

[Cite as *Boyles v. Kanz*, 2020-Ohio-1222.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STEVEN BOYLES	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellant	:	Hon. John W. Wise, J.
	:	Hon. Earle E. Wise, Jr., J.
-vs-	:	
	:	Case Nos. 2018 CA 0128
SCOTT KANZ, ET AL.	:	2019 CA 0040
	:	
Defendants-Appellees	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas, Case No. 2015 CV 1447 R

JUDGMENT: Affirmed

DATE OF JUDGMENT: March 23, 2020

APPEARANCES:

For Plaintiff-Appellant

JEFFREY N. KRAMER
2975 Springmill N. Road
Shelby, OH 44875

For Defendants-Appellees

MAX E. DEHN
KOMLAVI ATSOU
1300 East Ninth Street
20th Floor
Cleveland, OH 44114

Wise, Earle, J.

{¶ 1} Plaintiff-Appellant, Steven Boyles, appeals the November 15, 2018 order of the Court of Common Pleas of Richland County, Ohio, finding in favor of Defendants-Appellees, Scott Kanz, Dustin Thompson, and Atlas TKB Masonry, LLC (Case No. 2018 CA 0128). Appellant also appeals the trial court's April 15, 2019 order overruling his Civ.R. 60(B) motion for relief from judgment (Case No. 2019 CA 0040).

FACTS AND PROCEDURAL HISTORY

{¶ 2} In January 2012, appellant, a mason by trade, operated a masonry business called Valley Masonry. In November 2012, appellees Kanz and Thompson, also masons, formed a limited liability company, Atlas TK Masonry, LLC, with each having a fifty percent membership interest. Appellant and appellees had worked together in the past for another entity. After forming their businesses, the parties hired each other to work on their respective projects.

{¶ 3} In early 2013, the parties considered having appellant join Atlas as a potential equal one-third partner. They went as far as meeting with an attorney, Jerod Them, to discuss the matter. At the meeting, the parties signed a Unanimous Consent of Members agreement (hereinafter "UCM"), dated July 24, 2013, agreeing to change the name of the LLC to "Atlas TKB Masonry, LLC," the "B" reflecting the addition of appellant. On July 29, 2013, appellee Thompson filed Amended Articles of Organization with the Ohio Secretary of State to effectuate the name change. A new operating agreement was never executed.

{¶ 4} According to appellant, oral agreements were made to make him an equal one-third member of Atlas. He made capital contributions to Atlas via his time and effort

and gave Atlas several projects that had been awarded to Valley Masonry. By November 2015, the relationship soured and appellant was eventually "pushed out" of Atlas.

{¶ 5} On May 4, 2017, appellant filed an amended complaint against appellees, claiming breach of fiduciary duty. A trial before a magistrate commenced on June 14, 2017. By decision filed January 3, 2018, the magistrate found in favor of appellees, finding appellant was never made an equal one-third partner of Atlas.

{¶ 6} Appellant filed objections. By order filed November 15, 2018, the trial court overruled the objections and adopted and incorporated the magistrate's decision.

{¶ 7} Appellant filed an appeal on the November 15, 2018 order (Case No. 2018 CA 0128). Thereafter, on January 29, 2019, appellant filed a Civ.R. 60(B) motion for relief from judgment, claiming fraud upon the court. This court remanded the case to the trial court to rule on the motion. By order filed April 15, 2019, the trial court denied the Civ.R. 60(B) motion, finding the fraud argument was moot and irrelevant to the final determination as appellant did not prove his membership status with Atlas.

{¶ 8} Appellant filed a second appeal on the April 15, 2019 order (Case No. 2019 CA 0040). This matter is now before this court for consideration. Assignments of error are as follows:

I (CASE NO. 2018 CA 0128)

{¶ 9} "THE COURT ERRED IN DETERMINING APPELLANT NOT TO BE A LAWFUL OR EQUITABLE MEMBER OF THE LIMITED LIABILITY COMPANY, ATLAS TK MASONRY, LLC (ATLAS TKB MASONRY, LLC)."

I (CASE NO. 2019 CA 0040)

{¶ 10} "THE COURT ERRED IN OVERRULING APPELLANT'S CIV. R. 60(B) MOTION FOR RELIEF FROM JUDGMENT."

I (CASE NO. 2018 CA 0128)

{¶ 11} In his sole assignment of error in Case No. 2018 CA 0128, appellant claims the trial court erred in determining he was not a lawful or equitable member of the Atlas LLC. We disagree.

{¶ 12} Under a manifest weight of the evidence standard, the standard in a civil case is identical to the standard in a criminal case: a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine "whether in resolving conflicts in the evidence, the jury [or finder of fact] clearly lost its way and created such a manifest miscarriage of justice that the conviction [decision] must be reversed and a new trial ordered." *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). In *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), quoting *Black's Law Dictionary* 1594 (6th Ed.1990), the Supreme Court of Ohio explained the following:

Weight of the evidence concerns "the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the *greater amount of credible evidence* sustains the issue which is to be established before them. Weight

is not a question of mathematics, but depends on its *effect in inducing belief.*" (Emphasis sic.)

{¶ 13} In weighing the evidence, however, we are always mindful of the presumption in favor of the trial court's factual findings. *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517.

{¶ 14} Decisions related to legal questions are reviewed de novo. *Taylor Building Corporation of America v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, ¶ 35.

{¶ 15} Appellant's complaint alleges breach of fiduciary duty. In order to prevail on this claim, appellant must establish: "(1) the existence of a duty arising from a fiduciary relationship; (2) a failure to observe the duty; and (3) an injury resulting proximately therefrom." *Harwood v. Pappas & Associates, Inc.*, 8th Dist. Cuyahoga App. No. 84761, 2005-Ohio-2442, ¶ 26. *Accord Grossniklaus v. Waltman*, 5th Dist. Holmes No. 09 CA 15, 2010-Ohio-2937. The burden of proving the existence of a fiduciary relationship is on the party asserting it. *Craggett v. Adell Insurance Agency*, 92 Ohio App.3d 443, 635 N.E.2d 1326 (8th Dist.1993). Appellant claimed appellees controlled the books, records, and bank accounts of the LLC to enrich themselves to his detriment. He claimed he did not receive his equal distributive share, and appellees "freezed him out."

{¶ 16} Appellant argues he was an equal one-third partner of the Atlas LLC. He argues the parties had an oral operating agreement, he shared equally in the profits and distributions, and he made capital contributions consisting of time and effort and gave Atlas several projects that had been awarded to Valley Masonry. Conversely, appellees

argue appellant was never made a member of the LLC. Appellees argue an oral operating agreement was never made, and appellant never shared equally in the profits and distributions.

{¶ 17} R.C. 1705.14 governs membership in a limited liability company and states the following in pertinent part:

(A) A person becomes a member at the time that a limited liability company is formed or at any later time that is specified in the records of the company for becoming a member.

(B) After the filing of the articles of organization of a limited liability company, a person may be admitted as an additional member in either of the following ways:

(1) If he acquires an interest directly from the limited liability company, upon compliance with the operating agreement or, if the operating agreement does not so provide, upon the written consent of all of the members[.]

{¶ 18} A "member" "means a person whose name appears on the records of the limited liability company as the owner of a membership interest in that company," and a "membership interest" "means a member's share of the profits and losses of a limited liability company and the right to receive distributions from that company." R.C. 1705.01(G) and (H), respectively.

{¶ 19} An "operating agreement" "means all of the valid written or oral agreements of the members or, in the case of a limited liability company consisting of one member, a written declaration of that member, as to the affairs of a limited liability company and the conduct of its business." R.C. 1705.01(J).

{¶ 20} In reaching a decision, both the magistrate and the trial court relied on the case of *Matthews v. D'Amore*, 10th Dist. Franklin No. 05AP-1318, 2006-Ohio-5745, in support of their respective determinations.

{¶ 21} In *Matthews*, the Tenth District was called upon to determine the members of the subject LLC. The *Matthews* court at ¶ 46 stated:

As we have previously discussed, to determine the identity of the members of a limited liability company, one must read R.C. 1705.01(G) and (H) in pari materia. Taken together, these two statutes establish that to be a "member" of a limited liability company, a person's name must appear on the company records as one who shares in the company's profits and losses and has a right to receive distributions from that company.

{¶ 22} In *Stanfield v. On Target Consulting, LLC*, 1st Dist. Hamilton No. C-160890, 2017-Ohio-8830, cited by the magistrate, the First District concluded at ¶ 9 that the *Matthews* decision "may be unduly narrow" and found "the consideration of other statutes regulating limited-liability companies may provide [further] guidance." For example, R.C. 1705.28(A) sets forth a list of records an LLC shall keep at its principal office. The *Stanfield* court concluded at ¶ 10:

We therefore hold that, when determining if an individual is a member of a limited-liability company for the purpose of R.C. 1705.19, the trial court must consider records maintained by the company for the purpose of its corporate governance that name those owners entitled to receive distributions and share in the profits and losses of the company.

{¶ 23} The magistrate heard from seventeen witnesses and reviewed over sixty-five exhibits in whole or for a limited purpose. After considering the evidence presented, the magistrate, in her decision filed January 3, 2018 under conclusions of law, recommended finding in favor of appellees, determining the following in pertinent part:

50. While it is true that an LLC can have an operating agreement that is partially or fully verbal, Ohio law requires 2 written documents to add a new member to an existing limited liability company: 1) ORC § 1705.14(B)(1) requires the written consent of all members, that is Kanz and Thompson, to add Boyles as a member of the LLC; and, 2) the *sine qua non* for proof of a membership interest is a writing stating the membership interest, and designating the sharing of profits and losses and distributions. (Footnote omitted.)

51. The Magistrate has reviewed literally thousands of pages of documents admitted into evidence in this case and the trial transcript of testimony. In those thousands of pages, there are two documents that

simply do not exist: 1) a written unanimous consent from Thompson and Kanz for Boyles to be joined as a member of the limited liability company pursuant to ORC § 1705.14(B); and, 2) a writing assigning a membership interest, specifying the allocation of profits and losses among the members, pursuant ORC § 1705.10, and entitling Plaintiff Steven Boyles to distributions, pursuant to ORC § 1705.11.

52. No precise valuation of each member's contributions or status of their capital accounts as kept by Atlas TKB Masonry, LLC, were ever offered into evidence.

53. Boyles' name does not appear anywhere in the records of the company as ***the owner of a membership interest***. The UCM and the Notice of Special Meeting of Members and Managers of Atlas TKB, LLC are the only documents that list Boyles as a member of Atlas TKB Masonry LLC, and neither document assigns a membership interest to him or makes any reference to shares or distributions. (Emphasis sic.)

54. Failure to produce such written documents is fatal to Plaintiff Steven Boyles' claim to be the holder of a membership interest in Atlas TKB Masonry, LLC.

55. The IRS Form K-1s for the relevant period show Kanz and Thompson as 50% - 50% owners of Atlas TKB Masonry, LLC throughout the relevant period.

56. The Magistrate concludes as a matter of law that, even had the facts supported the formation of an oral agreement, no oral agreement is

sufficient to confer a membership interest in an LLC on a party not originally named as a member in a written operating agreement or other record of the company.

57. The Magistrate concludes as a matter of law that no oral contract to make Plaintiff Boyles a member of the Atlas TKB Masonry LLC existed before the July 24, 2013 meeting with Attorney Jerod Them, as there was no meeting of the minds as to the essential terms of the contract regarding distributions or wages.

58. The Magistrate concludes as a matter law that no oral contract to make Plaintiff Boyles a member of Atlas TKB Masonry LLC existed following the July 24, 2013 meeting with Attorney Jerod Them, as the parties contemplated further formalization of their relationship by the execution of a written operating agreement by January 1, 2014.

59. The Magistrate concludes that Plaintiff Steven Boyles has failed to meet his burden of proof to demonstrate by a preponderance of the evidence that he was a member of Atlas TKB Masonry LLC.

60. Plaintiff Steven Boyles has failed to meet his burden of proof to demonstrate by a preponderance of the evidence that he was owed any fiduciary duty, an essential element of a breach of fiduciary duty claim.

61. The Magistrate concludes as a matter of law that during the relevant time, Plaintiff Boyles was neither a member nor an employee of Atlas TKB Masonry, LLC.

62. The Magistrate concludes as a matter of law that during the relevant time Plaintiff Boyles was an independent subcontractor of Atlas TKB Masonry, LLC and that his income was properly reported on IRS form 1099.

{¶ 24} In its November 15, 2018 order, the trial court agreed with and adopted the magistrate's decision, finding appellant was not a member of the Atlas LLC.

{¶ 25} After a thorough review of the available testimony and exhibits presented in this case, we find credible evidence in the record to support the findings and concur with the trial court's order. The magistrate's decision is well organized and clear, and contains a lengthy analysis of the evidence presented with detailed citations to the record.

{¶ 26} Appellant cites to the following exhibits to support his argument that he was made a member of Atlas: 1) the UCM, 2) the Amended Articles of Organization, 3) a rough draft operating agreement, 4) a business card bearing his name for "Atlas TKB Masonry, LLC," and 5) a Notice of Special Meeting of Members and Managers of Atlas TKB, LLC. Plaintiff's Exhibits 7, 9, 10, and 18; Defendant's Exhibit B.

{¶ 27} The UCM, dated July 24, 2013, indicates that the parties unanimously consented to changing the LLC name to "Atlas TKB Masonry, LLC" and appellee Thompson would "execute any and all documents to effect said change." Plaintiff's Exhibit 7. The UCM does not mention adding appellant as a member and did not assign him any membership interest. Attorney Them testified he did not review any "corporate documents." T. at 30. He did not know the state of the capital contributions or the percentage interests for each member. T. at 10-11, 28-29. In fact, as noted by the trial

court in its November 15, 2018 order, much of Attorney Them's testimony was "equivocal," "vague," and "tentative."

{¶ 28} The Amended Articles of Organization, filed on July 29, 2013, merely reflected a name change. Defendant's Exhibit B.

{¶ 29} Attorney Them testified that he drafted a proposed operating agreement, but it was never formalized or finalized to include appellant as a member of Atlas or to designate his percentage of ownership or membership interest. T. at 10, 27-30, 387; Plaintiff's Exhibit 9. He could not recall if the parties' intention was to equally share in the profits and distributions. T. at 9-11. The proposed operating agreement was never signed by any of the parties.

{¶ 30} Appellant's business card is not a record of the LLC; rather, as found by the magistrate, "it is merely a publicity or public relations tool, used to develop business relationships, and therefore, a document generated by the company in the normal course of business. It has no probative value in proving that Boyles is a member of Atlas TKB Masonry, LLC." Conclusion of Law No. 32; Plaintiff's Exhibit 10.

{¶ 31} We concur with the magistrate's finding that the Notice of Special Meeting is not a record maintained by the LLC "for the purpose of its corporate governance as contemplated by ORC § 1705.28(A)(2)." Conclusion of Law No. 35; Plaintiff's Exhibit 18.

{¶ 32} We do not find any evidence in the record to support an oral agreement as argued by appellant. We do not find any meeting of the minds as to membership interest, allocation of profits and losses, and distribution amounts.

{¶ 33} Whenever appellant performed work for appellees, appellees paid appellant as an independent subcontractor and issued him an IRS Form 1099 for tax filing

purposes. T. at 595, 600, 636-637, 651. Appellant testified the payments were equal distributions from the LLC in the amount of \$1,000.00 per week for each party, regardless of the hours worked. T. at 161-162, 274. Appellees each testified there was never an agreement for equal weekly distributions, and each party was paid an equal hourly rate for the actual hours worked. T. at 632-633, 648-649, 942. The magistrate found the weekly payments to each party were wages based on the hourly rate times the number of hours worked and were not distributions to members of the LLC. Finding of Fact No. 65. There is nothing in the record to refute this finding other than appellant's own testimony. However, the timesheets and paychecks admitted into evidence belie appellant's claim of equal distributions. Plaintiff's Exhibits 43 and 44; Defendant's Exhibits W-GG and MM-PP. In its order filed November 15, 2018, the trial court set forth a statistical analysis after reviewing the timesheets and determined the following:

Thus there are a total of 74 discrepancies from the hourly rate of pay out of 261 total time cards equally a 28% discrepancy. This indicates the evidence shows by a preponderance of the evidence that parties were likely paid the \$25.00 hourly wage the Magistrate concluded at paragraph 51 rather than the \$1,000.00 member distributions claimed by the plaintiff.

This is an objective measure of credibility which refutes the plaintiff's allegations of equal members when the parties worked together. The mere fact that Mr. Boyles filed IRS form 1099 every year to 2015 would tip off an experienced businessman like Mr. Boyles that he wasn't being treated like a member at all but that he was treated as an independent contractor.

{¶ 34} The IRS K-1s for Atlas from 2012 through 2015 show appellees as each being a fifty percent owner of the LLC. Defendants' Exhibits E, F, G, and H. The IRS Form 1099s issued to appellant indicate he worked as an independent contractor and not as a W-2 employee or as a member of Atlas. Plaintiff's Exhibits 11, 12, and 13.

{¶ 35} Upon review, we find ample credible evidence to support the trial court's decision, and do not find any manifest miscarriage of justice.

{¶ 36} Assignment of Error I in Case No. 2018 CA 0128 is denied.

I (CASE NO. 2019 CA 0040)

{¶ 37} In his sole assignment of error in Case No. 2019 CA 0040, appellant claims the trial court erred in denying his motion for relief from judgment based on fraud upon the court. We disagree.

{¶ 38} A motion for relief from judgment under Civ.R. 60(B) lies in the trial court's sound discretion. *Griffey v. Rajan*, 33 Ohio St.3d 75, 514 N.E.2d 1122 (1987). In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983). Appellant based his Civ.R. 60(B) motion on "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party" and "any other reason justifying relief from the judgment." Civ.R. 60(B)(3) and (5). In *GTE Automatic Electric Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146, 351 N.E.2d 113 (1976), paragraph two of the syllabus, the Supreme Court of Ohio held the following:

To prevail on a motion brought under Civ.R. 60(B), the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken.

{¶ 39} In his January 29, 2019 motion for relief from judgment, appellant claimed the following:

The fraud, misrepresentation and misconduct involve what Defendants and their attorney(s) presented in evidence as Def. Exh. H, and represented as the Atlas TK Masonry, LLC 2012 federal tax return filed September 24, 2013, without disclosing that as part of exhibit H, Defendants and/or their attorneys had added a number of additional 2012 IRS tax forms including two more K-1 forms that have been discovered were created the month before trial in May, 2017, four years after the Atlas Masonry 2012 tax return was signed and filed.

{¶ 40} Appellant claimed the exhibit "was employed for a fraudulent purpose; to convey a false material fact to the magistrate at trial that supported Defendant Scott Kanz' false testimony." The false material fact was that appellees had written documentation of

who had a membership interest in the LLC since its inception in 2012, that is, the 2012 tax return, Defendant's Exhibit H. Appellant argued the magistrate relied on this exhibit in her decision and therefore he was denied a fair trial.

{¶ 41} In its April 15, 2019 order overruling appellant's Civ.R. 60(B) motion, the trial court found the issue of whether appellees committed a fraud upon the court in relation to Defendants' Exhibit H is a moot issue, "inasmuch as there is no document showing written consent of all members as required by R.C. 1705.14(B)(1)." See January 3, 2018 Magistrate's Decision, Conclusion of Law No. 51, cited above in ¶ 23. The trial court found the issue of fraud to be irrelevant as appellant's "theories of recovery otherwise fails regardless of whether Def. Ex. H was fraudulently proffered to the Court during the bench trial."

{¶ 42} Pursuant to our review of the entire record as discussed in Assignment of Error I in Case No. 2018 CA 0128, we concur with the trial court's decision. Appellant did not prove his claim of breach of fiduciary duty, Defendant's Exhibit H notwithstanding.

{¶ 43} Upon review, we find the trial court did not abuse its discretion in denying appellant's Civ.R. 60(B) motion for relief from judgment.

{¶ 44} Assignment of Error I in Case No. 2019 CA 0040 is denied.

{¶ 45} The judgment of the Court of Common Pleas of Richland County, Ohio is hereby affirmed.

By Wise, Earle, J.

Gwin, P.J. and

Wise, John, J. concur.

EEW/db