[Cite as *DeSarro v. Larkins*, 2017-Ohio-726.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

CHRIS DeSARRO	)	CASE NO. 15 CO 0021
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
ROY A. LARKINS	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS:	Civil Appeal from the Court of Common Pleas of Columbiana County, Ohio Case No. 2014-CV-182
JUDGMENT:	Affirmed.
APPEARANCES:	
For Plaintiff-Appellee:	Atty. George A. Gbur P.O. Box 2733 East Liverpool, Ohio 43920
For Defendant-Appellant:	Roy Larkins, *Pro se* 10436 Steubenville Pike Rd. Lisbon, Ohio 44432

JUDGES:

Hon. Cheryl L. Waite
Hon. Mary DeGenaro
Hon. Carol Ann Robb

Dated: February 27, 2017

[Cite as *DeSarro v. Larkins,* 2017-Ohio-726.]
WAITE, J.

{¶1} Appellant, Roy A. Larkins, acting *pro se*, appeals the judgment entry of the Columbiana County Court of Common Pleas awarding $9,029.53, plus interest for breach of contract to Appellee, Chris DeSarro. Appellant advances five assignments of error. In his first three assignments, Appellant challenges the verdict as being against the manifest weight of the evidence. The fourth and fifth assignments raise claims regarding ineffective assistance of counsel. However, Appellant did not file a transcript of the proceedings in this bench trial. Because we must presume that the factual issues were fairly and adequately litigated at trial and because Ohio law does not countenance ineffective assistance of counsel claims in civil cases, Appellant's assignments of error have no merit and the judgment of the trial court is affirmed.

Motion to Dismiss the Appeal

{¶2} On September 15, 2015, Appellee filed a motion to dismiss this appeal based on Appellant's failure to file a complete record. In his brief in opposition to the motion to dismiss filed on September 21, 2015, Appellant stated that he intended to rely exclusively on the judgment entry to demonstrate error in the lower court. On October 26, 2015, we denied the motion to dismiss based on Appellant's assertion that the trial transcript was not required to resolve any issue in this appeal. We reserved to Appellee his right to challenge any deficiency in the record, including that a claim and error may be based on facts not shown by the record on appeal.

Facts and Procedural History

{¶3} As Appellant has failed to file a transcript in this matter, the following facts may be gleaned from the judgment entry. Appellee provides coin-operated devices (such as juke boxes, poker machines, pinball machines, ATM machines, and pool tables) to bars and restaurants located in Columbiana County. Appellant is the owner of "My Bar," located in Columbiana County.

{¶4} On June 12, 2012, the parties entered into a written agreement, a standard form provided by the Coin Machine Association, granting Appellee the exclusive right to maintain and operate coin-operated devices ("Equipment") at My Bar for a term of five years. (6/12/12 Agreement at ¶ 1, 8.) Appellant testified at the bench trial that he "believed" he modified the contract to a term of two years, but that Appellee did not provide him with a copy of the modified agreement. Because the executed copy before the trial court did not include any hand-written modification, and Appellant did not contend that he signed the unmodified contract as a result of coercion or mistake, the trial court found that the contract was for a term of five years.

{¶5} Pursuant to the contract, Appellee was responsible for the cost of installing and maintaining the Equipment. *Id.* at ¶ 3. The Equipment remained the sole and exclusive property of Appellee throughout the contract term. *Id.* at ¶ 6. Appellee had the authority to terminate the contract with written notice should he determine that the net receipts from the operation of the Equipment were less than an amount which would allow Appellee to earn a satisfactory profit. *Id.* at ¶ 9. Appellee also had the authority to remove the Equipment upon termination of the contract or a breach of the contract by Appellant. *Id.* at ¶ 6.

{¶6} In the event of any proposed sale, assignment, or transfer of My Bar, Appellant was contractually obligated to provide prompt written notice of the identity and address of the proposed purchaser, assignee, or transferee to Appellee, and require the written assumption of the contract by the proposed purchaser, assignee, or transferee. Failure to do so would amount to breach on the part of Appellant. *Id.* at ¶ 9. The contract included a liquidated damages clause. *Id.* at ¶ 11.

{¶7} The parties divided the net profits from the Equipment pursuant to a formula contained in the contract. *Id.* at ¶ 2. According to testimony provided by Appellant and his employees, Appellee refused to allow Appellant or any of his representatives to observe him counting the proceeds from the Equipment. As a consequence, Appellant believed he was not receiving the appropriate contractual amount. Appellee denied that Appellant was being shorted, explaining that it was in his best interest to maintain good relationships with bar owners in order to protect his investment. According to Appellee, Appellant never complained or requested an accounting. In fact, during the two and one-half years following the execution of the contract, Appellant regularly signed receipts evincing the division of the profits. Despite Appellant's accusations, the trial court noted that he did not take any legal action until he filed a counterclaim in the instant case.

{¶8} Appellee testified that he received a telephone call from Appellant on Sunday, January 26, 2014, during which he was told that Appellant was being harassed by the local health department and was going to close the bar. Appellee testified that Appellant told him to "get the Equipment out ASAP." Appellant told

Appellee that he might sublease the premises, prompting Appellee to inquire as to whether the sublessee might want to utilize the equipment. Appellant told him that the potential sublessee would operate a family-style restaurant and would have no use for a pool table or juke box. According to Appellee, Appellant told him that if the Equipment was not removed immediately, Appellant would not be responsible for loss or damage. Appellant, on the other hand, testified that he simply warned Appellee that the local health department was threatening to cancel My Bar's food license. Should that happen, Appellant might have to close the bar.

{¶9} Appellee removed the Equipment from My Bar on the following day, January 27, 2014. Appellant was present when the Equipment was removed. Appellee claimed that he removed the Equipment because he was told that Appellant was closing the bar and he wanted to avoid damage to or loss of his property. Appellant, to the contrary, claimed that there was no reason to remove the Equipment on that date, and that Appellee removed the Equipment without written notice as required by the contract. Appellant testified that he lost money due to the removal of the pool table and the juke box, because at some point in time My Bar had a pool league. However, Appellant did not testify that he expressed any objection to the removal of the Equipment at the time.

{¶10} Within a day after the Equipment was removed, Appellee saw a truck containing similar machines, which he followed to My Bar. When confronted, Appellant admitted he was installing replacement machines. Appellant claimed at the

bench trial that he was merely mitigating the damages caused by Appellee's abrupt and unwarranted removal of the Equipment from My Bar.

{¶11} My Bar never lost its food license, never ceased operations, and remained open on the date of the bench trial. Appellee filed a breach of contract action with a demand for monetary damages against Appellant on April 7, 2014. Appellant filed an answer and counterclaims for breach of contract, theft of property, and for an accounting of the profits earned under the contract prior to its termination.

{¶12} Based on the testimony, the trial court concluded that Appellee would have had no reason to remove the Equipment from My Bar, unless Appellee had, in fact, told him that the closing of the bar was imminent and certain. The trial court reasoned that, while the Equipment was at My Bar, it was generating profits. It would generate no profits if it sat idle. The trial court concluded that Appellant used his problems with the health department as a ruse to end his contractual relationship with Appellee. The trial court cited the fact that Appellant did not object to the removal of the Equipment. Moreover, because Appellant had replacement devices at My Bar within forty-eight hours, the court concluded that Appellant, contrary to his testimony at trial, suffered no damages. As a consequence, the trial court held that Appellant breached the contract when he fraudulently induced Appellee to remove the Equipment from My Bar, and that this breach justified Appellee's removal of the Equipment pursuant to Section 6 of the contract. This timely appeal followed.

Standard and Scope of Review

{¶13} In an appeal from a civil bench trial, Ohio appellate courts generally review the trial court's judgment under a manifest weight of the evidence standard. Appellate courts weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether in resolving conflicts in the evidence, the trial court clearly lost its way and created such a manifest miscarriage of justice that its judgment must be reversed and a new trial ordered. See *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 20.

{¶14} In weighing the evidence, we must always be mindful of the presumption in favor of the finder of fact. *Id.* at ¶ 22. Where, however, the trial court's judgment is based upon a question of law, we review the trial court's determination of that issue *de novo*. See *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, ¶ 34; see also *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 81, 461 N.E.2d 1273 (1984) (holding that a finding of an error of law is a legitimate ground for reversal).

{¶15} The scope of our review on appeal is confined to the trial court record as defined in App.R. 12(A) & 9(A). *Lamar v. Marbury*, 69 Ohio St.2d 274, 431 N.E.2d 1028 (1982). Under App.R. 9(B), Appellant has the burden to furnish a record, by transcript or otherwise, to support the claimed error. *Wray v. Parsson,* 101 Ohio App.3d 514, 518, 655 N.E.2d 1355 (1995); and *State v. Barnes*, 7th Dist. 00 BA 44, 2002-Ohio-1158.

{¶16} In presenting his assignments of error, Appellant must provide this Court with a sufficient record of the facts, testimony, and evidentiary matters

necessary to address these assignments. *Id.* Where the record is incomplete, we must indulge in all reasonable presumptions consistent with the record in favor of the validity of the judgment under review and the legality of the proceedings below. *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199, 400 N.E.2d 384 (1980). Moreover, in the absence of a trial transcript, we must presume that the factual issues were fairly and adequately litigated at trial. *Chieffo v. YSD Industries, Inc.,* 157 Ohio App.3d 182, 2004-Ohio-2481, 809 N.E.2d 1186, ¶ 28 (7th Dist.).

Analysis

{¶17} The related assignments of error are grouped together for the purpose of clarity and to avoid redundancy. Assignments of error one through three challenge the weight of the evidence. Assignments of error four and five assert claims of ineffective assistance of counsel.

ASSIGNMENT OF ERROR NO. 1

> The Trial Court Judge created an error when he relied upon the verbal statements of the Plaintiff as the, Operator as to whether or not the defendant, the owner of My Bar, told the Plaintiff that the defendant was going to close My Bar.

ASSIGNMENT OF ERROR NO. 2

> The trial Court Judge created an error when it was admitted to the trial Court that the Plaintiff had nothing in writing from the Defendant as to the closing of My Bar, and the Trial Court still claimed the purported phone conversation was grounds to breach the contract.

ASSIGNMENT OF ERROR NO. 3

> The Trial Court Judge created an error when the Judge knew there was nothing in writing as per requirements of contract No. (9), when the Operator Chris DeSarro, removed the equipment with no notice in writing as per the requirements of the contract and still allowed the Plaintiff, Chris DeSarro a judgment in his favor.

{¶18} The first three assignments of error are based on the argument that Appellee, not Appellant, breached the contract when he removed the Equipment from My Bar without prior written notice. Appellant cites to the provision in the contract that allows Appellee to terminate the contract at any time by written notice if he decides the profits from the Equipment are unsatisfactory. Because Appellee removed the Equipment from My Bar without prior written notice, and despite the fact that he did so at Appellant's urging and not because he thought there were unsatisfactory profits, Appellant complains that it was Appellee who breached the contract.

{¶19} As previously stated, in the absence of a trial transcript, we must presume that the factual issues were fairly and adequately litigated at trial. *Chieffo, supra*, at ¶ 28. The determination as to which party is in breach, here, depends on which of the two stories the trier of fact believed. Appellant and Appellee presented different factual scenarios at trial. The trial judge was required to determine which parties' testimony was true, and it is clear that the trial court credited Appellee's version of the facts.

{¶20} It is longstanding law in Ohio that, in both civil and criminal cases, the weight to be given the evidence and determinations regarding credibility of witnesses are primarily for the trier of fact. *In re Termination of Guardianship of Hendrickson*, 152 Ohio App.3d 116, 2003-Ohio-1220, 786 N.E.2d 937, ¶ 19 (7th Dist.). The trier of fact is free to believe or disbelieve any witness and may accept all or any part of the witness's testimony. *Kranek v. Richards*, 7th Dist. No. 11 JE 2, 2011-Ohio-6374, ¶ 26. The trial court in this case believed that Appellant thought he was being short-changed by Appellee, and, rather than pursue legal recourse, Appellant instead chose to induce Appellee into removing the Equipment from My Bar in order to replace it with equipment from another vendor.

{¶21} The trial court's decision to credit Appellee's version of the story over Appellant's appears to be supported by the record. First, Appellant claimed that he modified the length of the contract and that Appellee never gave him a copy of the contract. However, Appellee offered an executed copy of the contract with no handwritten modification to the length of the contract. Appellant claimed that Appellee routinely refused to allow Appellant or any of his representatives to participate in counting the proceeds from the Equipment, but never took any action to rectify the situation over the course of two and one-half years. Appellant claimed that he did not want the Equipment removed from My Bar, but admits he did not object when it was removed. Appellant claimed that he suffered damages as a result of the removal of the Equipment from My Bar because his establishment hosted a pool league, but the record reflects that the Equipment was replaced within 24 hours by

one of Appellee's competitors. Finally, Appellee would be unlikely to remove the Equipment from My Bar, where it was generating profits, unless Appellant had urged him that closure of the bar was imminent and that the Equipment would be in jeopardy if it was not removed.

{¶22} In summary, because Appellant did not provide a transcript of the trial, we must presume that the factual issues were fairly and adequately litigated at trial. Of equal import, the decision in this case turned almost exclusively on the trial court's credibility determinations, which are reserved to the trier of fact, and supported by the recitation of facts found in the judgment entry. Accordingly, assignments of error one through three have no merit and are overruled.

ASSIGNMENT OF ERROR NO. 4

> The Trial Court Judge either knew or should of [sic] known that the Attorney for the Defendant Roy Larkins, (Attorney James T. Hartford), was ineffective towards his client as there never was any discovery filed upon the Plaintiff, or his Attorney, for the issues in the defendant's Counterclaim in which Attorney Hartford stated he needed more information on.

ASSIGNMENT OF ERROR NO. 5

> The Trial Court Judge created an error when after knowing of the Defendant's Attorney's ineffective assistance of counsel towards the Defendant, as there was no discovery requested, and failed to ask if the

> defendant wished to proceed with the trial or to postpone the trial to allow the Defendant to seek another Attorney.

{¶23} In his fourth and fifth assignments of error, Appellant contends that his trial counsel failed to conduct any discovery prior to the discovery deadline in this case. Appellee concedes that neither party conducted discovery prior to bench trial. Appellant argues that the trial judge should have recognized the ineffective assistance of his counsel and should have *sua sponte* granted him leave to retain new counsel. Appellant admits that he was aware that the discovery deadline in the case had passed and that no discovery had been conducted, despite the fact that in his counterclaim Appellant stated that an examination of Appellee's books and records would be necessary to determine the correct amount of damages.

{¶24} The Sixth Amendment guarantees a defendant effective counsel in criminal prosecutions. There is no such guarantee in civil actions. *Novello v. Novello*, 7th Dist. No. 10-378, 2011-Ohio-2973, ¶ 23. It is well-established that a claim of ineffective assistance of counsel in civil cases between individual litigants is not an appropriate ground for reversal:

> The state does provide a forum, via the judicial system, in which litigants can resolve disputes. Litigants may seek to be represented in this forum by attorneys trained in procedure and the law. But it is the litigant himself who selects that attorney. Therefore, the litigant cannot thereafter complain that his attorney was ineffective and require the other litigant to bear the loss for such negligent selection of an attorney.

Roth v. Roth, 65 Ohio App.3d 768, 776, 585 N.E.2d 482 (1989); see also, *Bonn v. Bonn*, 10th Dist. No. 12AP-1047, 2013-Ohio-2313, ¶ 17, *Marcus v. Seidner*, 12th Dist. No. CA2010-12-103, 2011-Ohio-5592, ¶ 52; *Huntington Natl. Bank v. Lomaz*, 11th Dist. Nos. 2008-P-0007, 2008-P-0061, 2010-Ohio-705, ¶ 41; *Castro v. Castro*, 7th Dist. No. 99 C.A. 249, 2000-Ohio-2602. Assignments of error numbers four and five also have no merit and are overruled.

Conclusion

{¶25} In summary, we must presume that the factual issues were fairly and adequately litigated at trial because no trial transcript was filed. Based on the record, the trial court believed Appellee's testimony at trial, which is within his purview as the trier of fact and supported by the judgment entry in this case. Additionally, ineffective assistance of counsel claims in civil cases are not recognized in Ohio law. All of the assignments of error are meritless and the judgment of the trial court is affirmed.

DeGenaro, J., concurs.

Robb, P.J., concurs.