[Cite as *Midwest Terminals of Toledo Internatl. v. Brown*, 2015-Ohio-2100.]

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

Midwest Terminals of Toledo International, Inc.

Appellant

v.

Otis Brown

Appellee

Court of Appeals No. L-14-1247

Trial Court No. CI0201402971

DECISION AND JUDGMENT

Decided: May 29, 2015

* * * * *

Ronald L. Mason and Aaron T. Tulencik, for appellant.

Donato Iorio and Edward J. Stechschulte, for appellee.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} This is an appeal from an order of the Lucas County Court of Common Pleas granting appellee's Civ.R. 12(B)(1) motion to dismiss appellant's complaint for tortious interference with a business relationship. We affirm.

A. Facts and Procedural History

{¶ 2} This case revolves around appellant, Midwest Terminals of Toledo International, Inc., and appellee, Otis Brown. Appellee was a former employee of appellant and also served as president of the International Longshoremen's Association, Local 1982 ("Local 1982") at the time of the dispute. Appellant and Local 1982 entered into a collective bargaining agreement and agreed to an accompanying safety handbook in January 2006. The collective bargaining agreement has an evergreen clause which allows the agreement to renew yearly unless one of the parties gives written notice of its intent to end the agreement. Appellant claims it ended the agreement in 2012.

{¶ 3} According to the collective bargaining agreement and the safety handbook, members of Local 1982 were required to attend monthly safety meetings. In early 2014, appellee ordered members of Local 1982 to refrain from attending these meetings. Due to his order, members of Local 1982 missed the safety meetings in March, April, and June of 2014. Despite maintaining the collective bargaining agreement has expired, appellant still asserts members are required to still attend the contractually required safety meetings.

{¶ 4} Appellant filed a complaint charging appellee with tortious interference with a business relationship between appellant and Local 1982 in June 2014. In its complaint, appellant claims the collective bargaining agreement established a business relationship between the parties, which appellee interfered with when he gave the order to refrain

from attending the meetings. Appellant attached the collective bargaining agreement and the safety handbook in support of its complaint.

{¶ 5} Appellee filed a Civ.R. 12(B)(1) motion to dismiss for lack of subject matter claiming appellant's claim was preempted by the National Labor Relations Act ("NLRA") and the Labor Management Relations Act ("LMRA"). Appellee also argued the claim should be dismissed because appellant failed to exhaust the grievance procedure in the collective bargaining agreement. On October 20, 2014, the trial court granted the motion and dismissed the complaint.

B. Assignment of Error

{¶ 6} Appellant raises one assignment of error for our review:

> The trial court erred in holding appellant's complaint for tortious interference with a business relationship against appellee was preempted by federal law, therefore granting appellee's Civ.R. 12(b)(1) Motion to Dismiss.

II. Analysis

{¶ 7} Appellant separates his assignment of error into three issues which are: (1) preemption under the NLRA, (2) preemption by the LMRA, and (3) the failure of appellant to follow the arbitration procedure in the collective bargaining agreement.

{¶ 8} We uphold the findings of the trial court. The claim for tortious interference with a business relationship is preempted by federal law as appellee's actions are either arguably protected under §7 or conversely arguably prohibited under §8 of the NLRA.

A. Standard of Review

{¶ 9} A Civ.R. 12(B)(1) motion allows a trial court to dismiss a complaint when the trial court lacks subject-matter jurisdiction at the time the complaint was filed. The issue under Civ.R. 12(B)(1) is "whether any cause of action cognizable by the forum has been raised in the complaint." *State ex rel. Bush v. Spurlock*, 42 Ohio St.3d 77, 80, 537 N.E.2d 641 (1989), citing *Avco Fin. Servs. Loan, Inc. v. Hale*, 36 Ohio App.3d, 65, 67, 520 N.E.2d 1278 (10th Dist.1987). Appellate courts review a decision to dismiss under such a motion de novo, employing the same standard as the trial court. *Howard v. Supreme Court of Ohio*, 10th Dist. Franklin Nos. 04AP-1093, 04AP-1272, 2005-Ohio-2130, ¶ 6, citing *Kramer v. Installations Unlimited, Inc.*, 147 Ohio App.3d 350, 352, 170 N.E.2d 632 (5th Dist.2002).

B. Preemption Under the NLRA

{¶ 10} We find appellant's claim is preempted by the NLRA. Therefore, we hold the trial court correctly dismissed appellant's claims for lack of subject-matter jurisdiction.

{¶ 11} The NLRA does not have an express preemption requirement. *J.A. Cronson Co. v. J.A. Guy, Inc.*, 81 Ohio St.3d 346, 350, 691 N.E.2d 655 (1998). However, where Congress has not been explicitly clear on whether preemption applies, "courts sustain local regulation 'unless it conflicts with federal law or would frustrate the federal scheme, * * *.'" *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209, 105 S.Ct.

1904, 85 L.Ed.2d 206 (1985), quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504, 98 S.Ct. 1185, 55 L.Ed.2d 443 (1978).

{¶ 12} To determine whether a complaint is preempted by the NLRA, a court must first determine whether the action is arguably either protected under §7 or arguably prohibited under §8 of the act. *Local 926, Internatl. Union of Operating Engineers, AFL-CIO v. Jones*, 460 U.S. 669, 676, 103 S.Ct. 1453, 75 L.Ed.2d 368 (1983), citing *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon*, 369 U.S. 236, 245, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959). "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by §7 of the National Labor Relations Act or constitute an unfair labor practice under §8, due regard for the federal enactment requires that the state jurisdiction must yield." *Garmon* at 244. Preemption may also apply to laws of general applicability when invoked in connection with a labor dispute. *Sears, Roebuck and Co. v. San Diego Cty. Dist. Council of Carpenters*, 436 U.S. 180, 193, 98 S.Ct. 1745, 56 L.Ed.2d 209 (1978). If the conduct at issue is arguably protected or prohibited under the act, the cause of action is generally preempted. *Jones* at 676, citing *Farmer v. United Brotherhood of Carpenters and Joiners of Am., Local 25*, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977). However, the guidelines for preemption found in *Garmon* are not to be applied "in a literal, mechanical fashion." *Jones* at 676, citing *Sears* at 187-190. The main issue to be determined is whether the cause of action is identical or distinctly different from the cause of action which would be presented before the National Labor Relations Board ("Board"). *Sears* at 197. In other

words, if both causes of action require proving the "same crucial element," then the cause of action will be preempted. *Jones* at 682.

{¶ 13} Exceptions to preemption requirements do exist in limited circumstances. One exception exists when the conduct at issue is "only a peripheral concern" to the NLRA. *Id*. at 676, citing *Garmon* at 243-244. Another allows the case to be held in state court if the cause of action is "deeply rooted in local feeling and responsibility." *Id*. A cause of action is deeply rooted in local feeling and responsibility when the importance of the cause of action to the state in protecting its citizens outweighs any potential harm to the regulatory scheme established by Congress. *Id*. at 676, citing *Sears* at 188-189 and *Farmer* at 297. Finally, an exception exists when Congress has failed to give clear guidance on who should preside over the cause of action. *Id*. at 676, citing *Garmon* at 243-244.

{¶ 14} Here, the actions of appellee are arguably protected under §7 of the NLRA. The act protects employees' rights to "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, * * *." 29 U.S.C. 157. The Ninth Circuit described "concerted activities" as activities that are engaged in on behalf of other employees, though the employees are not required to combine in any sort of way. *N.L.R.B. v. Mike Yurosek & Son, Inc.*, 53 F.3d 261 (9th Cir.1995), citing *Pacific Electricord Co. v. N.L.R.B.*, 361 F.2d 310, 310 (9th Cir.1966). The court held "If 'a single employee, acting alone, participates

in an integral aspect of a collective process,' the activity may nonetheless be considered 'concerted' for purposes of the Act." *Id.*, quoting *N.L.R.B. v. City Disposal Sys., Inc.*, 465 U.S. 822, 835, 104 S.Ct. 1505, 79 L.Ed.2d 839 (1984). Though appellee acted individually in making his order, he participated in an integral part of the process of negotiation when he ordered members of the union to allegedly break the collective bargaining agreement. Appellee's order "may be fairly assumed" to be "other concerted activities," because this type of organized denial could be seen as some form of a bargaining tool.

{¶ 15} Alternatively, appellee's actions are arguably prohibited under §8 of the NLRA. Section 8(b) prohibits a labor organization or its agents from restraining or coercing employees from exercising their rights under §7. 29 U.S.C. 158(b)(3). Appellee's actions arguably fall under the prohibitions in §8(b)(3) which prohibits a labor organization or its agents "to refuse to bargain collectively with an employer," 29 U.S.C. §158(b)(3). Appellee's order to not attend the safety meetings could be seen as an attempt to change the policies between the two parties unilaterally. This could be construed as an unfair labor practice and therefore prohibited under §8 of the NLRA. Therefore, because the conduct is arguably permitted under §7 or conversely prohibited under §8, appellant's state cause of action is preempted.

{¶ 16} Appellant argues that because the claims before the state court and the Board have no common elements, its claim should not be preempted. *See Sears*, 436 U.S. at 197, 98 S.Ct. 1745, 56 L.Ed.2d 209. A claim for tortious interference with a

business relationship in Ohio requires proving the existence of a relationship, knowledge of the relationship, that intentional interference with the relationship occurred, and that the interference caused damages. *Chandler and Assocs., Inc. v. America's Healthcare Alliance, Inc.*, 125 Ohio App.3d 572, 583, 709 N.E.2d 190 (8th Dist.1997). The claims for protected rights and prohibited activities under the NLRA do not require a showing of any of these elements. *See* 29 U.S.C. 157, 158(b)(3). However, the *Jones* court stated if such a state law claim is closely related to the labor dispute, the Board should still settle the dispute rather than the state court. *Jones*, 460 U.S. at 892, 103 S.Ct. 1453, 75 L.Ed.2d 368. Moreover, if both claims require proving the same crucial element, the state law claim must be preempted. *Id*. Here, the labor dispute about failing to attend the safety meetings according to the labor agreement and the claim for tortious interference are inseparable. Both claims require proving the same crucial element that appellee, acting as president of the union, ordered members not to attend certain safety meetings they may have been contractually obligated to attend. Appellant cannot prove tortious interference without proving appellee ordered union members not to attend the meetings and the labor dispute cannot be proven without the same information. Therefore, we find the trial court correctly granted appellee's Civ.R. 12(B)(1) motion because appellant's claim is preempted by the NLRA.

{¶ 17} As we find appellant's claim is preempted by the NLRA, we find appellant's other arguments moot. Appellant's sole assignment of error is found not well-taken.

III. Conclusion

{¶ 18} For the foregoing reasons, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

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

Arlene Singer, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE