

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

G. THOMAS THORNTON, ET AL	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiffs-Appellants	:	Hon. Sheila G. Farmer, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 09-CA-52
PREMIUM GLASS CO.,INC.	:	
	:	
Defendants-Appellees	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Civil appeal from the Fairfield County Court of Common Pleas, Case No.07CV1370

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: April 19, 2010

APPEARANCES:

For Plaintiffs-Appellants

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For Defendants-Appellees

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Gwin, P.J.

{¶1} Plaintiffs-appellants G. Thomas Thorton and Betty Thorton appeal a summary judgment of the Court of Common Pleas of Fairfield County, Ohio, entered in favor of defendants-appellees the Premium Glass Co., Inc. and Taylor Building Products, Inc. Other defendants, Nick Cangialosi, Tobin Mann, Harold Valley, Barb Krogulecki, and Gary Moore are not parties to this appeal. Appellants assign a single error to the trial court:

{¶2} “1. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS/APPELLEES TAYLOR AND PREMIUM AS TO THE FIRST CAUSE OF ACTION/SECOND COUNT BASED UPON THE DOCTRINE OF MOOTNESS AS THERE WAS NO ACTUAL CONTROVERYSY BETWEEN MR. AND MRS. THORNTON AND TAYLOR/PREMIUM CONCERNING THIS ISSUE.”

{¶3} The undisputed facts are fairly straight forward. Appellants were 100% owners of the Premium Glass Co., Inc. Defendant Cangialosi was the 100% owner of Taylor Building Products, Inc. In the summer of 2005, appellants and defendant Cangialosi entered into a business deal wherein appellants sold Cangialosi all their stock in the Premium Glass Co., Inc. in exchange for 10% of Cangialosi’s shares of Taylor Building Products, Inc. At the same time, appellant Thomas Thorton entered into an employment agreement with Taylor Building Products and Premium Glass. Both appellants also entered into a stock redemption agreement with defendant Cangialosi that provided certain conditions upon which Cangialosi would buy back appellants’ stock in Taylor Building Products.

{¶4} In November 2007, appellant Thomas Thorton was terminated from his employment with Taylor/Premium. Thereafter, appellants allege, defendant Cangialosi refused to acknowledge his duty to re-purchase appellant's stock pursuant to the stock redemption agreement. The parties all agree the stock redemption agreement was only with defendant Nick Cangialosi as an individual, and never with Taylor or Premium.

{¶5} In November 2007, appellants filed a complaint, and then an amended complaint. The amended complaint set out appellants' rendition of the factual background and explained the relationship of the parties. The remainder of the complaint was divided into sections. The first section set out in bold the "First Cause of Action-Defendants Premium Glass Co., Inc. and Taylor Building Products, Inc."

{¶6} Beneath this heading, appellants set out Count One, breach of the employment contract; Count Two, breach of the redemption agreement; and Count Three, which prayed for a declaratory judgment on the non-competition clause of the employment agreement.

{¶7} The next part of appellants' amended complaint included a heading labeled "Second Cause of Action-Defendant Cangialosi." Appellants' complaint separated the second cause of action into three counts: breach of fiduciary duty; declaratory judgment; and corporate mismanagement.

{¶8} The last section of appellants' amended complaint bore the heading "Third Cause of Action- Cangialosi, Mann, Valley, Krogulecki and Moore-Conspiracy/Breach of Fiduciary Duty." Under this heading, appellants alleged breach of fiduciary duty, and conspiracy as to all defendants.

{¶9} Appellants' amended complaint prayed for compensatory damages of \$250,000 on the first cause of action/count one; compensatory damages in an amount of excess of \$2,000,000 as prayed for in the first cause of action/count two; and compensatory damages, declaratory judgment, and punitive damages, and attorney fees for the remaining counts.

{¶10} Civ. R. 56(C) states in pertinent part:

{¶11} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

{¶12} A trial court should not enter a summary judgment if it appears a material fact is genuinely disputed, nor if, construing the allegations most favorably towards the non-moving party, reasonable minds could draw different conclusions from the undisputed facts, *Houndshell v. American States Insurance Company* (1981), 67 Ohio St. 2d 427. The court may not resolve ambiguities in the evidence presented, *Inland*

Refuse Transfer Company v. Browning-Ferris Industries of Ohio, Inc. (1984), 15 Ohio St. 3d 321. A fact is material if it affects the outcome of the case under the applicable substantive law, *Russell v. Interim Personnel, Inc.* (1999), 135 Ohio App. 3d 301.

{¶13} When reviewing a trial court's decision to grant summary judgment, an appellate court applies the same standard used by the trial court, *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St. 3d 35. This means we review the matter de novo, *Doe v. Shaffer*, 90 Ohio St.3d 388, 2000-Ohio-186.

{¶14} The party moving for summary judgment bears the initial burden of informing the trial court of the basis of the motion and identifying the portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the non-moving party's claim, *Drescher v. Burt* (1996), 75 Ohio St. 3d 280. Once the moving party meets its initial burden, the burden shifts to the non-moving party to set forth specific facts demonstrating a genuine issue of material fact does exist, *Id.* The non-moving party may not rest upon the allegations and denials in the pleadings, but instead must submit some evidentiary material showing a genuine dispute over material facts, *Henkle v. Henkle* (1991), 75 Ohio App. 3d 732.

{¶15} Appellants essentially argue Cangialosi was the only defendant against whom they brought their cause of action for breaching the stock redemption agreement. The trial court did not dismiss this count as to defendant Cangialosi, but dismissed it as to Taylor/Premium. Appellants urge the trial court should not have granted summary judgment on that count in favor of Taylor/Premium because they were not defendants on the claim. Appellants argue a trial court cannot not enter judgment in favor of a defendant on a cause of action not brought against it.

{¶16} Appellees argue the structure of the amended complaint sets out the first cause of action as a claim against the two corporations, Taylor and Premium, and the remaining portion of the complaint sets out the claims against Cangialosi. At best, appellees assert, the complaint is ambiguous as to the defendants in the first cause of action.

{¶17} Civil R. 56(D) provides:

{¶18} “If on motion under this rule summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court in deciding the motion, shall examine the evidence or stipulation properly before it, and shall if practicable, ascertain what material facts exist without controversy and what material facts are actually and in good faith controverted. The court shall thereupon make an order on its journal specifying the facts that are without controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.”

{¶19} Civ. R. 56(D) is designed for the occasions when a court is able to simplify a case by eliminating any issues not in dispute. *Ferguson v. Allied Anesthesia Inc.* (February 21, 1989) Franklin App. No 88 AP-483.

{¶20} We find the trial court’s judgment was designed to clarify the case and eliminate a potential source of confusion. For this reason, we conclude the trial court did not err in entering summary judgment on behalf of Premium and Taylor, finding neither appellee was liable for breach of the stock redemption agreement. It appears the court was careful to enter a judgment on this count only against the corporations, so as not to

affect the claim as set out in the second portion of the case, applicable to defendant Cangialosi.

{¶21} The assignment of error is overruled.

{¶22} For the foregoing reasons, the judgment of the Court of Common Pleas of Fairfield County, Ohio, is affirmed.

By Gwin, P.J.,

Farmer, J., and

Delaney, J., concur

HON. W. SCOTT GWIN

HON. SHEILA G. FARMER

HON. PATRICIA A. DELANEY

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IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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Plaintiffs-Appellants	:	
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-vs-	:	JUDGMENT ENTRY
	:	
PREMIUM GLASS CO.,INC.	:	
	:	
	:	
Defendants-Appellees	:	CASE NO. 09-CA-52

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Fairfield County, Ohio, is affirmed. Costs to appellants.

HON. W. SCOTT GWIN

HON. SHEILA G. FARMER

HON. PATRICIA A. DELANEY