

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

CIVIL DIVISION

CITY OF HUBER HEIGHTS, OHIO

Plaintiff,

v.

DON ALLEN HOLBROOK, LLC

Defendant/Third-Party Plaintiff

v.

Heather Dobrott, et al.,

Third-Party Defendants.

CASE NO. 2012-CV-02947

JUDGE MICHAEL TUCKER

MEMORANDUM IN OPPOSITION

OF DEFENDANT/THIRD-PARTY

PLAINTIFF DON ALLEN

HOLBROOK, LLC TO PLAINTIFF'S

MOTION TO STRIKE THIRD-PARTY

COMPLAINT, OR, IN THE

ALTERNATIVE, MOTION FOR

SEVERANCE OR A SEPARATE TRIAL

I. INTRODUCTION

Defendant/Third-Party Plaintiff Don Allen Holbrook, LLC ("Defendant" or "Don Allen

Holbrook, LLC") opposes the Motion to Strike Defendant's Second Amended Third-Party

Complaint, or, in the Alternative, Motion for Severance or a Separate Trial ("Motion to Strike"),

filed by Plaintiff the City of Huber Heights ("Plaintiff" or "City") for the following reasons.

First, this Court should deny the Motion to Strike because the Second Amended Third-Party Complaint ("Third-Party Complaint") is proper under Ohio common law and comports with Civ.R. 14(A). Second, although this Court has discretion to sever or separate claims under Civ.R. 42(B), upon balancing considerations, including but not limited to, the promotion of judicial convenience and efficiency, avoiding the duplication of evidence and testimony, and

ELECTRONICALLY FILED

COURT OF COMMON PLEAS

Tuesday, July 17, 2012 12:25:44 PM

CASE NUMBER: 2012 CV 02947 Docket ID: 17351670

GREGORY A BRUSH

CLERK OF COURTS MONTGOMERY COUNTY OHIO2

avoiding inconsistent verdicts on identical or similar evidence or testimony, this Court should keep the affirmative claims asserted in the Third-Party Complaint with the affirmative claims asserted in Defendant's Counterclaim and Plaintiff's Complaint. For these reasons and the reasons stated below, this Court should deny Plaintiff's Motion to Strike or to sever or separate the claims.

II. BACKGROUND

Briefly, the City filed a Complaint against Don Allen Holbrook, LLC alleging a legal claim for breach of contract, an equitable claim for unjust enrichment, the intentional tort claims of conversion and fraudulent inducement, and a tort claim for negligent misrepresentation, seeking compensatory and punitive damages and attorneys' fees. On Tuesday, May 29, 2012, Don Allen Holbrook, LLC filed its Answer to the Complaint denying the City's claim for breach of contract, including affirmative defenses and its Counterclaim with claims for breach of contract and declaratory judgment to protect Defendant's trade secrets. On the same day, Don

Allen Holbrook, LLC also filed a Motion to Dismiss the City's equitable claim for unjust enrichment and its intentional tort claims for conversion and fraudulent inducement, and its tort claim for negligent misrepresentation. Because Plaintiff is a municipal corporation organized under the laws of the State of Ohio (see Complaint, ¶ 1), it is protected under Chapter 2744 of the Ohio Revised Code on Political Subdivision Tort Liability from certain affirmative claims and defenses that Don Allen Holbrook, LLC could have otherwise asserted against a party that is not a political subdivision.

On June 12, 2012, Don Allen Holbrook, LLC filed its original Third-Party Complaint without leave of court, which it is permitted to do under Civ.R. 14(A). The claims asserted in the Third-Party Complaint arise from the same set of events as the subject matter of the Complaint 3 filed against Don Allen Holbrook, LLC, namely, the City's breach of its Agreement with Don Allen Holbrook, LLC and the City's decision to assert intentional tort claims, a claim for negligent misrepresentation, and to seek punitive damages and attorneys' fees in its Complaint against Don Allen Holbrook, LLC, when the parties had only a contractual relationship as shown by the exhibits attached to the City's Complaint.

In order to counter the City's baseless claims for conversion, fraudulent inducement, and negligent misrepresentation and to provide this Court with a more complete picture of the relevant underlying scenario, Don Allen Holbrook, LLC filed a Third-Party Complaint against numerous known and unknown Third-Party Defendants who are engaging in tortious actions against Don Allen Holbrook, LLC on the internet and by telephone. The former City Manager, Gary Adams, wrote an email to Defendant on February 29, 2012, that a reporter had contacted him and that he had a "strange conversation" with the reporter. See Third-Party Complaint, ¶ 28. Until March 14, 2012, the City had not told Don Allen Holbrook, LLC that it was dissatisfied in any way with its work or reports. See Third-Party Complaint, ¶ 33.

Upon information and belief, Third-Party Defendants' tortious actions against Don Allen

Holbrook, LLC not only procured a breach in the Agreement by the City, but are also the reason that the City demanded all of its money back, contrary to the terms and conditions of the Agreement. Third-Party Defendants' tortious actions, including but not limited to their defamatory and derogatory internet postings about Don Allen Holbrook, LLC, appear to be the reason that the City asserted intentional tort claims against Defendant, making all of the claims in the Complaint, Counterclaim and Third-Party Complaint part of the subject matter of the primary claim in the Complaint.

As it stands, by pleading claims for the intentional torts of conversion and fraudulent 4 inducement, and the tort of negligent misrepresentation against Don Allen Holbrook, LLC, the City itself has made the claims in Defendant's Third-Party Complaint a proper subject of a thirdparty action, despite its protestations that the Third-Party Complaint "grossly confuses the issues presented in the City's complaint and increases the City's expenses." See Motion to Strike, fifth page. Thus, if this Court denies Defendant's Motion to Dismiss the City's claims for unjust enrichment and the torts of conversion, fraudulent inducement, and negligent misrepresentation, then this Court must also deny the City's Motion to Strike the Third-Party Complaint because the Complaint, the Counterclaim, and the Third-Party Complaint are part of the same occurrence, arise from the primary claim asserted by the City or are derivative of the primary claim, making the Third-Party Complaint proper under Ohio law.

III. THE THIRD-PARTY COMPLAINT IS PROPER UNDER OHIO LAW.

Third-party practice in Ohio is governed by Civ.R. 14. Civ.R. 14(A) states in part: "At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him." Emphasis added.

When any party objects to a third-party complaint, a trial court must determine whether the thirdparty complaint should be tried with the claims in the complaint, severed, or tried separately.

State ex rel. Jacobs v. Municipal Court of Franklin Co., 30 Ohio St.2d 239, 241 (1972).

To determine whether a third-party complaint should be tried with the claims in the complaint, a trial court should first consider whether the claims in the third-party complaint arise out of the transaction or occurrence that is the subject matter of the complaint or is in some way derivative of it. Franklin Cty. Dist. Bd. of Health v. Paxson, 152 Ohio App.3d 193, 2003-Ohio 1331, ¶¶ 13-18 (10

th

Dist. 2003). Second, a trial court should consider whether the third-party 5 complaint is consistent with the purposes of Civ.R. 14. The Ohio Supreme Court in Jacobs held that the purposes of Civ. R. 14 are to:

1. promote judicial efficiency by avoiding a circuity of actions;
2. consolidate separate actions that should be tried together;
3. avoid a duplication of testimony and evidence; and
4. avoid inconsistent verdicts on identical or similar evidence or testimony.

Jacobs, 30 Ohio St.2d at 241. Finally, a trial court should consider whether a third-party complaint states claims upon which relief can be granted. State Farm Mut. Auto Ins. Co. v. Charlton, 41 Ohio App.2d 107, 109-10 (10

th

Dist. 1974). Also, under Civ.R. 18(A), a party asserting claims for relief, including a third-party complaint, “may join, either as independent or as alternate claims, as many claims, legal or equitable, as he has against an opposing party.” As will be shown below, this Court should deny Plaintiff’s Motion to Strike and to sever the ThirdParty Complaint.

IV. THIS COURT SHOULD DENY PLAINTIFF’S MOTION TO STRIKE BECAUSE
DEFENDANT’S THIRD-PARTY COMPLAINT IS PROPER UNDER CIV.R.
14(A) AND OHIO LAW.

A. Claims in the Third-Party Complaint arise from and/or are derivative of the

tort claims in the Complaint.

First, this Court should conclude that the claims in the Third-Party Complaint arise from the same transaction or occurrence that is the subject matter of the Complaint or are in some way derivative of the claims in the Complaint. Jacobs, 30 Ohio St.2d at 242; Paxson, at ¶ 18. There is only one Agreement at issue in the Complaint and the same Agreement is at issue in the Third-Party Complaint, the Agreement between the City and Don Allen Holbrook, LLC. Thus, the claims in the Third-Party Complaint arise from the same Agreement and/or are derivative of the primary claim in the Complaint based on the Agreement.

Moreover, it is the City that raised the issue of alleged wrongful conduct by Don Allen Holbrook, LLC in its Complaint by including claims of conversion, fraudulent inducement, and negligent misrepresentation, along with its claims for breach of contract and unjust enrichment. The tort claims in the Complaint and the Third-Party Complaint are linked because the former City Manager, Gary Adams, sent an email dated February 29, 2012, to Don Allen Holbrook, LLC that a reporter from the Houston Press had asked Mr. Adams if Don Allen Holbrook, LLC had a contract with the City of Huber Heights, asked when it was entered, and then published to Mr. Adams defamatory, false, and derogatory statements about Don Allen Holbrook, LLC, Don Holbrook, and a project in Houston, Texas, known as Earthquest. See Third-Party Complaint, ¶ 27. Thus, Defendant's third-party claims for civil conspiracy, for tortious interference with contract, and defamation have the same subject matter and/or are derivative of the same subject matter, and the damages that Don Allen Holbrook, LLC is seeking from Third-Party Defendants are for reimbursement for Third-Party Defendants' concerted efforts to interfere with and procure the breach of the Agreement, to recover from the Third-Party Defendants the damages sought by the City, plus punitive damages, and attorney's fees. In sum, the liability sought to be passed on by Don Allen Holbrook, LLC's Third-Party Complaint arises out of the same transaction that is the subject matter of the Complaint.

B. The Third-Party Complaint conforms to the purposes of Civ.R. 14.

Second, this Court should conclude that the Third-Party Complaint conforms to the purposes of Civ.R. 14(A). The purposes of Civ.R. 14 are to promote judicial efficiency by avoiding a circuity of actions; consolidate separate actions that should be tried together; avoid a duplication of testimony and evidence; and avoid inconsistent verdicts on identical or similar evidence or testimony. Jacobs, 30 Ohio St.2d at 241.

The Third-Party Complaint conforms to the purposes Civ.R. 14(A) based on identical 7 and/or substantially similar allegations by Don Allen Holbrook, LLC in its Counterclaim and the Third-Party Complaint. Contrary to the City's argument that the Third-Party Complaint "grossly confuses" the issues in the Complaint (see Motion to Strike, fifth page), the Third-Party Complaint puts the Complaint in context. This Court should note that Don Allen Holbrook, LLC asserted in its Affirmative Defenses to the Complaint that the City had "failed to join necessary parties under Civ.R. 19 that, upon information and belief, tortiously interfered with the Agreement between the parties." See Answer and Counterclaim, ¶ 33. Furthermore, Don Allen Holbrook, LLC purposefully asserted either identical or substantially similar allegations in the Counterclaim, see ¶¶ 36 to 59 therein, and in the Third-Party Complaint, see ¶¶ 13 to 39 therein, in order to conform to the purposes of Civ.R. 14(A). This Court should also note that the City has not moved to strike or sever any allegations in the Counterclaim.

Specifically, all of Don Allen Holbrook, LLC's claims in the Counterclaim and the Third-Party Complaint are based on the breach of the Agreement between the City of Huber Heights and Don Allen Holbrook, LLC, which happened in Montgomery County, Ohio. All of Don Allen Holbrook, LLC's claims argue the same or similar theory, namely that the breach of the Agreement by the City along with the concerted actions of the Third-Party Defendants caused Don Allen Holbrook, LLC's losses relating to this Agreement. Don Allen Holbrook, LLC has also generally alleged losses relating to reputation, good will, other future business and lost profits.

While Don Allen Holbrook, LLC may have other claims against the Third-Party Defendants based on other Agreements breached in other jurisdictions outside of Ohio, Don Allen Holbrook, LLC has not alleged those claims before this Court. All of the allegations in the Counterclaim and the Third-Party Complaint arise from and relate to the breach of the 8 Agreement with the City. Thus, judicial efficiency will be promoted by trying all of the claims relating to this Agreement in one action, will avoid a duplication of testimony and evidence and will avoid inconsistent verdicts on identical or similar evidence or testimony relating to this Agreement. If this Court strikes the Third-Party Complaint, it is likely that Defendant would refile these claims against the Third-Party Defendants, so judicial efficiency favors not striking the Third-Party Complaint.

C. The Third-Party Complaint states claims upon which relief can be granted.

Third, this Court should conclude that the Third-Party Complaint states legally cognizable claims against the Third-Party Defendants upon which relief can be granted (apart from the issue of personal jurisdiction against Third-Party Defendants, which is not now before this Court, but was before the Ohio Supreme Court in *Kauffman Racing Equipment, L.L.C. v. Roberts*, 2010-Ohio-2551, 126 Ohio St.3d 81, holding that Ohio courts have personal jurisdiction over out of state residents who publish defamatory comments on the internet which are seen by Ohio residents and cause tortious injury within the State of Ohio). The City's Motion to Strike does not argue that the Third-Party Complaint fails to state claims upon which relief can be granted, so this Court should conclude that the City is not disputing that Defendant's Third-Party Complaint meets this requirement.

D. For judicial efficiency, this Court should not sever or bifurcate the ThirdParty Complaint.

While this Court has discretion under Civ.R. 42(B), to sever or separate the Third-Party Complaint from the issues in the Complaint and Defendant's Counterclaim, Don Allen Holbrook, LLC believes that judicial efficiency and economy would be served by not severing the claims.⁹

IV. CONCLUSION

For the foregoing reasons, this Court should deny the City's Motion to Strike the ThirdParty Complaint and deny the Motion to sever or to separate the claims from the Complaint, the

Counterclaim, and the Third-Party Complaint.

Respectfully Submitted,

s/Sue Seeberger

Sue Seeberger (0059730)

5975 Kentshire Drive, Suite D

Dayton, Ohio 45440-4264

Voice: (937) 291-8646

Fax: (937) 291-8650

sueseeberger@biegeltye.com

Attorney for Defendant Don Allen

Holbrook, LLC

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served by the Court's e-filing system or by ordinary mail on this 17th day of July, 2012, upon the following:

L. Michael Bly (mbly@pselaw.com)

Joshua M. Kin (jkin@pselaw.com)

Pickerel, Schaeffer & Ebeling Co.

2700 Kettering Tower

Dayton, Ohio 45423

Attorneys for Plaintiff

Robert P. Bartlett, Jr. (rbartlett@ficlaw.com)

Andrew J. Reitz (areitz@ficlaw.com)

Faruki Ireland & Cox PLL

500 Courthouse Plaza, SW

10 North Ludlow Street

Dayton, Ohio 45402

Attorneys for Third-Party Defendants Stephens Media,

LLC dba Pahrump Valley Times; and The Houston

Press, The Houston Press dba Village Voice Media

Holdings, LLC dba Houston Press, LP dba

Backpage.com, LLC and Craig Malisow

Adam R. Webber

Falke & Dunphy, LLC

30 Wyoming Street

Dayton, Ohio 45409

Attorney for Heather Dobrott

Frank Maurizio

581 China Street

Pahrump, Nevada 89048-0782

Cynthia Calvert

The Tribune, aka,

Ourtribune.com

1036 First Street, Suite C

Humble, TX 77338

s/Sue Seeberger