

STATE OF MICHIGAN
COURT OF APPEALS

COMMODITIES EXPORT, CO.,

Plaintiff-Appellant,

v

AMMEX, INC.,

Defendant-Appellee.

UNPUBLISHED

June 7, 1996

No. 173005

LC No. 92-208568-CZ

Before: Jansen, P.J., and Hoekstra and D. Langford-Morris,* JJ.

PER CURIAM.

Plaintiff appeals as of right from a January 21, 1994, order of the Wayne Circuit Court dismissing its complaint. We affirm.

Plaintiff and defendant are competing duty-free businesses which operate near the Ambassador Bridge in the City of Detroit. Plaintiff brought this action seeking enforcement of a 1983 injunction which restricted the parties' conduct of their respective businesses. Plaintiff alleged that defendant was engaging in conduct that violated the injunction. Defendant answered by arguing that it was not the successor corporation to Ammex, Inc. (hereafter "Ammex 1"), and that it, therefore, was under no duty to assume Ammex 1's obligations under the prior injunction.

The trial court conducted an evidentiary hearing concerning whether defendant was the successor corporation to Ammex 1 and thus bound by the orders. Following the hearing, the trial court entered a written opinion in which it concluded that plaintiff did not sufficiently establish that defendant is the successor corporation of Ammex 1. The trial court thus concluded that defendant is not bound by the injunction entered in 1983. The trial court entered an order on January 21, 1994, dismissing plaintiff's complaint.

* Circuit judge, sitting on the Court of Appeals by assignment.

On appeal, plaintiff raises two issues. It first argues that the trial court erred in concluding that defendant was not bound by the 1983 injunction entered against Ammex 1. Plaintiff also argues that the trial court abused its discretion in denying its motion for disqualification.

The scope of an injunction is set forth in MCR 3.310(C)(4) which states that an injunction:

is binding only on the parties to the action, their officers, agents, servants, employees, and attorneys, and on those persons in active concert, or participation with them who receive actual notice of the order by personal service or otherwise.

Although there are no reported Michigan cases interpreting MCR 3.310(C)(4), FR Civ P 65(d) contains identical language to the Michigan court rule. Interpreting FR Civ P 65(d), the court in *G. & C. Merriam Co v Webster Dictionary Co, Inc*, 639 F2d 29, 35 (CA 1, 1980), stated that:

To hold a nonparty bound by an injunction it is thus essential to prove that either the nonparty participated in the contumacious act of a party or that the nonparty was subject to the injunction because legally identified with a party.

A nonparty can be found to be in contempt of the injunction only if in active concert or participation with a party in postinjunction activity. *Id.*

A successor corporation may be legally identified with a party, and thus subject to an injunction issued against a predecessor, where the successor has acquired the business of the predecessor. *Id.*, p 36. A successor business entity must be one who has received a transfer of the business or some part of it from the enjoined party. *Id.* Thus, the second business entity must have acquired the business, or at least a relevant part of it, from the first entity. *Id.* “It is not enough to prove that the first entity went out of existence and that the second entity entered into the enjoined type of business activity, knowing about the injunction but without having acquired the business, or a relevant part of it, from the first entity.” *Id.*

In the present case, the trial court concluded that defendant was not the successor in interest nor in privity with Ammex 1, the named party to the injunction. This finding is not clearly erroneous because there is record evidence to support it. MCR 2.613(C). There was evidence that Ammex 1’s assets were not purchased directly by defendant. The piece of property which was the subject of the 1983 injunction was owned by Ammex 1 until April 3, 1987, when it was sold to Ambassador Properties. Ambassador Properties then sold the property to defendant on August 1, 1991. The assets of Ammex 1 and Ammex Metro Corporation (a separate company) were sold jointly to the Detroit International Bridge Company, Ambassador Bridge Duty Free Store, Inc., and Ambassador Properties, Inc., on April 3, 1987. On April 17, 1987, Ambassador Bridge Duty Free Store, Inc. changed its name to Ammex, Inc. (defendant herein). Corporate records also showed that there was never any direct sale of assets from Ammex 1 to defendant.

Therefore, there is really no evidence that defendant acquired the business of Ammex 1. Rather, there is evidence that defendant was not the successor to Ammex 1. Accordingly, the trial court did not err in ruling that defendant is not the successor to Ammex 1, and, therefore, not bound by the injunction.

Next, plaintiff argues that the trial court should have disqualified itself because it was in the third degree of affinity to an attorney acting for a party. This Court reviews a trial court's decision on a motion for disqualification for an abuse of discretion. *Michigan Ass'n of Police v City of Pontiac*, 177 Mich App 752, 757; 442 NW2d 773 (1989).

Pursuant to MCR 2.003(B)(5), a judge is disqualified if she is within the third degree (civil law) of consanguinity or affinity to a person acting as an attorney to a party. Plaintiff argues that the trial judge abused her discretion in refusing to disqualify herself because her uncle by marriage represented Liberty Bell Agency, Inc., which is controlled or owned by Manuel J. Maroun, who also owns and controls defendant, and, thus, the trial judge was related to a person acting as an attorney to a party. We disagree that the trial judge was obliged to disqualify herself because unless the attorney personally appears and participates in the action, the attorney is not acting as the attorney or counselor for any party. *People v Dycus*, 70 Mich App 734, 736; 246 NW2d 326 (1976). There is no dispute that the trial court's uncle did not appear in this action, nor was there any evidence presented that the attorney represented defendant.

Accordingly, the trial court's uncle was not acting as an attorney to a party within the meaning of MCR 2.003(B)(5), and the trial court did not abuse its discretion in refusing to disqualify itself from this case.

Affirmed.

/s/ Kathleen Jansen

/s/ Joel P. Hoekstra

/s/ Denise Langford-Morris