[Cite as *Rood, M.D. v. FRJ, Ltd.*, 2011-Ohio-2712.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

RICHARD P. ROOD, M.D.,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2010-L-077**
- vs -	:	
FRJ, LTD, et al.,	:	
Defendants-Appellants.	:	

Civil Appeal from the Court of Common Pleas, Case No. 09 CV 003636.

Judgment: Affirmed.

Ari H. Jaffe and *Jonathan T. Hyman*, Kohrman, Jackson & Krantz, P.L.L., One Cleveland Center, 20th Floor, 1375 East Ninth Street, Cleveland, OH 44114-1793 (For Plaintiff-Appellee).

Maynard A. Buck and *Patrick O. Peters*, Benesch, Friedlander, Coplan & Arnoff, L.L.P., 2300 BP Tower, 200 Public Square, Cleveland, OH 44114-2378 (For Defendants-Appellants).

TIMOTHY P. CANNON, P.J.

{¶1} On November 6, 2009, appellee, Dr. Richard P. Rood, filed a complaint and petition for discovery pursuant to Civ.R. 34(D) and R.C. 2317.48. Appellee sought to obtain discovery from appellants, FRJ, Ltd. and Center for Digestive Health. Appellants now appeal the judgment of the Lake County Court of Common Pleas denying, in part, their motion to dismiss the complaint and petition for discovery.

{¶2} Appellants filed a motion to dismiss appellee's complaint pursuant to Civ.R. 12(B)(6). Appellants also sought an award of costs and attorney's fees. In said motion, appellants asserted (1) that appellee's request for pre-litigation discovery did not comply with R.C. 2317.48 and (2) that the discovery sought exceeded the scope of R.C. 2317.48, as that statute only allows pre-litigation discovery to the extent necessary to discover facts necessary to plead a cause of action. Appellants also argued that appellee did not comply with the requirements of Civ.R. 34(D).

{¶3} Appellee, in his brief in opposition to appellants' motion to dismiss, asserted that he had properly pled a claim for pre-litigation discovery under Civ.R. 34(D).

{¶4} Appellants filed a reply brief.

{¶5} In a June 23, 2010 judgment entry, the trial court granted in part, and denied in part, appellants' motion to dismiss and motion for sanctions. The trial court dismissed a portion of count one of appellee's complaint seeking pre-suit discovery pursuant to R.C. 2317.48, as appellee did not seek answers to interrogatories in this action. The trial court also dismissed a portion of count one of appellee's complaint seeking discovery of attorney-client privileged documents under Civ.R. 34(D). The court denied appellants' motion to dismiss that part of the complaint seeking the production of non-privileged documents and for sanctions against appellee, pursuant to R.C. 2323.51.

{¶6} Appellants filed a timely notice of appeal and allege the following assignment of error:

{¶7} "The trial court committed prejudicial error in granting Plaintiff-Appellee's, Richard P. Rood's, complaint and petition for discovery in that it ordered Defendants-Appellants, FRJ, Ltd. and Center for Digestive Health, Inc., to provide eighteen (18) categories of documents to Plaintiff-Appellee when (a) the discovery is not necessary to ascertain the identity of potentially adverse parties; and (b) Plaintiff-Appellee provided no indication of why he cannot bring his suit without the discovery."

{¶8} At the outset, this court must first determine whether it has jurisdiction to consider this appeal. As a general rule, other than those orders that deal with discovery of privileged matters, discovery orders are considered interlocutory and therefore not final and appealable orders. See *Legg v. Hallet*, 10th Dist. No. 07AP-170, 2007-Ohio-6595, at ¶16.

{¶9} Appellate courts have jurisdiction to "review, affirm, modify, set aside or reverse judgments or final orders." R.C. 2501.02. An order of the trial court is final and appealable only if the requirements of R.C. 2505.02 are satisfied.

{¶10} The Ninth Appellate District has concluded that, "in the context of a statutory action for discovery, a trial court order compelling provision of the requested discovery determines the action and prevents judgment in favor of the party contesting discoverability." *Natl. City Bank, Northeast v. Amedia* (1997), 118 Ohio App.3d 542, 545-546. See *Cerasuolo v. Goodyear Tire & Rubber Co.* (Apr. 5, 1989), 9th Dist. No. 13864, 1989 Ohio App. LEXIS 1241, *2. See, also, *Lieberman v. Screen Mach. Adver. Specialties & Screen Print Design* (Feb. 4, 1997), 10th Dist. No. 96APE05-665, 1997 Ohio App. LEXIS 410, *8.

{¶11} "Thus, an order granting prelitigation discovery pursuant to R.C. 2317.48 and/or Civ.R. 34(D) is a final appealable order of the first category as defined in R.C. 2505.02." Id. That is, "[a]n order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is *** [a]n order that affects a substantial right in an action that in effect determines the action and prevents a judgment[.]" R.C. 2505.02(B)(1). Finding that this court has jurisdiction to entertain the instant appeal, we now address its merits.

{¶12} This court reviews discovery issues under an abuse of discretion standard. *Baker v. Cooper Farms Cooked Meats*, 3d. Dist. No. 15-09-03, 2009-Ohio-3320, at ¶7. (Citations omitted.) An abuse of discretion is the trial court's "failure to exercise sound, reasonable, and legal decision-making." *State v. Beechler*, 2d. Dist. No. 09-CA-54, 2010-Ohio-1900, at ¶62, quoting Black's Law Dictionary (8 Ed.Rev.2004) 11.

{¶13} Complaints or petitions for discovery are governed by R.C. 2317.48 and Civ.R. 34(D). R.C. 2317.48 states:

{¶14} "When a person claiming to have a cause of action or a defense to an action commenced against him, without the discovery of a fact from the adverse party, is unable to file his complaint or answer, he may bring an action for discovery, setting forth in his complaint in the action for discovery the necessity and the grounds for the action, with any interrogatories relating to the subject matter of the discovery that are necessary to procure the discovery sought. Unless a motion to dismiss the action is filed under Civil Rule 12, the complaint shall be fully and directly answered under oath

by the defendant. Upon the final disposition of the action, the costs of the action shall be taxed in the manner the court deems equitable."

{¶15} The Supreme Court of Ohio has limited the application of R.C. 2317.48, allowing an action for discovery pursuant to this statute to only interrogatories "specifically concerning the facts necessary to the complaint or answer and [the interrogatories] are to be submitted only to the potentially adverse party to the contemplated lawsuit." *Poulos v. Parker Sweeper Co.* (1989), 44 Ohio St.3d 124.

{¶16} Therefore, "[a]n action for discovery is to be used *only to uncover facts necessary for pleading, not to gather proof to support a claim or to determine whether a cause of action exists*. *** R.C. 2317.48 'occupies a small niche between an unacceptable "fishing expedition" and a short and plain statement of a complaint or defense filed pursuant to the Civil Rules.' *** In other words, R.C. 2317.48 'provide[s] a "satisfactory middle course" for litigants who require additional facts in order to sufficiently file a valid complaint, but who already have enough factual basis for their assertions that the discovery process would not be turned into a "fishing expedition."' ***." (Emphasis added and internal citations omitted.) *Baker v. Cooper Farms Cooked Meats*, 2009-Ohio-3320, at ¶11.

{¶17} Civ.R. 34(D), which governs pre-suit discovery, "was promulgated in 1994 specifically in response to Ohio Supreme Court's interpretation of R.C. 2317.48 in [*Poulos v. Parker Sweeper Co.* (1989), 44 Ohio St.3d 124]." *Benner v. Walker Ambulance Co.* (1997), 118 Ohio App.3d 341, 343.

{¶18} Civ.R. 34(D) sets forth the requirements which must be met in order for a litigant to prevail in an action for discovery filed prior to the filing of an action, stating:

{¶19} "(1) Subject to the scope of discovery provisions of Civ.R. 26(B) and 45(F), a person who claims to have a *potential cause of action* may file a petition to obtain discovery as provided in this rule. Prior to filing a petition for discovery, the person seeking discovery shall make reasonable efforts to obtain voluntarily the information from the person from whom the discovery is sought. The petition shall be captioned in the name of the person seeking discovery and be filed in the court of common pleas in the county in which the person from whom the discovery is sought resides, the person's principal place of business is located, or the potential action may be filed. The petition shall include all of the following:

{¶20} "(a) A statement of the subject matter of the *petitioner's potential cause of action* and the petitioner's interest in the *potential cause of action*;

{¶21} "(b) A statement of the efforts made by the petitioner to obtain voluntarily the information from the person from whom the discovery is sought;

{¶22} "(c) A statement or description of the information sought to be discovered with reasonable particularity;

{¶23} "(d) The names and addresses, if known, of any person the petitioner expects will be an adverse party in the *potential action*;

{¶24} "(e) A request that the court issue an order authorizing the petitioner to obtain the discovery.

{¶25} "(2) The petition shall be served upon the person from whom discovery is sought and, if known, any person the petitioner expects will be an adverse party in the *potential action*, by one of the methods provided in these rules for service of summons.

{¶26} "(3) The court shall issue an order authorizing the petitioner to obtain the requested discovery if the court finds all of the following:

{¶27} "(a) The discovery is necessary to ascertain the identity of a *potential adverse party*;

{¶28} "(b) The petitioner is otherwise unable to bring the contemplated action;

{¶29} "(c) The petitioner made reasonable efforts to obtain voluntarily the information from the person from whom the discovery is sought." (Emphasis added.)

{¶30} Reading the plain language of the statute and the civil rule, it is clear there are four important distinctions. First, the statute provides for discovery by use of interrogatories, while the civil rule provides for the production of documents. Second, while the statute may be employed if the information is needed for a complaint *or* an answer, the civil rule is limited to use by the party filing a claim. Third, the statute limits the action to discovery of *facts* necessary to *determine a cause of action* or to file an answer. On the other hand, the civil rule limits the action to discovery of *identification of proper parties to include* in a cause of action. And, fourth, the statute limits its application only to the potentially adverse party to the contemplated lawsuit, yet the civil rule allows a party to obtain discovery from a person who may not be named as a defendant in the action.

{¶31} Appellants argue that the trial court erred in denying in part the motion to dismiss because the requested discovery was not necessary to ascertain the identity of a potentially adverse party nor was appellee unable to plead a cause of action without the requested information.

{¶32} As previously noted, appellee has not sought answers to interrogatories and, consequently, R.C. 2317.48 is not at issue in the instant appeal. Further, we recognize that appellants did not appeal the trial court's finding that appellee made "attempts to obtain the requested discovery prior to bringing the instant case," as required by Civ.R. 34(D)(3)(c). This court must therefore determine whether appellee met the criteria to obtain pre-filing production of documents, as outlined in Civ.R. 34(D)(3)(a)-(b).

{¶33} First, appellants maintain that the discovery requested is not necessary to ascertain the identity of any party, as required by Civ.R. 34(D)(3)(a). Appellants assert that a review of appellee's complaint reveals that appellee is aware of all possible parties, namely FRJ, Ltd. and the Center for Digestive Health, as well as their respective shareholders and members.

{¶34} As stated in the Staff Notes to Civ.R. 34(D), "[t]he 1993 amendment added new division (D), which provides a method whereby a person, with court approval, may compel limited discovery before filing a suit *in an effort to determine the identity of a potential adverse party*. *** The amended rule *** promotes efficiency, avoids the joining of unnecessary defendants, and reduces the time and expense of identifying those parties who may ultimately be liable for damages." (Emphasis added.)

{¶35} A review of appellee's complaint reveals that, although he names the aforementioned parties, he also claims that without the requested discovery, he is unable to ascertain the identity of other individuals against whom to bring a claim. Further, it is clear that the agreements between the parties establish the methods of computing the valuation of appellee's interest in the event of termination. While

appellee asserts that he has claims against the two entities, he also asserts he has a claim or claims against an individual, not yet known to appellee. The trial court correctly noted appellee needs to obtain the specific discovery requests, stating the complaint "alleges that the discovery is necessary to ascertain, at least in part, the identity of the potential defendant." We therefore determine that, contrary to appellants' assertion, appellee demonstrated that the discovery is necessary to ascertain the identity of a potential adverse party.

{¶36} Second, appellants argue that appellee failed to establish that he could not bring an action absent that information sought. Civ.R. 34(D)(3)(b). Appellants state that this rule is not to be utilized to conduct a fishing expedition in search of a claim. Instead, any cause of action must be known to the petitioner at the time the action is filed.

{¶37} In *Benner*, supra, the Sixth Appellate District stated that, although the civil rule allows discovery to ascertain the identity of a potentially adverse party, it is appropriate to use Civ.R. 34 to discover facts that would help a party determine if it "has a valid cause of action against a known adverse party." We do not interpret the civil rule that broadly.

{¶38} There are repeated references in the civil rule to *potential* actions. However, it is clear from the Staff Notes that the cause of action is only "potential" in the sense that it has not yet been filed. Under the civil rule, there must be a threshold *identification* of a known cause of action for the petitioner to proceed.

{¶39} In his complaint, appellee alleges that he believes in good faith that he has the following claims: breach of fiduciary duty, breach of contract, breach of the FRJ, Ltd.

operating agreement, and fraud. Appellee has set forth five potential causes of action that he believes to be in existence. Finding that appellee met the criteria of Civ.R. 53(D)(3)(b), the trial court stated that, "inasmuch as [appellee] claims that he may have a potential claim for fraud, which must be pled with particularity, the Court finds that [appellee] cannot bring at least one of his potential claims without the requested discovery." Contrary to appellants' assertion, it does not appear appellee is engaging in a fishing expedition. Appellee is utilizing Civ.R. 34(D) to obtain discovery necessary to determine which individuals are the proper defendants in the causes of action which he already believes to exist. The fact that the requested discovery may lead to discovery of other causes of action does not justify denial of the petition. Given our deferential standard of review, we cannot say the trial court abused its discretion in granting the petition and ordering production of the requested documents.

{¶40} Appellants' assignment of error is without merit.

{¶41} Based on the opinion of this court, the judgment of the Lake County Court of Common Pleas is hereby affirmed.

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.