[Cite as *Lorain Natl. Bank v. AC DC Leasing, Inc.*, 2010-Ohio-163.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93398

LORAIN NATIONAL BANK

PLAINTIFF-APPELLANT

vs.

AC DC LEASING, INC., ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-690468

BEFORE: Celebrezze, J., Rocco, P.J., and Sweeney, J.

RELEASED: January 21, 2010

JOURNALIZED:
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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Plaintiff-appellant, Lorain National Bank ("LNB"), appeals the decision of the trial court dismissing its case with prejudice. Finding merit to LNB's appeal, we reverse and remand to the trial court for proceedings consistent with this opinion.

{¶ 2} On April 20, 2009, LNB filed suit against AC DC Leasing Inc. ("ACDC") in an attempt to collect on six promissory notes on which ACDC was the principal obligor. These promissory notes were secured by 21 motor vehicles. Pursuant to the terms of the promissory notes, the trial court entered a cognovit judgment in favor of LNB in an aggregate amount of $1,257,668.99.

{¶ 3} On April 22, 2009, LNB filed a motion to appoint a receiver and a motion for order of possession, and a hearing was set for May 11, 2009. According to LNB, prior to the commencement of the May 11, 2009 hearing, the parties reached a payment plan whereby ACDC would surrender seven of the encumbered vehicles and pay LNB $6,000 weekly. In exchange, LNB agreed to forbear seizing the remaining 14 vehicles as long as the agreed weekly payments were timely made. Appellant claims that a proposed journal entry incorporating the terms of this payment plan was submitted to the trial court for approval, but such journal entry is noticeably missing from the record before us on appeal.

{¶ 4} The trial court issued a journal entry stating: "The case is SDWP. Supplemental JE to follow. This court retains jurisdiction over all post judgment motions. Final. Court costs assessed as directed." LNB first filed a motion to correct the journal entry nunc pro tunc asking the court to vacate the dismissal with prejudice and replace it with the proposed journal entry memorializing the terms of the temporary payment plan. LNB was notified by the trial court's staff attorney that the appropriate mechanism for such a request was a Civ.R. 60(B) motion to vacate. LNB then filed an almost identical motion entitled "Motion for Relief From and To Vacate Journal Entry of May 11, 2009." In this motion, LNB argued that no definitive settlement had been reached between the parties, the payment plan was only a temporary solution, and even if the terms of the payment plan were complied with, ACDC would still owe on the promissory notes.

{¶ 5} On May 21, 2009, the trial court denied LNB's motion to vacate stating that "if Plaintiff wishes the court to memorialize the terms of settlement (over which the court has retained jurisdiction for purposes of enforcement) then a signed copy of that agreement should be submitted to the court to be docketed as an OSJ." This appeal followed.[1]

{¶ 6} This court sua sponte remanded the case to the trial court for clarification with regard to its journal entry dismissing LNB's case. On

[1] Appellees did not submit a brief opposing this appeal.

October 5, 2009, the trial court issued a journal entry stating: "In an effort to clarify the docket, the entry of 5/11/09 settled and dismissed this case with prejudice as this case had been settled between the parties. The parties were to submit a journal entry memorializing their agreement, but failed to do so. Case was therefore dismissed with prejudice on 5/11/09. This court retained jurisdiction over all post judgment motions."

{¶ 7} LNB sets forth three assignments of error for our review:

{¶ 8} I. "In the granting of the order of dismissal the trial court violated several of the principal tenets of due process of law."

{¶ 9} II. "The trial court erred in the granting of the order of dismissal in that it failed to provide notice to plaintiff's counsel pursuant to Ohio Civil Rule 41(B)(1)."

{¶ 10} III. "The trial court erred in dismissing the case with prejudice while in the same order attempted to retain jurisdiction for post judgment motions. Such an order is inconsistent with dismissal on the merits."

Final Appealable Order

{¶ 11} Before addressing the merits of appellant's argument, we must first evaluate whether the dismissal with prejudice is a final appealable order. We first recognize that cognovit judgments are ordinarily final appealable orders. When a complaint requesting a cognovit judgment is accompanied by additional requests, however, the grant of the cognovit

judgment is not final and may not be directly appealed absent Civ.R. 54(B) certification. *Gilligan v. Robinson*, Franklin App. Nos. 05AP-1028, 05AP-1029, and 05AP-1030, 2006-Ohio-4619, ¶38-39 (stating that a cognovit judgment must comply with both Civ.R. 54(B) and R.C. 2505.02 in order to constitute a final appealable order).

{¶ 12} The complaint in this case did more than request a cognovit judgment in LNB's favor. The complaint also sought immediate possession of the collateral described in the security agreements and sought the appointment of a receiver. Because the cognovit judgment issued by the trial court on April 20, 2009 made no mention of these two additional issues, it was not a final appealable order. Had the cognovit judgment been final and appealable, however, the trial court's attempt to dismiss LNB's case with prejudice would be rendered void. *Murray v. Goldfinger, Inc.*, Montgomery App. No. 19433, 2003-Ohio-459, ¶6 (noting that once a court renders a final judgment in a case, a second attempt to impose a final judgment would be a nullity).

{¶ 13} Having found that the cognovit judgment in this case was not a final appealable order, and thus the dismissal with prejudice was not a nullity, we must address whether the dismissal with prejudice was a final appealable order. Although we recognize that a dismissal with prejudice is ordinarily a final appealable order, the dismissal in this case also stated that

a supplemental journal entry was to follow. It is well established that a judgment contemplating further action by the court is not a final appealable order.

{¶ 14} At first glance, the original dismissal with prejudice in this case, rendered on May 11, 2009 and anticipating a supplemental journal entry to be filed in the case, does not appear to be a final appealable order. In the trial court's entry clarifying the May 11, 2009 entry, however, the trial court indicated that the case had been dismissed with prejudice and that it did not foresee any future action.[2] Based on this clarification, we find that the May 11, 2009 order was final and appealable, and we will now address appellant's claims on the merits.

Notice Required for Dismissal with Prejudice

{¶ 15} Because appellant's second assignment of error is dispositive of this matter, we will address it first. LNB argues it was entitled to notice prior to the trial court dismissing its case with prejudice. We agree.

{¶ 16} The dismissal of actions is specifically addressed in Civ.R. 41. Because nothing in the record indicates that LNB requested a dismissal, nor did the parties file a joint motion for dismissal, this dismissal must fall under the purview of Civ.R. 41(B), which addresses involuntary dismissals.

[2]The entry specifically said that the parties were supposed to submit a journal entry memorializing the terms of their purported settlement, but never did; accordingly, the case was dismissed with prejudice.

Although Civ.R. 41(B) allows a court to dismiss an action upon its own motion, notice must be given to plaintiff's counsel prior to dismissal. Civ.R. 41(B)(1); *HSCA, Inc. v. Summit Mfg., Inc.* (Apr. 8, 1993), Cuyahoga App. No. 64373.

{¶ 17} This case is not dissimilar from *HSCA*, supra. In *HSCA*, plaintiff's counsel asked defendant's counsel to seek a continuance of the trial because the parties had engaged in settlement negotiations. Rather than grant the continuance, the trial court issued an entry dismissing plaintiff's case with prejudice. Id. Noting that the record was devoid of any request by plaintiff's counsel to voluntarily dismiss the case with prejudice, the court held that "[a] number of provisions in the Ohio Rules of Civil Procedure authorize a court to dismiss an action on its own motion. Civ.R. 4(E) and 41(B)(1). Nevertheless, such a dismissal may be entered only after the affected party is given notice of the court's intention. *Perotti v. Ferguson* (1983), 7 Ohio St.3d 1. More recently, in *Ohio Furniture Co. v. Mindala* (1986), 22 Ohio St.3d 99, the court concluded that '* * * the notice requirement of Civ.R. 41(B)(1) applies to all dismissals with prejudice * * *. A dismissal on the merits is a harsh remedy that calls for the due process guarantee of prior notice.' Id. at 101. *Mayrides v. Franklin Cty. Prosecutor's Office* (1991), 71 Ohio App.3d 381 * * *." Id.

{¶ 18} Here, LNB's case was dismissed because the trial court believed the parties had reached a settlement agreement. Noticeably, LNB did not file a motion to dismiss the action, nor was there a joint motion by LNB and ACDC for such a dismissal. Accordingly, this case is governed by Civ.R. 41(B) and its procedural requirements.

{¶ 19} Pursuant to Civ.R. 41(B) and *HSCA*, supra, the trial court was required to give LNB notice before dismissing its case with prejudice. See, also, *Polin, U.S.A., Inc. v. Walsh* (1989), 61 Ohio App.3d 637, 639, 573 N.E.2d 731 (noting that "[t]his court agrees that notice is required prior to all dismissals with prejudice").

{¶ 20} Accordingly, the trial court erred in dismissing LNB's case with prejudice without prior notice to LNB that such action would be taken. As such, LNB's second assignment of error is sustained.

{¶ 21} Our disposition of appellant's second assignment of error renders its first and third assignments of error moot. Accordingly, those arguments will not be addressed. See App.R. 12(A)(1)(c).

Conclusion

{¶ 22} Due process considerations mandate that the trial court give LNB notice before dismissing its case with prejudice. Because no such notice was given, LNB's second assignment of error is well taken, and we need not address the remaining assignments of error.

{¶ 23} This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant recover of said appellees costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., JUDGE

JAMES J. SWEENEY, J., CONCURS;
KENNETH. ROCCO, P.J., CONCURS (WITH SEPARATE CONCURRING OPINION)

KENNETH A. ROCCO, P.J., CONCURRING:

{¶ 24} While I concur with the majority's decision in this case, I must once again express my disagreement with this court's recent practice of remanding non-final orders to the trial court for "clarification."

{¶ 25} The journal entry from which appellant appealed specifically stated, "Supplemental JE to follow." This order plainly contemplated that another judgment entry would be filed, so it was not final. Accordingly, we should have dismissed this appeal sua sponte.

{¶ 26} Instead, however, this court remanded the case for the trial court to "reflect a clear and concise pronouncement of the trial court's intended judgment as mandated by Civ.R. 58(A) and Civ.R. 54(A)." In response, the trial court indicated that the case was dismissed with prejudice on May 11, 2009, removing any requirement that the parties submit a journal entry memorializing their agreement.

{¶ 27} I agree with the majority that this decision did not contemplate any future rulings, so it was final and appealable. Furthermore, I agree with my colleagues that the trial court erred by dismissing the case with prejudice without either a motion by the parties or notice to the plaintiff.

{¶ 28} In my view, however, it was not our role to prod the trial court into rendering an appealable decision for our review. If we had dismissed this appeal for lack of a final appealable order, the trial court might or might not have dismissed the case with prejudice. We should not have forced the trial court to reach an erroneous decision just because it gave us immediate jurisdiction.