

IN THE SUPREME COURT OF OHIO

356 REGISTRY, INC.

Appellant,

v.

R. STEPHEN HEINRICHS,

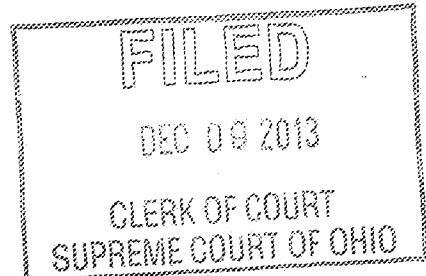
Appellee.

Case No. 13-1750

Appeal from Ohio's Tenth
District Court of Appeals, Case
No. 13AP-361

APPELLEE'S MEMORANDUM IN RESPONSE TO
APPELLANT'S MEMORANDUM IN SUPPORT OF JURIDICTIION

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STATEMENT OF APPELLEE'S POSITION

It is Appellee's position this appeal does not involve or raise any constitutional question and is not a case of public or great general interest.

Rather, this is a simple discovery dispute not implicating any greater interest, any constitutional issue, or any public concern.

This appeal involves an obstinate litigant (Appellant) determined to avoid typical discovery obligations. The discovery has been found relevant to the claims in this action, including Appellant's *own claims*. The trial court (in its sound discretion) found the discovery relevant to the claims and defenses. Now, Appellant is engaging in ongoing discovery evasion by frivolously appealing a simple discovery matter to the highest possible level.

For credibility considerations, please note this Appellant currently stands in contempt of court with respect to the trial court's discovery order. Upon its appeal to the Tenth District, Appellant requested a stay of the order pending appeal. The Tenth District denied the stay request. The trial court likewise rejected the stay request. Still, Appellant did not comply with the order and continues to be in contempt.¹

Appellant's jurisdictional brief is largely dedicated to arguing an interpretation of ORC § 1702.15. But that is not the issue on appeal. Rather, this appeal is about the basic right to obtain relevant discovery under the Civil Rules.

¹ Because of this, Appellee did file a motion for contempt with the trial court. The trial court was unwilling to rule on the contempt motion while the appeal is still pending.

There is no constitutional question or question of public interest—this is a simply a matter of a reticent litigant trying to evade typical discovery.

ARGUMENT

A. Notable Facts

This is an appeal of the trial court's discovery order, which compelled Appellant to respond to Appellee's first request for production of document. That discovery request sought documents relevant to Appellee's defamation and breach of fiduciary duty claims. It is also largely relevant to Appellant's affirmative defenses and Appellant's own proactive causes of action found in its counterclaim.

Appellant refused to produce documents responding to *any* categories in that document request. To emphasize—Appellant has not just withheld documents it finds objectionable for the reasons stated in its appeal, it has withheld *everything*.

The case includes multiple causes of action by both Appellant and Appellee. Appellee has asserted defamation and breach of fiduciary duty claims, and also alleges Appellant violated Appellee's right under ORC § 1702.15 to inspect Appellant's corporate books and records, as that statute requires.²

Appellant has asserted affirmative defenses to these claims stating, among other things, that Appellee's claims are barred by his own negligence, that Appellee engaged in "duress," that Appellee is guilty of laches, that Appellee is proceeding illegally, and that Appellee has failed to comply with Ohio law.

² Under § 1702.15, a member of an Ohio non-profit corporation is entitled, upon request and for good reason, to conduct an inspection of the corporation's "books and records." One issue involved in this case is that Appellee made a request for books and records under § 1702.15 but Appellant refused to comply. Appellant is an Ohio non-profit corporation.

Appellant asserted a counterclaim against Appellee. That includes claims of intentional interference with business relations and defamation.

Appellee's discovery request contained multiple categories aimed at discovering documents relevant to Appellee's defamation and breach of fiduciary duty claims, Appellant's affirmative defenses, and Appellant's defamation and intentional interference with business claims. As found by the trial court:

[T]he information the Plaintiff requests appears reasonably calculated to the discovery of admissible evidence to defend the claims of intentional interference with a business relation, defamation, and defamation, libel and slander per se. Civ.R. 26(B). Again, the Defendant may not use Plaintiff's claim under R.C. 1702.15 to shield it from producing material the Plaintiff is entitled to learn in order to defend counterclaims. (Trial Court Order at 6-7.)

Importantly, the document request *did not* seek production of Appellant's "books and records" within the meaning of ORC § 1702.15.

And when the trial court ordered Appellant to comply with its discovery obligations, the trial court absolutely did not order Appellant to produce its "books and records" within the meaning of ORC § 1702.15. In fact, the trial court expressly stated the issue of whether there has been any violation of § 1702.15 remains to be decided.

Appellant's position on appeal is that, because responding to these relevant discovery requests might subsume some of what Appellant considers to be its "books and records," Appellant should not have to respond to the discovery at all.

While this lawsuit does involve an allegation that Appellant violated Appellee's rights under § 1702.15, it involves many other issues for which Appellee

is entitled to discovery. Under Rule 26, Appellee is entitled to conduct relevant discovery for all those other claims and defenses. The existence of a § 1702.15 allegation does not trump the right to conduct regular discovery under the Civil Rules.

Put another way, if Appellee's complaint had not included an allegation that Appellant violated its obligations under § 1702.15, all of the requested documents would still be relevant and appropriate to the rest of the case and would be subject to discovery. Appellant is using the allegation of a § 1702.15 violation to justify avoiding relevant discovery on all claims and on all topics.

B. The Trial Court Did Not Order Production of § 1702.15 Books & Records.

Appellant's notion that the trial court's discovery order somehow involved an order to produce books and records pursuant to § 1702.15 is a fiction.

Appellant's constitutional/due process argument relies on the premise that the trial court ordered a production of its "books and records" (Memo. at 13), even though the trial court did no such thing.

In its discovery request, Appellee did not request production of Appellant's "books and records" within the meaning of § 1702.15. And the trial court did *not* order a production of Appellant's "books and records." Actually, the trial court did not rule on the § 1702.15 issue at all. Rather, the trial court confirmed that issue is not yet decided and indicated Appellant should tee up the issue for summary judgment if it wants it resolved.

[T]he Defendant has not moved for judgment on the violation of the R.C. 1702.15 and asked the Court to determine whether the Plaintiff

has a legal right to inspect the records; whether his purpose is proper, etc.

The Defendant cannot have it both ways: withhold discoverable evidence on the basis that Plaintiff is not permitted under R.C. 1702.15 to obtain the information, yet sit back and do nothing to elicit that determination from the Court. (Trial Court Order at 6.)

C. Enforcing Discovery Obligations Under the Civil Rules Does Not Abridge § 1702.15.

Appellant wrongly argues the Ohio Rules of Civil Procedure pertaining to discovery (and the trial court's discovery order) somehow abridge § 1702.15. ORC § 1702.15 is not a privilege statute and creates no privilege against civil discovery, the revealing of corporate documents relevant to civil claims, or production of relevant documents in its possession. Rather, § 1702.15 affords certain rights to the members of non-profit corporations (it is not written to afford protections to the corporation).

Section 1702.15 merely imposes requirements upon Ohio non-profit corporations to maintain certain records and make those available for inspection upon request. *See, e.g., Olentangy Condo. Ass'n v. Lusk*, 2010 Ohio 1023, ¶ 18 (10th App. Dist. Mar. 16, 2010). Nowhere in the text of § 1702.15 is there language creating any confidentiality protections, privacy rights, or privilege restricting a corporation from revealing certain information or testifying as to corporate communications. This can be confirmed from the plain language of the statute:

§ 1702.15. Books, records of account and minutes

Each corporation shall keep correct and complete books and records of account, together with minutes of the proceedings of its incorporators, members, directors, and committees of the directors or members. Subject

to limitations prescribed in the articles or the regulations upon the right of members of a corporation to examine the books and records, all books and records of a corporation, including the membership records prescribed by section 1702.13 of the Revised Code, may be examined by any member or director or the agent or attorney of either, for any reasonable and proper purpose and at any reasonable time.

Ohio Rev. Code Ann. § 1702.15.

Appellant's constitutional argument is, in part, that the courts below violated its due process rights by compelling production of documents relevant to this case although (according to Appellant) Appellee may not actually possess rights under § 1702.15 to examine its books and records.

As the Court can see by the statute's language, in no way does this statute absolve a non-profit corporation from otherwise abiding with requirements under the law, including under the Civil Rules. The statute does not supply a non-profit corporation with a method to object to or evade discovery under the Civil Rules when the party suing the corporation is a non-member.

Even if this case did not involve any allegation or dispute related to § 1702.15, all of the requested documents would still be relevant to the claims and defenses, and therefore subject to discovery under any circumstances. This is true regardless of whether the party requesting discovery holds any rights under § 1702.15.

If the trial court ultimately rules Appellee has no right to a § 1702.15 inspection, that changes nothing. Appellant would still need to respond to this discovery request. Appellee still would have civil claims under Ohio law to which this discovery is relevant.

So, regardless of whether Appellee is entitled to anything under § 1702.15, Appellee is still entitled to seek this discovery under the Civil Rules. The trial court and the Tenth District both agree, and Appellant has put forth no argument that a non-profit corporation is somehow protected from responding to civil discovery just because some of requested documents might happen to fall within the realm of "books and records."

D. Appellant Had Its Opportunity to Be Heard.

Appellant suggests the trial court's discovery order was improper because it was done without an evidentiary hearing. This issue is brought up for the first time before this Court. The trial court's local rules provide that discovery motions can be heard and decided without an oral hearing. Appellant did have the opportunity to file a memorandum in opposition to the motion to compel. Appellant never requested an oral hearing on the motion. Appellant never raised this as an issue on appeal before the Tenth District.

The opportunity to object to the discovery and be heard by the trial court was sufficiently provided to afford due process. The trial court complied with the Civil Rules and its own local rules and this is the first time any issue has been asserted to the contrary.

CONCLUSION

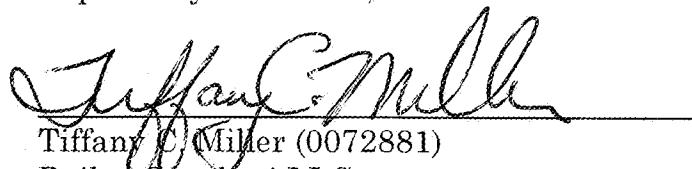
If there is any great public interest involved in this matter, it is in seeing this Court reject this appeal. In Ohio, there are statutes that allow members and shareholders of both non-profit and for-profit corporations to inspect certain books

and records. *See* Ohio Rev. Code §§ 1702.15 & 1701.37. Appellant's theory is that a corporation may evade regular civil discovery any time it can establish its opponent is not a member/shareholder holding a statutory right to inspect books and records. But that is not what these statutes state. Rather, these statutes supply a way for members and shareholders of corporations to have regular and simple access to certain corporate information without having to resort to a lawsuit or subpoena.

For the Court to accept this appeal would severely undermine the Ohio Rules of Civil Procedure and the right to pursue relevant discovery whenever one litigant happens to be is an Ohio corporation. Certainly Ohio's corporate statutes were not written, are not stated, and were never meant to allow corporations to evade discovery by opponents who are not member/shareholders.

For these reasons, the Court should not accept jurisdiction over this appeal, should remand this matter to the trial court, should order Appellant to immediately comply with the trial court's discovery order, and should order the trial court to issue a finding of contempt against Appellant for violating the court's discovery order in the absence of a stay.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify the foregoing Appellee's Memorandum in Response to Appellant's Memorandum in Support of Jurisdiction was served on each of the other parties to this action by sending a copy by electronic mail transmission on December 9, 2013 to the following:

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