

STATE OF MICHIGAN
COURT OF APPEALS

GAUTHIER ENTERPRISES, INC. and AMY
GAUTHIER

UNPUBLISHED
February 7, 1997

Plaintiffs-Appellants,

v

No. 192182

Wayne Circuit Court
LC No. 96-600401

PATRICIA S. DICKSON,

Defendant-Appellee.

Before: Corrigan, P.J., and J.B. Sullivan* and T.G. Hicks,** J.J.

PER CURIAM.

In this action between an employer and its former employee, plaintiffs appeal as of right from an order dismissing the action with prejudice, which was entered after the trial court declined to issue a preliminary injunction. We reverse and remand to a different judge for further proceedings consistent with this opinion.

Defendant was the bookkeeper for plaintiff Gauthier Enterprises, Inc., from July, 1993, until she was discharged by Amy Gauthier, the company president, on January 2, 1996. Upon notification of her termination, defendant allegedly departed company offices with computer disks containing the company's accounting records. Plaintiffs promptly commenced this action and obtained a temporary restraining order enjoining defendant from disseminating or otherwise disclosing the company's confidential and proprietary information. However, at the conclusion of a brief hearing on an order to show cause why a preliminary injunction should not issue held some two weeks later, the trial court denied plaintiffs' request for an evidentiary hearing and declined to issue a preliminary injunction. The court then, without explanation, entered an order dismissing the action.

* Former Court of Appeals Judge, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1996-10.

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

Plaintiffs contend that the trial court abused its discretion when it declined to issue a preliminary injunction without affording them the opportunity to present testimony at an evidentiary hearing. We agree. A formal hearing is required before a preliminary injunction may be issued. MCR 3.310(A)(1); *Campau v McMath*, 185 Mich App 724, 728; 463 NW2d 186 (1990). If a party can establish his entitlement to an injunction through nontestimentary evidence, the trial court need not take testimony at the hearing. However, where the circumstances of the case require it, the trial court must conduct an evidentiary hearing. *Campau, supra*, at 728. In the instant case, plaintiffs proffered limited documentary evidence and needed to present testimony in order to establish both the likelihood that they would prevail on the merits and the danger of irreparable injury if the injunction was not issued. Because these factors must be shown before an injunction will be issued, *Fruehauf Trailer Corp v Hagelthorn*, 208 Mich App 447, 449; 528 NW2d 778 (1995), the trial court assured that plaintiffs would be unable to meet their burden of proof when it precluded them from presenting the evidence. Accordingly, under the circumstances of this case, the trial court was required to conduct an evidentiary hearing before deciding whether to issue a preliminary injunction.¹ *Fancy v Egrin*, 177 Mich App 714, 722-723; 442 NW2d 765 (1989).

In light of the manner in which the trial court disposed of this case, plaintiffs urge us to remand to a different judge. Upon review of the circumstances of this case, we believe the trial judge would have difficulty putting his previously expressed views out of his mind when reconsidering the injunction issue on remand. In order to preserve the appearance of justice, we remand to a different judge because reassignment will not entail duplication or waste, as the required evidentiary hearing was not conducted during the original proceedings. *Feaheny v Caldwell*, 175 Mich App 291, 309-310; 437 NW2d 358 (1989).

Reversed and remanded to a different judge. We do not retain jurisdiction.

/s/ Maura D. Corrigan

/s/ Joseph B. Sullivan

/s/ Timothy G. Hicks

¹ We note that the trial court compounded its error by dismissing the case with prejudice after declining to issue the preliminary injunction. The refusal to grant a temporary injunction does not preclude later entry of the permanent injunction. *Cramer v Metropolitan Federal Savings & Loan Ass'n*, 34 Mich App 638, 641; 192 NW2d 50 (1971). Absent the resolution of a dispositive question of law at the hearing, the trial court should not dismiss the action. See *Fruehauf, supra* at 452.