

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

ROBERT L. ELIA, et al.,	:	MEMORANDUM OPINION
Plaintiffs-Appellants,	:	
- vs -	:	CASE NO. 2010-T-0036
FISHERMAN'S COVE, INC., et al.,	:	
Defendants,	:	
KIRK F. CUSICK,	:	
Defendant-Appellee,	:	
ERIE INSURANCE EXCHANGE,	:	
Intervenor-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2008 CV 01659.

Judgment: Appeal dismissed.

Mark I. Verkhlin, 839 Southwestern Run, Youngstown, OH 44514 (For Plaintiffs-Appellants).

Larry D. Wilkes and Enzo C. Cantalamessa, Davis & Young, L.P.A., 972 Youngstown-Kingsville Road, Suite G, P.O. Box 740, Vienna, OH 44473, and *James A. O'Brien*, 7337 Warren-Sharon Road, P.O. Box 9, Brookfield, OH 44403-0009 (For Defendant-Appellee).

Robert L. Tucker, Gregg A. Peugeot and R. Brian Borla, Hanna, Campbell & Powell, L.L.P., 3737 Embassy Parkway, #100, P.O. Box 5521, Akron, OH 44334 (For Intervenor-Appellee).

DIANE V. GRENDELL, J.

{¶1} On March 10, 2010, appellants, Robert L. Elia and Suzanne Elia, by and through counsel, filed a notice of appeal from a February 22, 2010 entry of the Trumbull County Court of Common Pleas. In that entry, the trial court granted the motion for summary judgment of intervenor-appellee, Erie Insurance Exchange, on its declaratory judgment action. The trial court also granted the motion for summary judgment of appellee, Kirk F. Cusick. In that same entry, the trial court denied appellants' motion for default judgment against defendant, Tara S. McGee. As to the motion for default judgment filed by appellants against defendant, Matthew A. Faber, the trial court found that the required affidavit had not been filed and held that portion of the motion for default judgment against Mr. Faber in abeyance to provide appellants an opportunity to file an appropriate affidavit in support of their motion.

{¶2} Erie filed a motion to dismiss the appeal on March 17, 2010. In its motion, Erie alleges that this court lacks jurisdiction to hear this appeal since the February 22, 2010 entry was not a final appealable order pursuant to Civ.R. 54(B). Appellant has not filed a response in opposition to the motion to dismiss.

{¶3} A review of the trial court docket reveals that appellants filed their initial complaint on June 10, 2008. Appellants subsequently filed two amended complaints. The second amended complaint filed by appellants included Fishermen's Cove, Inc., Mr. Cusick, Mr. Faber, and Ms. McGee, as defendants. Erie filed a motion for leave to intervene on August 4, 2008, which was granted. Erie then filed a motion for summary judgment on March 4, 2009. Mr. Cusick filed a motion for summary judgment on October 15, 2009. Appellants filed a motion for default judgment against Mr. Faber and

Ms. McGee on November 18, 2009. On December 2, 2009, Ms. McGee filed an answer to the complaint. In the February 22, 2010 entry, the trial court granted the motions for summary judgment of Erie and Mr. Cusick. The trial court denied the motion for default judgment as to Ms. McGee and held it in abeyance as to Mr. Faber. It is from that entry, appellants brought the instant appeal.

{¶4} Civ.R. 54(B) provides that:

{¶5} “When more than one claim for relief is presented in an action whether as a claim, counterclaim, cross-claim, or third-party claim, and whether arising out of the same or separate transactions, or when multiple parties are involved, the court may enter final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay. In the absence of a determination that there is no just reason for delay, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties, shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.”

{¶6} This court has held that where there are multiple claims and/or parties involved, an entry that enters final judgment as to one or more but fewer than all of the claims is not a final appealable order in the absence of Civ.R. 54(B) language stating that “there is no just reason for delay[.]” *Montello v. Ackerman*, 11th Dist. No. 2009-L-111, 2009-Ohio-6383, at ¶6. See, also, *Kessler v. Totus Tuus, L.L.C.*, 11th Dist. No. 2007-A-0028, 2007-Ohio-3019, at ¶7.

{¶7} It is well settled that a declaratory judgment action is a special proceeding pursuant to R.C. 2505.02 and, therefore, an order entered therein that affects a substantial right is a final appealable order as long as the requisite Civ.R. 54(B) determination is made. See *Walburn v. Dunlap*, 121 Ohio St.3d 373, 2009-Ohio-1221, ¶17.

{¶8} In the instant matter, while the trial court granted the motions for summary judgment of Erie and Mr. Cusick, it is clear that claims are still pending in the trial court against Mr. Faber, Ms. McGee, and Fishermen's Cove. Furthermore, the February 22 judgment entry that was appealed from does not contain any Civ.R. 54(B) language. Thus, without the inclusion of Civ.R. 54(B) language, there is no final appealable order at this time.

{¶9} Based upon the foregoing analysis, Erie's motion to dismiss is granted, and this appeal is hereby dismissed due to lack of a final appealable order.

{¶10} Appeal dismissed.

MARY JANE TRAPP, P.J,

CYNTHIA WESTCOTT RICE, J.,

concur.