STATE OF MICHIGAN

COURT OF APPEALS

IMPRESSIONS APPAREL, INC., and SHARKY'S CLOTHING COMPANY,

Plaintiffs-Appellees,

v

WILLIAM R. PORTER, d/b/a/ DLH ASSOCIATES,

Defendant-Appellant.

UNPUBLISHED
April 14, 2009

No. 278945
Oakland Circuit Court
LC No. 2005-064572-CZ

Before: Zahra, P.J., and O'Connell and K.F. Kelly, JJ.

PER CURIAM.

Following a bench trial, defendant appeals as of right the trial court's judgment in favor of plaintiffs in this breach of contract and breach of fiduciary duty action. We affirm.

Defendant first argues on appeal that the trial court erred in allowing plaintiffs an extra day to submit their answers to defendant's requests to admit. We disagree.

As provided by MCR 2.312 (B)(1),

> "[e]ach matter as to which a request is made is deemed admitted unless, within 28 days after service of the request, or within a shorter or longer time as the court may allow, the party to whom the request is directed serves on the party requesting the admission a written answer or objection addressed to the matter."

However, "[f]or good cause the court may allow a party to amend or withdraw an admission." MCR 2.312(D). The trial court has discretion to allow an amendment, "and the trial judge's decision will not be overturned absent an abuse of that discretion." *Medbury v Walsh*, 190 Mich App 554, 556; 476 NW2d 470 (1991). "An abuse of discretion occurs . . . when the trial court chooses an outcome falling outside this principled range of outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

As defendant asserts, he served requests for admissions on plaintiffs' counsel, by personal service, on December 19, 2005, and therefore, plaintiffs' answers should have been served on defendant on January 16, 2006, not January 17, 2008, as stated by plaintiffs. Nevertheless, "the failure to properly answer the requests for admissions does not mean that the

trial judge must automatically enter summary judgment even if (as here) the admissions cover the entire suit. The trial judge has the discretion to allow the party to file late answers or even to amend or withdraw the answers." *Janczyk v Davis*, 125 Mich App 683, 691; 337 NW2d 272 (1983).

"When a trial judge is asked to decide whether or not to allow a party to file late answers to the request for admissions, he is in effect called upon to balance between the interests of justice and diligence in litigation." *Id.* at 691. In balancing the interests there are three factors for the trial court to consider:

> First, whether or not allowing the party to answer late will aid in the presentation of the action. In other words, the trial judge should consider whether or not refusing the request will eliminate the trial on the merits. Obviously, this factor militates against granting summary judgment. Second, the trial court should consider whether or not the other party would be prejudiced if it allowed a late answer. Third, the trial court should consider the reason for the delay: whether or not the delay was inadvertent. [*Id.* at 692-693.]

Here, in terms of the first factor, had the answers been deemed admitted, the trial court would have had to grant summary disposition and forego a trial on the merits, which, as noted, is a "harsh remedy." Regarding the second and third factors, while plaintiffs offered no explanation for not complying with the rule, the answers were only one day late, and, as noted by the trial court, defendant had other remedies, such as a motion for sanctions. Therefore, defendant was not prejudiced and the trial court did not abuse his discretion in allowing plaintiffs to submit their answers to defendant's request to admit one day late.

Defendant next argues on appeal that the trial court erred in granting judgment for plaintiffs because plaintiffs failed to sustain their burden of proof. We disagree. "This Court reviews a trial court's findings of fact in a bench trial for clear error and its conclusions of law de novo. MCR 2.613(C)." *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). A finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made." *Id*. In the application of the clearly erroneous standard, "regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C).

In its opinion and order, the trial court determined that the sole issue before it was whether defendant was an independent contractor or an employee entitled to salary and benefits. In the trial court's view, plaintiffs' version of events was more credible than defendant's because the testimony of William Patrick Hill, plaintiffs' owner and principal, was corroborated by Susan Savalle, the operations manager, Denise Hollingsworth, the independent bookkeeper, and even Peter Paulus, plaintiffs' former employee who was convicted of embezzlement.

The trial court made the following findings of fact: 1) defendant failed to question Paulus regarding the $21,000 worth of checks that Paulus signed, without authorization; 2) defendant placed himself on the payroll, while continuing to receive payment via invoice, and thereby received an additional $110,000 in salary in addition to benefits from Blue Cross Blue Shield, for total damages of $126,000; 3) it is "inconceivable" that defendant could have worked as a full time employee and still billed plaintiffs for thousands of additional hours through his company,

DLH Associates; and, 4) defendant's actions were not uncovered until Hollingsworth examined payroll records wherein defendant had whited out his name in efforts to avoid detection.

Defendant argues that the trial judge erred because plaintiffs submitted no documentary evidence. Defendant contends that the judge relied solely on assertions and denials of plaintiffs' witnesses, while ignoring defense witness Rebecca Lichtenberg's testimony regarding defendant's skills, conscientiousness, and trustworthy character, as well as the spreadsheet containing defendant's "proposal" for full-time employment, allegedly initialed by Hill. Hill, nevertheless, denied that defendant had ever asked to be placed on the payroll. Moreover, as the trial court noted, defendant's credibility was damaged by his failure to report suspicious behavior by Paulus, and furthermore that it would be nearly impossible for him to work full time in addition to the thousands of hours he invoiced through DLH. Defendant's testimony was also suspect because he claimed all of the books and taxes were up to date, whereas Hollingsworth, an independent bookkeeper with nearly 30 years of experience, stated otherwise. Therefore, having reviewed the record and noting that the trial court was in the best position to judge the credibility of the witnesses, we do not have a definite and firm conviction that any mistakes were made in the trial court's findings of fact.

It is possible, however, that the trial court's finding of fact regarding the altered payroll records was based on improperly admitted evidence. Indeed, defendant argues on appeal that the court accorded great weight to Hollingsworth's testimony regarding the "whited-out payroll sheets," even though the payroll sheets themselves were never produced, which violates the best evidence rule. MRE 1002 provides that "to prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." *People v Girard*, 269 Mich App 15, 19; 709 NW2d 229 (2005), quoting MRE 1002. Under MRE 1004, the original is not required if 1) the originals are lost or destroyed, 2) the originals are not obtainable, 3) the original is in the possession of the opponent, or 4) "the writing, recording, or photograph is not closely related to a controlling issue." *Id.* at 20, quoting MRE 1004.

It would appear that under MRE 1002, plaintiffs should have submitted the payroll records themselves to show that they were altered, instead of relying on testimony from Hill and Hollingsworth. "This Court reviews a trial court's decision to admit evidence for an abuse of discretion; however, when the trial court's decision involves a preliminary question of law, such as whether a statute precludes the admission of evidence, a de novo standard of review is employed." *City of Detroit v Detroit Plaza Ltd P'ship*, 273 Mich App 260, 275-276; 730 NW2d 523 (2006). Even if this Court finds that "evidence was erroneously admitted," it will "deem the error harmless if it did not prejudice the defendant." *People v Bartlett*, 231 Mich App 139, 158; 585 NW2d 341 (1998). More pertinent to the case at bar, however, is that "objections to the admission of evidence may not be raised for the first time on appeal absent manifest injustice." *Phinney v Verbrugge*, 222 Mich App 513, 558; 564 NW2d 532 (1997). "A party opposing the admission of evidence must have timely objected at trial and specified the same ground for objection that it asserts on appeal. MRE 103(a)(1) . . . To be timely, an objection should be interposed between the question and the answer." *Int'l Union, UAW v Dorsey (On Remand)*, 273 Mich App 26, 45; 730 NW2d 17 (2006).

Not only did defendant fail to object to the testimony from Hill and Hollingsworth in regard to the "whited-out" and otherwise altered payroll sheets, but defense counsel elicited

similar testimony on cross-examination of Hill. Further, defendant did not dispute that his name was on the records. Moreover, the main issue in the case, as stated by the trial court, was whether defendant was *authorized* to put his name on the payroll. Had the improper testimony not been admitted, the trier of fact still would have heard conflicting testimony regarding whether defendant had such authorization. As discussed above, the trial court had ample reason to doubt defendant's credibility. Therefore, defendant cannot show manifest injustice and cannot now object to the testimony in regard to the altered payroll records. In sum, we conclude that the lower court record supports the trial court's findings and conclusions.

Affirmed.

/s/ Brian K. Zahra
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly