[Cite as *Leach Dev., L.L.C. v. Miami Woodworking, Inc.*, 2010-Ohio-2433.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

LEACH DEVELOPMENT, LLC,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-11-154
	:	O P I N I O N
- vs -	:	6/1/2010
MIAMI WOODWORKING, INC.,	:	
Defendant-Appellant.	:	

CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 06CV67328

Katz, Greenberger & Norton LLP, Scott H. Kravetz, Ryan F. Hemmerle, 105 East Fourth Street, 4th Floor, Cincinnati, Ohio 45202-4056, for plaintiff-appellee

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RINGLAND, J.

{¶1} Defendant-appellant, Miami Woodworking, Inc., appeals from the decision of the Warren County Court of Common Pleas finding in favor of plaintiff-appellee, Leach Development, LLC, in a lawsuit involving the fallout from an oral commercial lease agreement. For the reasons outlined below, we affirm in part and reverse in part.

{¶2} Leach Development owns commercial property located on Butler-Warren Road in Deerfield Township, Warren County, Ohio. Leach Development, which is co-

owned by Mark and LaDonna Leach, was created in 2002 to manage and operate the Warren County property. Miami Woodworking, which was incorporated in 1987, builds high-end custom cabinetry, bars, entertainment centers, and other built-in units.

{¶3} Beginning in approximately 1987, Kenneth Brewsaugh, the owner of Miami Woodworking, entered into a month-to-month oral lease with Ed Batey, LaDonna Leach's late father and Leach Development's predecessor in interest, to occupy a portion of his Warren County property. Following Batey's passing, Miami Woodworking continued to occupy the premises under the terms of the original month-to-month oral agreement. Pursuant to this agreement, Miami Woodworking was to pay Leach Development rent of $2,750 per month.

{¶4} In early 2006, Brewsaugh complained to Leach Development regarding problems with the congested parking lot. Specifically, Brewsaugh complained about dust and dirt generated by trucks from a neighboring mulch business damaging his woodworking projects, and that the parking habits of a number of other tenants cut off access to his loading dock door. However, despite Brewsaugh's complaints, and although Leach Development made several attempts to rectify the situation, the parking problems persisted.

{¶5} On March 21, 2006, Brewsaugh sent a letter to Leach Development demanding the parking problems be rectified or Miami Woodworking would withhold rent. In response, Leach Development promised to rectify the parking problems, but warned that eviction proceedings would commence if rent was withheld. Thereafter, Leach Development again tried to remedy the parking problems, but its efforts were essentially ignored and the problems continued.

{¶6} On June 29, 2006, after experiencing an increase in its insurance premiums, Leach Development raised Miami Woodworking's rent from $2,750 to $3,500

per month. In August and September of 2006, Miami Woodworking attempted to pay rent at the old rate of $2,750, but its checks were returned for being insufficient to cover the increased rental rate.

{¶7} On September 8, 2006, Leach Development filed an eviction action against Miami Woodworking in the Mason Municipal Court. The eviction action was subsequently dismissed after a misstatement was discovered in the complaint. Leach Development then served Miami Woodworking with a 30-day notice terminating its month-to-month tenancy. Miami Woodworking, who had not paid rent since July, subsequently vacated the leased premises in October of 2006.

{¶8} On November 21, 2006, Leach Development filed a complaint against Miami Woodworking seeking to recover back rent still owed, as well as damages it incurred repairing the leased premises following Miami's departure. On December 15, 2006, Miami Woodworking filed an answer and counterclaim, alleging, among other things, that Leach Development was liable for breaching its implied covenant of quite enjoyment.

{¶9} On November 8, 2007, a two-day bench trial commenced before a Warren County magistrate. However, on January 23, 2008, before the magistrate issued a decision, Miami Woodworking filed a "Motion for Order to Show Cause why Mark and LaDonna Leach Should Not be Held in Contempt" for allegedly committing perjury at trial. On April 16, 2008, the magistrate held a hearing on Miami Woodworking's show cause motion.

{¶10} On May 6, 2008, the magistrate issued two decisions; one regarding Leach Development's original complaint and counterclaim, and the other regarding Miami Woodworking's show cause motion.

{¶11} In regards to Leach Development's original complaint, the magistrate

found Leach was entitled to receive $11,720 in damages; namely, $10,500 in back rent owed from Miami Woodworking, as well as $1,220 for electrical repairs and a Phase II Environmental Inspection.[1] However, the magistrate also determined that Leach Development breached its covenant of quiet enjoyment, and, as a result, its damages would be off-set by $5,163.75.[2] The magistrate then determined that Leach Development was entitled to "prejudgment interest at the statutory rate from November 1, 2006 * * *."

{¶12} In regards to Miami Woodworking's show cause motion, the magistrate determined that Miami failed to produce evidence indicating Mark and Ladonna Leach, the co-owners of Leach Development, committed perjury "*beyond a reasonable doubt*." The magistrate then determined that the motion was frivolous. (Emphasis sic.)

{¶13} On May 20, 2008, Miami Woodworking filed objections to the magistrate's separate decisions. On November 5, 2008, the trial court adopted the magistrate's separate decisions in their entirety. On January 12, 2010, after a number of unrelated matters were resolved, the trial court issued a "Final Judgment Entry" ordering Miami Woodworking to pay Leach Development $6,556.25, including prejudgment interest, for back rent and damages. The trial court also ordered Miami Woodworking to pay Leach Development reasonable attorney fees and costs in the amount of $1,423.05 incurred defending against its show cause motion.

{¶14} Miami Woodworking now appeals, raising three assignments of error.

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1. **{¶a}** Leach Development's Phase II Environmental Inspection was necessitated after it discovered Miami Woodworking had left a 55-gallon drum outside the leased premises that was leaking an unknown chemical substance.

{¶b} The magistrate did not allow Leach Development to recover the costs it incurred to repair a garage door Miami Woodworking allegedly damaged.

2. The magistrate determined Leach Development's recovery should be reduced by $1,620 to off-set the cost of refinishing four woodworking projects ruined by dust and dirt from the mulch trucks, and $3,543.75

{¶15} Assignment of Error No. 1:

{¶16} "THE TRIAL COURT ERRED IN ITS VALUATION OF MIAMI'S LOSSES."

{¶17} In its first assignment of error, Miami Woodworking argues that the trial court erred by adopting the magistrate's decision finding it was only entitled to recover $3,543.75, or $15 per hour, for the 236.25 additional man-hours it was required to use unloading inventory from trucks in the parking lot, as opposed to near the loading dock door, due to Leach Development's breach of the covenant of quiet enjoyment for failing to remedy the parking congestion problems. We disagree.

{¶18} In ruling on objections to a magistrate's decision, Civ.R. 53(D)(4)(d) requires a trial court to undertake an independent review of the objected matters to ascertain whether the magistrate properly determined the factual issues and appropriately applied the law. *Koeppen v. Swank,* Butler App. No. CA2008-09-234, 2009-Ohio-3675, ¶26; *Knauer v. Keener* (2001), 143 Ohio App.3d 789, 793-794. In turn, because the trial court has the "ultimate authority and responsibility over the [magistrate's] findings and rulings," it may reject or adopt the magistrate's decision in whole or in part, and with or without modification. *State ex rel. Hrelec v. Campbell,* 146 Ohio App.3d 112, 117, 2001-Ohio-3425, quoting *Hartt v. Munobe,* 67 Ohio St.3d 3, 5, 1993-Ohio-177; *Mandzack v. Graves*, Butler App. No. CA2009-06-173, 2010-Ohio-595, ¶7. As a result, the trial court's rulings on objections to a magistrate's decision lies within its sound discretion and will not be reversed on appeal absent an abuse thereof. *Setzekorn v. Kost USA, Inc.,* Warren App. No. CA2008-02-017, 2009-Ohio-1011, ¶9. An abuse of discretion is more than error of law or judgment; it requires a finding that the trial court's attitude was unreasonable, arbitrary or unconscionable. *Blakemore v.*

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to compensate for the 236.25 additional man-hours it was required to use to unload its inventory from the parking lot, as opposed to the loading dock door.

Blakemore (1983), 5 Ohio St.3d 217, 219.

{¶19} After a thorough review of the record, and while Miami Woodworking may claim the "proper rate for reimbursement of the 236.25 man-hours for unloading inventory should be $45.00 per hour," the same hourly rate it billed to customers, it failed to provide any evidence indicating the additional man-hours used to unload inventory in the parking lot precluded it from accepting additional woodworking jobs. *Schnell v. Meyer* (Jan. 27, 1997), Butler App. Nos. CA95-12-220, CA96-01-003, 7-9. As a result, whether Miami Woodworking actually "could have" obtained these lost profits had it not been forced to unload its inventory in the parking lot, something that it now claims, is nothing more than pure speculation. Therefore, because the record contains competent and credible evidence that the Miami employees were paid $15 per hour to unload the trucks, and because "speculative or remote lost profits cannot be recovered," we find no abuse in the trial court's decision adopting the magistrate's finding Miami Woodworking was only entitled to receive $3,543.75, or $15 per hour, for the 236.25 additional man-hours used to unload its inventory from trucks in the parking lot.[3] *Hacker v. Mail* (June 24, 1996), Butler App. Nos. CA95-10-170, CA95-10-172, CA95-10-175, 8, citing *Charles R. Combs Trucking, Inc. v. International Harvester Co.* (1984), 12 Ohio St.3d 241, paragraph two of the syllabus. Accordingly, Miami's first assignment of error is overruled.

{¶20} Assignment of Error No. 2:

{¶21} "THE TRIAL COURT ERRED IN AWARDING PREJUDGMENT INTEREST."

3. It should be noted, Justin Williamson, a former "cabinetmaker" with Miami Woodworking who was recently promoted to foreman, testified that he made "$15 an hour" when he was "unloading the trucks." On the other hand, Craig James, a member of Miami Woodworking's "finishing department," testified that he also unloaded inventory from the trucks and that he was paid "thirteen dollars an hour." In turn, based

{¶22} In its second assignment of error, Miami Woodworking claims that the trial court erred by adopting the magistrate's decision awarding prejudgment interest to Leach Development because such an award was "unfair and unjustified."

{¶23} The right to recover prejudgment interest is governed by R.C. 1343.03. *Textiles, Inc. v. Design Wise, Inc.*, Madison App. Nos. CA2009-08-015, CA2009-08-018, 2010-Ohio-1524, ¶49. However, the applicable subsection of R.C. 1343.03 to a prejudgment interest claim is dependant upon whether the cause of action lies in contract or in tort. *Hance v. Allstate Ins. Co.*, Clermont App. No. CA2008-10-094, 2009-Ohio-2809, ¶6, citing *Lehrner v. Safeco Ins./Am. States Ins. Co.,* 171 Ohio App.3d 570, 2007-Ohio-795, ¶72.

{¶24} R.C. 1343.03(A), which this court has found applicable to contract claims, states that "when money becomes due and payable * * * upon all verbal contracts entered into * * * the creditor is entitled to interest * * *." *Hance* at ¶7. In turn, once a plaintiff receives judgment on a verbal contract claim, such as the case here, "the trial court has no discretion but to award prejudgment interest under R.C. 1343.03(A)." *Textiles* at ¶49, quoting *Zeck v. Sokol,* Medina App. No. 07CA0030-M, 2008-Ohio-727, ¶44; *Hance* at ¶17.

{¶25} In this case, Leach Development received a favorable judgment on its contract claim seeking to recover back rent Miami Woodworking still owed under the commercial lease terms, which, according to the magistrate, became due and payable on November 1, 2006. Therefore, because Leach Development received a favorable judgment on its contract claim for back rent, the trial court properly awarded prejudgment interest on the back rent still owed.

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on our review of the record, it seems clear that the magistrate actually used the *higher* hourly wage to calculate Miami Woodworking's losses.

{¶26} However, Leach Development did not merely bring a cause of action to recover back rent owed under the commercial lease, but instead, included a claim seeking damages it incurred repairing the leased premises following Miami Woodworking's departure. In turn, because Leach Development's second cause of action sounds in tort, we find R.C. 1343.03(C) equally applicable to the case at bar. *Hance* at ¶7.

{¶27} Pursuant to R.C. 1343.03(C), which was enacted to "to promote settlement efforts, to prevent parties who have engaged in tortious conduct from frivolously delaying the ultimate resolution of cases, and to encourage good faith efforts to settle controversies outside a trial setting," the court awards prejudgment interest if the following requirements are met:

{¶28} "*[U]pon motion* of any party to a civil action that is based on tortious conduct * * * in which the court has rendered a judgment * * * for the payment of money, *the court determines at a hearing held subsequent to the verdict or decision* in the action that the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case * * *." (Emphasis added.) Id., *Snyder v. Elliott* (July 12, 1999), Clermont App. No. CA98-09-079, 3, quoting *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 657, 1994-Ohio-324.

{¶29} Based on a clear reading of the statute, four requirements must be met before prejudgment interest can be awarded pursuant to R.C. 1343.03(C); namely:

{¶30} "The party seeking such interest must petition the court, the court must hold a hearing, the court must find that the party required to pay the judgment failed to make a good faith effort to settle, and the court must find that the party to whom the judgment is to be paid did not fail to make a good faith effort to settle the case." *Snyder*

at 3-4, citing *Moskovitz* at 658.

{¶31} After a thorough review of the record, we find that Leach did not petition the court to receive prejudgment interest on its tort claims, and, as a result, the court never held a hearing regarding prejudgment interest subsequent to its decision, nor did it make any findings regarding either of the parties' attempts to settle the case. Therefore, because the requirements of R.C. 1343.03(C) were not met before the magistrate awarded prejudgment interest to Leach Development on its tort claim, the trial court erred in its decision adopting the magistrate's decision awarding prejudgment interest as such.

{¶32} Accordingly, Miami Woodworking's second assignment of error is overruled as it pertains to Leach Development's contract claim for back rent still owed under the commercial lease, but sustained as it relates to its tort claim seeking to recover damages it incurred repairing the leased premises.

{¶33} Assignment of Error No. 3:

{¶34} "THE TRIAL COURT ERRED IN FINDING THE MOTION TO SHOW CAUSE TO BE FRIVOLOUS."

{¶35} In its third assignment of error, Miami Woodworking argues that the trial court erred by adopting the magistrate's decision finding it engaged in frivolous conduct by filing a motion requesting a show cause order why Mark and LaDonna Leach, co-owners of Leach Development, should not be held in contempt for allegedly committing perjury at trial. We disagree.

{¶36} A trial court's factual finding that a party's conduct was frivolous will not be disturbed where the record contains competent, credible evidence to support the court's determination. *In re K.A.G.-M.,* Warren App. No. CA2009-04-040, 2009-Ohio-6239, ¶17, citing *Jackson v. Bellomy,* Franklin App. No. 01AP-1397, 2002-Ohio-6495, ¶39, 45.

{¶37} "Conduct," as defined by R.C. 2323.51(A)(1), means, in pertinent part, the following:

{¶38} "The filing of a civil action, the assertion of a claim, defense, or other position in connection with a civil action, the filing of a pleading, motion, or other paper in a civil action, including, but not limited to, a motion or paper filed for discovery purposes, or the taking of any other action in connection with a civil action; * * *."

{¶39} "Frivolous conduct," as defined by R.C. 2323.51(A)(2)(a), means conduct that satisfies any of the following:

{¶40} "(i) It obviously serves merely to harass or maliciously injure another party to the civil action or appeal or is for another improper purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation.

{¶41} "(ii) It is not warranted under existing law, cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new law.

{¶42} "(iii) The conduct consists of allegations or other factual contentions that have no evidentiary support or, if specifically so identified, are not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

{¶43} "(iv) The conduct consists of denials or factual contentions that are not warranted by the evidence or, if specifically so identified, are not reasonably based on a lack of information or belief."

{¶44} In its May 6, 2008 decision finding Miami Woodworking's show cause motion to be frivolous, the magistrate stated the following:

{¶45} "It is [Miami Woodworking's] contention that these witnesses committed perjury at trial when they testified that a certain overhead garage door, part of the premises leased to [Miami], had been repaired following the end of [its] term. In point of

fact, in August of 2007, *a* door to the premises formerly occupied by [Miami Woodworking] was repaired, at a cost of $1,254.57. Apparently there is more than one door to these premises and [Miami Woodworking] is, even after trial, apparently confused as to which door [Leach Development] claims was damaged. This is due, no doubt, to the fact that neither during the depositions, nor at trial, did [Miami Woodworking] ask [Leach Development] to specifically identify the door at issue. * * *." (Emphasis sic.)

{¶46} The magistrate continued by stating the following:

{¶47} "While such confusion may be a basis for impeaching [Leach Development's] witnesses, it affords no basis for claiming these witnesses committed *perjury*, and no basis to ask the Court to hold them in criminal contempt * * *." (Emphasis sic.)

{¶48} After a thorough review of the record, and while there may be some precedent supporting Miami Woodworking's conduct, we find no error in the trial court's decision adopting the magistrate's finding such conduct was frivolous. See *Ohio Dept. of Taxation v. Kunkle*, 179 Ohio App.3d 747, 2008-Ohio-6393, ¶49. As noted above, Miami Woodworking's assertion that Mark and LaDonna Leach committed perjury was based solely on its own failure to specifically identify the door at issue during either their deposition or at trial. In turn, although the record indicates counsel zealously and diligently pursued his client's claims and defenses, this contentious issue could have been squelched by merely placing a phone call to opposing counsel.[4] Therefore, even though we do not construe his conduct as intended to harass or maliciously injure, we find that had counsel simply investigated the matter further, this matter would have

easily been resolved without the necessity for contempt proceedings. See R.C. 2323.51(A)(2)(a)(iii). Accordingly, while we may have imposed different sanctions, because the record contains competent, credible evidence to support the trial court's determination, Miami Woodworking's third assignment of error is overruled.

{¶49} Judgment affirmed in part and reversed in part.

YOUNG, P.J., and BRESSLER, J., concur.

4. In fact, when questioned during oral argument, Miami Woodworking's counsel conceded that "in retrospect" he wished he never filed the motion and that he "probably learned some lessons" by not merely telephoning opposing counsel.