

[Cite as *Alestock v. Bomestar*, 2004-Ohio-7317.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

ROBERT J. ALESTOCK

Plaintiff-Appellant

-vs-

MICHAELENE V. BOMESTAR

Defendant-Appellee

JUDGES:

Hon. W. Scott Gwin, P.J.
Hon. William B. Hoffman, J.
Hon. Sheila G. Farmer, J.

Case No. 2004CA00001

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Stark County Court of
Common Pleas, Juvenile Division, Case
No. JU115245 & JU115545

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

November 8, 2004

APPEARANCES:

For Plaintiff-Appellant

For Defendant-Appellee

THOMAS J. LOCASCIO
80 South Summit Street
Akron, Ohio 44308

DEREK J. LOWRY
101 Central Plaza South
Canton, Ohio 44702

Hoffman, J.

{¶1} Plaintiff-appellant Robert J. Alestock appeals the December 3, 2003 Judgment Entry of the Stark County Court of Common Pleas, Juvenile Division, which denied his objections to the magistrate's decision dismissing his motion for reallocation of parental rights and responsibilities against defendant-appellee Michaelene V. Bomestar.

STATEMENT OF THE FACTS AND CASE

{¶2} The parties are the parents of Benjamin L. Alestock, born September 1, 1998. They were never married, and no court had previously ordered an allocation of parental rights or responsibilities. On February 26, 2003, appellant filed a motion seeking "reallocation of parental rights and responsibilities" in the Stark County Court of Common Pleas, Juvenile Division, as relates to Benjamin. Appellant's motion sought to allocate parental rights and responsibilities for the first time. In addition, appellant filed a motion to restrain appellee from relocating with Benjamin to Indiana.

{¶3} At the time the motions were filed, appellant resided in Summit County.

{¶4} On March 3, 2003, the trial court issued an ex parte order restraining appellee from removing the minor child from the trial court's jurisdiction.

{¶5} On March 20, 2003, appellee filed an objection to the motions, alleging she had already moved prior to the date of the restraining order, and no court order prohibited her from doing so. She argued parental rights and responsibilities had not been established; therefore, they could not be reallocated.

{¶6} On April 24, 2003, the trial court held a hearing in this matter and both parties attended. The magistrate issued temporary companionship orders; appointed a guardian-ad-litem to represent the interests of the child; and ordered the parties to return for a

second pretrial on July 16, 2003. The mother did not raise the issue of jurisdiction at the April 24, 2003 hearing.

{¶7} Again, both parties attended a second pretrial on July 16, 2003. The magistrate issued further orders, including companionship for appellant. In addition, the magistrate ordered the parties to undergo psychological evaluations in preparation for the evidentiary hearing scheduled for September 25, 2003. Appellee voluntarily appeared at the July 16, 2003 pretrial, and did not raise the issue of jurisdiction.

{¶8} On September 23, 2003, appellee moved the trial court to dismiss the case, asserting the trial court did not have jurisdiction based upon appellant's residing in Summit County and appellee and the minor child residing in Indiana.

{¶9} The trial court held a hearing on the parties' motions on September 25, 2003. The magistrate considered the arguments regarding appellee's motion to dismiss, but did not take testimony or other evidence on the motion. On October 1, 2003, the magistrate issued a decision finding appellee had not been properly served with appellant's motion. Additionally, the magistrate determined personal jurisdiction had neither been established by appellant, nor had it been waived by appellee. The magistrate dismissed appellant's motion to reallocate parental rights and responsibilities.

{¶10} The trial court granted appellant an extension of time to file his objections to the magistrate's decision, and appellant timely filed his objections on November 25, 2003. Appellant did not request an oral hearing on the objections, and the trial court noted he did not comply with the local rules in filing his objections. However, the trial court reviewed the merits of the objections in light of the record, with no transcript provided, and overruled the

objections. On December 3, 2003, via Judgment Entry, the trial court rejected appellant's objections to the magistrate's decision, adopting the magistrate's decision.

{¶11} Appellant appeals the December 3, 2003 Judgment Entry assigning the following as error:

{¶12} "I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN ASSERTING THAT THE COURT DID NOT HAVE PERSONAL JURISDICTION OVER MOTHER WHEN MOTHER HAD NOT IN FACT DISPUTED IN PERSONUM JURISDICTION OF LACK OF SERVICE.

{¶13} "II. THE TRIAL COURT ERRED AS A MATTER OF LAW IN DETERMINING THAT MOTHER HAD NOT WAIVED THE DEFENSE OF LACK OF PERSONAL JURISDICTION.

{¶14} "III. ASSUMING ARGUENDO THAT MOTHER'S March 3, 2002 PLEADING IS CONSTRUED AS ASSERTING THE AFFIRMATIVE DEFENSE OF LACK OF IN PERSONAM JURISDICTION, THE MAGISTRATE ERRED IN NOT CONSIDERING MOTHER'S CONDUCT THEREAFTER IN ARRIVING AT HER DECISION TO DISMISS THESE PROCEEDINGS.

{¶15} "IV. THE TRIAL COURT ERRED IN DENYING FATHER'S MOTION/ORDER SEEKING TO HAVE A TRANSCRIPT OF THE OCTOBER 6, 2003 JOURNAL ENTRY PREPARED FOR PURPOSES OF SUPPORTING HIS OBJECTIONS.

{¶16} "V. THE TRIAL COURT ERRED IN ITS ASSESSMENT THAT STARK COUNTY LACKED JURISDICTION TO ADJUDICATE THESE MATTERS ONCE MOTHER RELOCATED IN INDIANA."

I, II, III, IV, V

{¶17} Appellant's assignments of error raise common and interrelated issues; therefore, we will address the assignments together.

{¶18} Initially, we address appellant's arguments with regard to the filing of a transcript of the proceedings before the magistrate.

{¶19} Appellant asserts the trial court erred in denying his motion seeking to have a transcript of the October 6, 2003 Journal Entry prepared for purposes of supporting his objections. Appellant notes the trial court's December 3, 2003 Judgment Entry states no transcript was provided to the trial court.

{¶20} In the Judgment Entry overruling appellant's objections to the magistrate's decision, the trial court states:

{¶21} "Notwithstanding, the court has reviewed the merits of the objections in light of the record (no transcript provided) and does order as noted below.***

{¶22} "The objections filed on 11-25-2003 are OVERRULED***"

{¶23} Ohio Juvenile Procedure Rule 40 states:

{¶24} "**(c) Objections to magistrate's findings of fact.** If the parties stipulate in writing that the magistrate's findings of fact shall be final, they may only object to errors of law in the magistrate's decision. Any objection to a finding of fact shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that fact or an affidavit of the evidence if a transcript is not available."

{¶25} Juv. R. 40 thus provides a transcript is required only when the party objects to a finding of fact. Upon review of the above, we find appellant was not required to file a transcript of the evidence submitted to the magistrate, as appellant objects to the

magistrate's order as a matter of law, not a finding of fact. Further, we note appellant filed a transcript of the proceedings on January 29, 2004. Based upon our disposition of appellant's arguments set forth above, we disagree with appellant's assertion the trial court erred in denying his motion with regard to the transcript. Appellant's legal argument concerning personal jurisdiction was not dependent nor prejudiced by failing to secure a transcript.

{¶26} Appellant further argues the trial court erred in finding it lacked personal jurisdiction as appellee did not dispute jurisdiction or lack of service. Appellant asserts appellee waived jurisdiction by her voluntary appearance and submission to the court's jurisdiction.

{¶27} The defense of lack of personal jurisdiction may be properly asserted in a motion to dismiss or in a responsive pleading. *Holm v. Smilowitz* (1992), 83 Ohio App.3d 757.

{¶28} The October 1, 2003 Magistrate's Decision finds:

{¶29} "11. Bomestar filed an objection wherein she noted that by the date the restraining order was sought and received, she had already moved to Indiana with the child, among other reasons.

{¶30} "12. A printout of the docket for case J115545 reveals that the court never served the Motion to Reallocate on Bomestar; the pleadings recite a "Certificate of Service" and that the Stark County Clerk of Courts sent certified mail to Bomestar. This did not happen. There is no return of service in the file, nor any mailing receipt for such service. Previous counsel signed the "Certificate of Service". Also, the UCCJA affidavit filed with the Motion to Reallocate is not complete; items 2, 3, and 4 were left blank.***"

{¶31} The Magistrate then states within the order:

{¶32} “Bomestar objected from the start to personal jurisdiction and her appearance to object to this action cannot be seen as a waiver of her action, see Lucas v. Green, supra, and State ex rel Rhodes v. Solether (1955) 162 Ohio St.559, as cited therein at page 6.***

{¶33} “***Finding no judicial jurisdiction and further, that Bomestar never waived personal jurisdiction, Bomestar’s motion to dismiss is sustained.”

{¶34} As noted in the magistrate’s order, appellee’s March 20, 2003 objection to appellant’s motion, states:

{¶35} “As for Plaintiffs request to restrain and the Order signed by Judge Hoffman on March 2, 2003, at the time Defendant had already vacated the state of Ohio. At the time Defendant undertook said action of moving there were no Court Orders restricting the same***” (Emphasis added).

{¶36} Thus, prior to her initial appearance before the trial court, appellee filed an objection to appellant’s motion seeking allocation of parental rights and responsibilities indirectly setting forth the issue of lack of personal jurisdiction. In the responsive motion, appellant asserts she moved to Indiana prior to the filing of appellant’s motion. Appellee’s subsequent motion to dismiss filed on September 23, 2003 then moves the court to dismiss the matter for lack of personal jurisdiction. Taken together, appellant’s responsive pleading and subsequent motion to dismiss properly raise the defense of lack of personal jurisdiction. Contrary to appellant’s arguments, appellee’s appearance before the court, after having raised the issue, cannot be viewed as waiving the defense of lack of personal jurisdiction.

{¶37} The December 3, 2003 Judgment Entry of the Stark County Court of Common Pleas, Juvenile Division, is affirmed.

By: Hoffman, J.

Gwin, P.J. and

Farmer, J. concur

JUDGES

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IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

ROBERT J. ALESTOCK

Plaintiff-Appellant

-vs-

MICHAELENE V. BOMESTAR

Defendant-Appellee

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JUDGMENT ENTRY

Case No. 2004CA00001

For the reasons stated in our accompanying Memorandum-Opinion, the December 3, 2003 Judgment Entry of the Stark County Court of Common Pleas, Juvenile Division, is affirmed. Costs assessed to appellant.

JUDGES