[Cite as *Schmidt v. AT&T, Inc.*, 2010-Ohio-5491.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94856

ROBERT SCHMIDT, ET AL.

PLAINTIFFS-APPELLEES

vs.

AT&T, INC., ET AL.

DEFENDANTS-APPELLEES

**[APPEAL BY GAIL FORD, ET AL.,
PROPOSED INTERVENORS-APPELLANTS]**

**JUDGMENT:
DISMISSED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-688788

BEFORE: Jones, J., Kilbane, P.J., and Cooney, J.

RELEASED AND JOURNALIZED: November 10, 2010

ATTORNEYS FOR APPELLANTS

John R. Climaco
David M. Cuppage
Scott D. Simpkins
Climaco, Wilcox, Peca, Tarantino & Garofoli
55 Public Square
Suite 1950
Cleveland, Ohio 44113

John E. Bell
225 South Meremec
Suite 620-T
Clayton, Missouri 63105

Don M. Downing
Patrick J. Hagerty
Thomas K. Neill
Robert F. Ritter
Gray, Ritter & Graham, P.C.
701 Market Street
Suite 800
St. Louis, Missouri 63101

ATTORNEYS FOR APPELLEES

For Robert Schmidt, Individually

Patrick J. Perotti
Nicole T. Fiorelli
Dworken & Bernstein Co., L.P.A.
60 South Park Place
Painesville, Ohio 44077

Attorneys continued

For AT&T, Inc.

Irene C. Keyse-Walker
Tucker Ellis & West L.L.P.
1150 Huntington Building
925 Euclid Avenue
Cleveland, Ohio 44115

Michael D. Frisch
Hans J. Germann
John E. Muench
James C. Schroeder
Mayer Brown, LLP
71 South Wacker Drive
Chicago, Illinois 60606

Rachael L. Israel
Kerin L. Kaminski
Melissa A. Laubenthal
Tina Rhodes
Giffen & Kaminski, LLC
1300 East Ninth Street
Suite 1600
Cleveland, Ohio 44114

LARRY A. JONES, J.:

{¶ 1} Proposed intervenors-appellants, Gail Ford and Carrie Dunne ("appellants"), appeal the trial court's denial of their motion to intervene in the case between plaintiffs-appellees, Robert Schmidt, et al. ("Schmidt") and defendants-appellees, AT&T, Inc., et al. ("AT&T"). Based on the following reasons, we dismiss the appeal for lack of a final, appealable order.

{¶ 2} In 2009, Schmidt filed a nationwide class action lawsuit against AT&T on behalf of himself and others similarly situated, alleging that AT&T failed to provide its internet customers with internet service speeds for which customers had contracted. In November 2009, the parties reached a settlement agreement. The next month, the trial court preliminarily certified a class consisting of all persons who had purchased Digital Subscriber Line ("DSL") service from AT&T in the United States since March 31, 1994. The trial court certified the class for settlement purposes only, set a date for the final approval hearing, and provided that any member of the class may opt out 30 days before the final hearing.

{¶ 3} Appellants represent a class of plaintiffs in another class action against AT&T that was filed in Missouri in 2005. See *Ford & Dunne v. SBC*, St. Louis County, Mo., Case No. 06CC-003325. The trial court in the Ohio case noted that class members in the Missouri case are potentially part of the

nationwide class and ordered that the members of the Missouri class action lawsuit be notified of the Ohio case. This would give the Missouri class an opportunity to be part of the nationwide class and either submit a claims form, opt-out, or object to the terms of the proposed settlement in the nationwide class action.

{¶ 4} In January 2010, appellants moved to intervene in the Ohio case, arguing that the proposed settlement is "unfair and inadequate" because the compensation for the class members is too low and there is no injunctive relief. Appellants also objected to the amount of attorney fees and the charitable contributions provided for in the settlement and the claims form. The trial court denied the motion to intervene, and appellants filed this appeal.

{¶ 5} Appellants raise the following assignment of error for our review:

{¶ 6} "I. The trial court erred in denying Appellants' Motion to Intervene."

{¶ 7} AT&T filed a motion to stay the trial court proceedings, which we granted.

Finality

{¶ 8} We first address the issue of whether the trial court's denial of the motion to intervene is a final, appealable order. AT&T moved this court to dismiss the appeal for lack of jurisdiction, arguing that the trial court's denial of appellants' motion to intervene is not a final, appealable order.

{¶ 9} Appellate courts have jurisdiction to review the final orders or judgments of lower courts within their appellate districts. Section 3(B)(2), Article IV, Ohio Constitution. It is well established that an order must be final before it can be reviewed by an appellate court. "If an order is not final, then an appellate court has no jurisdiction." *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.* (1989), 44 Ohio St.3d 17, 20, 540 N.E.2d 266.

{¶ 10} "An order of a court is a final appealable order only if the requirements of both R.C. 2505.02 and, if applicable, Civ.R. 54(B), are met." *State ex rel. Scruggs v. Sadler*, 97 Ohio St.3d 78, 2002-Ohio-5315, 776 N.E.2d 101, ¶5. Thus, the threshold requirement is that the order satisfies the criteria of R.C. 2505.02. *Gehm v. Timberline Post & Frame*, 112 Ohio St.3d 514, 2007-Ohio-607, 861 N.E.2d 519, ¶36. "There is no authority to support the general proposition that [the denial of a] motion to intervene always constitutes a final, appealable order." Id.

{¶ 11} R.C. 2505.02(B)(1) provides "an order is a final order that may be reviewed, affirmed, modified, or reversed, * * * when it is * * * an order that affects a substantial right in an action that in effect determines the action and prevents a judgment." R.C. 2505.02(A)(2) defines a substantial right as, "a right that * * * a statute * * * entitles a person to enforce or protect." Thus, the trial court's denial of the motion to intervene in this case only qualifies as a final, appealable order under R.C. 2505.02 if it affects a "substantial right"

as defined by R.C. 2505.02(A)(1) and if it "in effect determines the action and prevents a judgment." R.C. 2505.02(B)(1).

{¶ 12} In *Gehm*, the Ohio Supreme Court held that because "a motion to intervene is a right recognized by Civ.R. 24, intervention constitutes a substantial right under R.C. 2505.02(A)(1)." Id. at ¶29. Thus, we must determine whether the denial of the motion in this case "in effect determines the action and prevents a judgment" pursuant to R.C. 2505.02(B)(1).

{¶ 13} Appellants argue that the trial court's denial of the motion to intervene is a final, appealable order pursuant to R.C. 2505.02(B)(1) because they would not otherwise be able to assert their rights and objections in the Ohio case to protect the Missouri class members.

{¶ 14} Recently, in *State ex rel. Sawicki v. Court of Common Pleas of Lucas Cty.*, 121 Ohio St.3d 507, 2009-Ohio-1523, 905 N.E.3d 1192, the Ohio Supreme Court discussed whether an appeal from a denial of a motion to intervene was a final, appealable order. The appellate court denied the proposed party's motion to intervene, and the case was eventually appealed to the Ohio Supreme Court. In finding that the proposed-intervenor's appeal was timely filed, the high court stated that because the motion to intervene was not a final, appealable order, it was proper for the proposed-intervenor to wait until the case was disposed of to file its appeal. Id. The court found that "[a]lthough intervention constitutes a substantial right under R.C.

2505.02(A)(1), '[t]he denial of a motion to intervene, when the purpose for which intervention was sought may be litigated in another action, does not affect a substantial right under R.C. 2505.02(B)(1) that determines the action and prevents the judgment.'" Id. at ¶14., quoting *Gehm* at ¶29 and paragraph three of the syllabus.

{¶ 15} Appellants sought intervention for the purpose of challenging the proposed settlement in the Ohio case. Through their own admission, appellants sought to intervene in order to object to and challenge the proposed settlement including the method of distributions and claims process. But we find that the order denying intervention does not dispose of the merits of appellants' underlying claims or their objections to the settlement. In other words, Ford and Dunne have other remedies to pursue if they disagree with the terms of the nationwide class. They can opt out of the nationwide class and pursue separate litigation. They can also opt in and bring forth their objections at the trial court's fairness hearing. Therefore, the trial court's order denying intervention did not determine the action and prevent a judgment.

{¶ 16} The trial court's denial of appellants' motion to intervene is not a final, appealable order; therefore, we lack jurisdiction to hear this appeal.

{¶ 17} The motion to dismiss is granted.

Appeal dismissed.

It is ordered that appellees recover of appellants their 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 Cuyahoga County Court of Common Pleas 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.

LARRY A. JONES, JUDGE

MARY EILEEN KILBANE, P.J., and
COLLEEN CONWAY COONEY, J., CONCUR