Mesc v Park Lane Mgmt.

STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN EMPLOYMENT SECURITY COMMISSION,

Plaintiff-Appellee,

v

PARK LANE MANAGEMENT, INC.,

Defendant-Appellant.

UNPUBLISHED
September 28, 1999

No. 210592
Saginaw Circuit Court
LC No. 96-016314 CZ

Before: Talbot, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Defendant appeals by right an order of judgment in favor of plaintiff entered following a bench trial. Defendant challenges the trial court's ruling that plaintiff was entitled to collect $23,698.02 in disputed employment taxes. We affirm.

I

Defendant first argues that the trial court abused its discretion by refusing to permit defendant to present testimonial evidence to establish that it had not acquired one hundred percent of its predecessor company's Michigan assets. We review the trial court's decision to admit or exclude evidence for an abuse of discretion, *Chmielewski v Xermac, Inc,* 457 Mich 593, 614; 580 NW2d 817 (1998), and we review de novo the court's application of the doctrine of res judicata, *Phinisee v Rogers,* 229 Mich App 547, 551-552; 582 NW2d 852 (1998).

The doctrines of res judicata and collateral estoppel may prelude relitigation of MESC administrative decisions that are adjudicatory in nature. *Roman Cleanser Co v Murphy,* 386 Mich 698, 700, 703-704 n5; 194 NW2d 704 (1972); *Senior Accountants, Analysts and Appraisers Ass'n v City of Detroit,* 399 Mich 449, 457-458; 249 NW2d 121 (1976). Defendant provided the information upon which the MESC was able to determine that defendant had acquired one hundred percent of its predecessor's Michigan assets.[1] Having made that factual determination, the MESC applied the law to that factual determination and ruled that defendant was subject to employment compensation taxes at the ten percent rate for existing companies. The trial court found that the MESC

sent defendant a notice of the successorship determination; the notice alerted defendant that it had thirty days to appeal the determination. Defendant's failure to timely appeal the MESC determination of successorship rendered that determination res judicata to any subsequent challenges. *Roman Cleanser Co, supra.* Therefore, the trial court correctly ruled that plaintiff could rely on this determination and that defendant was precluded from relitigating the successorship determination.

II

Defendant also contends that plaintiff failed to demonstrate that the notice of successorship and the yearly tax rate notices were mailed and received. The trial court determined that the notices were mailed and further found no credible evidence that they were not received. We review the trial court's factual findings for clear error. *Traxler v Ford Motor Co,* 227 Mich App 276, 282; 576 NW2d 398 (1998). A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id*

Plaintiff relied on the "mailbox rule" to prove that defendant received the notice of successorship and the yearly tax rate notices. In *Stacey v Sankovich,* 19 Mich App 688, 694; 173 NW2d 225 (1969), this Court stated that "[t]he proper addressing and mailing of a letter creates a legal presumption that it was received. This presumption may be rebutted by evidence, but whether it was is a question for the trier of fact." This presumption is not legally conclusive but rather is a factual inference that arises because it is reasonable to assume that postal officials will do their duty to deliver the mail. *Rosenthal v Walker,* 111 US 185, 193-194; 4 S Ct 382; 28 L Ed 395 (1884). When evidence that letters were never received is presented, a question arises for the trier of fact to resolve, and the presumption then must be weighed in light of all the other evidence. *Id.*; *State ex rel Flores v State,* 183 Wis 2d 587, 612-613; 516 NW2d 362, 370 (Wis, 1994); *Insurance Placements, Inc v Utica Mutual Ins Co,* 917 SW2d 592, 595 (Mo Ct App, 1996). Whether the presumption has been rebutted is a question of fact for the trial court. *Glasser v Glasser,* 64 Cal App 4th 1004, 1010-1011 (1998). Citing *Stacey, supra,* this Court in *Crawford v Michigan,* 208 Mich App 117, 121; 527 NW2d 30 (1994), agreed that "there is authority for the presumption that items properly addressed and placed in the mail reach their destination."

Plaintiff presented testimony and evidence to show that it mailed to defendant the notice of successorship on May 17, 1993. Further testimony and evidence indicated that the revised ten percent yearly rate notices, were mailed on May 18, 1993, February 14, 1994, and January 30, 1995. A comparison of the address on the back of the notice of successorship and the address listed on the rate notices, with the address on the employer's quarterly contribution reports filed by defendant, indicates that plaintiff used the proper address for all the notices. Defendant's witness testified that he reviewed the mail and did not see the notice of successorship or the rate notices; however, he also admitted that a secretary opened and distributed the mail and that she sent tax-related documents to the firm that prepared defendant's taxes.

Plaintiff also presented testimony concerning the MESC's normal mailing procedures and introduced into evidence a copy of the notice of successorship and printed computer data showing that the yearly rate notices had been mailed. Plaintiff's witness testified that the MESC mailed out over

200,000 notices each year. Where the volume of mail processed by the party seeking to utilize the presumption is very large, "so that direct proof that a particular letter was mailed is impractical or not feasible, evidence of the settled custom and usage of the sender in the regular and systematic transaction of its business may be sufficient to give rise to a presumption of receipt by the addressee." *Insurance Placements, Inc, supra* at 595-596. Plaintiff presented sufficient evidence to give rise to the common-law presumption that defendant received the mailed documents.

To counter this presumption, as noted above, defendant presented only the testimony of a vice-president who stated that he reviewed some of the mail received by defendant, but who also admitted that a secretary received and distributed the mail. The secretary then forwarded tax-related items to the firm that handled defendant's tax preparation and general payroll matters. This evidence and counter-evidence, created an issue to be resolved by the trier of fact. *State ex rel Flores, supra* at 370; *Insurance Placements, Inc, supra* at 595. The trial court, having considered this testimony and evidence, and being in the best position to evaluate the credibility of the witnesses, *Lumley v Univ of Michigan Bd of Regents,* 215 Mich App 125, 135; 544 NW2d 692 (1996), properly determined that plaintiff mailed the notice of successorship and the rate notices and that defendant received them. Defendant failed to demonstrate that the trial court clearly erred in making that determination.

Defendant contends that computer printouts that were admitted in lieu of copies of the yearly tax rate notices were insufficient to establish that actual rate notices were mailed. MRE 1002 requires that to prove the contents of a writing, the original must be admitted, except as the rules otherwise provide. The exceptions to that rule include where the original is lost or destroyed MRE 1004(1). Because plaintiff did not keep a copy of the original rate notices that were mailed out, and defendant claimed that it had not received the rate notices, the original documents were effectively lost or destroyed. MRE 1001(3) provides in relevant part, however, that "[i]f data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an 'original.'" Furthermore, MRE 803(6) provides that data compilations are not excluded from evidence by the hearsay rule if they are "made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the . . . data compilation." Plaintiff's computer-generated listings were not hearsay because plaintiff generated these data compilations in the course of its regularly conducted business.

Plaintiff's regularly conducted business includes the mailing of some 200,000 rate determinations and payment notices each year, which is accomplished by accumulating and maintaining a computer database of information from which the notices are generated and mailed out. The raw data listings, complied from the computer data, were admitted into evidence. The documents were therefore sufficiently qualified as originals to be admitted into evidence in lieu of the actual yearly rate notices that were mailed.

Finally, we reject defendant's contention that because tax rate notices are involved a higher standard of proof of mailing should be imposed. Defendant cites no authority in support of this claim, so it should not be considered. "[A] mere statement of position is insufficient to bring an issue before this Court." *Meagher v Wayne State Univ,* 222 Mich App 700, 718; 565 NW2d 401 (1997). In any

event, this contention is meritless because the Legislature has not seen fit to require that plaintiff mail rate notices by certified mail or that it maintain a proof of service as evidence that a notice was mailed. We decline defendant's offer to impose these new mandates on plaintiff.

We affirm.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey

[1] Defendant's vice-president testified that the woman whose name appeared on the successorship document forwarded to plaintiff was not employed by and had no relationship with defendant. He later testified that she was a secretary (even though the successorship document identified her as an "administrative assistant"), and she would have had no knowledge concerning defendant's ownership of various interests.