[Cite as *Esber Beverage Co. v. Heineken USA, Inc.*, 2010-Ohio-2983.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

ESBER BEVERAGE CO. Plaintiff-Appellee -vs- HEINEKEN USA, INC., ET AL. Defendants-Appellants	JUDGES: Hon. Julie A. Edwards, P.J. Hon. Sheila G. Farmer, J. Hon. Patricia A. Delaney, J. Case No. 2009CA00258 O P I N I O N
CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 2008CV05055
JUDGMENT:	Dismissed
DATE OF JUDGMENT ENTRY:	June 28, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendants-Appellants
CARI FUSCO EVANS 4505 Stephen Circle, NW Suite 100 Canton, OH 44718	JAMES L. MESSENGER RICHARD J. THOMAS 6 Federal Plaza Central Suite 1300 Youngstown, OH 44503

Farmer, J.

{¶1} On September 1, 2008, appellant, Heineken USA, Inc. was granted a license by the state of Ohio to supply New Castle Brown Ale to beer distributors in Ohio. On October 24, 2008, appellant terminated the franchise of appellee, Esber Beverage Company, a distributor of alcoholic beverages.

{¶2} On November 25, 2008, appellee filed a complaint against appellant, Heineken N.V., and appellant Superior Beverage Group Ltd., requesting temporary and permanent injunctive relief, declaratory judgment, and money damages. An amended complaint was filed on November 26, 2008, adding Central Beverage Group, Ltd. as a party defendant. Appellee claimed the October 24, 2008 notification of termination of the franchise was untimely and therefore unlawful.

{¶3} On November 26, 2008, the trial court issued a temporary restraining order, prohibiting the termination of appellee's franchise. On December 15, 2008, the trial court indefinitely extended the temporary restraining order.

{¶4} On February 23, 2009, appellee voluntarily dismissed Heineken N.V.

{¶5} On June 1, 2009, the parties filed joint stipulations of fact.

{¶6} A bench trial commenced on September 11, 2009. By judgment entry filed September 18, 2009, the trial court granted declaratory judgment in favor of appellee.

{¶7} Appellants filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶8} "THE TRIAL COURT MISINTERPRETED THE OHIO ALCOHOLIC BEVERAGE SALES FRANCHISE ACT BY FAILING TO FIND THAT HUSA'S TERMINATION LETTER WAS TIMELY."

II

{¶9} "THE TRIAL COURT MADE ERRONEOUS FINDINGS OF FACT CONTRADICTED BY THE STIPULATIONS OF THE PARTIES."

III

{¶10} "THE TEMPORARY RESTRAINING ORDER SHOULD NOT HAVE BEEN GRANTED BECAUSE PLAINTIFF PRODUCED NO EVIDENCE OF IRREPARABLE HARM."

IV

{¶11} "HEINEKEN N.V. IS NOT A 'MANUFACTURER' AS DEFINED IN R.C. 1333.82 BECAUSE IT DOES NOT DO BUSINESS IN OHIO."

V

{¶12} "HUSA'S OCTOBER 24, 2008 TERMINATION LETTER WAS TIMELY ISSUED WITHIN 90 DAYS OF ACQUIRING ITS LICENSED (SIC) WITH THE STATE OF OHIO AS HELD BY *SUPERIOR BEVERAGE CO. INC. V. SCHIEFFELIN CO., 2007 U.S. DIST. LEXIS 69572.*"

VI

{¶13} "PLAINTIFF IS JUDICIALLY ESTOPPED FROM ARGUING THAT NOTICE SHOULD HAVE BEEN SENT AFTER APRIL 28, 2008, BECAUSE PLAINTIFF

SIMULTANEOUSLY WAS TAKING THE OPPOSITE POSITION IN ANOTHER STARK COUNTY CASE."

VII

{¶14} "THE TRIAL COURT IMPROPERLY RELIED ON LOUISIANA LAW."

{¶15} Procedurally, the matter before the trial court was Count One of the amended complaint filed on November 26, 2008 and the joint stipulations filed on June 1, 2009. Count One was a prayer for declaratory judgment:

{¶16} "24. Accordingly, Esber seeks a declaration from this Court, pursuant to Ohio Rev. C. § 2721, *et seq.,* and pursuant to other applicable authority, that Defendant Heineken's actions, including, but not limited to, the attempted termination of Esber's franchise and the attempted award to Superior or any other distributor of a franchise to distribute the Brands in Esber's territory, are unlawful and in violation of the Ohio Alcoholic Beverages Franchise Act, Ohio Revised Code Sections 1333.82, et seq., along with an Order enjoining Defendant from terminating the franchise, and directing Defendant to rescind all attempted letters of termination, to maintain and/or reinstate the statutory franchise relationship with Esber, to rescind any offers or awards of franchises to Superior or other distributors for the Brands in Esber's territory, and to continue and/or resume business as usual with Esber."

{¶17} Included in the amended complaint were three other counts requesting relief (intentional interference with a business relationship, promissory estoppel/detrimental reliance, and conspiracy). Counts Two and Four requested monetary damages, compensatory and punitive in excess of $25,000, and Count 3 requested damages as a result of the reliance on the assurances of continued business.

Prior to the filing of the judgment entry appealed from, appellee dismissed without prejudice its claims against Heineken N.V.

{¶18} In its judgment entry filed September 18, 2009, the trial court entered "declaratory judgment in favor of Plaintiff Esber Beverage with respect to Court (sic) One of Plaintiff's Complaint. **This is a final appealable order and there is no just cause for delay.**"

{¶19} The preliminary issue for review is whether this judgment entry is a final appealable order. The Supreme Court of Ohio recently addressed this issue in *Walburn v. Dunlap,* 121 Ohio St. 3d 373, 2009-Ohio-1221. The *Walburn* court at ¶27 found that a declaratory judgment action was a special proceeding for purposes of R.C. 2505.05(B)(2), but the analysis of whether it qualified as a final appealable order does not stop there:

{¶20} "Cases in which an insured seeks both a defense and indemnification are controlled by *Gen. Acc.* This case, however, involves only the insured's entitlement to coverage and does not involve a duty to defend. While a decision regarding the duty to defend immediately affects a substantial right of the insured or insurer, a decision that an insured is entitled to UM coverage, without a determination of damages, does not. Consequently, we hold that an order that declares that an insured is entitled to UM coverage but does not determine damages does not affect a substantial right for purposes of R.C. 2505.02(B)(2). The August 28, 2006 judgment entry in this case did not affect a substantial right made in a special proceeding and, therefore, was not a final order as defined in R.C.2505.02(B)(2)."

{¶21} The *Walburn* court at ¶31 reasoned when other issues relative to damages remain open, the Civ.R. 54(B) language of "no just cause for delay" does not bootstrap the order into a final appealable order:

{¶22} "Because this was not a final order, the Civ.R. 54(B) determination of no just reason for delay was of no effect. See *Gen. Acc.,* 44 Ohio St.3d at 21, 540 N.E.2d 266. 'As a general rule, even where the issue of liability has been determined, but a factual adjudication of relief is unresolved, the finding of liability is not a final appealable order even if Rule 54(B) language was employed.' *Noble v. Colwell* (1989), 44 Ohio St.3d 92, 96, 540 N.E.2d 1381. A trial court's use of such language does not convert an otherwise nonfinal order into a final, appealable order. Id."

{¶23} Similarly, in *State ex rel. New Concept Housing, Inc. v. Metz,* 123 Ohio St.3d 457, 2009-Ohio-5862, ¶3, the Supreme Court of Ohio reiterated the same philosophy:

{¶24} "The trial court's declaratory judgment was a final, appealable order because it affected the substantial rights of the parties, resolved the pertinent issues, and did not contemplate further action. Cf. id.at ¶ 45; see also *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.* (1989), 44 Ohio St.3d 17, 540 N.E.2d 266, paragraph two of the syllabus ('A declaratory judgment action is a special proceeding pursuant to R.C. 2505.02 and, therefore, an order entered therein which affects a substantial right is a final appealable order')."

{¶25} Therefore, in order to review this matter under the above cited authority, we must look at the interrelationship of Count One vis-à-vis the additional counts.

{¶26} As for the issue of the temporary restraining order and its indefinite extension, no appeal was taken from those orders. See, Judgment Entries filed November 26, and December 15, 2008. In the notice of appeal filed October 13, 2009, the judgment entry appealed from was the September 18, 2009 decision on the request for declaratory judgment. Further, the sole issue set for review as listed in appellant's October 13, 2009 docketing statement was "What is the effective date of acquisition of the brands for the purpose of becoming a successor manufacturer pursuant to R.C. 1333.35(C) and related issues." We conclude there is nothing pending on appeal regarding the issuance of the temporary restraining order and its indefinite extension.

{¶27} As for Count Two, intentional interference with a business relationship, appellee specifically prayed for compensatory and punitive damages. This claim was predicated on the dissemination of "false rumors to customers, employees, retailers, business associates, and others in the industry***." See, Amended Complaint at ¶28. The claim for damages is based upon the following averment in ¶30 of the amended complaint:

{¶28} "As a result of these unauthorized and improper activities by Defendants, Esber has sustained, and will continue to sustain, monetary and other damages, including, but not limited to, loss of revenue and profits, loss of customer goodwill, loss of business relationships, attorney fees and litigation expenses, and other damages to be identified."

{¶29} In Count Three, appellee averred that appellants made promises and assurances of continued business and as a result, appellee expended "both time and

money in marketing and promoting" appellants' products. See, Amended Complaint at ¶37.

{¶30} In Count Four, appellee averred a claim for conspiracy to intentionally interfere with appellee's business, resulting in damages.

{¶31} The trial court granted declaratory judgment to appellee, finding appellants had failed in their efforts to terminate appellee's franchise agreement because of an untimely notice pursuant to R.C. 1333.85(D). As a result of this ruling, the issue of damages raised in Count Two remains unresolved and are subject to further litigation. The issues raised in Counts Three and Four are technically resolved by the trial court's ruling. Once the trial court found the termination issue was unlawful, the claims of conspiracy and detrimental reliance were moot.

{¶32} Because the issue of damages raised in Count Two is still viable, we find the trial court's September 18, 2009 judgment entry is not a final appealable order.

{¶33} The appeal is dismissed.

By Farmer, J.

Edwards, P.J. and

Delaney, J. concur.

s/ Sheila G. Farmer

s/ Julie A. Edwards

s/ Patricia A. Delaney

JUDGES

SGF/sg 527

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

ESBER BEVERAGE CO.	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
HEINEKEN USA, INC., ET AL.	:	
Defendants-Appellants	:	CASE NO. 2009CA00258

For the reasons stated in our accompanying Memorandum-Opinion, this appeal is dismissed. Costs to appellants.

s/ Sheila G. Farmer

s/ Julie A. Edwards

s/ Patricia A. Delaney

JUDGES