

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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|------------------------------|---|------------------------|
| Jack Maxton Chevrolet, Inc., | : | |
| | : | No. 15AP-816 |
| Plaintiff-Appellee, | : | (C.P.C. No. 14CV-7521) |
| v. | : | |
| | : | (REGULAR CALENDAR) |
| Ammar Z. Hanbali et al., | : | |
| | : | |
| Defendants-Appellants. | : | |

D E C I S I O N

Rendered on March 24, 2016

On brief: *Campbell Perry, LLC, and Jeffrey T. Perry, Mancuso Law Office, and Anthony O. Mancuso, for appellee. Argued: Jeffrey T. Perry.*

On brief: *Marcelle Rose Anthony, for appellants. Argued: Marcelle Rose Anthony.*

APPEAL from the Franklin County Court of Common Pleas

DORRIAN, P.J.

{¶ 1} Defendants-appellants, Ammar Z. Hanbali and H & H Auto Sales, Inc., d.b.f. Ammar Z. Hanbali (collectively, "appellants"), appeal from a judgment of the Franklin County Court of Common Pleas denying their motion to vacate a prior default judgment entry in favor of plaintiff-appellee, Jack Maxton Chevrolet, Inc. Because we conclude that the default judgment entry from which appellants sought relief was not a final, appealable order and, therefore, the judgment denying the motion to vacate that default judgment entry was not a final, appealable order, we dismiss the appeal.

I. Facts and Procedural History

{¶ 2} Appellee filed a complaint on July 21, 2014, asserting that appellants entered into a contract to purchase a vehicle from appellee for \$25,000. Appellee alleged that Hanbali presented a check for payment of the contract purchase price that was later

returned due to insufficient funds. Appellee asserted that appellants were notified of the insufficiency and refused to pay the balance owed. The complaint sought treble damages, interest and costs, and attorney fees. Appellants failed to file an answer to the complaint or otherwise make an appearance; on October 15, 2014, appellee moved for default judgment. The trial court granted the motion and issued an entry granting judgment in favor of appellee in the amount of \$75,150, plus interest and costs. The default judgment entry further referred the matter to a magistrate for a hearing on attorney fees. Appellee then sought garnishment of appellants' bank accounts to satisfy the default judgment.

{¶ 3} After appellee sought garnishment, appellants made an appearance in the case and filed a motion to vacate the default judgment pursuant to Civ.R. 60(B). The trial court referred the matter to a magistrate, who conducted a hearing and issued a decision denying the motion to vacate. The magistrate concluded that appellants failed to demonstrate they were entitled to relief from the default judgment under one of the grounds set forth in Civ.R. 60(B)(1) through (5). Appellants filed objections to the magistrate's decision. The trial court denied appellants' objections and issued a decision adopting the magistrate's decision denying the motion to vacate the default judgment entry.

II. Assignments of Error

{¶ 4} Appellants appeal from the trial court's judgment, assigning five errors for this court's review:

I. Whether the trial court erred in granting Treble Damages Default Judgment plus attorney's fees on Count I of the Complaint, when the Complaint with exhibits failed to reflect any allegation and/or any evidence of a signed business contract, of a bad check, of a crime of theft in the first instance.

II. Whether Appellants demonstrated a Rule 60(B) reason to vacate the treble damages default judgment, namely "mistake" which the Magistrate found in her Findings of Fact in the Magistrate's Decision, but through error of law failed to find that "mistake" was a valid proven Rule 60(B) reason; thus, the default judgment should be vacated as a matter of law.

III. Whether Appellants demonstrated a Rule 60(B) reason to vacate the treble damages default judgment, including "excusable neglect" which the Magistrate failed to find but

was a valid proven Rule 60(B) reason; accordingly the default judgment should be vacated as a matter of law.

IV. Whether the trial court erred in adopting the Magistrate's Decision by failing to consider all of the Appellants' Objections of Fact and Law to the Magistrate's Decision, most of which demonstrated that the default treble damages judgment should be vacated as a matter of fact and law.

V. Whether Appellants were denied due process as guaranteed by the Fourteenth Amendment to the U.S. Constitution by not receiving a service copy of the Appellee's Motion for Default Judgment.

III. Discussion

{¶ 5} Appellee filed a motion to dismiss the appeal, asserting that this court lacked jurisdiction because the trial court's decision denying appellants' motion to vacate the default judgment entry was not a final, appealable order. Therefore, we begin by examining the question of the court's jurisdiction.

{¶ 6} Courts of appeals have jurisdiction to review final orders of lower courts. Ohio Constitution, Article IV, Section 3(B)(2). A trial court order is final and appealable if it meets the requirements of R.C. 2505.02 and, if applicable, Civ.R. 54(B). *Eng. Excellence, Inc. v Northland Assocs., L.L.C.*, 10th Dist. No. 10AP-402, 2010-Ohio-6535, ¶ 10. The types of orders that constitute final orders subject to review are set forth in R.C. 2505.02(B). Civ.R. 54(B) provides that where there are multiple claims or multiple parties, a court may enter final judgment as to one or more but fewer than all claims or parties only on an express determination that there is no just reason for delay. Appellate courts use a two-step analysis to determine whether an order is final and appealable. *Id.* at ¶ 11. First, the court determines if the order is final within the requirements of R.C. 2505.02. Second, the court determines whether Civ.R. 54(B) applies and, if so, whether the order being appealed contains a certification that there is no just reason for delay. *Id.*

{¶ 7} In response to the motion to dismiss, appellants argue that the trial court's decision denying the motion to vacate was a final order as defined by R.C. 2505.02 and that the decision included "no just reason for delay" language pursuant to Civ.R. 54(B). Generally, a decision denying a motion for relief from judgment under Civ.R. 60(B) is a final, appealable order. *Straquadine v. Crowne Pointe Care Ctr.*, 10th Dist. No. 10AP-607, 2012-Ohio-1152, ¶ 11. *See also Colley v. Bazell*, 64 Ohio St.2d 243 (1980), paragraph

one of the syllabus ("A judgment overruling a Civ.R. 60(B) motion for relief from a default judgment is a final appealable order."). " ' "However, this rule presumes that the underlying order under challenge by a movant's Civ.R. 60(B) motion is, itself a final appealable order." ' " *Straquadine* at ¶ 11, quoting *Safe Auto Ins. Co. v. Perry*, 10th Dist. No. 00AP-722 (Jan. 25, 2001), quoting *Wolf v. Associated Materials*, 5th Dist. No. 00COA01350 (Aug. 15, 2000). In *Straquadine*, we held that because the trial court's order involuntarily dismissing the appellants' complaint without prejudice was not a final, appealable order, the order denying appellants' Civ.R. 60(B) motion for relief from that dismissal order also was not a final, appealable order. *Id.* See also *Hack v. Keller*, 9th Dist. No. 14CA0036-M, 2015-Ohio-4128, ¶ 10 ("Where the underlying order is not itself a final judgment, Civ.R. 60(B) is not a proper procedural mechanism for relief and it cannot be used to convert an otherwise nonfinal judgment into a final appealable order."); *State ex rel. DeWine v. Big Sky Energy*, 11th Dist. No. 2012-A-0042, 2013-Ohio-437, ¶ 13 ("We note that the denial of a Civ.R. 60(B) motion is generally a final appealable order. However, in this case, there was no final order in the first place because the trial court had not issued a ruling on damages."); *Close v. Perry*, 5th Dist. No. 11CA37, 2012-Ohio-2953, ¶ 20 ("If the judgment is not final, the decision overruling the Civ.R. 60(B) Motion is likewise, not final.").

{¶ 8} Appellants' Civ.R. 60(B) motion requested that the trial court vacate its entry granting default judgment in favor of appellee. Therefore, we must determine whether the default judgment order was a final, appealable order. Appellee's complaint asserted claims for fraud or theft and declaratory judgment. The complaint sought treble damages, punitive damages, costs, and attorney fees. The trial court's default judgment entry granted judgment in favor of appellee on the complaint in the amount of \$75,150, plus interest and costs. The default judgment entry also referred the matter to a magistrate for a hearing on attorney fees. Thus, the default judgment entry left the amount of attorney fees unresolved, pending a magistrate's determination. The default judgment entry *did not* include "no just cause for delay" language pursuant to Civ.R. 54(B).

{¶ 9} Where an issue regarding entitlement to or the amount of attorney fees remains pending in the trial court, this court has distinguished between orders that contain Civ.R. 54(B) language and those that do not. *Kierland Crossing, L.L.C. v. Ruth's*

Chris Steak House, Inc., 10th Dist. No. 11AP-627, 2011-Ohio-5626, ¶ 13. "[I]n the absence of Civ.R. 54(B) language, a judgment that leaves the issue of attorney fees unresolved is not a final appealable order." See also *Internatl. Brotherhood of Elec. Workers, Local Union No. 8 v. Vaughn Industries, L.L.C.*, 116 Ohio St.3d 335, 2007-Ohio-6439, paragraph two of the syllabus ("When attorney fees are requested in the original pleadings, an order that does not dispose of the attorney-fee claim and does not include, pursuant to Civ.R. 54(B), an express determination that there is no just reason for delay, is not a final, appealable order."); *Green v. Germain Ford of Columbus, L.L.C.*, 10th Dist. No. 08AP-920, 2009-Ohio-5020, ¶ 26 ("[T]he trial court's order does not dispose of appellee's CSPA attorney fee claim, and it lacks Civ.R. 54(B) language. Therefore, it is not a final appealable order."). Compare *Niehaus v. Columbus Maennerchor*, 10th Dist. No. 07AP-1024, 2008-Ohio-4067, ¶ 16-24 (holding that judgment entry that did not resolve attorney fee claim was a final, appealable order because it contained Civ.R. 54(B) certification). In this case, appellee asserted a claim for attorney fees as part of its complaint. The default judgment entry did not resolve the attorney fee claim and did not include Civ.R. 54(B) language indicating that there was no just cause for delay. Therefore, the default judgment entry was not a final, appealable order. As a result, the decision denying appellants' Civ.R. 60(B) motion to vacate the default judgment was not a final, appealable order.

{¶ 10} Accordingly, this court lacks jurisdiction and the appeal must be dismissed for lack of a final, appealable order.

IV. Conclusion

{¶ 11} For the foregoing reasons, we grant appellant's motion to dismiss. The appeal is dismissed for lack of a final, appealable order.

*Motion to dismiss granted;
appeal dismissed.*

LUPER SCHUSTER and HORTON, JJ., concur.
