[Cite as *E. Cleveland Firefighters, IAFF 500, AFL-CIO v. E. Cleveland*, 2017-Ohio-1558.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104948

EAST CLEVELAND FIREFIGHTERS, IAFF 500, AFL-CIO, ET AL.

PLAINTIFFS-APPELLEES

vs.

CITY OF EAST CLEVELAND, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-16-861942

BEFORE: S. Gallagher, J., Keough, A.J., and Laster Mays, J.

RELEASED AND JOURNALIZED: April 27, 2017

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SEAN C. GALLAGHER, J.:

{¶1} The city of East Cleveland, Fire Chief Richard Wilcox, and Mayor Gary Norton Jr. ("City") appeal the finding of contempt and ensuing judgment of $103,000 in sanctions, awarded in favor of the East Cleveland Firefighters, IAFF Local 500, AFL-CIO, and Thomas Buth ("Union") and imposed upon the City's failure to comply with the terms of a temporary restraining order and preliminary injunction. We affirm.

{¶2} This is not the first time this issue has arisen. The collective bargaining agreement ("agreement") between the Union and the City has always required a set number of firefighter staffing assignments. In 2006, the agreement required the City to staff 14 firefighters per shift, with the full-time, union firefighters subject to recall on overtime to maintain the minimum staffing requirement. The City, citing fiscal concerns, began using part-time, non-union firefighters to maintain the minimum staffing requirements in order to decrease the overtime expenditures. The Union filed a complaint for a preliminary injunction, pending the arbitration of the matter, seeking to enjoin the City from violating their agreement. The trial court, in granting the injunction, agreed with the Union that the use of part-time firefighters would cause irreparable harm because the "esprit de corps" within the fire department would be deleteriously affected and the City's action undermined the firefighters' confidence in the collective bargaining process. The Union prevailed. After arbitration, the City paid the firefighters for the missed overtime, but the City and the Union agreed to reduce the minimum staffing

requirement in the next collective bargaining agreement to 12 firefighters per shift with the ability to use up to two part-time, non-union firefighters per day.

{¶3} In 2009, the City unilaterally reduced staffing from 12 to 10 union firefighters per shift, and increased the number of part-time firefighters that could be called for replacement. Once again, the Union filed for injunctive relief. This time, the trial court held that the injunction was necessary because the part-time firefighters were considered inexperienced and posed a risk to the full-time firefighters. Following the grievance and arbitration procedures, the City was required to pay back overtime pay to the union firefighters.

{¶4} In negotiating the agreement now in effect, the parties agreed to reduce the staffing levels to ten on-duty firefighters, but placed no limitation on the use of part-time firefighters to replace the full-time ones who called off.

{¶5} In April 2016, the Union filed a verified complaint for a preliminary injunction pending the outcome of an arbitration or grievance procedure initiated before the filing of the lawsuit. The Union was granted an ex parte restraining order and, subsequent to that, a preliminary injunction precluding the City from "unilaterally" violating the terms of the collective bargaining agreement primarily based on the safety concerns stemming from the understaffing of each shift, although the national standards call for more firefighters than the minimum staffing even provides. From the record, it appears that on any given shift as many as half the full-time firefighters are calling off, resulting in a severe depletion of resources to maintain safe firefighting practices.

{¶6} The temporary restraining order was facially invalid and should not have been granted. Civ.R. 65(A) provides the trial court with authority to enter a temporary restraining order if (1) it clearly appears from specific facts shown by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition; and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give notice and the reasons supporting his claim that notice should not be required. The Union did not present an affidavit certifying the steps taken to give notice before the issuance of the temporary restraining order. Further, the bond required under Civ.R. 65(C) was not posted until five days after the order was issued, two days before the preliminary injunction hearing. "No temporary restraining order or preliminary injunction is operative until the party obtaining it gives a bond executed by sufficient surety * * * in an amount fixed by the court." *Id.* We only note this in an effort to ensure compliance in the future should the issuance of a temporary restraining order be of the utmost concern.

{¶7} If this were 2006 or 2009, we would expect the same procedure and outcome. The City, however, is in severe financial distress. The auditor of the state of Ohio declared the City to be in a state of fiscal emergency, and the City's finances are now under the control of the state auditor under R.C. Chapter 118. As part of this process, the City must submit its budget for approval, and once approved, the City cannot deviate. The City's budget for 2016 was approved by the auditor, and according to the City, the

budget limitations forced the City to reduce the shift staffing of its full-time firefighters to eight on-duty personnel. In addition, if any firefighter becomes unavailable for duty, the City will not recall a replacement because of the limitations on the overtime budget.

{¶8} Unlike the previous two cases, the City failed to follow the terms of the order and filed a brief in opposition to the motion for preliminary injunction claiming that the budget approved by the state auditor prevented the City's compliance. No transcript for the preliminary injunction hearing was provided for our review. The trial court dismissed the City's argument and held the City in contempt for violating the temporary restraining order, which was harmless error because no sanctions were imposed for that finding of contempt. In the preliminary injunction order, the trial court threatened to fine the City $750 per day as a sanction for failure to comply with the trial court's injunction. This was in effect an opportunity to purge the contempt.

{¶9} The City timely appealed the preliminary injunction order. Upon motion from the Union, the appeal was dismissed because generally a preliminary injunction maintaining the status quo is an interlocutory order until all issues are resolved in the case. That dismissal may have been improvident in that R.C. 2505.02(B)(4) defines an order granting a preliminary judgment upon which there is no effective remedy from an appeal following the final judgment as a final appealable order. The only relief sought in the Union's complaint was for a preliminary injunction to maintain the status quo pending arbitration. Thus, the order granting the preliminary injunction was final; it resolved all claims sought in the complaint. If an appeal is not ripe following the granting of the

injunction in cases such as this, no appeal could ever be taken because of the fact that the arbitrator must resolve all issues between the parties. Appellate jurisdiction is not dependent on an outside factor; we must be able to determine our jurisdiction from the record.

{¶10} Thus, if we followed the general rule for finality of preliminary injunctions, no appeal would ever lie because the aggrieved party could not appeal the injunction following the arbitration. *E. Cleveland Firefighters, IAFF Local 500 v. E. Cleveland*, 8th Dist. Cuyahoga No. 88273, 2007-Ohio-1447, ¶ 6 (an appeal cannot be taken for the preliminary injunction after the arbitration has become final because any issues raised with respect to the preliminary injunction were mooted by the arbitrator's decision). In essence, our decisions have created a paradox of sorts. When an injunction pending arbitration is entered, no appeal lies because the parties have an adequate remedy in the direct appeal following a final judgment, but once the arbitration is complete, all issues with respect to the injunction are moot, so the direct appeal cannot offer any remedy.

{¶11} At some point we may be called upon to address this issue, but for now, we simply note that it may do well for parties to properly frame these issues to distinguish the general case law holding that the grant of a preliminary injunction within the scope of a complaint alleging other claims is interlocutory until all claims are resolved, from a situation such as the one presented here in which the preliminary injunction pending arbitration is the sole remedy advanced in the complaint. The City did not appeal the

dismissal to the Ohio Supreme Court and cannot collaterally attack that judgment within the scope of the current appeal.

{¶12} Nevertheless, in May, the Union filed a motion to show cause based on the City's failure to maintain the status quo. A show cause hearing was not held until August. At that time, the City was again found in contempt because it had failed to comply with the injunction. The trial court recognized that the City was precluded from unilaterally altering the budgetary expenditures under R.C. Chapter 118, but the City has the ability to seek approval to amend the financial plan approved by the state auditor. The trial court found the City to have created a self-imposed fiscal impossibility from complying with the preliminary injunction order. The sanction was increased to $1,250 per day from August 9 moving forward, but the only monetary sanction imposed totaled $5,000 for attorney fees at that point.

{¶13} In late August, the Union filed a motion "to reduce monetary obligations to judgment." In that motion, the Union sought the sanctions as damages from the date of the preliminary injunction. The trial court granted judgment in favor of the Union in the amount of $103,000 without a hearing. Around the same time, the City filed an answer with counterclaim that was stricken from the record. At that time, however, an answer was futile. The complaint in this case was solely for a preliminary injunction pending the arbitration that both parties agreed was to occur. Thus, upon the granting of the preliminary injunction, there were no claims left unresolved in the complaint.

{¶14} The City appealed. The Union filed with this court a motion for additional attorney fees under the mistaken belief that the City has no right to ever appeal the contempt finding or the preliminary injunction. The Union also claims in its brief that the City cannot challenge the preliminary injunction order because the appeal was not perfected within 30 days of the April 2016 order. As noted, the Union successfully sought dismissal of the original appeal, based on the lack of finality, that the Union now claims was necessary, permissible, and preclusive of the second appeal.

{¶15} It is also well-settled that a court order finding a party in contempt and imposing a sentence or monetary judgment is a final appealable one. *Docks Venture, L.L.C. v. Dashing Pacific Group, Ltd.*, 141 Ohio St.3d 107, 2014-Ohio-4254, 22 N.E.3d 1035, ¶ 23. The City's appellate brief primarily addresses the contempt proceedings and the impossibility of compliance with the injunction, which necessarily affects the court's authority to hold the City in contempt. Furthermore, where a non-appealable, interlocutory order that results in a judgment of contempt is appealed, the appellate court must review the propriety of the interlocutory order that is the underlying basis for the contempt adjudication.[1] *Smith v. Chester Twp. Bd. of Trustees*, 60 Ohio St.2d 13, 15-16, 396 N.E.2d 743 (1979). We have jurisdiction over this appeal, and the Union's motion for attorney fees based on the allegation that the appeal is frivolous is denied. *H & D Steel Serv. v. Weston, Hurd, Fallon, Paisley & Howley*, 8th Dist. Cuyahoga No. 72758,

[1]We only refer to the injunction in this case as being interlocutory because the City appealed the injunction in a separate appeal that was dismissed for the want of a final appealable order.

1998 Ohio App. LEXIS 3422, 4-5 (July 23, 1998). There is no legal basis for the Union's argument. *See Bd. of Health of Cuyahoga Cty., Ohio v. Petro*, 8th Dist. Cuyahoga No. 104882, 2017-Ohio-1164 (a party in contempt who admits to not complying with court ordered injunction for several years but argues the impossibility to comply because of financial distress has the right to a hearing before sanctions can be imposed based on the undisputed contempt).

{¶16} The City claims that the trial court erred by (1) striking its late-filed answer; (2) denying a request for hearing on dissolution of the injunction and awarding $5,000 as sanctions for frivolous conduct; (3) granting a preliminary injunction pending arbitration; and (4) finding the City in contempt subject to a $103,000 sanction because compliance with the injunction was impossible given the City's financial crisis. None of the City's claims have merit as presented.

{¶17} The City's answer was filed several months after service of the complaint. Civ.R. 12(A) provides only 28 days within which to file an answer unless a motion to dismiss is filed. The City did not file a motion to dismiss, which would have altered the answer deadline. According to Civ.R. 6(B), the City was required to seek leave for a belated filing upon the showing of excusable neglect. The answer was filed without seeking leave and thus properly stricken. *Williams v. Cleveland*, 8th Dist. Cuyahoga No. 56408, 1989 Ohio App. LEXIS 5167, 5 (Dec. 14, 1989).

{¶18} The trial court also did not abuse its discretion by denying the City's motion to dissolve the preliminary injunction. The City's motion was the second attempt to seek

reconsideration of the trial court's decision to grant a preliminary injunction. In the first attempt, the trial court put the City on notice that the trial court would not consider any new arguments pertaining to the granting of the injunction; it would only reconsider issues if an obvious error was raised. As the trial court held, although reconsideration of an interlocutory order is permitted under Civ.R. 54(B), it is within the trial court's discretion. *B&G Props. Ltd. Partnership v. OfficeMax, Inc.*, 2013-Ohio-5255, 3 N.E.3d 774, ¶ 37 (8th Dist.). A trial court, although permitted to, is not required to consider new arguments after the fact, and we decline to create such a rule.

{¶19} Further, because the City was placed on notice of the trial court's decision to refrain from considering new arguments, repackaging the same arguments in the motion for dissolution of the injunction could constitute frivolous conduct. The relevant statutory section, R.C. 2323.51, provides that frivolous conduct includes conduct that serves to merely harass another party. Filing multiple motions raising the same overruled arguments could constitute frivolous conduct. The City has not argued otherwise, but instead asks us to look at the merits of the arguments advanced against the injunction that the trial court declined to consider. Even if we reviewed the imposition of sanctions under R.C. 2323.51 de novo as the City requests, that does not mean we review the merits of arguments the trial court declined to hear. Our review is to determine whether the trial court's decision to impose sanctions upon the filing of multiple motions advancing the same arguments was in error. Upon the arguments presented, we can find no error.

{¶20} We note that even if we considered the merits of the City's argument, the City claimed that the collective bargaining agreement sets forth the sole remedy and the trial court should have denied injunctive relief on that basis alone. Generally, courts have jurisdiction to grant preliminary injunctions pending arbitration. *State ex rel. CNG Fin. Corp. v. Nadel*, 111 Ohio St.3d 149, 2006-Ohio-5344, 855 N.E.2d 473, ¶ 16; *Mears v. Zeppe's Franchise Dev.*, 8th Dist. Cuyahoga No. 90312, 2009-Ohio-27, ¶ 23; *Toledo Police Patrolman's Assn., Local 10 v. Toledo*, 127 Ohio App.3d 450, 471, 713 N.E.2d 78 (6th Dist.1998) (injunction pending arbitration under the procedure set out in a collective bargaining agreement is an appropriate exercise of the trial court's jurisdiction). The City has not provided a basis to distinguish this case from the general rule of law.

{¶21} Finally, we can find no reversible error in the finding of contempt and ensuing sanction. We review the finding of contempt under an abuse of discretion standard of review. *Cleveland v. Bryce Peters Fin. Corp.*, 8th Dist. Cuyahoga Nos. 98006-94024, 98078, 98079, 98163, and 98164, 2013-Ohio-3613, ¶ 11, citing *Cattaneo v. Needham*, 5th Dist. Licking No. 2009 CA00142, 2010-Ohio-4841, citing *State ex rel. Celebrezze v. Gibbs*, 60 Ohio St.3d 69, 573 N.E.2d 62 (1991). "'Courts may punish disobedience of their orders or enforce them in contempt proceedings.'" *KLN Logistics Corp. v. Norton*, 174 Ohio App.3d 712, 2008-Ohio-212, 884 N.E.2d 631, ¶ 23 (8th Dist.), quoting *State ex rel. Bitter v. Missig*, 72 Ohio St.3d 249, 252, 1995-Ohio-147, 648 N.E.2d 1355, citing *State ex rel. Adkins v. Sobb*, 39 Ohio St.3d 34, 35, 528 N.E.2d 1247 (1988).

{¶22} The City's sole defense to the contempt proceedings was impossibility of performance because the City has to operate within the budgetary constraints imposed by the state auditor under R.C. Chapter 118. The City's financial condition has deteriorated to the point that the City has submitted a request to the Ohio Tax Commissioner for approval to file a petition for bankruptcy. The City, however, has not presented evidence demonstrating that complying with the injunction was impossible. The City focused its evidence on the expenditure cuts that were necessary, but not upon what the actual financial plan approved by the state officials meant in practical terms to the scheduling of firefighters. In short, there is no evidence that the approved budget precluded staffing ten firefighters and replacing all those that called off of their duty assignments with others on overtime until a new collective bargaining agreement could be negotiated. The current agreement had expired at the end of 2015, so the parties needed to revisit this issue. The only evidence presented was that the budget for the fire department had to be cut, but not that those cuts absolutely precluded the temporary maintenance of the status quo. Upon the record presented, we cannot find that the trial court abused its discretion in holding the City in contempt.

{¶23} We affirm.

It is ordered that appellees recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.

SEAN C. GALLAGHER, JUDGE

KATHLEEN ANN KEOUGH, A.J., and
ANITA LASTER MAYS, J., CONCUR