[Cite as *Eberhard Architects, L.L.C. v. Schottenstein, Zox & Dunn Co., L.P.A.*, 2015-Ohio-2519.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102088

EBERHARD ARCHITECTS, L.L.C.

PLAINTIFF-APPELLEE

vs.

SCHOTTENSTEIN, ZOX & DUNN CO., L.P.A.

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-12-781105

BEFORE: Celebrezze, A.J., E.T. Gallagher, J., and Laster Mays, J.

RELEASED AND JOURNALIZED: June 25, 2015

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FRANK D. CELEBREZZE, JR., A.J.:

{¶1} Defendant-appellant, Schottenstein, Zox & Dunn Co., d.b.a. Ice Miller, L.L.P. ("SZD"), appeals the trial court's denial of its motion for leave to file a motion for summary judgment. After a careful review of the record and the relevant case law, we affirm.

I. Procedural and Factual History

{¶2} On April 23, 2012, plaintiff-appellee Eberhard Architects, L.L.C. ("EALLC") filed a complaint against SZD alleging breach of contract, unjust enrichment, and prejudgment attachment under R.C. 2715.01. EALLC contended that it had performed architectural work related to SZD's new office space, for which SZD refused to pay. Moreover, EALLC averred that it "had been previously known as Oliver Design Group, LLC * * * and assumed all of its rights and obligations, including unpaid accounts." SZD argued that it had not entered into a contract with EALLC, and that any work performed by EALLC was only meant to entice SZD to retain EALLC in the future.

{¶3} The parties engaged in a lengthy and contentious discovery process. SZD sought protective orders in February and April 2013, which were denied by the trial court. This court affirmed the trial court's decisions in December 2013. *See Eberhard Architects, L.L.C. v. Schottenstein, Zox & Dunn Co.*, 8th Dist. Cuyahoga No. 99867, 2013-Ohio-5319. The trial court held a pretrial conference on July 11, 2014, at which time the trial was subsequently set for October 1, 2014.

{¶4} On August 20, 2014, during the course of discovery, Bill Eberhard ("Eberhard"), the principal and sole-owner of both Oliver Design Group, Inc. ("ODG") and EALLC, executed a certified resolution memorializing an assignment of ODG's SZD account to EALLC. The certified resolution stated in pertinent part that:

> Oliver Design Group, Inc., to the extent it has not transferred all portions of accounts owed yet, transfers to Eberhard Architects, LLC, for $20, all right title and interest to any and all accounts receivable, debts, obligations, or moneys owed related to the account of Schottenstein, Zox & Dunn Co., LPA.

On August 21, 2014, SZD deposed Eberhard, at which time he disclosed the existence of the certified resolution. SZD obtained the resolution during the week of August 25, 2014. Eberhard's deposition resumed on August 29, 2014, during which SZD extensively questioned him about the resolution and purported assignment.

{¶5} On September 17, 2014, two weeks before the trial was set to begin, SZD filed a motion for leave to file a motion for summary judgment with the trial court, along with its proposed motion for summary judgment arguing in part that SZD was entitled to judgment as a matter of law because EALLC lacked standing to bring suit. EALLC filed its brief in opposition to SZD's motion for leave on September 24, 2014. Thereafter, the trial court denied SZD's motion for leave.

{¶6} The case proceeded to trial on October 1, 2014. At trial, the managing partner of SZD's Cleveland office testified that SZD and Eberhard, then the principal of ODG, agreed upon a set of terms in 2008, whereby Eberhard would complete architectural design work for six potential office locations. The partner conceded that

she communicated directly with Eberhard, and had corresponded with him via his ODG email account first, and then through his EALLC email account in 2009. Emails were produced evidencing that the managing partner, Eberhard, and the firm's IT specialist met for lunch in 2009, and that the firm's IT specialist and Eberhard subsequently collaborated on proposals for architectural work. Moreover, the managing partner acknowledged that she had received proposals from Eberhard in July and September 2009, at which time he was working under EALLC.

{¶7} Eberhard also testified at trial, and he acknowledged that he was the sole owner and principal of both ODG and EALLC. He explained that he began work for SZD in 2008 under the ODG name and continued to work through ODG until it closed in early 2009. After ODG ceased operations, Eberhard began doing business under the newly-formed EALLC. Eberhard stated that he physically transferred the SZD accounts and files out of ODG's offices on Madison Avenue and into EALLC's new offices on Detroit Avenue when ODG closed. At trial, Eberhard acknowledged that this physical exchange of SZD's accounts, assets, and files constituted an assignment, which was later memorialized in the certified resolution. Finally, Eberhard stated that he continued to provide services to SZD under the EALLC name, specifically by collaborating with SZD employees to draft and prepare a seven-year lease proposal in July and September 2009. These proposals were prepared and signed by Eberhard as a member of EALLC.

{¶8} On October 7, 2014, the jury returned a verdict in favor of EALLC in the amount of $18,464. SZD filed this timely appeal. SZD does not contest the jury's

findings; rather, it raises as its sole assignment of error that the trial court erred by denying SZD's motion for leave to file a motion for summary judgment.

II. Analysis

A. Final, Appealable Order

{¶9} First, we address EALLC's assertion that the denial of SZD's motion for leave to file a motion for summary judgment is not a final, appealable order. Specifically, EALLC argues that the trial court's denial of SZD's motion for leave to file a motion for summary judgment is not reviewable by this court because it neither disposed of any issue on the merits, nor precluded a judgment on the matter.

{¶10} Generally, a trial court's order denying leave to file a motion for summary judgment is not a final, appealable order as it does not determine the action or prevent a judgment. *Ross v. Ross*, 94 Ohio App.3d 123, 126, 640 N.E.2d 265, 267 (8th Dist.1994). This also proves true for an order denying a motion for summary judgment. *Martin v. Grange Mut. Ins. Co.*, 11th Dist. Geauga No. 2002-G-2473, 2003-Ohio-4869, ¶ 22, citing *Ryll v. Columbus Fireworks Display Co., Inc.*, 95 Ohio St.3d 467, 2002-Ohio-2584, 769 N.E.2d 372, ¶ 48. However, the Ohio Supreme Court has held that a trial court's denial of a motion for summary judgment is reviewable on appeal by the movant from a subsequent adverse final judgment. *Balson v. Dodds*, 62 Ohio St.2d 287, 289, 405 N.E.2d 293 (1980). Furthermore, any error in denying a motion for summary judgment is rendered moot or harmless if a subsequent trial on the same issues raised in the motion demonstrates that there were genuine issues of material fact

supporting a judgment in favor of the party against whom the motion was raised. *Continental Ins. Co. v. Whittington*, 71 Ohio St.3d 150, 156, 642 N.E.2d 615 (1994). Accordingly, Ohio courts have reviewed denials of summary judgment motions when a judgment has been entered in favor of the nonmoving party. *Id.* We believe this precedent also applies to the denial of leave to file a motion for summary judgment.

{¶11} Here, the case proceeded to trial after SZD's motion for leave was denied, and a jury verdict was issued in favor of EALLC. The jury's verdict was journalized as a final judgment by the trial court. The record shows that the issue of standing raised in SZD's proposed summary judgment motion was neither raised nor adjudicated at trial. Thus, because a subsequent, adverse judgment has been entered against SZD, and because the standing issue raised in SZD's proposed motion was not addressed at trial, we believe that the denial of SZD's motion for leave to file summary judgment is reviewable.

B. Abuse of Discretion

{¶12} In its sole assignment of error, SZD argues that the trial court erred in denying SZD's September 17, 2014 motion for leave to file a motion for summary judgment, thereby refusing to address the evidence regarding EALLC's alleged lack of standing. We disagree.

{¶13} Once an action has been set for pretrial or trial, a defending party may move for summary judgment "only with leave of court." Civ.R. 56(B). Thus, a trial court has discretion to grant or deny leave to file for summary judgment after the matter has been scheduled for pretrial or trial, and will not be reversed without showing that

discretion was abused. *Brandon/Wiant Co. v. Cadle Co.*, 8th Dist. Cuyahoga No. 74752, 1999 Ohio App. LEXIS 5672, * 12 (Dec. 2, 1999), citing *Woodman v. Jones*, 103 Ohio App.3d 577, 582 660 N.E.2d. 520 (8th Dist.1995); *see also Paramount Supply Co. v. Sherlin Corp*, 16 Ohio App.3d 176, 179-180, 475 N.E.2d. 197 (8th Dist.1984). To constitute an abuse of discretion, the ruling must be more than legal error; it must be unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). "In order to have an 'abuse' in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment, but defiance thereof, not the exercise of reason, but rather of passion or bias." *Huffman v. Hair Surgeon, Inc.*, 19 Ohio St.3d 83, 87, 482 N.E.2d 1248 (1985), citing *State v. Jenkins*, 15 Ohio St.3d 164, 222, 473 N.E.2d 264 (1984).

{¶14} In this case, we cannot say that the trial court abused its discretion in denying SZD's motion for leave to file a motion for summary judgment. Here, the record reflects that the trial court conducted a pretrial hearing on July 11, 2014, during which the judge set the trial date for October 1, 2014. SZD did not request leave to move for summary judgment until September 17, 2014, which was nearly three months after the trial date had been set and 14 days prior to the start of trial. Moreover, by the time SZD's motion was filed, the parties had been engaged in protracted, disputatious litigation for approximately two and one-half years. Based on these circumstances, the

trial court could have reasonably determined that any summary judgment motion should have been made at a time that would not interfere with the scheduled trial date.

{¶15} Additionally, we recognize that SZD has not demonstrated that it was prejudiced by the court's ruling. After SZD was denied leave, SZD had every opportunity to move for a directed verdict at trial on the issue of standing. SZD posits that it moved for a directed verdict on the standing issue prior to trial, and that the trial court denied SZD the opportunity to do so. However, SZD also concedes in its brief before this court that no record of its motion for directed verdict is contained in the trial transcript. Even so, SZD has not filed a statement under App.R. 9(C) to permit our consideration of the alleged motion. Nothing in the record substantiates SZD's claim that it moved for a directed verdict or challenged EALLC's standing during trial. Therefore, SZD's sole assignment of error is overruled.

C. Standing

{¶16} Although SZD asserted only one assignment of error, SZD included a "Statement of Issues Related to Assignment of Error No. 1," in which it raised the issue of standing for the first time. Generally, an appellate court need not address an appellant's argument if it is not set forth as an assignment of error in conformity with App.R. 12(A) and 16(A). *See State v. Mann*, 8th Dist. Cuyahoga No. 59046, 1991 Ohio App. LEXIS 5290, * 15 (Nov. 7, 1991); *Lu-Jean Feng v. Kelley & Ferraro*, 8th Dist. Cuyahoga No. 91738, 2009-Ohio-1368, ¶ 31. However, Ohio courts have also held that an appellate court may reach the merits of an argument if the assignments of error were

"readily discernable" from the propositions of law, and where the opposing party had responded as if the propositions were assignments of error. *See JPMorgan Chase Bank, N.A. v. Allton*, 10th Dist. Franklin No. 14AP-228, 2014-Ohio-3742, ¶ 6-7; *Carter-Jones Lumber Co v. Denune*, 132 Ohio App.3d 430, 432, 725 N.W.2d 330 (10th Dist.1999). Here, both SZD and EALLC heavily addressed the issue of standing in their respective briefs and at oral argument. Accordingly, we will treat SZD's sub-issue raising EALLC's lack of standing as a separate assignment of error.

{¶17} "Whether established facts confer standing to assert a claim is a matter of law. We review questions of law de novo." *Portage County Bd. Commrs. v. Akron*, 109 Ohio St.3d 106, 2006-Ohio-954, 846 N.E.2d 478, ¶ 90, citing *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835. "It is an elementary concept of law that a party lacks standing to invoke the jurisdiction of the court unless he has, in an individual or representative capacity, some real interest in the subject matter of the action." *State ex rel Dallman v. Franklin Cty. Court of Common Pleas*, 35 Ohio St.2d 176, 179, 298 N.E.2d 515 (1973).

{¶18} "Standing is required to invoke the jurisdiction of the common pleas court, and therefore it is determined as of the filing of the complaint." *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, ¶ 3. We recognize that standing is a jurisdictional issue and that it may be raised at any time during the pendency of the proceedings. *Id.* at ¶ 13, citing *New Boston Coke Corp. v. Tyler*, 32 Ohio St.3d 216, 218, 513 N.E. 2d 302 (1987). Moreover, since *Schwartzwald*,

Ohio courts have reasoned that standing may be raised for the first time on direct appeal. *Bank of Am., N.A. v. Kuchta,* 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, paragraph two of the syllabus ("Further, lack of standing is an issue that is cognizable on appeal * * *."); *Bank of Am., N.A. v. Stewart*, 7th Dist. Mahoning No. 13 MA 48, 2014-Ohio-723, fn. 1, citing *Beaver Excavating v. Testa*, 134 Ohio St.3d 565, 2012-Ohio-5776, 983 N.E.2d 1317, fn. 1 ("The language used by the Ohio Supreme Court in *Schwartzwald* * * * and the *Beaver Excavating* case discussed infra confirms that standing can be raised for the first time on appeal.").

{¶19} Recently, the Ohio Supreme Court held that, although a plaintiff must possess standing at the time the complaint is filed, proof of standing may be submitted subsequent to the filing of the complaint. *Wells Fargo Bank, N.A. v. Horn,* Slip Opinion No. 2015-Ohio-1484, ¶ 17. In that case, Wells Fargo initiated a foreclosure action and averred that it was the holder of the Horns' note as "'successor by merger to Wells Fargo Home Mortgage, Inc. fka Norwest Mortgage, Inc.'" *Id.* at ¶ 2, 18. The Ohio Supreme Court held that Wells Fargo sufficiently demonstrated that it was the real party in interest for pleading purposes because "[f]actual allegations made in a complaint are taken as true for purposes of determining whether the complaint states a claim." *Id.* at ¶ 13, citing *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988).

{¶20} Later, in its motion for summary judgment, Wells Fargo submitted proof that it was the real party in interest. *Id.* at ¶ 4. Wells Fargo provided the sworn

statement of its default litigation specialist, who averred that Wells Fargo held the note prior to the filing of the complaint. *Id.* Also attached to Wells Fargo's summary judgment motion were certificates from the California and Ohio secretaries of state, which acknowledged Wells Fargo's name change and merger with the original note holder. *Id.* The Ohio Supreme Court found that the documentation attached to Wells Fargo's motion for summary judgment verified that Wells Fargo was the real party in interest at the time it filed the complaint. *Id*. at ¶ 19.

{¶21} We believe that *Horn* is instructive here. In its complaint, EALLC averred that it, "had been previously known as the Oliver Design Group, LLC * * * and assumed all of its rights and obligations, including unpaid accounts." This language, which is similar to what the Ohio Supreme Court analyzed in the *Wells Fargo* complaint, was sufficient for pleading purposes because EALLC was only required to set forth a short and plain statement of the claim entitling EALLC to relief.

{¶22} Furthermore, like the plaintiff in *Wells Fargo*, EALLC subsequently verified that it was the real party in interest. Although no formal documentation from the Ohio Secretary of State's office was provided in this case to establish a merger between EALLC and ODG, the evidence in the record suggests that EALLC was the *de facto* successor.

{¶23} "A *de facto* merger is a merger in fact without an official declaration of such." *Welco Industries, Inc. v. Applies Cos.*, 67 Ohio St.3d 344, 350, 617 N.E.2d 1129 (1993). The hallmarks of a *de facto* merger include: (1) the continuation of the previous

business activity and corporate personnel; (2) a continuity of shareholders resulting from a sale of assets in exchange for stock; (3) the immediate or rapid dissolution of the predecessor corporation; and (4) the assumption by the purchaser of all liabilities and obligations ordinarily necessary to continue the predecessor's business operations. *Id.*, citing *Turner v. Bituminous Cas. Co.*, 397 Mich. 406, 420, 244 N.W.2d 873 (1976). Moreover, courts interpreting and applying Ohio's *de facto* merger doctrine have reasoned that a rule requiring the presence of all of the hallmarks would be too rigid and would dilute the doctrine. *Cytec Industries, Inc. v. B.F. Goodrich Co.*, 196 F.Supp.2d 644, 658 (S.D.Ohio 2002) (applying Ohio law); *see also Bondex Intern. Inc. v. Hartford Acc. and Indem. Co.*, N.D.Ohio No. 1:03-CV-1322, 2009 U.S. Dist. LEXIS 131638, *29-31 (Feb. 10, 2009).

{¶24} Here, the record indicates that Eberhard was the only agent, both of ODG and EALLC, with whom SZD communicated, negotiated, and contracted. EALLC was engaged in the same line of architectural and design services as ODG, and both companies were wholly owned and operated by Eberhard. Although the office location changed, Eberhard explained:

> We relocated and took all our business records and our people and our clients and our computers and our cables and basically changed the name of the business as far as I was concerned.

{¶25} Later at trial, the following conversation transpired between Eberhard and his counsel:

Eberhard: We took everything with us. Took our furniture, our computers, cables, files, people. We took everything.

Counsel: Did you take the Schottenstein, Zox & Dunn file?

Eberhard: You bet.

Counsel: You brought that with you. Then you expected to have Eberhard Architects use the Schottenstein, Zox & Dunn file going forward, is that correct?

Eberhard: We did. Same firm, different name.

{¶26} Eberhard also testified that he contacted ODG's clients, including SZD's managing partner, by telephone to inform them that he was changing the name of the firm to EALLC. He explained:

> I left them voicemail messages explaining I was changing the name of the firm and we were moving. But it was the same group of people, we had the same design team and we were prepared to continue and execute the contracts we had at Oliver Design Group. If anybody had a question or challenge, to let me hear from them.

{¶27} Furthermore, the record is replete with correspondence between SZD's managing partner and Eberhard both before and after he began working under the EALLC moniker. In March 2008 and March 2009 email chains, Eberhard's emails to SZD's managing partner contained a signature block denoting he was the principal-in-charge of ODG. However, email chains from July 2009 and January 2010 between SZD's managing partner and Eberhard contain a signature block indicating that he was the managing partner of EALLC. Despite this, nothing in the record indicates that SZD or its agents ever questioned EALLC's identity or objected to Eberhard's participation as a member of EALLC. In fact, Eberhard collaborated with SZD's IT professional to prepare two proposals at the request of SZD's managing partner in July and September 2009 under EALLC. Finally, much of Eberhard's testimony regarding

his affiliation with ODG and EALLC and the transfer of SZD's account went uncontested at trial.

{¶28} Because the record indicates that EALLC was a successor to ODG by virtue of a *de facto* merger, and because EALLC continued to provide the same services to SZD without objection, we find the circumstances in this case to be analogous to the validation of the bank's standing in *Wells Fargo Bank, N.A. v. Horn*, Slip Opinion No. 2015-Ohio-1484, and hold that EALLC possessed standing as the real party in interest at the outset of this lawsuit.

{¶29} SZD contends that the certified resolution, which was executed during litigation in 2014, was the first time ODG assigned SZD's account to EALLC. We disagree. Generally, the free assignability of contracts is favored absent clear contractual language otherwise. *Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co.*, 112 Ohio St.3d 482, 2006-Ohio-6551, 861 N.E.2d 121, ¶ 36. As one of our sister districts aptly explained in *Acme Co. v. Saunders & Sons Topsoil*, 7th Dist. Mahoning No. 10 MA 93, 2011-Ohio-6423, ¶ 82-83 (Waite, P.J., concurring):

> An assignment is defined as a transfer to another person of the whole of any property or right therein. Black's Law Dictionary (6th Ed. 1990) 119. An assignment may be written or oral, and should satisfy the requirements of a contract, i.e., the legality of object, capacity of parties, consideration, and meeting of the minds. 6 Ohio Jurisprudence 3d (2011), Assignments, Section 25. An assignment, no matter how informal, may be found when there is intent on the part of the assignor to assign the rights in question, an intent on the part of the assignee to be assigned the rights in question, and valuable consideration exchanged. *Id.;* see also, *Morris v. George C. Banning, Inc.*, 77 N.E.2d 372, 374.

{¶30} Here, contractual language prohibiting the assignment of SZD's account was noticeably absent. Additionally, the record indicates that ODG relinquished possession and control of SZD's account and files to EALLC when it ceased operations in early 2009. As Eberhard testified at trial:

> Counsel: Another question would be did you say to yourself, hey, Bill, I'm going to transfer the Schottenstein, Zox & Dunn file to you and you said I accept?
>
> Eberhard: I accepted my right hand to my left hand, yes.
>
> Counsel: You not only physically transferred the file, then you made a contractual record of it?
>
> Eberhard: I did.

{¶31} Moreover, as noted above, Eberhard reaffirmed that EALLC intended to use ODG's SZD file going forward, and did so by continuing conversations with SZD employees and by creating proposals for SZD in July and September 2009. That ODG memorialized the transfer in writing via the certified resolution during litigation is of no consequence to our decision. The record demonstrates that a valid transfer of SZD's account to EALLC occurred in 2009, more than three years prior to the filing of the complaint. Therefore, we conclude that EALLC was the real party in interest and possessed standing at the time the complaint was filed.

III. Conclusion

{¶32} The trial court did not abuse its discretion by denying SZD leave to file a motion for summary judgment. As the trial date in this case had already been set for nearly three months at the time SZD sought leave, the trial court was free to deny leave on the basis that any motion should have been made at a time that would not interfere with

the scheduled trial date. Furthermore, the record in this case confirms that EALLC possessed standing at the time this suit commenced.

{¶33} Judgment affirmed.

It is ordered that appellee recover from appellant 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.

FRANK D. CELEBREZZE, JR., ADMINISTRATIVE JUDGE

EILEEN T. GALLAGHER, J., and
ANITA LASTER MAYS, J., CONCUR