

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

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JOHN TOUHEY, ET AL.		
Plaintiffs-Appellants	:	C.A. CASE NO. 22756
vs.	:	T.C. CASE NO. 05CV3153
EAGLE FENCE AND CONSTRUCTION, INC., ET AL.	:	(Civil Appeal From
Defendants-Appellees	:	Common Pleas Court)

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O P I N I O N

Rendered on the 22nd day of May, 2009.

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GRADY, J.

{¶1} This is an appeal by the plaintiff in a breach of contract case.

{¶2} John Touhey contracted with Eagle Fence and Construction, Inc. ("Eagle") to construct and install fencing on his property in West Alexandria. Two kinds of fencing were to be installed at an agreed price of \$15,000.

{¶3} Eagle installed the two fences and Touhey paid Eagle \$15,000. Subsequently, on April 7, 2005, John Touhey and his wife, Mary Ann Touhey, commenced the action underlying this appeal on claims that Eagle had breached their contract.

{¶4} The Touheys' complaint alleged that Eagle constructed "the fence in an improper manner with curves and waviness in said fence," breaching Eagle's implied warranty to "construct said fence in a good and workmanlike manner." The complaint further alleged that Eagle "negligently constructed said fence on Plaintiff's property."

{¶5} The case was referred to a magistrate. Following hearings, the magistrate filed a decision finding that the fencing is poorly constructed and that one section of fence was installed improperly on a neighbor's property. The decision granted judgment for the Touheys for \$12,539, which the magistrate found is the reasonable cost of repair. (Dkt. 28).

{¶6} The magistrate granted a motion for new trial on the issue of damages that Eagle subsequently filed. (Dkt. 45). However, following hearings, the magistrate entered a decision awarding damages in the same amount as before, \$12,539. (Dkt. 52).

{¶7} Eagle filed objections to the magistrate's decision.

(Dkt. 53). The Touheys filed a memorandum contra. (Dkt. 64). Upon consideration, the trial court sustained Eagle's objections, in part. The court found that the magistrate applied the proper measure of damages, the cost to repair the defects, but that the defects concerning the condition and location of the fencing that the magistrate found had not been proved with respect to the entire fence Eagle constructed, but only with respect to a part of it, and the court referred the matter to the magistrate for retrial of the damages claim. (Dkt. 65).

{¶8} A different magistrate presided in the second referral. Following hearings, the magistrate filed a decision awarding the Touheys damages in the amount of \$2,662. (Dkt. 70). The Touheys filed objections to the magistrate's decision. (Dkt. 71). They objected to the court's remand, complaining that the \$12,539 in damages the first magistrate awarded was proper. They also objected to the \$2,662 in damages the second magistrate awarded.

{¶9} The trial court overruled the Touheys' objections. (Dkt. 83). The court held that Civ.R. 53(D) "is limited to objections to a magistrate's decision, (and does) not (contemplate) objections to prior decisions of a judge reviewing the magistrate's decision." (Dkt. 83, p.4). The

court reviewed the detailed evidence offered by Eagle at the rehearing concerning the cost of repairing the fence, noting that John Touhey had merely offered evidence concerning the \$15,000 he paid Eagle for the work it performed. (Dkt. 83, p.6). The court then overruled the Touheys' objections and, relying on the evidence Eagle offered, adopted the magistrate's decision awarding the Touheys damages in the amount of \$2,662.

{¶10} Mary Ann Touhey filed a notice of appeal (Dkt. 85) and a suggestion of the death of John Touhey. (Dkt. 86).

FIRST ASSIGNMENT OF ERROR

{¶11} "THE TRIAL COURT ERRED IN ITS DECISION OF AUGUST 2, 2007, WHEREIN IT GRANTED APPELLEE'S OBJECTIONS IN PART TO THE MAGISTRATE'S RECOMMENDATION OF JUDGMENT FOR PLAINTIFFS IN THE AMOUNT OF \$12,593.00, AND REFERRED BACK TO THE MAGISTRATE THE CASE FOR RECALCULATION OF DAMAGES RULING THAT THERE COULD BE NO DAMAGES FOR THE IMPROPERLY CONSTRUCTED FENCE ON THE EAST SIDE OF THE PROPERTY."

SECOND ASSIGNMENT OF ERROR

{¶12} "THE TRIAL COURT ABUSED ITS DISCRETION IN IGNORING THE EVIDENCE IN RENDERING ITS DECISION OF AUGUST 2, 2007, WHEREIN THE MATTER WAS REFERRED BACK TO THE MAGISTRATE FOR A RECALCULATION OF DAMAGES. SAID DECISION OF AUGUST 2,

2007, WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

{¶13} Civ.R. 53(D)(4)(b) provides:

{¶14} “Action on magistrate’s decision. Whether or not objections are timely filed, a court may adopt or reject a magistrate’s decision in whole or in part, with or without modification. A court may hear a previously-referred matter, take additional evidence, or return a matter to a magistrate.”

{¶15} Acting on the objections to the magistrate’s decision that Eagle filed, the trial court adopted the magistrate’s finding that Eagle is liable on the Touheys’ breach of contract claim, but modified the magistrate’s damages award on the court’s further finding that the Touheys had failed to prove the full extent of the defects in the fence on which the magistrate based the damages awarded. The court then referred the matter to the magistrate again to determine the amount of damages to which the Touheys are entitled on the defects which the court found they had proved.

Civ.R. 53(D)(4)(b).

{¶16} Following that referral, the magistrate filed a decision awarding the Touheys damages of \$2,662. The Touheys objected to the court’s referral, complaining that the prior award of \$12,539 was proper. That contention purports to defend the prior \$12,593 award, but that prior award had been

vacated. The objection the Touheys filed required them instead to show why the magistrate's new award of \$2,662 was improper.

{¶17} Civ.R. 53(D)(3)(b)(ii) provides:

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

{¶19} The Touheys' objection that the prior award of \$12,539 was proper fails to satisfy the particularity requirement of Civ.R. 53(D)(3)(b)(ii). They were required to state with particularity why the later award of \$2,662 was improper, and they failed to do that. The trial court did not abuse its discretion when it overruled the Touheys' objection.

{¶20} The Touheys argue on appeal that the trial court abused its discretion, nevertheless, because there were conflicts in the testimony before the magistrate, who had heard the witnesses personally, and the trial court therefore should not have substituted its own view of the evidence for the magistrate's. As a result, the Touheys claim the trial court's judgment for \$2,662 is against the manifest weight of the evidence.

{¶21} The "manifest weight of the evidence" standard applies to reviews by an appellate court of judgments of lower

courts. The burden it imposes on parties who argue that an error occurred reflects the deference an appellate court must give to the judgment of independent judicial officers. By contrast, Civ.R. 53(D)(4)(d) provides that "[i]n 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."

{¶22} The Tenth District Court of Appeals has written:

{¶23} "The trial court, when considering a referee's report, may have little, if any, greater advantage in determining the credibility of the witnesses than this court would upon review of the trial court's decision. The trial court, like a reviewing court, is limited to reviewing witnesses' testimony in the form of a written transcript, and lacks the advantage of physically viewing the witnesses in order to aid in determining truthfulness. However, the standard by which a trial court decides whether to adopt, reject or modify the report of a referee is not the same as that which governs the review by an appellate court of the trial court's decision upon questions of law. The Civil Rules clearly provide that the trial court must make its own factual

determination by undertaking an independent analysis of the issues. The trial court is bound to enter its own judgment. This is a similar function to that which this court performed upon former appeals upon questions of law and fact prior to the adoption of App.R. 2. The trial court should not adopt challenged referee's findings of fact unless the trial court fully agrees with them-that is, the trial court, in weighing the evidence itself and fully substituting its judgment for that of the referee, independently reaches the same factual conclusions." *DeSantis v. Soller* (1990), 70 Ohio App.3d 226, 233.

{¶24} The holding in *DeSantis* applied to a former version of Civ.R. 53 that required the court to perform an independent review in every instance. The current rule limits that requirement to matters that are the subject of objections. The same considerations apply, however.

{¶25} On the record before us, we cannot find that the trial court abused its discretion when it overruled the Touheys' objections and adopted the magistrate's decision, entering a judgment for the Touheys against Eagle in the amount of \$2,662.

{¶26} The first and second assignments of error are overruled.

THIRD ASSIGNMENT OF ERROR

{¶27} 'THE TRIAL COURT ERRED IN ENTERING FINAL JUDGMENT FOR APPELLANT IN THE AMOUNT OF \$2,662.00 ON APRIL 16, 2008, BECAUSE SAID AMOUNT WAS ENTIRELY INSUFFICIENT TO COMPENSATE APPELLANT FOR THE DAMAGES CAUSED BY APPELLEE."

{¶28} Appellants fail to offer reasons in support of this contention, except to argue that the first award of \$12,539 was proper, and they fail to cite to the parts of the record on which they rely. App.R. 16(A)(7). We do not perform a de novo review on weight of the evidence claims.

{¶29} The third assignment of error is overruled. The judgment of the trial court will be affirmed.

BROGAN, J. and FAIN, J., concur.

Copies mailed to:

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