

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
JAMI POWELL, AND ENCORE TECHNOLOGY GROUP, LLC,
Plaintiffs,
vs.
CLEAR TOUCH INTERACTIVE, INC. (a Nevada Corporation) f/k/a CLEAR TOUCH INTERACTIVE, LLC (a Nevada LLC); KEONE TRASK and TAMARA TRASK,
Defendants.

IN THE COURT OF COMMON PLEAS

Case No. 2017-CP-23-06520

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

RECEIVED
MAR 27 2019
SC Court of Appeals

THIS MATTER, comes before the Court upon motion by Defendants Clear Touch Interactive, Inc. f/k/a Clear Touch Interactive, LLC ("Clear Touch"), Keone Trask and Tamara Trask (*collectively* "Defendants"), to dismiss Intervening Plaintiff, Encore Technology Group, LLC's ("Encore") Complaint and remove it as a party to this action based upon Encore's lack of standing to pursue its claims following Defendants' payment of the entire judgment against them, including applicable post-judgment interest, into the Court under Rule 67. A hearing was held February 7, 2019, at which counsel for all parties participated. After considering the matters of record, materials presented at the hearing, and arguments of counsel, the Court finds and concludes that Encore should be dismissed as a party to this action because it no longer has any interest in the outcome of the claims in this case and as a result lacks the necessary standing to pursue its claims.

RELEVANT FACTUAL AND PROCEDURAL HISTORY

In September 2015, Encore filed a case captioned *Encore Technology Group, LLC v. Clear Touch Interactive, Inc. f/k/a Clear Touch Interactive, LLC and Keone Trask, C.A.* No. 2015-CP-23-05757 alleging numerous causes of action related to the Parties' business dealings. A week-long trial was held in September 2017 with the jury rendering a verdict in favor of the Plaintiff on six of the eight causes of action alleged. Following post-trial filings and arguments, this Court entered a Final Order and Judgment on April 2, 2018 in favor of the Plaintiff against Keone Trask individually totaling \$7,917,468.40 and judgment against Clear Touch for \$1,715,335.00 (an amount for which Trask was jointly and severally liable and therefore included in the judgment against him). That Order also granted Defendants' Motion to pay the respective judgments against them into the Court under Rule 67 pending resolution of any appeal. On April 17, 2018, Clear Touch paid the judgment against it in full into the Court under Rule 67.

Shortly after trial ended in the 2015 matter, Jami Powell filed the present case, a shareholder oppression suit styled *Jami Powell v. Clear Touch Interactive, Inc. et al., C.A.* No. 2017-CP-23-06520 claiming that she has an interest in Clear Touch. Powell's suit seeks, among other things, a declaratory judgment that Clear Touch was not properly converted from an LLC to a Corporation.

Encore's judgment against Trask remained outstanding throughout 2018, prompting it to pursue various avenues of satisfying that judgment debt. That included moving to intervene in the present case on July 26, 2018 claiming that, as a judgment creditor, Encore had an interest in the resolution of the declaratory judgment because it would impact whether Trask's interest in Clear Touch would be available for application

to the judgment debt. The Court agreed and granted Encore's Intervenor Motion on September 8, 2018.

On January 3, 2019, Keone Trask paid the outstanding judgment balance against him into the Court under Rule 67, thus fully depositing the entirety of Encore's judgment against both Defendants into the Court if the Trask and Clear Touch are considered jointly and severally liable for the \$849,890 in exemplary damages under the Trade Secrets award, as opposed to each owing \$849,890. The payments of April 17, 2018 and January 3, 2019 total \$8,316,104.58 and fully secure Encore's respective judgments against the Defendants pending resolution of the consolidated appeal arising out of and related to this matter.

On January 8, 2019, Defendants filed a Motion to Dismiss Encore as Intervenor Plaintiff due to its lack of standing to pursue its claims following Trask's payment of the judgment against him into the Court. Encore opposed the Motion, claiming that Defendants' miscalculated the judgment amount owed by Trask and asserting he was responsible for an additional \$1.2 million dollars because it claimed each Defendant owed \$849,890 in exemplary damages on the Trade Secrets awards, plus post-judgment interest. A February 7, 2019 hearing was held on Defendants' Motion to Dismiss Encore as Intervenor Plaintiff, along with several related motions.

LAW AND ANALYSIS

Standing to sue is a fundamental requirement for a party instituting or maintaining an action. *Blandon v. Coleman*, 285 S.C. 472, 475 (1985)(standing is a fundamental requirement for instituting an action and no justiciable controversy is presented unless the plaintiff has standing to maintain the action. "Once it is determined a plaintiff has no standing to prosecute, the court must dismiss the action." *Brock v. Bennett*, 313 S.C. 513,

519 (Ct. App. 1994). Standing requires a personal interest in the subject matter of the action, and that interest must be a personal state. *Duke Power Co. v. South Carolina Public Service Comm'n*, 284 S.C. 81, 96 (1985). Trask's payment of the full judgment debt against him into the Court deprived Encore of its only interest in this case and therefore standing to remain a party to this suit.

At the hearing, Encore conceded that its entire interest in this matter is predicated upon having a judgment against Trask. Trask agreed but claims his January 3, 2019 payment into the Court fully secured his judgment debt to Encore, and as a result, deprived Encore of its interest in this case. Both parties agree that in the absence of a judgment against Trask, Encore no longer has any interest in the disposition of this matter.

Encore, however, opposes Defendant's Motion because it claims Trask miscalculated the judgment debt he owes and a \$1.2 million-dollar shortfall remains. That alleged shortfall is comprised of three items; (1) \$849,890 in exemplary damages under the Trade Secret claim (which Encore calculated to total \$904,515.38 with post-judgment interest as of February 7, 2019) that Encore argues Trask owes despite Clear Touch's payment of the Trade Secret verdict into the Court; (2) the Receiver's fees and costs incurred to date; and (3) the fees and costs charged by Encore's counsel it attributes to post-judgment collection efforts

At the hearing, Encore admitted that if the Plaintiff can recover exemplary damages on the Trade Secrets awards from only one Defendant, and the Receiver fees and costs and its post-judgment attorney's fees and costs are not included in calculating the judgment against Trask, then the Defendants have paid the judgments against them in full into the

Court. Encore recognized that if the Court rejects its arguments, then the Defendants have paid the entirety of the judgments against them into the Court as of January 3, 2019.

The Court finds that, because it can recover the \$849,890 in exemplary damages under the Trade Secrets Act from only one Defendant, the Defendants have paid the entire balance of the judgments against them into the Court, fully securing their outstanding debt to Encore resulting from the verdict, and therefore Encore has no standing to remain a party to this action.

1. Potential Future Liabilities Have No Bearing on Judgment Calculation

Neither the Receiver's fees and costs nor any post-judgment fees and costs incurred by Encore's counsel are part of the judgment against Trask or Clear Touch. First and foremost, those fees and costs are not part of the judgments awarded in the Final Order, and as such, cannot impact calculation of the judgments rendered in it. Second, both are possible future liabilities that Trask may be responsible for at a later date. Trask owing the Receiver's fees and costs is contingent upon all or part of the appeal being upheld. (*See* Receiver Order p. 9)(“If the Judgment is affirmed in whole or in part, Plaintiff shall be entitled to reimbursement of such payments from Trask's assets in addition to the Judgment and the legal, accounting, and other costs of collecting same.”). Given the appeal remains unresolved, Trask does not yet owe the Receiver fees. Likewise, Trask does not yet owe Encore's post-judgment attorney's fees and costs when Plaintiff has not petitioned the Court for their recovery, much less obtained an order awarding them.

Thus, Encore's opposition hinges upon whether Trask and Clear Touch are each separately liable for the payment of \$849,890 in exemplary damages under the Trade Secret cause of action. The Court finds they are not.

2. Defendants are Jointly and Severally Liable for the Trade Secrets Verdict

In calculating the outstanding judgment against Trask as of January 3, 2019, the Defendants credited him in full for Clear Touch's payment of the Trade Secrets award into the Court. That included the \$849,890 in exemplary damages. Encore argues that Trask miscalculated the judgment against him because he treated the \$849,890 in exemplary damages under the Trade Secrets claim as a joint and several liability rather than an individual and separate debt owed by each him and Clear Touch. In other words, Encore contends Trask should not have been credited for Clear Touch's payment of those exemplary damages and he remains liable for them. The Court finds Trask was rightfully credited for Clear Touch's payment of all of the Trade Secrets award because the Defendants are jointly and severally liable for every aspect of those damages, including exemplary damages.

As noted above, Encore was awarded a total of \$1,715,335.00 under its Trade Secrets claim alleged against both Defendants. That figure is comprised of three components; (1) Actual damages (\$424,945); (2) Exemplary Damages (2x actuals) (\$849,890); and (3) Attorney's fees and costs (\$440,500).

Clear Touch's April 2018 payment of the Trade Secrets award into the Court fully satisfied and secured the judgment against it. It also reduced Trask's judgment by eliminating his liability for the Trade Secret award. That reduction included the \$849,490 in exemplary damages. Defendants calculated the outstanding judgment amount against Trask, including applicable post-judgment interest, as of January 3, 2019 by crediting him for Clear Touch's payment of the Trade Secrets verdict into the Court.

Encore concedes that the Defendants are jointly and severally liable for the actual damages and attorney's fees and costs components of the Trade Secret award, but argues that, like the tortfeasors jointly and severally liable for actual damages but separately liable for punitive damages described in *McGee v. Bruce Hospital System*, 344 S.C. 466, 545 S.E.2d 286 (2001), under the Trade Secrets Act and Final Order Clear Touch and Trask are each responsible for the payment of the full exemplary damages amount of \$849,890. Accordingly, Encore contends that it may recover \$849,890 in exemplary damages under the Trade Secrets claim twice—once from each Defendant—for a total recovery of \$1,699,780 in exemplary damages. Encore's argument relies upon a footnote in the Final Order that states "Each Defendant, however, will owe exemplary damages of \$849,890 for this claim because each engaged in willful, wanton, and reckless disregard of the Plaintiff's rights." (Final Order p. 11 fn3). Encore is mistaken and Defendants' liability for all aspects of the Trade Secrets award must be joint and several to avoid running afoul of the controlling law and in light of the fact it was treated as such at trial. Otherwise Encore would be able to recover quadruple its actual damages by recovering punitive damages for the same claim twice. The law prohibits Encore recovering exemplary damages for trade secret misappropriation in that amount and does not allow a party to recover the same damages more than once.

The South Carolina Trade Secrets Act specifies limits the amount of exemplary damages recoverable for violation of the Act to no more than two times the actual damages awarded for the misappropriation, stating in pertinent part that:

- (A) A complainant is entitled to recover actual damages for misappropriation of trade secrets....

(B) Damages may include both the actual loss caused by misappropriation or the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss....

(C) Upon a finding of willful, wanton, or reckless disregard of the plaintiff's rights, the court *may award separate exemplary damages in an amount not exceeding twice any award made under subsection (A)*.

S.C. Code Ann. § 39-8-40(*emphasis added*). The clear and unambiguous language of the statute caps the amount of exemplary damages a court can award for trade secret misappropriation to no more than twice the actual damages awarded for violation of the Act. *Hodges v. Rainey*, 314 S.C. 79, 85 (Ct. App. 2000)(“Where the statute’s language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.”). To adhere to that limitation, Defendants’ liability for all aspects of the Trade Secrets award must be treated as joint and several.

In this case, the jury awarded \$424,945 in actual damages, therefore limiting the exemplary damages Encore could recover under its Trade Secrets claim to \$849,890. The Court awarded the fullest amount of exemplary damages available. Clear Touch paid that amount into the Court and Trask rightfully credited himself for that payment when calculating the judgment against him as of January 3, 2019. Making each Defendant liable for that entire amount would result in an exemplary damages award of four times the actual damage verdict in violation of the Act. It also would allow Encore to recover the same punitive damages arising from single wrong twice; an outcome prohibited by well-established common law. *See Smith v. Strickland*, 314 S.C. 192, 197, 442 S.E.2d 207, 210 (Ct. App. 1994)(“As with actual damages, a plaintiff can recover damages that are punitive in nature only once, either as expressly-designated punitive damages or as trebled damages, where their recovery concerns a single wrong.”). Finally, at trial Defendants’ liability for

the alleged trade secret misappropriation was treated as joint and several as reflected by the wording of the Verdict Form for that cause of action. (Verdict Form p. 4)(Special Interrogatory to the jury asked “Was the Defendants’ conduct in violating the South Carolina Trade Secrets Act committed by the Defendants in a willful, wanton, or reckless disregard of Plaintiff’s rights?”).

Therefore, the SCTSA, common law, and treatment of Defendants’ liability for the alleged trade secret misappropriation at trial mandate that their liability for the Trade Secrets award be joint and several. Accordingly, Trask’s calculation of his judgment liability as of January 3, 2019 correctly credited him for Clear Touch’s payment of the Trade Secret award and the Defendants have paid the entirety of the judgments against them into the Court.

As noted, all parties, including Encore agreed that its entire interest in this matter is predicated upon having a judgment against Trask. Trask’s payment of the judgment against him into the Court on January 3, 2019 fully secured Encore’s judgment and deprived it of the right or ability to seek any further assets to apply in satisfaction of that debt. Consequently, Encore has no interest in the outcome of the present action and therefore no standing to remain a co-plaintiff in this case.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that, immediately upon Trask’s deposit of the Receiver fees and costs incurred through February 7, 2019 with the Receiver, Encore shall be dismissed as a party from this Action.

IT IS SO ORDERED.

The Honorable R. Lawton McIntosh
Judge, Tenth Judicial Circuit

Entered this _____ Day of _____, 2019.



Greenville Common Pleas

Case Caption: Jami Powell , plaintiff, et al vs. Clear Touch Interactive Inc ,
defendant, et al
Case Number: 2017CP2306520
Type: Order/Other

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