

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
LUCAS COUNTY

Michael Cooper

Court of Appeals No. L-13-1172

Appellee

Trial Court No. CVF-12-04657

v.

Brenton P. Ryan

**DECISION AND JUDGMENT**

Appellant

Decided: January 31, 2014

\* \* \* \* \*

Alan D. Mikesell, for appellee.

Barry E. Savage, for appellant.

\* \* \* \* \*

**SINGER, J.**

{¶ 1} This is an appeal from a judgment of the Toledo Municipal Court which granted summary judgment to appellee, Michael Cooper, in a breach of contract action. For the reasons set forth below, this court affirms the judgment of the trial court in part, and reverses in part.

{¶ 2} On March 17, 2010, appellant, Brenton Ryan, and appellee entered into an operating agreement to form a limited liability company called Cor Pac, LLC (“LLC”). The business involved the sale of packaging materials to companies in Ohio and Michigan. The parties are the only two members of the LLC.

{¶ 3} On March 14, 2012, appellee filed suit against appellant alleging that appellant had wrongfully withheld profits from the LLC in violation of the operating agreement. Specifically, appellee alleged that appellant entered into a sales contract with an established customer of the LLC and then failed to pay the proceeds of the contract to the LLC, as required by the parties’ operating agreement. The agreement requires proceeds to be paid to the LLC first for payment of operating expenses, and then, profits are to be allocated to the members.

{¶ 4} Both parties filed motions for summary judgment, and on June 28, 2013, appellee’s motion was granted. Appellant now appeals setting forth the following assignments of error:

I. The trial court committed error when it failed to dismiss the complaint upon the motion to dismiss filed by the defendant.

II. The trial court committed error as the judgment entry of June 28, 2013 did not comply with ORC 1705.52.

III. The trial court committed error where it made statements which conflict with the applicable law and do not support its decision.

IV. Implicit in the trial court's decision is that there is some type of duty statutory or otherwise for which the defendant is obligated which is totally erroneous.

{¶ 5} In his first assignment of error, appellant contends that the court erred in denying his motion to dismiss the original complaint. In his motion, appellant argued that it failed to state a claim upon which relief could be granted.

{¶ 6} We review a ruling on a Civ.R. 12(B)(6) motion to dismiss under a de novo standard of review. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004–Ohio–4362, 814 N.E.2d 44, ¶ 5. In our review, we must accept the factual allegations in the complaint as true and make all reasonable inferences in favor of the non-moving party. *Maitland v. Ford Motor Co.*, 103 Ohio St.3d 463, 2004–Ohio–5717, 816 N.E.2d 1061, ¶ 11. The motion should be granted when it is beyond doubt from the complaint that the plaintiff cannot prove a set of facts entitling him to recover. *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 2006–Ohio–2625, 849 N.E.2d 268, ¶ 11, citing *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 327 N.E.2d 753 (1975), syllabus.

{¶ 7} In support of his motion, appellant cited R.C. 1705.49 and R.C. 1705.51 which state:

A member of a limited liability company in which the management is not reserved to its members may commence an action on behalf of the company to recover a judgment in its favor if the managers of the company

with authority to commence the action have refused to do so or if an effort to cause those managers to commence the action is not likely to succeed.

R.C. 1705.49.

In a derivative action commenced pursuant to section 1705.49 of the Revised Code, the complaint shall set forth with particularity the effort of the plaintiff to secure commencement of the action by the managers or the reasons for not making the effort. R.C. 1705.51.

{¶ 8} Appellant contends that appellee should have brought this action on behalf of the company and that appellee failed to state with particularity his effort “to secure commencement of the action by the managers or the reasons for not making the effort.”

{¶ 9} In his complaint, appellant plainly asserted that:

[T]he terms of the operating agreement require the proceeds to be paid to the LLC for first payment of operating expenses, and thereafter net profits to be allocated among the members.” \* \* \* “Despite demand having been made, [appellant] has refused or failed to pay over to the LLC the net proceeds as provided in the parties’ agreement.

{¶ 10} Based on the above language, it is clear that appellee is seeking recovery on behalf of the LLC. Moreover, appellant and appellee are the only two members of the LLC, we find R.C. 1705.51 inapplicable to this dispute as there are no other members to consult with regarding the commencement of this action. Accordingly, appellant’s first assignment of error is found not well-taken.

{¶ 11} In his second assignment of error, appellant contends that the court's judgment entry, awarding appellee \$11,930.08 plus costs and interest, without specifically allocating the money, did not comply with R.C. 1705.52 which states:

If a derivative action commenced pursuant to section 1705.49 of the Revised Code is successful in whole or in part or if anything is received by the plaintiff as a result of a judgment, compromise, or settlement of the action or a claim in the action, the court may award the plaintiff reasonable expenses, including reasonable attorney's fees, *and shall direct* him to remit to the company the remainder of the proceeds received by him.

(Emphasis added.)

{¶ 12} The court's judgment entry in this case merely grants appellee judgment in the amount of \$11,930.08 plus costs and interest without directing that the proceeds be remitted to the company in compliance with R.C. 1705.52. Accordingly, appellant's second assignment of error is found well-taken.

{¶ 13} In his next two assignments of error, appellant contends that the court erred in granting appellee summary judgment.

{¶ 14} The appellate court reviews the grant of summary judgment under a de novo standard of review. *Doe v. Shaffer*, 90 Ohio St.3d 388, 390, 738 N.E.2d 1243 (2000), citing *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Applying the requirements of Civ.R. 56(C), we uphold summary judgment when it is clear:

(1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co., Inc.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

{¶ 15} Appellant does not dispute the fact that he facilitated a sales transaction with an established customer of the LLC, unbeknownst to appellee, while the operating agreement was still in effect. Appellant does not dispute the fact that he initially lied to appellee about conducting the transaction. Nor does he dispute the fact that he kept the proceeds of the sale for himself, in violation of the operating agreement. He now claims, however, that he was justified in doing so because the LLC was going broke. Moreover, he points out that the operating agreement did not contain a non-compete clause. While it is true that the agreement did not contain a non-compete clause, the agreement did not authorize appellant to intentionally withhold profits from the LLC.

{¶ 16} We agree with the trial court in this case that the parties, in their motions for summary judgment, failed to present alternative or disputed facts regarding appellant's breach of the operating agreement. Accordingly, the court did not error in granting summary judgment to appellee. Appellant's third and fourth assignments of error are found not well-taken.

{¶ 17} Accordingly, the judgment of the Toledo Municipal Court is affirmed in part, and reversed in part. This matter is remanded to the trial court for the limited purpose of amending the judgment entry in compliance with R.C. 1705.52. Appellant and appellee are ordered to split the costs of this appeal equally pursuant to App.R. 24.

Judgment affirmed, in part,  
and reversed, in part.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

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JUDGE

Arlene Singer, J.

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JUDGE

Stephen A. Yarbrough, P.J.  
CONCUR.

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JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <a href="http://www.sconet.state.oh.us/rod/newpdf/?source=6">http://www.sconet.state.oh.us/rod/newpdf/?source=6</a>.</p>
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