AFFIRMED; Opinion Filed November 10, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00614-CV

H2R RESTAURANT HOLDINGS, LLC D/B/A ABACUS JASPER'S RESTAURANT HOLDINGS D/B/A KENT RATHBUN CONCEPTS; ROTISSERIE TWO LLC D/B/A RATHBUN BLUE PLATE KITCHEN D/B/A KENT RATHBUN CATERING; KENT RATHBUN ELEMENTS LLC; AND BRIARWOOD WEST INVESTMENTS LLC, Appellants
V.
KENT RATHBUN, Appellee

On Appeal from the 116th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-16-06615

MEMORANDUM OPINION

Before Justices Lang, Evans, and Schenck
Opinion by Justice Lang

This is an accelerated, interlocutory appeal from the trial court's order denying, in part, a temporary injunction sought by appellants.[1] In their sole issue on appeal, appellants contend "the trial court err[ed] in holding that the Covenants Not to Compete Act, Tex. Bus. Com. Code §§ 15.50, *et seq*., governs a contract that grants [appellants] the exclusive right to use [appellee Kent Rathbun's] name and likeness within the food services, food preparation, and/or restaurant industries." *See* TEX. BUS. & COM. CODE ANN. §§ 15.50–.52 (West 2011) (the "Act").

[1] The term "appellants" in this opinion refers collectively to the following: H2R Restaurant Holdings, LLC d/b/a Abacus Jasper's Restaurant Holdings d/b/a Kent Rathbun Concepts ("H2R"); Rotisserie Two, LLC d/b/a Rathbun Blue Plate Kitchen d/b/a Kent Rathbun Catering ("Rotisserie Two"); Kent Rathbun Elements, LLC ("Kent Rathbun Elements"); and Briarwood West Investments, LLC ("Briarwood").

We decide appellants' issue against them. The trial court's order is affirmed.

I. FACTUAL AND PROCEDURAL CONTEXT

Starting in approximately 1999, Rathbun served as executive chef of several award-winning Dallas-area restaurants, including Abacus and Jasper's. In August 2007, Rathbun and William Hyde Jr. formed H2R by entering into a written "Company Agreement." Upon the formation of H2R, (1) that entity became the owner of Abacus and Jasper's, and (2) Rathbun continued as executive chef of those restaurants. Rathbun owns 25% of H2R and the remaining 75% is owned by Briarwood, of which Hyde is a member and the sole manager. The Company Agreement states in part that "each Manager, Member and Officer of the Company at any time and from time to time may engage in and possess interests in other business ventures of any and every type and description, independently or with others, including one in competition with the Company, with no obligation to offer to the Company or any other Member, Manager or officer the right to participate therein." Additionally, in 2009, Rotisserie Two and Kent Rathbun Elements were formed and Rathbun became a minority owner of those entities.

On approximately March 2, 2009, Rathbun signed a document titled "Assignment of Rights to Use of Name and Likeness" (the "Assignment"). According to the Assignment, (1) the term "Assignor" as used therein means Rathbun; (2) the term "Assignee" means H2R, Rotisserie Two, and Kent Rathbun Elements, collectively; and (3) the term "Restaurants" means "the restaurants now or hereafter owned, operated and/or managed by Assignee and/or its subsidiaries or affiliates." The Assignment states in part "the Assignor hereby transfers, assigns and conveys to Assignee all of his rights to use of his name 'Kent Rathbun' and his likeness within the food

services, food preparation and/or restaurant industries (the 'Industry') (collectively the 'Rathbun Rights')."[2]

In May 2016, Rathbun resigned as an employee of H2R, Rotisserie Two, and Kent Rathbun Elements. Approximately one week later, Rathbun filed this lawsuit against appellants, seeking, among other things, a declaration that the Assignment is unenforceable. Specifically, Rathbun contended in part that the Assignment (1) constitutes a "covenant not to compete" that is "impermissibly broad" and therefore invalid pursuant to the Act; (2) is in direct conflict with the Company Agreement, which "controls the relationship of the parties and expressly permits Rathbun to compete directly with [appellants] at his choosing"; and (3) was secured by fraudulent inducement and duress.

Appellants filed a general denial answer and multiple counterclaims, including a counterclaim for breach of the Assignment. Rathbun asserted several affirmative defenses to those counterclaims, including, *inter alia*, unclean hands, unconscionability, ambiguity, and lack of consideration.

On March 6, 2017, appellants filed an application for the temporary injunction in question. Specifically, appellants asserted in part (1) immediate and irreparable injury will result to them unless Rathbun is restrained from "using his name or likeness" and is "compelled to comply with the Assignment," and (2) absent an injunction, appellants will suffer damage to their goodwill and business reputation.

---

[2] Additionally, the Assignment states in part as follows:

> [T]he purpose of this Agreement is to allow Assignee the right to the sole, exclusive and unrestricted use of the Rathbun Rights for the purposes of advertising, marketing, promoting and operating the Restaurants; including, without limitation, those purchased, established or acquired in the future. Assignor expressly agrees that except for this assignment to Assignee pursuant to this Agreement, he will not at any time in the future, directly or indirectly, authorize any other person or entity whatsoever to utilize his name, any variation thereof, his likeness or image in any manner whatsoever, for promotional, advertising, marketing or otherwise to the extent relating in any manner whatsoever to the Industry or in any manner which would be likely to be damaging or derogatory to Assignee or discredit or be detrimental to the reputation, character and standing of Assignee or any of the Restaurants.

During the hearing on the application for temporary injunction, counsel for Rathbun argued in part "there are a lot of reasons why we believe the injunction shouldn't be issued." Additionally, both sides presented argument and evidence respecting, among other things, conflict between the Assignment and the Company Agreement, applicability of the Act, irreparable injury, and the affirmative defenses of unclean hands, unconscionability, ambiguity, and lack of consideration.[3]

[3] Among the exhibits admitted into evidence at the hearing was Plaintiff's Exhibit 62, which contained deposition testimony of Hyde and H2R corporate representative Brian Grindem. In that exhibit, Hyde testified in part,

> Q. —as to whether or not [Rathbun] is a sophisticated businessman—
>
> A. He's probably not a sophisticated businessman, if you wanted to categorize sophisticated businessman as somebody experienced in depth in running and managing organizations.
> . . . .
> Q. In fact, you have filed a counterclaim—or H2R has filed a counterclaim against him . . . saying just that, that Kent Rathbun is not a sophisticated businessman; isn't that true?
>
> A. I stand by that, yes.
> . . . .
> Q. So you understand based upon all the companies that you've been an officer and director and manager of that you have fiduciary duties to the shareholders; is that correct?
> . . . .
> A. Yes. In every officer's position, I understood that we, myself and others, have fiduciary responsibilities to the shareholders, yes, I do.
>
> Q. Okay. And, in fact, I think you mentioned at the beginning of the deposition that your responsibility as an officer and director or a manager is to conduct the affairs of the company in the best interest of the shareholders, deal in good faith and to provide value, correct?
>
> A. With some other things, but yes.
> . . . .
> Q. You also understand fiduciary duties mean that you have a special relationship of trust that's owed to the shareholders, correct ?
> . . . .
> A. Yes.
> . . . .
> Q. And, in fact, given that you are still manager and still president of H2R, you still owe those duties—those fiduciary duties to Kent Rathbun, do you not?
> . . . .
> A. All members of H2R, that's correct.

Further, Grindem testified in part as follows:

> Q. Now, would you agree with me that the transaction where H2R absorbed the Rotisserie One entity resulted in a net liability to H2R?
>
> A. Yes.
> . . . .
> Q. What is the—what is the amount of the net liability that was absorbed by H2R as a result of folding in Rotisserie One?
> . . . .
> A. It was probably over a million dollars.
> . . . .
> Q. . . . My question is, is there anywhere reflective [sic] that there was a discussion or a piece of paper or anything handed to Kent Rathbun or told to Kent Rathbun, by the way, when we're putting this Rotisserie One into H2R, meaning the assets and the liabilities, you're going to absorb your share of a net liability in excess of a million dollars?
> . . . .

Following that hearing, the trial court signed a May 30, 2017 "Temporary Injunction Order" in which it stated in part (1) "[t]he Court finds that the [Assignment] is a covenant not to compete subject to the Covenants Not to Compete Act because it places limits on Rathbun's professional mobility"; (2) "[t]he Court finds that Defendants have not met their burden in showing a probable right to the relief sought with respect to their causes of action articulated in their Counterclaim"; and (3) "[a]ccordingly, the [trial court] **DENIES** the Application as to any and all portions of the [Assignment] which seek to preclude Rathbun from using his name or likeness in the Industry." (emphasis original). Further, the trial court granted appellants' application for temporary injunction "as to the portion of the [Assignment] which seeks to preclude Rathbun from utilizing his name, any variation thereof, his likeness, or his image in any manner which would be likely to be damaging or derogatory to the Assignee . . . or discredit or

---

A. Right. No, I think I stated earlier that I don't have a document that says, Kent, you're going to absorb X amount of dollars by doing this.

Q. Is there any meeting where that took place where that discussion was had?

A. I don't recall a specific meeting about that, no.

. . . .

Q. So Bill Hyde and Bill Hyde alone had the ability to make the decision to fold—fold Rotisserie One into H2R?

A. He was the managing member of H2R, so yes.

. . . .

Q. So we know that Kent's 25 percent would have resulted in more than a $250,000 negative hit to the value of his equity in H2R?

A. Doing simple math, that would be the case.

. . . .

Q. Was Rotisserie Two also absorbed by H2R?

A. The assets and liabilities were taken over, yes.

Q. Okay. Was there also a net liability related to Rotisserie Two when it was absorbed by H2R?

A. Yes.

. . . .

Q. So with respect to the balance sheet, once H2R absorbed Rotisserie Two, do you know approximately what the net liability was?

. . . .

A. It was—I don't recall, actually. Somewhere between half a million and $2 million would be—

Q. And whatever that—between $500,000 and $2 million, that would have also had a negative impact to Kent Rathbun's equity in the tune of 25 percent of whatever that number is, correct?

A. Well, actually, I believe Kent's percentage was larger than that in Rotisserie Two. So I believe he was a 40 percent owner in Rotisserie Two. So—so, yes, I mean, he was a—he was a member of that LLC, so he would have participated in whatever percentage he had.

be detrimental to the reputation, character, and standing of the Assignee, as defined by the [Assignment]." Additionally, the trial court set this case for trial on October 16, 2017, which setting was subsequently continued to December 4, 2017. This appeal timely followed.

II. PARTIAL DENIAL OF TEMPORARY INJUNCTION

A. Standard of Review

The decision to grant or deny a temporary injunction is within the trial court's sound discretion. *See Leighton v. Rebeles*, 343 S.W.3d 270, 273 (Tex. App.—Dallas 2011, no pet.) (citing *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002)). Our review of a trial court's grant or denial of a temporary injunction is strictly limited to evaluating whether there has been an abuse of discretion by the trial court in granting or denying the interlocutory order. *Id.* "[T]he merits of the underlying case are not presented for appellate review." *Davis v. Huey*, 571 S.W.2d 859, 861 (Tex. 1978); *accord Leighton*, 343 S.W.3d at 273. When we review the trial court's order, we view the evidence in the light most favorable to the trial court's order, indulging every reasonable inference in its favor, and determine whether the order is so arbitrary that it exceeds the bounds of reasonable discretion. *Amend v. Watson*, 333 S.W.3d 625, 627 (Tex. App.—Dallas 2009, no pet.); *HMS Holdings Corp. v. Pub. Consulting Grp., Inc.*, No. 05-15-00925-CV, 2016 WL 1179436, at *1 (Tex. App.—Dallas Mar. 28, 2016, no pet.) (mem. op.). "A trial court does not abuse its discretion if it bases its decision on conflicting evidence and at least some evidence in the record reasonably supports the trial court's decision." *Frequent Flyer Depot, Inc. v. Am. Airlines, Inc.*, 281 S.W.3d 215, 220 (Tex. App.—Fort Worth 2009, pet. denied); *accord HMS Holdings*, 2016 WL 1179436, at *1 (citing *Butnaru*, 84 S.W.3d at 211).

B. Applicable Law

The purpose of a temporary injunction is to preserve the status quo of the subject matter of the litigation pending a trial on the merits. *Butnaru*, 84 S.W.3d at 204. A temporary injunction

is an extraordinary remedy and does not issue as a matter of right. *Id*. To obtain a temporary injunction, the applicant must plead and prove (1) a cause of action against the defendant, (2) a probable right to the relief sought, and (3) a probable, imminent, and irreparable injury in the interim. *Id*. "Findings and conclusions made by the trial court in conjunction with the interlocutory order may be 'helpful' in determining whether the trial court exercised its discretion in a reasonable and principled fashion, but they are not binding." *HMS Holdings*, 2016 WL 1179436, at *2 (citing *Tom James of Dallas, Inc. v. Cobb*, 109 S.W.3d 877, 884 (Tex. App.—Dallas 2003, no pet.)). Further, "we do not assume that the evidence presented at the injunction hearing is the same as the evidence that will be developed at a full trial on the merits." *Id*. (citing *Tom James*, 109 S.W.3d at 885).

C. Application of Law to Facts

In their brief on appeal, appellants contend (1) "[t]he trial court partially denied Appellants' request for temporary injunction for one reason: it concluded that the [Assignment] is governed by the Covenants Not to Compete Act"; (2) "[a]s a matter of Texas law, such an agreement is not governed by the Covenants Not to Compete Act"; and (3) therefore, this Court should reverse the trial court's decision and modify the temporary injunction order to prohibit Rathbun from using his name and likeness in violation of the Assignment. Additionally, appellants assert "[t]he sole basis for the trial court's refusal to grant the injunction that Appellants requested was that the [Assignment] was governed by the Covenants Not to Compete Act."

Rathbun responds that the trial court "did not abuse its discretion in partially denying [appellants'] application for a temporary injunction." Rathbun asserts that as to appellants' probable right to relief, (1) "the trial court correctly concluded that the Covenants Not to Compete Act applied, making the Assignment unenforceable"; (2) "express language in the

underlying Company Agreement—entered two years before the Assignment—lets the parties compete in other businesses"; and (3) Rathbun "introduced evidence about its affirmative defenses that further supports the trial court's exercise of discretion about [appellants'] likelihood of success on their claims." Additionally, Rathbun argues appellants "did not show a probable, imminent, or irreparable injury" because their evidence consisted of only "speculation about future harm."

In their appellate reply brief, appellants contend "the trial court's decision cannot be affirmed for the reasons articulated by the trial court or for the reasons that the trial court did not address." Specifically, appellants restate their arguments described above and, in addition, assert (1) "the Assignment neither conflicts with, nor is it negated by, the [Company Agreement]"; (2) "it is improper for this Court to consider the merits of [Rathbun's] affirmative defenses in the context of an interlocutory appeal from a temporary injunction order"; (3) "[e]ven if the Court could properly consider evidence pertaining to [Rathbun's] purported affirmative defenses," such evidence "was insufficient to preclude [appellants] from establishing a probable right to relief"; and (4) appellants presented "substantial evidence" that they would suffer probable, imminent, and irreparable harm absent a temporary injunction.

As described above, the trial court's temporary injunction order contains statements the trial court described as "findings." However, those "findings" do not meet the requirements of Texas Rule of Civil Procedure 299a. *See Tom James*, 109 S.W.3d at 884 (citing TEX. R. CIV. P. 299a (requiring findings of fact to be separately filed and not simply recited in judgment)). "Moreover, even if we considered the language embedded in the trial court's order to constitute findings of fact and conclusions of law, such findings and conclusions do not control the outcome of this case." *Id.* In an appeal from an interlocutory order, the trial judge may file findings and conclusions, but is not required to do so. *Id.* (citing TEX. R. APP. P. 28.1). Findings

filed in conjunction with appeal of an interlocutory order "do not carry the same weight on appeal as findings made under rule [of civil procedure] 296, and are not binding when we are reviewing a trial court's exercise of discretion." *Id.*; *see also HMS Holdings*, 2016 WL 1179436, at *2. Rather, we must evaluate whether, viewing the evidence in the light most favorable to the trial court's order and indulging every reasonable inference in its favor, some evidence reasonably supports the trial court's decision to partially deny the temporary injunctive relief requested. *See HMS Holdings*, 2016 WL 1179436, at *1.

Although appellants' issue in this appeal focuses only on the applicability of the Act, the record shows several independent, alternative bases were asserted by Rathbun for denial of the temporary injunction. Those bases included unenforceability of the Assignment because of noncompliance with the Act, conflict between the Assignment and the Company Agreement, lack of irreparable injury, and affirmative defenses of unclean hands, unconscionability, ambiguity, and lack of consideration.

As to Rathbun's affirmative defenses, appellants contend in their reply brief (1) "[b]ecause the merits of the parties' underlying claims are beyond the scope of a temporary injunction proceeding, courts have frequently held that it is appropriate to defer consideration of affirmative defenses until the trial on the merits" and (2) "[a]t least one court of appeals has held that it lacks jurisdiction to consider affirmative defenses that implicate the merits of a temporary injunction applicant's underlying claims." In support of their argument that it is appropriate to "defer consideration" of such defenses until trial on the merits, appellants cite three cases from this Court. *See Currie v. Int'l Telecharge, Inc.*, 722 S.W.2d 471, 475 (Tex. App.—Dallas 1986, no writ); *Keystone Life Ins. Co. v. Mktg. Mgmt., Inc.*, 687 S.W.2d 89, 93 (Tex. App.—Dallas 1985, no writ); *HMS Holdings*, 2016 WL 1179436, at *3. Each of those cases states it is "within the trial court's discretion to reserve matters of a purely defensive nature to the plenary hearing"

and the trial court "does not abuse its discretion" in granting the injunction and reserving those matters to be determined along with the ultimate rights of the parties. None of those cases states a requirement that any consideration of defensive matters must be reserved until a trial on the merits.

Further, as to appellants' argument that courts of appeals "lack[] jurisdiction to consider affirmative defenses that implicate the merits of a temporary injunction applicant's underlying claims," appellants cite two cases from the Eighth Court of Appeals in El Paso. *See Fuentes v. Union de Pasteurizadores de Juarez Sociedad Anonima De Capital Variable*, 527 S.W.3d 492, 499 (Tex. App.—El Paso 2017, no pet.); *Yardeni v. Torres*, 418 S.W.3d 914, 917 (Tex. App.—El Paso 2013, no pet.). In *Yardeni*, the Eighth Court of Appeals summarily declined to address a statute of limitations argument raised on interlocutory appeal of the granting of a temporary injunction, stating it would "'stray beyond our statutory mandate and render an advisory opinion' on the merits by addressing the limitations argument." 418 S.W.3d at 920; *see also id*. at 917 ("[b]ecause the grant of a temporary injunction forms the core of this case, we have jurisdiction to review issues necessary to the resolution of the injunction's propriety," but "[t]o the extent that any party raises issues outside the scope of the injunction order, we are without jurisdiction to decide those issues"). Subsequently, in *Fuentes*, that court of appeals was again presented with a statute of limitations argument in an interlocutory appeal of the granting of a temporary injunction. *See* 527 S.W.3d at 497. Although the *Fuentes* opinion is silent as to whether that defense was raised prior to the interlocutory appeal, the court of appeals stated *Yardeni* "binds us as precedent" and "[f]ollowing our approach in *Yardeni*, we decline to address Appellants' statute of limitations arguments on this interlocutory appeal." *Id*. at 499.

To the extent appellants seek a determination in this interlocutory appeal that "[a]s a matter of Texas law, [the Assignment] is not governed by [the Act]," it appears the El Paso cases

described above would require us to decline to address that issue and perhaps to dismiss this appeal. Further, as to consideration of defenses in evaluating the propriety of a temporary injunction, the Eighth Court of Appeals opined in a footnote in *Fuentes* as follows: "In any event, even if we were incorrect in *Yardeni* and we can theoretically consider statute of limitations issues as part of our probable right to relief analysis in straightforward cases, we would still overrule Issue One in this case because the limitations issue here is so complex and so enmeshed with the merits issue that there is a bona fide issue as to ultimate relief, making interlocutory resolution of this question is [sic] inappropriate." *Id*. at n.3. In the case before us, nothing in the record demonstrates that the evidence respecting Rathbun's affirmative defenses is so complicated as to bar us from reviewing the entire record and considering all that was presented to the trial court. Accordingly, we follow the precedent binding on this Court that directs us to evaluate whether, viewing the evidence in the light most favorable to the trial court's order and indulging every reasonable inference in its favor, some evidence reasonably supports the trial court's partial denial of the injunctive relief sought by appellants. *See HMS Holdings*, 2016 WL 1179436, at *1.

As to the defense of unclean hands, Rathbun contends (1) the evidence showed appellants "knew they owed duties of loyalty to Rathbun" and committed "serious breaches of [their] obligations to Rathbun, including surreptitiously removing him as a manager of H2R, secretly setting up affiliated companies, and hiding that Hyde subsumed earlier businesses into H2R, carrying with them millions of dollars of Hyde's liabilities," and (2) "[t]his evidence gave the trial court discretion to partially deny [appellants'] application for a temporary injunction." Appellants respond (1) "even assuming, *arguendo*, that [Rathbun] presented some competent evidence of these supposed breaches of fiduciary duty, none of that evidence relates to

Appellants' conduct in connection with the Assignment," and (2) "[a]ccordingly, such evidence does not support an unclean hands defense to the enforceability of the Assignment."

As described above, Plaintiff's Exhibit 62 contains (1) deposition testimony of Hyde respecting his knowledge of Rathbun's lack of business sophistication and his fiduciary duties owed to Rathbun and (2) deposition testimony of Grindem respecting transactions involving H2R and Rotisserie Two that resulted in Rathbun assuming financial liabilities that Rathbun might not have been made fully aware of.[4] Further, the record shows the Assignment was executed within approximately two years after the formation of Rotisserie Two and the parties to the Assignment were Rathbun, H2R, Rotisserie Two, and Kent Rathbun Elements.

"The doctrine of unclean hands allows a court to decline to grant equitable relief, such as an injunction, to a party whose conduct in connection with the same matter or transaction has been unconscientious, unjust, or marked by a want of good faith, or one who has violated the principles of equity and righteous dealing." *Id.* at *3. On this record, viewing the evidence in the light most favorable to the trial court's order and indulging every reasonable inference in its favor, we conclude there is some evidence to support an unclean hands defense to the enforceability of the Assignment. *See id.* Consequently, we conclude the trial court did not abuse its discretion by partially denying the temporary injunction in question. *See id.*; *Frequent Flyer Depot, Inc.*, 281 S.W.3d at 220; *see also Fuentes*, 527 S.W.3d at 503 (appellate court in interlocutory appeal of temporary injunction need not address every alternative ground if one meritorious ground would uphold order).

We decide appellants' issue against them.

[4] *See supra* note 3.

III. CONCLUSION

We decide against appellants on their issue. The trial court's order is affirmed.

/Douglas S. Lang/
DOUGLAS S. LANG
JUSTICE

170614F.P05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

H2R RESTAURANT HOLDINGS, LLC D/B/A ABACUS JASPER'S RESTAURANT HOLDINGS D/B/A KENT RATHBUN CONCEPTS; ROTISSERIE TWO LLC D/B/A RATHBUN BLUE PLATE KITCHEN D/B/A KENT RATHBUN CATERING; KENT RATHBUN ELEMENTS LLC; AND BRIARWOOD WEST INVESTMENTS LLC, Appellants

No. 05-17-00614-CV V.

KENT RATHBUN, Appellee

On Appeal from the 116th Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-16-06615.
Opinion delivered by Justice Lang, Justices Evans and Schenck participating.

In accordance with this Court's opinion of this date, the trial court's order is **AFFIRMED**.

It is **ORDERED** that appellee Kent Rathbun recover his costs of this appeal from appellants H2R Restaurant Holdings, LLC d/b/a Abacus Jasper's Restaurant Holdings d/b/a Kent Rathbun Concepts; Rotisserie Two LLC d/b/a Rathbun Blue Plate Kitchen d/b/a Kent Rathbun Catering; Kent Rathbun Elements LLC; and Briarwood West Investments LLC.

Judgment entered this 10th day of November, 2017.