

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

DOCTOR DOODLES,	:	Case No. 12CVF- 3339
	:	
Appellant,	:	(JUDGE FRYE)
	:	
v.	:	
	:	
OHIO DEPARTMENT OF HEALTH	:	
	:	
Appellee.	:	

DECISION AND FINAL JUDGMENT ENTRY
AFFIRMING THE DECISION OF THE OHIO DEPARTMENT OF HEALTH
IN PROPOSED CIVIL FINE #32926

I. Introduction

This is an Administrative Appeal by Doctor Doodles from an Order of the Ohio Department of Health finding Doctor Doodles violated the Ohio’s Smoke-Free Workplace Law by permitting smoking in a prohibited area and having an ashtray present in that area. The Order fined Doctor Doodles \$1,000.00 for the violation.

Doctor Doodles timely filed an appeal in this court.

Doctor Doodles contests whether a fine can be imposed against it as the DBA of G W Sheffield Enterprises, Inc. (sic), a duly registered Ohio corporation. Doctor Doodles maintains that it is merely a name on a building or name of a place and is not a “Proprietor” as that term is used in OAC 3701-52-02(P).

The court finds Doctor Doodles' argument unavailing. No prejudice inured to Doctor Doodles or its corporate owner from naming the DBA in this action. The corporate owner defended on behalf of Doctor Doodles and was afforded both notice and opportunity to be heard. Furthermore, R.C. 1329.10(C) allows suit to be brought against a party named only by its fictitious name (i.e. its DBA name). *Family Med. Found., Inc. v. Bright*, 96 Ohio St. 3d 183, 186 (Ohio 2002). The *Bright* court noted the evidence clearly indicated the corporate defendant had notice of the commencement of the suit, because defendant’s receptionist received service of the complaint. *Family Med. Found., Inc. v. Bright*, 96 Ohio St. 3d 183, 187 (Ohio 2002).

As in *Bright*, this suit against Doctor Doodles was brought against a corporate defendant using its DBA name and the corporation had notice of the suit. Additionally, unlike *Bright*, Doctor Doodles appeared and defended. Finding no prejudice to Doctor Doodles, this court affirms the Order of the Ohio Department of Health in its entirety.

II. Standard of Review

Decisions of administrative agencies are subject to a “hybrid form of review” in which a common pleas court must give deference to the findings of an agency, but those findings are not conclusive. *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 111, 407 N.E.2d 1265. In *Strausbaugh v. Dept. of Commerce, Div. of Real Estate & Professional Licensing* (10th District), Case No. 07AP-870, 2008-Ohio-2456, ¶ 6, the Court of Appeals set forth more fully the standard of review under Ohio’s administrative procedure act as follows: “In an administrative appeal pursuant to R.C. 119.12, the trial court reviews an order to determine whether it is supported by reliable, probative and substantial evidence and is in accordance with the law. *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 87, [487 N.E.2d 1248]; *Belcher v. Ohio State Racing Comm.*, 10th District No. 02AP-998, 2003-Ohio-2187, at ¶10.” The meaning of reliable, probative and substantial evidence was defined in *Our Place, Inc. v. Ohio Liquor Control Comm.* (1992), 63 Ohio St.3d 570, 571.

The common pleas court conducts a de novo review of questions of law, exercising its independent judgment to determine whether the administrative order is “in accordance with law.” *Ohio Historical Soc. V. State Emp. Relations Bd.* (1993), 66 Ohio St. 3d 466, 471, 613 N.E.2d 591.

III. Discussion

Doctor Doodles sets forth a single assignment of error with three issues presented:

- I. THE ORDER OF THE OHIO DEPARTMENT OF HEALTH IS NOT SUPPORTED BY RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE AND IS NOT IN ACCORDANCE WITH LAW BECAUSE THE REPORT LETTERS, VIOLATION LETTERS AND FINAL ADJUCIATION ORDERS NAMED AN INCORRECT PROPRIETOR.

ISSUES PRESENTED

- 1) Doctor Doodles is not a legal entity in Ohio and clearly is not and cannot be a proprietor and therefore cannot be found in violation of the Ohio Smoke-Free Workplace Law. (Law and Argument #1)
- 2) The investigator for Public Health Dayton and Montgomery County testified that the proprietor was Marina McClelland and she was listed as the proprietor on the investigation worksheet. (Law and Argument #1)
- 3) G W Sheffield Enterprise, Inc. is the corporate entity that operates the business where the smoking investigation occurred. (Law and Argument #1)

Doctor Doodles (“DD”) is the name on the building at 1510 Miamisburg-Centerville Road, Dayton, Ohio. DD is not a corporation, a limited liability company or a partnership. It is not a legal entity in Ohio. It cannot be a proprietor as defined by OAC 3701-52-01(P). DD is not an employer, owner, manager, operator, liquor permit holder, or person in charge or control of a public place or place of employment. DD is just a name of a place. It is nothing more than a dba for the business.

The OAC defines proprietor in 3701-52-02(P) as:

“(P) ‘Proprietor’ means an employer, owner, manager, operator, liquor permit holder, or person in charge or control of a public place or place of employment.”

Appellant concedes that G W Sheffield as the corporate owner could have been considered the proprietor and cited for the incident on October 27, 2010. Appellant believes that Marina McClelland could have been considered the proprietor and cited for the incident on October 27, 2010. Maybe even George Sexton could have been considered the proprietor even though he was not on the premises that night. However Public Health did not cite these individuals or the corporation and instead cited DD.

Doctor Doodles offers no legal support for the proposition that it cannot be a "proprietor".

The State of Ohio responds:

It is undisputed that G.W. Sheffield is the corporate owner, and thus a proprietor, of Doctor Doodles. Appellant's Brief, p. 11 ("Appellant concedes that G.W. Sheffield as the corporate owner could have been considered the proprietor cited for the incident on October 27, 2010."); *see also* Administrative Record, Doc. 14. The Smoke Free Act defines "proprietor" as an "employer, owner, manager, operator, liquor permit holder, or person in charge or control of a public place or place of employment." R.C. 3794.01(G); *see also* Ohio Adm. Code 3701-52-01(F). While the definition of proprietor under the Smoke Free Act allows several different people to be considered the proprietor, ODH correctly determined G.W. Sheffield is the responsible proprietor in this case. Appellant's interpretation of "proprietor" conflicts with R.C. 3794.04, which requires that the "provisions of this chapter shall be liberally construed so as to further its purposes of protecting public health and the health of employees."

Although not cited by the parties, the court believes Black's law dictionary provides additional support that an entity "doing business as" is an operator. Black's defines, in relevant part, doing business: The act of engaging in business activities; specif., the carrying out of a series of similar acts for the purpose of realizing a pecuniary interest..." (Black's, 9th ed., 2009 at 556). What constitutes "doing business" depends on

the facts in each particular case.” (Black’s, 5th ed., 1979 at 433) Black’s defines operate: “To perform a function, or operation, or produce an effect.” (*Id.* at p.984) Doctor Doodles was engaging in business on behalf of G W Sheffield, Inc. for the purpose of realizing pecuniary gain and is, the court finds, an operator as that term is used in R.C. 3794.01(G).

The court further finds that Doctor Doodles appeared with counsel at the hearing in this matter and has been represented by counsel hired by and paid for by corporate parent G W Sheffield Inc. Doctor Doodles counsel raised this same issue in 10 CVF 1935. There the issue concerned alleged confusion between whether the action had to be in the name of the proprietor, Mr. Ramsey, or whether Mr. Ramsey could be held liable for a violation of this act by proceeding against “Proprietor, Gator’s Sports Pub”. The court noted there was no confusion in the record about Mr. Ramsey being the proprietor of the establishment. Here there is no confusion in the record that Doctor Doodles was operating as establishment on behalf of its corporate parent. The Ramsey court noted there was no evidence Mr. Ramsey was prejudiced by the name on the complaint, citing *Korn v. Ohio*, (1988), 61 Ohio App.3d 677, 686 (10th Dist.) Doctor Doodles has shown no prejudice from the alleged error and is not entitled to a reversal of the Department’s Order.

The court notes that appellant concedes that its conduct has been proven by a preponderance of reliable, probative, and substantial evidence to have violated Ohio’s Smoke-free Workplace Law. Doctor Doodles’ brief simply states, “[O]n October 27, 2010 Investigator Jason Drier conducted an investigation and observed violations of the OSFW Law.” (App. Brief, p. 1).

JUDGMENT ENTRY

The Order of the Ohio Department of Health styled as Proposed Civil Fine #32926 is **AFFIRMED**. Costs of the appeal are taxed against Appellant Doctor Doodles.

IT IS SO ORDERED.

***** THIS IS A FINAL APPEALABLE ORDER.*****

Franklin County Court of Common Pleas

Date: 08-15-2012
Case Title: DOCTOR DOODLES -VS- OHIO DEPARTMENT OF HEALTH
Case Number: 12CV003339
Type: DECISION/ENTRY

It Is So Ordered.

A handwritten signature in cursive script, "Richard A. Frye", is written over a circular, textured seal. The seal appears to be an official court seal, though the text within it is illegible due to the low resolution and halftone pattern.

/s/ Judge Richard A. Frye

Court Disposition

Case Number: 12CV003339

Case Style: DOCTOR DOODLES -VS- OHIO DEPARTMENT OF HEALTH

Case Terminated: 18 - Other Terminations

Final Appealable Order: Yes

Motion Tie Off Information:

1. Motion CMS Document Id: 12CV0033392012-06-2099980000

Document Title: 06-20-2012-MOTION TO AMEND

Disposition: MOTION RELEASED TO CLEAR DOCKET