OSFC retained control over SHP and Lend Lease at all times relevant to this dispute—a key indicia of an agency relationship.⁴

i. ***SHP had authority to act as an "agent" of the OSFC.***

With respect to SHP, the Project's General Conditions demonstrate that: (1) SHP had broad authority to act on behalf of the OSFC to achieve the OSFC's (not SHP's) objectives, and (2)

¹ *Texas-Tennessee Int'l, Inc. v. Marshall C. Rardin & Sons*, 9th Dist No. 12431, 1986 Ohio App. LEXIS 7994, citing Restatement of the Law 2d, Agency (1958).

² The OSFC also granted implied and apparent authority to both SHP and Lend Lease to act as its agents on this Project.

³ *Master Consol. Corp. v. BancOhio Nat'l Bank*, 575 N.E.2d 817, 820 (Ohio 1991).

⁴ Control is particularly important because it is a key indicia of an agency relationship. See, e.g., *Williams v. ITT Fin. Servs.*, 1st Dist. Nos. C-960234 and C-960255, 1997 Ohio App. LEXIS 2721 (June 25, 1997); *New York, C. & S. L. R. Co. v. Heffner Constr. Co.*, 3rd Dist. No. 691, 223 N.E.2d 649, syllabus (agency relationship "exists only when one party exercises the right of control over the actions of another and those actions are directed toward the attainment of an objective which the former seeks").

SHP's authority was under the direct supervision and control of the OSFC. Therefore, an agency relationship existed between SHP and the OSFC at all times relevant to this dispute.

The Project's General Conditions⁵ grant broad authority to SHP to act as the OSFC's agent:

- As Project Architect, SHP's role on the Project was comprehensive: "protect the [OSFC] against Defective Work throughout the completion of the Project." (General Conditions, Article 3.1.);
- SHP was to do this by advising and consulting with the OSFC and the Project's Construction Manager, designating a Project representative to observe and check the quality and progress of the work, and attending the Project at regular intervals. (General Conditions, Section 3.1.1);
- Moreover, SHP was authorized to "take such action as is necessary or appropriate to achieve conformity with the Contract Documents." (General Conditions, Section 3.1.1.1);
- SHP could also disapprove or reject defective work to ensure "the integrity of the design concept of the Project as a functioning whole as indicated by the Contract Documents." (General Conditions, Section 3.1.2).⁶

While broad, the General Conditions also subject SHP's authority to the OSFC's control:

- Further, while SHP had authority to observe, review and check the progress and quality of the work and to reject defective work, SHP could do so only to the extent that (1) those actions "protect[ed] the Commission" or (2) ensured the integrity of the Contract Documents. (General Conditions, Section 3.1.1).
- For example, while SHP could designate its own Project representative, that designation was "subject to approval by the [OSFC]." (General Conditions, Section 3.1.1.1).
- Moreover, while the General Conditions instruct SHP to be present on the Project at regular intervals, SHP was also required to attend the Project "as may be deemed necessary by the OSFC." (General Conditions, Section 3.1.1.2).

⁵ See William Koniewich's Affidavit in Support, ¶3, attached hereto as Exhibit A.

⁶ SHP was also responsible for aiding the Construction Manager in facilitating an orderly construction of the Project. For that purpose, SHP was authorized to, in consultation with the Construction Manager, "authorize minor changes or alterations in the Work" that were "consistent with the intent of the Contract Documents." (General Conditions, Section 3.1.2), obtaining the necessary Project permits, (*Id.*), attending project and coordination meetings, (*Id.* at 3.2.1.2.), reviewing any forms required under the Contract Documents, (*Id.* at 3.2.1.4.), and rendering decisions with respect to the Contractor's responsibilities on the Project, (*Id.* at 3.2.1.5.).

- SHP was also required to “immediately notify” the OSFC “at any time [SHP] disapproves or rejects an item of Work.” (*Id.*).

The General Conditions also demonstrate that SHP’s authority was at all times subject to the direct oversight and control of the OSFC. This is seen clearly in Section 3.2.2 of the General Conditions:

- 3.2.2 The Architect is the initial interpreter of all requirements of the Contract Documents. All decisions of the Architect are subject to final determination by the Commission.

Thus, while SHP was the “initial interpreter” of the Contract Documents, it was the OSFC who retained authority to make “final determination [s]” regarding key Project decisions. (General Conditions, Section 3.2.2).

The OSFC retained similar control over SHP with respect to other Project tasks:

- For example, while SHP could designate its own Project representative, that designation was “subject to approval by the [OSFC].” (General Conditions, Section 3.1.1.1).
- Moreover, while the General Conditions instruct SHP to be present on the Project at regular intervals, SHP was also required to attend the Project “as may be deemed necessary by the OSFC.” (General Conditions, Section 3.1.1.2).
- SHP was also required to “immediately notify” the OSFC “at any time [SHP] disapproves or rejects an item of Work.” (*Id.*).

Taken as a whole, the General Conditions demonstrate that while SHP was granted broad authority to act on behalf of the OSFC to achieve the OSFC’s (not SHP’s) objectives, the OSFC retained control over SHP’s work at all times. In short, the General Conditions prove that SHP acted as an agent of the OSFC.

SHP's contract with the OSFC further supports this point.⁷ First, SHP's contract delegated broad authority to SHP to act on behalf of the OSFC.

- As part of SHP's "Basic Services" in the "Construction Phase," SHP was tasked with jobs that would be highly important to any project owner, including:
 - monitoring project costs, (SHP Contract, Section 2.7.11.),
 - evaluating and signing the Contractor's applications for payment, (SHP Contract, Section 2.7.12.),
 - and participating directly in the resolution of any Contractor claims, (SHP Contract, Section 2.7.15.).⁸

While broad, SHP's authority was again under the direct control of the OSFC:

- For example, SHP's services were to comply at all times with the "Ohio School Design Manual (unless otherwise waived by [an OSFC] approved variance)." (SHP Contract, Section 2.1.1.). Thus, the OSFC set the minimum standards of SHP's work.
- SHP was required to submit copies of design documents to the OSFC and to amend those documents at the sole discretion of the OSFC. (SHP Contract, Sections 2.4.2., 2.5.1.).⁹
- The OSFC also controlled SHP's work throughout the construction phase of the Project by requiring that SHP "shall provide its services during the Construction Phase in accordance with this Agreement and the Standard Conditions." (SHP Contract, Section 2.7.1.).
- SHP was required to report directly to the OSFC with respect to: any contract interpretation, any defective work found on the Project, and as to all contractor-submitted pay applications. (SHP Contract, Sections 2.7.2., 2.7.3., 2.7.12.).

⁷ SHP's Agreement for Professional Design Services is attached to the Motion for Leave of Defendant Ohio Schools Facilities Commission to File Third-Party Complaint Instantly as Exhibit A.

⁸ SHP was also responsible for: providing formal interpretations of the Contract Documents as necessary to complete the work, (SHP Contract, Section 2.7.2.), visiting the Project at regular intervals and observe the progression of the work, (SHP Contract, Section 2.7.4.), participating in all pre-construction, progress, and quality control meetings, (SHP Contract, Section 2.7.7.), reviewing and assessing submittals by the Construction Manager and the various Contractors, (SHP Contract, Section 2.7.9.), and preparing bulletins and other necessary documentation for changes in the work, (SHP Contract, Section 2.7.10.).

⁹ The OSFC's control over SHP is perhaps made most apparent by the fact that SHP was required to obtain the OSFC's written approval with respect to all of SHP's design documents. (See SHP Contract, Sections 2.4.2., 2.5.1.).

Perhaps most revealing, SHP's contract expressly limits SHP's authority "on behalf of the Commission" to those acts specifically authorized in SHP's contract:

1.1.11 Limitation of Authority. The Architect shall not have any authority to bind the Commission for the payment of any costs or expenses without the express written approval of the Commission or the Commission. The Architect shall have authority to act on behalf of the Commission only to the extent provided herein. The Architect's authority to act on behalf of the Commission shall be modified only by an amendment in accordance with Subparagraph 9.5.2.

(SHP Contract, Section 1.1.11.). This point is important, as courts have found similar contractual provisions compelling enough to establish an agency relationship on their own.¹⁰

In summary, the Project's General Conditions and SHP's contract demonstrate together that while SHP was given broad authority to act on behalf of the OSFC, SHP's authority was at all times controlled by the OSFC. Therefore, SHP was an "agent" of the OSFC at all times relevant to this dispute.

i. *Lend Lease had authority to act as an "agent" of the OSFC.*

As to Lend Lease, the General Conditions demonstrate the same two key facts: (1) the OSFC granted Lend Lease broad authority to act on the OSFC's behalf to achieve the OSFC's Project objectives and (2) while Lend Lease had that authority, the OSFC maintained control over Lend Lease's conduct. Thus, like SHP, Lend Lease was also an "agent" of the OSFC at all times relevant to this dispute.

The General Conditions delegate broad authority to Lend Lease to act on the OSFC's behalf:

- Among other responsibilities, the General Conditions tasked Lend Lease with scheduling and coordinating the work to "complete the Project in accordance with the Contract Documents." (General Conditions, Section 4.2.2.).

¹⁰ See *Kmart Corp. v. Meadowbrook, LLC*, 81 Va. Cir. 365, 369, 2010 Va. Cir. LEXIS 280 (December 21, 2010) (found agency relationship where "Standard Terms & Conditions" limited engineer's services to the "scope of services contained in the Contract."), discussed *infra* pg. 20.

- Lend Lease was to “develop and keep current the Construction Schedule” and maintain a “schedule of submittals which is coordinated with the Construction Schedule.” (General Conditions, Section 4.2.2.).
- Lend Lease was also required to monitor the performance of the work to ensure compliance with its Construction Schedule, (General Conditions, Section 4.2.4.), had authority to disapprove or reject defective work to ensure conformance with the Contract Documents, (General Conditions, Section 4.2.5.), and “with the Assistance of the Architect, shall render written recommendations . . . on any matter in question involving the Contractor.” (General Conditions, Section 4.2.10.).

While broad, Lend Lease’s authority—similar to the authority of SHP—was at all times subject to the OSFC’s control:

- For example, while Lend Lease had broad authority to coordinate and schedule the work, the General Conditions required that Lend Lease’s scheduling decisions “shall not exceed the time limits specified in the Contract Documents.” (General Conditions, Section 4.2.3.1.).
- In fact, Lend Lease’s conduct on the Project was at all times controlled by the OSFC’s pre-approved Contract Documents:
 - The OSFC could reject work only to ensure that the work “conforms to the Contract Documents.” (General Conditions, Section 4.2.5.).
 - Moreover, Lend Lease was to “monitor the progress of the Work for conformance with the Construction Schedule” and required to “initiate and coordinate revisions of the Construction Schedule as required by the Contracts Documents.” (General Conditions, Section 4.2.4.)
- Like SHP, Lend Lease was required to “immediately notify” the OSFC upon any rejection of defective work. (General Conditions, Section 4.2.5.).
- Further, while Lend Lease was given authority to “attend and conduct any and all progress and coordination meetings,” Lend Lease was also required to produce written reports of each meeting and to distribute that report directly to the OSFC, within three working days after the meeting. (General Conditions, Section 4.2.7.).

Indeed, important decisions—such as scheduling the Project’s working hours—were subject to the direct approval of the OSFC:

4.2 RESPONSIBILITY AND AUTHORITY OF THE CONSTRUCTION MANAGER

4.2.1 The Construction Manager shall consult with the Architect, the Commission and any governmental authority having jurisdiction over the Project, to obtain full knowledge of all rules, regulations or requirements affecting the Project. The Construction Manager shall establish the Project's regular working hours, subject to approval by the Architect and the Commission.

(General Conditions, 4.2.1.).

Taken as a whole, the General Conditions demonstrate that while the OSFC granted broad authority to Lend Lease to act on its behalf, Lend Lease was at all times under the direct supervision and control of the OSFC. In short, the General Conditions demonstrate that an agency relationship existed between the OSFC, as principal, and both SHP and Lend Lease, as agents, at all times relevant to this dispute.

As with SHP, Lend Lease's contract with the OSFC further supports this point.¹¹

Lend Lease had broad authority to act on the Project to ensure a timely and efficient completion of the Project.

- Among other items, Lend Lease was tasked with: recording the progress of the work, (Lend Lease Contract, Section 2.7.5.); scheduling the project, (Lend Lease Contract, Section 2.7.6.); scheduling, conducting, and participating in construction-related meetings, (Lend Lease Contract, Section 2.7.7.); and maintaining Project cost accounting records, (Lend Lease Contract, Section 2.7.11.).

At the same time, Lend Lease's authority was under the control of the OSFC.

- Lend Lease's contract sets forth **detailed procedures (prescribed by the OSFC)** by which Lend Lease was to: record the progress of the work; schedule the project; participate in meetings; and maintain cost-accounting records. (Lend Lease Contract, Sections 2.7.5, 2.7.6, 2.7.7., 2.7.11.).
- Lend Lease was also required to report directly to the OSFC throughout its Project activities. (Lend Lease Contract, Sections 2.7.3., 2.7.6., 2.7.12.).

¹¹ Lend Lease's Final Agreement for Construction Management Services is attached to the Motion for Leave of Defendant Ohio Schools Facilities Commission to File Third-Party Complaint Instantly as Exhibit B.

- Finally, as with SHP, Lend Lease's contract also contains an **express "limitation of authority"** limiting the OSFC's "authority to act on behalf of the Commission only to the extent provided herein." (Lend Lease Contract, Section 1.1:11).

The fact that Lend Lease acted as an "agent" of the OSFC is further supported by the OSFC's own position on this issue in a prior dispute. In 2012, the OSFC argued before this Court that its Construction Manager was "**indisputably** the agent of OSFC" for the purpose of the attorney-client and attorney work product privileges:

Plaintiff's argument cites to the fact that the communications in question were shared with Rob Kelly, a consultant retained by OSFC. Under the Civil Rules, "A party may obtain discovery of documents and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer or agent) only upon a showing of good cause therefor. Civ R. 26(B)(3). Here, Quandel is indisputably the agent of OSFC and Rob Kelly is a consultant retained by OSFC and its attorneys to aid in fact finding for the underlying dispute. Plaintiff's argument overlooks the fact that "an agent acting on behalf of legal counsel...is subject to all the legal implications of the attorney-client and attorney work product privileges." *Am Motors Corp.*, 61 Ohio St. 3d, 575 N.E. 2d 116, at 346; see *State v. Post*, 32 Ohio St. 3d 380, 385, 513 N.E. 2d 754 (1987) (The attorney-client privilege "includes communications through persons acting as the attorney's agents.").

The OSFC's opposite argument here is not persuasive.¹²

In summary, the Project's General Conditions and Lend Lease's contract with the OSFC taken together demonstrate two key facts: (1) Lend Lease had broad authority to act on behalf of the OSFC as its agent, and (2) while that authority was broad, Lend Lease's authority was at all

¹² See OSFC's Memorandum Contra Motion To Compel Discovery, *Converse Electric, Inc. v. OSFC*, Oh. Ct. Claims Case No. 2011-09571, pg. 5, attached hereto as Exhibit B. The Referee should also note that in the initial stages of discovery in this case, the OSFC took the position that certain emails between the OSFC, SHP and Lend Lease were "privileged." See Robert Grinch Email Log—Documents Withheld, attached as Exhibit C hereto.

times subject to the direct control of the OSFC. Therefore—as the OSFC recognized in *Converse Electric*—Lend Lease should be treated as an agent of the OSFC.

B. Other Project Records Show SHP And Lend Lease Acted as the OSFC's Agents.

SHP and Lend Lease's authority to act on behalf of the OSFC, and the OSFC's control over SHP and Lend Lease, can be also inferred from correspondence during the Project:

- For example, on July 18, 2011, Madison W. Dowlen, Project Administrator of the OSFC, wrote to SHP notifying SHP that it had failed to deliver important Project Documents, including the drawings and specifications for the Campus Wide Bid Package, on time and were delaying the Project. Dowlen wrote, "Please note if contractors submit delay claims as a result of drawings and specifications being received late, SHP will be expected to pay those costs."¹³
- On August 30, 2011, Clayton Keith, Project Manager for Lend Lease, put the OSFC on notice through a "Contract Notification" that because of delays in receiving corrected drawings, the Project was at risk of being delayed.¹⁴
- On November 15, 2011, Clayton Keith wrote to Madison Dowlen with two questions in relation to TransAmerica. Keith asked "can we go ahead and start assessing LD's based on the roof and window enclosure complete milestone." Seeking the OSFC's guidance, Keith continued, "Let me know your thoughts."¹⁵

These emails show that while SHP and Lend Lease had broad authority on the Project, both were also under the direct supervision and control of the OSFC throughout the Project.¹⁶

¹³ See email dated July 18, 2011, from OSFC Project Administrator Madison Dowlen, attached as Exhibit D hereto, which was previously authenticated as seen on Page No. 103 in the Deposition Transcript of Madison W. Dowlen already on file with the Court.

¹⁴ See email dated August 30, 2011, from Lend Lease Project Manager Clayton Keith, attached as Exhibit E hereto, which was previously authenticated as seen on Page Nos. 130-131 in the Deposition Transcript of Madison W. Dowlen already on file with the Court.

¹⁵ See email dated November 15, 2011, from Lend Lease Project Manager Clayton Keith, attached as Exhibit F hereto which was previously authenticated as seen on Page No. 143 in the Deposition Transcript of Madison W. Dowlen already on file with the Court.

¹⁶ The OSFC's control over the design team was established from day one. In the Pre-proposal Conference for Professional Design Services held on January 26, 2007, the OSFC made clear that the design team would need to follow the OSFC's detailed design requirements. Further, the OSFC made it clear that a particular firm would only be hired to perform services during the design phase if the OSFC was satisfied with that firm's services in the earlier stages of the Project. See January 26, 2007 Pre-Proposal Meeting Minutes, attached hereto as Exhibit G, which were previously authenticated as seen on Page No. 21 in the Deposition Transcript of Richard Hickman already on file with the Court.

SHP and Lend Lease's authority as agents can also be implied from the OSFC's conduct on the Project. In place of the OSFC, both SHP and Lend Lease were actively involved on the Project from start to finish.¹⁷ SHP and Lend Lease regularly attended project meetings, issued frequent correspondence directly to Project participants, and even maintained a consistent presence on the Project in a work-site trailer.¹⁸ Throughout SHP and Lend Lease's involvement on the Project, it was clear to all Project participants including TransAmerica that SHP and Lend Lease were acting in their capacity as representatives (or agents) of the OSFC.¹⁹ From the OSFC's conduct throughout construction, it was clear to TransAmerica that SHP and Lend Lease were present on the Project to represent the interests of the OSFC.²⁰

Illustrating this point, the OSFC permitted Lend Lease and SHP to approve change orders on its behalf which increased TransAmerica's contract amount. There are at least eleven such changes orders, which comprise over \$50,000, where only SHP and Lend Lease provided approval yet the OSFC allowed TransAmerica's contract to increase. In most cases, Lend Lease signed the change order on behalf of the OSFC.²¹ The OSFC also induced TransAmerica into believing, in good faith, that SHP and Lend Lease were agents of the OSFC.²²

II. Conclusion

Key project records show that an agency relationship existed between the OSFC, as principal, and SHP and Lend Lease, as its agents, at all times relevant to this dispute. Therefore, the Court should grant TransAmerica's Motion to Separate and issue an Order separating the OSFC's third-party claims pursuant to Civ.R. 14(A).

¹⁷ Koniewich Affidavit in Support, ¶4

¹⁸ Koniewich Affidavit in Support, ¶5.

¹⁹ Koniewich Affidavit in Support, ¶6.

²⁰ Koniewich Affidavit in Support, ¶7.

²¹ Koniewich Affidavit in Support, ¶8.

²² Koniewich Affidavit in Support, ¶9-12.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Objections to the Referee's Decision Denying TransAmerica's Motion to Separate was sent via e-mail and by regular U.S. mail, postage prepaid, this 17th day of February, 2015 to:

William C. Becker
Jerry K. Kasai
Craig D. Barclay
Assistant Attorneys General
Court of Claims Defense
150 East Gay Street, 18th Floor
Columbus, OH 43215-3130



Michael J. Madigan (0079377)

Severance Timeline

12/30/14 - Mo for lv to file 3rd party complaint;

1/28/15 - Ref: No severance;

2/11 - T/A objs;

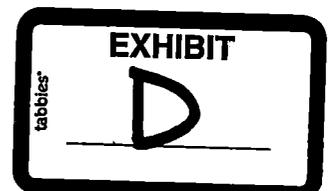
2/17 - T/A: Renewed motion;

3/24 - J: T/A objs = Renewed motion;

3/24 - Ref: Severance granted;

4/17 - J: Must move to set aside Order within 10 days

53(D)(2)(b)



2005 WL 1503701

CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio, Eleventh District, Geauga
County.

Maxine E. CUNNANE-GYGLI, Plaintiff-Appellant,
v.

Lynn F. MACDOUGAL, Executrix of the Estate of
Robert P. Gygli, Deceased, Defendant-Appellee.

No. 2004-G-2597. | June 24, 2005.

Synopsis

Background: Wife sought divorce from husband. The Court of Common Pleas, Domestic Relations Division, No. 04 D 000436, Geauga County, adopted the magistrate's division of property and award of spousal support and granted divorce. Wife appealed.

Holdings: The Court of Appeals, Rice, J., held that:

[1] wife was precluded from challenging magistrate's factual findings;

[2] trial court did not abuse its discretion in denying motion to extend time to file transcript; and

[3] wife was not entitled to attorney fees.

Affirmed.

Civil Appeal from the Court of Common Pleas, Domestic Relations Division, Case No. 04 D 000436, Affirmed.

Attorneys and Law Firms

Daniel R. Corcoran, Chagrin Falls, OH, for
Plaintiff-Appellant.

Joseph E. Bolek, Jr., Beachwood, OH, for
Defendant-Appellee.

OPINION

RICE, J.

*1 { ¶ 1 } Appellant, Maxine E. Cunnane-Gygli appeals the Geauga County Court of Common Pleas' November 2, 2004 judgment entry overruling her objections to the September 30, 2004 magistrate's decision.

{ ¶ 2 } On May 10, 2004, appellant filed a complaint with the lower court seeking divorce. The parties were married on September 9, 1977 and, at the time of the filing of the current matter, appellant was 80 years old and appellee was 76 years old. The case was referred to Magistrate Thomas Mullen who set the case for trial on September 8, 2004. During the pendency of the proceedings, appellee was diagnosed with terminal cancer.

{ ¶ 3 } The parties entered into certain stipulations prior to trial, which lasted only one day. On September 30, 2004, the magistrate awarded appellant and appellee their respective separate property; appellant was also awarded spousal support. The parties agreed to a division of furniture and other personal belongings.

{ ¶ 4 } On October 12, 2004, appellant filed her objections to the magistrate's decision but filed no transcript with the objections. Appellee duly opposed appellant's objections by motion on October 18, 2004. On October 26, 2004, appellant sought leave to stay the proceedings and supplement her objections with a transcript of the proceedings before the magistrate. The court failed to expressly rule on appellant's motion but, on November 2, 2004, after an independent review of the magistrate's decision, the trial court adopted the same and granted the parties a divorce.

{ ¶ 5 } On November 5, 2004, appellant filed her notice of appeal; appellee passed away on the same day.

{ ¶ 6 } While appellant raised eight assignments of error, we shall address the following four as the others set forth in her brief were either asserted without argument or are cumulative in relation to the following:

{ ¶ 7 } "[1.] The trial court committed reversible error in not determining that accounts held by [P]rudential [F]inancial were marital property and failure to award appellant-plaintiff all or part of these accounts.

{ ¶ 8 } “[2.] The trial court committed reversible error in not awarding all or part of the of [sic] other stocks and securities that were awarded to appellee-defendant. [sic.]

{ ¶ 9 } “[3.] The trial court committed reversible error in not permitting a hearing on attorney fees on behalf of the appellant plaintiff.

{ ¶ 10 } “[4.] The trial court committed reversible error in not granting appellant-Plaintiff’s motion to supplement objections and to stay proceedings until transcript prepared. [sic.]

{ ¶ 11 } As they admit to the same analysis, we will address appellant’s first and second assignments of error together. In her first two assigned errors, appellant argues the trial court erred in adopting the magistrate’s decision to the extent that the Prudential IRAs, stocks, and other securities were not separate, but marital property. We disagree.

*2 ^[1] { ¶ 12 } The record indicates that appellant, while filing objections to the magistrate’s decision, failed to file a transcript or reasonable substitute with her objections. Civ.R. 53(E)(3)(c) requires any objection to a finding of fact to be supported by “a transcript of all the evidence submitted to the magistrate relevant to that fact or an affidavit of that evidence if a transcript is not available.” The objecting party bears the burden of submitting the transcript or affidavit to the trial court. *Walther v. Newsome*, 11th Dist. No.2002-P-0019, 2003-Ohio-4723, at ¶ 20.

{ ¶ 13 } We have previously held that an objecting party who fails to provide either a transcript or an affidavit in support of her objections may not argue factual determinations to the trial court. *Id*; see, also, *Yancey v. Hahn* (March 3, 2000), 11th Dist. No. 99-G-2210, 2000 Ohio App. LEXIS 788, at 7, 2000 WL 263757. Likewise, appellant is precluded from challenging the magistrate’s factual findings in this appeal due to her failure to provide the trial court with a proper record of the magisterial proceedings. *In the Matter of Stevens* (Nov. 17, 2000), 11th Dist. No. 99-T-0066, 2000 Ohio App. LEXIS 5374, at 6, 2000 WL 1734933. This court is therefore limited to determining whether or not the trial court abused its discretion in adopting the magistrate’s decision. *Ackroyd v. Ackroyd* (June 30, 2000), 11th Dist. No. 99-L-018, 2000 Ohio App. LEXIS 2983, at 4, 2000 WL 895599.

{ ¶ 14 } Appellant currently argues that the trial court erred in adopting the magistrate’s decision as it pertained to the division of certain property; specifically, appellant

contends that appellee’s Prudential Financial accounts, IRAs, as well as other stocks and securities were marital property, not separate property as the magistrate determined. A proper analysis of appellant’s argument would require a review of the testimony given at the hearing. While appellant provided a copy of the hearing transcript on appeal, the trial court was not afforded the opportunity to examine this evidence. Appellant’s failure to provide a transcript or an affidavit prevents us from considering these issues.

{ ¶ 15 } That said, even though appellant failed to provide the trial court with a transcript or an affidavit, the lower court was nevertheless obligated to review the magistrate’s decision to determine whether there was an error of law or other defect on the face of the decision. Civ.R. 53(E)(4)(a). In the instant matter, the trial court reviewed the magistrate’s decision independently and found “no error of law or other defect” on the face of the decision. Our review of the magistrate’s decision reveals the same, i.e., the decision was legally sufficient, was adequately detailed, and contained no obvious errors on its face. The magistrate’s decision complied with the requirements of Civ.R. 53 and, as a result, the trial court did not abuse its discretion in adopting the magistrate’s decision. Appellant’s first and second assignments of error are without merit.

*3 { ¶ 16 } Because it dovetails well with the foregoing analysis, we shall next address appellant’s fourth assignment of error. In her fourth assignment of error, appellant contends the trial court erred in overruling her motion to supplement her objections and stay the proceedings until a transcript was prepared.

^[2] { ¶ 17 } As indicated supra, if a party fails to file a transcript of the hearing before the magistrate, the trial court may adopt the magistrate’s decision without further consideration. However, Civ.R. 53(E)(3)(c) does not require a transcript to be filed simultaneously with objections; rather, if the objecting party does not file a transcript at all before the hearing date to consider the objections, the trial court may adopt the magistrate’s findings without further consideration. *Dressler v. Dressler*, 12th Dist. Nos. CA2002-08-085 and CA2002-11-128, 2003-Ohio-5115, 2003 Ohio App. LEXIS 4608, at 11-12, 2003 WL 22227532.

{ ¶ 18 } Here, the magistrate’s decision was filed on September 30, 2004. Pursuant to Civ.R. 53(E)(3)(a), an objecting party must file her objections to the magistrate’s decision within fourteen days. Appellant complied with the dictates of Civ.R. 53(E)(3)(a) and filed her objections, without a transcript, on October 12, 2004. Two weeks

later, and twenty seven days after the magistrate released his decision, on October 26, 2004, appellant filed a "Motion to Supplement Objections and Stay Proceedings until Transcript Prepared." In her motion, appellant declared that she had engaged "an approved reporter to transcribe the proceedings of the Magistrate herein from the audio recording." Appellant noted the transcript would be complete by November 15, 2004. In support of her motion, appellant urged while Civ.R. 53(E)(3) requires a transcript accompanying factual objections to a magistrate's decision, the rule does not establish a time within which the objecting party must file the evidence. See, *Shull v. Shull* (1999), 135 Ohio App.3d 708, 735 N.E.2d 496. This argument notwithstanding, appellant's motion provided no reasons for her delay in producing the relatively short (183 page) transcript.

{ ¶ 19} The trial court did not rule on appellant's motion and, on November 2, 2004, the trial court filed its judgment entry adopting the magistrate's decision.

{ ¶ 20} We must note that a trial court's failure to rule on a motion creates a presumption that the trial court overruled the motion. *Brown v. Brown*, 11th Dist. No.2001-L-051, 2002-Ohio-4364, at ¶ 33. That said, appellant's motion, when read functionally, is a request for an extension of time to file the transcripts. Civ.R. 6(B) allows a trial court to extend the period for filing a transcript of proceedings. See *Vance v. Rusu* (Aug. 1, 2001), 9th Dist. No. 20442, 2001 Ohio App. LEXIS 3375, at 3-4, 2001 WL 866277. A court may grant or deny an extension of time under Civ.R. 6(B) in its sound discretion. Civ.R. 6(B).

{ ¶ 21} Under the circumstances, appellant's motion was filed nearly a month after the magistrate's decision was filed. While a transcript does not need to be filed contemporaneously with objections to a magistrate's decision, appellant's objections did not indicate a transcript was forthcoming; rather, appellant waited another fourteen days after filing her objections before filing her motion to supplement her objections with a transcript.

*4 { ¶ 22} Further, it is worth noting that on October 12, 2004, the same day on which appellant filed her objections, appellee's counsel moved the court to "enter a final judgment." In this motion, appellee's counsel communicated the urgency of resolving the case due to appellee's rapidly deteriorating health. On October 15, 2004, appellant filed a motion opposing appellee's motion to enter a final judgment. Again, appellant did not indicate she had ordered transcripts of the proceedings upon which her objections were based. On October 18,

2004, appellee filed his motion in opposition to appellant's objections the primary focus of which was appellant's failure to file a transcript. Eight days later, on October 26, 2004, appellant filed her motion to stay the proceedings in interest of supplementing her objections with a transcript. On November 2, 2004, the trial court adopted the magistrate's findings without the benefit of a transcript; on November 5, 2004, appellee died.

{ ¶ 23} Given the foregoing facts, we do not think the trial court abused its discretion when it impliedly overruled appellant's October 26, 2004 motion. Our holding on this issue is based upon the following considerations: (1) Civ.R. 53(E)(3)(c) requires a transcript or affidavit in support of objections; (2) appellant did not broach the issue of filing a transcript until nearly four weeks after the magistrate filed its decision and eight days after the issue was brought to the court's attention; (3) the transcript was relatively short and would not require a great deal of time to prepare; and, (4) appellant was on notice of the arguable urgency of resolving matters in light of appellee's failing health. In consideration of the foregoing, the denial of appellant's motion does not indicate the court maintained an arbitrary, unreasonable, or unconscionable posture towards the appellant and her request. Appellant's fourth assignment of error is therefore overruled.

[3] { ¶ 24} In her third assignment of error, appellant contends the trial court erred by failing to conduct a hearing on attorney's fees.

{ ¶ 25} We start our analysis by noting that a hearing is not always necessary before overruling a motion for attorney fees. *State ex rel. Chapnick v. East Cleveland Cty School District Bd. of Education*, 93 Ohio St.3d 449, 452, 755 N.E.2d 883, 2001-Ohio-1585. That said, a party requesting fees under this section has the burden of demonstrating their reasonableness. *Shaffer v. Shaffer* (1996), 109 Ohio App.3d 205, 214, 671 N.E.2d 1317. Generally, the decision whether to award attorney fees is a matter within the sound discretion of the trial court. *Kalia v. Kalia*, 151 Ohio App.3d 145, 783 N.E.2d 623, 2002-Ohio-7160, ¶ 50. Save a clear abuse of discretion, a reviewing court will not reverse the trial court's determination as to attorney fees. Id.

{ ¶ 26} In her brief, appellant notes that counsel moved the court orally for attorney fees, but the court denied the same. Further, the record includes a motion for attorney fees pursuant to R.C. 3105.18(H) filed on October 4, 2004, five days after the magistrate's decision was filed. The motion states that appellant is unable to "defray" the expense of attorney fees and notes that counsel's hourly

rate of \$150.00 was stipulated a reasonable rate.

*5 { ¶ 27} By his own admission, counsel's oral motion for fees was denied. The proper means for challenging this denial is not filing a second written motion several days subsequent to the filing of the magistrate's decision. Rather, Civ.R. 53(C)(3)(a) states:

{ ¶ 28} "Unless otherwise specified in the order of reference, the magistrate may enter orders without judicial approval in pretrial proceedings under Civ.R. 16, in discovery proceedings under Civ.R. 26 to 37, temporary restraining orders under Civ.R. 75(I), in hearings under Civ.R. 75(N), and other orders as necessary to regulate the proceedings." (Emphasis added).

{ ¶ 29} Further, Civ.R. 53(C)(3)(b) provides, in relevant part:

{ ¶ 30} "Any person may appeal to the court from any order of a magistrate entered under division (C)(3)(a) of this rule by filing a motion to set the order aside, stating the party's objections with particularity. The motion shall be filed no later than ten days after the magistrate's order is entered. * * *"

{ ¶ 31} Here, we construe the magistrate's denial of appellant's oral motion as an "order necessary to regulate the proceedings." Therefore, appellant was required to file a motion to set aside the magistrate's order. In lieu of doing so, appellant filed a second motion for attorney fees to the court, who denied the same. In our view, appellant was not entitled to a hearing on his motion for attorney fees and, in an effort to obtain the fees, counsel used inappropriate procedural channels to vindicate his claim. Under the circumstances, we find appellant's contentions without merit.

^[4] { ¶ 32} However, assuming arguendo that appellant used proper procedure and her motion was properly before the trial court, we still believe she failed to offer adequate evidence to substantiate her motion.

Specifically, R.C. 3105.18(H) provides that:

{ ¶ 33} "in divorce or legal separation proceedings, the court may award reasonable attorney's fees to either party at any stage of the proceedings, * * * if it determines that the other party has the ability to pay the attorney's fees that the court awards. When a court determines whether to award reasonable attorney's fees to any party pursuant to this division, it shall determine whether either party will be prevented from fully litigating that party's rights and adequately protecting that party's interests if it does not award reasonable attorney's fees."

{ ¶ 34} Here, while the parties stipulated to the reasonableness of counsel's hourly rate, appellant failed to offer any evidence that she was unable to effectively prosecute her case due to a lack of monetary funds. Appellant's rights were fully protected and defended by counsel during the magisterial hearing. Notwithstanding the reasonableness of counsel's per hour fee, we do not believe appellant's vague declaration of need within her motion for attorney fees suffices to meet the requirements set forth under R.C. 3105.18(H). Appellant's third assignment of error is overruled.

*6 { ¶ 35} For the aforementioned reasons, appellant's four assigned errors are without merit and the judgment of the Geauga County Court of Common Pleas is hereby affirmed.

DONALD R. FORD, P.J., DIANE V. GRENDALL, J.,
concur.

Parallel Citations

2005 -Ohio- 3258

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2011 WL 2536668

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REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio,
Seventh District, Mahoning County.

J & B FLEET INDUSTRIAL SUPPLY, INC.,
Plaintiff–Appellant,

v.

Rick MILLER, Defendant–Appellee.

No. 09 MA 173. | Decided June 16, 2011.

Synopsis

Background: Supplier of sundry products brought breach of contract action against independent distributor. The Common Pleas Court, Mahoning County, No. 08 CV 1591, granted summary judgment in favor of distributor. Supplier appealed.

Holdings: The Court of Appeals, Degenaro, J., held that:

- [1] debts were not fraudulently incurred;
- [2] distributor did not waive bankruptcy discharge defense;
- [3] distributor was not estopped from asserting defense; and
- [4] trial court’s incorrect conclusion that injunctive relief was barred was harmless error.

Affirmed.

Civil Appeal from Common Pleas Court, Case No. 08 CV 1591.

Attorneys and Law Firms

Attorney Kenneth Cardinal, Sebring, OH, for plaintiff-appellant.

Attorney Dennis Haines, Attorney Charles Oldfield, Green, Haines, Sgambati, Co., LPA, Youngstown, OH, for defendant-appellee.

Opinion

DeGENARO, J.

*1 { ¶ 1 } Plaintiff–Appellant, J & B Fleet Industrial Supply, Inc. appeals the decision of the Mahoning County Court of Common Pleas overruling objections to a magistrate’s decision and granting summary judgment in favor of Defendant–Appellee, Rick Miller, in a suit for breach of contract, injunctive relief and fraud. J & B argues the trial court erred by concluding that J & B’s contract-based claims against Miller were discharged in bankruptcy and by improperly limiting discovery. Finally, J & B argues there were genuine issues of material fact precluding summary judgment on its fraud claim, and that it pleaded the fraud claim with sufficient particularity. For the following reasons, J & B’s assignments of error are meritless, and accordingly, the judgment of the trial court is affirmed.

Facts and Procedural History

{ ¶ 2 } J & B is a corporation that supplies sundry products to commercial and industrial markets. Miller was employed by J & B as a sales agent. Prior to that, Miller worked in sales and marketing for J & B’s competitors, where he gained expertise in the industry.

{ ¶ 3 } On March 23, 2003, Miller and J & B entered into an “Independent Sales and Marketing Agreement” which had a stated term of twenty years. Among other things, Miller agreed to terminate his employment relationship with J & B and instead become an independent distributor. J & B agreed to permit Miller to use the J & B logo, signage, catalogs, and business accounts for banking purposes. J & B agreed to extend to Miller a \$10,000.00 line of credit, which was secured by Miller’s “funded account,” the retainage held by J & B from Miller’s sales commissions when Miller was employed as a J & B sales agent. The Agreement also contained a non-compete clause which purported to limit Miller’s right to compete with J & B for the duration of the contract and for an additional 20 years. The non-compete clause allowed J & B to conduct business in 87 out of 88 of Ohio’s counties. It provided Miller with exclusive rights only to Franklin County, but permitted J & B to retain some existing customers. The non-compete clause further prohibited Miller from competing with J & B in 56 Ohio counties, including Stark, where Miller resides, and counties

surrounding Stark.

{ ¶ 4 } On November 18, 2003, Miller filed a Chapter 7 bankruptcy petition, and on April 7, 2004, was granted a no-asset discharge.

{ ¶ 5 } According to Miller, he informed J & B owner and president Louis W. diDonato¹ about his bankruptcy filing. Miller also averred he had discussions with diDonato about the bankruptcy, both before he filed, and during the course of the bankruptcy proceedings. diDonato admitted that he was aware of Miller's financial problems, stating: "Miller did inform me that he was or would be seeking a divorce and he had debts. He expressed that he may have to file bankruptcy to rid himself of marital and personal debts. I cannot recall if he told me before March or after March, 2003."

*2 { ¶ 6 } Following Miller's bankruptcy discharge, Miller continued to perform his obligations under the Agreement. Miller did not notify J & B of the discharge. However, Miller never entered into a reaffirmation agreement with J & B.

{ ¶ 7 } J & B filed a complaint against Miller for breach of contract and injunctive relief. J & B claimed that Miller breached the non-compete clause by conducting business in competition with J & B in areas prohibited by the Agreement. J & B requested that Miller be enjoined from continuing to breach the non-compete clause and prayed for damages for the breach. J & B attached an affidavit from diDonato in support of the request for an injunction.

{ ¶ 8 } Miller answered and counterclaimed for fraud and breach of contract. Specifically, Miller claimed that J & B had committed fraud by failing to disclose all of its accounts as provided in the Agreement, and that Miller had relied on J & B's alleged misrepresentations and had been damaged therefrom. Miller also alleged that J & B had breached the non-compete clause by competing with Miller in Franklin County in contravention of the Agreement. Miller also requested an injunction prohibiting J & B from breaching the non-compete.

{ ¶ 9 } In an August 5, 2008 decision, the magistrate issued a preliminary injunction, preventing both parties from breaching the non-compete clause. No objections were filed and the trial court adopted the decision.

{ ¶ 10 } On January 13, 2009, Miller, having retained new counsel, filed a motion for leave to amend his answer and stay discovery. Specifically, Miller sought to add the affirmative defense of discharge in bankruptcy. Further, Miller moved the court to stay discovery as he intended to

file a dispositive motion on the basis of the bankruptcy discharge defense and was concerned if discovery continued on other matters J & B could gain information about Miller's business operations that could give J & B a competitive advantage over Miller.

{ ¶ 11 } On March 18, 2009, the magistrate issued an order granting both parties leave to amend their pleadings. The magistrate set deadlines for filing summary judgment motions. Finally, the magistrate ruled that pending a ruling on the motion for summary judgment discovery is stayed except relating to: (1) Miller's affirmative defense of discharge in bankruptcy; (2) J & B's contention that a contract between the parties existed after the bankruptcy; and (3) violations of the court's previous orders.

{ ¶ 12 } J & B never moved to set aside this order. Instead, despite the directives of that order, on March 20, 2009, J & B filed a motion to compel discovery. As noted in the record, this motion was improperly served on Miller's prior counsel. The trial court never ruled on the motion to compel.

{ ¶ 13 } On March 27, 2009, the magistrate issued an amended magistrate's order, which was substantially the same as the March 18 order, except that it corrected misidentification of the parties and errors with dates. J & B never moved to set aside this order.

*3 { ¶ 14 } On March 26, 2009, Miller filed an amended answer and counterclaim, in which he added the affirmative defense of discharge in bankruptcy. On April 10, 2009, J & B filed an amended complaint which added claims for fraud and estoppel, in addition to the claims for breach of contract and injunctive relief. Miller filed an answer to the amended complaint.

{ ¶ 15 } Miller filed a motion for summary judgment on April 24, 2009 with regard to J & B's claims against him, arguing J & B's claims for breach of contract and injunctive relief had been discharged in bankruptcy. Alternatively, Miller argued that the non-compete clause is unreasonable and should not be enforced. Finally, Miller argued there were no genuine issues of material fact with regards to J & B's fraud claim. Attached to Miller's motion were his affidavit and two exhibits, the Agreement and his discharge order from the bankruptcy court.

{ ¶ 16 } J & B filed a brief in opposition raising four arguments. First, J & B argued that its breach of contract and injunctive relief claims could not be barred by the bankruptcy discharge because Miller had waived the use of that defense by counterclaiming for breach of contract.

Second, its claim for injunctive relief is non-dischargeable as it was a separate and distinct remedy under the Agreement which arose post-bankruptcy. Third, the non-compete clause was reasonable, and that the law cited by Miller with regard to the non-compete was inapplicable because the covenant was not made in an employment context. Fourth, there were genuine issues of material fact remaining regarding its fraud claim. J & B attached seven exhibits, five of which were pleadings contained in the record. The other two were an affidavit from diDonato and a copy of the Agreement.

{ ¶ 17} On June 12, 2009, the magistrate issued a two-sentence decision granting summary judgment against J & B for all of its claims against Miller. J & B filed a request for findings of fact and conclusions of law. Miller filed a motion to strike that request, claiming that findings of fact and conclusions of law are inappropriate where litigation has been terminated by summary judgment. The magistrate overruled Miller's motion to strike and ordered Miller to submit proposed findings of fact and conclusions of law.

{ ¶ 18} On August 11, 2009, the magistrate issued a lengthier decision concluding that the bankruptcy discharge barred the claims for breach of contract and injunctive relief, and even if the claims were not barred, the non-compete was unreasonable and unenforceable. Finally, the magistrate found there were no genuine issues of material fact regarding the fraud and estoppel claims.

{ ¶ 19} J & B filed objections to the magistrate's decision which the trial court overruled, adopting the magistrate's decision in its entirety, and entering judgment for Miller on J & B's amended complaint.

Discovery Orders

{ ¶ 20} For ease of analysis, J & B's seven assignments of error will be addressed out of order and will be grouped together by subject matter. In its fourth and fifth assignments of error, J & B contends:

*4 { ¶ 21} "The trial court erred in issuing a stay of full discovery which would establish the reasonableness of the mutual non-compete clause which each sought to enforce by injunctive relief in the respective pleadings."

{ ¶ 22} "The trial court erred by terminating pre-trial discovery regarding fundamental issues in the litigation based solely upon an affirmative defense in order to expedite the conclusion of the case."

{ ¶ 23} J & B specifically takes issue with two magistrate's orders, one dated March 18, 2009 and the other March 27, 2009. Substantively, both orders are the same in that they granted both parties leave to amend pleadings and file motions for summary judgment. Both orders include the following language:

{ ¶ 24} "Pending a decision on the motion for summary judgment, discovery herein is stayed, except that discovery relating to the following:

{ ¶ 25} "1.) Defendant's affirmative defense of discharge in bankruptcy.

{ ¶ 26} "2.) Plaintiff's contention that a contract between the parties existed after the bankruptcy;

{ ¶ 27} "3.) Violations of this Court's previous Order."

{ ¶ 28} The only changes to the March 27, 2009 order (which was labeled "Amended Magistrate's Order") involved correcting typographical errors regarding dates and party names (i.e., changing "plaintiff" to "defendant.")

{ ¶ 29} J & B argues these orders prevented further discovery regarding the reasonableness of the non-compete clause, and the limited scope contravenes the Civil Rules, which provide for liberal discovery on "any matter, not privileged, which is relevant to the subject matter involved in the pending action." Civ.R. 26(B)(1). Miller counters that J & B waived these arguments by failing to oppose the discovery orders at the proper time in the trial court.

^[1] { ¶ 30} Magistrates have the authority to enter orders without judicial approval "if necessary to regulate the proceedings and if not dispositive of a claim or defense of a party." Civ.R. 53(D)(2)(a)(i). Orders regulating discovery, such as the ones at issue here, clearly fall under the purview of this rule. See, e.g., *Crawford v. Hawes*, 2d Dist. No. 23209, 2010-Ohio-952, at ¶ 25. See, also, Staff Notes to 2006 Amendments to Civ.R. 53(D). Subpart (2)(b) specifies the procedure for setting aside a magistrate's order:

{ ¶ 31} "Any party may file a motion with the court to set aside a magistrate's order. The motion shall state the moving party's reasons with particularity and shall be filed not later than ten days after the magistrate's order is filed. The pendency of a motion to set aside does not stay the effectiveness of the magistrate's order, though the magistrate or the court may by order stay the

effectiveness of a magistrate's order."

{ ¶ 32} If a party does not move to set aside a magistrate's order, that party waives a challenge to that order on appeal. *Nettle v. Nettle*, 9th Dist. No. 25001, 2010-Ohio-4638, at ¶ 13, citing *Crawford*, supra. See, also, *Spier v. Spier*, 7th Dist. No. 05 MA 26, 2006-Ohio-1289, at ¶ 55-57 (discussing a prior version of Civ.R. 53(D)(2)(b)). J & B never filed a motion to set aside either of the magistrate's discovery orders, and is precluded from raising the issue on appeal.

*5 { ¶ 33} Moreover, J & B never moved for additional time to complete discovery pursuant to Civ.R. 56(F). The remedy for a party who must respond to a summary judgment motion before he or she has completed adequate discovery is a motion under Civ.R. 56(F). *Carbone v. Austintown Surgery Ctr., L.L.C.*, 7th Dist. No. 09 MA 35, 2010-Ohio-1314, at ¶ 30. Importantly, "an appellant who failed to seek relief under Civ.R. 56(F) in the trial court has not preserved his rights thereto for purposes of appeal." *Petty v. Mahoning Women's Centre, Inc.* (Feb. 15, 1995), 7th Dist. No. 93 C.A. 32, at *3-4, quoting *Stegawski v. Cleveland Anesthesia Group, Inc.* (1987), 37 Ohio App.3d 78, 523 N.E.2d 902, at paragraph four of the syllabus.

{ ¶ 34} Civ.R. 56(F) permits, "a party the opportunity to request additional time to obtain, through discovery, the facts necessary to adequately oppose a motion for summary judgment." *Morantz v. Ortiz*, 10th Dist. No. 07AP-597, 2008-Ohio-1046, at ¶ 20. "A party seeking a Civ.R. 56(F) continuance has the burden of establishing a factual basis and reasons why the party cannot present sufficient documentary evidence without a continuance." *Shirdon v. Houston*, 2d Dist. No. 21529, 2006-Ohio-4521, at ¶ 10; see, also, *Beegle v. Amin*, 156 Ohio App.3d 533, 2004-Ohio-1579, 806 N.E.2d 1045, at ¶ 8 (Seventh District). Pursuant to the language of Civ.R. 56(F), this factual basis must be set forth in an affidavit. Civ.R. 56(F). Such affidavits are made by the movant or his or her counsel. See, e.g., *Reywal Co. Ltd. Partnership v. Dublin*, 188 Ohio App.3d 1, 2010-Ohio-3013, 933 N.E.2d 1164 at ¶ 58-59, *Shirdon* at ¶ 11. The affidavit must explain the need for additional discovery and what such discovery would be likely to uncover. *Id.*

{ ¶ 35} J & B argues that Exhibit F of its Brief in Opposition to Summary Judgment, an affidavit from diDonato, was its attempt to comply with Civ.R. 56(F). However, diDonato's affidavit failed to mention what additional discovery would have been beneficial to the case. Rather, it was offered pursuant to Civ.R. 56(C) as substantive evidence in opposition to the summary

judgment motion. Accordingly, J & B failed to utilize Civ.R. 56(F).

{ ¶ 36} Because J & B failed to move to set aside the magistrate's discovery orders, and because it failed to avail itself of the procedures contained in Civ.R. 56(F), J & B is precluded from challenging the discovery orders on appeal, or from asserting that the trial court prematurely granted summary judgment prior to the completion of full discovery. Accordingly, J & B's fourth and fifth assignments of error are meritless.

Summary Judgment due to Bankruptcy Discharge

{ ¶ 37} J & B's first, second and third assignments of error assert:

{ ¶ 38} "The trial court erred in granting summary judgment based upon Appellee's certification of discharge in bankruptcy because there continues to exist a genuine issue of fact as to the effectiveness of said discharge to the Appellee/Defendant's indebtedness to this Appellant."

*6 { ¶ 39} "Plaintiff/Appellant's claims for relief are not barred by Appellee's 2003 bankruptcy discharge since Appellee counterclaimed for breach and injunctive relief thereby waiving the effectiveness of this affirmative defense."

{ ¶ 40} "The trial court erred in that J & B's claim for injunctive relief is equitable and thus a separate and distinct remedy under the contract which is not barred by the Appellee's 2003 bankruptcy even if shown to be effective."

{ ¶ 41} An appellate court reviews a trial court's summary judgment decision de novo, applying the same standard used by the trial court. *Ohio Govt. Risk Mgt. Plan v. Harrison*, 115 Ohio St.3d 241, 2007-Ohio-4948, 874 N.E.2d 1155, at ¶ 5. A motion for summary judgment is properly granted if the court, viewing the evidence in a light most favorable to the party against whom the motion is made, determines that: (1) there are no genuine issues as to any material facts; (2) the movant is entitled to a judgment as a matter of law; and (3) the evidence is such that reasonable minds can come to but one conclusion and that conclusion is adverse to the opposing party. Civ.R. 56(C); *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, 850 N.E.2d 47, at ¶ 10. Only the substantive law applicable to a case will identify what constitutes a material issue, and only the disagreements "over facts that might affect the outcome of the suit under

the governing law” will prevent summary judgment. *Byrd* at ¶ 12, citing *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202. “[T]he moving for summary judgment, “the moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party’s claim.” *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 296, 662 N.E.2d 264. The nonmoving party has the reciprocal burden of specificity and cannot rest on the mere allegations or denials in the pleadings. *Id.* at 293, 662 N.E.2d 264.

Effectiveness of Bankruptcy Discharge

²¹ { ¶ 42} J & B argues that summary judgment was improper because there is a genuine issue of material fact regarding the effectiveness of the bankruptcy discharge with respect to J & B’s contract-based claims. Specifically, J & B argues that Miller’s debts are excepted from the bankruptcy discharge because they were fraudulently incurred. Miller counters that this argument has been waived because J & B failed to raise it in its brief in opposition to Miller’s motion for summary judgment.

{ ¶ 43} J & B never argued that Miller’s debts were excepted from the bankruptcy discharge due to Miller’s alleged fraud. However, as Miller concedes, J & B did argue, both in its brief in opposition to summary judgment and its objections to the magistrate’s decision, that there were genuine issues of material fact remaining regarding J & B’s separate fraud claim against Miller. These issues, whether the debts are excepted from bankruptcy due to fraud, and whether there are genuine issue of material fact regarding J & B’s fraud claim, are similar and turn on the same set of facts; whether the fact that Miller failed to tell J & B about the bankruptcy and continued to comply with the contract post-discharge constitutes fraud. Thus, this issue was not waived.

*7 { ¶ 44} The Bankruptcy Code, defines a debt as a “liability on a claim.” Section 101(12), Title 11, U.S.Code. The term “claim” is defined broadly under section 101(5) as:

{ ¶ 45} “(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

{ ¶ 46} “(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.” Section 101(5), Title 11, U.S.Code.

{ ¶ 47} The United States Supreme Court held a “right to payment” means “nothing more nor less than an enforceable obligation * * *.” *FCC v. NextWave Personal Communications, Inc.* (2003), 537 U.S. 293, 303, 123 S.Ct. 832, 154 L.Ed.2d 863

{ ¶ 48} A creditor is defined as, *inter alia*, an “entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor[.]” Section 101(10)(A), Title 11, U.S.Code.

{ ¶ 49} A discharge in bankruptcy under Section 727(a), Title 11, U.S.Code “discharges the debtor from all debts that arose before the date of the order of relief.” Section 727(b), Title 11, U.S.Code. When dealing with a contract-based claim, the claim “arises on the day the agreement is signed by the parties.” *In re May* (Bankr.Ct.S.D. Ohio.1992), 141 B.R. 940, 944. Thus, the “right to payment, although contingent as to a future breach, arises when the parties enter into the [] contract.” *Id.*

{ ¶ 50} There are statutory exceptions to discharge listed in Section 523, Title 11, U.S.Code. At issue is the fraud exception found in section 523(a)(2)(A), which provides in pertinent part:

{ ¶ 51} “(a) A discharge under section 727, * * * of this title does not discharge an individual debtor from any debt—

{ ¶ 52} “(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—

{ ¶ 53} “(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor’s or an insider’s financial condition[.]”

{ ¶ 54} To establish a *prima facie* case under Section 523(a)(2)(A), the creditor must demonstrate that: “(1) the debtor obtained money through a material misrepresentation that, at the time, the debtor knew was false or made with gross recklessness as to its truth; (2) the debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) its reliance was the proximate cause of loss.” (Internal

footnote omitted) *In re Salupo*
(Bankr.Ct.N.D.Ohio.2008), 386 B.R. 659, 665.

{ ¶ 55} There is nothing in the record demonstrating that Miller made a material misrepresentation to J & B, either prior to or after entering into, the Agreement. To the contrary, Miller averred that he told J & B's owner about his divorce, resulting financial downturn and that he planned to file bankruptcy. J & B's president diDonato admitted: "Miller did inform me that he was or would be seeking a divorce and that he had debts. He expressed that he may have to file bankruptcy to rid himself of marital and personal debts." Thus, the uncontroverted evidence establishes that J & B had full knowledge of Miller's shaky financial circumstances.

*8 { ¶ 56} J & B cites to *Ohio Finance Co. v. Greathouse* (1947), 64 Ohio Law Abs. 1, 110 N.E.2d 805, which is factually distinguishable. In *Ohio Finance*, the creditor presented evidence that the debtor submitted a written credit application that contained materially false information about the debtor's financial condition, which was relied upon by the creditor in lending money to the debtor. This court concluded the creditor had thus proven the debt was fraudulently incurred, thereby rebutting the debtor's assertion of the bankruptcy discharge defense. *Id.* at 808. By contrast, J & B has failed to rebut the presumption of an effective discharge as it has presented no evidence that Miller made misrepresentations to J & B prior to entering into the Agreement.

{ ¶ 57} That Miller failed to list J & B as a creditor in his bankruptcy does not constitute fraud either. The failure to list a debt in a no-asset Chapter 7 bankruptcy petition does not affect its dischargeability. *In re Madaj* (C.A.6, 1998), 149 F.3d 467, 469-470 (holding that unscheduled debt owed by Chapter 7 debtors was discharged in no-asset case, even though creditors did not learn of case until after entry of discharge order and noting that the law in this area is "counter-intuitive.") Moreover, "a debt is either fraudulent or not depending on the debtor's actions and intent in incurring the debt in the first instance. An otherwise innocently incurred debt * * * does not suddenly become a fraudulently incurred debt when the debtor fails to list it." *Id.* at 471 (parenthetical example omitted).

{ ¶ 58} Finally, Miller's failure to notify J & B after-the-fact about the discharge and its legal effect on the parties' contract does not constitute fraud. A party may voluntarily comply with an obligation after a bankruptcy discharge. Section 524(f), Title 11, U.S.Code. Absent a reaffirmation agreement that complies with the requirements of Section 524(c), Title 11, U.S.Code, such

voluntary compliance does not create a new enforceable obligation. *In re Whitmer*, (Bankr.Ct.S.D.Ohio.1992), 142 B.R. 811, 815. See, also, *Rogers v. Huntington Natl. Bank*, 12th Dist. No. CA2004-03-005, 2004-Ohio7045, at ¶ 21, citing *In re Turner* (C.A.7, 1998), 156 F.3d 713, 718 ("A reaffirmation agreement is the only means by which a debtor's dischargeable personal liability on a debt may survive a Chapter 7 discharge.") There is no reaffirmation agreement between the parties in the record.

{ ¶ 59} A Chapter 7 no-asset debtor does not have the duty to notify his creditors of a discharge and its legal ramifications. *In re Madaj*, supra. Further, J & B was, at the very least, on notice that Miller might file bankruptcy and could have consulted counsel as to the legal effect of a bankruptcy discharge, and therefore J & B cannot prove justifiable reliance. Accordingly, J & B's first assignment of error is meritless.

Waiver of Bankruptcy Discharge Defense

*9 ^[3] { ¶ 60} First, J & B argues Miller waived his bankruptcy discharge defense by counterclaiming for breach of contract and injunctive relief. In other words, Miller cannot assert that J & B's claims for breach of the Agreement and injunctive relief were discharged in bankruptcy while at the same time claiming J & B breached the Agreement. Miller counters that this argument has been waived on appeal for failure to raise it in J & B's objections to the magistrate's decision.

{ ¶ 61} Civ.R. 53(D)(3)(b) provides in pertinent part:

{ ¶ 62} "(ii) *Specificity of objection.* An objection to a magistrate's decision shall be specific and state with particularity all grounds for objection. * * *

{ ¶ 63} (iv) *Waiver of right to assign adoption by court as error on appeal.* Except for a claim of plain error, a party shall not assign as 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 has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b)."

^[4] { ¶ 64} A careful reading of the objections reveals that J & B did not argue that Miller waived the bankruptcy discharge defense vis-a-vis his counterclaim for breach and injunctive relief.

{ ¶ 65} Thus, J & B waives review of this argument on

appeal absent a showing of plain error. Civ.R. 53(D)(3)(b)(iv); *Chalker v. Steiner*, 7th Dist. No. 08 MA 137, 2009-Ohio-6533, at ¶ 39-40. The civil plain error standard is stringent and rarely utilized, reserved for 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.” *Gable v. Gates Mills*, 103 Ohio St.3d 449, 2004-Ohio-5719, at 816 N.E.2d 1049, at ¶ 43, quoting *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, 679 N.E.2d 1099, at syllabus.

{ ¶ 66} The trial court did not err, let alone commit plain error. Miller did not waive the bankruptcy discharge defense vis-a-vis his counterclaim for breach of contract and injunctive relief because Civ.R. 8 allows for pleading in the alternative:

{ ¶ 67} “A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or equitable grounds. All statements shall be made subject to the obligations set forth in Rule 11.” Civ.R. 8(E)(2).

*10 { ¶ 68} Thus, a party may raise counterclaims that are inconsistent with defenses. The fact that Miller counterclaimed for breach of the Agreement, while simultaneously asserting that J & B’s claim for breach of the Agreement was discharged in bankruptcy does not mean that Miller waived the bankruptcy discharge defense. See, e.g., *CommuniCare, Inc. v. Wood Cty. Bd. of Commrs.* 161 Ohio App.3d 84, 2005-Ohio-2348, 829 N.E.2d 706, at ¶ 21 (concluding that neither the timing of the pleading of a defense nor the existence of claims potentially inconsistent with that defense compelled a finding of waiver since alternative pleading is permitted under Civ.R. 8(E)(2).) Accordingly, this argument under J & B’s second assignment of error is meritless.

Estoppel of Bankruptcy Discharge Defense

¹⁵¹ { ¶ 69} J & B next argues that summary judgment was improper because either promissory or equitable

estoppel applies to prevent Miller from asserting the bankruptcy discharge defense. Miller counters that J & B waived this argument by failing to raise it in its brief in opposition to the motion for summary judgment, or in its objections to the magistrate’s decision.

{ ¶ 70} J & B did amend its complaint to include a “claim” for estoppel, after Miller amended his answer to include the bankruptcy discharge defense. J & B did not specify which type of estoppel or how it was to be employed. However, in the language of the amended complaint below, J & B was alleging equitable estoppel and using it defensively; not as a separate cause of action but rather as a tool to prevent Miller’s use of the bankruptcy discharge defense. See, e.g., *Merriner v. Goddard*, 7th Dist. No. 08-MO-2, 2009-Ohio-3253, at ¶ 98 (noting that under Ohio law equitable estoppel doctrine may be employed to prohibit the inequitable use of a defense.)

{ ¶ 71} Count Four, entitled “Estoppel” states in relevant part:

{ ¶ 72} “30. MILLER, at all material times alleged in Count One, Count Two and Count Three, has materially, economically and commercially gained an advantage against J & B competing in the restrictive market place as set forth in the AGREEMENT.

{ ¶ 73} “31. For over five (5) years MILLER has misled, [sic] induced, encouraged and fraudulently misrepresented to J & B the AGREEMENT was in full force and effect and MILLER received all the benefits that derived therefrom.

{ ¶ 74} “32. MILLER should be estopped from repudiating the AGREEMENT after five (5) years of receiving the benefits therefrom to the detriment of J & B.

{ ¶ 75} “33. MILLER should be estopped from alleging a discharge in bankruptcy after having received all the benefits of the AGREEMENT.”

{ ¶ 76} Notably, in its brief in opposition to Miller’s motion for summary judgment, J & B did not argue that Miller should be equitably estopped from asserting the bankruptcy discharge defense. And in its objections, J & B merely made a blanket statement that its “fraud and estoppel claims raise genuine issues of material fact.” J & B neither explained specifically what facts were in dispute nor argued that Miller should be equitably estopped from asserting the bankruptcy defense. Thus, J & B waived its estoppel argument on appeal and we are constrained to review for plain error only.

*11 ^[6] { ¶ 77} “ ‘A prima facie case for equitable estoppel requires a plaintiff to prove four elements: (1) that the defendant made a factual misrepresentation; (2) that it is misleading; (3) [that it induced] actual reliance which is reasonable and in good faith; and (4) [that the reliance caused] detriment to the relying party.’ “ *Helman v. EPL Prolong, Inc.* (2000), 139 Ohio App.3d 231, 246, 743 N.E.2d 484 (Seventh District), quoting *Doe v. Blue Cross/Blue Shield of Ohio* (1992), 79 Ohio App.3d 369, 379, 607 N.E.2d 492.

{ ¶ 78} However, as this court explained in *Merriner*, supra at ¶ 98, where equitable estoppel is applied defensively, it is better explained via the related concept of waiver by estoppel:

{ ¶ 79} “Waiver by estoppel “exists when the acts and conduct of a party are inconsistent with an intent to claim a right, and have been such as to mislead the other party to his prejudice and thereby estop the party having the right from insisting upon it.” “ *National City Bank v. Rini*, 162 Ohio App.3d 662, 2005-Ohio-4041, 834 N.E.2d 836, at ¶ 24, citing *Mark-It Place Foods, Inc. v. New Plan Excel Realty Trust*, 156 Ohio App.3d 65, 2004-Ohio-411, 804 N.E.2d 979, at ¶ 57. ‘Waiver by estoppel allows a party’s inconsistent conduct, rather than a party’s intent, to establish a waiver of rights.’ *Id.*” *Merriner* at ¶ 99.

{ ¶ 80} Miller is not equitably estopped from asserting the bankruptcy discharge defense. As discussed, supra, a party may voluntarily comply with its obligations under a discharged contract, but absent a reaffirmation agreement, that compliance does not create a new enforceable obligation. Sections 524(c),(f), Title 11, U.S.Code. *In re Whitmer*, supra, 142 B.R. at 815.

{ ¶ 81} Moreover, Miller did not misrepresent his financial situation to J & B. To the contrary, diDonato admitted he knew about Miller’s financial problems, including the possibility of a bankruptcy filing. diDonato chose not to take any action on this knowledge, such as consult legal counsel regarding the potential ramifications. Rather, he stated he considered this Miller’s “personal business.” Miller did not mislead J & B to its prejudice by continuing to comply with the contract post-discharge. Therefore, the trial court did not commit error, let alone plain error.

{ ¶ 82} Regarding, J & B’s promissory estoppel argument which was never raised in the trial court, this “is a quasi-contractual concept where a court in equity seeks to prevent injustice by effectively creating a contract where none existed by supplying the element of

consideration when necessary. The device is not available to override the terms of an express contract where one exists.” *TLC Healthcare Servs., L.L.C. v. Enhanced Billing Servs., L.L.C.*, 6th Dist. No. L-08-1121, 2008-Ohio-4285, at ¶ 24, citing *Telxon Corp. v. Smart Media of Delaware, Inc.*, 9th Dist. No. 22098, 2005-Ohio-4931, ¶ 58. Here there is no question that the parties had an express contract. Therefore, promissory estoppel does not apply to this case. Accordingly, this argument under J & B’s second assignment of error is meritless.

Bankruptcy Discharge of Claim for Injunctive Relief

*12 ^[7] { ¶ 83} J & B next argues that the trial court erred by determining that its claim for injunctive relief was barred by the bankruptcy discharge, because it is separate from the claim for damages and therefore survives the discharge. Again, Miller counters this argument has been waived. Because this argument was not raised in the objections to the magistrate’s decision, it is reviewable for plain error only.

^[8] { ¶ 84} The trial court’s decision regarding the dischargeability of the injunctive relief was erroneous. As aforementioned, a “claim” is defined by the Bankruptcy Code as, inter alia, the “right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.” Section 101(5)(B), Title 11, U.S.Code.

{ ¶ 85} In *Ohio v. Kovacs*, 469 U.S. 274, 105 S.Ct. 705, 469 U.S. 274, 105 S.Ct. 705, 83 L.E.2d 649, the United States Supreme Court addressed the issue of whether a state-court injunction ordering the clean-up of an environmental site was discharged under section 101(5)(B). The state court had appointed a receiver to take possession of the property. While cleanup was underway the debtor filed bankruptcy. The Supreme Court held that because the injunctive relief requested necessarily gave rise to a payment of money, the clean up costs, it was a claim dischargeable in bankruptcy. *Id.* at 283.

{ ¶ 86} In *U.S. v. Whizco, Inc.* (C.A.6, 1988), 841 F.2d 147, the Sixth Circuit, relying on *Kovacs*, held that a coal mine operator’s Chapter 7 bankruptcy discharged the operator’s obligation to reclaim a mine site to the extent that fulfilling the obligation to reclaim the site would force the operator to spend money, but to the extent the

operator could comply without spending money, the operator's obligation to comply was not discharged. *Id.* at 150–151.

{ ¶ 87} Building on this law, the Sixth Circuit *Kennedy v. Medicap Pharmacies, Inc.* (C.A.6, 2001), 267 F.3d 493 held that a creditor's right to an injunction for breach of a covenant not to compete was not a claim dischargeable in bankruptcy.

{ ¶ 88} “In this case, compliance with an injunction would not require the expenditure of money. The Kennedys would simply be required to cease operating the pharmacy in violation of the franchise agreement. Looking at the substance of the equitable relief sought, it is clear that Medicap was not seeking the payment of money. Medicap's right to equitable relief does not, therefore, equate to being a claim.

{ ¶ 89} “Nor is the requested injunction an alternative to the right of payment. The Medicap franchise agreement is governed by Iowa law. Iowa law, therefore, determines the nature of Medicap's remedies arising from the Kennedys' breach. See *Butner v. United States*, 440 U.S. 48, 54–55, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979). Under Iowa law, damages may be awarded in addition to an injunction for breach of a covenant not to compete. An injunction, however, is designed to avoid irreparable injury and may issue only when the party seeking it has no adequate remedy at law. *Presto-X-Company v. Ewing*, 442 N.W.2d 85, 89 (Iowa 1989).” *Kennedy* at 497–498.

*13 { ¶ 90} Similarly, Ohio law allows for the award of damages in addition to an injunction for breach of a covenant not to compete. See, e.g., *Mesarvey, Russell & Co. v. Boyer* (July 30, 1992), 10th Dist. No. 91 AP–974 at *5 (“Equitable relief and damages are not necessarily mutually exclusive remedies. But, where damages will adequately compensate an injured party for a harm suffered, equitable relief is not appropriate.”)

{ ¶ 91} J & B's request for an injunction “barring Miller from engaging in acts prohibited by the Agreement,” is not a claim that was discharged by the bankruptcy. Looking to the “substance of the equitable relief sought” the injunction itself does not require the payment of money.

{ ¶ 92} The trial court's analysis focused on whether J & B's amended complaint also sought damages for breach of the non-compete in concluding the claim for injunctive relief was discharged. The proper perspective is whether the result of granting the injunction itself necessarily causes the debtor to incur costs, not whether there is also

a separate claim for damages. Thus, the trial court erroneously concluded that the claim for injunctive relief was discharged in the bankruptcy. However, this does not rise to the level of plain error. Rather, this actually constitutes harmless error, in light of the trial court's alternative determination that the non-compete clause was unreasonable and therefore unenforceable.

{ ¶ 93} “A non-compete clause prohibits a former employee from working in competition with his former employer and amounts to a restraint of trade, so these clauses will be enforced only to the extent that the restraints imposed are reasonably necessary to protect the employer's legitimate business interests. *Brentlinger Enterprises v. Curran* (2001), 141 Ohio App.3d 640, 645, 752 N.E.2d 994, citing *Raimonde v. Van Vlerah* (1975), 42 Ohio St.2d 21, 25–26, 325 N.E.2d 544. ‘A covenant restraining an employee from competing with his former employer upon termination of employment is reasonable if the restraint is no greater than is required for the protection of the employer, does not impose undue hardship on the employee, and is not injurious to the public.’ *Raimonde* at paragraph two of the syllabus. The factors to consider when deciding whether a noncompete clause is reasonable include: 1) the absence or presence of limitations as to time and space, 2) whether the employee represents the sole contact with the customer, 3) whether the employee is possessed with confidential information or trade secrets, 4) whether the covenant seeks to eliminate competition which would be unfair to the employer or merely seeks to eliminate ordinary competition, 5) whether the covenant seeks to stifle the inherent skill and experience of the employee, 6) whether the benefit to the employer is disproportional to the detriment to the employee, 7) whether the covenant operates as a bar to the employee's sole means of support, 8) whether the employee's talent which the employer seeks to suppress was actually developed during the period of employment, and 9) whether the forbidden employment is merely incidental to the main employment. *Id.* at 25, 325 N.E.2d 544.” *Alan v. Andrews*, 7th Dist. No. 06 MA 151, 2007–Ohio–2608, at ¶ 40.

*14 { ¶ 94} Although the agreement between Miller and J & B is not the typical employer-employee non-competition agreement as it involves a post-employment contract, the *Raimonde* factors still apply. See, e.g., *Century Business Servs., Inc. v. Urban*, 179 Ohio App.3d 111, 2008–Ohio–5744, 900 N.E.2d 1048, at ¶ 25 (applying *Raimonde* to non-compete agreement entered into simultaneously with the sale of a business).

{ ¶ 95} The burden is on the former employer to prove

the restraint is reasonable and the agreement is valid. *Gen. Medicine, P.C. v. Manolache*, 8th Dist. No. 88809, 2007-Ohio-4169, at ¶ 8. While Miller came forward with evidence and arguments why the clause was unreasonable, J & B presented no evidence in support of the clause and did not rebut the arguments Miller made in his motion for summary judgment. Instead, J & B chose to argue that it was unable to complete discovery on this issue. However, as discussed earlier, J & B did not move to set aside the magistrate's orders limiting discovery, nor did it avail itself of the procedures contained in Civ.R. 56(F). Thus, the trial court properly made a determination regarding the reasonableness of the non-compete based upon the evidence it had before it.

{ ¶ 96} Further, the court correctly determined the non-compete is unreasonable and therefore unenforceable based on the *Raimonde* factors. First, there are significant time and place restrictions in the non-compete. It prohibits Miller from competing with J & B for the 20 year term of the Agreement, plus 20 additional years thereafter. It also prohibits Miller from competing in 56 of Ohio's 88 counties while prohibiting J & B from competing only in Franklin County, except for some existing accounts. Notably, Miller was prohibited from competing in Stark, his county of residence, and all contiguous counties. Further, the non-compete seeks to eliminate ordinary competition, and stifle Miller's sales and marketing skills and experience, much of which Miller had developed prior to his employment with J & B.

{ ¶ 97} Moreover, the benefit to J & B is grossly disproportionate to the benefit to Miller. J & B asserts the non-compete should be enforced because the parties bargained for it and because Miller received valuable consideration in the form of a line of credit to support his fledgling business. This argument fails considering: (1) the line of credit was secured by Miller's "funded account," the retainage held by J & B from Miller's sales commissions when Miller was employed as a J & B sales agent; and (2) the parties' relatively unequal bargaining power. Finally, the non-compete operates as a bar to Miller's sole means of support, which is his sales business.

{ ¶ 98} Although the trial court incorrectly concluded that the claim for injunctive relief was discharged in bankruptcy, that determination does not rise to the level of plain error. Rather, this constitutes harmless error in light of the trial court's correct determination that the non-compete was unreasonable and therefore unenforceable. Accordingly, J & B's third assignment of error is meritless.

Fraud

*15 { ¶ 99} J & B's sixth and seventh assignments of error assert:

{ ¶ 100} "The trial court erred in granting summary judgment on the fraud claim and incidental issues thereto based upon disputed affidavit testimony which turned on credibility."

{ ¶ 101} "The trial court erred in granting summary judgment because even though pleadings may be vague Appellee Miller has notice of the matters of which J & B complains and strict application of rule requiring pleading of fraud with particularity could service no useful purpose."

{ ¶ 102} Civ.R. 9(B) provides: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." The elements of a fraud claim are: "(1) a representation (or concealment of a fact when there is a duty to disclose) (2) that is material to the transaction at hand, (3) made falsely, with knowledge of its falsity or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, and (4) with intent to mislead another into relying upon it, (5) justifiable reliance, and (6) resulting injury proximately caused by the reliance." *Volbers-Klarich v. Middletown Mgt., Inc.*, 125 Ohio St.3d 494, 2010-Ohio-2057, 929 N.E.2d 434, at ¶ 27, citing *Burr v. Stark Cty. Bd. of Commrs.* (1986), 23 Ohio St.3d 69, 73, 23 OBR 200, 491 N.E.2d 1101.

{ ¶ 103} Turning first to the specificity of J & B's fraud claim, as Miller points out, the trial court's adverse ruling on J & B's fraud claim was on the merits, not for a lack of specificity as required by Civ.R. 9. Second, to the extent J & B focuses on the fact that it was not allowed to complete discovery on this claim, as discussed in assignment of error six, J & B is precluded from challenging the magistrate's discovery orders or arguing that summary judgment was premature because it failed to object to those orders and follow the procedures in Civ.R. 56(F).

{ ¶ 104} Turning to the merits, the trial court correctly granted summary judgment on the fraud claim. There is nothing in the record demonstrating that Miller made a material misrepresentation to J & B, either prior to or after entering into, the Agreement. Rather, Miller averred that he told J & B's owner about his divorce, resulting financial downturn and that he planned to file bankruptcy.

diDonato admitted that Miller had informed him he was or would be seeking a divorce, that he had debts, and that he may file bankruptcy. Moreover, as discussed above, the fact that Miller failed to list J & B as a creditor in his bankruptcy does not constitute fraud. See *In re Madaj* at 471. Finally, Miller's failure to notify J & B after-the-fact about the discharge and its legal effect on the parties' contract does not constitute fraud. A party may voluntarily comply with its obligations under a discharged contract, but that compliance does not create a new enforceable obligation. J & B was, at the very least, on notice that Miller might file bankruptcy and could have consulted counsel as to the legal effect of a bankruptcy discharge. Because J & B cannot prove justifiable reliance, J & B's sixth and seventh assignments of error are meritless.

*16 { ¶ 105 } In conclusion, J & B's assignments of error are meritless. Many of J & B's arguments were not raised at the proper time in the trial court and are therefore waived absent plain error. First, because J & B failed to move to set aside the magistrate's discovery orders, and because it failed to avail itself of the procedures contained in Civ.R. 56(F), J & B is precluded from challenging the discovery orders on appeal, or from asserting that the trial court prematurely granted summary judgment prior to the completion of full discovery. Further, Miller's debts were

not "fraudulently incurred" and therefore they can be excepted from the bankruptcy discharge for that reason. Miller did not waive his bankruptcy discharge defense by counterclaiming for breach of contract and injunctive relief. Neither promissory nor equitable estoppel applies to this case. And although the trial court erred by concluding the claim for injunctive relief was discharged in bankruptcy, it does not rise to the level of plain error. Rather, this error was harmless in light of the trial court's correct conclusion that the non-compete clause was unreasonable and therefore unenforceable. Finally, the trial court properly granted summary judgment on J & B's fraud claim. Accordingly, the judgment of the trial court is affirmed.

DONOFRIO, J., concurs.

VUKOVICH, J., concurs.

Parallel Citations

2011 -Ohio- 3165

Footnotes

¹ The record reveals diDonato uses his middle name, William, and also Bill.

2010 WL 3292962

CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio,
Tenth District, Franklin County.

CONSTRUCTION SYSTEMS, INC. et al.,
Plaintiffs-Appellees,

v.

GARLIKOV & ASSOCIATES, INC. et al.,
Defendants-Appellants,
NBBJ [East Limited Partnership],
Defendant-Appellee.

No. 09AP-1134. | Decided Aug. 19, 2010.

Appeal from the Franklin County Court of Common
Pleas.

Attorneys and Law Firms

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defendants-appellants.

Luper Neidenthal & Logan, and Luther L. Liggett, Jr., for
defendant-appellee.

Opinion

FRENCH, J.

*1 { ¶ 1 } Defendants-appellants, Garlikov & Associates,
Inc. and Garlikov & Associates, LLC (collectively,
“Garlikov”), appeal the Franklin County Court of
Common Pleas’ judgment in favor of plaintiffs-appellees,
Construction Systems, Inc. (“CSI”) and Colors, Inc.
(“Colors”), and in favor of defendant-appellee, NBBJ
East Limited Partnership (“NBBJ”).¹ For the following
reasons, we reverse and remand this matter to the trial
court.

{ ¶ 2 } Garlikov is a company engaged in the business of
providing insurance services and products to high
net-worth individuals and corporations. Since 1986,
Garlikov has maintained its home office in the Huntington
Center in Columbus, Ohio. After receiving notification in

2001 that a law firm had exercised an option to lease the
space then occupied by Garlikov’s offices on the 27th
floor, Garlikov entered into a sublease with Huntington
Bank for office space on the 33rd and 34th floors of the
Huntington Center. The sublease contemplated that
Garlikov would renovate and/or improve the portion of
the leased premises it intended to occupy, and the
sublease provided that Huntington would offer a limited
cash allowance to offset the costs of improvement.
Shortly after executing the sublease, Garlikov retained
NBBJ as architect, owner’s representative, and
construction manager for the design and construction of
its relocated office space (“the project”). CSI acted as the
general trades contractor on the project, and Colors acted
as the wall-covering contractor.

{ ¶ 3 } As a result of problems and conflicts that arose
during the course of the project, CSI and Colors filed a
complaint for breach of contract against Garlikov and
NBBJ on February 20, 2003.² Garlikov & Associates, Inc.
filed counterclaims for breach of contract and tortious
interference with contractual relations against CSI, a
counterclaim for breach of contract against Colors, and
various cross-claims, including breach of contract, against
NBBJ. In turn, NBBJ filed cross-claims against Garlikov
for breach of contract, indemnification, and contribution.
After numerous continuances, and pursuant to a
stipulation filed in January 2006, the matter was tried to a
magistrate over the course of several, non-consecutive
weeks in 2006 and 2007. The magistrate issued a lengthy
and detailed decision, containing findings of fact and
conclusions of law, on December 31, 2008. The
magistrate concluded that CSI, Colors, and NBBJ were
each entitled to judgment in their favor on their claims
against Garlikov, and Garlikov filed objections to the
magistrate’s decision. On November 9, 2009, the trial
court struck Garlikov’s objections to the magistrate’s
findings of fact, overruled Garlikov’s objections to the
magistrate’s conclusions of law, and adopted the
magistrate’s decision in its entirety. On November 25,
2009, the trial court entered final judgment in favor of
NBBJ in the amount of \$45,388, in favor of CSI in the
amount of \$110,765, and in favor of Colors in the amount
of \$33,550, non-inclusive of pre- and post-judgment
interest. The court further rendered judgment, consistent
with the magistrate’s decision, in favor of CSI and Colors
on Garlikov’s counterclaims and in favor of NBBJ on
Garlikov’s cross-claims.

*2 { ¶ 4 } Garlikov filed a timely notice of appeal and
presently raises the following assignments of error:

Appellants’ First Assignment of Error: The Trial Court

Erred In Striking and Otherwise Failing to Consider Garlikov's Objections to the Magistrate's Factual Findings.

Appellants' Second Assignment of Error: The Trial Court Erred In (a) Adopting the Magistrate's Decision in Favor of [NBBJ] and (b) Granting Judgment For NBBJ As Both Are Contrary to Law and Otherwise Against the Manifest Weight of The Evidence.

Appellants' Third Assignment of Error: The Trial Court Erred In (a) Adopting the Magistrate's Decision in Favor of [CSI and Colors] and (b) Granting Judgment For CSI And Colors As Both are Contrary to Law and Otherwise Against the Manifest Weight of The Evidence.

Appellants' Fourth Assignment of Error: Alternatively, The Trial Court Erred In Granting Any Relief Against Garlikov & Associates, LLC.

Appellants' Fifth Assignment of Error: Alternatively, The Trial Court Should Have Rejected The Magistrate's Decision In Its Entirety.

{ ¶ 5} Because it is dispositive, we begin our analysis with the first assignment of error, by which Garlikov argues that the trial court erred in striking Garlikov's objections to the magistrate's findings of fact. The crux of this assignment of error is the enforceability of a stipulation filed on January 19, 2006. Paragraph three of the stipulation states as follows:

[The parties] stipulate and agree that all findings of fact by the magistrate shall be final and shall not be subject to objection by the parties to the Court of Common Pleas; provided, however, that the parties retain and do not waive the right to appeal any of the magistrate's findings of fact to the Tenth District Court of Appeals. In all other respects, the parties shall proceed in accordance with Civ.R. 53 with respect to the magistrate's decisions, which shall include the filing of objections to the magistrate's conclusions of law as required by Civ.R. 53.

The stipulation also included the parties' waiver of a jury trial in favor of a bench trial to one of two named magistrates.

{ ¶ 6} Based on the parties' stipulation, the trial court struck Garlikov's timely objections to the magistrate's findings of fact and ordered Garlikov to refile objections only to the magistrate's conclusions of law. The trial court subsequently noted that Garlikov's refiled objections, despite a new caption and minor revisions, were essentially identical to the original objections. On November 9, 2009, the trial court struck Garlikov's refiled objections to the magistrate's findings of fact, overruled Garlikov's refiled objections to the magistrate's conclusions of law, and adopted the magistrate's decision in its entirety.

{ ¶ 7} Civ.R. 53 governs proceedings before a magistrate, including the procedure for objecting to a magistrate's decision, and the trial court's duties in accepting or rejecting a magistrate's decision. When the parties executed their stipulation in January 2006, Civ.R. 53(E)(3) provided, in pertinent part, as follows:

***3 (c) Objections to magistrate's findings of fact.** If the parties stipulate in writing that the magistrate's findings of fact shall be final, they may object only to errors of law in the magistrate's decision. Any objection to a finding of fact shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that fact or an affidavit of that evidence if a transcript is not available.

(d) Waiver of right to assign adoption by court as error on appeal. A party shall not assign as error on appeal the court's adoption of any finding of fact or conclusion of law unless the party has objected to that finding or conclusion under this rule.

{ ¶ 8} On July 1, 2006, prior to the commencement of trial in this case, Civ.R. 53 was amended. The amended rule eliminated the provision in former Civ.R. 53(E)(3)(c) authorizing parties to stipulate to the finality of a magistrate's findings of fact. The amended rule states, in pertinent part, as follows:

(iii) Objection to magistrate's factual finding; transcript or affidavit. An objection to a factual finding, whether or not specifically designated as a finding of fact under Civ.R. 53(D)(3)(a)(ii), 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. With leave of court, alternative technology or manner of reviewing the relevant evidence may be considered. The objecting party shall file the transcript or affidavit with the court within thirty days after filing objections unless the court extends the time in writing for preparation of the transcript or other good cause. If a

party files timely objections prior to the date on which a transcript is prepared, the party may seek leave of court to supplement the objections.

(iv) *Waiver of right to assign adoption by court as error on appeal.* Except for a claim of plain error, a party shall not assign as 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 has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b).

Civ.R. 53(D)(3)(b)(iii) and (iv). The amendments to Civ.R. 53 neither altered the requirement that a trial court must rule on timely filed objections to a magistrate's decision nor the principle that a magistrate's decision is ineffective until adopted by the trial court. See Former Civ.R. 53(E)(4)(a) and (b); Civ.R. 53(D)(4)(a) and (d). Although the amended rule is presumptively applicable to subsequent proceedings in cases pending as of July 1, 2006, former Civ.R. 53 remains applicable "to the extent that * * * application [of the amended rule] in a particular action pending when the amendments take effect would not be feasible or would work injustice." Civ.R. 86(CC).

{ ¶ 9 } As it argued in the trial court, Garlikov maintains that amended Civ.R. 53 applies here and that the parties' stipulation was unenforceable because it is in direct conflict with the amended rule, which requires the actual filing of objections as a prerequisite to appellate review of the trial court's adoption of a magistrate's findings of fact and conclusions of law. In response, also reiterating arguments made in the trial court, appellees contend that permitting Garlikov to avoid the stipulation would deprive appellees of the benefit of their bargain in waiving a jury trial as part of the stipulation. Appellees also argue that the trial court's rejection of Garlikov's factual objections did not prejudice Garlikov because the magistrate's factual findings are subject to appellate review pursuant to the stipulation. The trial court agreed with appellees' assertion that permitting Garlikov to object to the magistrate's findings of fact, in contravention of the intent expressed in the parties' stipulation, would prejudice appellees and that application of amended Civ.R. 53 to invalidate the stipulation would, thus, be unjust. Accordingly, the court determined that former Civ.R. 53 applied and that, under that rule, the parties' stipulation precluded Garlikov's objections to the magistrate's factual findings.

*4 { ¶ 10 } "[A] stipulation running directly contrary to the clear import of a rule of civil procedure should not be enforced." *Welsh v. Brown-Graves Lumber Co.* (1978), 58 Ohio App.2d 49, 52 (rejecting a stipulation that

conflicted with Civ.R. 63(B)). The First District Court of Appeals recently rejected a stipulation by which the parties attempted to circumvent the essential requirements, under Civ.R. 53, that a trial court review and either adopt, modify or reject a magistrate's decision. See *Yantek v. Coach Builders Ltd., Inc.*, 1st Dist. No. C-060601, 2007-Ohio-5126. The stipulation at issue there provided that, after a jury trial before a magistrate, the trial court would sign a final judgment entry based on any verdict and any motion rulings by the magistrate and that the parties waived any objection to the magistrate presiding over the trial, but retained the right to appeal the substance of any of the magistrate's rulings. The First District held that the stipulation was not in compliance with Civ.R. 53 and noted, at ¶ 18, that permitting the stipulation "would allow parties to substitute magistrates' decisions for those of the trial court and would, in effect, permit direct appeal from a magistrate's decision."

{ ¶ 11 } In *Hollobaugh v. D & v. Trucking*, 7th Dist. No. 99 CA 303, 2001-Ohio-3265, the court similarly invalidated a stipulation by which the parties agreed that no objection would be made in the jury's presence with respect to evidence that was the subject of a failed motion in limine, despite the general rule that an objection at trial is necessary to preserve the admissibility question for purposes of appeal. The court stated, "[i]n essence, counsel * * * stipulate[d] that the normal procedure would not be followed in regard to the need for an objection. Under Ohio law, this type of stipulation is not permissible." While the stipulation at issue there did not conflict with a rule of civil procedure, the court stated that "a stipulation cannot change the mode of proceeding in a trial and cannot change the application of the rules of evidence." *Id.*, citing 89 Ohio Jurisprudence 3d (1989) 111-12, 114-15, Trial, Sections 75, 77.

{ ¶ 12 } Also instructive is *Calmes v. Goodyear Tire & Rubber Co.* (Dec. 20, 1989), 9th Dist. No. 13952, reversed, 61 Ohio St.3d 470, in which Goodyear argued to the Ninth District Court of Appeals that the trial court erred by entering judgment on a special verdict, despite the parties' agreement to the use of a special verdict. Although Goodyear maintained that Civ.R. 49 abolished the use of special verdicts and, thus, invalidated the jury's verdict, the Ninth District held that Goodyear waived the right to object to the special verdict by agreeing to its use. The Supreme Court of Ohio, however, disagreed. Although the Supreme Court determined that a new trial was warranted on other grounds, it stated, at 476, that "[t]he failure of the jury to return a general verdict warrant[ed] comment." The Supreme Court stated that both Civ.R. 49 and R.C. 2315.19(B) explicitly require a general verdict and that the trial court erred by not

requesting a general verdict from the jury, despite any agreement amongst the parties to the contrary. Accordingly, the Supreme Court implicitly invalidated the parties' agreement that conflicted with the requirements of Civ.R. 49.

*5 { ¶ 13} The essence of Garlikov's argument is that the parties' stipulation conflicts with amended Civ.R. 53 because it purports to permit appellate review of the magistrate's findings of fact without objections to those findings in the trial court, whereas amended Civ.R. 53 requires objections as a prerequisite to appellate review and does not permit a stipulation as to the finality of the magistrate's factual findings. We agree that the parties' stipulation runs directly contrary to amended Civ.R. 53 because that rule no longer provides for a stipulation as to the finality of a magistrate's findings of fact and also requires the filing of objections before a party is entitled to appeal the trial court's adoption of the magistrate's findings of fact or conclusions of law.

{ ¶ 14} We further conclude, however, that the stipulation is also contrary to the clear import of former Civ.R. 53. Although former Civ.R. 53 did permit stipulations as to the finality of a magistrate's factual findings, that rule nevertheless explicitly stated that "[a] party shall not assign as error on appeal the court's adoption of any finding of fact * * * unless the party has objected to that finding * * * under this rule." Former Civ.R. 53(E)(3)(d). Thus, contrary to the parties' stipulation, former Civ.R. 53 did not permit parties to stipulate that the magistrate's factual findings were final for purposes of review by the trial court, but were nevertheless subject to appellate review once adopted by the trial court. Rather, under that rule, the parties could either file objections to the magistrate's findings of fact in the trial court, and, thus, preserve appellate review of those findings, or the parties could stipulate that the magistrate's findings of fact were final, not only in the trial court but also for purposes of appellate review.

{ ¶ 15} The Seventh District Court of Appeals recognized this principle in *Visyak v. McGowan*, 7th Dist. No. 99-JE-11, 2000-Ohio-2663, in which it held that an appellant was not entitled to appeal the trial court's adoption of a magistrate's findings and recommendation where the appellant, in reliance on an agreement between counsel to waive the filing of objections in the trial court, did not object to the magistrate's findings. Despite the parties' waiver of objections to the magistrate's decision, the appellate court held that the failure to timely file objections in the trial court constituted a waiver of any alleged error in either the magistrate's decision or in the trial court's adoption thereof.

{ ¶ 16} The Eighth District Court of Appeals similarly acknowledged this principle in *Cangemi v. Cangemi*, 8th Dist. No. 84678, 2005-Ohio-772. The Eighth District distinguished the unorthodox procedure ordered by the trial court in that case, based on an agreement by the parties, from proceedings before a magistrate under Civ.R. 53. The trial court order included an agreement that "[t]he parties hereby waive any appeal rights provided by Ohio Civil Rule 53[but] retain all rights of appeal to the Eighth District Court of Appeals." *Id.* at ¶ 12. The Eighth District explained, at ¶ 22, as follows:

*6 * * * Civ.R. 53 contemplates that a magistrate's report will be filed with the clerk and served on the parties, that the parties will have an opportunity to object, and that the court will rule on those objections and either adopt, reject or modify the magistrate's order. While the parties can stipulate that the magistrate's findings of fact will be final, there is no provision allowing the parties to "waive" the trial court's obligation to review the magistrate's decision for errors of law and directly appeal any such errors to this court, as the parties attempted to do here. Quite the opposite, if a party fails to object, he or she may not appeal from the trial court's adoption of a finding of fact or conclusion of law.

The stipulation in that case went further than the stipulation here, in that it attempted to obviate not only the need for objections to the magistrate's findings of fact, but also to the magistrate's conclusions of law. Nevertheless, despite recognizing the stipulation provision in former Civ.R. 53 with respect to a magistrate's findings of fact, the court stated that a party may not avoid the necessity of objections in the trial court as a prerequisite to appellate review of either a magistrate's findings of fact or conclusions of law.

{ ¶ 17} Both versions of Civ.R. 53 provide that, in the absence of objections to the magistrate's findings of fact in the trial court, an appellate court will not review the trial court's adoption of the magistrate's findings. Accordingly, even if we were to conclude that former Civ.R. 53 applies and that the parties were entitled to stipulate that the magistrate's findings of fact were final and not subject to objections in the trial court, the parties

were not entitled to also stipulate that, despite the absence of review by the trial court, the magistrate's findings of fact would be subject to review on appeal. Therefore, the parties' attempt, via their stipulation, to preserve appellate review of the magistrate's findings of fact, while forgoing the trial court's review of those findings, conflicts with the clear import of Civ.R. 53 and was improper.

{ ¶ 18} Having concluded that the parties' stipulation was improper, the question resolves to that of the proper remedy. One possible remedy is to proceed, as the parties suggest, to review appellant's assignments of error. The difficulty of doing so, however, reveals itself when we consider the appropriate standard for that review.

{ ¶ 19} Civ.R. 53 requires a trial court, when faced with objections to a magistrate's decision, to conduct an independent review of the magistrate's findings of fact and conclusions of law. *Schultz v. Wurdlow*, 10th Dist. No. 09AP-301, 2010-Ohio-1140, ¶ 11; Civ.R. 53(D)(4)(d). Our review on appeal is different. We review a trial court's adoption, denial or modification of a magistrate's decision for an abuse of discretion. *O'Connor v. O'Connor*, 10th Dist. No. 07AP-248, ¶ 7, citing *State ex rel. Duncan v. Chippewa Twp. Trustees* (1995), 73 Ohio St.3d 728.

*7 { ¶ 20} Here, however, the trial court exercised no discretion with respect to the facts of the case. Rather, the court stated that, because of the stipulation, "the Court is unable to make an independent *de novo* determination regarding the facts in this matter." We cannot review a decision for an abuse of discretion if no discretion has been exercised.

{ ¶ 21} Appellees do not suggest that, in the absence of appellate review, we should enforce the first prong of paragraph three independently. In fact, the parties stipulated that the magistrate's findings of fact would not be subject to objection in the trial court "*provided*,

however, that the parties retain and do not waive the right to appeal any of the magistrate's findings of fact to the Tenth District Court of Appeals." (Emphasis added.) Having concluded that appellate review is impossible under these circumstances, we further conclude that paragraph three of the stipulation as a whole is unenforceable. In the absence of an enforceable stipulation, the trial court had no legitimate basis for striking Garlikov's objections. Therefore, we sustain Garlikov's first assignment of error and conclude that the proper remedy is to remand this matter to the trial court to rule on Garlikov's properly filed objections to the magistrate's findings of fact and, if necessitated by those rulings, to reconsider Garlikov's objections to the magistrate's conclusions of law.

{ ¶ 22} Because Garlikov's remaining assignments of error depend on the magistrate's findings of fact, which the trial court must review on remand, those assignments of error are now moot. In conclusion, we sustain Garlikov's first assignment of error and render moot Garlikov's second, third, fourth, and fifth assignments of error. We reverse the judgment of the Franklin County Court of Common Pleas and remand this matter to that court for rulings on Garlikov's objections to the magistrate's decision.

Judgment reversed and cause remanded.

BRYANT and KLATT, JJ., concur.

Parallel Citations

2010 -Ohio- 3893

Footnotes

- 1 NBBJ East Limited Partnership is named simply "NBBJ" in the complaint and the trial court's judgment entry, despite NBBJ's assertion of its correct name in its answer.
- 2 Another contractor, Mid-City Electrical Construction ("Mid-City"), was also a plaintiff, but all claims by or against Mid-City have been resolved, and Mid-City is no longer a party to this appeal.