

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 CA 0429

CLIPPER ESTATES MASTER HOMEOWNERS' ASSOCIATION, INC.

VERSUS

JOHN B. HARKINS, JR. AND DEBORAH KUBRICHT HARKINS,
ABC COMPANY(IES) AND ABC INSURANCE COMPANY

Judgment Rendered: NOV 04 2013

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On Appeal from the
22nd Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Trial Court No. 2007-10186

The Honorable Reginald T. Badeaux, III, Judge Presiding

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BEFORE: PARRO, GUIDRY, AND DRAKE, JJ.

DRAKE, J.

This appeal arises from the dissolution of a temporary restraining order (TRO) sought by plaintiff, Clipper Estates Master Homeowners' Association, Inc. (CEMHOA), against defendants, John B. Harkins, Jr. and Debra Kubricht Harkins, to restrain any construction, installation activity, or landscaping on their lot due to a failed bulkhead adjacent to the defendants' lot. The TRO was dissolved at the hearing on the preliminary injunction, the preliminary injunction was denied, and costs and damages were to be rendered at a later date upon defendants' motion. The trial court awarded damages and attorney's fees in a judgment signed on September 19, 2012, following the defendants' filing of a Motion to Tax Costs and Award Damages. It is from this judgment that CEMHOA appeals.

FACTS AND PROCEDURAL HISTORY

On January 12, 2007, CEMHOA filed a petition against the defendants seeking an injunction to prevent any further damage to the bulkhead adjacent to the defendants' property as well as damages. The defendants' property is located in the Clipper Estates Subdivision, St. Tammany Parish, Louisiana, and is subject to the Declaration of Covenants, Conditions and Restrictions (Declaration) and Supplementary Declaration of Covenants, Conditions and Restrictions (Supplementary Declaration) (collectively referred to as Restrictive Covenants". The property owned by the defendants abuts a waterway passage used by the residents of Clipper Estates Subdivision to get to Lake Pontchartrain. CEMHOA owns the waterway passage. A bulkhead separates the waterway passage from the property of the defendants. CEMHOA first contended in 2007 that the defendants had damaged the bulkhead, causing it to fail, by their construction and activity on their property in violation of the Restrictive Covenants. CEMHOA filed First and Second Supplemental and Amending Petitions adding facts and details as to their claim for an injunction and damages. On June 22, 2012, CEMHOA filed a Third

Supplemental and Amending Petition asserting that a pool installation company had contacted it regarding the defendants' property, and that exterior landscape and maintenance work was being performed on the lot, which violated the Restrictive Covenants. CEMHOA also sought a temporary restraining order against the defendants preventing any construction or installation activity. The trial court issued the TRO on June 29, 2012, and set a hearing date on the preliminary injunction for July 16, 2012. The defendants filed a Motion to Vacate Ex Parte Order and Strike Third Supplemental and Amending Petition, To Dissolve Temporary Restraining Order and For Damages on July 9, 2012. The trial court set the hearing on the defendants' motion on the same date as the preliminary injunction hearing. Following the hearing, the trial court granted the defendants' motion for directed verdict on CEMHOA's preliminary injunction, dissolved the temporary restraining order, denied the preliminary injunction, and deferred the defendants' request for damages until a motion to tax costs was filed, with the judgment being signed accordingly on July 30, 2012. The defendants subsequently filed a Motion to Tax Costs and Award Damages which was heard on September 11, 2012. After a hearing on costs and damages requested by the defendants, the trial court signed a judgment on September 19, 2012, awarding the defendants costs, attorney fees in the amount of \$7,600, and \$700 each in general damages. The trial court designated the September 19, 2012, judgment as final and appealable in accordance with Louisiana Civil Code of Procedure article 1915(A).¹ CEMHOA appeals the awarding of damages and attorney's fees to the

¹ Pursuant to La. C.C.P. art. 3612, an appeal does not lie from a trial court judgment dissolving a TRO. See *Kinchen v. Kinchen*, 256 La. 28, 235 So. 2d 81, 83 (1970). However, a money judgment for the wrongful issuance of a TRO, even when coupled with an interlocutory order in a preliminary injunction, is a final judgment. *Kinchen*, 256 La. at 35, 235 So. 2d at 84; see also, *Carson v. Thomas*, 342 So. 2d 1219, 1221 (La. App. 2d Cir. 1977). The appeal in the present matter from the money judgment for the wrongful issuance of a TRO is a final appealable judgment.

defendants. The defendants answered the appeal and seek additional attorney's fees in connection with the appeal.

ASSIGNMENT OF ERRORS

CEMHOA asserts that the trial court erred in awarding attorney's fees since the preliminary injunction hearing and the motion to dissolve the TRO were held at the same time or because the TRO had expired by its own terms. CEMHOA also claims the trial court erred in awarding damages to the defendants. Finally, CEMHOA claims that the defendants' Answer to Appeal seeking additional attorney's fees should be denied.

ATTORNEY'S FEES

CEMHOA claims that since the trial court set the preliminary injunction hearing at the same time as the motion to dissolve the TRO, the defendants are not entitled to attorney's fees. The defendants rely upon La. C.C.P. art. 3608 which states, "[t]he court may allow damages for the wrongful issuance of a temporary restraining order or preliminary injunction on a motion to dissolve or on a reconventional demand. Attorney's fees ... may be included as an element of damages...." CEMHOA asserts that La. C.C.P. art. 3607 requires a hearing on the TRO separate from the hearing on the preliminary injunction. Louisiana Code of Civil Procedure article 3607 states:

An interested person may move for the dissolution or modification of a temporary restraining order or preliminary injunction, upon two days' notice to the adverse party, or such shorter notice as the court may prescribe. The court shall proceed to hear and determine the motion as expeditiously as the ends of justice may require.

The court, on its own motion and upon notice to all parties and after hearing, may dissolve or modify a temporary restraining order or preliminary injunction.

CEMHOA argues that the defendants were not entitled to attorney's fees since the defendants' attendance at the hearing was to defend the preliminary injunction as much as it was to dissolve the TRO.

The issue before this court is whether attorney's fees were permitted to be awarded when the TRO expired prior to the hearing on the issuance of a preliminary injunction. The TRO was signed on June 29, 2012. A TRO "shall expire by its terms within such time after entry, not to exceed ten days, as the court prescribes." La. C.C.P. art. 3604(A). The defendants filed the motion to dissolve the TRO on July 9, 2012, which is the day the TRO expired. A rule to show cause regarding the issuance of a preliminary injunction was heard on July 16, 2012. There is nothing in the record indicating that the TRO was extended. Defendants claim they agreed to the extension, but the only agreement in the record took place at the July 16, 2012 hearing to include all matters, the dissolution of the TRO and the issuance of a preliminary injunction at the hearing.²

"Where the temporary restraining order has expired by operation of law ten days after issuance before a hearing is had to determine if it should be dissolved, the issue is moot and attorney fees have generally been denied." *Gaudet v. Reaux*, 450 So. 2d 1009, 1011 (La. App. 1 Cir. 1984). *See also Lighthouse Life Ins. Co., Inc. v. Rich*, 343 So. 2d 444, 446 (La. App. 3d Cir. 1977) (attorney fees not awarded when preliminary injunction hearing continued until after the TRO expired ten days after its issuance); *Davis v. Raymond Petroleum, Inc.*, 396 So. 2d 600, 601 (La. App. 3d Cir. 1981) (damages, but not attorney fees, may be awarded when preliminary injunction hearing continued until after the TRO expired ten days after its issuance and TRO was not extended).

² The TRO issued by the trial court did include language that it was in place "until further order of this Court." However, a TRO can only be for ten days, with extensions by the court for good cause shown for periods of up to ten days. La. C.C.P. art. 3604.

The First Circuit again addressed this issue in *Morris v. Sonnier*, 546 So. 2d 1296 (La. App. 1 Cir. 1989). Relying upon *Khaled v. Khaled*, 424 So. 2d 370 (La. App. 2d Cir. 1982), this court noted that when a dissolution hearing for a TRO and a preliminary injunction hearing are at the same time, the same preparation for both is required. Therefore, the defendants could not prove damages of attorney's fees required to dissolve the TRO. *Id.* The language in La. C.C.P. art. 3608 provides for attorney's fees "for the services rendered in connection with the dissolution of a restraining order of preliminary injunction." This language refers to the date of the hearing. *See United Gas Pipe Line Co. v. Caldwell*, 590 So. 2d 724, 726-27 (La. App. 3d Cir. 1991). "Therefore, if the hearing for dissolution is not held before the TRO expires, attorney's fees cannot be awarded." *Id.* *See also Lewis v. Adams*, 28,496 (La. App. 2d Cir. 8/21/96), 679 So. 2d 493, 496.

Defendants rely upon *Cook v. Ed Francis Chevrolet, Inc.*, 365 So. 2d 1178 (La. App. 3d Cir. 1978) which permitted attorney's fees for the wrongful issuance of a TRO when the dissolution of the TRO and the preliminary injunction hearing took place at the same time. *Cook* is distinguishable from the present case because the hearing on the preliminary injunction was held on the tenth day after the issuance of the TRO. Therefore, the TRO had not yet expired.

Since the TRO in the present case expired prior to the hearing on the dissolution or preliminary injunction, attorney's fees are not recoverable. Therefore, the attorney's fees award of the trial court is reversed.

DAMAGES

CEMHOA also asserts that the damages awarded to the defendants should be reversed. After hearing testimony, the trial court awarded each defendant \$700 in damages for the wrongful issuance of the TRO. The ruling of a trial court on the issue of damages under La. C.C.P. art. 3608 should not be disturbed on appeal absent a clear abuse of discretion. *Arco Oil & Gas Co., a Division of Atlantic*

Richfield Co. v. DeShazer, 98-1487 (La. 1/20/99), 728 So. 2d 841, 844. Louisiana Code of Civil Procedure article 3608 provides that the trial court may allow damages for the wrongful issuance of a TRO or preliminary injunction. The trial court has great discretion in awarding damages pursuant to La. C.C.P. art. 3608 and such award will not be disturbed on appeal absent an abuse of discretion. *United Gas*, 590 So. 2d at 726. After reviewing the record, we find that the trial court was reasonable and that there was no abuse of discretion in awarding each defendant \$700 for the wrongful issuance of the TRO.

ANSWER TO APPEAL

Defendants have answered this appeal and seek additional attorney's fees for defending the appeal of the wrongful damages awarded. Because this court finds defendants are not entitled to attorney's fees for the dissolution of the TRO, defendants are not entitled to attorney's fees for the appeal of the damage award resulting from the wrongful issuance of the TRO.

CONCLUSION

For the foregoing reasons, the judgment of the trial court is reversed in part and affirmed in part. Costs of the appeal are assessed equally to both parties.

REVERSED IN PART; AFFIRMED IN PART; ANSWER TO APPEAL DENIED.