

[Cite as *Easterwood v. Easterwood*, 2010-Ohio-2149.]

STATE OF OHIO)
)ss:
COUNTY OF MEDINA)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STEPHANIE L. EASTERWOOD

C.A. No. 09CA0043-M

Appellee

v.

KEITH A. EASTERWOOD

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF MEDINA, OHIO
CASE No. 07 DR 0533

Appellant

DECISION AND JOURNAL ENTRY

Dated: May 17, 2010

BELFANCE, Judge.

{¶1} Appellant, Keith Easterwood, appeals from the decision of the Medina County Court of Common Pleas, Domestic Relations Division to disqualify his trial counsel due to counsel’s conflicts of interest. For the reasons set forth below, we affirm in part, and reverse in part.

BACKGROUND

{¶2} On September 19, 2007, Appellee, Stephanie Easterwood (“Wife”) filed a complaint for divorce against Appellant, Keith Easterwood (“Husband”). The trial court has not yet issued a decree of divorce. Throughout the course of the divorce proceedings, Husband has been represented by Attorney Brent English.

{¶3} On May 14 and 15, 2009, the trial court conducted a hearing on temporary orders concerning child and spousal support, and allocation of expenses. In taking testimony with respect to the parties’ finances, the trial court became concerned that Husband’s counsel had

conflicts of interest. Following the hearing, the trial court issued temporary orders. In that journal entry, the trial court also stated that the evidence adduced at the hearing was sufficient to raise a question as to whether Attorney English had a conflict of interest in Husband and Wife's divorce action. The trial court sua sponte scheduled a hearing on June 23, 2009, to explore the issue.

{¶4} It appears that the trial court was concerned about Attorney English's prior representation of Lewis Easterwood, Husband's father, as well as Attorney English's representation of several business entities. Husband is involved in several business entities: Kennah Homes, Inc., Lenwood, Inc. and Kennah Konstruction, LLC. Husband formed Kennah Konstruction, LLC during the pendency of the instant divorce matter. However, Attorney English has not represented that entity in any way.

{¶5} Kennah Homes, Inc. is a closely-held corporation owned by Husband (51%) and Wife (49%). Attorney English represented Husband's father, Lewis Easterwood in a divorce action that concluded in 2008. During the course of Lewis Easterwood's divorce, Kennah Homes placed a mechanic's lien on his home. After the divorce, Attorney English in his capacity as counsel for Lewis Easterwood, drafted the document that released Kennah Homes' \$108,000 lien. According to the trial court, the lien was released without Wife's consent and without proper corporate resolution. At the time of the temporary hearing in this matter, Attorney English was also representing Kennah Homes in an insurance subrogation claim unrelated to the parties' divorce action.

{¶6} Lenwood, Inc. is a closely-held corporation owned by Husband (35%), an unrelated third-party (35%), and Lewis Easterwood (30%). Husband was employed by Lenwood but lost his employment due to a lay-off in June 2008. Attorney English has represented

Lenwood in various commercial disputes over the past fifteen years but does not serve as its general counsel. At the June hearing, Attorney English stated that he has not represented Lenwood regarding personnel matters and was not involved in Lenwood's decision to lay off Husband.

{¶7} In addition to representing Husband in the current divorce, Attorney English has represented the husband on prior matters such as a divorce commenced over fifteen years ago, a collection action and a 1995 traffic matter. He also represents Husband in the foreclosure action on Husband and Wife's marital residence. Attorney English represented Wife in a minor traffic case prior to the parties' marriage in 1997.

{¶8} At the June 23, 2009 hearing, each attorney addressed the court, arguing his analysis of the possible conflicts of interest. No witnesses were presented. One exhibit, consisting of the corporate documents of Kennah Homes, was admitted into evidence to demonstrate that Husband had authority to act on behalf of Kennah Homes without obtaining Wife's approval.

{¶9} The following day, the trial court issued an order finding that Attorney English had a conflict of interest that precluded him from representing Husband in the divorce. The trial court's order also prohibits Attorney English from representing Kennah Homes "in all causes of action unless [Wife] consents[.]" Husband appealed from the order of June 24, 2009.

ASSIGNED ERRORS

{¶10} At the outset, Wife raised an issue concerning the structure of Husband's brief. The rules governing appellate procedure mandate that the appellant's brief must contain a statement of the assignments of error. App.R. 16(A)(3); Loc.R. 7(B)(3). The appellant must then separately argue each assignment of error, including supporting authority and citations to

the record. App.R. 16(A)(7); Loc.R. 7(B)(7). Husband has appropriately identified his assignments of error on page two of the brief. These errors are numbered one through eight. However, in the “Argument” section of his brief, Husband has abandoned the numbering system to identify a single assignment of error with a heading and seven subheadings in which he discusses the alleged errors of the trial court. Thus, Wife is technically correct in pointing out these deficiencies. Notwithstanding, we will address the arguments contained in Husband’s merit brief because they address Husband’s specified assignments of error.

{¶11} Husband argues that the trial court erred when it disqualified Attorney English because: (1) no conflicts of interest exist with respect to his representation of Lewis Easterwood in which he prepared the release of the mechanic’s lien held by Kennah Homes; (2) no conflict of interest exists regarding Attorney English’s representation of Kennah Homes in the subrogation action, or Lenwood; (3) Attorney English is not a necessary witness in the divorce proceeding; and, (4) the trial court did not have jurisdiction to prohibit Attorney English from representing Kennah Homes. Husband further argues that certain findings of fact were not supported by the weight of the evidence, specifically, that the mechanic’s lien was released (1) at the request of Lewis Easterwood for Kennah Homes and (2) without the appropriate corporate resolution.

DISQUALIFICATION AS COUNSEL FOR KENNAH HOMES

{¶12} We first consider whether the trial court committed reversible error in ruling that Attorney English could not represent Kennah Homes in any cause of action without Wife’s consent. Husband has argued that the trial court was without jurisdiction to issue such a ruling.

{¶13} We recognize that the trial court has authority to regulate the proceedings and parties before it, *Carnegie Cos., Inc. v. Summit Properties, Inc.*, 183 Ohio App.3d 770, 2009-

Ohio-4655, at ¶20, quoting *Mentor Lagoons, Inc. v. Rubin* (1987), 31 Ohio St.3d 256, 259, however, that authority does not extend to matters not actually before the court or persons over which the trial court has not obtained jurisdiction.

{¶14} At first glance, it would appear that Kennah Homes is a party to this action and thus the trial court did have jurisdiction over Kennah Homes. On December 12, 2007, the magistrate in the divorce proceeding issued an order in which it stated: “The parties’ company, Kenna (sic) Homes, by agreement of the parties, is added as a defendant party.” However, no further action was taken to bring the corporation into the action. For example, Wife did not amend her complaint to include Kennah Homes as a party defendant. See Civ.R. 3(A), 15(A). Thus, although the magistrate’s order states that Kennah Homes is added as a party defendant, Kennah Homes never actually became a defendant to this action. As such, the trial court did not have jurisdiction over Kennah Homes and therefore it could not dictate Kennah Homes’ choice of counsel. We also note that the trial court disqualified Attorney English from representing Kennah Homes in an unrelated subrogation matter pending in a different court. However, clearly, the trial court had no jurisdiction over that case and hence no authority to regulate the proceedings in another court. Accordingly, we conclude that the trial court erred when it disqualified Attorney English from representing Kennah Homes in the subrogation action and when it generally barred Attorney English from representing Kennah Homes absent Wife’s consent. Husband’s assignment of error with respect to that issue is sustained.

DISQUALIFICATION AS COUNSEL FOR HUSBAND

{¶15} A trial court’s decision to disqualify a litigant’s attorney is a final, appealable order. *Carnegie Cos., Inc.* at ¶17, quoting *Russell v. Mercy Hosp.* (1984), 15 Ohio St.3d 37, syllabus.

{¶16} As noted above, Husband has set forth eight assignments of error. With the exception of our resolution above regarding Kennah Homes, all of the remaining assignments of error require this Court to review the factual findings of the trial court in order to evaluate whether it committed reversible error in disqualifying Attorney English based upon alleged conflicts of interest. Unfortunately, the record on appeal only contains the transcript of the June hearing and does not contain the transcript of the May hearing. The record on appeal must contain the transcripts of proceedings held in the trial court as well as papers and exhibits filed below. App.R. 9(A). The appellant has the duty to ensure that the record on appeal contains any transcripts “necessary for the determination of the appeal[.]” App.R. 10(A). If a transcript is not available, the appellant may submit his statement of the evidence or an agreed statement of the facts and issues that were presented to the trial court. App.R. 9(C), (D). “When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court’s proceedings, and affirm.” *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199.

{¶17} In determining whether the trial court erred by disqualifying Attorney English, we must have all the evidence that was before the trial court upon which it based its decision. The trial court initially became concerned about possible conflicts of interest in light of testimony that was offered during the hearing on May 14 and 15, 2009. The court then conducted the brief, non-evidentiary hearing on June 23, during which the attorneys only presented legal argument. In the judgment entry disqualifying Attorney English, the trial court states that its decision is based on “the stipulations of the parties, the arguments of counsel and review of the trial testimony from the hearing held May 14 and 15, 2009[.]” Although the trial court references

some of the statements of counsel offered during the June hearing, the court also bases its decision on evidence presented at the May hearing.

{¶18} Husband has not provided a transcript of the May hearing, nor availed himself of the alternatives presented in App.R. 9(C) or (D). In the absence of a complete record of the proceedings below that led to the judgment from which Husband has appealed, we must affirm the trial court's ruling to disqualify Attorney English as Husband's counsel with respect to the divorce. *Knapp*, 61 Ohio St.2d at 199.

CONCLUSION

{¶19} This Court affirms the judgment of the Medina County Court of Common Pleas, Domestic Relations Division disqualifying Attorney English from representing Husband in the divorce matter. However, we reverse that portion of the judgment that precluded Attorney English from representing Kennah Homes, Inc.

Judgment affirmed in part,
and reversed in part.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is

instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to both parties.

EVE V. BELFANCE
FOR THE COURT

DICKINSON, P. J.
CONCURS

CARR, J.
DISSENTS, SAYING:

{¶20} I respectfully dissent. I believe that the trial court had personal jurisdiction over Kennah Homes and could, therefore, address the issue of any conflict of interest involving counsel for Kennah Homes.

{¶21} A trial court may render judgment against a defendant who has not been served with process, if the defendant has voluntarily submitted himself to the court's jurisdiction or has otherwise waived the defense of lack of personal jurisdiction. *Maryhew v. Yova* (1984), 11 Ohio St.3d 154, 156-57; *Kennedy v. Kennedy*, 9th Dist. No. 09CA009645, 2010-Ohio-404, at ¶7.

{¶22} In this case, both Husband and Wife stipulated to the addition of Kennah Homes as a party-defendant to facilitate relief in regard to the distribution of marital property. Kennah Homes is a closely held corporation owned solely by Husband and Wife. "A close corporation is [] characterized by an identity of management and ownership." *Gigax v. Repka* (1992), 83 Ohio App.3d 615, 620, citing *Estate of Schroer v. Stamco Supply* (1984), 19 Ohio App.3d 34, 36-37. The business entity strongly resembles a partnership, albeit one which enjoys the advantages of a

corporation. *Id.* at 37. Where all managers/owners of the business have stipulated to the party status of the entity, I believe that the business has submitted to the jurisdiction of the trial court.

{¶23} Moreover, “[a] majority shareholder has a fiduciary duty not to misuse his power by promoting his personal interests at the expense of corporate interests.” *U.S. v. Byrum* (1972), 408 U.S. 125, 137. Because Husband is the majority shareholder in Kennah Homes, I would conclude that the trial court did not err when it disqualified Attorney English from representing Kennah Homes absent Wife’s consent. Furthermore, I believe that the trial court had the authority to disqualify Husband’s counsel from further representation of party-defendant Kennah Homes in any action which impacted on the issues relevant to the divorce action.

APPEARANCES:

BRENT L. ENGLISH, Attorney at Law, for Appellant.

JOSEPH G. STAFFORD and GREGORY J. MOORE, Attorneys at Law, for Appellee.