IN THE TENTH DISTRICT COURT OF APPEALS
FOR FRANKLIN COUNTY, OHIO

VERONICA WAGNER COVATCH,
et al.,

Plaintiffs-Appellees,

v.

PENNY G. SANDERBECK, et al.,

Defendants-Appellants.

Case No. 15AP000699

APPELLEES' MOTION TO DISMISS AND RESPONSE TO APPELLANTS' MOTION TO ENLARGE TIME FOR FILING MERIT BRIEF

Now come Plaintiffs-Appellees Veronica Wagner Covatch and Michelle Wilson, by and through counsel, and submit the following as their Motion to Dismiss the within appeal for good cause, as set forth in the accompanying Memorandum in Support attached hereto and incorporated herein as if fully rewritten.

Appellees further submit the following as their Response to Appellants' Motion to Enlarge Time for Filing of Merit Brief, which Motion is not well taken and supports Appellees' Motion to Dismiss the within appeal, as also set forth in the accompanying Memorandum in Support attached hereto.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

Appellants move this Court for an enlargement of time to file their Merit Brief until twenty days after the transcript of the July 23, 2015 hearing is filed with the Court. While Appellees would not object to an enlargement of time for Appellants to file their Brief if the issue were properly before the Court, the facts in the case at bar do not support Appellants' request for the reasons following.

II. LAW AND ARGUMENT

A. Appellants' Motion to Enlarge Time Lacks Procedural Support

As a procedural matter, although Appellants contend that they ordered the transcript of the trial proceedings below, no transcript order is contained in the record in Franklin County Municipal Court nor in the documents filed in this Court. Rather, in the Docketing Statement filed by Appellants at Question 2, Appellants specifically respond, "No" to the question, "Is a copy of an order of the transcript from the court reporter filed herewith?"

In this regard, it should be noted that although the affidavit from the Court Reporter submitted by Appellants indicates that "following the said July 23, 2015 hearing" the transcript was ordered, it does not reflect what date "following" the hearing the transcript was requested, nor whether it was requested orally or in writing as required by Rule. Further in this regard, although counsel for Appellants states at footnote 1 of Appellants' instant Motion that the Court Reporter advised him that she was not notified by this Court

of the due date for the transcript, the reason for this alleged lack of notice is clear—no transcript order is part of the record in this court or the trial court.

In addition, the record below was transmitted on August 5, 2015. The Notice accompanying same clearly states that no transcripts are included in the record and advises counsel to check the record to make sure it is correct and complete. At no time prior to their instant motion for enlargement of time to file their brief did Appellants file anything to even suggest that the transmitted record was not complete.

This is not a mere oversight by Appellants, as Appellees raised the issue of Appellants' lack of a transcript order as early as July 29, 2015 in Appellees' Memorandum Contra Appellants' Motion for Stay at p. 19.

Accordingly, based upon the procedural posture of this case, Appellants' Motion to Enlarge Time for Filing of Merit Brief is not well taken and should be denied.

B. The judgment from which Appellants are attempting to appeal is not a final appealable order.

It is well settled that if an order is not final and appealable, the reviewing Court has no jurisdiction to review the matter and must dismiss it. See Ohio Constitution, Article IV, Section 3(B)(2); *Gen. Acc. Ins. Co. v. Ins. Co. of N. America*, 44 Ohio St. 3d 17 (1989) "A judgment that leaves issues unresolved and contemplates that further action must be taken is not a final appealable order." *State ex rel. Keith v. McMonagle*, 103 Ohio St. 3d 430, 2004-Ohio-5580.

To be final and appealable and order must comply with R.C. Section 2505.02 and Ohio Rule of Civil Procedure 54(B), if applicable. See *Wisintainer v. Elcen Power Strut*

Co., 67 Ohio St. 3d 352 (1993).

Pursuant to R.C. Section 2505.02(B) an order is final when it (1) "affects a substantial right in an action that in effect determines the action and prevents a judgment"; (2) "affects a substantial right made in a special proceeding or upon a summary application in an action after judgment"; (3) vacates or sets aside a judgment or grants a new trial; (4) "grants or denies a provisional remedy and to which both of the following apply: (a) The 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) The appealing party would not be afforded meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action; (5) an order as to class actions; (6) an order determining the constitutionality of changes to the Revised Code; and (7) an order in an appropriation proceeding.

The only sections of R.C. Section 2505.02(B) which could even arguably apply to this case are Sections 2505.02(B)(1) and (4). R.C. Section 2505.02(B)(1) is not applicable to this case because the issue of ownership or possession of a dog is not a substantial right as defined by R.C. Section 2505.02(A)(1). Likewise, the order in question does not determine the action nor prevent a judgment, as various other claims of Plaintiffs-Appellees remain pending, as do the Counterclaims of Defendants-Appellants. In this regard, it should be noted that although the Trial Court indicated at the hearing on July 23, 2015 that it would be issuing an order striking the Counterclaims and denying

Defendants-Appellants' motion for leave to file amended counterclaims, that order was not reduced to a judgment entry. The fact that entries have not yet been journalized is confirmed by Appellants in their instant Motion at p. 2.

It is well settled that a court speaks only through its journal entries. *Schenley v. Kauth,* 160 Ohio St. 109 (1953). Since some of the oral decisions of the Trial Court have not yet been journalized, the claims orally addressed by the Trial Court, including but not limited to Defendants-Appellants' counterclaims, remain pending. See *Pettit v. Glenmoor Country Club, Inc.*, 2012-Ohio-5622 (5th Dist.)

R.C. Section 2505.02(B)(4) is not applicable in this case because the order does not prevent a judgment in favor of the appealing parties and despite the decision of the Trial Court, the appealing parties (Appellants herein) would still be afforded a meaningful and effective remedy by an appeal following final judgment as to all proceedings, issues, claims and parties in the action.

Further, it has long been held that an order that affects a substantial right is "one which, if not immediately appealable, would foreclose appropriate relief in the future." *Bell v. Mt. Sinai Med. Ctr.*, 67 Ohio St. 3d 60 (1993), modified on other grounds, *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St. 3d (1994). If this Court delays its review of the Trial Court's decision until after the action below is fully adjudicated, Appellants still have appropriate relief in the form of another appeal available to them in the future. See, *Burt v. Harris*, 2004-Ohio-756 (10th Dist.)

It should also be noted in this regard that it is Appellees who filed their action for

replevin. Appellants made no counter-replevin claim nor did they seek declaratory judgment affirming they are the owner of Piper. Rather, they simply sought damages on various claims purportedly arising out of Plaintiffs-Appellees' attempts to retrieve Piper from Appellants COSR and Penny Sanderbeck. See Joint Answer filed 9/2/14, Joint Answer to Amended Complaint filed 1/29/15, Joint Amended Answer to Amended Complaint filed 2/5/15, Counterclaims filed 6/18/15, and Motion for Leave to file Counterclaims with Counterclaims attached filed 7/21/15. Accordingly, it is clear that money damages and injunctive relief for alleged internet postings and alleged burglary, not physical possession of Piper, are the "meaningful or effective remedy" Appellants seek.

In fact, the Docketing Statement itself filed by Appellants demonstrates the fact that they are aware that the order at issue does not resolve all of the claims of the parties, as the Appellants note that their assignments of error include errors in the admission of evidence and errors as to ruling on discovery and as to striking of Appellants' counterclaims, in addition to error in the Court's decision as to replevin.

In addition, Appellants' instant Motion indicates that Appellants intend to argue issues related to "several rulings" of the Trial Court, including discovery issues, which are not yet journalized. See Appellants' Motion to Enlarge Time at p. 2. Clearly the Order at issue in the case at bar does not dispose of the merits of the case, nor does it leave "nothing for the determination of the court"; therefore, it is not a final order. See *State ex rel. Downs v. Panioto,* 107 Ohio St.3d 347, 2006-Ohio-8.

In addition to meeting the requirements of R.C. Section 2505.02, if the action involves multiple claims or multiple parties and the order does not enter judgment on all the claims as to all the parties, as in the case below, the entry must also satisfy Civil Rule 54(B) by including the language that "there is no just reason for delay." *Int'l Brotherhood of Electrical Workers, Local Union No. 8 v. Vaughn Indus., LLC*, 116 Ohio St. 3d 335, 2007-Ohio-6439.

While the Trial Court in the case at bar did include the Rule 54(B) language, the mere fact that such language was included in the entry does not turn an otherwise non-final order into a final appealable order. *Noble v. Colwell*, 44 Ohio St. 3d 92 (1989), *Chef Italiano Corp. v. Kent State University*, 44 Ohio St. 3d 86 (1989), *Wisintainer v. Elcen Power Strut Co.,* 67 Ohio St. 3d 352 (1993), *Hitchings v. Weese*, 77 Ohio St. 3d 390 (1997), *State ex rel. A & D Limited Partnership v. Keefe*, 77 Ohio St. 3d 50 (1996) This fact was also acknowledged by Appellants in Appellants' Reply Memorandum In Further Support of Motion for Stay filed 7/31/15 at p. 7.

Further, it has been held that a trial court abuses its discretion in attempting to make the disposition of only part of the claims appealable by the addition of Civil Rule 54(B) language when the parties and issues contained in that order are so related and interconnected with an interlocutory order that, for purpose of judicial economy they should be considered together. In such an instance, the appellate court is without jurisdiction to entertain the appeal until all of the intertwined claims are final. *Ollick v. Rice*, 16 Ohio App. 3d 448 (1984). Also see *Noble v. Colwell*, supra.

The Plaintiffs-Appellees' claims in this case include replevin, conspiracy, unjust enrichment, fraud, violation of due process, violation of state law and conversion. See Amended Complaint filed 12/24/14. All such claims in addition to Plaintiffs-Appellees' claim for damages on the replevin claim remain pending and are currently set for trial on August 27, 2015. Accordingly, one must conclude that the order of possession at issue herein is not final and appealable.

This is particularly true inasmuch as R.C. Section 2737.14 requires that in an action to recover possession of personal property in which an order of possession has been issued, "the final judgment shall award permanent possession of the property and any damages to the party obtaining the award. . .and the costs of the action." The Order of Possession herein at issue does not award, nor even speak to damages, nor does it assess costs of the action. Rather, it specifically states that as to "various outstanding motions and issues pending before the Court. . . The Court will file a separate entry journalizing the Court's disposition of those matters." Order of Possession filed 7/23/15 at the first paragraph. And by separate entry the Trial Court did issue an order scheduling trial on outstanding issues on August 27, 2015.

Accordingly, While Appellants are certainly entitled to appeal the decision when the judgment of the Trial Court becomes final, the mere fact of the decision is not a valid ground for an appeal. Rather, it is clear that the Final Order of Possession, no matter its language, is not a final appealable order and this Court lacks jurisdiction of this appeal.

III. CONCLUSION

Based upon the foregoing and upon the facts and circumstances of this case it is clear that this Court lacks jurisdiction of this appeal and the same should be dismissed. Likewise, Appellants' Motion to Enlarge Time for Filing of Merit Brief should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was duly served upon John A. Bell, Esq., P.O. Box 091022, Bexley, Ohio 43209 and Scott O. Sheets, Assistant Prosecuting Attorney, 373 South High Street, 13th Floor, Columbus, Ohio 43215, via ordinary U.S. Mail and/or facsimile, this 20th day of August, 2015.

/s/James H. Banks
James H. Banks, Esq.