

[Cite as *Cleveland Metal Processing of Ohio v. Precision Recycling Group, Ltd.*, 2002-Ohio-6643.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 81176

CLEVELAND METAL PROCESSING	:	JOURNAL ENTRY
OF OHIO	:	AND
Plaintiff-appellant	:	OPINION
	:	
-vs-	:	
	:	
PRECISION RECYCLING GROUP LTD.	:	
	:	
Defendant-appellee	:	

DATE OF ANNOUNCEMENT
OF DECISION:

DECEMBER 5, 2002

CHARACTER OF PROCEEDING:

Civil appeal from the
Court of Common Pleas
Case No. CV-447554

JUDGMENT:

Affirmed.

DATE OF JOURNALIZATION:

APPEARANCES:

For Plaintiff-Appellee:

JAMES K. ROOSA, ESQ.
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Cleveland, Ohio 44113-1309

For Defendant-Appellant:

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ANN DYKE, J.:

{¶1} Defendant-appellant, Precision Recycling Group, LTD. (“appellant”), appeals from the judgment of the trial court which granted summary judgment in favor of plaintiff-appellee, Cleveland Metal Processing, Inc. (“appellee”). For the reasons set forth below, we affirm the judgment of the trial court.

{¶2} A review of the record indicates that Cleveland Metal Processing purchased certain assets that had been owned by Tool Producers, Inc. (“TPI”) from National City Bank (“NCB”) in a secured party sale prior to NCB’s foreclosure that resulted from TPI’s loan default. After the sale commenced, TPI’s operations ceased. Among the assets that the appellee purchased were the accounts receivable, including a certain account in the amount of approximately \$41,000 owed by the appellant. The basis for the account receivable was an agreement that the appellant had entered into with TPI, in which TPI gave its scrap metal to the appellant, whose company then sold the scrap metal to third parties. The appellant then paid TPI the proceeds from the sale of the scrap metal but retained a five percent commission on all sales.

{¶3} After the appellee’s purchase of assets from NCB, the appellee became the assignee of, among other things, the account receivable in question. The appellee commenced the underlying action after the appellant failed to pay on the account. In response, the appellant claimed it was in the process of brokering the sale and had not yet been paid by a third party for the scrap metal.

{¶4} The appellee thereafter filed a complaint on account against the appellant on August 30, 2001. The appellant, through counsel of record Joseph Jerome, filed an answer

and counterclaim on October 9, 2001. On November 7, 2001, the trial court set discovery and a trial date to begin on March 18, 2002.

{¶5} On March 13, appellant's counsel filed a motion to withdraw from the case, which the trial court denied. The appellant finally terminated the relationship with Joseph Jerome on March 12, 2002 and filed a notice of termination with the trial court on March 13, 2002. The appellant also filed a motion for extension of time to respond to the plaintiff's motion for summary judgment and for a continuance of trial. Within an hour on the same day, Joseph Jerome filed a reply and brief in opposition to the plaintiff's motion for summary judgment, of which the appellant was not aware. The trial court denied the appellant's motion for the extension of time and the motion for a continuance. The trial court warned that "the trial court has not encouraged delay tactics and has repeatedly advised the defendant that the dates will take place as scheduled." At trial the following day, the defendant appeared in court without counsel. According to the trial court, the defendant refused the opportunity provided by the court to attempt to negotiate a settlement. Further, the trial court noted in its entry that the defendant was given the opportunity to adopt the brief in opposition to the plaintiff's motion for summary judgment that was filed by his former counsel, Joseph Jerome, after the defendant had notified the court of his termination of Jerome as his counsel. The defendant declined to adopt the brief in opposition. Because the time to respond to the plaintiff's motion for summary judgment had already passed, the trial court granted the motion unopposed. It is from this ruling that the appellant now appeals, asserting three assignments of error for our review, which we address out of order.

{¶6} “II. The trial court committed reversible error and erred as a matter of law by granting appellee’s Motion for Summary Judgment.”

{¶7} With regard to procedure, we note that this court reviews the lower court’s grant of summary judgment de novo in accordance with the standards set forth in Civ.R. 56 (C). *North Coast Cable v. Hanneman* (1994), 98 Ohio App.3d 434. In order for summary judgment to be properly rendered, it must be determined that:

{¶8} “(1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from such evidence that reasonable minds can come to but one conclusion and, reviewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to the party.” *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327. See also, *State v. ex rel. Zimmerman v. Tompkins* (1996), 75 Ohio St.3d 447, 448.

{¶9} The burden of establishing that there are no genuine issues of material fact to be litigated is upon the party moving for summary judgment. *Turner v. Turner* (1993), 67 Ohio St.3d 337, 340. If the moving party meets this burden, the nonmoving party must then produce evidence pursuant to Civ.R. 56 setting forth specific facts which show that there is a genuine triable issue. *State ex rel. Zimmerman v. Tompkins*, supra.

{¶10} In this case, the appellee presented evidence that it was the lawful assignee of the accounts receivable. The secured party sale agreement between the appellee and NCB demonstrated that the appellee purchased assets of TPI, which included all accounts receivable. While the appellant now argues in his brief on appeal that the appellee failed to demonstrate that it had purchased this particular account receivable from NCB, Paul

Granger, the sole owner of the appellant corporation, in fact conceded this point during deposition:

{¶11} "Q. Why did [appellee] think that you owed [appellee] money?

{¶12} "A. [Appellee] purchased this receivable from Tool Producers—

{¶13} "Q. That's what I wanted to know.

{¶14} "A. —was the way it was explained to me.

{¶15} "Q. Did you have any reason to doubt that [appellee] purchased that receivable from Tool Producers?

{¶16} "A. No, I don't have any reason to doubt it.

{¶17} "Q. Or from National City Bank?

{¶18} "A. No, I don't have any reason to doubt it. It is not that I doubt."

(Deposition of Paul Granger, p. 36).

{¶19} Further, the appellee presented evidence demonstrating that the appellant owed approximately \$41,000 on the account receivable in question. In deposition, Granger admitted that there was \$41,000 outstanding on account for scrap metal that was sold to third parties. Despite his contention in his answer to interrogatories, he admitted that the scrap metal had been sold and he was purposely not paying the account:

{¶20} "Q. *** Tool Producers provided you with certain amounts of scrap derived from its operations ***, correct?

{¶21} "A. Correct.

{¶22} "Q. And what did you do with the scrap?

{¶23} "A. I did what I did every month with it. I brokered the scrap directly to market.

{¶24} "Q. And what happened to the money from that?

{¶25} "A. Some was collected by [appellant]. Some was collected by Tool Producers ***.

{¶26} "Q. Of the amounts that were collected by Tool Producers, is there a portion that *** remains unpaid to Tool Producers?

{¶27} "A. Yes.

{¶28} "Q. How much is that?

{¶29} "A. Approximately \$41,000.

{¶30} "Q. Why hasn't that been paid to Tool Producers?

{¶31} "A. For starters, I lost my contract. The contract is worth \$300,000 plus. The compensation owed to Tool Producers is \$41,000. That's quite a difference. I have a vested interest and a position to protect." (Deposition, p. 29-30). Granger went on to explain his position:

{¶32} "Q. So you've essentially offset what you feel you're owed?

{¶33} "A. Without a doubt. The contract is an asset to me." (Deposition, p. 30).

{¶34} In deposition and its brief on appeal, the appellant urges that the appellee's purchase of TPI's assets through NCB obligated the appellee to pay the appellant for any benefit it received as a result of a contract that the appellant and TPI once had. Specifically, the appellant contends that it had a six-year scrap metal purchasing agreement with TPI in which it alleges that it was guaranteed \$300,000 in business. It follows, the appellant argues, that the appellee must, in essence, honor the agreement because it is receiving a benefit by virtue of the scrap metal technology having previously been installed

at TPI's facilities, which the appellee now owns. We disagree. We note that the appellant has failed to cite any law supporting this proposition.

{¶35} The appellee purchased only the assets of TPI through the secured party sale with NCB, which included the accounts receivable. The appellee was not a party to the contract between the appellant and TPI. The contract contained no language, such as an assignment clause indicating that if TPI were to cease to exist that a third party would be bound by the terms of the contract. If the appellant intended that the contract between it and TPI were to be somehow assigned to a third party under circumstances such as in this case, it should have so provided in the contract. It is axiomatic that rules of construction with regard to ambiguities in contracts are to be construed against the drafting party. *Ottery v. Bland* (1987), 42 Ohio App.3d 85, 87.

{¶36} Further, the appellant failed to demonstrate how the appellee's purchase of assets of TPI in a secured party sale should have been accompanied by any attendant liabilities. The well-recognized general rule of successor liability provides that the purchaser of a corporation's assets is not liable for the debts and obligations of the seller corporation. *Welco Industries, Inc. v. Applied Cos.* (1993), 67 Ohio St.3d 344, citing: *Flaughner v. Cone Automatic Machine Co.* (1987), 30 Ohio St.3d 60; *Cyr v. B. Offen & Co., Inc.* (C.A.1, 1974), 501 F.2d 1145. There are exceptions to this general rule and a successor corporation may be held liable if:

{¶37} "1. The buyer expressly or impliedly agrees to assume such liability;

{¶38} "2. The transaction amounts to a de facto consolidation or merger;

{¶39} "3. The buyer corporation is merely a continuation of the seller corporation; or

{¶40} “4. The transaction is entered into fraudulently for the purpose of escaping liability.”

{¶41} *Flaughner*, supra. In this case, the appellant does not allege that any of these exceptions exist, nor do we find that they do after reviewing the record.¹ We therefore find that the trial court properly granted summary judgment on its complaint against the appellant.

{¶42} With regard to the appellant’s counterclaim alleging misappropriation of trade secrets in violation of R.C. 1333.61, we find that the trial court’s grant of summary judgment in the appellee’s favor was also proper.

{¶43} The appellant maintains that the appellee misappropriated, by improper means, his company’s “Scrap Management Technology” and therefore has been unjustly enriched.

{¶44} R.C. 1333.61 defines a trade secret as:

{¶45} “Information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses or telephone numbers, that satisfies both of the following:

¹While the trial court granted the motion for summary judgment unopposed when the appellant chose not to adopt the brief in opposition to the appellee’s motion for summary judgment, we included this brief in our review of the entire record. Further, on appeal, the appellant has now adopted the brief.

{¶46} “(1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use.

{¶47} “(2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”

{¶48} In this case, there is no evidence that the appellant’s alleged “technology” was the subject of reasonable efforts to maintain its secrecy. The contract between TPI and the appellant failed to reference that the information contained within the program to be installed at TPI was to remain confidential. In fact, in his deposition, the appellant admitted that there was nothing that would prevent TPI’s employees from discussing the technology with other metal stampers. We cannot say that the appellant ever attempted to maintain the secrecy of his technology and therefore cannot find that it constituted a trade secret. The trial court’s grant of summary judgment in favor of the appellee on the appellant’s counterclaim for misappropriation was therefore proper. We therefore overrule this assignment of error.

{¶49} “I. The trial court abused its discretion and erred as a matter of law by failing to grant Defendant/Appellant’s Motion for a Continuance to obtain new counsel and thereby violated Appellant’s due process rights.”

{¶50} The decision to grant or deny a continuance rests in the sound discretion of the trial court. *Hartt v. Munobe* (1993), 67 Ohio St.3d 3, 9; *State v. Unger* (1981), 67 Ohio St.2d 65, 67. “An appellate court must not reverse the denial of a continuance unless there has been an abuse of discretion.” *Unger*, supra citing *Ungar v. Sarafite* (1964), 376 U.S. 575. Factors to consider in determining whether the trial court abused its discretion in

denying a party's request for a continuance include "whether other continuances have been requested and received; the inconvenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful or contrived; whether the requesting party contributed to the circumstances which gives rise to the request for a continuance; and other relevant factors, depending on the unique facts of each case. *Unger, supra*.

{¶51} In this case, the trial court repeatedly warned the appellant that the trial would go forward as scheduled. Nonetheless, the appellant chose to fire his attorney on the eve of trial. The trial court's decision to deny a continuance was not an abuse of discretion.

{¶52} In light of the foregoing, we find the third assignment of error moot.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KENNETH A. ROCCO, P.J., CONCURS

COLLEEN CONWAY COONEY, J., CONCURS

IN JUDGMENT ONLY

ANN DYKE
JUDGE

N.B. This entry is an announcement of the court's decision. See App.R.22(B), 22(D) and 26(A); Loc.App.R.22. This decision will be journalized and will become the judgment and order of the court pursuant to App. R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also S.Ct.Prac.R. II, Section 2(A)(1).