

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

MIMI HAMDAN, et al.,	:	JUDGES:
	:	John W. Wise, P.J.
Plaintiffs-Appellees	:	Julie A. Edwards, J.
	:	Patricia A. Delaney, J.
-vs-	:	Case No. 2009 CA 00135
	:	
SAFAA MUHEISEN, et al.,	:	<u>OPINION</u>
Defendants-Appellants	:	

CHARACTER OF PROCEEDING:	Civil Appeal from Stark County Court of Common Pleas Case No. 2008-CV-04575
--------------------------	---

JUDGMENT:	Affirmed In Part and Reversed and Remanded In Part
-----------	---

DATE OF JUDGMENT ENTRY:	March 8, 2010
-------------------------	---------------

APPEARANCES:

For Plaintiffs-Appellees

For Defendants-Appellants

JOHN V. BOGGINS, Esq.
1428 Market Ave., North
Canton, Ohio 44714

MICHAEL P. ZIRPOLO
Suite 206 Belden Village Tower
4450 Belden Village Street, N.W.
Canton, Ohio 44718

Edwards, J.

{¶1} Appellants, Safaa Muheisen, Hasan Muheisen and Ahmad Hamdan, appeal a judgment of the Stark County Common Pleas Court awarding damages to appellees, Eddie Hmeidan and Mimi Hamdan, in the amount of \$163,117.83 for breach of contract and \$60,300.00 for passing a bad check.

STATEMENT OF FACTS AND CASE

{¶2} Appellee Eddie Hmeidan (hereinafter “Hmeidan”) and his wife owned and operated a convenience store in Canton, Ohio. In December of 2004, Hmeidan entered an agreement with appellants, through their wives, for the sale of the store. Appellants Hasan Muheisen (hereinafter “Muheisen”) and Ahmad Hamdan (hereinafter “Hamdan”) operated the store together.

{¶3} Hmeidan and his nephew, Brian Hmeidan, had a bank account through U.S. Bank which serviced the store. The store offered electronic services including Ohio Lottery, Western Union, money orders and telephone services, whereby customers would pay the store for services and the service providers would electronically deduct the value of each service from the U.S. Bank account. In order to assist in the transition of ownership of the store, Hmeidan allowed appellants to use the account for electronic services offered by the store after the sale because appellants did not have their own account. From January, 2005, until July, 2005, appellants used Hmeidan’s bank account to operate the store’s electronic services.

{¶4} The bank statements on the U.S. Bank account listed payments to the store from credit card companies, payments by the State of Ohio for food stamps used at the store, and commissions on sales from service providers as “other deposits.” The

statements also demonstrated that service providers would directly withdraw amounts of services provided. Because the withdrawals for electronic services exceeded the “other deposits,” Hmeidan deposited his own money, reflected on the statements as “customer deposits,” into the account to maintain a positive balance. Although Hmeidan was still the owner of the bank account, the statements were mailed to the store and he did not have access to them.

{¶5} In July of 2005, appellants stopped using Hmeidan’s account to operate electronic services and Hmeidan approached Muheisen about repaying the money advanced on the account. Muheisen orally agreed to repay the amount owed. Appellants would often combine payments in one check to Hmeidan for their monthly lease payment, a monthly payment toward the purchase of stock in the company, payments toward the electronic transaction deficit and repayments of short term loans. Appellants ceased paying on the electronic transaction deficit when Hmeidan went to prison in 2006.

{¶6} In addition to allowing appellants to use the bank account to operate electronic services at the store, Hmeidan would advance cash to appellants on checks. Appellants would write a check to Hmeidan for a dollar amount plus interest. Hmeidan gave appellants cash in exchange for the check, and held the check. Appellants used this cash in the store to provide check cashing services to their customers. Appellants would then deposit the checks received from the customers into their account, notify Hmeidan to cash the original check, and Hmeidan would cash or deposit the check he had received from appellants.

{¶7} On February 10, 2006, Hamdan wrote Hmeidan a check for \$20,100.00, representing a cash advance in the amount of \$20,000.00 plus interest at .5%. Hmeidan ascertained that there were insufficient funds to cover the check, and he did not cash the check. Hmeidan was not repaid the \$20,100.00 for the cash advance.

{¶8} Appellees filed the instant action on October 29, 2008, seeking damages in the amount of \$120,905.46 for breach of contract for appellants' failure to pay the amount owed on the electronic transfer account, and seeking damages in the amount of \$20,100.00 for the alleged bad check. On December 16, 2008, appellees amended their demand, asking for treble damages on the bad check claim pursuant to R.C. 2307.61. Appellees amended their demand on January 29, 2009, on the breach of contract claim, seeking damages in the amount of \$166, 617.83.

{¶9} The case proceeded to bench trial before a magistrate on January 30, 2009. Following trial, the magistrate found in favor of appellees on the breach of contract claim in the amount of \$163,117.83. The magistrate accepted appellees accounting of the amount due on the electronic transfer account, with the exception of a \$3500 deposit to the account in February 2005. The magistrate found that there was no evidence that demonstrated that such deposit was owed to appellees. On the bad check claim, the magistrate found that Hamdan committed the offense of passing bad checks as codified in R.C. 2913.11 by issuing a check to Hmeidan, knowing there were insufficient funds in the account at the time of its issuance. The magistrate accordingly awarded treble damages in the amount of \$60,300.00.

{¶10} Appellants filed objections to the magistrates report. The court entered judgment in accordance with the magistrate's opinion after conducting a de novo review

of the transcript of the bench trial. Judgment Entry, April 30, 2009. Appellant's assign four errors on appeal:

{¶11} "I. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO CREDIT \$201,205.42 IN PAYMENTS MADE BY DEFENDANTS TO PLAINTIFFS, THAT WERE PROVED AT TRIAL BY THE ADMISSIONS OF PLAINTIFFS AND BY UNDISPUTED DOCUMENTARY EVIDENCE PRODUCED BY PLAINTIFFS AT TRIAL.

{¶12} "II. THE TRIAL COURT'S SUA SPONTE FINDING THAT DEFENDANT HAMDAN COMMITTED THE CRIMINAL OFFENSE OF PASSING BAD CHECKS WHEN NO EVIDENCE OF PURPOSE TO DEFRAUD ON THE PART OF DEFENDANT HAMDAN WAS ADDUCED ON TRIAL IS AN ABUSE OF DISCRETION AND CONTRARY TO LAW.

{¶13} "III. THE TRIAL COURT'S SUA SPONTE APPLICATION OF RC 2307.61 TO THIS CASE WHEN A CIVIL ACTION PURSUANT TO RC 2307.60 WAS NEVER PLEADED NOR TRIED IS AN ABUSE OF JUDICIAL DISCRETION AND THE TRIAL COURT'S AWARDED OF TREBLE DAMAGES TO PLAINTIFFS IS THEREFORE CONTRARY TO LAW.

{¶14} "IV. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO CREDIT A \$5,000.00 PAYMENT MADE BY DEFENDANTS TO PLAINTIFFS THAT WAS PROVED AT TRIAL BY THE ADMISSION OF PLAINTIFFS AND BY UNDISPUTED DOCUMENTARY EVIDENCE."

I

{¶15} Appellants argue that the judgment is incorrect on the undisputed facts because in its judgment concerning the electronic funds account, the trial court did not

credit appellants with payments of \$171,205.42 shown on Plaintiffs Exhibit 34 and did not credit appellants with six payments of \$5,000.00 evidenced by cancelled checks (Plaintiffs Exhibits 20-25, 27).

{¶16} Appellants stress that this is not a manifest weight of the evidence case, arguing at page 13 of their brief, “At the outset, Appellant wants to make it clear that this appeal is *not* about the weight of the evidence. It *is* about admissions and undisputed evidence presented by plaintiffs at trial.”

{¶17} However, in their objections to the magistrate’s report, appellants argued that the magistrate should not have believed the testimony of Hmeidan, a twice convicted felon, and further that the magistrate erred in rejecting the best evidence of what was paid to appellees by appellants, that being the accounting prepared contemporaneously by Brian Hmeidan rather than the accounting prepared for trial. It is clear from a reading of the transcript and the magistrate’s decision that the evidence conflicted as to what was owed and what was paid, and each side submitted their own documents as to what they believed was owed. The documentary evidence accounting for the electronic funds account was confusing at best and not a clear record of the transactions between the parties. As noted by the magistrate, “[I]t appears as though there was a miscommunication and/or misunderstanding as to the amount owed due to the disjointed recording (sic) keeping engaged in by both parties.” Findings of Fact and Conclusions of Law, February 6, 2009, Conclusion of Law No. 49.

{¶18} Thus, despite appellants’ attempts to characterize their argument as an abuse of discretion based on undisputed evidence, it is clear that the argument is a

weight of the evidence claim and we therefore review appellants' argument on a weight of the evidence standard of review.

{¶19} A judgment supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578. As the trier of fact, the judge is in the best position to view the witnesses and their demeanor in making a determination of the credibility of the testimony. “[A]n appellate court may not simply substitute its judgment for that of the trial court so long as there is some competent, credible evidence to support the lower court's findings.” *State ex rel. Celebrezze v. Environmental Enterprises, Inc.* (1990), 53 Ohio St.3d 147, 154, 559 N.E.2d 1335.

{¶20} Both Eddie Hmeidan and Brian Hmeidan testified that they were unable to calculate the total balance due on the electronic transfer account until they obtained the bank statements previously mailed to the store through discovery. While the computer in the store reflected the electronic transactions conducted through the register, which are reflected on Plaintiffs Exhibit 34 and relied on by appellants, additional Western Union money orders were placed over the telephone and not included on this exhibit. Plaintiffs' Exhibit 33 is an accounting prepared by Brian Hmeidan after receiving the bank statements which reflected the telephone orders withdrawn from the bank account. This Exhibit documents the amounts withdrawn as well as the payments made by appellees toward this account. While appellants argue that certain payments reflected on Exhibit 34 were not included in Exhibit 33, Exhibit 34 includes a hodge-podge of numbers from which it is very difficult to determine what payments were made by

appellants and whether such payments were made toward the electronic funds account, the lease payment, the stock purchase payment, or the cash advances for purposes of check cashing at the store.

{¶21} Appellants also argue that the court failed to include six cancelled checks for \$5,000.00 each in calculating the payments made toward the electronic funds account. However, Plaintiffs' Exhibit 11 is a list of the payments received in \$5,000.00 increments toward the electronic funds transfer, totaling \$70,000.00, which the court credited to appellants in the judgment. It is not clear that the cancelled checks appellants claim should be further credited to the account are excluded from Exhibit 11, particularly as once again many of the checks included amounts due for the monthly lease and stock purchase payments and for the cash advances.

{¶22} At trial, appellants presented no evidence in contradiction of appellees' claims, other than Hamdan's testimony that the entire amount had been paid, and Defendants' Exhibit C which appears to reflect \$104,791.79 owed on the account. The magistrate found with regard to appellants' evidence of the amount owed, "This Magistrate finds that, had the defendants believed that they only owed \$104,791.79, as reflected in 'Plaintiff's Exhibit 34,' they would not have paid Hmeidan \$509,224.99." Findings of Fact and Conclusions of Law, February 6, 2009, Conclusion of Law No. 41.

{¶23} The court relied on the accounting presented by appellees in Exhibit 33, as supported by the bank statements and other Exhibits of payments, in particular Exhibits 11 and 34. This judgment is supported by the testimony of Eddie and Brian Hmeidan as to the amount due. The judgment is not against the manifest weight of the evidence.

{¶24} Appellants also argue that the trial judge “did not conduct a de novo review, as allowed by Civil Rule 53(E)(4).” Appellant’s brief, page 14. However, the trial judge states in the judgment adopting the decision of the magistrate, “The Court has reviewed the objections and has conducted de novo review of the transcript of the bench trial filed by the defendant.” Judgment Entry, April 30, 2009.

{¶25} The first assignment of error is overruled.

II, III

{¶26} We address the second and third assignments of error together because both relate to the award of treble damages pursuant to R.C. 2307.61.

{¶27} In their complaint, appellees alleged in their fourth cause of action that on February 10, 2006, appellants presented Hmeidan with a check for \$20,100.00, as payment of a loan Hmeidan made to appellants. The complaint alleged that the check was dishonored for insufficient funds and appellants remained indebted to Hmeidan for the cash advance of \$20,100.00.

{¶28} On December 16, 2008, appellees filed an amended demand seeking treble damages pursuant to R.C. 2307.61, which provides in pertinent part:

{¶29} “(A) If a property owner brings a civil action pursuant to division (A) of section 2307.60 of the Revised Code to recover damages from any person who willfully damages the owner’s property or who commits a theft offense, as defined in section 2913.01 of the Revised Code, involving the owner’s property, the property owner may recover as follows:

{¶30} “(1) In the civil action, the property owner may elect to recover moneys as described in division (A)(1)(a) or (b) of this section:

{¶31} “(b) Liquidated damages in whichever of the following amounts is greater:

{¶32} “(ii) Three times the value of the property at the time it was willfully damaged or was the subject of a theft offense, irrespective of whether the property is recovered by way of replevin or otherwise, is destroyed or otherwise damaged, is modified or otherwise altered, or is resalable at its full market price.”

{¶33} R.C. 2307.61 is premised on R.C. 2307.60(A), which provides that any person injured by a criminal act may recover damages in a civil action. Passing bad checks is a criminal act, a theft offense, defined by R.C. 2913.11:

{¶34} “(B) No person, with purpose to defraud, shall issue or transfer or cause to be issued or transferred a check or other negotiable instrument, knowing that it will be dishonored or knowing that a person has ordered or will order stop payment on the check or other negotiable instrument.

{¶35} “(C) For purposes of this section, a person who issues or transfers a check or other negotiable instrument is presumed to know that it will be dishonored if either of the following occurs:

{¶36} “(1) The drawer had no account with the drawee at the time of issue or the stated date, whichever is later;

{¶37} “(2) The check or other negotiable instrument was properly refused payment for insufficient funds upon presentment within thirty days after issue or the stated date, whichever is later, and the liability of the drawer, endorser, or any party who may be liable thereon is not discharged by payment or satisfaction within ten days after receiving notice of dishonor.”

{¶38} The evidence presented at trial by way of Hamdan's bank statement demonstrated that there were insufficient funds to cover the check on the date it was issued. However, the check does not facially demonstrate that it was presented and dishonored for insufficient funds, nor does the testimony of Hmeidan reflect that he formally attempted to cash the check. Hmeidan testified that when he went to cash the check there was "no money" in the account. Tr. 36. However, the check which was admitted into evidence as Plaintiffs' Exhibit 12 was not endorsed by Hmeidan nor does it bear any indication that the bank dishonored the check. Because the check was not presented and dishonored, appellants did not have notice of dishonor, triggering the ten-day period within which they could discharge the debt to rebut the presumption defined by R.C. 2913.11(C)(2). Appellees did not prove facts leading to a presumption that appellants knew the check would be dishonored under R.C. 2913.11(C).

{¶39} Further, appellees did not present evidence that appellants issued the check with purpose to defraud. Hamdan testified that appellants would give Hmeidan a check before Hmeidan advanced cash to appellants and he would "cash" it for them for a percentage of half a percent. Tr. 156, 159. Hmeidan testified that in the business practice between the parties he would give appellants cash, just like cashing a check. Tr. 40. Appellants would take the cash to use to cash checks for customers in the store, and appellants would put the customers' checks in appellant's bank account. Id. Hmeidan would hold the check for a few days, then deposit the check. Tr. 156. Hmeidan would then draw money from the account. Tr. 40.

{¶40} The evidence reflects that the usual business practice of the parties was that appellants would give Hmeidan a check in exchange for cash, and Hmeidan would

hold the check for a few days before depositing the check. Nothing in the record demonstrates that this transaction was different from the others, and the bank statement does reflect that the balance was sufficient to cash the check on February 13, 2006, three days after the check was issued. Appellees failed to prove that the check was issued with purpose to defraud, and therefore the court erred in awarding treble damages pursuant to R.C. 2307.61.

{¶41} However, the evidence clearly established that the check was not cashed and that appellees were not repaid for the loan evidenced by the \$20,100.00 check, and the magistrate made such a finding in accordance with the evidence. Findings of Fact and Conclusions of Law, February 6, 2009, Finding of Fact 30. Appellees therefore are entitled to judgment of \$20,100.00 as compensatory damages for the unpaid loan.

{¶42} The second and third assignments of error are sustained.

IV

{¶43} In their fourth assignment of error, appellants' challenge the magistrate's finding that they did not repay the \$20,100.00 that was the subject matter of the alleged bad check. Appellants argue that this finding is contrary to the undisputed documentary evidence, specifically plaintiffs' exhibit 29, a check for \$5,000.00. As in assignment of error one, we find this claim to be a weight of the evidence argument and review the evidence under the standard outlined in assignment of error one.

{¶44} Appellants' argument that they did not receive credit for this check is without merit. Hmeidan testified that he applied this payment toward the \$100,000.00 promissory note outstanding under the stock purchase agreement. Tr. 49. Appellants presented no evidence to dispute this testimony. The court therefore could conclude

that this \$5,000.00 payment was used toward repayment of the note and not toward repayment of the \$20,100.00 appellees advanced to appellants for use for check cashing in the store.

{¶45} The fourth assignment of error is overruled.

{¶46} The judgment of the Stark County Common Pleas Court is reversed as to the award of treble damages in the amount of \$60,300.00. The judgment is affirmed in all other respects. This cause is remanded for further proceedings according to law, consistent with this opinion. Costs split between the parties.

By: Edwards, J.

Wise, P.J. and

Delaney, J. concur

JUDGES

JAE/r1123

