

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

James R. Hagy, III, et al.,	:	
Plaintiffs,	:	
v.	:	Case No. 2:11-cv-530
	:	
Demers & Adams, LLC, et al.,	:	Magistrate Judge Kemp
Defendants.	:	

OPINION AND ORDER

This matter is before the Court on a second motion for leave to file a supplemental complaint filed by Plaintiff James R. Hagy, III, on behalf of himself and Patricia R. Hagy¹ ("the Hagys") (Doc. #140). For the reasons set forth below, the motion will be granted.

I. Background

The factual background of this case has been set forth in previous orders of this Court and will not be repeated in great detail here. For purposes of resolving the present motion, however, the Court notes that this case arises from a foreclosure action initiated by the Law Firm Defendants on behalf of Green Tree against the Hagys. After the foreclosure action was filed, the Hagys signed a warranty deed in lieu of foreclosure in return for which it was agreed that there would be no attempt to collect any deficiency balance. Thereafter, the foreclosure complaint was dismissed, but Green Tree began contacting the Hagys by telephone for the collection of an alleged deficiency.

The Hagys filed this case against the Law Firm Defendants and Green Tree alleging violations of the Fair Debt Collection

¹On February 9, 2012, this Court granted James R. Hagy's motion requesting that he be substituted for his wife, Patricia R. Hagy, following Mrs. Hagy's death. (Doc. #47).

Practices Act ("FDCPA"), 15 U.S.C. §§1692, *et seq.*, the Ohio Consumer Sales Practices Act ("OCSPA"), O.R.C. §§1345.01 *et seq.*, and common law invasion of privacy. In an opinion and order issued on October 22, 2013, the Court entered judgment in favor of the Hagys and against the Law Firm Defendants in the total amount of \$76,307.67. The arbitration claims remained pending and were not resolved by the Court's opinion and order.

On January 3, 2014, the Hagys filed the motion for leave to file a supplemental complaint pursuant to Fed. R. Civ. P. 15(d). In the motion, the Hagys alleged that the proposed supplemental complaint set forth new facts bearing on the relationship between the parties, and stated a new claim against ProAssurance Casualty Company ("ProAssurance"), the company which insures the Law Firm Defendants. In an opinion and order issued on February 26, 2014, the Court found that there was not a final judgment and a lapse of thirty days since that judgment without payment. Consequently, the Court denied the Hagys' motion for leave to file a supplemental complaint as untimely.

Thereafter, Magistrate Judge Norah McCann King held a settlement conference with the parties concerning the arbitration claims. On October 15, 2014, Magistrate Judge King issued an order stating that the parties had agreed to terms of settlement and the language of settlement documents. Consequently, at the suggestion of the Hagys and with the agreement of the defendants, Magistrate Judge King dismissed the action, but indicated that the Court would retain jurisdiction to effectuate the terms of the settlement. (Doc. #135).

On October 16, 2014, Magistrate Judge King issued a *nunc pro tunc* order, clarifying that "the parties have agreed to terms of settlement and the language of settlement documents regarding the arbitration claims only." Thus, Magistrate Judge King ordered dismissal of the arbitration claims only, and again indicated

that the Court would retain jurisdiction to effectuate the terms of settlement. (Doc. #136).

On December 22, 2014, the parties filed a "stipulation of settlement of arbitration claims only." (Doc. #139). The stipulation states:

Plaintiff James R. Hagy, III has settled the arbitration claims against Green Tree Servicing, LLC and Kevin Winehold that this Court referred to arbitration (Doc. 44). Accordingly, the arbitration claims only are dismissed with prejudice. Each party to this settlement shall pay his/its own attorney fees and costs.

Id. The stipulation is signed by "Plaintiffs' Attorney" Edward A. Icove and "Defendants' Attorney" Adam J. Bennett.

On February 5, 2015, the Hagys filed the second motion for leave to file a supplemental complaint. (Doc. #140). In the motion, the Hagys contend that the stipulation, filed pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii), was a final appealable order. The Hagys contend that, because more than thirty days have lapsed since the parties filed the stipulation, the Court can properly consider their motion. The Hagys state that the following "new facts" are relevant to their motion:

In a November 21, 2013 email, the undersigned counsel notified Law Firm Defendants that a failure to move to stay the execution of the judgment would result in execution proceedings. See proposed complaint, Exhibit F.

Neither Law Firm Defendants, nor anyone on their behalf, has responded to the November 21, 2013 email. Neither Law Firm Defendants, nor anyone on their behalf, has filed a motion to post an appeal bond.

Supplemental Defendant [ProAssurance], who insured Law Firm Defendants, was timely notified by the Hagys regarding this action so that its rights would not be prejudiced. See proposed complaint at 2, ¶¶7, 8. Defendant Pro Assurance has not contacted the Hagys' counsel since acknowledging receipt of notification of this law suit [sic].

(Doc. #140 at 2). The Hagys argue that the supplemental

complaint alleges new facts bearing on the relationship between the parties, and it states a new claim against ProAssurance under O.R.C. §3929.06. Accordingly, the Hagys request leave to file the supplemental complaint.

In response, defendants argue that no final order exists in the case, and “[n]othing has changed the status of this Court’s decision of October 22, 2013 as a non-final order.” (Doc. #141 at 1). More specifically, defendants argue that:

[t]he stipulation (Doc. #139) filed by the parties meets none of the requirements of Rule 54(b). First, it is not an “order or other decision”, but rather a stipulation. Second, it was not directed, issued or signed by this Court. Third, it does not adjudicate anything. Fourth, it addresses fewer than all the claims or the rights and liabilities of fewer than all of the parties. Fifth, it does not expressly determine that there is not [sic] just cause for delay, and since it is not authored by this Court but rather the parties to this case, it would be nonsensical for the stipulation to insert ‘no just cause for delay’ language.

Id. at 2. According to defendants, the stipulation merely “inform[s] the Court of the status of the arbitration claims,” but it is up to the Court to issue a final appealable order or certify pursuant to Fed. R. Civ. P. 54(b) that there is no just cause for delay. Id. at 2-3.

In reply, the Hagys assert that Fed. R. Civ. P. 54(b) applies to interlocutory appeals only and is inapplicable here because “this case was terminated by the December 22, 2014 Stipulation of Settlement of Arbitration Claims Only....” (Doc. #142 at 1). The Hagys claim that the primary issue before this Court is whether a dismissal under Fed. R. Civ. P. 41(a)(1)(A)(ii), signed by all parties to the action, terminates the case and constitutes a final appealable order absent any Court intervention. Based upon the foregoing, the second motion for leave to file a supplemental complaint has been briefed fully, and it is now ripe for decision.

II. Discussion

As in its prior motion to file a supplemental complaint, the Hagys seek to bring the supplemental complaint pursuant to O.R.C. §3929.06 and a complaint for declaratory judgment pursuant to O.R.C. §§2201-2202. Ohio Revised Code §3929.06 provides, in relevant part, that

(A)(1) If a court in a civil action enters a final judgment that awards damages to a plaintiff for injury, death, or loss to the person or property of the plaintiff or another person for whom the plaintiff is a legal representative and if, at the same time that the cause of action accrued against the judgment debtor, the judgment debtor was insured against liability for that injury, death, or loss, the plaintiff or the plaintiff's successor in interest is entitled as judgment creditor to have an amount up to the remaining limit of liability coverage provided in the judgment debtor's policy of liability insurance applied to the satisfaction of the final judgment.

(2) If, within thirty days after the entry of the final judgment referred to in division (A)(1) of this section, the insurer that issued the policy of liability insurance has not paid the judgment creditor an amount equal to the remaining limit of liability coverage provided in that policy, the judgment creditor may file in the court that issued the final judgment a supplemental complaint against the insurer seeking the entry of a judgment ordering the insurer to pay the judgment creditor the requisite amount. Subject to division (C) of this section, the civil action based on the supplemental complaint shall proceed against the insurer in the same manner as the original civil action against the judgment debtor.

(B) Division (A)(2) of this section does not authorize the commencement of a civil action against an insurer until a court enters the final judgment described in division (A)(1) of this section in the distinct civil action for damages between the plaintiff and an insured tortfeasor and until the expiration of the thirty-day period referred to in division (A)(2) of this section.

The statute, therefore, "creates a subrogation action, wherein the injured party stands in the shoes of the insured against his

or her insurer, and the statute may only be used to bring insurers into an action." Elkins v. American Int'l Special Lines Ins. Co., 611 F. Supp. 2d 752, 758 (S.D. Ohio 2009). The statute creates two conditions precedent to the filing of a supplemental complaint. Specifically, there must be (1) a final judgment and (2) a lapse of thirty days since that judgment without payment of the judgment in order for a judgment creditor to properly file a supplemental complaint. See Martin v. Turner & Son Building Contractor, No. 2010-L-137, 2010 WL 5296143, at *3 (Ohio App. 11 Dist. Dec. 20, 2010)(citing O.R.C. §3929.06(B)).

In the February 26, 2014 opinion and order, this Court addressed whether its October 22, 2013 judgment constituted a final appealable order under Rule 54(b). The Court noted that, although there were no remaining claims against the Law Firm Defendants, there were remaining claims against the Green Tree Defendants which had been stayed pending arbitration. Further, despite entering judgment in favor of the Hagys and against the Law Firm Defendants in the amount of \$76,307.67, the Court had not certified pursuant to Fed. R. Civ. P. 54(b) that there was no just cause for delay. Consequently, the Court found that a final order had not been issued in this case.

The procedural posture of this case has changed since the Court issued the February 26, 2014 opinion and order. Most significantly, the remaining arbitration claims have been settled, and the parties filed a stipulation on December 22, 2014 memorializing that settlement. Thus, there are no claims pending before this Court for resolution.

Although O.R.C. §3929.06 uses the term "final judgment," it does not mandate a final judgment under Rule 54(b). Because the terms "final judgment" and "final appealable order" are often used interchangeably, the relevant inquiry is whether there exists a final appealable order in the case. See, e.g., Northern

v. U.S., 300 F.2d 131, 132 (6th Cir. 1962) (noting that "only those decisions which are final may be appealed to the Court of Appeals"). Thus, the sole issue before the Court is whether the December 22, 2014 stipulation constitutes a final appealable order. While the Hagys argue that the stipulation under Fed. R. Civ. P. 41(a)(1)(ii) created a final appealable order, defendants maintain there is no final appealable order until the Court issues a final judgment under Fed. R. Civ. P. 54(b). The Court first examines the language of those rules and then discusses applicable case law.

Fed. R. Civ. P. 41(a) addresses the voluntary dismissal of actions. Fed. R. Civ. P. 41(a)(1)(ii) provides that a plaintiff may dismiss an action "without a court order" by filing "a stipulation of dismissal signed by all parties who have appeared." Thus, a stipulation filed pursuant to Fed. R. Civ. P. 41(a)(1)(ii) terminates a case without any further action from the Court. Stated differently, the Court need not enter a final judgment to terminate the case because the stipulation is a final appealable order which terminates the case.

Fed. R. Civ. P. 54(b) addresses a different situation. That rule is applicable when the case is terminated as the result of the Court's issuance of a final judgment, and not a voluntary dismissal. Fed. R. Civ. P. 54(b) sets forth the particular requirements which are necessary for a Court order to constitute a final judgment. Under that rule, a Court order will not terminate a case unless the Court issues a final appealable order which enters judgment and finds that there is no just reason for delay. There is no need for a final judgment under Fed. R. Civ. P. 54(b) if a Fed. R. Civ. P. 41(a)(1)(ii) stipulation has been filed.

In Fassett v. Delta Kappa Epsilon (New York), 807 F.2d 1150, 1155 (3d Cir. 1986), the Third Circuit addressed whether the

voluntary dismissal of claims remaining in a multi-party litigation constituted a final appealable order. In that case, the District Court Judge entered an order granting summary judgment in favor of all but one of the defendants. The Court of Appeals noted that the order granting summary judgment did not become final, however, until the claims against the remaining defendant were voluntarily dismissed. The Court of Appeals reached this conclusion because the "dismissal left no outstanding issues or parties before the district court." Id. at 1155.

Other courts have taken a "pragmatic approach" to determining the finality of the document last filed. See Matter of Lytton's, Henry C. Lytton & Co., 1986 WL 11662, at *5 (N.D. Ill. Oct. 10, 1986), citing In re Amatex Corp., 755 F.2d 1034 (3d Cir. 1985). Such an approach requires the Court to examine the "practical effect" of the document at issue. See id.; see also Wallace ex rel. Wallace v. Oklahoma Dept. of Human Servs., 2004 WL 1875048, at *1 (10th Cir. Aug. 23, 2004)(applying the "practical effect" test to determine whether order denying motion to modify consent decree was final and appealable). Similarly, the Court of Appeals has noted that functional compliance, rather than formalistic compliance, is "all that is required" to establish jurisdiction for a notice of appeal in the Sixth Circuit. Isert v. Ford Motor Co., 461 F.3d 756, 759 (6th Cir. 2006).

Applying a "pragmatic approach" to determine the finality of the stipulation, the Court observes that, although the stipulation addressed settlement of the arbitration claims only, it had the practical effect of eliminating any claims remaining before the Court for resolution. Stated differently, once the stipulation was filed, the Court had no claims before it to resolve. Thus, the stipulation had the practical effect of

terminating the case. Further, as the Hagys point out, the stipulation was signed by all of the parties to the action because Mr. Bennett is counsel of record for both the Law Firm Defendants and the Green Tree Defendants. Consequently, there can be no argument that the Law Firm Defendants were unaware of the stipulation and its practical effect of resolving the remaining claims in the case. Based on the foregoing, the Court finds that the stipulation constitutes a final appealable order which terminated this case. Because there has been a lapse of more than thirty days since that final appealable order without payment, the Hagys can properly file the supplemental complaint. Consequently, the Hagys' second motion for leave to file a supplemental complaint will be granted. (Doc. #140).

III. Conclusion

For the reasons set forth above, the Hagys' second motion for leave to file a supplemental complaint is granted (Doc. #140).

/s/ Terence P. Kemp
UNITED STATES MAGISTRATE JUDGE