[Cite as *Covert v. Kanieski*, 2011-Ohio-4170.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

TIM COVERT & ELECTOLITE,	:	**O P I N I O N**
Plaintiffs-Appellees,	:	**CASE NO. 2010-G-2993**
- vs -	:	
SANDRA KANIESKI,	:	8-19-11
Defendant-Appellant.	:	

Civil Appeal from the Chardon Municipal Court, Case No. 2010 CVI 00597.

Judgment: Affirmed.

Tim Covert, pro se, and *Electolite*, pro se, 8829 Mayfield Road, Chesterland, OH 44026 (For Plaintiffs-Appellees).

Paul J. Mooney, Law Office of Paul J. Mooney, 3401 Enterprise Parkway, Suite 340, Beachwood, OH 44122 (For Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Appellant, Sandra Kanieski, appeals from the September 14, 2010 judgment entry of the Chardon Municipal Court, which overruled her objections to and adopted the magistrate's decision awarding appellees, Tim Covert and Electolite, $2,200, plus four percent interest, for breach of contract. For the following reasons, we affirm the decision.

{¶2} **Substantive Facts and Procedural History**

{¶3} In early 2010, Ms. Kanieski entered into a contract with Tim Covert and Electolite to design, fabricate, and install two signs at her places of business in Troy and Solon, Ohio. As a down payment, Ms. Kanieski wrote a check to Mr. Covert for $1,000, to be applied towards the purchase of materials. Ms. Kanieski provided Mr. Covert with the check payable to "Electolite or Tim Covert" in early February; however, she post-dated the instrument for February 15, 2010. Mr. Covert presented the check for payment on February 16, 2010, but the check was returned to him due to insufficient funds. Mr. Covert attempted to present the check a number of times thereafter, but was denied payment each time, always due to a lack of sufficient funds.

{¶4} On February 23, 2010, after attempts to discuss the check with Ms. Kanieski without resolution, Mr. Covert wrote an email to Chris Kanieski, Ms. Kanieski's son, who was also involved in the management of the businesses. Mr. Covert advised that he would no longer be able to make the requested signs because of Ms. Kanieski's failure to make the funds available for deposit of the $1,000 check. He further indicated that he would deliver to the Kanieskis the color renderings and printed forms for the sign designs he had already produced, and would write off the cost of the design development.

{¶5} On April 12, 2010, the check remained dishonored and Mr. Covert wrote a letter to Ms. Kanieski indicating he would give her ten days to make the check good before he took appropriate legal action. Ms. Kanieski failed to provide sufficient funds for payment of the check and Mr. Covert brought this action in the Small Claims Division of the Chardon Municipal Court.

{¶6} In his suit, Mr. Covert sought damages of $2,100 plus 15 days' interest, based on an Electolite invoice dated February 1, 2010. The case was tried to a magistrate on June 8, 2010. During the hearing, Ms. Kanieski asserted that she was not personally liable to Mr. Covert and Electolite because she was acting as an agent on behalf of a principal. She further challenged the formation of the contract, arguing that the alleged contract did not in fact exist.

{¶7} After the hearing, the magistrate found in favor of Mr. Covert and Electolite in the amount of $2,200 plus 15 days' interest. In a written decision, the magistrate found that the parties had entered into a contract for $4,000, that Ms. Kanieski was personally liable on the contract because she had failed to disclose her status as an agent, and that Ms. Kanieski had breached the contract, thereby preventing Mr. Covert's and Electolite's full performance on the contract.

{¶8} The magistrate calculated damages as follows: "[t]he court finds that plaintiffs would have earned a profit of $400.00 on the contract had defendant not breached the contract. Accordingly, the cost portion of the contract was $3,600 ($4,000 minus [$]400.00). Because plaintiffs had done one-half the work called for by the contract, they are entitled to one-half the cost portion of the contract, or $1,800.00. In addition, plaintiffs are entitled to all of the lost profit from the contract, or an additional $400.00."

{¶9} After the magistrate's hearing, Ms. Kanieski filed a "Defendant's Request to [Overrule] Magistrate's Decision" and asked the court to hold an in-person hearing to review the facts. Ms. Kanieski failed to support her objections with a transcript of all the evidence submitted to the magistrate or an affidavit of that evidence, pursuant to Civ.R.

53(D)(3)(b)(iii). The judge independently reviewed the magistrate's decision and issued a written judgment entry finding the magistrate had properly determined the factual issues and applied the law. The judgment entry further stated that no error of law or other defect was present on the face of the decision. The trial court, accordingly, overruled Ms. Kanieski's objections and adopted the magistrate's decision without modification.

{¶10} Ms. Kanieski timely appealed, bringing the following four assignments of error:

{¶11} "[1.] The trial court's judgment adopting the magistate's [sic] decision is against the manifest weight of the evidence.

{¶12} "[2.] The trial court erred as a matter of law in finding appellant personally liable for the non-payment of an alleged contactual [sic] obligation entered between appellee and two corporations.

{¶13} "[3.] The trial court erred in not conducting a hearing to obtain additional evidence on the magistrate's errors of law concerning contract law and piercing the corporate veil.

{¶14} "[4.] To the prejudice of the appellant the Chardon Municipal Court did not have jurisdiction to determine the case as account was due outside its jurisdiction."

{¶15} Mr. Covert and Electolite have not filed a brief in answer to Mr. Kanieski's appeal.

{¶16} **Adoption of the Magistrate's Decision**

{¶17} Ms. Kanieski's first assignment of error challenges the trial judge's adoption of the magistrate's factual findings. Ms. Kanieski argues that the trial court's adoption of the magistrate's decision was against the manifest weight of the evidence.

{¶18} "On appeal, a trial court's adoption of a magistrate's decision will not be overruled unless the trial court abused its discretion in adopting the decision." *Brown v. Gabram,* 11th Dist. No. 2004-G-2605, 2005-Ohio-6416, ¶11, citing *Lovas v. Mullet* (July 29, 2001), 11th Dist. No. 2000-G-2289, 2001 Ohio App. LEXIS 2951, *5-6. "This court has recently stated that the term 'abuse of discretion' is one of art, connoting judgment exercised by a court, which does not comport with reason or the record." *State v. Underwood*, 11th Dist. No. 2008-L-113, 2009-Ohio-2089, ¶30, citing *State v. Ferranto* (1925), 112 Ohio St. 667, 676-678. The Second Appellate District recently adopted this definition of the abuse-of-discretion standard in *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, at ¶62, citing Black's Law Dictionary (8 Ed.Rev.2004) 11.

{¶19} "Under Civ.R. 53(D)(3)(b), parties are required to support any objection to a magistrate's decision with '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.' Failure to provide an acceptable record to the trial court permits the trial court to ignore any objections to factual matters that may have been challenged." *Yancey v. Haehn* (Mar. 3, 2000), 11th Dist. No. 99-G-2210, 2000 Ohio App. LEXIS 788, *7, citing *Witt v. J&J Home Ctrs., Inc.* (Apr. 26, 1996), 11th Dist. No. 95-G-1939, 1996 Ohio App. LEXIS 1703, *4-5. "If the complaining party fails to support her factual objections pursuant to Civ.R. 53, she is precluded from arguing factual determinations on appeal." Id., citing

Dintino v. Dintino (Dec. 31, 1997), 11th Dist. No. 97-T-0047, 1997 Ohio App. LEXIS 6027, *5-7.

{¶20} As we noted in *Beres v. G. S. Bldg. Co.,* 11th Dist. No. 2007-L-061, 2007-Ohio-6564, "[e]ven in the context of small claims hearings, Civ.R. 53 must be strictly followed. It is well-settled law that when an appellant fails to provide a transcript or an alternative to a transcript as provided for in the civil rules, 'there is nothing for us to pass upon and we must presume the validity of the trial court proceedings and affirm the judgment below.'" Id. at ¶20, citing *DeCato v. Goughnour* (2000), 136 Ohio App.3d 795, 799. See, also, *Waddle v. Waddle* (Mar. 30, 2001), 11th Dist. No. 2000-A-0016, 2001 Ohio App. LEXIS 1551, *7-8.

{¶21} Although Ms. Kanieski provided this court a transcript of the magistrate's hearing upon appeal, a transcript was never provided to the reviewing trial judge upon her objections to the magistrate's findings. Ms. Kanieski is now "precluded from challenging the trial court's findings of fact on appeal and has waived any claim that the lower court erred in adopting the magistrate's findings." *Allen v. Allen* (Mar. 31, 2000), 11th Dist. No. 98-T-0204, 2000 Ohio App. LEXIS 1464, *7, citing *Pawlowski v. Pawlowski* (Aug. 22, 1997), 11th Dist. No. 96-L-144, 1997 Ohio App. LEXIS 3778. See, also, *Yancey,* supra. As there is no defect appearing on the face of the decision, we find no abuse of discretion in the trial court's order. Assignment of error one is without merit.

{¶22} **Ms. Kanieski's Personal Liability**

{¶23} In her second assignment of error, Ms. Kanieski argues that the trial court erred in finding her personally liable on the contract with Electolite because she was

acting as an agent for a principal, and not on her own behalf. In her brief, Ms. Kanieski appears to mistakenly presume that the trial court found her personally liable via a "piercing the corporate veil" theory. However, it is apparent from the hearing transcript and the magistrate's decision that the trial court found her personally liable under a very different theory, one that her brief fails to contemplate.

{¶24} The magistrate's decision clearly states that Ms. Kanieski "did not disclose her status as an agent acting on behalf of a principal or principals, and is thereby personally obligated on said contract." This statement makes evident that the trial court did not rely on a theory of "piercing the corporate veil" to assign personal liability to Ms. Kanieski. Rather, the trial court relied on a theory of an "undisclosed agent" and "undisclosed principal."

{¶25} "[B]y incorporating his business, a person may escape liability for debts of the business, under certain circumstances. Whether or not he will escape personal liability for debts of the business is most often a question for the law of agency. A corporation, being an artificial person, can act only through agents. When a person incorporates his business and proceeds to conduct business on behalf of the corporation, he is acting as an agent for the corporation. But like any other agent, he may still incur personal liabilities. Thus, he will avoid personal liability for debts of the corporation only if he complies with the rules which apply in all agency relationships -- he must so conduct himself in dealing on behalf of the corporation with third persons that those persons are aware that he is an agent of the corporation and it is the corporation (principal) with which they are dealing, not the agent individually." *James G. Smith & Assoc., Inc. v. Everett* (1981), 1 Ohio App.3d 118, 120.

{¶26} As the court in *Everett* summarized, several circumstances exist where the courts will hold an agent personally liable to the persons with whom he had dealt. An agent is liable "[*w*]*here the principal is only partially disclosed*, i.e., where the existence of agency is known to the third person, but the identity of the principal is not known." (Emphasis *sic.*) Id. An agent is liable, as well, "[*w*]*here the principal is undisclosed*, i.e., where neither the existence of an agency nor the identity of the principal is known to the third party. *** Here, the dealing is held to be between the agent and the third party, and the agent is liable." (Emphasis *sic.*) Id.

{¶27} An agent is also liable, "[*w*]*here there is a fictitious or non-existent principal, or the principal is without legal capacity or status*. If an agent purports to act on behalf of such a 'principal,' the agent will be liable to the third party as a party to the transaction. *** One cannot be an agent for a nonexistent principal; there is no agency." (Emphasis *sic.*) Id. at 121 (internal citations omitted). See, also, *Stryker Farms Exch. v. Mytczynskyj* (1998), 129 Ohio App.3d 338, 341-342 (an agent may only be held personally liable for the debt of his principal if the principal is undisclosed, partially disclosed, or is fictitious or non-existent); *C-Z Constr. Co. v. Russo* , 7th Dist. No. 02 CA 148, 2003-Ohio-4008 (the general rule is that an agent is personally liable for contracts entered into on behalf of an undisclosed, fictitious or nonexistent principal).

{¶28} Ms. Kanieski asserts she was not personally liable on the contract because of a corporate veil or shield. The evidence required to prevail on such a defense would include proof of the corporate status of the principal for which she allegedly acted as an agent. She was on notice from the caption of the small claims complaint that she was being sued individually, and, although this was heard in the

small claims setting in which the Ohio Rules of Evidence are not applicable, Ms. Kanieski still had the burden of demonstrating to the court that a corporation indeed existed and that she was acting soley in an agency capacity.

{¶29} Although the hearing transcript was not presented to the trial court for its consideration, as required, it was filed and included as a part of the record in this appeal. A review of the hearing transcript in the case demonstrates that even if the trial judge had the transcript, it would have confirmed Ms. Kanieski's failure to meet her burden of proof. She was required to show, not only that she made it clear to Mr. Covert that she was acting as an agent on behalf of a principal, but, that the purported principal did, in fact, exist.

{¶30} Ms. Kanieski testified that that she was an "outside accountant for three different corporations"; that she "does accounting work for River Walk Entertainment Complex, Inc. *** [and] for 1543, Inc., which does business as the Arena Sports and Entertainment Complex"; and that she "never personally had anything to do other than to invite Mr. Covert to give us quotes on the jobs that were to be done ***." Conversely, Mr. Covert rebutted that he "dealt with her [Ms. Kanieski] and her son, and mostly with her, and she specifically said she's the one that writes the check. And all I knew was Sandra Kanieski, I didn't know about ABC or EFG Corporation. All I knew about, it was Ms. Kanieski."

{¶31} At that point the state of the evidence regarding corporate or individual liability was at the very least in equipoise. The rule is well established that "the burden of maintaining the affirmative of the issue involved in the action is upon the party alleging the fact which constitutes the issue, and this burden remains throughout the

trial." *Klunk* v. *Hocking Valley Ry. Co.* (1906), 74 Ohio St. 125, 136, citing *Heinemann* v. *Heard et al.*, 62 N. Y. 448. When the whole of the evidence upon the issue involved leaves the case in equipoise, the party with the affirmative burden must fail. Id.

{¶32} The exhibits in this case were properly brought before both the trial court and this court. A review of the exhibits reveals nothing definitive about Ms. Kanieski's purported agent status. The documents, on their face, do not disclose the existence of a corporation for which Ms. Kanieski was operating as an agent. No documentary evidence reflected the names of these corporations—the NSF check at issue, and signed by Ms. Kanieski without any indication of title or representative capacity, bore the hand written name of "Arena Sports & Ent. Complex"; the invoice prepared by Mr. Covert listed the business name as "Arena Sports Complex" and his color renderings listed the clients as "Arena Sports & Entertainment Complex" and "River Walk Ent. Complex Christophers Steak House." Thus, the documentary evidence discloses only Ms. Kanieski's name and various trade names related to her businesses. If Ms. Kanieski's defense to the lawsuit was that she was not personally liable because of a corporate veil or shield, it was incumbent upon her to prove the elements of such a defense. See *HLC Trucking v. Harris*, 7th Dist. No. 01 BA 37, 2003-Ohio-694, 2003 Ohio App. Lexis 664, *16.

{¶33} Thus, we are left with an issue of credibility. Even were we in a position to consider the transcript, our court will not interfere with the findings of the court below regarding the credibility of witnesses and the weight to be given to their testimony. See, *Seasons Coal Co., Inc. v. City of Cleveland* (1984), 10 Ohio St.3d 77. Ms. Kanieski's assertion that she was acting solely as an agent for these corporations was rebutted by

Mr. Covert's testimony. As no evidence was proffered to show that the companies for which Ms. Kanieski ordered the signs were in fact corporations, she failed to shield herself from personal liability. See *Clark v. D'Alessio* (Nov. 22, 1995), 7th Dist. No. 94-J-22, 1995 Ohio App. LEXIS 5207, *3.

{¶34} The second assignment of error is without merit.

{¶35} **Refusal to Conduct Further Hearings**

{¶36} In her third assignment of error, Ms. Kanieski claims the trial court erred in not conducting a hearing for the presentation of further evidence.

{¶37} Civ.R. 53(D)(4)(d) states that "[i]f one or more objections to a magistrate's decision are timely filed, the court shall rule on those objections. In ruling on objections, the court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law. Before so ruling, the court may hear additional evidence but may refuse to do so unless the objecting party demonstrates that the party could not, with reasonable diligence, have produced that evidence for consideration by the magistrate." Thus, it is clear from the rule that the "trial court possesses the discretion to consider or refuse to consider additional evidence at a hearing on objections." *Zamos v. Zamos*, 11th Dist. No. 2008-P-0021, 2009-Ohio-1321, ¶29.

{¶38} Ms. Kanieski argues that the trial court should have conducted further hearings regarding whether the law of contracts was properly applied and whether the corporate veil should have been pierced. The trial court clearly believed that further hearings were not necessary in order to evaluate Ms. Kanieski's objections. The record the trial court had before it made it quite evident that the magistrate had not, in fact, relied on a theory of piercing the corporate veil in order to assign Ms. Kanieski personal

liability. Furthermore, it was within the trial court's discretion to determine whether it had enough information before it to consider whether a contract had, in fact, been formed between the two parties. It is reasonable, therefore, to conclude that the trial court did not feel it necessary to conduct further proceedings in order to understand the case before it and render a decision on Ms. Kanieski's objections. Furthermore, Ms. Kanieski failed to demonstrate in her motion that she was unable to have produced the required evidence at the time of the magistrate's hearing. No abuse of discretion is evident and Ms. Kanieski's third assignment of error is without merit.

{¶39} **Trial Court's Jurisdiction to Hear the Case**

{¶40} In her fourth assignment of error, Ms. Kanieski challenges the jurisdiction of the Chardon Municipal Court to hear and adjudicate this case. In her brief, however, Ms. Kanieski discusses venue, as governed by Civ.R. 3. Although Ms. Kanieski uses the term "jurisdiction" in her assignment of error, it appears from her brief that she has confused the notion of jurisdiction with that of venue. She is actually challenging whether Chardon Municipal Court was the proper venue for this matter. Therefore, we will conduct an analysis of venue and not jurisdiction.

{¶41} "'Jurisdiction' means 'the courts' statutory or constitutional power to adjudicate the case.' *** The term encompasses jurisdiction over the subject matter and over the person. *** Because subject-matter jurisdiction goes to the power of the court to adjudicate the merits of a case, it can never be waived and may be challenged at any time." *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, ¶11 (internal citations omitted); See, also, *Neil R. Wilson Co., L.P.A. v. Adams*, 11th Dist. No. 2007-L-0065,

2008-Ohio-5321, ¶26 (defining subject matter jurisdiction and discussing voidness of a court's decision for want of subject matter jurisdiction).

{¶42} On the other hand, venue "connotes locality, the place where the suit should be heard." *New York, Chicago & St. Louis Rd. Co. v*. *Matzinger* (1940), 136 Ohio St. 271, 276. Civ.R. 3 governs venue and lists in subsection (B) the following, among other locations, as appropriate venues:

{¶43} "(1) The county in which the defendant resides;

{¶44} "(2) The county in which the defendant has his or her principal place of business;

{¶45} "(3) A county in which the defendant conducted activity that gave rise to the claim for relief;

{¶46} "(4) A county in which a public officer maintains his or her principal office if suit is brought against the officer in the officer's official capacity;

{¶47} "(5) A county in which the property, or any part of the property, is situated if the subject of the action is real property or tangible personal property;

{¶48} "(6) The county in which all or part of the claim for relief arose; or, if the claim for relief arose upon a river, other watercourse, or a road, that is the boundary of the state, or of two or more counties, in any county bordering on the river, watercourse, or road, and opposite to the place where the claim for relief arose[.]"

{¶49} Riverwalk was located in Troy Township, Geauga County. The Chardon Municipal Court's jurisdiction is countywide. Therefore, venue was proper in Chardon Municipal Court, as Mr. Covert and Electolite were entitled to bring their claim in the

county/municipality in which all or part of their claim for relief arose. See Civ.R. 3(B)(6). Venue was proper and Ms. Kanieski's fourth assignment of error is without merit.

{¶50} For the foregoing reasons, we affirm the judgment of the Chardon Municipal Court.

TIMOTHY P. CANNON, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.