STATE OF MICHIGAN

COURT OF APPEALS

LORETTA SHORTER,

Plaintiff-Appellant,

v

GERALD J. GARNER, P.C., GERALD J. GARNER, and MARILYN GARNER,

Defendants-Appellees.

UNPUBLISHED
May 27, 2008

No. 275149
Macomb Circuit Court
LC No. 97-004215-CK

Before: Servitto, P.J., and Cavanagh and Kelly, JJ.

PER CURIAM.

Plaintiff appeals by delayed leave granted from an order denying her motion for a new trial. We affirm.

Plaintiff, a former employee of defendant Gerald J. Garner, P.C. (Garner P.C.), brought this action against Garner P.C. and the two individual defendants, Gerald Garner and Marilyn Garner, to recover unpaid wages and other damages arising from her employment. Plaintiff's amended complaint alleged claims for breach of contract and violation of the Whistleblowers' Protection Act, MCL 15.361 *et seq*. Although a bench trial was conducted in March 2000, a judgment was not entered until May 4, 2001. The judgment dismissed plaintiff's claims against Marilyn Garner pursuant to the parties' stipulation, directed a verdict in favor of Gerald Garner, and awarded plaintiff $223 on her breach of contract claim against Garner P.C.

In June 2001, plaintiff filed a pro se motion for a new trial alleging various different grounds. After plaintiff retained new counsel, counsel filed a supplemental motion for a new trial. Thereafter, in June 2002, plaintiff's counsel filed a renewed motion for a new trial, alleging that an accurate trial transcript could not be obtained from plaintiff's copy of the videotape of the trial. Counsel requested that the trial court either grant plaintiff a new trial or provide a second copy of the videotape. On June 26, 2002, the trial court ordered that plaintiff be provided with another copy of the videotape at no additional charge. Approximately three years later, in July 2005, plaintiff filed another renewed motion for a new trial, alleging that an accurate transcript of the trial could not be obtained from the videotape. The trial court denied the renewed motion in an opinion and order dated December 28, 2005, and also denied plaintiff's motion for reconsideration.

Plaintiff's claim of appeal from the December 28, 2005, order was dismissed by this Court for lack of jurisdiction, because it was not timely filed. This Court subsequently granted plaintiff's delayed application for leave to appeal the December 28, 2005 order.

Under MCR 2.611(A)(1), a "new trial may be granted to all or some of the parties, on all or some of the issues, whenever their substantial rights are materially affected," for any of the reasons set forth in subsections (a) to (h). If a bench trial was conducted, the trial court may set aside the judgment, take additional testimony, or amend or make new findings of fact and conclusions of law. MCR 2.611(B). In general, we review a trial court's decision denying a motion for a new trial for an abuse of discretion. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 761; 685 NW2d 391 (2004). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). To the extent that a constitutional question or other question of law has been raised, appellate review is de novo. See *Kelly v Builders Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001); *DeGeorge v Warheit*, 276 Mich App 587, 591; 741 NW2d 384 (2007); *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 526; 672 NW2d 181 (2003). Additionally, any error is subject to the harmless error standard in MCR 2.613(A), which provides:

> An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.

On appeal, plaintiff argues that the trial court erred in evaluating her inability to produce a complete and accurate transcript of the bench trial when denying her renewed motion for a new trial. We disagree. In *Elazier v Detroit Non-Profit Housing Corp*, 158 Mich App 247, 249-250; 404 NW2d 233 (1987), this Court evaluated a missing transcript situation under MCR 2.611(A)(1)(a) (an irregularity in the proceeding affecting a party's substantial rights), MCR 2.611(A)(1)(h) (any ground listed in MCR 2.612), and MCR 2.612(C)(1)(f) (any other reason justifying relief from judgment), and determined that a trial court must determine if the existing record and any possible settlement or reconstruction of the record is insufficient to allow evaluation of a specific allegation of error before granting a motion for a new trial.

The trial court in this case did not base its decision solely on the transcript problem, but considered the totality of the circumstances before it. It is clear from the trial court's opinion and order that it sought to determine if there was an alleged error, apart from the transcript issue, that would support a new trial for the purpose of determining whether the transcript problem would warrant a new trial or some other relief. Considering that plaintiff's counsel conceded at the November 14, 2005, motion hearing that the renewed motion for a new trial was filed only because plaintiff would not be able to produce a transcript for an appeal, the trial court could reasonably conclude that the renewed motion failed to set forth any reason justifying a new trial.

Had plaintiff timely filed a claim of appeal from the December 28, 2005, order denying her renewed motion for a new trial, MCR 7.210(B) would have afforded plaintiff an opportunity to obtain a certified statement of facts. See, also, *Admiral Ins Co v Columbia Cas Ins Co*, 194 Mich App 300, 305; 486 NW2d 351 (1992). We find no merit to plaintiff's assertion that the trial court should be faulted for her failure to file a timely claim of appeal. Further, we decline to evaluate the trial court's denial of the renewed motion for a new trial in light of plaintiff's subsequent failure to file the timely appeal.

"It is settled that error requiring reversal may only be predicated on the trial court's actions and not upon alleged error to which the aggrieved party contributed by plan or negligence." *Lewis v LeGrow*, 258 Mich App 175, 210; 670 NW2d 675 (2003). To properly preserve an issue concerning a motion, a party should seek an answer from the trial court. See *People v Kowalski*, 230 Mich App 464, 486; 584 NW2d 613 (1998) (Corrigan, C.J.) (inaction regarding a motion can constitute abandonment); *People v Riley*, 88 Mich App 727, 731; 279 NW2d 303 (1979) (motion abandoned where the defendant did not follow through on the motion by seeking an answer from the trial court). Therefore, based on the record evidence that plaintiff did not pursue any particular matter at the motion hearing except for the transcript problem, we conclude that the trial court did not make a premature ruling in denying the renewed motion for a new trial. We are not persuaded that the trial court was required to do more to explore other avenues for preparing a record of the trial, especially considering that plaintiff did not allege any independent basis for a new trial.

We also disagree with plaintiff's argument that the trial court's consideration of prejudice affords a basis for disturbing its decision to deny a new trial. Substantively, plaintiff has raised only an unpreserved claim that a new trial should be ordered under the attorney misconduct standard applicable to jury trials, as articulated in *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 102-103; 330 NW2d 638 (1982). While this Court may overlook preservation requirements, *Stewart v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002), plaintiff's reliance on *Reetz, supra*, is misplaced because a bench trial was conducted in this case. "[M]atters which constitute error requiring reversal when a case is tried before a jury do not necessarily require reversal when they occur in a bench trial." *People v Rushlow*, 179 Mich App 172, 175; 445 NW2d 222 (1989), aff'd 437 Mich 149 (1991).

Further, plaintiff has insufficiently briefed the factual basis of her unpreserved claim of misconduct. Although the record indicates that there were problems obtaining a complete trial transcript, this deficiency did not excuse plaintiff from filing an affidavit in support of her renewed motion for a new trial to establish facts not of record, MCR 2.611(D)(1), or her failure to obtain transcripts of pretrial proceedings relevant to her claim of ongoing discovery violations. This Court "limits its review to the record provided on appeal and will not consider any alleged evidence or testimony that is not supported by the record presented to the Court for review." *Admiral Ins Co, supra* at 305. General references to lower court docket entries are insufficient for appellate review. Facts stated in support of an argument "must be supported by specific page references to the transcript, the pleadings, or other document or paper filed with the trial court." MCR 7.212(C)(7); see, also, *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 388; 689 NW2d 145 (2004). Therefore, even accepting as true plaintiff's assertion that the trial judge

changed his ruling so as not to require production of the original "log" or "payroll" book, plaintiff has insufficiently briefed any claim of misconduct to warrant appellate consideration.[1]

Plaintiff also argues that the number of judges who participated in this case led to irregularities in the proceedings and violated her rights to equal protection and due process. We deem this issue abandoned because it was not pursued in plaintiff's renewed motion for a new trial. Even if we were to overlook this preservation requirement pursuant to *Steward*, *supra* at 554, no basis for relief is apparent. "Due process in civil cases generally requires notice of the nature of the proceedings, an opportunity to be heard in a meaningful time and manner, and an impartial decisionmaker." *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995). Plaintiff's cursory argument on appeal fails to establish anything about the manner in which judicial assignments were made in this case that suggests a violation of these basic rights. Therefore, further consideration of this issue is not warranted. See *Derderian*, *supra* at 388; *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003).

Similarly, plaintiff has not shown that she was deprived of the equal protection of the laws through the judicial assignments. "The constitutional guarantee of equal protection ensures that people similarly situated will be treated alike, but it does not guarantee that people in different circumstances will be treated the same." *Brinkley v Brinkley*, 277 Mich App 23, 35; 742 NW2d 629 (2007). A plaintiff is not deprived of the equal protection of laws unless there is some unequal treatment, such as the application of neutral judicial reassignment rules in an unequal manner. See *Terrell v Shope*, 687 F Supp 579, 581 (ND Ga, 1988), aff'd 911 F2d 741 (CA 11, 1990).

Because plaintiff has not shown any basis for disturbing the trial court's denial of her motion for a new trial, it is unnecessary to consider defendants' claim that plaintiff lacked standing to pursue her renewed motion for a new trial. The trial court did not decide plaintiff's motion on this basis, but only noted that it appeared that plaintiff lacked standing to pursue the motion. In passing, however, we find merit to defendants' argument because plaintiff's bankruptcy was converted to a Chapter 7 bankruptcy and there is no indication that the bankruptcy trustee formally abandoned the cause of action under 11 USC 554. Under Rule 6009 of the Federal Rules of Bankruptcy Procedure, only a debtor in possession or a trustee may prosecute a pending action. See *Cable v Ivy Tech State College*, 200 F3d 467, 472 (CA 7, 1999), and *Cain v Hyatt*, 101 BR 440, 442 (ED Pa, 1989) (after trustee is appointed, Chapter 7 debtor no longer has standing to pursue a cause of action existing at the time the Chapter 7 petition was filed, absent formal abandonment under 11 USC 554); see, also, *In re Ybarra*, 424 F3d 1018, 1025 n 9 (CA 9, 2005) ("[t]he 'debtor-in-possession' is a debtor in a Chapter 11 or Chapter 12 case or a person who has qualified as a trustee under § 322").

[1] We note that the records of the district and circuit court proceedings include copies of pages from the payroll book, and plaintiff's own proposed findings of fact for the bench trial, filed in March 2000, indicate that she was allowed to introduce a copy of the payroll book that she received during discovery. Although plaintiff also claimed that the copy of the payroll book was incomplete, plaintiff has not made any attempt on appeal to explain what she believes was missing. Accordingly, we decline to address this matter further.

For these reasons, we affirm the trial court's order denying plaintiff's motion for a new trial.

Affirmed.

/s/ Deborah A. Servitto
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly