[Cite as *Kopp v. Associated Estates Realty Corp.*, 2009-Ohio-2595.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Kyle Kopp et al.,	:	
Plaintiffs-Appellants,	:	No. 08AP-819
v.	:	(C.P.C. No. 03CVH-06-6736)
Associated Estates Realty Corp.,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on June 4, 2009

Stephen R. Felson and *Michael B. Ganson*, for appellants.

Baker & Hostetler LLP, Rodger L. Eckelberry, *Mark A. Johnson*, and *Catherine E. Woltering*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} Plaintiffs-appellants, Kyle Kopp and Melanie Kopp (collectively "appellants") appeal from the judgment of the Franklin County Court of Common Pleas denying their motion for summary judgment and granting summary judgment in favor of defendant-appellee, Associated Estates Realty Corp. ("appellee").

{¶2} On June 18, 2003, appellants filed a complaint asserting various causes of action arising out of a residential lease agreement, and on January 23, 2004, appellants moved for class certification. On February 2, 2004, appellee requested leave to amend its answer and assert a counterclaim. Thereafter, appellee filed a motion for summary

judgment and a motion to stay class certification pending disposition of the summary judgment motions. On May 27, 2004, appellees were granted leave to file an amended answer and counterclaim, and on June 1, 2004, appellee asserted a claim against appellants for breach of contract.

{¶3} The trial court rendered a decision on August 18, 2008, denying appellants' motion for summary judgment and granting summary judgment in favor of appellee on all of appellants' claims. A judgment entry was filed on Sept 8, 2008, stating in part:

> For the reasons set forth in the Court's August 18, 2008 Decision which granted Defendant's Motion for Summary Judgment and denied Plaintiff's Motion for Summary Judgment, judgment is hereby granted to Defendant on all of Plaintiff's claims, costs to Plaintiffs.

{¶4} Neither the decision nor the judgment entry, however, makes any reference to the counterclaims. On appeal, appellants raise the following assignment of error:

> The trial court erred when it granted Defendant's motion for summary judgment and denied Plaintiffs' motion for summary judgment.

{¶5} We do not reach the merits of this assigned error, however, because we lack jurisdiction to do so.

{¶6} Section 3(B)(2), Article IV of the Ohio Constitution, limits this court's appellate jurisdiction to the review of final orders of lower courts. The Supreme Court of Ohio has stated that a final order "is one disposing of the whole case or some separate and distinct branch thereof." *Lantsberry v. Tilley Lamp Co.* (1971), 27 Ohio St.2d 303, 306. An appellate court may raise, sua sponte, the jurisdictional question of whether an order is final and appealable. See *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86, 87; *State ex rel. White v. Cuyahoga Metro. Hous. Auth.* (1997), 79 Ohio St.3d

543, 544. Moreover, we must sua sponte dismiss an appeal that is not from a final appealable order. See *Whitaker-Merrell Co. v. Geupel Constr. Co.* (1972), 29 Ohio St.2d 184, 186 (holding that the appeals court should have sua sponte dismissed the appeal where the entry granting summary judgment to fewer than all the parties did not include Civ.R. 54(B) language).

{¶7} A trial court's order is final and appealable only if it meets the requirements of R.C. 2505.02 and, if applicable, Civ.R. 54(B). *Denham v. New Carlisle*, 86 Ohio St.3d 594, 596, 1999-Ohio-128, citing *Chef Italiano Corp.*, at 88. In *Noble v. Colwell* (1989), 44 Ohio St.3d 92, 96, the Supreme Court of Ohio held that, to constitute a final order, an order must fit into at least one of the categories set forth in R.C. 2505.02(B), which defines a final order, in pertinent part, as any of the following:

> (1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;
>
> (2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;
>
> (3) An order that vacates or sets aside a judgment or grants a new trial[.]

{¶8} " 'Substantial right' means a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect." R.C. 2505.02(A)(1).

{¶9} As the Supreme Court of Ohio noted in *Denham*, at 595, courts must read R.C. 2505.02 in conjunction with Civ.R. 54(B). Civ.R. 54(B) applies to situations where there is more than one claim for relief presented or there are multiple parties involved in

an action, and where the trial court has rendered judgment with respect to fewer than all the claims or fewer than all the parties. Civ.R. 54(B) provides:

> 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, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all of the parties.

{¶10} In the absence of express Civ.R. 54(B) language, an appellate court may not review an order disposing of fewer than all claims. *IBEW, Loc. Union No. 8 v. Vaughn Industries, LLC*, 116 Ohio St.3d 335, 337, 2007-Ohio-6439. Hence, because the entry does not contain a certification by the trial court that there is no just reason for delay as required by Civ.R. 54(B), we need not consider whether the entry before us is a final order under R.C. 2505.02.

{¶11} In the case sub judice, the trial court did not enter judgment on the counterclaim asserted against appellants, nor did the judgment entry contain Civ.R. 54(B) language that there was no just reason for delay. Thus, the fact that the judgment entry states that it is a "final entry" is immaterial. See *Shimko v. Lobe* (Apr. 25, 2002), 10th Dist. No. 01AP-1113. Without an express determination that there is no just cause for delay, any order that adjudicates fewer than all the claims does not terminate the action. See, e.g., *Lehtinen v. Drs. Lehtinen, Mervart & West, Inc.*, 99 Ohio St.3d 69, 2003-Ohio-

2574, at fn. 1. "Indeed the use of the language 'no just reason for delay' in an entry is mandatory under Civ.R. 54(B) and unless such words appear in an entry, the order is subject to modification and is neither final nor appealable." *Shimko*, citing *Bay W. Paper Corp. v. Schregardus* (2000), 137 Ohio App.3d 685, 689, citing *Noble*, supra. See, also, *Bell v. Turner*, 4th Dist. No. 05CA10, 2006-Ohio-704; *Dutch Maid Logistics, Inc. v. Acuity*, 8th Dist. No. 86600, 2006-Ohio-1077; *Hillis v. Humphrey*, 5th Dist. No. 04-CA-06, 2005-Ohio-253.

{¶12} Because appellee's counterclaims are still pending, and the trial court's judgment entry does not contain the "no just reason for delay" language of Civ.R. 54(B), we are not presented with a final appealable order.[1] Accordingly, we lack jurisdiction to consider the appeal, and appellants' appeal must be dismissed.

{¶13} For the foregoing reasons, appellants' appeal is sua sponte dismissed.

Appeal sua sponte dismissed.

FRENCH, P.J., and CONNOR, J., concur.

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[1] The Supreme Court of Ohio has held that Civ.R. 54(B) language is not required to make the judgment final and appealable where the effect of that judgment is to render the remaining claims moot. *Gen. Accident Ins. v. Ins. Co. of N. America* (1989), 44 Ohio St.3d 17, 21; *Noble*, supra. We note that in this case the judgment of the trial court does not render appellee's counterclaims moot.