[Cite as *Law Office of Natalie F. Grubb v. Bolan*, 2010-Ohio-1156.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

THE LAW OFFICE OF NATALIE GRUBB,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2008-G-2840**
- vs -	:	
KELLY BOLAN,	:	
Defendant/ Third Party Plaintiff,	:	
NATALIE F. GRUBB, ESQ.,	:	
Third Party Defendant-Appellant,	:	
(R. RUSSELL KUBYN,	:	
Appellee).	:	

Civil Appeal from the Chardon Municipal Court, Case No. 2007 CVF 520.

Judgment: Appeal dismissed.

Natalie F. Grubb and *John S. Lobur*, Grubb & Associates, L.P.A., 437 West Lafayette Road, Ste. 260-A, Medina, OH 44256 (For Plaintiff-Appellant and Third Party Defendant-Appellant).

R. Russell Kubyn, The Kubyn Law Firm, 8373 Mentor Avenue, Mentor, OH 44060 (For Appellee).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellants, The Law Office of Natalie F. Grubb ("NFG") and Natalie F. Grubb, Esq., appeal from the judgment of the Chardon Municipal Court denying their motion for sanctions, attorney fees, and costs filed against appellee, R. Russell Kubyn. Because the underlying judgment is not a final appealable order, this appeal is dismissed.

{¶2} On May 3, 2007, NFG filed a complaint against Kelly Bolan for failure to pay legal services rendered. Ms. Bolan later filed an answer accompanied by a counterclaim and third-party complaint which named Ms. Grubb as third-party defendant. Ms. Bolan's counterclaim asserted that Ms. Grubb committed malpractice in representing her in a previous case.

{¶3} On September 7, 2007, NFG and Ms. Grubb filed an answer to Ms. Bolan's counterclaim/third-party complaint. In addition to answering the pleadings, NFG and Ms. Grubb alleged a claim for malicious prosecution against Ms. Bolan. They further filed a motion for sanctions pursuant to Civ.R. 11 and R.C. 2323.51, alleging that Ms. Bolan's attorney, appellee-Mr. Kubyn, materially misled the trial court by signing the counterclaim/third-party complaint without grounds of support. Specifically, Ms. Grubb claimed the allegation of malpractice had no foundation because she had never met nor represented Ms. Bolan in any previous matter.

{¶4} On October 22, 2007, NFG and Ms. Grubb filed a motion for attorney fees and costs against Ms. Bolan and Mr. Kubyn also pursuant to Civ.R. 11 and R.C. 2323.51. The matter was set for hearing on March 3, 2008. Prior to the hearing, Mr. Kubyn filed a motion to withdraw as Ms. Bolan's counsel, which the trial court granted. On the day of the hearing, NFG and Ms. Grubb filed another motion for sanctions,

attorney fees, and costs to "remind [the] Court that the withdrawal of an attorney has no effect on an action concerning his or her frivolous conduct in a matter." The hearing proceeded ex parte as Mr. Kubyn failed to appear. On April 23, 2008, the magistrate concluded NFG and Ms. Grubb failed to prove that Mr. Kubyn violated Civ.R. 11 and also failed to show he engaged in frivolous conduct. The trial court adopted the magistrate's decision on April 28, 2008.

{¶5} On April 18, 2008, several days before the magistrate issued his decision, Ms. Bolan, via newly retained counsel, filed a pleading captioned "Suggestion of Stay." The pleading sought to notify the trial court that a "bankruptcy stay" had been entered by the federal court pursuant to Section 362 of the United States Bankruptcy Code. The magistrate subsequently issued a ruling captioned "Magistrate's Order" in which he concluded "all proceedings in the within cause be and they are hereby stayed until further order of the court. The court shall show the within case closed and plaintiff shall be billed for any outstanding costs due to the Court." No action was taken by the trial court on the "Magistrate's Order."

{¶6} On May 16, 2008, appellants filed their notice of appeal of the trial court's April 28, 2008 decision. Ms. Bolan later filed a motion to stay the appellate proceedings, asserting all further proceedings related to the underlying case should be stayed pending a final order from the United States Bankruptcy Court. On June 5, 2008, this court granted Ms. Bolan's motion. On January 28, 2009, Ms. Bolan was discharged in bankruptcy. As a result, the stay of proceedings was lifted by a judgment of this court entered on May 26, 2009. The record was subsequently transmitted and the parties filed their respective briefs.

{¶7} Appellants assert the following three assignments of error on appeal:

{¶8} "[1.] The trial court erred to the prejudice of Appellants as the trial court failed to make a factual finding or legal conclusion that the Appellee violated Civil Rule 11.

{¶9} "[2.] The trial court erred to the prejudice of Appellants as the trial court failed to make a factual finding or legal conclusion that the Appellee violated O.R.C. Section 2323.51.

{¶10} "[3.] The trial court erred to the prejudice of Appellants as the trial court failed to make a factual finding or legal conclusion that the Appellants presented a malicious prosecution counterclaim."

{¶11} We need not broach the merits of appellants' arguments because, as pointed out in our introductory paragraph, the order from which the instant appeal was taken is not final. To invoke the jurisdiction of an appellate court, the subject order or judgment must be final. *Davis v. Border*, 170 Ohio App.3d 758, 761, 2007-Ohio-692; see, also, *Klein v. Bendix--Westinghouse Automotive Air Brake Co.* (1968), 13 Ohio St.2d 85, 86. In order to be final and appealable, an order must comply with R.C. 2505.02 and, when applicable, Civ.R. 54(B). The judgment submitted for our review fails to meet the criteria set forth under the statute.

{¶12} R.C. 2505.02(B) provides:

{¶13} "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:

{¶14} "(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

{¶15} "(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

{¶16} "(3) An order that vacates or sets aside a judgment or grants a new trial;

{¶17} "(4) An order that grants or denies a provisional remedy and to which both of the following apply:

{¶18} "(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.

{¶19} "(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. ***"

{¶20} First of all, a necessary criterion for finality under R.C. 2505.02(B)(1) and (2) is a finding that the order affect a substantial right. Pursuant to R.C. 2505.02(A)(1), 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." Although Civ.R. 11 and R.C. 2323.51 enable a party to seek sanctions for frivolous conduct, one is not *entitled to* sanctions simply because such procedures exist. Because appellants have no right to sanctions under the enabling rule or statute, the denial of their motion did not affect a substantial right. See, e.g., *Monda v. Shore*, 11th Dist. No. 2008-P-0078, 2009-Ohio-2088, at ¶ 21.

{¶21} Additionally, the denial of the motion neither determined the underlying action nor prevented a judgment on the complaint or counterclaim. Appellants' breach

of contract claim and Bolan's malpractice claim were fundamentally unaffected by the court's decision to deny the motion.

{¶22} Further, the judgment was not entered in a special proceeding. Rather, the court's denial of the motion occurred after a pretrial hearing which was ancillary to an underlying action for breach of contract. A breach of contract action is an ordinary civil proceeding in which a party seeks damages. Such an action does not qualify as a special proceeding. *Walters v. The Enrichment Ctr. of Wishing Well, Inc.*, 78 Ohio St.3d 118, 121-122, 1997-Ohio-232; see, also *Mattison v. Khalil,* 6th Dist. No. L-07-1393, 2008-Ohio-716, at ¶16. Given these reasons, R.C. 2505.02(B)(1) and (2) do not operate to render the subject judgment final and appealable.

{¶23} The only remaining provision of the statute that could apply is R.C. 2505.02(B)(4). However, nothing indicates appellants would be precluded from obtaining "a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action." R.C. 2505.02(B)(4)(b). That is, there is no danger that a meaningful remedy would be unavailable upon an appeal after the underlying proceedings properly concluded. Accordingly, R.C. 2505.02(B)(4) is also inapplicable to the instant case and the judgment upon which this appeal is premised is not a final, appealable order.

{¶24} We recognize that several days before the magistrate entered his decision, Ms. Bolan filed a pleading suggesting the underlying proceedings be stayed pending resolution of federal bankruptcy proceedings into which she had recently entered. On the same day the magistrate entered his decision overruling appellant's motion for sanctions, he issued an additional order granting the stay "until further order

of the court." The magistrate further observed that "[t]he court records shall show the within case closed and plaintiff shall be billed for any outstanding costs due to the Court." The magistrate's statement indicates an intention to enter a sua sponte involuntary dismissal of all claims remaining in the underlying matter. However, there is nothing in the record to indicate the trial court ever adopted the magistrate's decision.

{¶25} Civ.R. 53(D)(4)(a) provides: "[a] magistrate's decision is not effective unless adopted by the court." Accordingly, by not adopting the magistrate's decision, the trial court did not enter judgment on the issue. See, e.g., *Price v. Paragon Graphic, Ltd*., 5th Dist. No. 08CA3, 2008-Ohio-6626, at ¶19. Consequently, the "magistrate's order" closing the case was inconsequential. Pursuant to the Ohio Rules of Civil Procedure, "*** only a judge-not a magistrate-may terminate a claim or action by entering judgment." *Harkai v. Scherba Industries, Inc*. (2000), 136 Ohio App.3d 211, 218. Thus, the magistrate's entry had no effect on the appealability of the judgment under consideration.

{¶26} Because we conclude the judgment was not a final, appealable order under R.C. 2505.02(B), we are precluded from addressing the merits of the denial of appellants' motion for sanctions, attorney fees and costs against appellee. The instant appeal is hereby dismissed.

MARY JANE TRAPP, P.J.,

TIMOTHY P. CANNON, J.,

concur.