

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

ALLEN DAVIS,	:	APPEAL NO. C-070753
	:	TRIAL NO. A-0501565
Plaintiff-Appellee,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
CNG FINANCIAL CORPORATION,	:	
	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

CNG Financial Corporation (“CNG”) appeals the trial court’s judgment that granted Allen Davis’s motion for a preliminary injunction. We conclude that the trial court’s order is not a final, appealable order, and we therefore dismiss the appeal.

CNG is an S-corporation that has four shareholders: Davis, his two sons, Jared and David, and David Rosenberg. Davis was a director and officer of CNG. His sons are current directors and officers. Davis alleged in his complaint that, in December 2002, as part of a divorce settlement, he had transferred half of his CNG common stock to his wife, Judith Davis, and she had given Davis an option to repurchase the stock for \$16 million. Judith Davis immediately transferred the stock to CNG in exchange for \$15 million. CNG entered into an agreement with Davis that

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

gave him an option to repurchase the stock for \$16 million or to acquire a portion of the stock by exercise of a cashless option (“option agreement”). The portion of the stock that was subject to the cashless option agreement was to be determined by a formula. At the same time in December 2002, Davis and his sons executed a close-corporation agreement for CNG. In August 2004, Davis exercised the cashless option and received \$37 million worth of CNG stock. CNG treated the value of the stock as compensatory income to Davis.

In February 2005, Davis filed a complaint against CNG that sought a declaration that the shares transferred to him under the option agreement were part of a divorce settlement and were not compensation; that determined the number of shares to which Davis was entitled under the option agreement; and that declared the identity of CNG’s shareholders and the amount of shares held by each shareholder. In addition, Davis sought a preliminary injunction enjoining CNG from holding shareholder meetings, issuing shares of stock and other securities, and destroying records.

CNG removed the case to federal court. The federal court determined that the complaint involved state-law questions and transferred the case back to the common pleas court. The trial court granted Davis’s request for a temporary restraining order that enjoined CNG from conducting any shareholder meetings, issuing any debt instruments or securities, or declaring and paying dividends.

CNG argued that the case was governed by the arbitration clause in the close-corporation agreement that was entered into by Davis and his sons in December 2002. To this end, CNG separately sought a writ of prohibition to prevent the trial court from deciding whether to grant the preliminary injunction before deciding the

issue of arbitrability. This court's dismissal of CNG's petition for a writ of prohibition was affirmed by the Ohio Supreme Court.²

In October 2007, after several months of hearings, the trial court granted Davis's motion for a preliminary injunction. The court enjoined CNG from declaring or paying any dividends except by approval of the court, incurring any additional debt not in the ordinary course of business, and holding any shareholder meetings. Both parties were also ordered to preserve documents.

In its sole assignment of error, CNG now asserts that the trial court erred when it granted Davis's motion for a preliminary injunction. Before addressing the assignment of error, we consider Davis's argument that the court's order is not a final, appealable order.

This court's appellate jurisdiction is limited to the review of final judgments of lower courts.³ A final order is defined in part as "[a]n order that grants or denies a provisional remedy and to which both of the following apply: (a) [t]he order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy[;] and (b) [t]he appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action."⁴ A preliminary injunction is a provisional remedy.⁵

The preliminary injunction in this case clearly satisfies the first part of R.C. 2505.02(B)(4). At issue is whether CNG would be afforded a meaningful remedy by

² *State ex rel. CNG Financial Corp. v. Nadel*, 111 Ohio St.3d 149, 2006-Ohio-5344, 855 N.E.2d 473.

³ Section 3(B)(2), Article IV, Ohio Constitution.

⁴ R.C. 2505.02(B)(4).

⁵ R.C. 2505.02(A)(3).

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an appeal after the entry of final judgment on all Davis's claims. We conclude that it would. The preliminary injunction preserves the status quo. As indicated by its findings, the trial court was concerned that CNG's value was diminishing because it was taking on large amounts of debt and paying out more in dividends than it was earning. The preliminary injunction sought to preserve the parties' rights until the case could be decided on its merits.

The trial court will next presumably determine whether the option agreement is subject to the arbitration clause in the close-corporation agreement. Surely, judicial economy would be served by deciding this preliminary matter as soon as possible. If the claims do not go to arbitration, the trial court will determine the declaratory-judgment request by Davis. Because we conclude that the trial court's judgment that granted the preliminary injunction is not a final, appealable order, we dismiss CNG's appeal.

Further, a certified copy of this Judgment Entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

PAINTER, P.J., DINKELACKER and WINKLER, JJ.

RALPH WINKLER, retired, from the First Appellate District, sitting by assignment.

To the Clerk:

Enter upon the Journal of the Court on March 26, 2008
per order of the Court _____
Presiding Judge