

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

MICHAEL RAMUN,)	
)	CASE NO. 08 MA 185
PLAINTIFF-APPELLEE,)	
)	
- VS -)	OPINION
)	
JOHN RAMUN, et al.,)	
)	
DEFENDANTS-APPELLANTS.)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court,
Case No. 04CV1738.

JUDGMENT: Affirmed.

APPEARANCES:

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JUDGES:

Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: December 4, 2009

VUKOVICH, P.J.

¶{1} Defendants-appellants John Ramun and Allied Consolidated Industries, Inc. (ACI) appeal the Mahoning County Common Pleas Court's decision denying their motion for protective order and granting plaintiff-appellee Michael Ramun's motion to compel discovery requests. Two issues are presented in this appeal. The first issue is whether the trial court abused its discretion when it denied John and ACI's motion for a protective order. The second issue is whether the trial court's decision to grant Michael's motion to compel was a final appealable order, and if it was, did the trial court abuse its discretion when it granted the motion to compel. For the reasons expressed below, we find no merit with the first issue and as to the second issue, we find that the trial court's decision to grant a motion to compel is not a final appealable order. For the following reasons, the judgment of the trial court is affirmed.

STATEMENT OF THE CASE

¶{2} John and Michael are brothers and together they owned ACI. John was president of the company and owned 75% of the shares, while Michael was vice-president and treasurer and owned 25% of the shares. In 2004, Michael resigned from the company and requested that John buy his shares. In response, John sought to impose stock restrictions on the sale or transfer of ACI stock. Michael then filed a complaint against John for breach of fiduciary duty and sought an injunction to prohibit the implementation of the stock restrictions.

¶{3} The trial court granted a TRO, but after an evidentiary hearing on the preliminary injunction, the magistrate denied the motion for a preliminary injunction. The trial court adopted the magistrate's decision. That order was appealed to this court, and we affirmed the trial court's denial of the preliminary injunction finding that enacting a valid reasonable stock restriction was not a breach of fiduciary duty. *Ramun v. Ramun*, 7th Dist. No. 05MA44, 2005-Ohio-6921, ¶42-45.

¶{4} Following our decision, the case proceeded in the trial court. John filed a motion for summary judgment. 07/06/06 Motion. Prior to that motion being ruled upon, Michael amended his complaint. 10/06/06 Amended Complaint. The amended complaint asserted a new breach of fiduciary duty claim and also asserted a breach of

oral contact claim. The breach of fiduciary duty claim was premised on John's alleged mismanagement of ACI and his enactment of a new stock restriction that was allegedly unreasonable. A breach of oral contract claim asserted that John and ACI breached its oral agreement with Michael that once ACI settled its claim against U.S. Steel, Michael would be compensated for the years he did not receive compensation for the work he did at ACI.

¶{5} John and ACI filed a motion to dismiss the amended complaint asserting that the fiduciary duty claim was barred by our decision and that the oral contract claim did not set forth the terms of the agreement and showed that the contract lacked consideration. The trial court, after reviewing the motions, allowed the amended complaint. 03/15/07 J.E.

¶{6} John also filed a motion to compel the return of sealed documents and a confidentiality order. 03/14/07 Motion. The trial court denied the motion to compel and did not allow a confidentiality order. Instead, it directed John and ACI to seek a protective order once he was served with discovery. 06/28/07 J.E.

¶{7} Michael filed interrogatories and a production of document request. John and ACI did not answer all requests, and consequently, Michael filed a motion to compel discovery. The motion to compel sought to compel the production of documents to requests numbers one, two, three, six, seven, eight, nine and ten and compel an answer to interrogatory number five. Michael also asserted that John and ACI should have filed for a protective order in response to the request for discovery.

¶{8} Request for production number one sought financial records for specific projects. Number two sought financial records for the U.S. Steel litigation settlement. Three sought all documents reflecting "project proceeds or non-recurring gains" from 1998 until the present. Six sought the tax returns for both ACI and John. Seven sought the contracts for the sale of non-ferrous scrap. Eight sought all agreements between U.S. Steel and ACI. Nine sought all documents reflecting bonuses paid to employees and officers. Ten sought all agreements between Strenn Consulting and ACI. In response to these requests, John and ACI asserted that the documents were confidential and that the requests were vague, overly broad, unduly burdensome, and not relevant or reasonably calculated to lead to the discovery of admissible evidence.

¶{9} Interrogatory number five sought the identification of any and all “key man” or similar insurance policies and the amount of coverage, effective date and the named insured(s) and beneficiary(ies). In response to this request, John and ACI asserted that the request was not reasonably calculated to lead to the discovery of admissible evidence.

¶{10} John and ACI filed a response to Michael’s motion to compel. In that response, John and ACI asserted that they were not required to file a motion for protective order, all that was required was to object to the production of documents in the manner they did. They further requested that the court order the parties to submit proposed protective orders.

¶{11} The motions were heard before a magistrate. The magistrate granted the motion to compel and denied the motion for the parties to submit proposed protective orders. It stated that ACI and John were required to move for a protective order when they asserted that the request for the production of documents was unduly burdensome, overbroad or privileged. Furthermore, it explained that the burden to show that documents were confidential was on John and ACI and they did not provide any information to support their claims of privilege.

¶{12} John and ACI then moved to set aside the magistrate’s order and moved for a protective order. The protective order sought an “Attorneys’ Eyes Only” or confidential designation for certain documents so that the nature of those documents would not be public and would be limited to who could view the documents. Michael responded to the motion to compel asserting that the magistrate’s decision ordering production of the documents was correct and that an order adopting a confidentiality agreement would be inappropriate. It explained that it would be inappropriate because a motion to set aside an order of the magistrate is not the proper avenue to request a protective order under Civ.R. 26.

¶{13} The trial court denied the protective order in part and granted it in part. 08/18/08 J.E. The court agreed with John that his personal income tax returns would not lead to any admissible information. In all other respects, the trial court disagreed with the request for a protective order.

¶{14} The trial court then issued a separate entry denying the motion to set aside the magistrate's order, and thus, granted Michael's motion to compel and ordered John and ACI to provide complete responses by a date certain. 08/19/08 J.E.

¶{15} John and ACI timely appealed from both the August 18, 2008 judgment entry denying in part their motion for a protective order and the August 19, 2008 judgment entry granting Michael's motion to compel production of documents and answer to interrogatory number five.

FIRST ASSIGNMENT OF ERROR

¶{16} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND ABUSED ITS DISCRETION WHEN IT UNREASONABLY AND ARBITRARILY DENIED DEFENDANTS-APPELLANTS' MOTION FOR PROTECTIVE ORDER AND REFUSED TO PROVIDE ANY PROTECTION FOR DEFENDANTS-APPELLANTS' CONFIDENTIAL, PROPRIETARY, AND TRADE SECRET INFORMATION, WHICH THE TRIAL COURT HAD RULED MUST BE PRODUCED TO PLAINTIFF-APPELLEE."

¶{17} This assignment of error deals with the trial court's denial of the protective order for John and ACI. As stated above, the trial court granted the protective order in part and denied it in part; the only part of the motion for protective order that was granted was for John's personal income tax returns.

¶{18} Prior to addressing the correctness of the ruling, whether the denial of a protective order is a final appealable order must be addressed. Generally, discovery orders are not final appealable orders. However, pursuant to R.C. 2505.02(A)(3) discovery of a privileged matter falls under the definition of a provisional remedy, and as such, could constitute a final appealable order if the elements of R.C. 2505.02(B)(4) are met. That statute states:

¶{19} "(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

¶{20} "* * *

¶{21} "(4) An order that grants or denies a provisional remedy and to which both of the following apply:

¶{22} “(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

¶{23} “(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.”

¶{24} Denial of the protective order and the granting of the motion to compel of alleged privileged materials meets prong (a) because it does determine the action with respect to the provisional remedy and prevents judgment in respect to that provisional remedy.

¶{25} As to prong (b), whether John and ACI would be afforded an effective remedy by an appeal following final judgment from all of the proceedings, the Ninth Appellate District has explained that an order denying a motion to compel discovery of purported privileged material was not a final appealable order because it did not preclude a “meaningful or effective remedy” after final judgment. *Giusti v. Akron Gen. Med. Ctr.*, 178 Ohio App.3d 53, 2008-Ohio-4333, ¶10. This is so because, “The trial court’s decision denying * * * access to the requested information can be remedied on appeal following final judgment if this court determines that the privilege did not apply to the written discovery requests. See, e.g., *Williams v. Nationwide Mut. Ins. Co.*, 4th Dist. No. 05CA15, 2005-Ohio-6798, at ¶9.” *Id.* It then went on to add that an order denying the production of documents is different than an order compelling the production of a claimed privileged material, because denying the motion to compel “will not destroy any privilege that may apply. See R.C. 2505.02(B)(4)(b); see also *Callahan v. Akron Gen. Med. Ctr.*, 9th Dist. No. 22387, 2005-Ohio-5103, at ¶29.” *Id.*

¶{26} Thus, the Ninth Appellate District was insinuating that the granting of a motion to compel alleged privileged material or the denial of a protective order is a final appealable order pursuant to R.C. 2505.02(B)(4) because once the material is disclosed and is public, there is no way “that the proverbial bell cannot be unrung.” *Concheck v. Concheck*, 10th Dist. No. 07AP-896, 2008-Ohio-2569, ¶10 (stating that the case did not involve an order to disclose allegedly privileged material or trade secrets, rather, it was a case whether the protective order was granted).

¶{27} We deem the logic set forth in the proceeding cases to be persuasive authority. Consequently, the August 18, 2008 order denying the protective order is a final appealable order.

¶{28} As there is a final order to review, we turn our attention to the merits of the assignment. We start by noting that we review the trial court's decision to deny a motion for a protective order for an abuse of discretion. *Mauzy v. Kelly Services, Inc.*, 75 Ohio St.3d 578, 592, 1996-Ohio-265 (indicating that in the regulation of discovery, the trial court's decision will be reviewed for an abuse of discretion).

¶{29} Civ.R. 26(C) governs protective orders and provides, in pertinent part, that:

¶{30} "Upon motion by any party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: * * * that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way." Civ.R. 26(C)(7).

¶{31} The burden of showing that testimony or documents are confidential or privileged rests with the part seeking to exclude it. *Covington v. The MetroHealth Sys.*, 150 Ohio App.3d 558, 2002-Ohio-6629, ¶24, citing *Lemley v. Kaiser* (1983), 6 Ohio St.3d 258, 263-264 (discussing attorney-client privilege). Likewise, the burden to identify and demonstrate that the material is a trade secret is on the person claiming it to be a trade secret. *Fred Siegel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St.3d 171, 181, 1999-Ohio-260.

¶{32} Here, the trial court denied the request for the protective order stating:

¶{33} "The Court notes that since Plaintiff is a twenty-five percent (25%) shareholder, he has a financial interest in Allied Consolidates Industries, Inc. Additionally, as a shareholder, he should be entitled to view documents such as financial statements, tax returns and other documents concerning the economic status of his investment. The Court agrees with Defendants that the personal tax returns of

Defendant, John Ramun would not lead to any admissible information since any bonuses paid to him should be evident in the company's records.

¶{34} “Therefore, Defendant’s Motion for a Protective Order is overruled except as it relates to Defendant John Ramun in Request for Production #6.” 8/18/08 J.E.

¶{35} Thus, the trial court found that John and ACI did not meet their burden of proof for a protective order to be granted on production of documents numbers one, two, three, seven, eight, nine, and ten or on interrogatory number five.

¶{36} Likewise, even though the magistrate did not have the July 17, 2008 Motion for Protective Order at the March 12, 2008 hearing when it was deciding the motions to compel and request for production of documents, it noted that the objections to the requests did not provide any basis for why the sought after information was confidential or a trade secret. 6/2/08 Magistrate Order.

¶{37} The motion seeking a protective order did provide more information than the blanket statements of confidentiality and/or trade secrets that were made in John and ACI’s objections to the requests. Their motion for protective order stated that the discovery sought requested access to ACI’s internal business and financial documents and agreements that contain confidential, trade secrets and commercially sensitive information regarding ACI, its customers, including U.S. Steel, and affiliated companies. As to the request for the settlement agreement between U.S. Steel and ACI, they asserted that the settlement agreement contains a clause prohibiting ACI from publicly disclosing the commercial provisions relating to the parties settlement and working relationship. They also stated that all of the documents requested, not just the U.S. Steel documents, are carefully guarded and protected within ACI and are accessible only by authorized employees on a need to know basis. The motion for protective order also asserted that Michael now operates his own dismantling company and works for another dismantling contractor, both of which are competitors of ACI, and thus, if Michael is privy to the information requested he would be given an unfair competitive advantage. As such, John and ACI asked for certain material to be marked “Attorneys’ Eyes Only” so that only Michael’s lawyers and experts could view the documents.

¶{38} Attached to the motion for protective order was an affidavit from John. In that affidavit, John averred to the allegations in the motion for the protective order that are discussed above. He asserted that without a protective order for all documents and answers requested, he and ACI will be severely prejudiced.

¶{39} Despite providing more information in the motion for protective order than was in the objections to the requests, we do not find that the reasoning provided in the magistrate's decision any less persuasive. Given our standard of review, we cannot find that the trial court abused its discretion in denying the protective order when the movants failed to meet their burden to prove, i.e. they failed to allege enough information to prove that John and ACI were entitled to a protective order and an "Attorneys' Eyes Only" designation.

¶{40} Furthermore, even if the motion for a protective order contained enough information to warrant a protective order, for the reasons expressed below, the "Attorneys' Eyes Only" designation that was requested by John and ACI was not appropriate in this instance. An "Attorneys' Eyes Only" designation would only permit Michael's attorneys and experts to view the documents; no one else, including Michael, could view the documents. This would prohibit Michael from divulging any of the information that was obtained through discovery that was covered by the protective order because he would not be able to view the documents. This designation would be permissible under R.C. 1333.65, which states that a trial court can preserve the secrecy of an alleged trade secret by reasonable means "that may include granting protective orders in connection with discovery proceedings, holding in-camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval." Furthermore, as John and ACI note, courts have permitted the "Attorneys' Eyes Only" designation. *Medtronic Sofamor Danek, Inc. v. Michelson* (S.D.Tenn. 2002), Nos. 01-2373 MLV, 03-2055 MLV; *Montrose Ford, Inc. v. Starn*, 147 Ohio App.3d 256, 2002-Ohio-87.

¶{41} However, those cases are not directly on point for the proposition that the "Attorneys' Eyes Only" designation would be warranted in this case. For instance, in *Montrose Ford*, Montrose employed Starn and during his employment he had

access to customer lists, information on discounting, vendor habits and accounts. Starn left his employment with Montrose and began working for Clarke. Montrose claimed that Starn misappropriated that information and used it while working at Clarke. Montrose then issued a subpoena duces tecum on Clarke requesting customer invoices, purchase and sale invoices, account statements, sales analysis reports, portions of financial statements, customer lists, and documents identifying discounts given by vendors to Clarke and by Clarke to its customers. Montrose wanted this information to ascertain the extent of any transfer of customers and profits from Montrose to Clarke, which would support its allegations that Starn misappropriated trade secrets and confidential commercial information. Clarke sought a protective order, which was obtained and an “Attorneys’ Eyes Only” designation for Montrose’s general counsel was ordered for the information sought from Clarke so that Montrose could not use that information to its advantage. Clarke opposed the “Attorneys’ Eyes Only” designation for Montrose’s general counsel. In upholding the designation, the appellate court explained:

¶{42} “Clarke has asserted that access to its trade secrets by Montrose's general counsel, even under the protective order issued by the trial court, would jeopardize Clarke's trade secrets. This court declines to hold, however, that the status of Montrose's counsel as in-house conclusively creates an unacceptable risk that Clarke's trade secrets, produced under a protective order, will be revealed to Montrose. Clarke's assertion, moreover, is not supported by any evidence that Montrose's general counsel is involved in competitive decision making at Montrose. In the absence of any such evidence in the record, this court cannot find that the trial court abused its discretion in granting Montrose's general counsel access to Clarke's trade secrets under the protective order. Clarke's argument must therefore fail.” *Id.* at ¶18.

¶{43} *Montrose* is distinguishable from the case at hand because it was dealing with a suit against a former employee for misappropriation of trade secrets. It is not like this case where a minority shareholder is suing the majority shareholder/president of the corporation to show a breach of fiduciary duty and/or breach of oral contract. In the situation before us, both Michael and John owe each

other a fiduciary duty; shareholders in a closely held corporation owe a fiduciary duty to each other; shareholders owe a duty to fellow shareholders to maintain trade secrets and abstain from self-dealing. *Provac Plant Services, Inc. v. Glass* (June 28, 2000), 7th Dist. No. 99CO44, citing *Crosby v. Beam* (1989), 47 Ohio St.3d 105, 108, citing *United States v. Byrum* (1972), 408 U.S. 125 (applying Ohio law and holding that shareholders in a closely held corporation owed a fiduciary duty to each other). Thus, both parties owe a fiduciary duty to each other to protect ACI's alleged trade secrets and the need for "Attorneys' Eyes Only" is probably not as necessary as it would be in a situation with a former employee. Furthermore, the *Montrose* court was merely upholding the designation as not being an abuse of discretion, it was explaining when the failure to issue an "Attorneys' Eyes Only" protective order would constitute an abuse of discretion. Consequently, for those reasons, we cannot find that the trial court abused its discretion in failing to grant the "Attorneys' Eyes Only" designation as requested by John and ACI.

¶{44} Admittedly, the "Attorneys' Eyes Only" designation is not the only way to protect the information. Trial courts can regulate the discovery of trade secrets by ordering "that [the] use of the discovered information be limited to the lawsuit" and by "limit[ing] the persons who have access to the information" or limit the scope of discoverable trade secret information to trial issues only and to restrain, under penalty of contempt, use of the disputed information for any purpose other than the instant litigation. *Alpha*, 134 Ohio App.3d at 683; *Majestic Steel*, 8th Dist. No. 76521.

¶{45} However, John and ACI's specific request was for an "Attorneys' Eyes Only" designation, not for a formulation of language similar to that discussed above. Given our determination that the trial court did not abuse its discretion in failing to issue an "Attorney's Eyes Only" protective order, we will not order the trial court to issue a protective order that uses better or more appropriate conditions than the one requested, even if it could be warranted. It is not the province of this court to act as appellant's counsel. Therefore, for the reasons expressed above, this assignment of error lacks merit.

SECOND ASSIGNMENT OF ERROR

¶{46} “THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND ABUSED ITS DISCRETION WHEN IT UNREASONABLY AND ARBITRARILY DENIED DEFENDANTS-APPELLANTS’ MOTION TO SET ASIDE THE ORDER OF THE MAGISTRATE WHICH GRANTED PLAINTIFF-APPELLEE’S MOTION TO COMPEL AND FORCED THE DISCLOSURE OF DEFENDANT-APPELLANTS’ CONFIDENTIAL, PROPRIETARY, AND TRADE SECRET INFORMATION, ALL OF WHICH IS ENTIRELY UNRELATED TO PLAINTIFF-APPELLEE’S CLAIMS AND ALL OF WHICH IS BEING COMPELLED TO BE DISCLOSED IN THE ABSENCE OF A PROTECTIVE ORDER.”

¶{47} This assignment of error deals with the trial court’s order upholding the magistrate’s decision ordering John and ACI to respond to the motion to compel. John and ACI separate the arguments into three parts – interrogatory number five; productions of documents numbers one through three; and production of documents six, seven, eight, and ten. However, before addressing these arguments, we determine whether the order compelling the answer to interrogatory number five and the production of the documents is a final appealable order.

¶{48} As explained above, a motion compelling the production of purported privileged material would be a final appealable order because it meets both prongs of R.C. 2505.02(B)(4). However, the brief does not argue under this assignment of error that the motion to compel should have been denied because of confidential material. Rather, it argues that the requests were overly broad and not reasonably calculated to lead to discovery of admissible evidence. Such an argument would not render the issue a final and appealable order. If it is not privileged material there is no issue with being denied an effective remedy following the end of the entire cause. This would not be the situation where the “the proverbial bell could not be unrung.” Thus R.C. 2505.02(B)(4)(b) cannot be met, and the August 19, 2008 judgment ordering the production of documents and an answer to interrogatory number five is not ripe for review at this time.

CONCLUSION

¶{49} For the reasons expressed above, the first assignment of error lacks merit and the second assignment of error is not ripe for review. Thus, the judgment of the trial court is hereby affirmed.

Waite, J., concurs.

DeGenaro, J., concurs.