

IN THE COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY

TARA HOFFMAN,

Plaintiff-Appellee,

v.

MICHAEL CHESELKA, JR., LLC.,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. CA 19 108874

Civil Appeal from the
Court of Common Pleas of Cuyahoga County, Ohio
Case No. CV-18-895909

BEFORE:

Gene Donofrio, Cheryl L. Waite, Carol Ann Robb, Judges.
Judges of the Seventh District Court of Appeals Sitting by Assignment.

JUDGMENT:

Affirmed

Atty. Brian D. Spitz and Atty. Chris P. Wido, The Spitz Law Firm, LLC., 25200 Chagrin Boulevard, Suite 200, Beachwood, Ohio 44122, for Plaintiff-Appellee and

Atty. Erin R. Flanagan, The Bradley Building, 1220 West Sixth Street, Suite 203, Cleveland, Ohio 44113, for Defendant-Appellant.

Dated:
July 2, 2020

Donofrio, J.

{¶1} Defendant-appellant, Michael Cheselka, Jr., LLC, appeals the judgment of the Cuyahoga County Common Pleas Court granting plaintiff-appellee, Tara Hoffman, motion to enforce a settlement agreement.

{¶2} Appellee was one of appellant's employees. During appellee's employment, she fell while on the job and was allegedly disabled because of the fall. Appellee allegedly told her supervisors that she intended to file a worker's compensation claim because of the injuries she sustained from the fall. But before appellee could file a worker's compensation claim, appellant terminated appellee's employment.

{¶3} Appellee filed a complaint against appellant asserting two causes of action: wrongful discharge in violation of public policy and disability discrimination. Appellant filed its answer where it generally denied the allegations set forth in the complaint and raised numerous affirmative defenses.

{¶4} The trial court set the matter for a jury trial on March 4, 2019. On the day of trial, the parties reached a settlement agreement. The parties stated the settlement agreement's terms on the record. Relevant to this appeal, the verbal settlement agreement provided: appellant agreed to pay appellee a total of \$7,500 in three equal payments with the first payment due May 3, 2019; in the event appellant missed a payment, the entire amount became due and owing (the acceleration clause); all payments were to be paid in the form of a cashier's or certified check; in the event either party breached the settlement agreement, the non-breaching party was entitled to \$10,000 in liquidated damages; and in the event a motion to enforce the settlement was filed, the prevailing party was entitled to attorney's fees related to the motion to enforce. Appellee herself and Michael Cheselka Jr., as appellant's proprietor, agreed to these terms.

{¶5} On May 6, 2019, appellee filed a motion to enforce the settlement agreement on the basis that appellant breached the settlement agreement by failing to timely submit the first payment. Appellee attached to this motion two exhibits. Exhibit 1 is a copy of the trial transcript where the parties stated the terms of the settlement

agreement on the record. Exhibit 2 is a series of emails from March 5, 2019 to May 6, 2019 between appellee's counsel and appellant's counsel. These emails show that appellant's counsel was drafting a written settlement agreement and was awaiting his client's approval of the agreement before sending it to appellee's counsel. These emails also addressed a dispute between both counsels as to whether the settlement agreement was required to be reduced to writing. The final email states that as of May 6, 2019, appellee had not received the first payment.

{¶6} Appellant filed an opposition to appellee's motion to enforce making two arguments. First, at the time the opposition was filed, appellant submitted and appellee accepted the first payment. Second, the delay of the first payment was due to appellee's failure to provide appellant with necessary tax information.

{¶7} The trial court held a hearing on appellee's motion to enforce the settlement agreement. Appellee argued that appellant breached the settlement agreement in three ways: failing to sign a written settlement agreement containing the terms agreed to on the day of trial; submitting the first payment late; and submitting the first payment in a form other than a cashier's or certified check. Cheselka made three arguments on appellant's behalf: he experienced a banking issue and subsequently changed banks which led to the delay of the first payment; he made the first payment at the earliest time he could after resolving the banking issue; and he agreed to the settlement under duress.

{¶8} Appellee called Cheselka to testify at this hearing. Cheselka testified that he understood he was bound by the terms of the settlement that were read into the record on the day of trial. Cheselka testified that he did not sign a written settlement agreement because of the acceleration clause. Cheselka agreed twice that he was required to sign a written agreement but disputed when he was supposed to sign such an agreement. As of the hearing on the motion to enforce, Cheselka had not signed a written agreement. Cheselka disputed the validity of the acceleration clause and disputed that he breached the terms of the settlement because he placed the first payment in the mail on May 3, 2019. Cheselka admitted that the first payment was not in the form of a cashier's or certified check.

{¶9} Chris Wido and Brian Spitz, appellee's attorneys, also testified. Wido testified generally about the terms of the settlement agreement and to appellant's breach

of the agreement by not signing a written agreement. Both Wido and Spitz testified that the total amount of attorneys' fees related to appellee's motion to enforce was \$9,650.

{¶10} At the end of the hearing, the trial court found that Cheselka was not under duress when he agreed to the settlement's terms. The trial court held that the settlement's terms in Exhibit 1 of the motion to enforce were accurate and reflected the settlement agreement reached by both parties. The trial court also held that Cheselka breached the settlement agreement in three ways: not reducing the agreement to writing and signing the writing; not timely paying the first payment; and making the first payment in a form other than a cashier's or certified check. The trial court awarded appellee the remaining \$5,000 from the original agreement, \$10,000 in liquidated damages per the settlement agreement, and \$9,650 in attorneys' fees.

{¶11} The trial court memorialized its ruling in a judgment entry dated July 11, 2019. Appellant timely filed this appeal on July 31, 2019. Appellant now raises two assignments of error.

{¶12} Appellant's first assignment of error states:

THE TRIAL COURT ERRED IN FINDING THAT APPELLANT BREACHED THE SETTLEMENT AGREEMENT BY FAILING TO REDUCE ITS TERMS TO A WRITING.

{¶13} Appellant's second assignment of error states:

THE TRIAL COURT ERRED IN FAILING TO FIND THAT ACCEPTANCE OF LATE PAYMENTS CONSTITUTED A WAIVER OF THE CONDITIONS ORIGINALLY REQUIRED BY THE SETTLEMENT AGREEMENT AND, THEREWITH, FURTHER ALLOWING APPELLEE'S REQUEST FOR ATTORNEYS' FEES.

{¶14} We will consider both assignments of error together because the doctrine of waiver applies to both of them. These assignments of error are waived because appellant did not raise either of these arguments with the trial court. "Arguments raised for the first time on appeal are generally barred." *Cawley JV, L.L.C. v. Wall St. Recycling*,

L.L.C., 8th Dist. Cuyahoga No. 102121, 2015-Ohio-1846, ¶ 17; see also *Schade v. Carnegie Body Co.*, 70 Ohio St.2d 207, 210, 436 N.E.2d 1001 (1982).

Such arguments are barred by the doctrine of waiver for failure to raise these arguments before the trial court. It is well established that a party cannot raise any new issues or legal theories for the first time on appeal. Litigants must not be permitted to hold their arguments in reserve for appeal, thus evading the trial court process.

Cawley at ¶ 17 quoting *Hollish v. Maners*, 5th Dist. Knox No. 2011CA000005, 2011-Ohio-4823 (internal citations omitted).

{¶15} Appellant’s argument regarding signing a written settlement agreement was not raised in either its opposition to the motion to enforce or during the hearing on the motion to enforce. Thus, this argument is waived.

{¶16} As for appellant’s argument that appellee waived enforcement of the settlement agreement by accepting the first payment late, appellant’s opposition to the motion to enforce said, in a single sentence, that the first payment had been submitted and accepted. Appellant did not raise this issue at the hearing on the motion to enforce and, as a result, the trial court did not have an opportunity to consider this issue. Thus, this argument is also waived.

{¶17} Addressing the merits of these assignments of error would not change the result of this appeal. As appellee argues, all that needed to be established to recover was a single breach. The record establishes a breach for failure to timely pay and in a required form without waiver of the terms of the settlement agreement.

{¶18} Accordingly, appellant’s two assignments of error are without merit and are overruled.

{¶19} For the reasons stated above, the trial court’s judgment is hereby affirmed.

Waite, P. J., concurs.
The Seventh District Court of Appeals
Sitting by Assignment

Robb, J., concurs.
The Seventh District Court of Appeals
Sitting by Assignment

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Cuyahoga County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.