[Cite as *Adams, Babner & Gitlitz, L.L.C. v. Tartan Dev. Co. (West), L.L.C.*, 2013-Ohio-1573.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Adams, Babner & Gitlitz, LLC,	:	
Plaintiff-Appellee,	:	No. 12AP-729
v.	:	(M.C. No. 2011 CVF 035018)
Tartan Development Co. (West), LLC,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on April 18, 2013

Adams Babner, LLC, and *Frederick W. Stratmann*, for appellee.

Mills, Mills, Fiely & Lucas LLC, *Laura L. Mills* and *Paul W. Vincent*, for appellant.

APPEAL from the Franklin County Municipal Court

KLATT, P.J.

{¶ 1} Defendant-appellant, Tartan Development Company (West), LLC ("Tartan"), appeals a judgment of the Franklin County Municipal Court in favor of plaintiff-appellee, Adams Babner, LLC ("AB").[1] For the following reasons, we affirm.

{¶ 2} AB is a law firm. On September 16, 2011, AB filed a complaint against Tartan seeking the payment of legal fees that it claimed Tartan had incurred between March 2007 and June 2008. AB directed the Franklin County Municipal Court Clerk ("clerk") to serve the complaint and summons by certified mail on T.A. Development

[1] AB initially filed its suit under the name Adams, Babner & Gitlitz, LLC, but during the course of this action, it changed its name to Adams Babner, LLC.

Company at 8070 Tartan Fields Drive, Dublin, Ohio, 43017. When the United States Postal Service ("USPS") could not deliver the complaint and summons as addressed, AB asked the clerk to serve by certified mail "Thomas Anderson, Statutory Agent," at 2480 Coventry Road, Upper Arlington, Ohio, 43221. Once again, the USPS could not deliver the complaint and summons as addressed. Consequently, AB supplied the clerk with a third address, requesting that the clerk serve by certified mail "Thomas Anderson, Statutory Agent" at 937 Burrell Avenue, Grandview Heights, Ohio, 43212. On February 9, 2012, the USPS delivered the complaint and summons to the specified address, where "Jason P. Witt" signed as recipient.[2]

{¶ 3} When Tartan did not answer the complaint, AB moved for default judgment. The trial court granted AB's motion. Within weeks of the entry of default judgment, Tartan moved for relief under Civ.R. 60(B), arguing that it had timely submitted an answer, but mistakenly filed the answer under the wrong case number. On May 8, 2012, the trial court entered judgment granting Tartan's motion, setting aside the default judgment, and accepting Tartan's answer.

{¶ 4} AB then moved for summary judgment. In support of its motion, AB relied on the affidavit testimony of Cindy M. Smith, AB's office manager, and Bret A. Adams, AB's managing partner. Both testified that Tartan had defaulted on its agreement to pay for the legal services that AB had rendered to it, and that Tartan owed AB $11,659.32 in legal fees. Adams also testified that the rates AB charged Tartan were reasonable.

{¶ 5} In response, Tartan argued that summary judgment was inappropriate because AB had yet to perfect service upon it. Tartan also contended that questions of fact remained regarding who had the responsibility to pay for AB's legal services and how much was owed to AB. Although Tartan alleged facts and relied on documents to support its arguments, it did not attach any Civ.R. 56(C) evidence to its memorandum in opposition to the motion for summary judgment.

{¶ 6} On August 12, 2012, the trial court granted AB summary judgment and ordered Tartan to pay $11,659.32, plus interest and costs. Tartan now appeals from that judgment, and it assigns the following errors:

[2] We have difficulty discerning the first name of the person who signed for the complaint and summons, but it appears to be "Jason."

> [1.] Whether the trial court erred by finding that service upon Defendant-Appellant was perfected when Plaintiff-Appellee provided a signatory from someone not affiliated with Defendant-Appellant, representing a company other than Defendant-Appellant's.
>
> [2.] Whether the trial court erred by finding that Defendant-Appellant owes Plaintiff-Appellee $11,659.32 in unpaid legal fees without assessing the reasonableness of the fees, whether the fee statements were actually sent to Defendant-Appellant, and/or whether they were due at all.[3]

{¶ 7} Summary judgment is appropriate when the moving party demonstrates that: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion when viewing the evidence most strongly in favor of the nonmoving party, and that conclusion is adverse to the nonmoving party. *Hudson v. Petrosurance, Inc.*, 127 Ohio St.3d 54, 2010-Ohio-4505, ¶ 29; *Sinnott v. Aqua-Chem, Inc.*, 116 Ohio St.3d 158, 2007-Ohio-5584, ¶ 29. Appellate review of a trial court's ruling on a motion for summary judgment is de novo. *Hudson* at ¶ 29. This means that an appellate court conducts an independent review, without deference to the trial court's determination. *Zurz v. 770 W. Broad AGA, L.L.C.*, 192 Ohio App.3d 521, 2011-Ohio-832, ¶ 5 (10th Dist.); *White v. Westfall*, 183 Ohio App.3d 807, 2009-Ohio-4490, ¶ 6 (10th Dist.).

{¶ 8} By its first assignment of error, Tartan argues that lack of service prohibited the trial court from entering summary judgment against it. Tartan maintains that service failed because neither the person who signed the certified mail receipt nor the address served was affiliated with it. We disagree.

{¶ 9} Civ.R. 4.1(A)(1)(a) permits service of process by certified mail. Civ.R. 4.2 specifies who may be served. Under that rule, to serve a limited liability company, a plaintiff may direct service of process to "the agent authorized by appointment or by law to receive service of process." Civ.R. 4.2(G). Certified mail service upon such an agent is effective upon delivery, if evidenced by a signed return receipt. *Stonehenge Condominium Assn. v. Davis*, 10th Dist. No. 04AP-1103, 2005-Ohio-4637, ¶ 14, citing

---

[3] Although Tartan actually articulated only issues, not assignments of error, we will treat the issues presented as assignments of error.

Mitchell v. Mitchell, 64 Ohio St.2d 49, 51 (1980). Service is valid if "any person" at the address signs for the certified mail, whether or not the recipient is the defendant's agent. Civ.R. 4.1(A)(1)(a); *TCC Mgt., Inc. v. Clapp*, 10th Dist. No. 05AP-42, 2005-Ohio-4357, ¶ 11.

{¶ 10} If a plaintiff follows the Ohio Rules of Civil Procedure that govern service of process, a presumption of proper service arises. *Erin Capital Mgt. LLC v. Fournier*, 10th Dist. No. 11AP-483, 2012-Ohio-939, ¶ 18. A defendant can rebut the presumption of proper service with sufficient evidence that service was not accomplished. *Id.* at ¶ 19. Service of process fails if it does not comply with the requirements of due process. *Akron-Canton Regional Airport Auth. v. Swinehart*, 62 Ohio St.2d 403 (1980), syllabus. Due process requires service to be " 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' " *Id.* at 406, quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Consequently, a defendant may rebut the presumption of proper service by establishing that the plaintiff failed to direct service to an address where it would be "reasonably calculated" to reach a person or entity that may be served under Civ.R. 4.2. *See Fournier* at ¶ 19.

{¶ 11} Here, the parties do not dispute that Tartan designated T.A. Development Company as its statutory agent or that Thomas Anderson is the president of T.A. Development. AB directed the clerk to serve Anderson by certified mail. The clerk complied and received a signed certified mail receipt evidencing delivery of the summons and complaint. Thus, AB complied with the Ohio Rules of Civil Procedure, and a presumption of proper service arose.

{¶ 12} Tartan attempts to rebut this presumption by arguing that the signatory of the certified mail receipt and the address at which service was achieved are unknown and unrelated to Tartan. Tartan's unfamiliarity with "Jason P. Witt" does not invalidate proper service. As we stated above, a certified mail receipt signed by "any person," once returned to the clerk, establishes proper service. Tartan's unfamiliarity with the address served also fails to rebut the presumption of proper service. AB sought to serve Tartan's statutory agent, not Tartan itself. Tartan's lack of affiliation with the address served, therefore, is irrelevant. The operative question is whether Tartan's statutory agent had a

connection to the address. Tartan, however, does not argue that its statutory agent did not receive mail at the address served and, thus, service was not "reasonably calculated" to reach the agent at that address. Consequently, we conclude that AB achieved service of process on Tartan, and we overrule Tartan's first assignment of error.

{¶ 13} By Tartan's second assignment of error, it argues that the trial court erred in granting AB summary judgment on its claim for breach of contract. We disagree.

{¶ 14} To prove a breach of contract, a plaintiff must demonstrate the existence of a contract, the plaintiff's performance of the contract, the defendant's breach of the contract, and damage to the plaintiff. *Andrew v. Power Marketing Direct, Inc.*, 10th Dist. No. 11AP-603, 2012-Ohio-4371, ¶ 34. Here, Tartan first argues that AB failed to present evidence to establish the first element—the existence of a contract. However, in their affidavits attached to AB's motion for summary judgment, both AB's office manager and managing partner testified that, "Tartan Development Company (West) has defaulted on their agreement to pay for the legal services rendered." Smith affidavit, at ¶ 4; Adams affidavit, at ¶ 9. These statements satisfy AB's obligation to set forth evidence of a contract between the parties.

{¶ 15} Second, Tartan argues that questions of fact remain regarding the amount owed to AB. To establish these questions of fact, Tartan relies on two documents: a list of Tartan's open accounts payable showing that it only owed AB $12 as of December 2007 and an email from Adams regarding "Tartan West Legal Fees." Neither of these documents qualifies as the type of evidence that a party may use to oppose summary judgment. Pursuant to Civ.R. 56(C), in deciding a motion for summary judgment, a court may only consider "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, [that are] timely filed in the action." If a party wishes to introduce a document that Civ.R. 56(C) does not list, it must incorporate the document into an affidavit that meets the requirements of Civ.R. 56(E). *Columbus v. Bahgat*, 10th Dist. No. 10AP-943, 2011-Ohio-3315, ¶ 14. Documents that are not sworn, certified, or authenticated by way of affidavit have no evidentiary value and, generally, should not be considered by the trial court. *Thompson v. Hayes*, 10th Dist. No. 05AP-476, 2006-Ohio-6000, ¶ 103.

{¶ 16} Here, no affidavit identifies and authenticates the documents that Tartan relies upon. Those documents, therefore, do not constitute Civ.R. 56(C) evidence, and they cannot establish questions of fact.

{¶ 17} Finally, Tartan argues that the trial court erred in not articulating its reasons for determining that AB's fees were reasonable. We are not persuaded by this argument.

{¶ 18} Before recovering unpaid fees incurred under an hourly fee arrangement, an attorney must establish the fairness and reasonableness of the fees. *Bertrand v. Lax*, 11th Dist. No. 2004-P-0035, 2005-Ohio-3261, ¶ 23; *Climaco, Seminatore, Delligatti & Hollenbaugh v. Carter*, 100 Ohio App.3d 313, 323 (10th Dist.1995). Because a court must consider multiple factors to determine the reasonableness of attorney fees, we normally require the trial court to set forth its analysis so we may review it for error. *Roberts v. Hutton*, 152 Ohio App.3d 412, 2003-Ohio-1650, ¶ 48 (10th Dist.). Here, the trial court only briefly explained its rationale for granting AB summary judgment, and it did not specifically address the reasonableness of AB's fees. We, however, do not find that the paucity of analysis warrants reversal given the evidence that AB provided and Tartan's failure to challenge that evidence.

{¶ 19} Here, Adams, AB's managing partner, testified to the following in his affidavit:

> 4. The rates charged by the attorneys and paralegals working on Tartan's behalf were reasonable considering the experience, reputation, and ability of the attorneys providing the work, and are commensurate with rates charged by comparable attorneys in this State.
>
> 5. The rates charged Tartan were based upon the prevailing rates in the geographical area in which the attorney or paralegal practices, as well as their experience and the nature of their practice.
>
> 6. At all times, work was assigned to attorneys and paralegals consistent with their knowledge and skill level.
>
> 7. During [AB's] representation of Tartan, the client never declared any dissatisfaction with our services, and never stated that our fees were unreasonable or excessive.

> 8. Based on my 28 years of experience in civil litigation[,] the fees incurred by Tartan are reasonable and necessary considering the complex nature of the matters the attorneys engaged in, the expertise and experience of the attorneys working on Tartan matters, the work necessary in order to represent Tartan in these matters, and the success of our efforts.

{¶ 20} In its response to AB's motion for summary judgment, Tartan did not provide any evidence contradicting Adams' statements. Moreover, Tartan's memorandum in opposition contained no assertion that Adams' statements were wrong. In sum, Tartan did not contest the reasonableness of AB's fees in any way. Therefore, based on AB's evidence and Tartan's failure to challenge that evidence, we conclude that the trial court did not err in granting AB summary judgment without elucidating why AB's fees were reasonable. The record simply contains no question of fact on that issue.

{¶ 21} Although it did not do so below, Tartan argues on appeal that Adams cannot testify as to the reasonableness of his own firm's fees. Generally, a party waives the right to raise on appeal an argument it could have raised, but did not, in earlier proceedings. *Niskanen v. Giant Eagle, Inc.*, 122 Ohio St.3d 486, 2009-Ohio-3626, ¶ 34. Because Tartan failed to challenge Adams' affidavit testimony before the trial court, it cannot now challenge it on appeal.

{¶ 22} After reviewing each of Tartan's arguments, we conclude that the trial court did not err in granting AB summary judgment on its claim for breach of contract. Accordingly, we overrule Tartan's second assignment of error.

{¶ 23} For the foregoing reasons, we overrule Tartan's two assignments of error, and we affirm the judgment of the Franklin County Municipal Court.

Judgment affirmed.

SADLER and VUKOVICH, JJ., concur.

VUKOVICH, J., of the Seventh Appellate District, sitting by assignment in the Tenth Appellate District.