

[Cite as *MD Acquisition, L.L.C. v. Myers*, 2013-Ohio-3825.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

MD Acquisition, LLC,	:	
	:	
Plaintiff-Appellee/ [Cross-Appellant],	:	
	:	
v.	:	<b>No. 11AP-390</b>
	:	(C.P.C. No. 05CVH-09-10556)
	:	
Martin L. Myers,	:	<b>(REGULAR CALENDAR)</b>
	:	
Defendant-Appellant/ [Cross-Appellee].	:	
	:	
	:	
MD Acquisition, LLC et al,	:	
	:	
Plaintiffs-Appellees,	:	
	:	
v.	:	<b>No. 11AP-412</b>
	:	(C.P.C. No. 05CVH-09-10556)
	:	
Martin L. Myers et al.,	:	<b>(REGULAR CALENDAR)</b>
	:	
Defendants-Appellees,	:	
	:	
(Pet Brands, Inc.,	:	
	:	
Defendant-Appellant.)	:	
	:	

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D E C I S I O N

Rendered on September 5, 2013

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*Squire, Sanders LLP, John R. Gall, Aneca E. Lasley, Heather L. Stutz, and Christopher R. Haas, for appellee MD Acquisition, LLC.*

*Taft Stettinius & Hollister LLP, Stephen C. Fitch, Joseph C. Pickens, and Celia M. Kilgard, for appellant Pet Brands, Inc.*

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APPEALS from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} These consolidated appeals are brought from the same judgment of the Franklin County Court of Common Pleas. Broadly put, the case arises out of the sale of a closely-held business and subsequent violations of the contractual agreements governing that sale.

{¶ 2} Martin Designs, Inc., now insolvent, was in the business of licensing brand names and images for commercial use. In 2003, Martin L. Myers was the sole owner and, the record strongly suggests, the essential creative force and managerial presence in the company. In 2003, Myers negotiated a sale of 70 percent of Martin Designs to MD Acquisition, LLC ("MDA"), a company formed by new investors to undertake the purchase. Myers retained a 25 percent personal ownership stake and reserved 5 percent for two other key Martin Designs employees. In connection with the sale, Myers and MDA executed a stock purchase agreement, a stockholders' agreement, and an executive employment agreement pursuant to which Myers continued as president of Martin Designs after the sale.

{¶ 3} Soon after the sale, the investors in MDA and Martin Designs learned that Myers, while continuing to operate Martin Designs under his employment agreement, had founded and promoted a new company, Pet Brands, Inc., which operated in a related field. They believed that this represented a diversion from Myers' duty to devote his talents to Martin Designs, pursuant to his executive employment agreement, as well as an appropriation of certain business opportunities in direct violation of the purchase agreements governing the sale of Martin Designs.

{¶ 4} This lawsuit began in 2005 with a complaint filed by plaintiffs MDA and Martin Designs naming Myers and Pet Brands as defendants. The complaint specified actions for rescission, breach of contract, and misappropriation of trade secrets against Myers, and claims of tortious interference with contractual relations and unjust enrichment against Pet Brands. In 2007, the court of common pleas granted Pet Brands' motion for judgment on the pleadings in the tortious interference claim. The plaintiffs thereafter dismissed their unjust enrichment claim against Pet Brands, and the action proceeded to trial solely on the plaintiffs' claims against Myers.

{¶ 5} As the case was about to go to the jury Martin Designs moved for a directed verdict against Myers on Count 3 of the complaint, which alleged breach of the sale agreements through Myers' misappropriation of business opportunity. Through the same motion, Martin Designs also asked the court to grant an equitable remedy in the form of a constructive trust over shares of Pet Brands owned by Myers. The court granted the directed verdict as to liability but, after some hesitation, reserved judgment on the request for a constructive trust. The court has yet to explicitly rule on that issue as of the time of appeal.

{¶ 6} The jury then returned verdicts against Myers on all remaining claims, awarding over \$5 million in favor of MDA and \$7 million in favor of Martin Designs. Immediately after the jury verdicts, Martin Designs filed a motion for injunctive relief seeking to freeze the assets of Pet Brands and Myers while awaiting the court's ruling on the proposed constructive trust. Under contested circumstances that present the basis for Pet Brands' appeal in this case, the trial court eventually granted the requested injunction.

{¶ 7} The trial court entered judgment reflecting the partial directed verdict and jury verdicts on March 1, 2011. Myers then filed a motion for judgment notwithstanding the verdict, or in the alternative for a new trial. The trial court rendered judgment denying these motions on April 5, 2011, forming the final appealable order that incorporates the preceding orders in the case and constitutes the basis for this appeal. Timely notices of appeal were filed from this order, which for unknown reasons was not journalized properly by the clerk. The court then re-entered the final order on May 5, 2012, during the pendency of this appeal, with the parties stipulating that this reflects the court's judgment of April 5, 2011. Although the notices of appeal based on the April 5, 2011 unjournalized order were arguably premature under these circumstances, we have gone forward with the appeal under the rule applied in *Am. Chem. Soc. v. Leadscope, Inc.*, 10th Dist. No. 08AP-1026, 2010-Ohio-2725, reversed in part on other grounds, 133 Ohio St.3d 366, 2012-Ohio-4193, causing the premature notice of appeal to relate forward to journalization of the eventual final order.

{¶ 8} Myers filed an appeal from the trial court's judgment under case No. 11AP-390. MDA cross-appealed under the same case number seeking to reverse the trial court's judgment of dismissal in favor of Pet Brands. Pet Brands filed a separate notice of appeal

under case No. 11AP-412, seeking relief from the injunction granted by the trial court. Myers soon thereafter entered personal bankruptcy proceedings, staying all appeals. On October 5, 2011, the bankruptcy trustee voluntarily dismissed Myers' appeal, and the consolidated appeals returned to the active docket upon expiration of the bankruptcy stay. On November 1, 2011, Martin Designs, which itself had filed bankruptcy in 2008, filed a "notice of non-participation" indicating that it would not participate in the appeal, and requested to be removed from the service list.

{¶ 9} After these reductions in participating parties, the present appeal presents two active parties and two issues: defendant-appellant, Pet Brands, contests the trial court's imposition of an injunction intended to preserve the status quo of Pet Brands' assets and ownership, and plaintiff-appellee/cross-appellant, MDA, seeks to reverse the trial court's judgment on the pleadings in favor of Pet Brands on the tortious interference claim. We first address MDA's cross-appeal, which presents the following sole assignment of error:

THE TRIAL COURT ERRED IN ITS DECISION AND ENTRY OF MARCH 15, 2007, WHICH GRANTED JUDGMENT ON THE PLEADINGS AGAINST PLAINTIFF MD ACQUISITION, LLC ON ITS TORTIOUS INTERFERENCE CLAIM AGAINST PET BRANDS, INC.

{¶ 10} MDA brought a tortious interference claim, in parallel with that of Martin Designs, alleging that Pet Brands had procured Myers' breach of the purchase agreements to which MDA was a party, the stock purchase agreement, and the shareholders' agreement. MDA also asserted that it was an intended beneficiary of the employment agreement between Martin Designs and Myers. MDA asserted that Pet Brands could be held liable for the tortious conduct of its promoter and incorporator, Myers, who became chief executive officer, majority shareholder, and a director of Pet Brands, while still a part-owner and employee of Martin Designs.

{¶ 11} The trial court ruled that the tortious interference claim failed as a matter of law and must be dismissed upon the pleadings. The trial court reasoned that the alleged contractual interference occurred prior to Pet Brands' incorporation, and that Pet Brands was merely the product of the breach, rather than the cause of it. MDA now argues on appeal that this was a fundamentally erroneous assessment by the trial court for two

reasons. MDA asserts that the court improperly limited the claim to events occurring before Pet Brands formally came into existence, without acknowledging that the complaint clearly alleged ongoing wrongdoing by Myers and Pet Brands *after* Pet Brands was incorporated. MDA also argues that under well-settled law controlling corporate liability, Pet Brands can be held liable for the actions of its promoters occurring prior to incorporation, relying on cases such as *Illinois Controls, Inc. v. Langham*, 70 Ohio St.3d 512 (1994).

{¶ 12} Pursuant to Civ.R. 12(C), a defendant may file a motion for judgment on the pleadings on the grounds that the plaintiff has failed to state a claim upon which relief can be granted. *Burnside v. Leimbach*, 71 Ohio App.3d 399, 402 (10th Dist.1991). A motion for judgment on the pleadings presents only questions of law and may be granted when the moving party is entitled to judgment as a matter of law, when all pleadings and every reasonable inference to be drawn from the pleadings are liberally construed in a light most favorable to the non-moving party. Civ.R. 12(C); *Anetomang v. OKI Sys. Ltd.*, 10th Dist. No. 10AP-1182, 2012-Ohio-822, ¶ 12. Our review of the trial court's grant or denial of judgment on the pleadings is de novo. *Id.* The trial court should not grant judgment on the pleadings under Civ.R. 12(C) unless, after construing as true all material allegations in the complaint and drawing all reasonable inferences in favor of the non-moving party, the court finds that the plaintiff could prove no set of facts entitling him to relief under the claim. *Whaley v. Franklin Cty. Bd. of Commrs.*, 92 Ohio St.3d 574, 581 (2001).

{¶ 13} In Ohio, a tortious interference claim rests on the following elements: (1) the existence of a contract, (2) the defendant's knowledge of the contract, (3) the defendant's intentional procurement of a breach by one of the contracting parties, (4) lack of justification for procuring the breach, and (5) resulting damages. *Fred Siegel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St.3d 171, 172 (1999); *Kenty v. Transamerica Premium Ins. Co.*, 72 Ohio St.3d 415, 419 (1995).

{¶ 14} The existence of contracts in the present case is not disputed. Paragraph 50 of the complaint alleges that "Pet Brands had knowledge of Myers' contractual relations with Martin Designs and MD Acquisition." Paragraph 51 alleges that "[w]hile working on behalf of Pet Brands, Myers willfully, intentionally, and substantially breached his agreements with Martin Designs and MD Acquisition. Pet Brands, therefore, through

Myers, intentionally procured Myers' willful breaches of his agreements with Martin Designs and MD Acquisition." Paragraph 52 alleges that "Pet Brands' interference with Martin Designs' contractual relations was wrongful and without justification," and paragraph 53 alleges damages devolving from these actions.

{¶ 15} The trial court's decision in this case is premised on the assumption that Pet Brands only came into existence after the breach by Myers, and that Pet Brands could not be liable for events occurring before Pet Brands itself came into being. Because the complaint also includes allegations that Myers' breach was ongoing and continued after the creation of Pet Brands during the period when he worked for both companies, we find that this reasoning does not support the trial court's decision. *See, e.g.*, paragraph 18 of the complaint:

Beginning in 2004, Myers, while still a Management Shareholder of Martin Designs, and unbeknownst to Martin Designs or MD Acquisition, founded a new company, Pet Brands. Upon information and belief, Myers conceived it, formed it, organized it, developed its business plans and pro formas, established its operations in Columbus, Ohio, recruited employees and stockholders for it, arranged and guaranteed its financing, undertook extensive sales activity on its behalf, and has functioned as its de facto or de jure chief executive officer at various times since its conception. Prior to his resignation as an employee of Martin Designs in March 2005, Myers devoted substantial time and effort to the Pet Brands business. Myers' efforts in connection with Pet Brands have involved spending substantial time in Columbus, Ohio.

{¶ 16} While we do not agree with the trial court's basis for its decision, particularly with respect to the post-incorporation acts clearly set forth in the complaint, we nonetheless find that the trial court properly granted judgment on the pleadings in favor of Pet Brands.

{¶ 17} The theory put before us is that Pet Brands, acting through Myers, could induce Myers to breach his own agreements with MDA and Martin Designs. Pet Brands responds that interference with the performance of contract is a tort that can only be committed by a stranger to that contract, that is, that the entity interfering with the contract must not be a party to that contract. *See, e.g., Tiger, Inc. v. Time Warner*

*Entertainment Co., L.P.*, 26 F.Supp.2d 1011, 1019 (N.D. Ohio 1998), citing *Kenty* and Restatement of the Law 2d, Torts, Sections 766 (1979).

{¶ 18} Analysis of who may be a "stranger" to a given contract has been an arduous task for courts both in Ohio and elsewhere when faced with complex contracts and interlocking commercial relationships. *See, e.g., Pasqualetti v. Kia Motors Am., Inc.*, 663 F.Supp.2d 586, 603 (N.D. Ohio 2009); *Parsons & Whittemore Ent. Corp. v. Cello Energy, LLC*, 613 F.Supp.2d 1271 (S.D. Ala. 2009). Based on these cases, had the complaint before us alleged different facts to the extent that procurement of Myers' breach on behalf of Pet Brands were effected by a different agency or actor than Myers himself, we believe that an action for tortious interference against Pet Brands would lie in this case. However, and the precise facts of this case seem to make this a matter of first impression not only in Ohio but in any other jurisdiction, we are asked here to find whether Myers could be the instrumentality of his own breach, that is, while wearing his hat as promoter and manager of Pet Brands, he could induce himself, now wearing his hat as contractual obligor to MDA and Martin Designs, to breach the acquisition contracts. While this argument is far from frivolous, we ultimately do not accept it. We acknowledge that under general principles of agency Myers' acts could be attributed to Pet Brands as his employer, regardless of his other obligations in his personal capacity. Nonetheless, we find that the situation more closely calls for application of the "stranger" rule governing tortious interference cases, and Myers, no matter what hat he wears, cannot be entirely a stranger to the acquisition agreements. We therefore find that the trial court did not err in granting judgment on the pleadings in favor of Pet Brands, and MDA's assignment of error on cross-appeal is overruled.

{¶ 19} We now turn to Pet Brands' assignments of error on appeal:

I. THE TRIAL COURT ERRED IN GRANTING PLAINTIFF MARTIN DESIGNS' FEBRUARY 25, 2011 MOTION FOR INJUNCTIVE RELIEF AGAINST DEFENDANT MYERS.

II. THE TRIAL COURT ERRED IN GRANTING PLAINTIFF MARTIN DESIGNS' JUNE 21, 2011 MOTION FOR ISSUANCE OF SHOW CAUSE ORDER IN CONTEMPT.

{¶ 20} Immediately after the verdicts in favor of plaintiffs, Martin Designs moved in the trial court on February 25, 2011 for injunctive relief "pursuant to Ohio Rule of Civil

Procedure 65 (and/or Delaware Chancery Court Rule 65)." (R. 665.) The motion noted that the court had granted on February 23, 2011 Martin Designs' motion for directed verdict in its complaint for breach of the stockholders agreement by Myers, and pursuant to the terms of that agreement, Martin Designs was entitled to seek imposition of a constructive trust on the common stock of Pet Brands held or owned by Myers. The motion stated that the purpose of the motion was "simply to preserve the status quo with respect to the business operations of Pet Brands until Martin Designs had adequate opportunity to consummate imposition of the constructive trust and to seek imposition of a receiver to manage the affairs of Pet Brands for the benefit of Martin Designs." (R. 665.)

{¶ 21} The alternative reference to Delaware Chancery Court Rules apparently stems from a choice-of-law clause in the stockholders agreement specifying application of Delaware law to its enforcement. In any event, neither the trial court nor the parties raised any significant difference between the two states procedural rules, and the matter proceeded as if under Civ.R. 65.

{¶ 22} The trial court held an oral hearing on the motion on February 25, 2011. Counsel for Pet Brands was present, albeit on extremely short notice. During the course of the hearing, the procedural class of injunction sought (temporary restraining order, preliminary injunction, or permanent injunction) was never expressly defined by either the court or the parties. The trial court, however, did refer at one point to a 14-day duration for the order, and Martin Designs' motion clearly only anticipated an order that would shortly be superseded by the court's later ruling on the proposed constructive trust. Together, these make clear that neither the movant nor the court intended a permanent injunction here.

{¶ 23} At the close of these rather indeterminate proceedings, the trial court eventually signed the equally vague entry as submitted by the movant, Martin Designs. As the matter evolved over time, it would be MDA, rather than Martin Designs, that would seek to enforce the injunction through a motion filed on June 21, 2011, requesting a show cause order.

{¶ 24} We first consider Pet Brands' second assignment of error, which contests the trial court's issuance of a show-cause order for purported violations of the injunction. In Ohio, the general rule for contempt proceedings is that a judgment of contempt



becomes a final appealable order only when there is both a finding of contempt and the imposition of a penalty. *Chain Bike Corp. v. Spoke 'N Wheel, Inc.*, 64 Ohio App.2d 62, 64 (8th Dist.1979); *EMC Mtge. v. Pratt*, 10th Dist. No. 07AP-214, 2007-Ohio-4669, ¶ 5. Pet Brands has not asserted, and the record does not reflect, that a contempt finding ensued from the show cause order or any penalty was imposed by the trial court. The appeal from that order of the trial court is therefore premature and not properly before us. Pet Brands' second assignment of error is overruled.

{¶ 25} Pet Brands' first assignment of error challenges the trial court's grant of injunctive relief. MDA argues on two grounds that this issue is also not properly before us.

{¶ 26} MDA first asserts that the order granting an injunction is not a final appealable order because the trial court has yet to rule upon the underlying request for a constructive trust, and the court's decision in that respect would resolve the need for an injunction. We disagree. All interlocutory orders and decrees are merged into the final judgment, and as such, an appeal from the final judgment brings up all interlocutory rulings so merged with it. *Bard v. Soc. Natl. Bank*, 10th Dist. No. 97APE11-1497 (Sept. 10, 1998). The trial court's April 5, 2011 final judgment incorporates the February 25, 2011 interlocutory order granting an injunction.

{¶ 27} MDA next asserts that subsequent agreements between the parties have resolved the constructive trust issue and the injunction has become moot. This may well be true, but it calls for reference to materials outside the record, and thus outside our permissible review. Moreover, any such agreement has not resulted in an explicit order terminating the injunction, which (depending on what class of injunction the court intended) theoretically remains in force. The issue is not moot.

{¶ 28} Turning to the substance of this assignment of error, Pet Brands asserts that the trial court failed to grant necessary procedural safeguards before granting the injunction. Whether to grant or deny an injunction "is solely within the trial court's discretion and, therefore, a reviewing court should not disturb the judgment of the trial court absent a showing of a clear abuse of discretion." *Garono v. State*, 37 Ohio St.3d 171, 173 (1988), citing *Perkins v. Quaker City*, 165 Ohio St. 120, 125 (1956).

{¶ 29} As stated above, it is not clear what class of injunction was contemplated by the trial court. If the court intended to grant a temporary restraining order, that order would have been effective for no more than 14 days. Civ.R. 65(A). Any error in such case would lie in continuing to enforce the order, rather than in granting it. Since we have no effective enforcement of the order on the part of the trial court, we find that if the trial court intended a temporary restraining order, there is no error currently before us to review.

{¶ 30} Pet Brands further argues that if the court intended a preliminary injunction, due process required an evidentiary hearing and reasonable notice to the opposing party. Pet Brands cites *Johnson v. Morris*, 108 Ohio App.3d 343 (4th Dist.1995) and *Sea Lakes, Inc. v. Sea Lakes Camping, Inc.*, 78 Ohio App.3d 472 (11th Dist.1992) for the proposition that an evidentiary hearing is always required. This court, however, has applied a less absolute requirement:

Civ.R. 65 explicitly addresses both [temporary restraining orders] and preliminary injunctions. Civ.R. 65(A) and (B). Contrary to plaintiff's contentions, "Civ.R. 65 does not require a court to hold a hearing on a TRO." *Ridenour v. Wilkinson*, 10th Dist. No. 07AP-200, 2007-Ohio-5965, ¶ 49, citing Civ.R. 65(A), and *Hohmann, Boukis & Curtis Co., L.P.A. v. Brunn Law Firm Co., L.P.A.* (2000), 138 Ohio App.3d 693, 698-99, 742 N.E.2d 192. Moreover, Civ.R. 65(A) and (B) require a trial court to hold a hearing on a motion for preliminary injunction only if a TRO has been granted. *Id.* Because the trial court properly did not grant plaintiff's [previous request for a] TRO, the trial court was not required to conduct a hearing under Civ.R. 65 on plaintiff's motion for preliminary injunction. *Id.*

*Thomson v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 09AP-782, 2010-Ohio-416, ¶ 29.

{¶ 31} The trial court in our case pointed out at the hearing that in addressing the motion for injunctive relief it would rely on the extensive evidentiary background provided by the just concluded trial on the merits. Under the circumstances, this was not an abuse of discretion. Likewise, although counsel for Pet Brands were given only a few hours notice of the motion and hearing, the issues underlying the matter were well developed at the hearing, and on appeal Pet Brands does not articulate any persuasive argument demonstrating prejudice from the lack of lengthier notice.

{¶ 32} It is clear that the injunctive relief granted by the trial court has persisted long beyond any period contemplated by the court and even the moving party, which in any case has lost interest in the matter. Nonetheless, that duration is not the result of any abuse of discretion by the trial court in granting injunctive relief, but rather the result of intervening appeals, bankruptcy stays, and procedural complexities of the case. On remand after this decision, the trial court will no doubt have the opportunity to reassess the impact of the contested injunction. For the present, we find no abuse of discretion in the trial court's ruling on the motion, and Pet Brands' first assignment of error is overruled.

{¶ 33} In summary, the sole assignment of error of cross-appellant MD Acquisition, LLC is overruled and the judgment of the Franklin County Court of Common Pleas dismissing the tortious interference claim against Pet Brands, Inc. is affirmed. The two assignments of error brought by appellant Pet Brands, Inc. are overruled. The matter will be remanded to the Franklin County Court of Common Pleas for disposition of the remaining issues in the case.

*Judgment affirmed;  
cause remanded.*

BROWN and DORRIAN, JJ., concur.

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