[Cite as *Dragway 42, L.L.C. v. Kokosing Constr. Co., Inc.*, 2009-Ohio-5630.]

STATE OF OHIO))ss: COUNTY OF WAYNE)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
DRAGWAY 42, LLC aka DRAGWAY PROPERTIES, L.L.C. Appellee v. KOKOSING CONSTRUCTION CO., INC. Appellant	C. A. No. 09CA0008 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF WAYNE, OHIO CASE No. 07-CV-0378

DECISION AND JOURNAL ENTRY

Dated: October 26, 2009

CARR, Presiding Judge.

{¶1} Appellant, Kokosing Construction Co., Inc. ("Kokosing"), appeals the judgment of the Wayne County Court of Common Pleas. This Court dismisses the appeal for lack of a final, appealable order.

I.

{¶2} Appellee, Dragway 42, L.L.C., aka Dragway Properties, L.L.C. ("Dragway"), filed a complaint against Kokosing, alleging two claims, to wit: breach of contract and negligence. Kokosing filed an answer and counterclaim, alleging three claims, to wit: breach of contract, negligence, and quantum meruit. Kokosing filed a motion for summary judgment which the trial court denied, and the case was scheduled for jury trial.

{¶3} The "List of Documents" enumerated by the Wayne County Clerk of Courts, and filed on March 30, 2009, does not indicate the docketing of any jury interrogatories or verdict

forms. The record, however, contains four unjournalized jury interrogatories.[1] On interrogatory number one, seven of eight jurors found by a preponderance of the evidence that Kokosing breached its contract with Dragway by performing work in an unworkmanlike manner. On interrogatory number two, one of eight jurors found that Dragway failed to prove by a preponderance of the evidence that Kokosing breached the contract due to unworkmanlike performance. On interrogatory number three, the jury found that Dragway proved damages in the amount of $434,000.00. Interrogatory number four, in which the jury might have found an amount of damages proved by Kokosing, was left blank. Finally, the "Instructions for Verdict Forms" following those interrogatories directed the jurors to sign the appropriate verdict form depending on their responses to the interrogatories. The record contains no verdict forms, whether executed by the jury or left blank.

{¶4} On August 6, 2008, the trial court issued a judgment in which it noted that it dismissed Dragway's negligence claim upon Kokosing's request, and that "the case was duly tried to a jury upon the issue of breach of contract and the jury rendered its verdict." The remaining paragraph of the judgment states:

> "In conformity with the verdict of the jury, it is ORDERED AND ADJUDGED that the Plaintiff Dragway 41, L.L.C. aka Dragway Properties, L.L.C. recover of the Defendant Kokosing Construction Co, Inc. the sum of four hundred thirty-four thousand dollars and no/100 ($434,000.00) and its costs of the action." (sic)

{¶5} On August 13, 2008, Kokosing filed a motion for judgment notwithstanding the verdict or, in the alternative, motion for new trial. Dragway filed a memorandum in opposition, and Kokosing filed a supplemental memorandum in support.

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[1] This Court notices the undocketed and unjournalized jury interrogatories for clarification only, as they do not constitute a part of the official record and cannot be considered in any substantive manner.

{¶6} On August 29, 2008, Kokosing filed a notice of appeal. On October 7, 2008, the trial court issued a judgment entry in which it asserted that it would not consider Kokosing's motions because its filing of an appeal divested the trial court of jurisdiction. On October 14, 2008, this Court, by journal entry, dismissed Kokosing's appeal for lack of jurisdiction because its Civ.R. 50(B) and 59(B) motions were still pending.

{¶7} On October 27, 2008, Kokosing filed a motion in the trial court for a ruling on his motions and entry of a final, appealable order. On November 5, 2008, Kokosing filed a second notice of appeal, acknowledging that the trial court had not yet ruled on its motions but that it wished to preserve its right to appeal. On December 15, 2008, this Court, by journal entry, again dismissed the appeal for lack of jurisdiction because the trial court had not yet addressed Kokosing's motions for judgment notwithstanding the verdict and new trial.

{¶8} On January 20, 2009, the trial court issued a judgment entry, denying Kokosing's motions for judgment notwithstanding the verdict and new trial. On February 9, 2009, the trial court issued a "nunc pro tunc clarification judgment entry on verdict." The nunc pro tunc judgment was identical to the August 6, 2008 judgment except for some nonsubstantive modifications to punctuation, the identification of the plaintiff as Dragway 42 instead of Dragway 41, and the taxing of court costs to Kokosing.

{¶9} Kokosing filed a timely appeal, raising five assignments of error for review.

II.

ASSIGNMENT OF ERROR I

"THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED REVERSIBLE ERROR BY FAILING TO INSTRUCT THE JURY ON THE LAW PERTAINING TO DIFFERING SITE CONDITIONS, MUTUAL MISTAKE OF FACT AND UNILATERAL MISTAKE OF FACT."

ASSIGNMENT OF ERROR II

"THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING GARY FERGUSON TO TESTIFY ON THE ISSUE OF PROXIMATE CAUSE."

ASSIGNMENT OF ERROR III

"THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR DIRECTED VERDICT."

ASSIGNMENT OF ERROR IV

"THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR NEW TRIAL[.]"

ASSIGNMENT OF ERROR V

"THE TRIAL COURT ERRED BY DENYING APPELLANT'S JNOV MOTION[.]"

{¶10} Kokosing argues that the trial court improperly instructed the jury, improperly admitted certain evidence, and erred by denying its motions for directed verdict, new trial, and judgment notwithstanding the verdict. This Court lacks jurisdiction to consider Kokosing's arguments.

{¶11} This Court is obligated to raise sua sponte questions related to our jurisdiction. *Whitaker-Merrell Co. v. Geupel Constr. Co., Inc.* (1972), 29 Ohio St.2d 184, 186. Section 3(B)(2), Article IV of the Ohio Constitution limits this Court's appellate jurisdiction to the review of final judgments of lower courts. For a judgment to be final and appealable, it must satisfy the requirements of R.C. 2505.02 and, if applicable, Civ.R. 54(B). *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86, 88.

{¶12} R.C. 2505.02(B)(1) states:

"An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is [a]n order that affects a substantial right in an action that in effect determines the action and prevents a judgment[.]"

This Court has recognized that "an order may not be 'final,' within the meaning of Section 2505.02, if it fails to dispose of all claims presented in an action." *Gosden Constr. Co., Inc. v. Gerstenslager* (Sept. 13, 1996), 9th Dist. No. 17687.

{¶13} Civ.R. 54(B) states, in pertinent part:

> "When more than one claim for relief is presented in an action whether as a claim, counterclaim, cross-claim, or third-party claim, and whether arising out of the same or separate transactions, or when multiple parties are involved, the court may enter final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay. In the absence of a determination that there is no just reason for delay, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties, shall not terminate the action as to any of the claims or parties ***."

{¶14} In this case, the trial court did not include the express determination that there is no just reason for delay pursuant to Civ.R. 54(B) in its February 9, 2009 judgment. Assuming arguendo that the trial court could enter judgment on the jury's verdict in the absence of any jury verdict in the record, the trial court failed to dispose of all pending claims in its February 9, 2009 judgment. The judgment fails to dispose of any of Kokosing's counterclaims. There is no judgment entry indicating that the counterclaims were dismissed. Furthermore, it appears from the February 9, 2009 judgment entry that Kokosing's counterclaim alleging negligence was not even tried, as the judgment entry merely states that "the case was duly tried to a jury upon the issue of breach of contract and the jury rendered its verdict." Because Kokosing's counterclaims have not been disposed, and because the trial court failed to use the language mandated by Civ.R. 54(B) in its February 9, 2009 judgment entry, the order from which Kokosing attempts to appeal is not a final, appealable order. See *Gosden Constr. Co., Inc.*, supra. Accordingly, this Court lacks jurisdiction to consider the merits of the appeal.

III.

{¶15} The judgment entry out of the Wayne County Court of Common Pleas does not constitute a final, appealable order. Accordingly, the appeal is dismissed for lack of jurisdiction.

Appeal dismissed.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

DONNA J. CARR
FOR THE COURT

WHITMORE, J.
BELFANCE, J.
CONCUR

APPEARANCES:

DOUGLAS P. HOLTHUS, Attorney at Law, for Appellant.

D. KIM MURRAY, Attorney at Law, for Appellee.