

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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| FULLER & ASSOCIATES | : | JUDGES: |
| | : | Hon: W. Scott Gwin, P.J. |
| Plaintiff-Appellee | : | Hon: William B. Hoffman, J. |
| | : | Hon: Julie A. Edwards, J. |
| -vs- | : | |
| | : | Case No. 2004CA00242 |
| HEIL WINDERMERE MOVING & STORAGE CO., et al. | : | |
| | : | |
| Defendants-Appellants | : | <u>OPINION</u> |

CHARACTER OF PROCEEDING: Civil Appeal From Stark County Court of
Common Pleas Case 2003CV00771

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: May 23, 2005

APPEARANCES:

For Plaintiff-Appellee

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Gwin, P.J.,

{¶1} Defendants-appellants MPK Holdings, LTD, aka MPK Holdings, LLC, Move It Now, Inc., and Phillip Kubec appeal from the June 30, 2004, Judgment Entry of the Stark County Court of Common Pleas. Appellants assign four errors to the trial court:

{¶2} “I. THE TRIAL COURT’S FINDINGS THAT PHILLIP KUBEC SIGNED A CONFIDENTIALITY AGREEMENT WITH HIS OWN PERSONAL SIGNATURE IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, CONTRARY TO LAW, AND AN ABUSE OF DISCRETION.

{¶3} “II. THE TRIAL COURT’S FINDING THAT THERE WAS CONCERTED ACTIVITY ON THE PART OF PHILLIP KUBEC, MPK HOLDING LLC, MOVE IT NOW, INC. OR ANY PARTY IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND THE IMPOSITION OF ANY LIABILITY THEREFOR IS CONTRARY TO LAW, AND AN ABUSE OF DISCRETION.

{¶4} “III. THE TRIAL COURT’S FINDING THAT MOVE IT NOW, INC. BREACHED ITS LEGAL DUTY TO FULLER IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, CONTRARY TO LAW, AND AN ABUSE OF DISCRETION.

{¶5} “IV. THE TRIAL COURT’S FINDING THAT MOVE IT NOW, INC. IS SIMPLY AN ARM OF KUBEC AND MPK IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, CONTRARY TO LAW, AND AN ABUSE OF DISCRETION.”

{¶6} Co-defendants Eileen Heil and Heil Windemere also appeal the judgment against them in Case No. 2004CA00241.

{¶7} Appellee Fuller & Associates, Inc. is a business broker which sells on-going businesses. On or about November 5, 2001, appellee and Heil Windermere Storage & Moving entered into an exclusive 'right to sell' listing contract. Pursuant to the terms of the contract, Heil Windermere agreed to pay appellee a fee in the amount of 8% of the total purchase price or a minimum of \$8,000.00, whichever is greater, if "OWNER sells, leases, trades, or otherwise disposes of all or any part of the Business within ONE (1) YEAR from the termination date of the Sole and Exclusive Period to any person, firm or entity referred to the BUSINESS by BROKER, or who became aware of the Business through the efforts of BROKER during the Sole and Exclusive Period."

{¶8} Eileen Heil, who is a shareholder and officer of Heil Windermere, signed the contract on behalf of Heil Windermere. Directly above her signature is printed: "We have read and understood, and hereby agree to the above terms and provisions of this contract and any Addendum hereto, and hereby acknowledge receipt of a copy of this contract. Also, I/we represent and warrant that I/we constitute all of the owners/partners/shareholders of the business listed herein and hereby personally guarantee performance of this contract." The contract expired on April 30, 2002.

{¶9} Pursuant to an addendum signed by Eileen Heil and by Richard Heil, who is also a shareholder and officer of Heil Windermere, the contract was extended until October 31, 2002.

{¶10} Appellant MPK had entered into a confidentiality agreement with appellee. In the confidentiality agreement, which was signed by appellant Philip

Kubec on behalf of appellant MPK Holdings, appellant MPK agreed to “structure the transaction to assure that Fuller’s [appellee’s] fee, per its written agreement with the Company is properly provided for in the purchase and sale documents and is complied with at closing.”

{¶11} After appellee introduced appellant MPK Holdings to Heil Windermere, appellant MPK entered into a purchase agreement with Heil Windermere for the purchase of the business. In late 2002, the business was sold to appellant Move It Now, Inc. for \$320,000.00.

{¶12} On March 3, 2003, appellee filed a complaint for breach of contract and breach of personal guaranty against Heil Windermere, Eileen Heil and MPK. The complaint alleged Heil Windermere had breached the contract by failing to pay appellee its brokerage commission and Eileen Heil had given her personal guaranty to pay but also breached the contract. Appellee further alleged appellant MPK had breached the confidentiality agreement by failing to provide for the payment of appellee’s brokerage commission, or, in the alternative, appellant MPK had entered into a contract to assume liability for the payment of brokerage commissions to appellee, who was a third party beneficiary to such contract, and appellant MPK had breached the contract.

{¶13} With leave of court, appellee filed an amended complaint adding Richard Heil and appellants Phillip Kubec and Move It Now, Inc. as defendants. The amended complaint contained ten counts, alleging breach of contract, fraud in the inducement of the contract, tortious interference with contract rights, and fraud. The amended complaint also alleged Heil Windemere was the alter ego of Eileen

and Richard Heil, while Move It Now, Inc. and/or MPK Holdings was the alter ego of Phillip Kubec. Appellee sought both compensatory and punitive damages as well as prejudgment and post judgment interest and attorney's fees.

{¶14} On February 25, 2004, appellee voluntarily dismissed count eight of its complaint [fraud] with respect to Richard Heil only.

{¶15} After a bench trial, the trial court granted judgment against Heil Windermere, Eileen Heil, MPK, Phillip Kubec and Move It Now in the amount of \$25,600.00 (8% of the \$320,000.00 purchase price), the amount of the brokerage commission due and owing to appellee, plus interest. The trial court stated:

{¶16} "The Court finds that the following parties have breached their legal duty and are jointly and severally responsible for the amount due. The following entities are legally responsible: Heil Windermere Moving & Storage Company, Eileen Heil, MPK Holdings LLC, Phillip Kubec Move It Now, Inc. The Court can find no legal responsibility for Richard Heil personally.

{¶17} "Clearly, the above entities were involved in a concerted effort to deprive the broker of the earned brokerage commission. The broker brought the parties together in this matter and was intimately involved in the negotiation of the purchase. The above parties are legally responsible. The corporation, Move It Now, Inc., was formed specifically to buy Heil Windermere and is simply an arm of Kubec and MPK."

{¶18} Appellants filed two separate requests for findings of fact and conclusions of law pursuant to Civ.R. 52. Appellants' motions were denied by the trial court.

{¶19} Appellants challenge the trial court's findings, arguing they are against the manifest weight of the evidence, contrary to law, and an abuse of discretion. It is well settled that a judgment supported by competent and credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence, *C.E. Morris Company v. Foley Construction Company* (1978), 54 Ohio St. 2d 279, 376 N.E. 2d 578. When the issue is one of the manifest weight of the evidence, the reviewing court has the authority and duty to weigh the evidence and determine whether the findings of the trier of fact were so against the weight of the evidence as to require reversal and remanding of the case for re-trial, *State ex rel. Squire v. City of Cleveland* (1948), 150 Ohio St. 3d 303, 82 N.E. 2d 709. A reviewing court must presume the findings of the trier of fact were correct, *Season Coal Company v. Cleveland* (1984), 10 Ohio St. 3d 77, 461 N.E. 2d 1273. The fact finder is best able to view the witnesses and judge the credibility of the testimony, *Id.*

{¶20} However, the Supreme Court has established a different standard for reviewing courts to apply in examining how trial courts have interpreted a contract, *Nationwide Mutual Fire Insurance Company v. Guman Brothers Farm* (1995), 73 Ohio St. 3d 107. If a contract is clear and unambiguous, then its interpretation is a matter of law, and there is no issue of fact presented, see, e.g., *Inland Refuse Transfer Company v. Browning-Ferris Industries of Ohio, Inc.* (1984), 15 Ohio St. 3d 321. This court reviews a trial court's decisions on questions of law de novo.

I

{¶21} In their first assignment of error, appellants urge the trial court erred when it found appellant Philip Kubec signed the confidentiality agreement with appellee both personally and on behalf of his prospective buyer group, appellant MPK.

{¶22} The confidentiality agreement sets forth obligations of the parties. Below the phrase, “agreed to and accepted” is a signature line. Below the signature line is typewritten “Authorized Signature.” Phillip Kubec signed on this line. Below Kubec’s signature line is a line labeled “Name of Prospective Buyer’s Group”. The name written on the signature line is MPK Holdings LLC. Below the MPK’s name is a P.O. Box in Richfield, Ohio.

{¶23} From the above, the trial court found as a matter of law Kubec signed as an individual and hence is personally liable.

{¶24} In *George Ballas Leasing, Inc. v. State Security Service, Inc.* (December 31, 1991), Lucas Appellate No. L-91-069, the Court of Appeals found a signature gives a clear indication the signer is acting as an agent if the name of the principal is disclosed, the signature is preceded by words of agency, such as “by”, “per”, or “on behalf of”, and the signature is followed by a title or statement showing the capacity in which the signer is executing the document.

{¶25} We find the phrase “authorized signature” coupled with the disclosed principal’s name is a clear indication Kubec signed as the agent of the prospective buyer group. We find the trial court erred in finding Kubec signed the confidentiality agreement as an individual.

{¶26} Although we find the finding Kebuc did not sign as an individual, this does not excuse him from liability under the tort action, see II infra. Thus, the trial court's finding the parties were jointly and severally liable is correct. For this reason, the first assignment of error is overruled as moot.

II

{¶27} In their second assignment of error, appellants argue the trial court's finding the various appellants acted in concert was against the manifest weight of the evidence and contrary to law and thus, liability may not be imposed on them.

{¶28} In its complaint, appellee alleged fraud, tortious interference with the contract, and civil conspiracy. In order to recover for a claim of intentional interference with a contract, a claimant must prove: (1) a contract; (2) the wrongdoer's knowledge of the contract; (3) the intentional procurement of a breach; (4) the absence of justification; and (5) damages resulting from the breach, see, e.g., *Larissey v. Financial Investment* (November 26, 1986), Cuyahoga Appellate Nos. 50933, 50934, and 50935. In *Juhasz v. Quick Shops, Inc.* (1977), 55 Ohio App. 2d 51, the Court of Appeals for Summit County found tortious interference with a contract means: (1) the defendant's conduct interfered with the business rights of the plaintiffs; and (2) taking into consideration the situation and relationship between the parties, such conduct on behalf of the defendant was not privileged.

{¶29} The Ohio Supreme Court has defined civil conspiracy as a malicious combination of two or more persons acting to injure another in person or property, in a way not competent for one person acting alone, which results in actual damages, *Williams v. Aetna Finance Company* (1998), 83 Ohio St. 3d 465. The act must be a

tort, see *Galmish v. Cicchini* (June 2, 1999), Stark Appellate No. 97-CA-00319. Appellants argue breach of contract is not a tort, *Motorist Mutual Insurance Company v. Said* (1992), 63 Ohio St. 3d 690. Thus, breach of contract, even if malicious, cannot be posited as the underlying activity giving rise to a civil conspiracy. Appellants argue if one person may lawfully commit an act, then the fact the act is committed by two or more persons, even maliciously, cannot be the basis for a conspiracy claim, see *Palmer v. Westmeyer* (1998), 48 Ohio App. 3d 296. While appellants are correct, intentional interference with business relationships is a tort, and is one of the bases of appellee's claim.

{¶30} Finally, appellants argue there is no malice demonstrated in any of the actions the various appellants performed. The element of malice in a tort action may be presumed by the nature of the act. For example, in an action for malicious prosecution, if the want of probable cause is proven, one permissible legal inference is that the proceedings are actuated by malice, *Melanowski v. Judy* (1921), 100 Ohio St. 153. Thus, in *Gosden v. Lewis* (1996), 116 Ohio App. 3d 195, 687 N.E. 2d 481, the Court of Appeals for the Ninth District held malice may be inferred from or imputed to a common design by two or more persons to cause harm to another and need not be proven separately or expressly. In fact, the proof of a malicious combination of two or more persons to injure another does not require a showing of an express agreement, but only a common understanding or design, even if tacit, to commit an unlawful act.

{¶31} We have reviewed the record, and we find there was sufficient, competent and credible evidence to demonstrate the various appellants acted in

concert in such a way to deprive appellee of the brokerage commission it had earned.

{¶32} The second assignment of error is overruled.

III

{¶33} In their third assignment of error, appellant Move It Now, Inc., argues the trial court's finding it breached a duty to appellee is against the manifest weight of the evidence, contrary to law, and an abuse of discretion. Appellants argue the evidence showed National City Bank would not fund a purchase of Heil by appellant MPK, and required another corporation be set up for this purpose. Appellant Move It Now, Inc argues there was no contract between it and appellee, and appellant Move It Now, Inc never assumed any legal contractual duty to appellee.

{¶34} The record contains a purchase agreement executed December 13, 2002, between Heil Windermere, referred to as the "Seller" and Move It Now, Inc., referred to as the "Buyer". Under Section 12 (E), the contract provides the seller gives notice appellee Fuller & Associates has been engaged as a broker and the buyer agrees to hold seller harmless from payment for brokerage fees to Fuller & Associates. The contract was signed by Richard Heil as secretary of Heil Windermere Storage and by someone for Move It Now, Inc., although the signature and designation of the signer's capacity is illegible.

{¶35} Even if appellant Move It Now, Inc., is correct in arguing the trial court erred in finding it had a legal duty to appellee, the trial court also found appellant Move It Now, Inc., acted in concert with the other parties to deprive the appellee of

its earned brokerage commission. This makes appellant Move It Now, Inc., liable jointly and severally for tortious interference with business relations.

{¶36} The third assignment of error is overruled.

IV

{¶37} In their fourth assignment of error, appellants argue the trial court was incorrect in holding appellant Move It Now, Inc., was simply an arm of appellants Kubec and MPK.

{¶38} Appellants admit the reason for the creation of Move It Now, Inc., was to secure funding to purchase Heil Windemere. The trial court found the parties acted in concert to deprive the appellee of its earned brokerage commission, and found Kubec and MPK used Move It Now, Inc., as the vehicle to secure the loan and finalize the purchase. We find the trial court's decision is supported by competent and credible evidence in the record.

{¶39} The fourth assignment of error is overruled.

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

By: Gwin, P.J. and

Hoffman, J. concur;

Edwards, J., dissents

JUDGES

EDWARDS, J. DISSENTING OPINION

{¶41} I respectfully dissent from the majority's analysis and disposition of appellant's assignments of error for the following reasons.

{¶42} After the bench trial in the case sub judice, the trial court, on June 30, 2004, issued a Judgment Entry granting judgment in favor of appellee and against appellants. Appellants then filed two separate motions for findings of fact and conclusions of law pursuant to Civ.R. 52 that were denied by the trial court.

{¶43} Civ.R. 52 provides:

{¶44} "When questions of fact are tried by the court without a jury, judgment may be general for the prevailing party unless one of the parties in writing requests otherwise before the entry of judgment pursuant to Civ.R. 58, or not later than seven days after the party filing the request has been given notice of the court's announcement of its decision, whichever is later, in which case, the court shall state in writing the conclusions of fact found separately from the conclusions of law."

{¶45} The provisions of Civ.R. 52 are mandatory in any situation in which questions of fact are tried by the court without intervention of a jury. *In re Adoption of Gibson* (1986), 23 Ohio St.3d 170, 172, 492 N.E.2d 146, citing *Werden v. Crawford* (1982), 70 Ohio St.2d 122, 435 N.E.2d 424. Separate conclusions of law and facts enable a reviewing court to determine the existence of assigned error. *Orlow v. Vilas* (1971), 28 Ohio App.2d 57, 59, 274 N.E.2d 783. "Generally,...the findings and conclusions must articulate an adequate basis upon which a party can mount a challenge to, and the appellate court can make a determination as to the propriety of, resolved disputed issues of fact and the trial court's application of the law." *Kroeger v.*

Ryder (1993), 86 Ohio App.3d 438, 442, 621 N.E.2d 534. As noted by the court in *Gibson*, supra., “[f]indings of fact and conclusions of law are required because ... when a judgment is rendered in general terms a reviewing court is not sure whether the case was decided ... upon the erroneous application of legal principles.” *Id.* at 172-173.

{¶46} Appellee, in its amended complaint, alleged breach of contract, breach of guaranty, fraud, intentional interference with contract, and fraudulent transfer of assets. Appellee’s amended complaint contained a total of ten counts against six different parties and requested compensatory and punitive damages as well as attorney’s fees. In addition, appellee, in its amended complaint, sought to pierce the corporate veil with respect to appellants MPK, Move It Now, and Heil Windermere.

{¶47} The trial court, in its June 3, 2004, Judgment Entry, found that appellants had breached their legal duty and “were involved in a concerted effort to deprive the broker of the earned brokerage commission.” However, without more detailed findings of fact and conclusions of law, it is unclear what the trial court meant by “concerted activity” and it is unclear whether the trial court dealt with all of the counts in appellee’s amended complaint. In short, I believe that the trial court’s Judgment Entry does not provide this Court with an adequate basis upon which to decide the assignments of error. I find that neither the trial court’s cursory findings of fact nor its conclusions of law provide this Court with an adequate basis upon which to decide the numerous issues presented.

{¶48} Based on the foregoing, I would vacate the trial court's judgment and remand the matter for the trial court to prepare detailed findings of facts and conclusions of law and then re-enter judgment in accordance therewith.

