[Cite as *Doctor Doodles v. Ohio Dept. of Health*, 2013-Ohio-2982.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Doctor Doodles,	:	
Appellant-Appellant,	:	No. 12AP-784 (C.P.C. No. 12CV-3339)
v.	:	(REGULAR CALENDAR)
Ohio Department of Health,	:	
Appellee-Appellee.	:	

D E C I S I O N

Rendered on July 9, 2013

The Gearhiser Law Firm, Inc., and *Kurt O. Gearhiser*, for appellant.

Michael DeWine, Attorney General, and *Angela M. Sullivan*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

VUKOVICH, J.

{¶ 1} Appellant-appellant, Doctor Doodles, appeals from a judgment of the Franklin County Court of Common Pleas upholding a prior administrative determination rendered by appellee-appellee, the Ohio Department of Health. Doctor Doodles is the trade name ("doing business as," or "dba") for a public bar located in Montgomery County, Ohio. The business is owned by a corporate entity, G.W. Sheffield Enterprises, Inc. Doctor Doodles is charged with violations of Ohio's Smoke-Free Workplace Act ("Smoke-Free Act"), codified at R.C. Chapter 3794, which prohibits smoking in many public places and places of employment. As the case is now postured, the issue on appeal is not whether the Smoke-Free Act violations occurred on the premises, but whether prosecution of the violations proceeded against the correct legal entity.

{¶ 2} The facts and procedural history of the case are not in dispute. Appellee's delegee, the Public Health Department of Dayton and Montgomery County ("PHDDMC"), initiated the matter with a notification letter addressed to "Doctor Doodles" at the bar's address on Miamisburg-Centerville Road in Dayton, Ohio. This notification letter does not bear a salutation. This letter advised the establishment that PHDDMC received an anonymous tip alleging smoking violations on the premises.

{¶ 3} Based on the anonymous tip and the bar's history of Smoke-Free Act violations, PHDDMC initiated an investigation. A department sanitarian visited the premises and observed violations of the Smoke-Free Act. After announcing his presence, the investigator spoke with the bartender in charge of the establishment on the day in question, Marina McClelland, and she is named on the investigation worksheet as the "proprietor."

{¶ 4} Based on these observed violations, PHDDMC sent a violation letter, again addressed to "Doctor Doodles," detailing the observed violations and consequent fines. The letter also advised of appeal rights. The salutation of this letter reads "Dear Proprietor."

{¶ 5} George Sexton, identifying himself as owner and operator of Doctor Doodles, responded with a letter conveying a formal request for administrative review of the violations. The Ohio Department of Health replied with a notice of administrative review setting the hearing date. This notice is addressed to "Doctor Doodles, George Sexton, Owner/Operator." (Record of Proceedings, at 13; hereinafter "R. __.") Counsel for G.W. Sheffield Enterprises, Inc. responded with a motion for continuance of the hearing previously scheduled for March 4, 2011. Counsel's motion captions the matter as "In Re. G. W. Sheffield Enterprises, Inc. Dba Doctor Doodles," and indicates that counsel had recently been retained by "the permit holder," needed additional time to prepare, and had a conflict on a previously set date. (R. 15.)

{¶ 6} The Ohio Department of Health responded with a letter addressed to "Doctor Doodles George Sexton, Owner/Operator" granting the continuance. (R. 16.)

{¶ 7} All further correspondence in the record is addressed to "George Sexton Doctor Doodles." (R. 16, exhibit a.)

{¶ 8} The matter was heard before a hearing officer on June 9, 2011, conducted pursuant to Ohio Adm.Code Section 3701-52-08. At this hearing, the ownership and responsibility for the business was clarified, albeit only partially, by the testimony of George Sexton. He stated that the owner of the business is G.W. Sheffield Enterprises, Inc., and this name appears on the liquor license. Mr. Sexton testified that he believed that the name on the health department food service license was Doctor Doodles Lounge. Finally, Mr. Sexton testified that G.W. Sheffield Enterprises, Inc. is owned by his wife, Wanda Sexton, but that he runs the day-to-day business.

{¶ 9} The report of the hearing officer is captioned "In the matter of: Doctor Doodles," and notes that the violator appeared represented by counsel. The hearing officer noted that, in correspondence preceding the hearing, Mr. Sexton identified himself as the owner/operator of Doctor Doodles and that most notices were sent to Doctor Doodles and Mr. Sexton at the establishment address. The hearing officer noted that this was the fifth violation for the establishment, but that the first two violations had been assessed against Mr. Sexton as the named violator. The three subsequent violations had been assessed against Doctor Doodles as the named violator. Based on this distinction, the hearing officer concluded that the applicable penalty under the progressive fine structure of Ohio Adm.Code 3701-52-09(A) was that for a third, rather than fifth, violation.

{¶ 10} The director of the Ohio Department of Health approved the hearing officer's recommendation and made a final finding of a violation. Appellant appealed to the Franklin County Court of Common Pleas, which upheld the department's order and rejected appellant's argument that Doctor Doodles, as a mere dba of G.W. Sheffield Enterprises, Inc. the actual permit holder and owner of the bar, could not be held liable for the Smoke-Free Act violation. The common pleas court found no prejudice to appellant from the ambiguity, and noted that all affiliated entities had a full opportunity to litigate and contest the violation. The common pleas court examined the language of the Smoke-Free Act and concluded that the Act allows different persons acting in different capacities to be simultaneously considered as proprietors and therefore responsible for a violation. Although the proceedings had been initiated by naming only Doctor Doodles, the court found that the fine could be imposed against G.W. Sheffield, Inc.

{¶ 11} Appellant has timely appealed and brings the following two assignments of error:

> I. THE COURT BELOW ERRED WHEN IT FOUND THAT THE NOTICES AND VIOLATION LETTERS SENT TO DOCTOR DOODLES CONSTITUTED VALID NOTICES AND VIOLATIONS AGAINST THE CORPORATION, G W SHEFFIELD ENTERPRISES, INC.
>
> II. THE COURT BELOW ERRED WHEN IT IGNORED THE TESTIMONY OF THE WITNESSES FOR PUBLIC HEALTH DAYTON AND MONTGOMERY COUNTY WHICH IDENTIFIED MARINA MCCLELLAND AS THE PROPRIETOR AND STILL FOUND THAT DOCTOR DOODLES WAS THE PROPRIETOR AND RESPONSIBLE PARTY.

{¶ 12} We find that appellant's two assignments of error raise different facets of the same issue: Did the regulatory action in this case go forward against the right party, and thus in a form that comports with procedural due process? We accordingly address both assignments in a single discussion.

{¶ 13} The Smoke-Free Act defines "proprietor" as an "employer, owner, manager, operator, liquor permit holder, or person in charge or control of a public place or place of employment." R.C. 3794.01(G). Appellant argues that, as a mere dba, it cannot be a "proprietor" for purposes of incurring penalties for violations of the Smoke-Free Act. In furtherance of that claim, appellant maintains that the aforementioned statutory definition might be applicable to other actors in this transaction such as: Marina McClelland (the bartender in charge of the premises on the day in question) or G.W. Sheffield Enterprises, Inc. (the permit holder and owner of the business) or Mr. Sexton, who identified himself as owner/operator of the business in his request for administrative review. Appellant concludes that Doctor Doodles, which is essentially nothing more than a name on a sign, can neither receive notice of a violation nor incur the penalty for such a violation. Appellant cites to the Supreme Court of Ohio's decision in *Patterson v. V&M Auto Body*, 63 Ohio St.3d 573, 576 (1992), for the proposition that a dba is not an actual or legal entity, and any judgment rendered against it is void.

{¶ 14} When addressing an administrative appeal brought pursuant to R.C. 119.12, the standard of review for the common pleas court is that it will affirm an agency's order if

it finds "upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law." R.C. 119.12.

> The evidence required by R.C. 119.12 can be defined as follows: (1) "Reliable" evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true. (2) "Probative" evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. (3) "Substantial" evidence is evidence with some weight; it must have importance and value.

(Footnotes deleted.) *Our Place, Inc. v. Ohio Liquor Control Comm.*, 63 Ohio St.3d 570, 571 (1992).

{¶ 15} An agency's findings of fact will be presumed to be correct and deferred to by the reviewing court unless the court determines that "the agency's findings are internally inconsistent, impeached by evidence of a prior inconsistent statement, rest upon improper inferences, or are otherwise unsupportable." *Ohio Historical Soc. v. State Emp. Relations Bd.*, 66 Ohio St.3d 466, 471 (1993). Upon further appeal from the common pleas court to this court, our review is limited to a determination of whether the common pleas court abused its discretion in determining whether the agency's order was supported by reliable, probative, and substantial evidence and was in accordance with law. *Hartzog v. Ohio State Univ.*, 27 Ohio App.3d 214 (10th Dist.1985). The term "abuse of discretion" connotes more than a mere error of judgment or law, it implies an attitude that is arbitrary, unconscionable, or unreasonable. *State v. Adams*, 62 Ohio St.2d 151, 157 (1980). However, on the question of whether the agency's order was in accordance with law, this court's review is plenary and without deference to the conclusions of law reached either by the administrative adjudication or the common pleas court on initial appeal. *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.*, 63 Ohio St.3d 339, 343 (1992).

{¶ 16} We first note that appellant can prove no procedural prejudice from the fact that many of the civil fine letters in this case are addressed to a dba without mention of the proprietor or principal of the business. At a minimum, due process of law requires notice and an opportunity to be heard prior to deprivation of a protected interest. *State ex*

rel. Midwest Pride IV, Inc. v. Pontious, 75 Ohio St.3d 565, 567 (1996). Mr. Sexton's responses to the civil fine letters, his request for administrative review, and his retention of counsel all conclusively demonstrate that the entities behind Doctor Doodles were fully apprised of the proceedings and had every opportunity to defend them.

{¶ 17} With respect to whether an administrative proceeding may go forward against a trade name and thereby give liability to the corporate owner of that trade name, we rely, as did the common pleas court, on *Family Medicine Found., Inc. v. Bright,* 96 Ohio St.3d 183, 2002-Ohio-4034, to support the conclusion that a party may be listed by its fictitious name in a lawsuit. In *Bright,* the plaintiff brought a malpractice claim against the fictitious name under which a medical corporation did business. The parties offered differing interpretations of R.C. 1329.10(C), governing this aspect of fictitious business names: "An action may be commenced or maintained against the user of a trade name or fictitious name whether or not the name has been registered or reported in compliance with section 1329.01 of the Revised Code." The plaintiff read this language for the proposition that naming the dba alone would suffice to pursue a judgment against the owner of a business. The defendant asserted to the contrary that the section permitted only that suit be brought against the "user" of a trade name, i.e., the entity using the fictitious name in business.

{¶ 18} The Supreme Court of Ohio held that the action could be maintained in this form: "[W]e hold that R.C. 1329.10(C) permits a plaintiff to bring suit against a party named only by its fictitious name." *Bright* at ¶ 15. The court noted that if the defendant's interpretation were adopted, subsection (C) would do no more than state the obvious, that a corporation may be sued in its own name. The court further pointed out that the preceding subsection of the statute addressed the capacity of an entity to *bring* suit under a fictitious name, so that the logical conclusion was that subsection (C) provided the complementary governance of the entity's capacity to be sued: "Thus, when read together, subsections (B) and (C) set forth rules relating to an entity's capacity to sue or be sued under its fictitious name." *Id.* at ¶ 9, citing *Frate v. Al–Sol, Inc.*, 131 Ohio App.3d 283, 287 (8th Dist.1999).

{¶ 19} We find the holding in *Bright,* a civil case, all the more binding in a regulatory context. The Smoke-Free Act is to be liberally construed to further its public

health goals. R.C. 3794.04; *Wymsylo v. Bartec, Inc.*, 132 Ohio St.3d 167, 2012-Ohio-2187. Placing greater restriction on regulatory proceedings here that on an ordinary civil case would hinder the liberal application of the Act. Moreover, the Smoke-Free Act is manifestly drawn to allow enforcement officials the flexibility to deal with the multiple permutations of ownership and management that may particularly be found in hospitality business, where the preponderance of violations were sure to arise.

{¶ 20} Again, this is a case in which there is no impact on the proceedings by going forward under the trade name for the bar rather than its corporate owner, principal manager, or other possible statutorily defined "proprietor." Neither the Ohio Department of Health nor the common pleas court was bound by the use of Marina McClelland's name and initial citation as proprietor of Doctor Doodles in the initial stages of paperwork in the matter. The very definition of "proprietor" under the Smoke-Free Act, as defined above, clearly contemplates that more than one person can be defined as a proprietor for purpose of the Smoke-Free Act for any given business, including employees and owners simultaneously. The identification of the employee in charge of the premises on the night of the violation should not control later proceedings against the truly responsible proprietor and, under the Smoke-Free Act, the Ohio Department of Health can clearly choose the most appropriate form of the entity against which to proceed. This case in fact illustrates that no procedural or substantive prejudice devolved upon appellant by allowing the action to go forward in the name by which the business most commonly presents its face to the public. Appellant's assignments of error are overruled.

{¶ 21} Based on the foregoing, we find that appellant's two assignments of error are without merit, and we affirm the judgment of the Franklin County Court of Common Pleas finding that the determination of appellee, Ohio Department of Health, is supported by reliable, probative and substantial evidence and is in accordance with law.

Judgment affirmed.

KLATT, P.J., and SADLER, J., concur.

VUKOVICH, J., of the Seventh Appellate District, sitting by assignment in the Tenth Appellate District.