

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
LUCAS COUNTY

The Huntington National Bank

Court of Appeals No. L-09-1240

Appellee

Trial Court No. CI0200905589

v.

Paul A. Syroka, et al.

**DECISION AND JUDGMENT**

Appellants

Decided: March 26, 2010

\* \* \* \* \*

Brian C. Kalas and Jonathan M. Hanna, for appellee.

George R. Royer, for appellants.

\* \* \* \* \*

PER CURIAM.

{¶ 1} This matter is before the court on plaintiff-appellee's, The Huntington National Bank, "Notice of Dismissal of Underlying Action and Motion to Dismiss Appeal." Defendants-appellants, Paul Syroka and Journeyman Professionals, Inc., filed their opposition to appellee's motion to dismiss.

{¶ 2} This case arises from appellee's complaint for cognovit judgment. On July 22, 2009, the trial court entered judgment on the cognovit note in favor of appellee. Appellants filed their notice of appeal from the trial court's judgment on September 10, 2009.<sup>1</sup>

{¶ 3} While this appeal was pending, on February 19, 2010, appellee filed its "Notice of Dismissal Without Prejudice" in the trial court. According to the terms of the notice, appellee dismissed "all of its claims, pursuant to Civ.R. 41(A) \* \* \* without prejudice \* \* \*." Since appellee has filed its Civ.R. 41(A) dismissal, appellee argues this court now lacks jurisdiction to further hear appellants' appeal.

{¶ 4} Appellants maintain the dismissal is ineffective to alter or revisit the status of any past action in the trial court, and argue they may still maintain their appeal in this case.

{¶ 5} The "filing of a notice of appeal divests the trial court of any authority over those aspects of the case on appeal." *Estate of Beavers v. Knapp*, 175 Ohio App.3d 758, 2008-Ohio-2023, ¶ 75. A timely filed notice of appeal invokes the jurisdiction of the appellate court. See App.R. 3(A).

{¶ 6} Appellee filed its notice of voluntary dismissal on February 19, 2010, well after appellants filed their notice of appeal on September 10, 2009. The voluntary

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<sup>1</sup>There is nothing in the appearance docket stating that the clerk of court served appellants with the cognovit judgment journalized on July 22, 2009. Thus, the 30-day appeal deadline under App.R. 4(A) never began to run and appellants' notice of appeal filed September 10, 2009, was timely.

dismissal clearly relates to an aspect of the case on appeal. Thus, the trial court was divested of jurisdiction when appellee filed its voluntary dismissal in the trial court. The voluntary notice of dismissal is a nullity.

{¶ 7} Appellee cites *Fox v. Kraws*, 9th Dist. No. L-157, 2009-Ohio-6860, in support of its argument that this court was divested of jurisdiction to hear this appeal once appellee filed its Civ.R. 41(A) notice of dismissal in the trial court. However, *Fox* is procedurally distinguishable from the present case. In *Fox*, as in the other cases examined by this court,<sup>2</sup> the voluntary dismissal, which was filed and which divested the appellate court of jurisdiction, was filed *before* appellant filed her notice of appeal. *Id.* at ¶ 1. This court is unaware of any Ohio case finding a voluntary dismissal filed *after* a timely filed notice of appeal divests the appellate court of jurisdiction.

{¶ 8} Moreover, appellee is essentially attempting to create a procedural mechanism under the Rules of Appellate Procedure authorizing appellee to unilaterally dismiss an appeal. This is inconsistent with App.R. 28:

{¶ 9} "*If the parties to an appeal or other proceeding shall sign and file with the clerk of the court of appeals an agreement that the proceedings be dismissed and shall pay whatever costs are due, the court shall order the case dismissed.*

{¶ 10} "*An appeal may be dismissed on motion of the appellant upon such terms as may be fixed by the court.*" (Emphasis added.)

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<sup>2</sup>See, e.g., *Toledo Heart Surgeons, Inc. v. The Toledo Hosp.*, 6th Dist. No. L-02-1059, 2002-Ohio-3577.

{¶ 11} Thus, there is no express or implicit procedure under App.R. 28 for appellee to unilaterally dismiss this appeal. We decline to create one in this case.

{¶ 12} On March 18, 2010, while appellee's motion to dismiss was pending before this court, the trial court issued a judgment granting appellee's "Motion to Vacate Judgment and Dismiss Case Pursuant to Civ.R. 41." Apparently, appellee recently filed this motion while the instant appeal was pending. In this judgment, the trial court sought to vacate the subject July 17, 2009 cognovit judgment. The trial court served this court with a copy of its order on March 18.

{¶ 13} It has been held that "an appeal divests trial courts of jurisdiction to consider Civ.R. 60(B) motions for relief from judgment." *Howard v. Catholic Social Serv. of Cuyahoga Cty., Inc.* (1994), 70 Ohio St.3d 141, 147. In *Majnaric v. Majnaric* (1975), 46 Ohio App.2d 157, the court stated:

{¶ 14} "Where a motion to vacate a judgment is pending in the trial court and an appeal is also pending from the same judgment, the appellant may move the appellate court, for good cause, to remand the matter to the trial court for a hearing on the motion to vacate. Sustaining such a motion will not divest the appellate court of jurisdiction to hear the pending appeal if it is not rendered moot by the hearing on the motion to vacate."

{¶ 15} Pursuant to our earlier discussion, it stands the trial court is without jurisdiction to consider or rule on appellee's "Motion to Vacate Judgment and Dismiss Case Pursuant to Civ.R. 41" while this appeal is pending. On consideration whereof, we

find it is in the interest of judicial economy to sua sponte remand this case to the trial court for further action with respect to appellee's Civ.R. 60(B) motion.

{¶ 16} Appellee's motion to dismiss is denied. This court remands this case to the Lucas County Court of Common Pleas for a period of 30 days from the date of this decision and judgment for the purpose of allowing that court to take action consistent with this decision on appellee's Civ.R. 60(B) motion. The clerk of the Lucas County Court of Common Pleas shall notify this court when the judge rules on the Civ.R. 60(B) motion. It is so ordered.

Mark L. Pietrykowski, J.

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JUDGE

Arlene Singer, J.

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JUDGE

Keila D. Cosme, J.  
CONCUR.

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JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:  
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