[Cite as *Wells Fargo Ins. USA Servs., Inc. v. Gingrich*, 2012-Ohio-677.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

WELLS FARGO INSURANCE SERVICES USA, INC.,	:	
	:	CASE NO. CA2011-05-085
Plaintiff-Appellant,	:	O P I N I O N
	:	2/21/2012
- vs -	:	
	:	
MICHAEL P. GINGRICH, et al.,	:	
	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2010-08-3637

Katz, Teller, Brant & Hild, James F. McCarthy III, Laura Hinegardner, 2400 Chemed Center, 255 East Fifth Street, Cincinnati, Ohio 45202, for plaintiff-appellant

Denlinger, Rosenthal & Greenberg, Mark E. Lutz, 425 Walnut Street, Suite 2300, Cincinnati, Ohio 45202, for defendants-appellants, Michael P. Gingrich, Todd A. Smittle, Shirley M. Nixon, Neace Lukens Insurance Agency, LLC, Nease & Associates Insurance Agency of Ohio, Inc.

RINGLAND, J.

{¶ 1} Plaintiff-appellant, Wells Fargo Insurance Services USA, Inc. (Wells Fargo), appeals from a Butler County Court of Common Pleas decision denying its motion for preliminary injunction against defendants-appellees, Michael P. Gingrich, Todd A. Smittle, and Shirley M. Nixon. For the reasons outlined below, we dismiss this appeal for lack of a

final appealable order.

{¶ 2} On August 25, 2010, Gingrich, Smittle, and Nixon resigned from their respective positions at Wells Fargo and immediately began working for Neace Lukens Insurance Agency, LLC, Neace & Associates Insurance Agency of Ohio, Inc. (Neace-Lukens). It is undisputed that Wells Fargo and Neace-Lukens are competitors in the local insurance industry.

{¶ 3} Shortly after their resignations, Wells Fargo brought suit against its three former employees alleging, among other things, that they had breached certain covenants found in their individual employment agreements and that they had misappropriated its trade secrets. Wells Fargo also moved for preliminary injunctive relief seeking to enjoin Gingrich, Smittle, and Nixon from soliciting business from a select group of its customers. After holding a hearing on the matter, the trial court issued an order denying Wells Fargo's request.

{¶ 4} Wells Fargo subsequently appealed from the trial court's decision denying its request for preliminary injunctive relief. However, before the matter was submitted for review, this court requested additional briefing on the issue of whether the trial court's order denying Wells Fargo's request for preliminary injunctive relief was a final appealable order. After a thorough review of the record and without making any determination on the merits of Wells Fargo's single assignment of error raised in its original brief, we find Wells Fargo has not established its right to immediately appeal from the trial court's decision as that order is not a final appealable order.

{¶ 5} A preliminary injunction is a provisional remedy that is considered interlocutory, tentative, and impermanent in nature. *N. Fairfield Baptist Church v. G129, L.L.C.*, 12th Dist. No. CA2009-11-281, 2010-Ohio-2543, ¶ 16; *Quinlivan v. H.E.A.T. Total Facility Solutions, Inc.*, 6th Dist. No. L-10-1058, 2010-Ohio-1603, ¶ 3. As such, an order granting or denying a preliminary injunction does not automatically qualify as a final appealable order. *See*

Empower Aviation, L.L.C. v. Butler Cty. Bd. of Commrs., 185 Ohio App.3d 477, 2009-Ohio-6331, ¶ 9 (1st Dist.). Instead, a trial court's order granting or denying a preliminary injunction is a final appealable order only if it fulfills the two-pronged test set forth in R.C. 2505.02(B)(4). *Freeman Indus. Prods. L.L.C. v. Armor Metal Group Acquisitions, Inc.*, 193 Ohio App.3d 438, 2011-Ohio-1995, ¶ 16 (12th Dist.); *Neamonitis v. Gilmour Academy*, 8th Dist. No. 92452, 2009-Ohio-2023, ¶ 7. Therefore, this court may only consider the trial court's order denying Wells Fargo's request for preliminary injunctive relief if it falls within the confines of R.C. 2505.02(B)(4). *Cleveland Hous. Renewal Project, Inc. v. Wells Fargo Bank N.A.*, 188 Ohio App.3d 36, 2010-Ohio-2351, ¶ 17 (8th Dist.).

{¶ 6} According to R.C. 2505.02(B)(4), an order granting or denying a preliminary injunction is a final appealable order where:

{¶ 7} "(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; [and]

{¶ 8} "(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."

{¶ 9} In applying the two-pronged test, we find the first prong provided for by R.C. 2505.02(B)(4)(a) has been satisfied. The trial court issued an order denying Wells Fargo's request for a preliminary injunction. That order fully determined the action with respect to the provisional remedy and prevented a judgment in favor of Wells Fargo regarding its request for preliminary injunctive relief. *See Hootman v. Zack*, 11th Dist. No. 2007-A-0063, 2007-Ohio-5619, ¶ 14; *Ormet Aluminum Prods. Corp. v. United Steelworkers of Am.*, 7th Dist. Nos. 05-MO-1, 05-MO-2, 05-MO-10 and 05-MO-11, 2006-Ohio-3782, ¶ 27.

{¶ 10} Of more concern, however, is the second prong of R.C. 2505.02(B)(4)(b). In

order to satisfy this prong, Wells Fargo must show that it was "deprived of a meaningful and effective remedy if they cannot appeal now." *E. Cleveland Firefighters, IAFF Local 500 v. E. Cleveland*, 8th Dist. No. 88273, 2007-Ohio-1447, ¶ 4, citing *Deyerle v. Perrysburg*, 6th Dist. No. WD-03-063, 2004-Ohio-4273, ¶ 14. In other words, Wells Fargo must demonstrate that it "would have no adequate remedy from the effects of that interlocutory order on appeal from final judgment." *Empower Aviation*, 185 Ohio App.3d 477, 2009-Ohio-6331 at ¶ 18. In deciding this issue, this court is not to "construe R.C. 2505.02(B)(4)(b) to require the absence of every theoretical remedy in order to find that appellant would be denied a 'meaningful' or 'effective' remedy following final judgment." *Ankrom v. Hageman*, 10th Dist. No. 06AP-735, 2007-Ohio-5092, ¶ 10. This is particularly so when "the court will be unable to fashion a remedy which would replace a potential loss of business goodwill, or repair business relationships with third parties such as creditors and suppliers." *Bob Krihwan Pontiac-GMC Truck, Inc. v. General Motors Corp.*, 141 Ohio App.3d 777, 781 (10th Dist.2001).

{¶ 11} Ohio Courts, including this court, have found the absence of an adequate remedy following a final judgment in cases involving possible trade-secret misappropriation and the request to enforce covenants not to compete.[1] For example, in *Premier Health Care Services, Inc. v. Schneiderman*, 2nd Dist. No. 18795, 2001 WL 1479241 (Aug. 21, 2001), the plaintiffs filed a complaint and a motion for a preliminary injunction against several of their former employees seeking to enforce the non-competition covenants found in their respective employment contracts. *Id*. at *1. In its decision finding the trial court's order was a final

1. We are mindful of this court's decision in *Freeman Indus. Prods., L.L.C. v. Armor Metal Group Acquisitions, Inc.*, 193 Ohio App.3d 438, 2011-Ohio-1995 (12th Dist.) finding, without any analysis, that there was "no question" that the trial court's order denying preliminary injunctive relief was "based on a final, appealable order, given the subject matter involving possible trade-secret misappropriation and the enforceability of employee noncompete clauses." However, that decision should not be interpreted to mean all orders denying preliminary injunctive relief involving such matters are final appealable orders as a matter of law. Instead, whether an order denying preliminary injunctive relief is a final appealable order satisfying the statutory requirements of the two-pronged test found in R.C. 2505.02(B)(4)(a) and (b) in a case involving possible trade-secret misappropriation and the enforceability of employee noncompete clauses should be determined on a case-by-case basis.

appealable order, the Second District Court of Appeals found the plaintiffs would not have a meaningful or effective remedy if they were precluded from immediately appealing because "the court will be unable to fashion a remedy which would replace a potential loss of market share or trade secrets." *Id*. at *3. In so holding, the court found that "[t]he measure of money damages for a loss of market share or for the loss of trade secrets is notoriously difficult to prove, and the likelihood that a plaintiff will have a real, but unprovable, injury is great." *Id*. The court also found that "reversal of the denial of a preliminary injunction after the litigation has been completely adjudicated in the trial court would be ineffective" for a "reversal at the end of the litigation would not remedy damages occurring during the time the injunction should have been in effect." *Id*.

{¶ 12} In addition, in *LCP Holding Co. v. Taylor*, 158 Ohio App.3d 546, 2004-Ohio-5324 (11th Dist.), plaintiff filed a complaint against its former employee seeking a preliminary injunction to enforce the non-competition, nondisclosure, and noninterference covenants found in his security holders agreement. *Id*. at ¶ 5-10. In its decision finding the trial court's order was a final appealable order, the Eleventh District Court of Appeals determined that a reversal following a final judgment would not compensate the plaintiff for damages arising from its potential lost market share, forced competition with a former employee, and possible dissemination of trade secrets. *Id*. at ¶ 28. In so holding, the court, quoting the Second District's decision in *Premier Health*, found that the plaintiff "would essentially be deprived of a remedy because the passage of time would render moot any review sought." *Id*.

{¶ 13} Although factually similar, we find these cases distinguishable for there is simply nothing in the record to indicate money damages would not sufficiently compensate Wells Fargo for any determined loss. *See N. Fairfield Baptist Church*, 2010-Ohio-2543 at 24 (finding denial of preliminary injunction not a final appealable order where defendant failed to prove monetary damages would not sufficiently compensate it for any determined loss); *see*

also Simmons v. Trumbull Cty. Engineer, 11th Dist. No. 2004-T-0016, 2004-Ohio-1663, ¶ 11 (finding denial of temporary restraining order was not a final appealable order as there was no indication that monetary damages would not adequately compensate for any loss).

{¶ 14} Here, unlike the plaintiffs in *Premier Health* and *LCP Holding*, Wells Fargo is only seeking to enjoin Gingrich, Smittle, and Nixon from soliciting business from a limited number of select customers for which they acted as brokers, or, as Wells Fargo stated at the preliminary injunction hearing, "a very specific discreet book of business." In turn, while its managing director did testify that there was no way to quantify its losses for it has "no idea how many of [these customers] they are calling on today" and are unable to determine "what that business will evolve to," the lost revenue resulting from the departure of any one these customers is easily calculable by using a standard industry multiplier. As a result, because any losses to Wells Fargo can be remedied by money damages at the conclusion of the case, so too can any losses that it may incur during the pendency of the case. *See Cooper v. Cleveland Boat Club Ltd. Partnership*, 8th Dist. No. 81995, 2003-Ohio-2874, ¶ 18. Therefore, unlike the plaintiffs in *Premier Health* and *LCP Holding*, we find Wells Fargo has not established its right to immediately appeal from the trial court's order denying its request for a preliminary injunction. See R.C. 2505.02(B)(4). Accordingly, based on the facts and circumstances of this case, we dismiss this appeal for lack of a final appealable order.

{¶ 15} Appeal dismissed.

POWELL, P.J., and YOUNG, J., concur.

Young, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.