

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

NORTHEAST PROFESSIONAL HOME CARE, INC., ET AL	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
	:	Hon. Sheila G. Farmer, J.
	:	Hon. Patricia A. Delaney, J.
Plaintiff-Appellant	:	
	:	
-vs-	:	Case No. 2009-CA-00180
	:	
ADVANTAGE HOME HEALTH SERVICES, INC., ET AL	:	<u>OPINION</u>
	:	
Defendant-Appellee	:	

CHARACTER OF PROCEEDING: Civil appeal from the Stark County Court of Common Pleas, Case No. 2008CV03530

JUDGMENT: Affirmed in part; Reversed in part; Modified

DATE OF JUDGMENT ENTRY: April 12, 2010

APPEARANCES:

For Plaintiff-Appellant

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Gwin, P.J.

{¶ 1} This appeal arises from a Stark County Court of Common Pleas case involving a noncompetition and confidentiality agreement. On August 13, 2008, Northeast Professional Home Care, Inc. and Northeast Professional Home, Inc. (collectively, the "Appellants") instituted the present lawsuit against a former employee, appellee Brian Nam, as well as a start-up competitor he was involved with, appellee Advantage Home Health Services, Inc. and two of that competitor's initial directors. Those directors were Brian Nam's father, appellee Kun Woo Nam, M.D. and Brian Nam's live-in girlfriend, appellee Maria Swisher. The lawsuit alleges various claims, including claims for breach of contract, tortious interference with contact, breach of fiduciary duty, and breach of duty of loyalty.¹

{¶ 2} Almost from the beginning of the case there have been disputes regarding fact discovery. Many of these disputes have been ruled upon by the trial court.

{¶ 3} A protective order was issued by the trial court on November 19, 2008. The protective order set forth a two-tiered designation system in which documents could be classified as either "CONFIDENTIAL" or "CONFIDENTIAL-ATTORNEYS EYES ONLY." A "CONFIDENTIAL" designation generally provided that the parties could only use the information for purposes of the litigation, and must file such under seal with the trial court. A "CONFIDENTIAL-ATTORNEYS EYES ONLY" designation added the requirement that designated documents could only be shared with counsel and experts, not with parties.

¹ A Statement of the Facts underlying Appellant's causes of action is unnecessary to our disposition of this appeal. Any facts needed to clarify the issues addressed in Appellant's assignments of error shall be contained therein.

{¶ 4} Paragraph 14 of the Protective Order concerned the production of documents that appellants allege were misappropriated by appellees. Paragraph 14 established that, to the extent that appellants disclose documents which it alleges were misappropriated by appellees, those documents must be designated as "CONFIDENTIAL," which would enable appellees themselves to see such documents. Paragraph 14 required the re-classification of those documents appellants claim appellees took in order to start their own competing company.

{¶ 5} After the filing of the protective order, the parties continued the process of exchanging written discovery. On March 2, 2009, appellees filed a motion seeking an order from the trial court that certain specific documents be re-classified from "CONFIDENTIAL – ATTORNEYS EYES ONLY" to "CONFIDENTIAL" Copies of the documents were attached to the motion as "Exhibit A". Appellants filed a written response.

{¶ 6} On May 29, 2009, appellees filed a "Motion for Order" asking that a non-party, Anthony Vallone, be prohibited from attending depositions in the matter. Various pages of Mr. Vallone's deposition testimony supported the motion. The appellant responded in writing under seal on June 5, 2009.

{¶ 7} On June 9, 2009, the trial court ruled that Anthony Vallone would not be "permitted to attend the depositions of the Defendants and any of the lay or expert witnesses during the pendency of this action." The trial court's determination was based upon excerpts from Vallone's deposition transcript that were filed with the trial court, statements of counsel made on May 20, 2009, and the motions filed by the parties.

{¶ 8} The second entry at issue was filed on June 15, 2009. In it, the trial court re-designated as "NON-CONFIDENTIAL" documents that had previously been classified by appellants as "CONFIDENTIAL ATTORNEY'S EYES ONLY."

{¶ 9} On September 25, 2009, the trial court filed its entry correcting its June 15, 2009 order. The trial court corrected the entry by referring to the proper motion.² However, the trial court did not change its previous designation of the documents as "NON-CONFIDENTIAL."

{¶ 10} It is from the trial court's June 9, 2009 Judgment Entry and the trial court's June 15, 2009 Judgment Entry, as corrected by its September 25, 2009 Judgment Entry, that appellants have appealed, raising two assignments of error:

{¶ 11} "I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY PROHIBITING APPELLANT NORTHEAST HOME CARE'S DESIGNATED CORPORATE REPRESENTATIVE FROM ATTENDING DEPOSITIONS.

{¶ 12} "II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY REDESIGNATING APPELLANTS' DOCUMENTS, WHICH HAD BEEN PREVIOUSLY DESIGNATED BY APPELLANTS AS "CONFIDENTIAL -ATTORNEYS EYES ONLY," AS "NONCONFIDENTIAL."

I & II

{¶ 13} Because appellant's first and second assignments of error each require us to determine whether this court has jurisdiction to review the merits of the specific assignment of error, we shall address the assignments collectively.

² In the September 25, 2009 Judgment Entry the trial court mistakenly referred to Defendant's Motion for an Order dated May 29, 2009. The June 15, 2009 Judgment Entry corrected the previous order to note that the motion to re-designate was filed March 2, 2009.

{¶ 14} Before reaching the merits of the appeal, we must address the threshold issue of whether the judgment appealed is a final appealable order. Section 3(B) (2), Article IV of the Ohio Constitution limits an appellate court's jurisdiction to the review of final judgments. For a judgment to be final and appealable it must satisfy R.C. 2505.02 and, if applicable, Civ. R. 54(B). *Hitchings v. Weese*, 77 Ohio St.3d 390, 1997-Ohio-290, 674 N.E.2d 688 (Resnick, Justice, concurring), (Citations omitted). This court has no choice but to sua sponte dismiss an appeal that is not taken from a final appealable order. *Whitaker-Merrell v. Geupel Construction Co.* (1972), 29 Ohio St.2d 184, 280 NE.2d 922.

{¶ 15} R.C. 2905.02, which defines a final appealable order, provides in pertinent part:

{¶ 16} "(A) As used in this section:

{¶ 17} "(1) 'Substantial right' means a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.

{¶ 18} "(2) 'Special proceeding' means an action or proceeding that is specially created by statute and that prior to 1853 was denoted as an action at law or a suit in equity.

{¶ 19} "(3) 'Provisional remedy' means a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, suppression of evidence, a prima-facie showing pursuant to section 2307.85 or 2307.86 of the Revised Code, a prima-facie showing pursuant to section 2307.92 of the Revised Code, or a finding made pursuant to division (A) (3) of section 2307.93 of the Revised Code.

{¶ 20} “(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

{¶ 21} “(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

{¶ 22} “(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

{¶ 23} “(3) An order that vacates or sets aside a judgment or grants a new trial;

{¶ 24} “(4) An order that grants or denies a provisional remedy and to which both of the following apply:

{¶ 25} “(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

{¶ 26} “(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

{¶ 27} “* * *”

{¶ 28} Thus, under R.C. 2505.02(B) an order is a final appealable order if it satisfies each part of a three-part test: (1) the order must either grant or deny relief sought in a certain type of proceeding, which the General Assembly calls a "provisional remedy;" (2) the order must both determine the action with respect to the provisional remedy and prevent a judgment in favor of the appealing party with respect to the provisional remedy; and (3) the reviewing court must decide that the party appealing the order would not be afforded a meaningful or effective remedy by an appeal following final

judgment. *Sinnott v. Aqua-Chem, Inc.*, 116 Ohio St.3d 158, 876 N.E.2d 1217, 2007-Ohio-5584, ¶ 16; *State v. Muncie*, 91 Ohio St.3d 440, 446, 746 N.E.2d 1092, 2001-Ohio-93.

{¶ 29} To assist appellate courts with the application of the R.C. 2505.02(B)(4) test, the General Assembly defined the term "provision remedy" as "a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, [or] suppression of evidence * * *." R.C. 2505.02(A) (3). The examples set forth in this definition merely serve an illustrative purpose, so exclusion from the list does not preclude an appellate court from recognizing an unlisted ancillary proceeding as a provisional remedy. *Muncie* at 448, 746 N.E.2d 1092.

{¶ 30} Ordinarily, a ruling on a discovery request is not a final appealable order. *Walters v. Enrichment Ctr. of Wishing Well, Inc.*, 78 Ohio St.3d 118, 121, 1997-Ohio-232, 676 N.E.2d 890. However, if they meet the requirements of R.C. 2505.02(B)(4), they are appealable. Very few discovery proceedings qualify as provisional remedies. *Myers v. Toledo*, 110 Ohio St.3d 218, 852 N.E.2d 1176, 2006-Ohio-4353, ¶ 24. R.C. 2505.02(A) (3) itself names only one--a proceeding that results in the discovery of privileged matter. *Bennett v. Martin*, Franklin App. No. 09AP-294, 2009-Ohio-6195 at ¶ 33.

{¶ 31} However, there has been a broadening of the definition of final orders pursuant to R.C. 2505.02(B) to include certain types of discovery orders affecting substantial rights and for which no meaningful appeal would be present at the conclusion of the proceedings. *Delost v. Ohio Edison Co.*, Mahoning App. No. 07-MA-

171, 2007-Ohio-5680 at ¶ 4; *Cubberly Holdings, Inc. v. H R Imaging Partners, Inc.* Delaware App. No. 07-CAE-06-0032, 2008-Ohio-2142 art ¶ 15.

{¶ 32} In addition to encompassing the discovery of “privileged” matter, the term “provisional remedy” also encompasses “confidential” information such as trade secrets. *Armstrong v. Marusic*, Lake App. No. 2001-L-232, 2004-Ohio-2594. (Citations omitted).

{¶ 33} “Trade secrets” are defined by the Revised Code as “information, including the whole or any portion or phrase of * * * any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that * * * derives independent economic value * * * from not being generally known to * * * persons who can obtain economic value from its disclosure or use[, and] is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” R.C. 1333.61(D).

{¶ 34} Noting the similarity between the discovery of “privileged matter” and the discovery of “confidential matter,” appellate courts have held that proceedings resulting in the discovery of “confidential matter” are also provisional remedies. *Armstrong v. Marusic*, 11th Dist. No.2001-L-232, 2004-Ohio-2594, ¶ 12; *Gibson-Myers & Assoc. v. Pearce* (Oct. 27, 1999), 9th Dist. No. 19358. These courts have recognized that an order requiring the disclosure of privileged matter presents the same harm as an order requiring the disclosure of confidential matter. In both cases, injury results from the dissemination of the information itself, which cannot be remedied absent an immediate appeal. *Bennett v. Martin*, supra 2009-Ohio-6195 at ¶ 33.

{¶ 35} Appellant’s first assignment of error challenges the trial court’s order prohibiting Anthony Vallone, a non-party to the litigation, from attending depositions.

However, with respect to appellant's first assignment of error we find that appellant has an effective remedy by way of appeal at the conclusion of the case.

{¶ 36} In the regulation of discovery, the trial court has discretionary power and its decisions will not be overturned absent an abuse of that discretion. *Mauzy v. Kelly Services, Inc.*, 75 Ohio St.3d 578, 592, 1996-Ohio-265 (citations omitted); *State ex rel. Daggett v. Gessaman* (1973), 34 Ohio St. 2d 55, 57, 295 N.E.2d 659. Generally, an appellate court reviews a claimed error relating to a discovery matter under an abuse-of-discretion standard. *Lightbody v. Rust* (2000), 137 Ohio App.3d 658, 663, 739 N.E.2d 840; *Trangle v. Rojas*, 150 Ohio App.3d 549, 553, 2002-Ohio-6510, 782 N.E.2d 617.

{¶ 37} There is nothing in the record before us that indicates that the trial court's ruling with respect to Mr. Vallone has denied appellant access to any document or piece of information without which their case will be prejudiced in such a way that a later appeal will not afford them a meaningful and effective remedy. Nothing prevents Mr. Vallone from attending the trial, or from reviewing the transcripts of any deposition testimony. The trial court relied upon Mr. Vallone's own admission that he is not a corporate representative for either of the appellants. The trial court further ordered, "Sookie Vallone is permitted to attend as corporate representative." [Judgment Entry, June 9, 2009]. Thus, the rights of the appellant are protected.

{¶ 38} We find no case law that would qualify the order appealed as a final order under R.C. 2505.02. Nor do we find the order to be a "final" order as otherwise defined in any section of R.C. 2505.02. Moreover, this assignment of error does not involve an order to disclose allegedly privileged material or trade secrets, such that the proverbial bell cannot be unrung. Thus, appellant has not shown that a later appeal will not afford

them a meaningful and effective remedy. *Dispatch Printing Co. v. Recovery Ltd. Partnership*, 166 Ohio App.3d 118, 2006-Ohio-1347, 849 N.E.2d 297, ¶ 13; *Briggs v. Mt. Carmel Health Sys.*, Franklin App. No. 07AP-251, 2007-Ohio-5558, ¶ 12; *Williams v. Nationwide Mut. Ins. Co.*, Meigs App. No. 05CA15, 2005-Ohio-6798, ¶ 8-9.

{¶ 39} Accordingly, we find the need for an immediate review is substantially outweighed by the general policy disallowing interlocutory appeals. See *Cent. Benefits Mut. Ins. Co. v. State Emp. Comp. Bd.* (1992), 78 Ohio App.3d 172, 174, 604 N.E.2d 198; *Concheck v. Concheck*, Franklin App. No. 07AP-896, 2008-Ohio-2569 at ¶ 10.

{¶ 40} For these reasons, we conclude that the June 9, 2009 order upon which appellant has predicated its first assignment of error is not a final, appealable order and we lack jurisdiction over that order and this assignment of error. Accordingly, the appellant's first assignment of error is dismissed.

{¶ 41} In the second assignment of error, appellants argue that the discovery proceedings constitute a provisional remedy because they culminated in an order granting discovery of what they claimed was confidential business information. We find that the trial court's order determines the action as to the provisional remedy, i.e., the order settles the discovery dispute between the parties. *Bennett v. Martin*, supra, 2009-Ohio-6195 at ¶ 40; *Armstrong v. Marusic*, supra, 2004-Ohio-2594 at ¶ 16.

{¶ 42} In the case at bar, the documents requested by appellees were subject to a protective order filed November 19, 2008. That order provided, in relevant part,

{¶ 43} "The parties shall only designate Materials as "CONFIDENTIAL – ATTORNEY EYES ONLY" for materials that are (1) proprietary or other business

information which could provide another party with a competitive advantage, and (2) attorney-client work product information.

{¶ 44} “* * *

{¶ 45} “14. **Process for Converting a Party's Designation by Stipulation.** Following production of Materials designated "CONFIDENTIAL - ATTORNEYS EYES ONLY" under paragraph 3, Plaintiffs' counsel shall identify those documents that Plaintiffs claim are confidential and proprietary and that Plaintiffs claim were misappropriated by any Defendant as alleged in the Complaint. With respect to those documents that have been identified by Plaintiffs' counsel to be confidential and proprietary and allegedly misappropriated, the parties shall enter into a stipulation converting the designation of the identified documents from "CONFIDENTIAL - ATTORNEYS EYES ONLY" to "CONFIDENTIAL," thereby allowing the parties to review the documents at issue with their respective counsel per paragraph 2. Those documents not identified by Plaintiffs' counsel to have allegedly been misappropriated shall remain "CONFIDENTIAL - ATTORNEYS EYES ONLY," and shall not be disclosed to the parties. Any such re-designation must occur as soon as Plaintiffs and/or their counsel determine that any such documents may have been allegedly misappropriated, such re-designation to occur no later than two weeks prior to any evidentiary hearing and/or trial of this matter in order for any such documents to be deemed admissible in any such evidentiary hearing and/or trial of this action.

{¶ 46} “15. **Process for Objecting to a Party's Designation.** If the receiving/requesting party disagrees with the producing/withholding party's designation or withholding of any Materials or information, the receiving/requesting party shall

request in writing that the producing/withholding party re-designate such Materials or testimony and shall set forth the specific Materials or testimony at issue and the reasons the receiving/requesting party believes such document should be re-designated. If the producing/withholding party does not re-designate the Materials or information within five (5) business days after receipt of the request to re-designate, the receiving/requesting party may then make a motion to the Court to order the re-designation or production of such Materials or information.” (Protective Order, filed November 19, 2008).

{¶ 47} Appellant does not argue that any of the documents that it sought to classify as "CONFIDENTIAL - ATTORNEYS EYES ONLY," qualify as attorney-client work product information. Accordingly, pursuant to the trial court's order, the only documents that appellant can classify as "CONFIDENTIAL - ATTORNEYS EYES ONLY," are proprietary or other business information which could provide another party with a competitive advantage.

{¶ 48} “In determining whether to grant a protective order, a trial court must balance the competing interests to be served by allowing discovery to proceed against the harm which may result.” *Arnold v. Am. Natl. Red Cross* (1994), 93 Ohio App.3d 564, 576, 639 N.E.2d 484, 491-492, citing *Doe v. Univ. of Cincinnati* (1988), 42 Ohio App.3d 227, 231, 538 N.E.2d 419, 423-424. In the case at bar, the trial court's June 15, 2009 Judgment Entry as correct by its September 25, 2009 Judgment Entry found, in relevant part,

{¶ 49} “However, the Court has had to balance (1) the Plaintiffs interest of confidentiality and fear that disclosure of these documents would cause severe consequences to their business interest; and (2) the Defendants' ability to defend

themselves against the Plaintiffs' complaint in which they are seeking compensatory damages, punitive damages of \$1,000,000.00 and attorney fees. After balancing the competing interests, the Court is more swayed that due process requires the Defendants be permitted to view the documents to defend themselves against the Plaintiffs allegations. Defendants claim that Plaintiffs have removed confidential information and wrongly utilized it to start a business. If the Court were to deny the Defendants' request to re-designate these documents, the Court may be obstructing their defense in this action. If this case shall proceed to trial, the majority of these exhibits, documents and facts are going to be displayed in a public forum. As a result, the Court grants the Defendants' Motion to Redesignate filed on January 20, 2009 and the documents listed in Exhibit A are now listed as non-confidential."

{¶ 50} Accordingly, the trial court conducted the appropriate balancing test before ordering the documents be reclassified as "non-confidential."

{¶ 51} While we note that the case at bar does not involve "trade secrets", per se, we note by way of analogy that R.C. 1333.65 provides that a court may preserve the secrecy of an alleged trade secret by reasonable means, including holding in-camera hearings, sealing the records of the action and ordering any person involved in the litigation not to disclose an alleged trade secret. Civ.R. 26(C) provides that a court may order that discovery be had "on terms and conditions as are just." Thus, pursuant to the court's authority to regulate discovery, the court may, for example, order that use of the discovered information be limited to the lawsuit, limit the persons who have access to the information, limit or prohibit the reproduction of documents, require a bond to protect against the risk of injury from the disclosure of the trade secrets, and designate who

shall serve as custodian of the records. *Alpha Benefits Agency, Inc. v. King Ins. Agency, Inc.* (1999), 134 Ohio App.3d 673, 683, 731 N.E.2d 1209, 1215-1216. See, also *Majestic Steel Serv., Inc. v. Disabato* (Dec. 16, 1999), 8th Dist. No. 76521, (noting that a court is “well within its discretion to limit the scope of discoverable [trade secret] information to trial issues only and to restrain, under penalty of contempt, use of the disputed information for any purpose other than the instant litigation”).

{¶ 52} In the case at bar, the appellees only requested the trial court re-classify the documents in question as “CONFIDENTIAL.” A cursory review reveals many of the appellant’s classification of the documents as “CONFIDENTIAL - ATTORNEYS EYES ONLY,” are frivolous. For example, appellant fails to explain how a document that they did not create and that is available to the general public, i.e., Number 25, “ODJFS – You Have the Right” in any way jeopardizes their ability to conduct business or contains specific proprietary or other business information that could provide another party with a competitive advantage. [See, also documents numbers 26 and 27, created by the Illinois Foundation for Health Care.] While this list is by no means exhaustive, we find that appellant’s interests will be adequately protected by re-classifying the documents listed in “Exhibit A” as CONFIDENTIAL. The trial court then retains full discretion to further review any specific claims that may arise in the future.

{¶ 53} Appellant’s second assignment of error is sustained in part and modified. On the authority contained in Section 3(B) (2), Article IV of the Ohio Constitution the trial court’s June 15, 2009 Judgment Entry as corrected by its September 25, 2009 Judgment Entry is modified to re-classify the documents listed in Exhibit A as “CONFIDENTIAL” documents.

{¶ 54} Accordingly, the judgment of the Stark County Court of Common Pleas is affirmed, in part and reversed, in part. Pursuant to Section 3(B) (2), Article IV of the Ohio Constitution the trial court's June 15, 2009 Judgment Entry as corrected by its September 25, 2009 Judgment Entry is modified to re-classify the documents listed in Exhibit A as "CONFIDENTIAL" documents.

By Gwin, P.J.,

Farmer, J., and

Delaney, J., concur

HON. W. SCOTT GWIN

HON. SHEILA G. FARMER

HON. PATRICIA A. DELANEY

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