

THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
ASHTABULA COUNTY, OHIO

SCOTT ALLEN BARNES,	:	MEMORANDUM OPINION
ADMINISTRATOR OF THE ESTATE OF	:	
ROBERT L. BARNES,	:	
Plaintiff-Appellee,	:	
-vs-	:	CASE NO. 2003-A-0122
ANDOVER VILLAGE RETIREMENT	:	
COMMUNITY, LTD., et al.,	:	
Defendant-Appellant	:	

Civil Appeal from the Court of Common Pleas, Case No. 2003 CV 298.

Judgment: Appeal Dismissed.

Nicholas A. Iarocci, The Iarocci Law Firm, Ltd., 213 Washington Street, Conneaut, OH 44030, *Ronald A. Marks*, 258 Seneca Avenue, N.E., Warren, Ohio 44481 (For Plaintiff-Appellee).

Lisa Marie Clark, 405 Tallmadge Road, #123, Cuyahoga Falls, OH 44221 (For Defendant-Appellant).

WILLIAM M. O'NEILL, J.

{¶1} On November 12, 2003, appellant, Andover Village Retirement Community, Ltd., filed a notice of appeal from an October 9, 2003 judgment of the Ashtabula County Court of Common Pleas. Thus, the appeal was filed thirty-two days after the judgment had been issued by the trial court.

{¶2} On November 24, 2003, appellee, Scott Allen Barnes, filed a motion to dismiss this appeal on two grounds. First, appellee asserts that the notice of appeal was untimely filed. Second, appellee argues that the judgment being appealed was not a final appealable order. Appellant filed a response on December 1, 2003.

{¶3} App.R. 4(A) states:

{¶4} “A party shall file the notice of appeal required by App.R. 3 within thirty days of the later of entry of the judgment or order appealed or, in a civil case, service of the notice of judgment and its entry if service is not made on the party within the three day period in Rule 58(B) of the Ohio Rules of Civil Procedure.”

{¶5} Loc.R. 5(C) of the Eleventh District Court of Appeals provides:

{¶6} “In the filing of a Notice of Appeal in civil cases in which the trial court clerk has not complied with Ohio Civ.R. 58(B), *and the Notice of Appeal is deemed to be filed out of rule*, appellant shall attach an affidavit from the trial court clerk stating that service was not perfected pursuant to Ohio App.R. 4(A). The clerk shall then perfect service and furnish this Court with a copy of the appearance docket in which date of service has been noted. Lack of compliance shall result in the *sua sponte* dismissal of the appeal under Ohio App.R. 4(A).” (Emphasis sic.)

{¶7} In the present case, appellant has not complied with the thirty-day rule. Because the thirty-day deadline fell on Saturday, November 8, 2003, appellant had until Monday, November 10, 2003 to file its notice of appeal. App.R.14(A). The notice of appeal was filed two days later, on November 12, 2003.

{¶8} Appellant claims that service was not timely perfected pursuant to App.R. 4(A) and that, in fact, it did not receive notice of the trial court’s judgment until October 14, 2003. Thus appellant asserts that its notice of appeal was timely filed as it was within thirty days of that date.

{¶9} It is clear, however, that appellant has failed to comply with Loc.R. 5(C) of the Eleventh District Court of Appeals. That rule requires that an allegation that the trial court clerk has not complied with Civ.R. 58(B) be supported by an affidavit from the trial court clerk stating that service was not perfected pursuant to App.R. 4(A). The clerk then needs to furnish this court with a copy of the appearance docket in which date of service has been noted.

{¶10} In the instant cause, appellant has not provided this court with an affidavit from the trial court clerk and, furthermore, the docket indicates that service was made on appellant's attorney on October 9, 2003, which is the same day that the judgment was issued. Accordingly, this court must accept as true the notation in the docket that service was made in compliance with App.R. 4(A). Thus, appellant's notice of appeal was untimely filed. The time requirement is jurisdictional in nature, and may not be enlarged by an appellate court. *State ex rel. Pendell v. Adams Cty. Bd. of Elections* (1988), 40 Ohio St.3d 58, 60; App.R. 14(B).

{¶11} Hence, appellee's motion to dismiss this appeal due to untimeliness must be granted. This makes the issue of whether the judgment being appealed is a final appealable order moot.

{¶12} Appellee's motion to dismiss this appeal is hereby granted.

{¶13} The appeal is dismissed.

Appeal dismissed.

DONALD R. FORD, P.J., and JUDITH A. CHRISTLEY, J., concur.