[Cite as *Cooney v. Radostitz*, 2021-Ohio-2521.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

MOLLY K. COONEY,	:	
Plaintiff-Appellant,	:	No. 110009
v.	:	
JOSEPH R. RADOSTITZ,	:	
Defendant-Appellee.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: DISMISSED
RELEASED AND JOURNALIZED: July 19, 2021

Civil Appeal from the Cuyahoga County Court of Common Pleas
Domestic Relations Division
Case No. DR-18-370155

Appearances:

Rosenthal | Thurman | Lane, L.L.C., and Adam J. Thurman, *for appellant*.

Carrabine & Reardon Co., L.P.A., and James W. Reardon, *for appellee*.

EILEEN A. GALLAGHER, J.:

{¶ 1} Plaintiff-appellant Molly Cooney ("Mother") appeals from an order of the Cuyahoga County Common Pleas Court, Domestic Relations Division, denying (1) her motion to dismiss a motion to modify child support filed by defendant-

appellee Joseph Radostitz ("Father") and (2) her motion to strike Father's objections to the magistrate's decision.

{¶ 2} For the reasons that follow, we dismiss this appeal for lack of a final, appealable order.

Procedural and Factual Background

{¶ 3} Mother and Father were divorced on December 28, 2018. Pursuant to the judgment entry of divorce, Father was ordered to pay $1,350.10 per month (plus a two-percent processing fee) in child support for the couple's three minor children.

{¶ 4} On April 8, 2019, Father filed a motion to modify child support along with a supporting affidavit. Mother's address was stated in the caption of the motion. On April 10, 2019, Father filed instructions for service of the motion. The instructions for service indicated that service was to be made by certified mail and that two service attempts should be made. Under "additional instructions," Father simply identified the documents to be served: "Motion to modify child support and affidavit of Joseph R. Radostitz." No address for service was included in the instructions for service; however, the standard language on the instructions-for-service form stated: "show address for service if different from the one shown in caption." Although Mother was the "plaintiff," as stated in the caption, Father's attorney was listed as "Plaintiff Attorney" on the instructions for service. Instead of serving Mother with the motion, the trial court sent a copy of Father's motion by certified mail to Father at Father's address.

{¶ 5} On April 9, 2019, the trial court set a hearing on Father's motion to modify child support and sent out notice of the hearing to the parties. On April 29, 2019, Mother's attorney filed a notice of appearance and a motion for continuance of the hearing on the grounds that he was "just retained and need[ed] additional time to review the file and prepare for the motion hearing" and was scheduled for trial on another matter that day and unable to attend the hearing. On May 7, 2019, Mother served Father with requests for the production of documents related to his motion. On June 10, 2019, Mother filed a motion to show cause and for attorney fees based on Father's alleged failure to pay child support.

{¶ 6} After several continuances, a hearing was scheduled for February 24, 2020 on the pending motions. At the outset of the hearing, Mother made an oral motion to dismiss Father's motion to modify child support on the grounds that the motion had been "improperly served," i.e., there had been no service of the motion on Mother within six months as required under Civ.R. 4(E). The magistrate dismissed the motion for want of service, and the hearing proceeded on Mother's motion to show cause and for attorney fees.

{¶ 7} On March 11, 2020, the magistrate issued her written decision finding that Father owed $17,865.28 in child support, finding Father in civil contempt of court and awarding Mother $2,897.50 in attorney fees associated with the contempt. The magistrate's decision also indicated that "[s]ince the hearing had commenced without [Father] obtaining service on [Mother], and the motion had been pending for ten months, [Mother's] oral motion to dismiss his motion for lack

of service was granted" and that Father's motion was "dismissed without prejudice for want of prosecution."

{¶ 8} On March 17, 2020, Father filed objections to the magistrate's decision, objecting to the magistrate's decision on the ground that it was "contrary to the weight of the evidence" and "contrary to [l]aw and constitutes an abuse of discretion." Father also requested leave to file supplemental objections within 60 days. Mother filed a motion to strike and/or brief in opposition to Father's objections to the magistrate's decision on the grounds that Father's preliminary objections failed to comply with Loc.R. 27 of the Cuyahoga County Domestic Relations Court Local Rules of Practice and Civ.R. 53.

{¶ 9} On May 21, 2020, Father filed supplemental objections to the magistrate's decision, setting forth the following objections to the magistrate's decision:

> 1. The Court erred when it dismissed Defendant's Motion to Modify Child Support without timely objection of Plaintiff's Counsel for lack of service.
>
> 2. The Court erred when it dismissed Defendant's motion pursuant to Civ.R. 4(E) to modify child support without notice or motion, for lack of service upon Plaintiff.
>
> 3. Defendant's due process rights were violated when the Court proceeded to hearing without allowing Defendant the opportunity to obtain counsel.

Mother filed a brief in opposition to Father's supplemental objections.

{¶ 10} In its September 9, 2020 judgment entry, the trial court sustained Father's first two supplemental objections and denied his third supplemental

objection. The trial court held that Mother had "waived her jurisdictional defect argument" based on lack of service "by responding and actively participating in the proceedings before raising it at the February 24, 2020 hearing." The trial court denied Mother's motion to strike Father's objections to the magistrate's decision, noting that "[w]hile [Father's] initial objections were brief, [Father] supplemented his objections with particularity." The court indicated that Father's motion to modify child support would "be heard in due course by the Magistrate." The trial court adopted the magistrate's decision as modified.

{¶ 11} Mother appealed, raising the following two assignments of error for review:

> Assignment of Error I: The trial court erred and abused its discretion when it failed to dismiss appellee's motion to modify child support for failure of service as required by Rule 4 and Rule 7 of the Ohio Rules of Civil Procedure.
>
> Assignment of Error II: The trial court erred and abused its discretion when it failed to strike appellee's preliminary objections and supplemental objections as they did not comply with Rule 53 of the Ohio Rules of Civil Procedure and Rule 27 of the Cuyahoga [County] Domestic Relations Court Local Rules of Practice.

Law and Analysis

{¶ 12} Before reviewing the merits, we must first consider whether we have jurisdiction to hear this appeal. Our appellate jurisdiction is limited to reviewing judgments and orders that are final. *See* Article IV, Section 3(B)(2), Ohio Constitution; R.C. 2505.02 and 2505.03. "If an order is not final and appealable, then an appellate court has no jurisdiction to review the matter and the appeal must

be dismissed." *Assn. of Cleveland Firefighters, # 93 v. Campbell*, 8th Dist. Cuyahoga No. 84148, 2005-Ohio-1841, ¶ 6. This court has a duty to examine, sua sponte, potential deficiencies in jurisdiction. *See, e.g., Scheel v. Rock Ohio Caesars Cleveland, L.L.C.*, 8th Dist. Cuyahoga No. 105037, 2017-Ohio-7174, ¶ 7; *Arch Bay Holdings, L.L.C., v. Goler*, 8th Dist. Cuyahoga No. 102455, 2015-Ohio-3036, ¶ 9; *see also Scanlon v. Scanlon*, 8th Dist. Cuyahoga No. 97724, 2012-Ohio-2514, ¶ 5 ("In the absence of a final, appealable order, the appellate court does not possess jurisdiction to review the matter and must dismiss the case sua sponte.").

{¶ 13} R.C. 2505.02(B) sets forth the types of orders that qualify as final, appealable orders. R.C. 2505.02(B) provides:

> An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one 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;
>
> (4) An order that grants or denies a provisional remedy and to which both of the following apply:
>
> (a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.
>
> (b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.
>
> (5) An order that determines that an action may or may not be maintained as a class action;

> (6) An order determining the constitutionality of any changes to the Revised Code made by Am. Sub. S.B. 281 of the 124th general assembly * * * or any changes made by Sub. S.B. 80 of the 125th general assembly * * *;
>
> (7) An order in an appropriation proceeding that may be appealed pursuant to division (B)(3) of section 163.09 of the Revised Code.

{¶ 14} A "substantial right" is "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). A "special proceeding" is "an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity." R.C. 2505.02(A)(2). A "provisional remedy" is "a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, suppression of evidence, a prima-facie showing pursuant to section 2307.85 or 2307.86 of the Revised Code, a prima-facie showing pursuant to section 2307.92 of the Revised Code, or a finding made pursuant to division (A)(3) of section 2307.93 of the Revised Code."

{¶ 15} It is well established that, in general, a trial court's order denying a motion to dismiss is not a final, appealable order because a party can seek an appropriate remedy on appeal after a final judgment is entered. *See, e.g.*, *Cantie v. Hillside Plaza*, 8th Dist. Cuyahoga No. 99850, 2014-Ohio-822, ¶ 24; *Matteo v. Principe*, 8th Dist. Cuyahoga No. 92894, 2010-Ohio-1204, ¶ 19-20; *Bressan v. Secura Ins. Co.*, 8th Dist. Cuyahoga No. 64997, 1994 Ohio App. LEXIS 1800, 13

(Apr. 28, 1994); *United States Bank, N.A. v. Courthouse Crossing Acquisitions, L.L.C.*, 2017-Ohio-9232, 103 N.E.3d 300, ¶ 12 (2d Dist.); *see also Haskins v. Haskins*, 104 Ohio App.3d 58, 61, 660 N.E.2d 1260 (2d Dist.1995) ("Generally, an order denying a motion to dismiss is not a final order because the reasons for which the dismissal was sought continue undisturbed to the final judgment, permitting prosecution of the error, if any, on the final judgment.").

{¶ 16} The rule that the denial of a motion to dismiss is not a final order applies with "equal force" to motions to dismiss that challenge personal jurisdiction and subject matter jurisdiction. *See, e.g., Cantie* at ¶ 24; *Goree v. Northland Auto Ent.*, 8th Dist. Cuyahoga No. 108881, 2020-Ohio-3457, ¶ 29 ("An order denying a motion to dismiss for lack of personal jurisdiction is not a final, appealable order and cannot be reviewed by this court."); *Nejman v. Charney*, 8th Dist. Cuyahoga No. 102584, 2015-Ohio-4087, ¶ 5, 27 ("This court has long held that an order denying a motion to dismiss for lack of personal jurisdiction does not determine the action, does not prevent judgment, and is not a final, appealable order."); *Matteo* at ¶ 19-22 (Appellate court lacked jurisdiction to consider whether trial court erred by denying father's motion to dismiss mother's motions to modify child support on the grounds that the child had reached the age of majority because trial court's order was not a final, appealable order. Trial court's order did not determine the action and prevent a judgment and father had the ability to challenge the trial court's exercise of jurisdiction through an appeal of any order that modified child support.); *Bressan* at 12-13 (appellate court lacked jurisdiction over cross-appeal of order

denying motion to dismiss for lack of personal jurisdiction and insufficiency of service of process); *see also Courthouse Crossing Acquisitions* at ¶ 11-13 (appellate court lacked jurisdiction to consider denial of motion to dismiss raising issues of standing, jurisdiction, service and capacity); *First Natl. Bank v. Teofilo*, 5th Dist. Richland No. 95 CA 65-2, 1996 Ohio App. LEXIS 4448, 3-4 (Sept. 20, 1996) (judgment entry overruling appellant's motion to strike motions and other filings filed during bankruptcy stay was not a final and appealable order as defined by R.C. 2505.02).

{¶ 17} On March 22, 2021, this court ordered appellant to file a brief addressing "the existence of a final, appealable order in this case," including *Nejman*, 2015-Ohio-4087, and *Shane v. Tracy*, 8th Dist. Cuyahoga No. 77025, 2000 Ohio App. LEXIS 3844 (Aug. 24, 2000), and "whether the trial court's denial of appellant's motion to dismiss and motion to strike in this case constitute final appealable orders."

{¶ 18} In *Nejman*, this court held that a trial court's order denying a motion to dismiss for lack of personal jurisdiction was not a final, appealable order under R.C. 2505.02(B)(1), (2) or (4) because the order did not conclusively determine the action with respect to a provisional remedy, the claims at issue were common law actions and not special proceedings, the ruling did not involve a summary application in an action after judgment and the ruling did not prevent a judgment or determine an action. *Nejman* at ¶ 19, 22-28.

{¶ 19} In *Shane*, this court held that an order denying a motion to dismiss on grounds of immunity, among others, was not a final, appealable order under R.C. 2505.02(B)(1), (2) and (4) because (1) the denial of a motion to dismiss does not determine the action and prevent a judgment, (2) the denial of a motion to dismiss does not constitute a provisional remedy because "it is not ancillary to the action but goes to the essence of the action itself," (3) the denial of a motion to dismiss does not affect a substantial right and (4) a party does not lack an opportunity for meaningful review of the trial court's ruling "as it can be brought up on appeal following the conclusion of the action." *Shane* at 10-12. The court explained: '"Ordinarily, after a motion to dismiss is overruled, the case will proceed to trial and in the event of a judgment adverse to the moving party, the trial court's action overruling the motion may become one of the assignments of error on appeal.'" *Id.* at 10, quoting *Lakewood v. Pfeifer*, 83 Ohio App.3d 47, 50, 613 N.E.2d 1079 (8th Dist.1992), citing *State v. Eberhardt*, 56 Ohio App.2d 193, 197-198, 381 N.E.2d 1357 (8th Dist.1978).

{¶ 20} On April 8, 2021, Mother filed a "brief in support of a final appealable order." In her brief, Mother does not identify any basis under R.C. 2505.02(B), pursuant to which she contends the trial court's order would qualify as a final, appealable order. Nor does she cite any case law in support of her contention that the trial court's order denying her motion to dismiss Father's motion to modify child support and denying her motion to strike Father's objections to the magistrate's decision is a final, appealable order. She simply argues that her appeal should be

permitted to proceed because: (1) it is "uncontroverted" that she was not served with Father's motion to modify child support in accordance with Civ.R. 4; (2) the trial court "clearly erred" when it reversed the magistrate's decision dismissing Father's motion to modify child support for lack of service; (3) "[i]t would be a waste of judicial resources and unduly burdensome" to require Mother "to litigate a motion to a final decision when the [c]ourt has no jurisdiction over [her] with respect to that motion" and (4) Mother "will never be able to recover the time and expense she will incur if she is required to wait until the Motion to Modify Child Support is fully litigated before she is permitted to file an appeal." With respect to this court's prior holdings in *Nejman* and *Shane*, Mother simply contends that those cases are distinguishable because neither of those cases involved an appeal of a denial of a motion to dismiss "involv[ing] a challenge regarding failure of personal service."

{¶ 21} In this case, we find no basis upon which to deviate from the general rule that a trial court's order denying a motion to dismiss is not a final, appealable order. The order that is the subject of Mother's appeal does not fall within any of the seven categories of final, appealable orders identified in R.C. 2505.02(B).

{¶ 22} Although a motion to modify child support may qualify as a "special proceeding" under R.C. 2505.02(B)(2), *see, e.g.*, *In re K.A.V.*, 2d Dist. Montgomery No. 26312, 2014-Ohio-5575, ¶ 13, *Worch v. Worch*, 2d Dist. Darke No. 98 CA 1477, 1999 Ohio App. LEXIS 2589, 3 (June 11, 1999), and *Jennings v. Hall*, 12th Dist. Butler No. CA2012-12-259, 2013-Ohio-1731, ¶ 6, the trial court's order denying Mother's motion to dismiss Father's motion to modify child support and Mother's

motion to strike Father's objections to the magistrate's decision does not affect a substantial right.

{¶ 23} An order affects a substantial right if, in the absence of an immediate appeal, one of the parties would be foreclosed from appropriate relief in the future. *See, e.g., Crown Servs. v. Miami Valley Paper Tube Co.*, 162 Ohio St.3d 564, 2020-Ohio-4409, 166 N.E.3d 1115, ¶ 16 ("An order affects a substantial right 'only if an immediate appeal is necessary to protect the right effectively.'"), quoting *Wilhelm-Kissinger v. Kissinger*, 129 Ohio St.3d 90, 2011-Ohio-2317, 950 N.E.2d 516, ¶ 7, citing *Bell v. Mt. Sinai Med. Ctr.*, 67 Ohio St.3d 60, 63, 616 N.E.2d 181 (1993). There has been no showing that Mother would be denied the ability to obtain effective relief by being required to raise her arguments that (1) the trial court incorrectly determined that Mother "waived her jurisdictional defect argument" based on lack of service "by responding and actively participating in the proceedings before raising it at the February 24, 2020 hearing" and (2) the trial court incorrectly considered Father's objections to the magistrate's decision, after that court determines whether Father's child support obligation should be modified. Mother can seek an appropriate remedy on appeal after a final judgment is entered. Thus, R.C. 2505.02(B)(2) does not apply.

{¶ 24} The trial court's order does not determine the action and prevent a judgment on Father's motion to modify child support; determination of Father's motion to modify child support was deferred to a later date. *See, e.g., Crown Servs.* at ¶ 17 ("An order determines the action and prevents a judgment when it 'dispose[s]

of the merits of the cause or some separate and distinct branch thereof and leave[s] nothing for the determination of the court[.]' * * * 'A judgment that leaves issues unresolved and contemplates further action is not a final, appealable order.'"), quoting *VIL Laser Sys., L.L.C., v. Shiloh Industries, Inc.*, 119 Ohio St.3d 354, 2008-Ohio-3920, 894 N.E.2d 303, ¶ 8. And the trial court's order did not grant or deny a provisional remedy. *See, e.g., Shane*, 2000 Ohio App. LEXIS 3844, at 12 ("[A] denial of a motion to dismiss does not constitute a provisional remedy as it is not ancillary to the action but goes to the essence of the action itself. Nor is a party precluded from meaningful review of the trial court's denial as it can be brought up on appeal following the conclusion of the action."). Increased litigation costs and the delay caused by continued litigation does not generally render a remedy following final judgment unmeaningful or ineffective. *See, e.g., Ralls v. 2222 Internatl., L.L.C.*, 8th Dist. Cuyahoga No. 108314, 2019-Ohio-4261, ¶ 23; *Gardner v. Ford*, 1st Dist. Hamilton No. C-150018, 2015-Ohio-4242, ¶ 5-8, 11. Thus, R.C. 2505.02(B)(1) and (4) do not apply.

{¶ 25} Finally, the trial court's order did not vacate or set aside a judgment or grant a new trial, did not determine if the case could proceed as a class action, did not determine the constitutionality of any changes to the Revised Code made by Am. Sub. S.B. 281 of the 124th General Assembly or Sub. S.B. 80 of the 125th General Assembly and was not entered in an appropriation proceeding. Thus, R.C. 2505.02(B)(3), (5), (6) and (7) do not apply.

{¶ 26} Because the trial court's order is not a final, appealable order under R.C. 2505.02, we dismiss this appeal.

{¶ 27} Appeal dismissed.

It is ordered that appellee shall recover from appellant the costs herein taxed.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

EILEEN A. GALLAGHER, JUDGE

ANITA LASTER MAYS, P.J., and
KATHLEEN ANN KEOUGH, J., CONCUR