

[Cite as *Smith v. Williams*, 2010-Ohio-1381.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Adam L. Smith et al.,	:	
Plaintiffs-Appellants/ Cross-Appellees,	:	
v.	:	No. 09AP-732 (C.P.C. No. 08CVH07-10568)
William W. Williams et al.,	:	(ACCELERATED CALENDAR)
Defendants-Appellees/ Cross-Appellants,	:	

D E C I S I O N

Rendered on March 31, 2010

Kayne Law Group, and Adam L. Smith; Smith Law, Ltd., and Karen K. Fuller Smith, for Adam L. Smith and Karen K. Fuller Smith.

Stephen A. Moyer, for William W. Williams.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Plaintiffs-appellants/cross-appellees, Adam L. Smith and Karen K. Fuller Smith, appeal from a judgment of the Franklin County Court of Common Pleas that granted the motion for reconsideration of defendant-appellee/cross-appellant, William W. Williams, including a stay of plaintiffs' action pending arbitration. Because (1) the trial court's original decision denying defendant's request for arbitration was final and

appealable, and (2) the trial court thus lacked jurisdiction to modify the decision pursuant to a motion for reconsideration, we reverse.

I. Procedural History

{¶2} Because the procedural posture of this case underlies the issues on appeal, we address it in some detail. On July 23, 2008, plaintiffs filed a complaint against defendant, contending defendant breached its construction contract with plaintiffs under which defendant was to complete an addition to plaintiffs' residence. Defendant responded on September 9, 2008 with an answer. On September 19, 2008, defendant filed a counterclaim against plaintiffs. Because defendant also asserted a mechanic's lien on the property, defendant filed a third-party complaint against The Corn City State Bank, the bank that held the mortgage on plaintiffs' property.

{¶3} On October 6, 2008, plaintiffs filed a motion to dismiss defendant's counterclaim pursuant to Civ.R. 13 because defendant did not file the counterclaim with his answer on September 9. Contending defendant's counterclaim was compulsory and had to be filed with defendant's answer, plaintiffs asserted the counterclaim was not timely filed, was waived, and was properly dismissed.

{¶4} After the parties fully briefed the motion, the trial court on November 19, 2008 granted plaintiffs' motion to dismiss. The court decided the claims in defendant's counterclaim were compulsory, so defendant was required "to raise them when he filed his Answer." (Decision, 2.) Because defendant did not, the court concluded defendant waived the claims. On December 18, 2008, the court filed a journal entry that journalized its November 19, 2008 decision dismissing defendant's counterclaim. It further ordered defendant's mechanic's lien to be removed since defendant also waived it when he failed

to assert it in a counterclaim filed with his answer. As a result, the court also dismissed the third-party defendant, The Corn City State Bank.

{¶5} With discovery in the action ongoing, defendant filed three motions on January 6, 2009. Defendant filed a motion for leave to file an amended answer and counterclaim or, in the alternative, an amended answer and supplemental complaint. He further filed a motion for relief from the judgment granting plaintiffs' motion to dismiss, ordering the mechanic's lien removed and dismissing the third-party defendant. Finally, defendant filed a motion for arbitration. The next day, defendant filed a motion for summary judgment or, in the alternative, a motion for stay of proceedings pending arbitration. Both the motion for summary judgment and the motion for stay of proceedings were directed solely to defendant's request that the case be stayed pending arbitration.

{¶6} On March 3, 2009, the trial court journalized a decision and entry denying defendant's motion for relief from judgment. The trial court concluded defendant failed to show he was entitled to relief from judgment under the provisions of Civ.R. 60(B)(1) – (5). In a footnote, the trial court also denied defendant's motion for leave to file an amended answer and counterclaim. On the same day, the trial court filed a decision and entry denying defendant's motion for summary judgment or for a stay pending arbitration.

{¶7} Apparently as a result of a status conference the trial court conducted, defendant filed a motion for reconsideration on May 22, 2009. Plaintiffs responded with a motion to strike the motion for reconsideration and requested sanctions.

{¶8} On July 1, 2009, the trial court issued (1) a decision and entry granting defendant's motion for reconsideration, (2) an entry staying the action pending arbitration, (3) an entry vacating the court's March 3, 2009 decision denying defendant's motion to

stay, (4) an entry vacating the court's November 19, 2008 decision granting plaintiffs' motion to dismiss, and (5) an entry vacating the court's December 18, 2008 entry granting plaintiffs' motion to dismiss and releasing defendant's mechanic's lien.

{¶9} The court noted that "[t]he filing of the present motion has caused the Court to rethink its previous decision. * * * This assessment has revealed that the Court did not in fact make the right decision." (Decision, 6.) The court determined it "acted improperly" in denying defendant's request to stay the action pending arbitration. (Decision, 7.) Concluding that the arbitration provision "requires all claims to be submitted to arbitration prior to the initiation of legal proceedings," the court decided "this matter should not have been initially filed and the Court's previous judgments should not have been made. Therefore, the Court must vacate its November 19, 2008 decision and its December 18, 2008 entry granting Plaintiffs' Motion to Dismiss and releasing Defendant's mechanic's lien." (Decision, 9.)

II. Assignments of Error

{¶10} Plaintiffs appeal, assigning two errors:

ASSIGNMENT OF ERROR NO. 1:

The trial court erred by Granting Contractor's Motion for Reconsideration because a Motion for Reconsideration of a Final Judgment is a "Nullity".

ASSIGNMENT OF ERROR NO. 2:

The trial court erred by Granting Contractor's Motion for Reconsideration upon the finding that the parties had not waived their right to enforce arbitration.

{¶11} Defendant's cross-appeal assigns three errors:

Assignment of Error No. 1

The trial court erred by dismissing Defendant's counterclaim.

Assignment of Error No. 2

The trial court erred in denying Defendant William W. Williams' Motion for Summary Judgment, or in the Alternative, Motion to Stay proceedings, filed January 7, 2009.

Assignment of Error No. 3

The trial court erred in denying Defendant William W. Williams' Motion for Relief from Judgment, filed January 6, 2008.

{¶12} Both plaintiffs' and defendant's assigned errors invoke the issue of when a decision of the trial court becomes final and thus subject to appeal. Generally, pursuant to Section 3(B)(2), Article IV, Ohio Constitution and R.C. 2505.03, appellate courts have jurisdiction to review only final orders, judgments, or decrees. "[T]he entire concept of 'final orders' is based upon the rationale that the court making an order which is not final is thereby retaining jurisdiction for further proceedings. A final order, therefore, is one disposing of the whole case or some separate and distinct branch thereof." *Browder v. Shea*, 10th Dist. No. 04AP-1217, 2005-Ohio-4782, ¶10, quoting *Noble v. Colwell* (1989), 44 Ohio St.3d 92, 94, quoting *Lantsberry v. Tilley Lamp Co.* (1971), 27 Ohio St.2d 303, 306. Conversely, "[a] judgment that leaves issues unresolved and contemplates that further action must be taken is not a final appealable order." *Id.*, quoting *State ex rel. Keith v. McMonagle*, 103 Ohio St.3d 430, 2004-Ohio-5580, ¶4, quoting *Bell v. Horton*, 142 Ohio App.3d 694, 696, 2001-Ohio-2593.

{¶13} As relevant here, one of separate and distinct branches of a case subject to immediate appeal is set forth in R.C. 2711.02(C), which provides "an order * * * that grants or denies a stay of a trial of any action pending arbitration * * * is a final order that may be reviewed, affirmed, modified, or reversed on appeal pursuant to the Rules of Appellate Procedure and, to the extent not in conflict with those rules, Chapter 2505. of

the Revised Code." Applying that language, the Supreme Court of Ohio held in *Mynes v. Brooks*, 124 Ohio St.3d 13, 2009-Ohio-5946, that "R.C. 2711.02(C) permits a party to appeal a trial court order that grants or denies a stay of trial pending arbitration, even when the order makes no determination pursuant to Civ.R. 54(B)." *Id.* at syllabus.

III. Plaintiffs' First Assignment of Error – Motion for Reconsideration

{¶14} Plaintiffs' first assignment of error contends the trial court erred in granting defendant's motion for reconsideration and reversing its decision to deny defendant's motion for stay of plaintiffs' action pending arbitration.

{¶15} Defendant first filed his demand for arbitration on January 6, 2009; the following day, defendant filed a motion for summary judgment or in the alternative a motion for stay of the proceedings pending arbitration. On March 3, 2009, the trial court denied defendant's motion. Pursuant to *Mynes*, the trial court's decision denying defendant's motion for stay pending arbitration is a final, appealable order. Two consequences flow from that premise.

{¶16} Initially, because the decision is final and appealable, the disappointed moving party could appeal pursuant to App.R. 4. Defendant did not. Moreover, the decision, while arguably subject to a motion for relief from judgment under Civ.R. 60(B), is not subject to a motion for reconsideration. As plaintiffs properly point out, the Supreme Court of Ohio in *Pitts v. Dept. of Transp.* (1981), 67 Ohio St.2d 378, stated that "the Rules of Civil Procedure specifically limit relief from judgments to motions expressly provided for within the same Rules. A motion for reconsideration is conspicuously absent within the Rules." *Id.* at 380. As a result, the court concluded that "[w]ithout a specific prescription in the Civil Rules for a motion for reconsideration, it must be considered a nullity." *Id.*

Because the trial court's entry denying defendant's motion for a stay pending arbitration was a final judgment, defendant's motion for reconsideration was a nullity.

{¶17} Defendant nonetheless contends the trial court possesses inherent power to vacate a judgment. To support his contention, defendant initially relies on the Supreme Court's opinion in *Jelm v. Jelm* (1951), 155 Ohio St. 226. In that case, the Supreme Court stated that "[t]he Common Pleas Court, as a court of general jurisdiction, has inherent power to vacate a judgment * * * procured by means practiced by the successful party such as to constitute a fraud upon the court." *Id.* at paragraph two of the syllabus. Defendant's reliance on *Jelm* is misplaced. Initially, it was decided before the civil rules became effective in Ohio; *Pitts* specifically addresses the issue under the civil rules. Moreover, *Jelm* is premised on parties securing a judgment through fraud. Defendant points to nothing in the record to suggest the trial court's judgment denying his motion for stay pending arbitration was procured through plaintiffs' fraud.

{¶18} Similarly, *Patton v. Diemer* (1988), 35 Ohio St.3d 68, on which defendant also relies, does not advance defendant's contention that the common pleas court possessed inherent authority to vacate its judgment denying defendant's motion for stay pending arbitration. *Patton* dealt with a judgment for which the common pleas court lacked jurisdiction, rendering the judgment void. Here, the common pleas court had jurisdiction; at best, the trial court's judgment would be voidable pursuant to Civ.R. 60(B). Cf. *Freedom Mtge. Corp. v. Mullins*, 10th Dist. No. 08AP-761, 2009-Ohio-4482 (concluding that when a court lacks jurisdiction, any judgment rendered is void).

{¶19} Because the trial court's judgment denying defendant's request for a stay pending arbitration was a final order subject to appeal, the trial court erred in granting

defendant's motion for reconsideration of that judgment. Plaintiffs' first assignment of error is sustained.

IV. Plaintiffs' Second Assignment of Error – Waiver of Arbitration

{¶20} Plaintiffs' second assignment of error contends defendant waived any right to arbitration by engaging in litigation and failing to assert the right to arbitration at the outset of the case. Because we determined the trial court erred in granting defendant's motion for reconsideration and staying the action pending arbitration, plaintiffs' second assignment of error is moot.

V. Defendant's Cross-Appeal

{¶21} Defendant's three assignments of error on cross-appeal challenge the trial court's (1) November 19, 2008 decision dismissing defendant's counterclaim, and (2) March 3, 2009 decision denying defendant's motion for stay pending arbitration and motion for relief from judgment.

{¶22} Because this court's jurisdiction is limited to final orders under R.C. 2505.02, we first must determine whether any of defendant's assigned errors addresses a final order of the common pleas court. To the extent defendant appeals from an order that is not final, we lack jurisdiction to consider the assigned error. *Terpenning v. Comfortrol, Inc.*, 10th Dist. No. 09AP-315, 2009-Ohio-6418.

{¶23} While the trial court's decision granting or denying defendant's motion for a stay pending arbitration is final and appealable, only that issue is final and appealable absent some other basis for concluding other aspects of the trial court's decisions are final under R.C. 2505.02. Cf. *Essman v. Portsmouth*, 4th Dist. No. 08CA3244, 2009-Ohio-3367 (considering the issue of immunity under R.C. Chapter 2744 and concluding denial

of summary judgment on statute of limitations basis was not a final appealable order in the appeal); *Novak v. Studebaker*, 9th Dist. No. 24615, 2009-Ohio-5337 (concluding an order partially granting a motion to compel discovery was final and appealable under the provisional remedy provisions of R.C. 2505.02, but the other appealed order that denied a stay pending resolution of felony charges was not final and appealable).

A. First Assignment of Error on Cross-Appeal – Counterclaim Dismissal

{¶24} Defendant's first assignment of error on cross-appeal asserts the trial court erred in granting plaintiffs' motion to dismiss defendant's counterclaim.

{¶25} The trial court's decision granting plaintiffs' motion to dismiss defendant's counterclaim was not a final appealable order under the relevant portions of R.C. 2505.02(B). An order is final and appealable under R.C. 2505.02(B)(1) if it "affects a substantial right in an action that in effect determines the action and prevents the judgment." Here, the trial court's order granting plaintiffs' motion to dismiss defendant's counterclaim meets neither branch of R.C. 2505.02(B)(1). The order did not determine the action, as the merits of the complaint have yet to be resolved. Moreover, the trial court's order does not affect a substantial right under R.C. 2505.02(A)(1), as "[a]n order affecting a substantial right is 'one which, if not immediately appealable, would foreclose appropriate relief in the future.'" *Broder v. Shea*, 10th Dist. No. 04AP-1217, 2005-Ohio-4782, ¶13, quoting *Bell v. Mt. Sinai Med. Ctr.* (1993), 67 Ohio St.3d 60, 63. Once the action is fully determined in the common pleas court, defendant will have the right to appeal the entire action, including the trial court's granting plaintiffs' motion to dismiss defendant's counterclaim.

{¶26} Nor does the order constitute a final order under R.C. 2505.02(B)(2) which defines a final order as one that "affects a substantial right made in a special proceeding." Again, because the trial court's order does not affect a substantial right, the order cannot be final under R.C. 2505.02(B)(2).

{¶27} Finally, R.C. 2505.02(B)(4) defines a final order as one "that grants or denies a provisional remedy" provided two conditions are met. Initially, the order subject of appeal must determine the action with respect to the provisional remedy and prevent a judgment in favor of the appealing party regarding the provisional remedy. R.C. 2505.02(B)(4)(a). Secondly, an appeal following judgment must not afford a meaningful and effective remedy to the appealing party. R.C. 2505.02(B)(4)(b). Because, as noted, the trial court's decision granting plaintiffs' motion to dismiss does not deprive defendant of a meaningful and effective remedy on appeal following final judgment, the decision is not final under R.C. 2505.02(B)(4). Accordingly, we lack jurisdiction to consider defendant's first assignment of error on cross-appeal.

B. Second Assignment of Error on Cross-Appeal – Denial of Motion to Stay Pending Arbitration

{¶28} Defendant's second assignment of error on cross-appeal contends the trial court erred in denying his motion for summary judgment or in the alternative, to stay proceedings pending arbitration. Because the order denying defendant's request for a stay was a final order, it was immediately appealable. *Kelm v. Kelm* (1992), 73 Ohio App.3d 395. To vest this court with jurisdiction over an appeal of that order, defendant was required to file a notice of appeal within 30 days pursuant to App.R. 4(A). Defendant did not, and so we lack jurisdiction to consider defendant's second assignment of error on

cross-appeal. *State v. Myers*, 9th Dist. No. 08CA0041, 2009-Ohio-2082 (dismissing for lack of jurisdiction because the appeal was untimely).

C. Third Assignment of Error on Cross-Appeal – Denial of Motion for Relief from Judgment

{¶29} Defendant's third cross-assignment of error asserts the trial court's March 3, 2009 decision and entry wrongly denied his motion for relief from the trial court's decision granting plaintiffs' motion to dismiss, ordering the mechanic's lien released, and dismissing the third-party defendant. A decision denying a Civ.R. 60(B) motion is final and appealable. *Whipps v. Ryan*, 10th Dist. No. 08AP-838, 2009-Ohio-2228, ¶27, citing *Colley v. Bazell* (1980), 64 Ohio St.2d 243, paragraph one of the syllabus (holding that "[a] judgment overruling a Civ.R. 60(B) motion for relief from a default judgment is a final appealable order").

{¶30} Although defendant's appeal is from a final order, defendant's assignment of error lacks merit. Initially, the trial court denied defendant's motion for relief from judgment on March 3, 2009. Accordingly, defendant's appeal from that decision is untimely. Because it is untimely, we lack jurisdiction. Moreover, "Civ.R. 60(B) allows the court to vacate final judgments or orders on the criteria that the rule requires." *Wourms v. Wourms*, 166 Ohio App.3d 519, 2006-Ohio-1968, ¶18. Defendant filed a motion for relief from judgment concerning the trial court's decision granting plaintiffs' motion to dismiss defendant's counterclaim, ordering the mechanic's lien released, and dismissing the third-party defendant. Without Civ.R. 54(B) language, none of those decisions meets the criteria for a final order earlier noted. Accordingly, the Civ.R. 60(B) motion was not a proper means of addressing the trial court's decision concerning defendant's counterclaim, mechanic's lien, and third-party complaint.

{¶31} Even so, because the decisions are interlocutory and not final, they were subject to defendant's motion for reconsideration. The trial court granted the motion for reconsideration, reversing its decision to dismiss defendant's counterclaim, release the mechanic's lien, and dismiss the third-party defendant, The Corn City State Bank. Accordingly, the matter will be returned to the trial court to consider not only plaintiffs' complaint but defendant's counterclaim and third-party complaint, all of which may be appealed at the conclusion of the case. At this juncture, however, we lack jurisdiction over defendant's third assignment of error on cross-appeal because the appeal was not timely filed.

VI. Disposition

{¶32} Because we (1) sustain plaintiffs' first assignment of error, (2) rendering plaintiffs' second assignment of error moot, and (3) lack jurisdiction over the assigned errors in defendant's assignments of error on cross-appeal, we reverse the judgment of the trial court granting reconsideration of the trial court's decision denying defendant's motion for stay pending arbitration and remand this matter to the trial court for further proceedings consistent with this decision.

*Judgment reversed and
cause remanded.*

KLATT and McGRATH, JJ., concur.
