

[Cite as *Ohio-Carrier Concrete Cutting, Inc. v. Carrier Concrete Cutting, L.L.C.*, 2009-Ohio-6783.]
IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Ohio-Carrier Concrete Cutting, Inc.,	:	
Plaintiff-Appellee,	:	
v.	:	
Carrier Concrete Cutting, LLC,	:	
Defendant-Appellant, Third-Party Plaintiff,	:	No. 09AP-526 (C.P.C. No. 09CVH01-396)
Jerry Carrier et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees,	:	
James R. Aston,	:	
Third-Party Defendant- Appellee.	:	

D E C I S I O N

Rendered on December 22, 2009

Gamble Hartshorn, LLC, Nora E. Jones, and Ray P. Drexel,
for plaintiff-appellee.

Percy Squire Co., LLC, and Percy Squire, for defendant-
appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} This is an appeal by defendant-appellant, Carrier Concrete Cutting, LLC, from an entry of the Franklin County Court of Common Pleas, denying appellant's motion for an order to attach property of plaintiff-appellee, Ohio-Carrier Concrete Cutting, Inc.

{¶2} On January 9, 2009, appellee filed a complaint for damages, naming as defendants Jerry Carrier, Keith Kessler, Dina Kessler, and appellant. The complaint alleged that appellee and appellant had entered into an asset purchase agreement, dated March 1, 2008, under which appellant, as venter, sold to appellee, as purchaser, all of appellant's intellectual property, including the name Carrier Concrete Cutting. The complaint alleged breach of the asset purchase agreement, based upon claims that (1) appellant continued to use intellectual property sold to appellee; (2) appellant failed to deliver certain items under the agreement; (3) appellant overstated the value and quality of accounts receivable sold to appellee; and (4) appellant and defendant Jerry Carrier wrongfully disclosed confidential information regarding appellee's business.

{¶3} On February 26, 2009, appellant filed an answer, counterclaim, and third-party complaint against James R. Aston ("Aston"). In the counterclaim, appellant alleged it was entitled to compensatory damages in the amount of \$83,461.22 on the basis that appellee had failed to remit to defendant Jerry Carrier the hold-back amount and bad debt reserve under the terms of the agreement. Also on February 26, 2009, appellant filed a motion to attach the property of appellee, pursuant to R.C. 2715.01, as well as a request for an oral hearing on the motion. On March 11, 2009, appellee filed a memorandum contra appellant's motion to attach. Upon motion of appellee and third-party defendant, Aston, the action was transferred to the trial court's commercial docket.

{¶4} On May 6, 2009, appellant filed an emergency motion to attach the property of appellee, and requested an oral hearing on the motion. On May 18, 2009, appellee filed a memorandum contra appellant's emergency motion to attach. By decision and entry filed May 27, 2009, the trial court denied appellant's February 26, 2009 motion to attach, and also denied appellant's request for an oral hearing and appellant's emergency motion to attach filed May 6, 2009.

{¶5} On appeal, appellant sets forth the following single assignment of error for this court's review:

The trial court erred when it denied Appellant, Carrier Concrete, a hearing under R.C. 2715.043, in connection with his motion for an order of attachment.

{¶6} Under its single assignment of error, appellant asserts that the trial court erred in denying its motion to attach without first conducting a hearing. Appellant, while acknowledging that its initial motion to attach did not contain an affidavit, argues that it subsequently filed a reply in the form of a verified memorandum, as well as a second motion to attach which included the affidavit of Jerry Carrier. Appellant maintains that, despite these filings, the trial court ignored the language of R.C. 2715.043 providing for a hearing on the attachment motion.

{¶7} R.C. 2715.01 sets forth several grounds for a creditor to obtain an order of attachment. In the present case, appellant's motion for attachment was based upon R.C. 2715.01(A)(10), which provides for attachment against the property of a defendant upon a showing that "the defendant has fraudulently or criminally contracted the debt, or incurred the obligations for which suit is about to be or has been brought."

{¶8} A creditor seeking an order of attachment must first submit a motion and affidavit in support. Specifically, R.C. 2715.03 states:

A plaintiff in an action for the recovery of money, upon or at any time after the commencement of the action, may apply to the court by written motion for the attachment of property, other than personal earnings, of the defendant. The motion shall have attached to it the affidavit of the plaintiff, his agent, or attorney, which shall set forth all of the following:

(A) The nature and amount of the plaintiff's claim, and if the claim is based upon a written instrument, a copy of that instrument;

(B) The facts that support at least one of the grounds for an attachment contained in section 2715.01 of the Revised Code;

(C) A description of the property sought and its approximate value, if known;

(D) To the best of plaintiff's knowledge, the location of the property;

(E) To the best of the plaintiff's knowledge, after reasonable investigation, the use to which the defendant has put the property and that the property is not exempt from attachment or execution;

(F) If the property sought is in the possession of a third person, the name of the person possessing the property.

{¶9} It is not disputed that appellant's February 26, 2009 motion to attach and request for hearing did not contain an affidavit. In the accompanying memorandum in support of its motion, appellant cited R.C. 2715.01(A)(10) as grounds for attachment. Specifically, appellant alleged that appellee, at the time of the closing of the underlying transaction, represented itself as a valid business entity in compliance with the laws of its formation jurisdiction. Appellant contended, however, that certain documents indicated appellee was not incorporated until March 18, 2008, several weeks after the March 1,

2008 closing date; according to appellant, appellee's "representations otherwise were fraudulent" because it was not a valid business entity at the time of the closing.

{¶10} In its memorandum contra appellant's motion for attachment, appellee argued that the motion was defective because no affidavit was attached, as required by R.C. 2715.03, and because the motion did not address all of the criteria set forth under R.C. 2715.03(A) through (F). Appellee further argued that the motion improperly sought pre-judgment attachment of unspecified property, and that appellant failed to show probable cause to assert that appellee fraudulently contracted the debt or incurred the obligations.

{¶11} Appellant filed a reply to appellee's memorandum on March 20, 2009. Appellant also filed a "verified motion to attach property," which again alleged that appellee was not incorporated until after the closing. Appellant sought from the trial court an order "attaching \$83,461.22 and requiring Ohio Carrier to immediately remit this amount into the Registry of the Court." The motion included "verification" by counsel for appellant that "the above is true to the best of my knowledge[,] information [and] belief."

{¶12} Attached to appellant's emergency motion to attach, filed May 6, 2009, was the affidavit of Jerry Carrier. In the affidavit, Carrier averred the following:

2. On information and belief, Ohio-Carrier is not meeting its financial obligations to governmental entities, such as the Occupational Safety and Health Administration, (OSHA) and is not current in payments to its creditors, including the undersigned.
3. It is my belief that Ohio-Carrier and James Aston are in financial distress.
4. The precarious financial position [of] Ohio Carrier and Aston create[s] a grave and immediate risk that unless funds

from their Ohio bank accounts are immediately sequestered, a recovery will not be available.

{¶13} On May 18, 2009, appellee filed a memorandum contra, asserting that the motion to attach was defective under R.C. 2715.03(A) through (F). Attached to the memorandum was the affidavit of Susan E. Morgan, Senior Vice-President of Signature Bank, N.A. In the affidavit, Morgan averred that Aston, and the corporations in which he has a controlling interest, including Ohio-Carrier Cutting, Inc., maintain banking relationships with Signature Bank; further, that all "personal and corporate deposit accounts and loan accounts have been maintained as agreed," and that "Mr. Aston and Ohio-Carrier * * * are all clients in good standing with Signature Bank."

{¶14} In its decision and entry denying appellant's motion to attach and request for oral hearing, the trial court, following review of Jerry Carrier's affidavit, determined that it lacked subject-matter jurisdiction to consider the motion because appellant failed to set forth the necessary information under R.C. 2715.03(A) through (F), including the failure to identify specific property. The trial court also determined that the allegations in the motion regarding the corporate status of appellee at the time of the agreement were lacking in facts sufficient to show probable cause for attachment, i.e., that the "short delay" by appellee in formally registering Ohio-Carrier Concrete Cutting, Inc., did not rise to the level of fraudulent or criminal conduct under R.C. 2715.01(A)(10). Finally, the trial court agreed with appellee's argument that Jerry Carrier's affidavit, in which he expressed his "belief" that appellee and/or Aston are in "financial distress," failed to set forth good cause to grant the relief requested.

{¶15} Upon review, we agree with the trial court's finding that the affidavit submitted in support of the motion did not comply with the statutory requirements.

Specifically, the affidavit of Jerry Carrier contains no facts to support a claim that appellee fraudulently or criminally contracted the debt to support grounds for attachment under R.C. 2715.01(A)(10), nor does the affidavit contain a description of the specific property to be attached. We note that, while appellant argued in its memorandum in support of the motion to attach that appellee was not incorporated until after the closing, the affidavit itself contains no mention of alleged representations made by appellee that the business was incorporated, nor did the affidavit explain, as noted by the trial court, why the status of appellee as a business entity on the date of closing was material to the agreement. We further agree with the trial court's determination that Jerry Carrier's averment as to his "belief" that Ohio-Carrier is in financial trouble is insufficient to support an order of attachment. See, e.g., *Dunlevy v. Schartz* (1867), 17 Ohio St. 640 (affidavit merely setting forth "belief" of plaintiff that debt was fraudulently contracted, without setting forth any facts justifying such belief, is insufficient to state ground for issuing attachment). Accordingly, the trial court did not err in finding that the affidavit contains no statement of facts to support a finding that appellee fraudulently contracted the alleged debt.

{¶16} Appellant contends that the trial court was mandated to hold a hearing prior to ruling on the motion to attach. We disagree. Appellant relies upon the language of R.C. 2715.043(A), which states in part that, "[u]pon the filing of the motion for an order of attachment pursuant to section 2715.03 * * *, the court shall cause the matter to be set for hearing within twenty days thereafter and the defendant shall be notified in accordance with section 2715.041." Pursuant to R.C. 2715.043(B), if a hearing is requested in accordance with R.C. 2715.04, "the hearing shall be limited to a consideration of whether there is probable cause to support the motion." R.C. 2715.04 pertains to a written

request for a hearing by "[a] defendant against whom a motion for attachment is filed" under R.C. 2715.03.

{¶17} Although a "defendant" has a right to a hearing, the defendant must request such a hearing in writing or it will be cancelled. R.C. 2715.04. Further, if a defendant does not request a hearing within the prescribed time, the court may issue an order of attachment without conducting a hearing if it finds, on the basis of the affidavit, that there is probable cause to support the motion. R.C. 2715.042(A). See also *Bd. of Trustees of the Cleveland Asbestos Workers Pension Fund v. Berry Pipe & Equip. Insulation Co.*, (N.D. Ohio 2008), Case No. 1:08-01082-JG (hearing on attachment motion is not mandatory, and where defendants have not requested an evidentiary hearing, a court can attach property if it finds that probable cause supports the motion for attachment).

{¶18} In the present case, the "defendant against whom [the] motion for attachment" was filed (appellee) did not request a hearing on the motion; rather, appellee requested that the motion be denied because it was deficient. Before a court may consider a plaintiff's motion, the plaintiff must satisfy several statutory prerequisites. See R.C. 2715.01 and 2715.03. See also *Nationwide Mut. Ins. Co. v. Whiteford Sys., Inc.* (S.D. Ohio 1992), 787 F.Supp. 766, 768 ("[o]nly upon determining that Plaintiff has satisfied [the] requirements [of R.C. 2715.03] may the Court consider the actual motion for attachment"). Here, however, appellant did not satisfy the minimal requirements that would permit the trial court to consider granting an order of attachment, including, as previously addressed, the submission of an affidavit setting forth facts that would support a finding that appellee fraudulently contracted the alleged debt at issue. Nor could the court have determined, based upon the affidavit presented, that there was probable

cause to support the motion. Under these circumstances, the trial court did not err in failing to conduct a hearing, nor did the court err in denying appellant's motion to attach.

{¶19} Based upon the foregoing, appellant's single assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

FRENCH, P.J., and CONNOR, J., concur.
