

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

CIVIL DIVISION

SUPERINTENDENT, OHIO DEPARTMENT :
OF INSURANCE,

Plaintiff, :

v. :

A DAY IN THE COUNTRY, et al., :

Defendants. :

Case No. 03CVH09-10020

Judge Schneider

FILED
COMMON PLEAS COURT
FRANKLIN COUNTY, OHIO
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CLERK OF COURTS

- DECISION (1) DENYING DEFENDANT R.B. THOMAS ELECTRIC, INC.'S MOTION FOR RECONSIDERATION, FILED JULY 5, 2005;**
(2) DENYING DEFENDANT R.B. THOMAS ELECTRIC, INC.'S SECOND MOTION FOR SUMMARY JUDGMENT, FILED JULY 5, 2005;
(3) DENYING DEFENDANT UNIVERSAL TIRE MOLDS, INC.'S MOTION FOR RECONSIDERATION, FILED JULY 8, 2005;
(4) DENYING DEFENDANT GAUER SERVICE & SUPPLY CO.'S MOTION FOR RECONSIDERATION, FILED JULY 8, 2005;
(5) DENYING DEFENDANT ROGERS INDUSTRIAL PRODUCTS' MOTION FOR RECONSIDERATION, FILED JULY 8, 2005;
(6) DENYING DEFENDANT CUSTOM POLY BAG, INC.'S MOTION FOR RECONSIDERATION, FILED JULY 8, 2005;
(7) DENYING DEFENDANT ESTERLE MOLD & MACHINE CO.'S MOTION FOR RECONSIDERATION, FILED JULY 8, 2005;
(8) DENYING DEFENDANT W.T. PETTIT & SONS, CO.'S MOTION FOR RECONSIDERATION, FILED JULY 11, 2005; AND
(9) DENYING DEFENDANT PAULLIN MILK CARTAGE, INC.'S MOTION FOR RECONSIDERATION, FILED JULY 8, 2005

Rendered this 16th day of August, 2005.

Schneider, C., J.

I. Motion for Reconsideration

"Interlocutory orders are subject to motions for reconsideration, whereas judgments and final orders are not." Pitts v. Ohio Dep't of Transportation (1981), 67 Ohio

St. 2d 378, 379-80 n.1; see Jenkins v. Bazzoli (Franklin 1994), 99 Ohio App. 3d 421, 425 n.2. This is so because “[t]he Ohio Rules of Civil Procedure do not prescribe motions for reconsideration after a final judgment in the trial court.” Pitts, 67 Ohio St. 2d 378 (syllabus, para. 1); see State ex rel. Batten v. Reece (1982), 70 Ohio St. 2d 246, 248 (per curiam); Kemper Securities, Inc. v. Schultz (Franklin 1996), 111 Ohio App. 3d 621, 625. Motions for reconsideration filed after the entry of final judgment are thus a “nullity.” Franks v. The Lima News (Allen 1996), 109 Ohio App. 3d 408, 411; Bodo v. Nationwide Ins. Co. (Trumbull 1991), 75 Ohio App. 3d 499, 504.

After the court has rendered a decision, a judgment entry is to be filed. Loc. R. 25. A motion for reconsideration is proper only if a journal entry of judgment has yet to be filed. See Finck v. Capital Tax Planning, Inc. (Franklin C.P., July 28, 1993), 92CVH-02-1316 (Decision and Entry) (slip op.) (referring to vacating summary judgment in another case when that decision had not been journalized). In this regard, a motion for reconsideration is proper as to other orders issued prior to the entry of final judgment.

II. Discussion of Motions of R.B. Thomas Electric Co., et al.

On August 16, 2004, plaintiff filed her Motion “for Partial Summary Judgment as to Employer-Members’ Liability for Assessments under R.C. § 1739.15”; a number of defendants filed cross-motions for summary judgment. A decision on these motions was filed May 19.

On July 5, 2005, defendant R.B. Thomas Electric Co. filed its motions for reconsideration of the May 19 decision and for summary judgment. On July 8, defendants Universal Tire Molds, Inc., Gauer Service & Supply Co., Rogers Industrial

Products, Custom Poly Bag, Inc., and Esterle Mold & Machine, Co. “join[ed] Defendant R.B. Thomas Electric in its Motion for Reconsideration” and filed their respective motions for reconsideration. On July 11, defendant W.T. Pettit & Sons, Co. similarly “join[ed] Defendant, R.B. Thomas Electr[ic], in its Motion for Reconsideration” and filed its motion for reconsideration.

In this regard, defendants have failed to show that the May 19 decision was erroneous. Thus, defendants’ motions are unwarranted.

First, the May 19 decision properly held that “plaintiff has the authority to levy assessments against defendants for the deficits in the Builders & Contractors Employee Benefit Trust (BCEBT)” because “the Builders and Contractors Employee Benefit Association Trust (BCEBAT) is a ‘multiple-employer welfare arrangement’” under O.R.C. 1739.01(F) and O.R.C. 1739.02(A); “O.R.C. 1739.01(E) defines ‘member’ as ‘an individual or an employer that is a member of an organization sponsoring a multiple employer welfare arrangement’”; and “the Builders and Contractors Employee Benefit Association offered health-benefits coverage through the BCEBAT.”

Second, the May 19 decision properly held that “defendants cannot avoid liability for the assessments on the ground that they did not sign or see a written ‘agreement’ which established the MEWA or provided for its operation.”

The “Master Contract”/“Request for Coverage” entered into by defendant R.B. Thomas Electric Co. states that R.B. Thomas Electric Co.

hereby applies for membership and adopts herein agreement in the Builders and Contractors Employee Benefit Association (BCEBA) and appoints Plan Administrator, Association Plan Administrators Inc. (APAI), as my proxy and authorize them in my absence at any meeting of members of BCEBA to cast any votes I would be entitled to cast if

personally present, on any and all matters, said proxy to continue . . . until this proxy is cancelled by 90 days prior written notice, delivered to Builders and Contractors Employee Benefit Association, and Association Plan Administrators.

The undersigned employer requests coverage on behalf of the employees of the above firm in the medical benefits plan of the BCEBA Trust and subscribes to the terms and conditions of the Trust. . . .

. . . . The employer certifies that . . . he has read and understands the eligibility, participation, and maintenance requirements. The undersigned employer also understands that any oral or written representations made by any representing agent or broker other than those contained in the Master Contract or written material furnished by the Plan Administrator is not binding

. . . . It is further agreed . . . that membership in the Association is voluntary.

. . . . The undersigned acknowledges he/she has read the application in full, including the plan description requested and that the representative has explained the coverages and limitations and details of coverage of this health benefit plan, including the under-writing rules and regulations. The undersigned understands that no insurance hereunder is effective until written approval by Builders and Contractors Employee Benefit Association and/or Association Plan Administrators, Inc. has been given.

MASTER CONTRACT

This contract is binding upon receipt and acceptance of "Employer Information" application, "Plan Description Request," "Certification, Proxy and Agreement," and "Agent's Statement," which becomes part of this Master Plan Document

As such, R.B. Thomas Electric Co.'s "Master Contract"/"Request for Coverage" explicitly refers to the "BCEBA Trust" and the employer's agreement to "subscribe[] to the terms and conditions of the Trust," the employer's "membership" in the Builders and Contractors Employee Benefit Association, and appointment of a voting proxy at "any meeting of members of" the Builders and Contractors Employee Benefit Association and declares the binding nature of the "Master Contract."

The May 19 decision also cited a number of court decisions setting forth the well-

established principle that “[d]ocuments that are incorporated by reference into a contract are to be read as though they are restated in the contract.” Indeed, R.B. Thomas Electric Co.’s “Master Contract”/“Request for Coverage” explicitly states that R.B. Thomas Electric Co. “subscribes to the terms and conditions of the Trust.” As such, although many of the “Master Agreements” contained an explicit incorporation provision, defendant R.B. Thomas Electric Co. cannot evade its obligations under the contract on the ground that its contract does not contain such an incorporation provision.

Third, as the May 19 decision held, “defendants cannot avoid liability for the assessments on the ground that the Master Agreements do not meet the requirements of O.R.C. 1739.01(A)” because “O.R.C. 1739.01(A) is a definitional section and does not set forth the requirements for creating a MEWA or for imposing liability on employers for a MEWA’s liabilities” and “does not provide for invalidating the creation of a MEWA or for relieving employers of their obligations, including liability for assessments.” The May 19 decision also noted that Ohio’s MEWA statute does not state “that assessments or other obligations under a ‘multiple-employer welfare arrangement’ are not binding on an employer in the absence of an ‘agreement’ as defined by O.R.C. 1739.01(A)” and that “Defendants also cite no legal authority which has held that an employer is relieved from its obligations under a MEWA or may not be held liable for a MEWA’s funding deficiencies or that a MEWA is deemed to have never existed if a document does not possess all the elements of an ‘agreement’ as defined by O.R.C. 1739.01(A).”

In any event, defendant R.B. Thomas Electric Co.'s "Master Contract"/"Request for Coverage" was sufficient to meet the requirements purportedly imposed by O.R.C. 1739.01(A) because this contract and the BCEBAT's Trust Agreement are in writing; the contract states that R.B. Thomas Electric Co. "subscribes to the terms and conditions" of the BCEBA Trust; R.B. Thomas Electric Co. agreed to become a "member" of the BCEBA and to be bound by the terms of the "Master Contract"; and BCEBAT's Trust Agreement and Plan Document establish and provide for the operation of the MEWA. R.B. Thomas Electric Co. has also failed to present any legal authority which has held that references to a MEWA's trust agreement as were made in the "Master Contract" are insufficient to incorporate the terms of the trust agreement or put an employer on notice that it was bound by such terms.

Fourth, as the May 19 decision held, "nowhere in Ohio's MEWA statute is a requirement that an employer's Master Agreement or other document for membership in a trade, industry, or professional association which offers a MEWA must itself mention the MEWA, use terms . . . which specifically refer to a MEWA, or explicitly refer to a MEWA's bylaws in order for an employer to be liable for assessments under the MEWA statute." Defendant R.B. Thomas Electric Co. also fails to present any legal authority which has held that a contract for coverage such as R.B. Thomas Electric Co.'s "Master Contract"/"Request for Coverage" was required to explicitly state that the insurance was being provided by a MEWA or use terms which would specifically pertain to a MEWA or which has held that a failure to use such language or the use of language used in "normal" insurance policies constitutes misrepresentation or otherwise

exempts an employer from liability for assessments or other liabilities under a MEWA.

In any event, "Master Contract"/"Request for Coverage" uses words which indicate that health-benefits coverage was being provided by means other than simply purchasing a "normal" insurance policy by stating that the employer "applies for membership and adopts herein agreement in the Builders and Contractors Employee Benefit Association (BCEBA)," that "membership in the Association" is voluntary, that the employer seeks coverage provided by the "BCEBA Trust and subscribes to the terms and conditions of the Trust," and that the employer is appointing a proxy which is authorized to vote at "any meeting of members of" the Builders and Contractors Employee Benefit Association.

Additionally, the May 19 decision observed that "a defendant's lack of awareness of O.R.C. Chapter 1739 would not excuse its liability under that statute."

Fifth, R.B. Thomas Electric Co.'s "Master Contract"/"Request for Coverage" is not ambiguous, and the differences in language from other defendants' Master Agreements do not make its contract ambiguous. As previously discussed, R.B. Thomas Electric Co.'s "Master Contract"/"Request for Coverage" clearly stated that the employer "applies for membership and adopts herein agreement in the Builders and Contractors Employee Benefit Association (BCEBA)" and seeks coverage provided by the "BCEBA Trust and subscribes to the terms and conditions of the Trust." R.B. Thomas Electric Co. was thus unambiguously bound by the "terms and conditions" of the BCEBAT.

As the May 19 decision held, "defendants cannot avoid liability under the Master Agreements and O.R.C. Chapter 1739 under the guise of ambiguity. The Master

Agreements made clear references to the “Trust,” and neither the lack of a specific reference to the MEWA statute nor the possibility that the Master Agreements could have included MEWA-specific terms required the Master Agreements to specifically include these terms or rendered the Master Agreements ambiguous if these terms were not included.” The same rational applies to R.B. Thomas Electric Co.’s “Master Contract”/“Request for Coverage.”

Sixth, as the May 19 decision held, “defendants’ subjective belief that they were unaware that they were participating in a MEWA or that they were covered by ‘normal’ insurance is insufficient to demonstrate misrepresentation.” Contrary to defendant R.B. Thomas Electric Co.’s argument that “[t]here is no conflict between R.B. Thomas’[] subjective belief and the documents executed by it,” its “Master Contract”/“Request for Coverage” unambiguously states that coverage was provided by the “BCEBA Trust” and that R.B. Thomas Electric Co. was becoming a member of BCEBA and agreed to be bound by “the terms and conditions of the Trust.” Also, as the May 19 decision held, “even if defendants were unaware that they were participating in a MEWA, such a lack of awareness does not bar the statutorily-authorized assessments against them for the BCEBAT’s under-funding.” R.B. Thomas Electric Co. is similarly responsible for the statutorily-authorized assessment against it.

Seventh, as the May 19 decision held, “defendants which were provided health-benefits coverage by BCEBAT received benefits from the BCEBAT, and disallowing the assessments would force those with unpaid claims to bear the burden of the BCEBAT’s under-funding,” and so “the assessments are supported by equitable principles, as well

as statutory provisions and contractual terms,” whether or not the employers which obtained coverage from the BCEBAT signed Master Agreements. Also, defendants and not their individual employees made the decisions as to the means of obtaining health-benefit coverage and chose to obtain coverage from the BCEBAT. As such, equitable principles are consistent with Ohio law in holding defendants liable for the assessments.

Contrary to defendant R.B. Thomas Electric Co.’s argument that the May 19 decision needs “clarification,” the May 19 decision clearly states that Ohio law gives the Superintendent of Insurance the power to levy assessments, that defendants entered into binding agreements to obtain benefits from the BCEBAT, and that permitting defendants to escape liability for its obligations under the BCEBAT after having already received benefits from the BCEBAT in the past would be inequitable. R.B. Thomas Electric Co. entered into the “Master Contract”/“Request for Coverage” and so is responsible for its obligations under that contract—including its liability for assessments.

Thus, the motions for reconsideration of defendant R.B. Thomas Electric Co. and of the other defendants who “joined” R.B. Thomas Electric Co.’s motion are unwarranted.

III. Discussion of Paullin Milk Cartage, Inc.’s Motion

On July 8, defendant Paullin Milk Cartage, Inc. filed its motion for reconsideration (captioned as its “supplemental memorandum”). Defendant argues that “minor mismanagement may not be an element to avoid summary judgment but major mismanagement as has occurred here is not part of doing business and demands

scrutiny by this Court” and that “[t]his defendant was not a ‘Multiple Employer’ according to the definition under O.R.C. §1739.01(F).

However, defendant cites no legal authority for its “major mismanagement” argument. As the May 19 decision held, “defendants cite no legal authority which requires the Superintendent of Insurance to pursue claims against a MEWA’s trustees or plan administrator prior to or instead of levying assessments against employers, which bars assessments if the unpaid obligations resulted from the trustees’ or plan administrator’s mismanagement or misconduct, which bars assessments if recovery might be possible from other sources, or which requires evidence that service providers will seek payment from employees before the Superintendent of Insurance can levy assessments for a MEWA’s under-funding.” The May 19 decision also held that “plaintiff’s motion for partial summary judgment concerns the Superintendent of Insurance’s authority to levy assessments” and does not concern “the ability of an employer to recover those sums from others who engaged in mismanagement or misconduct” or “the amounts sought in plaintiff’s notices of assessment, the time-period for which a defendant is liable, and any amounts to be credited toward a defendant’s assessment liability.”

Also, O.R.C. 1739.01(F) defines a “Multiple employer welfare arrangement” (MEWA) which offers insurance. The BCEBAT is a MEWA. O.R.C. 1739.01(F) does not require that an employer be a “multiple employer,” and even if it did, defendant admits that it has five employees.

Because defendant has failed to show that the May 19, 2005 decision was

erroneous, its motion for reconsideration/"supplemental memorandum" is unwarranted.

IV. Conclusion

Therefore, defendant R.B. Thomas Electric, Inc.'s motions for reconsideration and for summary judgment and the motions for reconsideration of defendants Universal Tire Molds, Inc.; Gauer Service & Supply Co.; Rogers Industrial Products; Custom Poly Bag, Inc.; Esterle Mold & Machine, Co.; W.T. Pettit & Sons, Co.; and Paullin Milk Cartage, Inc. are DENIED. Counsel for plaintiff shall prepare an appropriate entry and submit the proposed entry to counsel for the adverse parties pursuant to Loc. R. 25.01. A copy of this decision shall accompany the proposed entry when presented to the Court for signature.



CHARLES A. SCHNEIDER, JUDGE

Copies to:

Michael H. Igoe, Esq.
David M. Karr, Esq.
Necol Russell-Washington, Esq.
Attorneys for Plaintiff

Colin G. Skinner, Esq.
Attorney for Defendant R.B. Thomas Electric, Inc.

John N. Childs, Esq.
Darrin R. Toney, Esq.
Leigh A. Kobzowicz, Esq.
Attorneys for Defendants Universal Tire Molds, Inc.,
Gauer Service & Supply Co., Rogers Industrial Products,
Custom Poly Bag, Inc., and Esterle Mold & Machine, Co.

Timothy J. Jacob, Esq.
John T. Savage, Esq.
Attorneys for Defendant W.T. Pettit & Sons, Co.

Sam J. Lett, Esq.
Attorney for Defendant Paullin Milk Cartage, Inc.