STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2355

Mathew S. Gates,
Respondent,

vs.

Richard S. Wheeler,
Appellant,

Residential Science Resources,
Defendant.

Filed November 23, 2010
Affirmed
Klaphake, Judge

Dakota County District Court
File No. 19HA-CV-09-1863

David Arnold Schooler, Ankoor Bagchi, Diane Bratvold, Briggs and Morgan, P.A., Minneapolis, Minnesota (for respondent)

Richard S. Wheeler, Minneapolis, Minnesota (pro se appellant)

Considered and decided by Klaphake, Presiding Judge; Shumaker, Judge; and Worke, Judge.

U N P U B L I S H E D O P I N I O N

KLAPHAKE, Judge

In this appeal from a temporary injunction issued in an action for dissolution of a limited liability company under Minn. Stat. § 322B.833 (2008), appellant challenges the

district court's jurisdiction and asserts that the district court abused its discretion by granting injunctive relief. Appellant also challenges the court's award of attorney fees.

Because the district court had the authority to order injunctive relief and because it did not abuse its discretion by doing so, we affirm. The challenge to the attorney fees is not properly before us, and we decline to review this issue.

FACTS

Appellant Richard S. Wheeler and respondent Mathew S. Gates were co-owners of a limited liability company, defendant Residential Science Resources, LLC (RSR). As relations deteriorated between the two men, Gates sued Wheeler and RSR pursuant to Minn. Stat. § 322B.833, which permits the court to grant equitable relief when the owners of a limited liability company are deadlocked in the management of the company and are unable to break the deadlock. Following service of the complaint, the parties began discovery.

Wheeler was the designated administrator for RSR's computer server. This allowed him to access any email with the suffix "@residentialscience.com." Unbeknownst to Gates, Wheeler contacted an information technology contractor, Jeremy Stein, who was working with the company, and with Stein's assistance he obtained access to Gates' email account, including both personal and business emails. The emails included correspondence between Gates and his wife, personal financial and password information, and correspondence between Gates and his attorney concerning the pending lawsuit. Wheeler began accessing these emails in March 2009, when the complaint was served; Gates became aware of the situation in November 2009, during Wheeler's

deposition. Wheeler was providing copies of the emails to his attorney, Skjold • Barthel, P.A.

Upon learning of Wheeler's actions, Gates filed and served a motion for a temporary restraining order and a temporary injunction directing Wheeler to stop intercepting emails and to preserve evidence of the interception. After protracted evidentiary hearings, the district court issued its order for a temporary injunction. The court ordered Wheeler to (1) cease and desist interception of emails; (2) copy and produce all information intercepted; and (3) preserve all computers or related devices used to send, receive, or store this information. Further, Wheeler and his attorneys were ordered to return all information obtained from Gates without his knowledge and were enjoined from using or disclosing any confidential, proprietary, or attorney-client privileged information obtained from Gates without his knowledge. The district court concluded that Gates "has established a probability of success on the merits of his claims for Invasion of Privacy, Violation of the Minnesota Privacy of Communications Act, Violation of the Federal Wire and Electronic Communications and Transactional Records Access Act, Conversion, Unjust Enrichment."

Following the grant of injunctive relief, Gates filed a motion to amend his complaint to include claims involving the interception of emails.[1] Wheeler opposed this motion and filed an appeal of the court's temporary injunction.

[1] Gates sought to add claims including breach of fiduciary duty and duty of loyalty, invasion of privacy, violations of state and federal wire-tap statutes, conversion, unjust enrichment, and punitive damages.

D E C I S I O N

We review the district court's decision to grant or deny a temporary injunction for an abuse of discretion. *Carl Bolander & Sons Co. v. City of Minneapolis*, 502 N.W.2d 203, 209 (Minn. 1993). The district court's findings are reviewed for clear error. *Haley v. Forcelle*, 669 N.W.2d 48, 55 (Minn. App. 2003), *review denied* (Minn. Nov. 25, 2003).

Jurisdiction[2]

Wheeler contends that the district court lacked the authority to issue a temporary injunction because the underlying complaint did not include a request for injunctive relief or any claim related to invasion of privacy, interception of emails, or interference with electronic data, which the court gave as a basis for the injunction. Furthermore, Gates did not amend his complaint to include these claims until after the district court issued its order for a temporary injunction and Wheeler filed his notice of appeal.

A temporary injunction is an equitable remedy intended to maintain the status quo between parties pending a decision on the merits of a complaint. *Metro. Sports Facilities*

---

[2] Wheeler argues that the district court lacks subject-matter jurisdiction. Subject-matter jurisdiction is the court's statutory or constitutional power to hear certain classes of cases. *Id*. *See Bode v. Minn. Dep't of Natural Res.*, 594 N.W.2d 257, 259 (Minn. App. 1999) (noting that district courts have original subject-matter jurisdiction over civil and criminal cases, but not over bankruptcy or administrative agency decisions), *aff'd* 612 N.W.2d 862 (Minn. 2000). The district courts undoubtedly have subject-matter jurisdiction over civil actions involving dissolution of a limited liability company or a request for a temporary injunction. But certain circumstances can impede or prohibit the district court's ability to hear a matter, such as failure to adhere to time limits or to follow certain procedures. *Id.*; *but see Rubey v. Vannett*, 714 N.W.2d 417, 422 (Minn. 2006) (rejecting notion that time limits in claims processing rules are jurisdictional because they can be waived). The issue here is more accurately framed as whether there is an underlying action that permits the district court to exercise its equitable powers.

Comm'n v. MN Twins P'ship, 638 N.W.2d 214, 221 (Minn. App. 2002), *review denied* (Minn. Feb. 4, 2002). It is therefore necessarily grounded in the allegations of the complaint. *See Devose v. Herrington*, 42 F.3d 470, 471 (8th Cir. 1994) ("[A] party moving for a preliminary injunction must necessarily establish a relationship between the injury claimed in the party's motion and the conduct asserted in the complaint."). In *DeVose*, the Eighth Circuit affirmed denial of a federal prisoner's request for an order enjoining prison officials from filing disciplinary charges because the prisoner made the motion in an unrelated suit against the Arkansas Department of Corrections for inadequate medical treatment. *Id.* The Eight Circuit concluded, as had the district court, that the new assertions of improper disciplinary charges were unrelated to the prisoner's inadequate medical treatment suit. *Id.*; *see also Stewart v. U.S. Immigr. & Naturaliz. Serv.*, 762 F.2d 193, 198-99 (2nd Cir. 1985) (reversing grant of preliminary injunction when applicant failed to commence action for improper suspension in district court but sought injunction in previously filed employment discrimination action because underlying causes of action were unrelated); *Leboeuf, Lamb, Greene & Macrae, LLP v. Abraham*, 180 F. Supp. 2d 65, 69-70 (D.C. Cir. 2001) (denying motion for a preliminary injunction, because motion related to action in which no complaint had been issued; although parties were the same, causes of action were unrelated).

We conclude these cases are inapposite. Wheeler correctly points out that the complaint here does not make a request for the particular injunctive relief granted by the district court or even raise a claim related to the issues on which the court based its order; but the temporary injunction does serve to preserve the status quo between the parties as

to the underlying complaint and it relates to the suit itself. The federal cases cited by Wheeler involve matters where the underlying complaint was wholly unrelated to the subject matter of the injunction. Here, the district court issued a temporary injunction in order to regulate what are essentially dubious discovery tactics used during litigation involving the complaint.

The district court's authority to impose a temporary injunction is not strictly limited to matters raised in the underlying complaint. For example, the district court may issue an injunction against litigation of "a substantially similar action" in another court while a case is still pending. *First State Ins. Co. v. Minn. Mining & Mfg. Co.*, 535 N.W.2d 684, 687 (Minn. App. 1995), *review denied* (Minn. Oct. 18, 1995). This is permissible "whenever the facts of the case make such restraint necessary to enable the court to do justice, and prevent one citizen from obtaining an inequitable advantage over other citizens" by pursuing actions in other jurisdictions. *Hawkins v. Ireland*, 64 Minn. 339, 344, 67 N.W. 73, 75 (1896). While this is an admittedly narrow area of the law of injunctive relief, it demonstrates that the court has discretion to exercise its equitable powers beyond the narrowly prescribed subject of the complaint and that it may do so in the interests of controlling the legal process, as the district court attempted to do here.

Wheeler also argues that Gates failed to amend his complaint in a timely fashion to reflect the invasion of privacy and improper access to email violations, noting that Gates' motion to amend was not granted until after Wheeler had filed an appeal with this court. But Minn. R. Civ. P. 15.01 states that leave to amend should be "freely given when justice so requires." This has been interpreted to permit even post-judgment, post-

appeal amendment of a complaint in certain circumstances. *Johns v. Harborage I, Ltd.*, 664 N.W.2d 291, 295 (Minn. 2003) (concluding that amendment was proper when proposed amendment did not represent a challenge to the judgment but sought to enforce it against a successor party). Minn. R. Civ. P. 15.02 also permits amendment of a complaint when an issue is "tried by express or implied consent of the parties" or when the district court is satisfied that amendment of a complaint during trial will not prejudice maintenance of the action or defense upon the merits. Because the sanctioned behavior occurred after the complaint was served and seemingly in response to the complaint, even a tardy amendment of the complaint is possible under these rules.

Finally, the district court is given discretion under Minn. Stat. § 322B.833 to "grant any equitable relief it considers just and reasonable in the circumstances" in an action for deadlock. *Id.*, subd. 1. This grant of discretionary authority is broad enough to encompass controlling the actions of members of a limited liability company during the dissolution process.

We therefore conclude that the district court had the authority to issue injunctive relief.

Temporary Injunction

Wheeler argues that the district court abused its discretion by granting the temporary injunction. The party requesting a temporary injunction must demonstrate that there is no adequate legal remedy and that an injunction is necessary to prevent irreparable injury. *U.S. Bank Nat'l Ass'n v. Angeion Corp.*, 615 N.W.2d 425, 434 (Minn. App. 2000), *review denied* (Minn. Oct. 25, 2000). If a plaintiff makes "even a doubtful

showing as to likelihood of success on the merits, a district court may consider issuing a temporary injunction to preserve the status quo until trial on the merits." *Metro. Sports Facility*, 638 N.W.2d at 226.

It is difficult to discern what legal remedy would be appropriate or adequate here; monetary damages would not cure the continuing loss of privacy and the disclosure of confidential and privileged information during litigation.

In evaluating whether an injunction is necessary to prevent irreparable injury, the district court must consider the five *Dahlberg* factors: (1) the nature and background of the relationship between the parties; (2) the balance of harm to the parties; (3) the likelihood that the party seeking the injunction will prevail on the merits of the action; (4) whether there are public policy considerations; and (5) whether there are any administrative burdens involved in judicial supervision and enforcement of the temporary injunction. *Metro. Sports Facility*, 638 N.W.2d at 220-221 (citing *Dahlberg Bros. v. Ford Motor Co.*, 272 Minn. 264, 274-75, 137 N.W.2d 314, 321-22 (1965)).

The district court here made cursory findings on the *Dahlberg* factors. The court stated:

> A temporary injunction to maintain the status quo appears appropriate to this Court following an analysis of the Dahlberg factors. The two parties are engaged in a contentious dispute and [Gates] could suffer irreparable harm from the publication and potential use of confidential and attorney-client privileged information. Mr. Wheeler has indicated that he had used the intercepted e-mails in this lawsuit and his relationship to Mr. Gates as a partner adverse to him in a shareholder litigation dispute weights in favor of an injunction. In addition, under the circumstances, money damages would be inadequate and an injunction prohibiting

> any further e-mail interceptions will prevent any future harm. In addition, based on the record before the Court at this point, [Gates] appears likely to succeed on the merits of his privacy claims.

Wheeler's primary argument is that the district court erred by finding that Gates was likely to prevail on the merits of the action. Wheeler asserts that the court based its decision on claims that were not in Gates' complaint or that were to be added to the amended complaint only after the court issued its order for a temporary injunction and that the court failed to make any findings on the probability of success on the merits of the deadlock claim, the only issue in the unamended complaint.

A court may grant "any equitable relief it considers just and reasonable in the circumstances" under Minn. Stat. § 322B.833, a broad grant of authority. The court may act when a member of a limited liability company establishes that the person in authority is "deadlocked in the management of the affairs of the limited liability company and the members are unable to break the deadlock." *Id.*, subd. 1(2)(i). Certainly, the fact that Wheeler felt impelled to surreptitiously intercept Gates' emails because he claimed that he was being shut out of information and that it was necessary to do "in order to monitor the activities of RSR and preserve the value of the business" suggests that this two-man board was unable to act together and that Gates was likely to prevail on the complaint.

Wheeler asserts that the court failed to consider that the business was apparently still profitable. But while the court must take into account the financial condition of the company, it cannot "refuse to order any particular form of relief solely on the ground that the limited liability company has accumulated or current operating profits." Minn. Stat.

§ 322B.833, subd. 3. Further, the court shall consider "the duty that all members in a closely held limited liability company owe one another to act in an honest, fair, and reasonable manner in the operation of the limited liability company and with each other." *Id.*, subd. 4. Based on these considerations, a temporary injunction based solely on the probability of success on the merits of the deadlock action would be appropriate.

The district court, however, based its decision on the probability of success in the privacy claims, which were filed in an amended complaint only after the court's temporary injunction order issued, although Gates indicated to the court that he intended to add the privacy claims. Wheeler asserts that the court erred in its findings and conclusions about privacy and electronic communication law.[3]

Privacy torts include intrusion upon seclusion. "This tort has three elements: (a) an intrusion; (b) that is highly offensive; and (c) into some matter in which a person has a legitimate expectation of privacy." *Swarthout v. Mut. Serv. Life Ins. Co.*, 632 N.W.2d 741, 745-46 (Minn. App. 2001). There are no published Minnesota cases dealing with this tort in relation to interception of email. The Restatement (Second) of Torts § 652B (1981) generally discusses this tort and includes as examples opening private and personal mail (cmt. B) or surreptitiously recording telephone conversations without the other party's knowledge (illustration 3). In an unpublished case, the Minnesota federal district court concluded that a husband's secret recording of his

[3] Gates' amended complaint included claims of invasion of privacy and violations of Minn. Stat. §§ 626A.01-41 (2008), 18 U.S.C. § 2510-2522 (2010), and 18 U.S.C. §§ 2701-2712 (2010). Minnesota invasion of privacy law mirrors and is based on federal law. *See* 7 Henry W. McCarr & Jack S. Nordby, *Minnesota Practice* § 5.58 (3d ed. 2001).

estranged wife's telephone conversations could prove invasion of privacy and violations of the Minnesota and federal telecommunications privacy acts. *Milke v. Milke*, No. 03-CV-6203, 2004 WL 2801585 at *4 (D. Minn. 2004).

Wheeler argues that his intrusion into Gates' emails was not highly offensive and that Gates had no reasonable expectation of privacy. Conduct is highly offensive to the ordinary reasonable person when such a person would strongly object to the conduct. *Swarthout*, 632 N.W.2d at 745. This is generally a question of fact. *Id.* The record reflects that Wheeler collected emails of communications between Gates and his attorneys, email reminders Gates sent to himself about litigation strategy, pictures of Gates' children at a park with degrading captions added by Wheeler, personal emails between Gates and his wife, emails with passwords and financial account information, and private communications between Gates and his accountant. Surreptitious collection of these items would be offensive to the reasonable person.

Wheeler also argues that Gates did not have a reasonable expectation of privacy in his work account and that Gates should have realized that Wheeler could gain access to this information because Wheeler was the administrator for the email system. This court discussed reasonable expectations of privacy in *State v. Torgrimson*, 637 N.W.2d 345 (Minn. App. 2002), *review denied* (Minn. Mar. 19, 2002). We concluded that a person confined in a marked police car did not have a reasonable explanation of privacy and that recording of a conversation between two suspects as they sat in the squad did not violate their right to privacy or Minn. Stat. § 626A.04. *Id.* at 350. In reaching this conclusion, this court opined that a person may have a reasonable expectation of privacy even in a

public area, such as a telephone booth, which is intended to protect the privacy of conversations. *Id.*

Here, although Wheeler may have had technical authority to access all emails on the company server, he acquired specific access to Gates' emails, both personal and business, by working with the IT person, Stein, to route all of Gates' emails to Wheeler. The division of Gates' account into personal and business files indicates that Gates expected that the personal file would be private.

Minnesota courts have not addressed whether an employee can have an expectation of privacy in a company email account, although other jurisdictions have examined this issue. Conclusions are mixed. Some courts have concluded that a person has a lesser or no reasonable expectation of privacy when using an employer's email system. *See, e.g., Smyth v. Pillsbury Co.*, 914 F. Supp. 97, 100-01 (E.D.Pa. 1996). Others have found a reasonable expectation when the employee accessed a private, web-based account on the company's server, rather than using the employee's company account. *See Convertino v. U.S. Dep't Justice*, 674 F. Supp. 2d 97, 110 (D.D.C. 2009). Still others examine whether the employer had a clear company policy. *See In re Asia Global Crossing, Ltd.*, 322 B.R. 247, 257 (Bankr. S.D.N.Y. 2005). The court in *In re Asia Global* formulated a test to measure the expectation of privacy: (1) is there a corporate policy; (2) does the company monitor employee email use; (3) do third parties have a right of access; and (4) did the corporation notify the employee or did the employee know about the use and monitoring policies? *Id.* Although Gates and Wheeler

were partners and not employer and employee, this provides a useful framework for considering reasonable expectations of privacy.

According to the record here, RSR had no email policy and did not monitor email use of any other employees, third parties did not have a right of access, and Wheeler did not notify Gates and Gates did not know that Wheeler was intercepting his emails.

As to Gates' claims under the state and federal laws governing interception of electronic communications and access to stored communications, Wheeler argues that Gates did not make a sufficient showing of the likelihood of success on these claims. Both Minn. Stat. § 626A.01, subd.1(a) and 18 U.S.C. § 2511, subd. 1(a) create a private cause of action when a person intercepts electronic communications without permission. "Interception" occurs when "acquisition [is] contemporaneous with transmission." *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 878 (9th Cir. 2002). "Interception" does not include access to stored communications, but access to stored communications is regulated by Minn. Stat. § 626A.26 and 18 U.S.C. 2701(a), both of which prohibit unauthorized access to stored communications. *See Bunnell v. Motion Picture Ass'n of America*, 567 F. Supp. 2d 1148, 1152 (C.D.Cal. 2007).

Here, Wheeler both intercepted and accessed stored electronic communications. During his deposition, Wheeler stated that Stein had arranged matters so that Gates' emails posted on Wheeler's account, "so now I look at my e-mails and [Gates'] emails." Further, Wheeler produced emails that pre-dated the time when he began accessing Gates' account, suggesting that he was accessing stored communications. Although Wheeler argues that he was authorized as administrator to access these accounts, this

again raises the question of expectations of privacy. On these facts, the district court's finding that Gates had demonstrated a likelihood of success on the merits of his electronic communication claims is not clearly erroneous.

Based on the record evidence, Gates demonstrated at least a "doubtful showing as to the likelihood of prevailing on the merits," sufficient to permit the court to issue a temporary injunction in order to preserve the status quo. *Metro. Sports Facility*, 638 N.W.2d at 226.

Wheeler also disputes the district court's findings on the remaining *Dahlberg* factors. The court noted that, as to the relationship between the parties, the two were engaged in litigation after a contentious relationship. The district court found that the balance of harm weighed in favor of granting the injunction: Gates' litigation position would be harmed by the "publication and potential use of confidential and attorney-client privileged information." On the other hand, Wheeler could access the information to which he was legitimately entitled through discovery and application for discovery sanctions if Gates was not forthcoming, so it is difficult to discern how Wheeler is harmed by the temporary injunction. Wheeler argues that public policy does not support a temporary injunction, but the existence of the rules of civil procedure suggest that the courts have established a system for the orderly discovery of information that does not include surreptitious and secret surveillance. Finally, the court's administrative burden is not increased so long as Wheeler refrains from secretly accessing Gates' email.

Finally, Wheeler asserts that the district court erred by failing to require Gates to post a bond or other security. Minn. R. Civ. P. 65.03 states "No temporary restraining

order or temporary injunction shall be granted except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained."

We noted in *Ecolab, Inc. v. Gartland*, 537 N.W.2d 291, 296-97 (Minn. App. 1995), that security was required by the rule but that a district court could, in its discretion, waive the security requirement. *Id.* at 296-97. This court went on to remark that the district court must "note its decision" to waive security and cannot merely fail to address the issue. *Id.* at 297; *see also Bio-Line, Inc. v. Burman*, 404 N.W.2d 318, 321-22 (Minn. App. 1987) (same).

We agree that bond must be posted to ensure payment of costs or damages, but the district court's order here only enjoined Wheeler from unauthorized access to Gates' emails. We cannot envision any cost or damage arising from this injunction and conclude under these circumstances the failure to post a bond or security does not affect the validity of the temporary injunction.

The district court's findings are not clearly erroneous; its decision that a temporary injunction was justified was not an abuse of discretion.

Attorney Fees

Wheeler challenges the district court's order setting attorney fees. But the order appealed from stated that Gates was entitled to fees without indicating a basis for them or

an amount. An award of attorney fees was made in an order issued after this appeal was filed. The issue is therefore not properly before us and we decline to review it.

Affirmed.