

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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|--|---|--------------------|
| State of Ohio ex rel. | : | |
| ABM Janitorial Midwest, Inc., | : | |
| | : | |
| Relator, | : | |
| | : | |
| v. | : | No. 09AP-27 |
| | : | |
| Franklin County Court of Common Pleas, | : | (REGULAR CALENDAR) |
| Calvin H. Meyer, Karen Rogers Boring | : | |
| and Quality Building Services, LLC, | : | |
| | : | |
| Respondents. | : | |
| | : | |

D E C I S I O N

Rendered on February 23, 2010

Lane Alton Horst, LLC, Maryellen Corna Reash and Joseph A. Gerling, for relator.

Ron O'Brien, Prosecuting Attorney, and *Mary Jane Martin*, for respondent Franklin County Court of Common Pleas.

Newhouse, Prophater, Letcher & Moots, LLC, and Barbara K. Letcher, for respondents Calvin H. Meyer, Karen Rogers Boring, and Quality Building Services, LLC.

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

TYACK, P.J.

{¶1} ABM Janitorial Midwest, Inc. ("ABM"), filed this action in mandamus, seeking a writ to compel the Franklin County Court of Common Pleas to enter a

protective order to preserve the secrecy of information which ABM views as being trade secrets. The information is part of the information revealed or to be revealed in discovery in a case in common pleas court.

{¶2} In accord with Loc.R. 12(M), the case was referred to a magistrate to conduct appropriate proceedings. The parties stipulated the pertinent evidence and filed briefs. The magistrate then issued a magistrate's decision containing detailed findings of fact and conclusions of law, which is appended to this decision. The magistrate's decision includes a recommendation that we deny the request for a writ.

{¶3} Counsel for ABM has filed objections to the magistrate's decision. Counsel for the Franklin County Court of Common Pleas has filed a memorandum in response. Counsel for the opposing parties in the common pleas court case has also filed a memorandum in opposition to the objections. ABM filed a reply memorandum. The mandamus case is now before this court for a full, independent review.

{¶4} The central issue in this mandamus action is whether a trial court has discretion under R.C. 1333.65 to refuse to issue a protective order for something which is alleged to be a trade secret, whether or not the information has been demonstrated to be a trade secret.

{¶5} R.C. 1333.65 states, in pertinent part:

In an action under [The Ohio Trade Secrets Act], a court shall 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.

{¶6} If a trial court has discretion to issue or not issue such a protective order, then no clear legal right to the issuing of such a protective order exists and no writ of mandamus shall be issued. See *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28, and *State ex rel. Keenan v. Calabrese* (1994), 69 Ohio St.3d 176.

{¶7} We are not prepared to find that trial court judges have no discretion to issue or not issue a protective order in any given case. The mere allegation that something is a trade secret does not force a trial court to close a public courtroom or seal a public record. The countervailing concerns in a democratic society that courtrooms and those who conduct business in courtrooms are open to public scrutiny must be honored. To honor that overriding societal concern, trial court judges must have the flexibility to craft protective orders which protect the parties while respecting the public's right to know what is occurring in its courtrooms; or even to refuse to issue any protective order at all.

{¶8} As an appellate court, we should not issue a writ to force a trial judge to exercise his or her discretion. In light of the Supreme Court of Ohio precedent, we cannot issue such a writ.

{¶9} The objections to the magistrate's decision are overruled. We adopt the findings of fact and conclusions of law contained in the magistrate's decision. As a result, we deny the request for a writ of mandamus.

Objections overruled; writ denied.

SADLER and FRENCH, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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| Respondents. | : | |
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MAGISTRATE'S DECISION

Rendered on September 22, 2009

Lane Alton Horst, LLC, Maryellen Corna Reash and Joseph A. Gerling, for relator.

Ron O'Brien, Prosecuting Attorney, and Mary Jane Martin, for respondent Franklin County Court of Common Pleas.

Newhouse, Prophater, Letcher & Moots, LLC, and Barbara K. Letcher, for respondents Calvin H. Meyer, Karen Rogers Boring, and Quality Building Services, LLC.

IN MANDAMUS

{¶10} In this original action, relator, ABM Janitorial Midwest, Inc. ("ABM" or "relator"), requests a writ of mandamus ordering respondent Franklin County Court of Common Pleas ("common pleas court") to enter a protective order pursuant to R.C. 1333.65 that, by reasonable means, preserves the secrecy of trade secrets alleged by relator in an action filed by relator in the common pleas court.

Findings of Fact:

{¶11} 1. On March 6, 2008, relator filed an action in the common pleas court against respondents Calvin H. Meyer ("Meyer"), Karen Rogers Boring ("Rogers"), and Quality Building Services, LLC ("QBS") who are the named defendants in that action.

{¶12} 2. According to the complaint filed by relator in the common pleas court ("common pleas complaint"), ABM is a nationwide organization that offers a full range of commercial cleaning and building services.

{¶13} 3. According to the common pleas complaint, Meyer was formerly employed by ABM as "VP-Ohio" until February 5, 2007. Thereafter, Meyer was assigned "direct Branch Management responsibilities for Columbus [Ohio]."

{¶14} 4. According to the common pleas complaint, Rogers was formerly employed by ABM as "Operations Manager," and she reported directly to Meyer prior to her resignation. Rogers was assigned certain customer accounts and was responsible for managing ABM's service delivery as well as customer relationship management of certain ABM accounts.

{¶15} 5. According to the common pleas complaint, Meyer's employment with ABM was terminated effective December 12, 2007, "in connection with a company restructuring and the acquisition of another company."

{¶16} 6. According to the common pleas complaint, Rogers informed ABM of her intention to resign on January 23, 2008, and her last day with the company was February 6, 2008.

{¶17} 7. According to the common pleas complaint, in January 2008, Meyer and Rogers formed QBS, a company that competes directly with ABM. Shortly after QBS was formed, it was awarded a contract for the "Easton Commons Property" that Rogers "participated in soliciting on behalf of ABM."

{¶18} 8. Among the several claims alleged in the common pleas complaint is misappropriation of ABM's trade secrets in violation of Ohio's Trade Secrets Act, R.C. 1333.61 et seq. ABM seeks damages and injunctive relief.

{¶19} 9. On March 7, 2008, the common pleas court issued a temporary restraining order against Meyer, Rogers, and QBS.

{¶20} 10. On April 9, 2008, the common pleas court approved a "Stipulated Confidentiality and Protective Order" ("SCPO") that had been negotiated by the parties.

Set forth in 13 enumerated paragraphs, the SCPO provides:

* * * [P]ursuant to Rule 26 of the Ohio Rules of Civil Procedure, and in order to facilitate the parties' discovery in this case, the following procedure shall govern the production, use and handling of documents, testimony, and other written, recorded or graphic matter designated as "Confidential" by any party during these proceedings:

1[.] This Stipulated Confidentiality and Protective Order shall apply to designated portions of depositions, productions of documents, answers to interrogatories, responses to requests for admissions, and all other discovery undertaken pursuant to the Ohio Rules of Civil Procedure, as well as all testimony and evidence adduced at any hearing or trial and any other information produced or utilized by any party or non-party in connection with this action[.]

* * *

7. Any person who obtains discovery material protected by this Stipulated Confidentiality and Protective Order through this action shall be instructed not to reveal or discuss such information with any person not entitled to receive such information, as set forth above. If counsel for any party shall believe it necessary, for the purpose of this litigation only, to disclose materials designated as CONFIDENTIAL by the other party to any person other than those designated in paragraph 6, counsel shall not do so without first obtaining written permission from counsel for the party that designated the materials CONFIDENTIAL.

* * *

9. Nothing in this Stipulated Confidentiality and Protective Order shall prevent the parties from using, in accordance with the Order, discovery material protected by this Order in connection with the trial, deposition, motion, memorandum, or other proceeding in this action[.]

10. Nothing in this Stipulated Confidentiality and Protective Order shall prevent any party from seeking modification of this Stipulated Confidentiality and Protective Order, or from objecting to discovery that it believes to be otherwise improper.

* * *

12[.] The Court retains jurisdiction to make such amendments, modifications, and additions to this Stipulated Confidentiality and Protective Order as the Court may from time to time deem appropriate on its own motion or that of any party.

(Emphases sic.)

{¶21} 11. Earlier, the parties conducted depositions and exchanged written discovery in preparation for the preliminary injunction hearing. Producing numerous documents for respondents, relator claimed that the documents were confidential.

{¶22} 12. A common pleas court magistrate conducted a preliminary injunction hearing beginning April 11, 2008 and issued a magistrate's decision on April 28, 2008. Objections to the magistrate's decision were filed.

{¶23} 13. On May 22, 2008, the common pleas court sua sponte issued the following order:

The parties previously entered into a Stipulated Confidentiality and Protective Order which the Court approved.

Upon review, the Court notes that according to the terms of the Order, testimony or documents introduced at trial could be subject to the Order[.] The Court is of the opinion that any testimony or documents introduced at trial are by definition, with very little limited exceptions that would not apply in this case, public[.] This would apply even if the testimony or document was previously viewed as protected during a discovery proceeding.

Therefore the Court, on its own motion strikes the previously agreed upon order. The parties are invited to draft a new agreement within the limitations set forth above.

{¶24} 14. On June 5, 2008, ABM moved for a protective order and for a "*Nunc Pro Tunc*" order. (Emphasis sic.) ABM requested that the court clarify its May 22, 2008 order:

* * * [T]o ensure that the parties' previously agreed-upon protections apply to information already exchanged and submitted to the Court, and to preserve the secrecy of ABM confidential customer, business, and financial information during subsequent proceedings in this case as follows:

- Any documents containing information alleged to be trade secrets of ABM shall be submitted and maintained under seal;
- All copies of documents containing confidential information alleged to be trade secrets of ABM that are not retained by the Court shall be returned to counsel for Plaintiff immediately following hearing or trial;

- Any testimony specifically referencing confidential information alleged to be trade secrets of ABM shall be noted as "Confidential" and, if transcribed, shall be held under seal;
- Defendants shall not use or disclose any information alleged to be trade secrets of ABM outside the proceedings in this case.

{¶25} 15. While ABM's June 5, 2008 motion was pending, respondents served on ABM interrogatories and requests for production of documents.

{¶26} 16. On September 12, 2008, the common pleas court granted a preliminary injunction and denied ABM's June 5, 2008 motion. The September 12, 2008 order of the common pleas court offered the following explanation for denying ABM's June 5, 2008 motion:

On June 5, 2008, plaintiff filed its "Motion for Protective Order & Motion for Nunc Pro Tunc Order[.]" Plaintiff seeks an order "amending and clarifying the Court's Order of May 22, 2008[.]"

In this regard, plaintiff has failed to show that the May 22, 2008 order is erroneous[.] For the reasons set forth in the May 22, 2008 order and the Magistrate's April 28, 2008 decision, this motion is unwarranted[.]

(Emphasis sic.)

{¶27} 17. On November 10, 2008, in the common pleas court action, respondents moved to compel discovery.

{¶28} 18. On January 8, 2009, the common pleas court entered an order granting the November 10, 2008 motion to compel discovery.

{¶29} 19. On January 9, 2009, relator, ABM Janitorial Midwest, Inc., filed this mandamus action.

Conclusions of Law:

{¶30} It is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶31} R.C. 1333.65 states:

In an action under sections 1333.61 to 1333.69 of the Revised Code, a court shall 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.

{¶32} It is well settled that in order for a writ of mandamus to issue, relator must demonstrate: (1) that it has a clear legal right to the relief prayed for; (2) that respondent is under a clear legal duty to perform the act; and (3) that relator has no plain and adequate remedy in the ordinary course of law. *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28, 29.

{¶33} In the underlying common pleas court action, the common pleas court entered an order under R.C. 1333.65 that relator had negotiated with respondents. That order, issued April 9, 2008, is captioned "Stipulated Confidentiality and Protective Order" and is set forth in pertinent part above.

{¶34} After the preliminary injunction hearing at which allegedly confidential information was introduced, the common pleas court, on May 22, 2008, sua sponte struck its April 9, 2008 order and presented the following rationale for so doing:

* * * The Court is of the opinion that any testimony or documents introduced at trial are by definition, with very little limited exceptions that would not apply in this case, public[.] This would apply even if the testimony or document was

previously viewed as protected during a discovery proceeding.

{¶35} Although the common pleas court invited the parties "to draft a new agreement within the limitations set forth" in the order, relator claims here that a new agreement preserving its rights under R.C. 1333.65 is not possible within the limitations set forth in the order. Thus, relator did not attempt to negotiate a new agreement but did file, on June 5, 2008, a motion for a protective order and for a "Nunc Pro Tunc" order. Relator asked the common pleas court to clarify its May 22, 2008 order. As previously noted, relator's June 5, 2008 motion was denied.

{¶36} On January 8, 2009, the common pleas court granted respondents' motion to compel discovery. Relator claims that the discovery order commands it to produce confidential information absent any protection from a court order under R.C. 1333.65.

{¶37} Apparently, as it now stands, there is no R.C. 1333.65 protective order in the common pleas action, and relator is under a court order to produce alleged confidential information without a protective order.

{¶38} Based on the foregoing, relator asks for a writ of mandamus compelling the common pleas court to issue a protective order that will, by reasonable means, preserve the secrecy of its alleged trade secrets under R.C. 1333.65.

{¶39} In the magistrate's view, *State ex rel. Records Deposition Serv. v. Aurelius* (Mar. 8, 2001), 8th Dist. No. 78456, is dispositive of this action.

{¶40} *Records Deposition Service of Ohio, Inc. ("Records Deposition")* commenced a mandamus action in the Court of Appeals, Eighth District, against respondents Judge William Aurelius and the Cuyahoga County Common Pleas Court to compel the respondents in that action to issue a protective order for alleged trade

secrets pursuant to R.C. 1333.65 in the underlying action. Respondents moved for dismissal of the mandamus action and the court of appeals granted the motion.

{¶41} In the underlying action, Records Deposition sued George Sintsirmas for breaching a covenant not to compete and converting trade secrets when he left Records Deposition and went to work with a competitor. At the beginning of the litigation, Records Deposition sought a preliminary injunction and a protective order regarding alleged trade secrets. Judge Aurelius denied the motion for a protective order. Records Deposition then commenced its mandamus action in the court of appeals.

{¶42} In denying the writ, the *Records Deposition* court explained:

The gravamen of Records Deposition's argument is that R.C. 1333.65 requires a court to issue a protective order for alleged trade secrets. It maintains that the language of the statute is so clear that issuing such an order is a mere ministerial act over which the trial court has no discretion. * * *

* * *

Records Deposition relies exclusively on the language "a court shall preserve the secrecy of an alleged trade secret." It cites no other authority for its interpretation of the statute, that a trial court has no discretion in issuing some form of a protective order when confronted with alleged trade secrets.

However, the case authority does not support that position. Rather, it holds that R.C. 1333.65 provides the court with tools to protect trade secrets, but the threshold decision to issue any protective order still remains within the discretion of the trial judge. In *Alpha Benefits Agency, Inc. v. King Insurance Agency, Inc.* (1999), 134 Ohio App.3d 673, 731 N.E.2d 1209, this court initially reaffirmed the basic principle that "[t]he decision to grant a motion for a protective order is left to the discretion of the trial court." 134 Ohio App.3d at 680. Subsequently, this court, in discussing R.C. 1333.65 stated: "a trial court has broad authority to fashion a protective order that protects the secrecy of a trade secret. R.C. 1333.65

provides that a court may preserve the secrecy of an alleged trade secret by reasonable means, including 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."

Additionally, Records Deposition's interpretation of the statute is problematic because it would force courts to honor overbroad claims, or even sham claims, of trade secrets. This would be contrary to the courts' duty to search for the truth. Thus, there must necessarily be a threshold issue of determining whether the alleged trade secrets are authentic trade secrets and worthy of protection. In *Koval v. General Motors Corporation* (1990), 62 Ohio Misc.2d 694, 610 N.E.2d 1199, the trial court refused to issue any protective order for alleged trade secrets because it determined that the relevant records and information were not trade secrets. Thus, it is difficult to conclude that the statute creates a duty to protect any alleged trade secrets without a necessary review by the trial court. Moreover, the courts have ruled that the decision to grant a motion for a protective order is left to the sound discretion of the trial court. *Arnold v. American National Red Cross* (1994), 93 Ohio App.3d 564, 639 N.E.2d 484 and *Fairfield Commons Condominium Association v. Stasa* (1985), 30 Ohio App.3d 11, 506 N.E.2d 237. * * *

In conclusion although R.C. 1333.65 provides for the protection of trade secrets, this court is not convinced that Records Deposition has established that a trial court has a nondiscretionary duty to issue a protective order upon a party's allegation of trade secrets. The absence of case law upholding that interpretation, the case law holding that the issuance of a protective order is within the discretion of the court and the problem that the relator's interpretation could lead to unjust results cause this court to doubt that there is a clear right to mandamus. Accordingly, this court declines to issue the writ. In doing so the court does not opine on the propriety of the trial court's decision or whether the matter should be reconsidered in the trial court.

Id. at 2-3.

{¶43} In *Records Deposition*, as here, the common pleas court denied the request for a protective order and thus the underlying litigation was left to proceed

without a protective order. Given that a motion for a protective order is left to the sound discretion of the trial court, there is no clear legal right upon which relator can compel the issuance of a writ of mandamus in the instant action.

{¶44} Accordingly, for all the above reasons, it is the magistrate's decision that this court deny relator's request for a writ of mandamus.

/s/Kenneth W. Macke

KENNETH W. MACKE
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).