

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

Joseph A. Burns

Court of Appeals No. S-08-035

Appellant

Trial Court No. 06-CV-000835

v.

Burns Iron & Metal Co., Inc., et al.

DECISION AND JUDGMENT

Appellees

Decided: June 30, 2009

* * * * *

Paul A. Radon and R. Ethan Davis, for appellant.

Margaret G. Beck, for appellee Burns Iron & Metal Co., Inc.;
Denise M. Hasbrook and Emily Ciecka Wilcheck, for appellee
Joyce Burns; Anthony Chudzinski, for appellee David Burns.

* * * * *

HANDWORK, J.

{¶ 1} This accelerated case is before the court on appeal from a judgment of the Sandusky County Court of Common Pleas.

{¶ 2} Appellant is Joseph A. Burns, who holds 25 percent of the shares in Burns Iron & Metal Co., Inc. ("Burns"). He is also a former employee of Burns. On August 28, 2006, appellant filed a complaint in the trial court naming as defendants (now appellees): (1) Burns, in its corporate capacity; (2) David R. Burns; and (3) Joyce M. Burns. David is appellant's uncle and the majority shareholder in, and a director and president of, the corporation. Joyce is David's sister; she is also a 25 percent shareholder in Burns and a director and officer of the corporation. In addition, Joyce is the company's bookkeeper and does all of the accounting for the business. Appellant later filed an amended complaint in which he added appellee, Richard Farmer, the former general manager of Burns, as a defendant.

{¶ 3} In a subsequent first amended complaint, appellant alleged that appellees (1) breached their fiduciary duties, including the covenant of good faith and fair dealing; (2) converted corporate assets for their personal use and gain; and (3) usurped corporate opportunities by establishing a business in direct competition with Burns. Appellant also set forth a claim for the wrongful/retaliatory termination of his employment at Burns and requested a mandatory injunction ordering appellees to allow him to inspect the records of the corporation.

{¶ 4} On March 9, 2008, appellant filed a motion asking the court below to appoint a receiver to take over the business operations and management of Burns. A hearing was held on this motion on August 14, 2008. On October 23, 2008, the common pleas court denied appellant's motion for the appointment of a receiver finding, in

essence, that while appellees may have engaged in questionable behavior, e.g., breached their fiduciary duty to appellant as a shareholder, in the past, appellant presented no evidence of the same occurring in the present. The court further determined that appellant had an adequate remedy at law, specifically, an award of monetary damages. Appellant timely appeals that judgment and asserts the following assignment of error:

{¶ 5} "The trial court erred and abused its discretion by denying Appellant/Plaintiff Joseph A. Burns' motion for a receivership over Burns Iron & Metal Co., Inc."

{¶ 6} R.C. 2735.01(A) permits the appointment of a receiver by a court "[i]n an action * * * between partners or others jointly owning or interested in any property * * * on the application of the plaintiff * * * when it is shown that the property * * * is in danger of being lost, removed or materially injured." R.C. 2735.01(F) also allows for the appointment of a receiver "[i]n all other cases in which receivers have been appointed by usages of equity." A trial court is vested with sound discretion to appoint a receiver. *State ex rel. Celebrezze v. Gibbs* (1991), 60 Ohio St.3d 69, 73. In exercising that discretion, the court considers "all the circumstances and facts of the case, the presence of conditions and grounds justifying the relief, the ends of justice, the rights of all the parties interested in the controversy and subject matter, and the adequacy and effectiveness of other remedies." *Id.* at 73, fn. 3, quoting 65 American Jurisprudence 2d (1972) 873, 874, Receivers, Sections 19, 20. In order to find that the court below abused its discretion, we must determine the trial court's attitude in reaching its decision was

unreasonable, arbitrary, or unconscionable and not merely an error of law or judgment.

Blakemore v. Blakemore (1983), 5 Ohio St.3d 217, 219.

{¶ 7} In the present case, the following evidence relevant to our disposition of this cause was offered by the parties. Appellant was an employee of Burns for 31 years, working as a truck driver and mechanic. He testified that on two occasions in either 2003, 2004, and 2005, he received cash from Richard Farmer as "extra money," and later asked Joyce when he would get more "candy money." It is undisputed that appellant never received any of this cash until he became a shareholder in the corporation. In 2007, appellant's employment with Burns was terminated. He claimed that this termination was done in retaliation for the initiation of the instant lawsuit. Appellees maintain that appellant lost his job because he failed a routine drug screen, was insubordinate, and was absent from or tardy for work frequently.

{¶ 8} Farmer, David Burns, and Joyce Burns admitted that checks, totaling over \$100,000, from DMI Metals, a company located in Columbus, Ohio, and a customer of Burns, were made out to them rather than the corporation. According to these witnesses, however, they each cashed the checks and the monies received were distributed to the shareholders, including appellant on more than two occasions. It is also undisputed that in 2005, Farmer, Richard Burns, and Joyce Burns each received a one time bonus of \$33,750 and appellant received a bonus of \$6,500.

{¶ 9} Joyce further testified that she had to use her Visa to purchase a "specialized new steel" from a business in Texas and then wrote out a company check to

reimburse herself. In addition, Joyce admitted that for a period of seven years she made out a corporate check to Keybank. Part of this money was placed in what she denominated as her "Christmas Club" account, part was put into a similar account in the name of Richard Burns, and part into her daughter's "Christmas Club account." According to Joyce, these were funds owed to her and were simply a means of saving money.

{¶ 10} Appellant also claimed that a receiver should be appointed for Burns because appellees formed another scrap metal company that was in "direct competition" with Burns. Joyce testified that she, David Burns, Richard Farmer, "Chris," and "Steve" are 20 percent shareholders in that company, Tiffin Iron and Metal. Joyce stated that this company was formed for the sole purpose of demolishing a scrap yard next to Tiffin University, which wanted to extend their campus into that area.

{¶ 11} Brenda Katherine Burns, who became the general manager of Burns in February 2008, informed the court that as of the ensuing Monday, Tiffin Iron and Metal would no longer exist because its job for the university would be completed. She further testified that Burns is a solvent corporation with an equity of \$400,000 and that the "transactions" previously employed by Joyce are no longer permitted.

{¶ 12} Based upon the foregoing evidence, we cannot say that the trial court's attitude in denying appellant's request for the appointment of a receiver was arbitrary, unreasonable, or unconscionable. In particular, appellant failed to establish that Burns'

assets are "in danger of being lost, removed or materially injured." Therefore, appellant's sole assignment of error is found not well-taken.

{¶ 13} The judgment of the Sandusky County Court of Common Pleas is affirmed. Appellant, Joseph A. Burns, is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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