[Cite as *Craine v. ABM Servs., Inc.*, 2011-Ohio-5710.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

KATIE CRAINE,	:	**MEMORANDUM OPINION**
Plaintiff-Appellee,	:	**CASE NO. 2011-P-0028**
- vs -	:	
ABM SERVICES, INC.,	:	
Defendant-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2010 CV 01871.

Judgment: Appeal dismissed.

James J. Collum, Crescent Pointe Building, 4774 Munson St., #400, Canton, OH 44718-3634 (For Plaintiff-Appellee).

Thomas A. Skidmore, Thomas A. Skidmore Co., L.P.A., One Cascade Plaza, 12th Floor, PNC Center Building, Akron, OH 44308 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, ABM Services, Inc. ("ABM"), appeals the judgment of the Portage County Court of Common Pleas converting its "counterclaim" for frivolous conduct pursuant to R.C. 2323.51 against appellee, Katie Craine, into a "motion" for frivolous conduct. Because we hold that the trial court's judgment is not a final appealable order, we dismiss this appeal by memorandum opinion.

{¶2} On December 9, 2010, appellee, Katie Craine, filed a three-count complaint against ABM alleging that she was subjected to workplace sexual harassment

by her employer, ABM (Count I); that she was subjected to retaliation for complaining about such harassment to ABM's management (Count II); and that ABM subjected her to the intentional infliction of emotional distress (Count III).

{¶3} On February 9, 2011, ABM filed its answer and counterclaim alleging frivolous conduct pursuant to R.C. 2323.51. Under its counterclaim, ABM alleged there was no legal or factual basis for the complaint and that Ms. Craine had filed her complaint to maliciously injure or harass ABM. As a result, ABM alleged it was entitled to attorney fees.

{¶4} Ms. Craine filed a motion to dismiss ABM's counterclaim pursuant to Civ.R. 12(B)(6). She argued that, pursuant to R.C. 2323.51, a request for attorney fees for frivolous conduct must be made by motion and that since ABM raised the issue by counterclaim, its pleading failed to state a claim upon which relief could be granted.

{¶5} On March 14, 2011, the trial court entered judgment, stating: "The court deems the counterclaim as to ORC 2323.51 to be a motion and the court shall set the motion for evidentiary hearing at the appropriate time. The counterclaim as to ORC 2323.51 shall be dismissed." The trial court included a finding pursuant to Civ.R. 54(B) that there was no just reason for delay as to the dismissal of the counterclaim, purporting to make its ruling a final appealable order.

{¶6} ABM appeals, asserting the following for its sole assignment of error:

{¶7} "The trial court committed prejudicial error in granting Plaintiff-Appellee Craine's Motion to Dismiss Defendant-Appellant's Counterclaim for Frivolous Conduct as a matter of law and converting it to a motion to be heard at a later time."

{¶8} ABM argues the trial court erred in dismissing its counterclaim and converting it to a motion for frivolous conduct because, it argues, the case law allows such issue to be raised by way of motion or counterclaim. R.C. 2323.51(B)(2) provides in pertinent part:

{¶9} "*** [A]t any time not more than thirty days after the entry of final judgment in a civil action ***, any party adversely affected by frivolous conduct *may file a motion for an award of *** reasonable attorney's fees* *** incurred in connection with the civil action ***." (Emphasis added.)

{¶10} Thus, pursuant to the express language of the statute, a request for attorney fees for frivolous conduct may be made by motion. We note, however, that several Ohio Appellate Districts have stated that a request for such an award may also be made by way of a counterclaim. *Univ. Commons Assoc. LTD. v. Commercial One Asset Mgt., Inc*., 8th Dist. No. 85202, 2005-Ohio-4568, at ¶20, fn. 7; *Texler v. Papesch* (Sep. 2, 1998), 9th Dist. No. 18977, 1998 Ohio App. LEXIS 4070, *5; *Buettner v. Estate of Bader* (Jan. 9, 1998), 6th Dist. No. L-97-1106, 1998 Ohio App. LEXIS 2, *5-*6; *Burrell v. Kassicieh* (June 5, 1998), 3d Dist. No. 13-97-54, 1998 Ohio App. LEXIS 2623; *Jones v. Billingham* (1995), 105 Ohio App.3d 8, 12.

{¶11} Here, the trial court did not dismiss ABM's counterclaim outright; it simply changed the procedural device by which the issue would be raised from a counterclaim to a motion to conform to the express language of R.C. 2323.51(B)(2). Thus, ABM was not denied its right to request attorney fees for alleged frivolous conduct under R.C. 2323.51. While ABM may have been entitled to raise the issue by way of a counterclaim, it cannot be disputed that R.C. 2323.51(B)(2) expressly states that "[a]n

award may be made *** upon the *motion* of a party." (Emphasis added.) Thus, we perceive no error in the court's conversion of ABM's counterclaim into a motion.

{¶12} In any event, even if the trial court had erred in so ruling, ABM's argument would still lack merit because it has failed to demonstrate it was prejudiced by the court's ruling. R.C. 2309.59 provides that "[i]f the reviewing court determines *** that *** substantial justice has been done to the party complaining ***, all alleged errors or defects occurring [below] shall be deemed not prejudicial to the party complaining and shall be disregarded ***."

{¶13} "'An appellant, in order to secure reversal of a judgment against him, must not only show some error but must also show that that error was prejudicial to him.'" *Wagner v. Roche Laboratories* (1999), 85 Ohio St.3d 457, 460-461, quoting *Smith v. Flesher* (1967), 12 Ohio St.2d 107, 110. Thus, it is the appellant's burden to demonstrate that he was prejudiced by the alleged error of the trial court. Here, ABM has failed to demonstrate or even allege prejudice as a result of the trial court's ruling. Further, based on our review of the limited record before us, we are unable to discern any prejudice to ABM from the court's ruling. For this additional reason, ABM's argument lacks merit.

{¶14} However, this is not the end of our analysis. After determining (1) that the trial court did not err in dismissing the counterclaim and simultaneously converting it into a motion and (2) that ABM has failed to demonstrate prejudice as a result of the trial court's ruling, we are left with an order of the court that simply indicates a hearing on the request for attorney fees shall be set for a later date. We must now determine whether the judgment appealed from is a final appealable order. *Barnes v. Andover Vill. Ret.*

Community, Ltd., 11th Dist. No. 2006-A-0039, 2007-Ohio-4112, at ¶14. In the event the parties to an appeal do not raise this jurisdictional issue, it may be raised sua sponte. Id., citing *Chef Italiano Corp. v. Kent State Univ*. (1989), 44 Ohio St.3d 86, 87.

{¶15} Appellate courts have jurisdiction to review only final orders or judgments of the inferior courts in their district. Ohio Constitution, Sec. 3(B)(2, Art. IV); R.C. 2505.02. If an order is not final and appealable, we have no jurisdiction to review the matter and must dismiss it. *Alkenbrack v. Green Tree*, 11th Dist. No. 2009-G-2889, 2009-Ohio-6512, at ¶11, citing *General Accident Ins. Co. v. Ins. Co. of N. Am.* (1989), 44 Ohio St.3d 17, 20.

{¶16} R.C. 2505.02(B) provides in pertinent part:

{¶17} "An order is a final order that may be reviewed, affirmed, modified, or reversed *** when it is one of the following:

{¶18} "(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

{¶19} "(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

{¶20} "***

{¶21} "(4) An order that grants or denies a provisional remedy and to which both of the following apply:

{¶22} "(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.

{¶23} "(b) The 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."

{¶24} Here, the judgment appealed from does not affect a substantial right, determine the action or remedy, or prevent a judgment in ABM's favor because the court has not yet ruled on the request for attorney fees. It is therefore not a final appealable order.

{¶25} As a final note, it is worth pointing out that the trial court's inclusion of the Civ.R. 54(B) language of "no just reason for delay" in its judgment did not turn it into a final order. The Ohio Supreme Court has stated that "even where the issue of liability has been determined, but a factual adjudication of relief is unresolved, the finding of liability is not a final appealable order even if Rule 54(B) language was employed." *Noble v. Colwell* (1989), 44 Ohio St.3d 92, 96. Thus, the mere incantation of the Civ.R. 54(B) language does not turn an otherwise non-final order into a final appealable order. Id. Here, the trial court has not yet ruled on the issues of entitlement to or the amount of attorney fees.

{¶26} We therefore hold that this appeal is dismissed due to the lack of a final appealable order.

MARY JANE TRAPP, J.,

THOMAS R. WRIGHT, J.,

concur.