[Cite as *Girard v. Youngstown Belt Ry. Co.*, 2019-Ohio-5417.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

CITY OF GIRARD, OHIO, Plaintiff-Appellant, - vs - THE YOUNGSTOWN BELT RAILWAY COMPANY, et al., Defendant-Appellee.	: : : : : :	**MEMORANDUM OPINION** **CASE NO. 2019-T-0060**

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 2006 CV 02995.

Judgment: Appeal dismissed.

LuWayne Annos, P.O. Box 413, Niles, OH 44446; and *Brian C. Kren,* Girard City Law Director, 100 West Main Street, Girard, OH 44420 (For Plaintiff-Appellant).

Richard Leland Evans and *Richard James Silk, Jr.,* Dickie McCamey & Chilcote, P.C., 250 Civic Center Drive, Suite 280, Columbus, OH 43215 (For Defendant-Appellee).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellee, The Youngstown Belt Railway Co., et al. ("YBR"), has moved to dismiss the underlying appeal, filed by appellant, City of Girard, Ohio ("the city"), for lack of a final, appealable order. For the reasons that follow, we grant YBR's motion and dismiss the instant appeal.

{¶2} In 2006, the city sought to appropriate approximately 41.5 acres of a 55-acre parcel of land owned, but not fully used, by YBR. YBR filed a motion to dismiss,

arguing the Trumbull County Court of Common Pleas was federally preempted by the Interstate Commerce Commission Termination Act ("ICCTA") and that, therefore, the matter must be committed to the exclusive jurisdiction of the Surface Transportation Board ("STB"). The city opposed YBR's motion, arguing the appropriation would have no effect on YBR's operation of its railway and, as a result, its cause of action was not federally preempted. In May 2010, the trial court concluded the city's cause of action in appropriation was federally preempted.

{¶3} The city appealed and, in *Girard v. Youngstown Belt Ry. Co.*, 196 Ohio App.3d 271, 2011-Ohio-4699 (11th Dist.), while rejecting much of the trial court's rationale, this court affirmed the trial court's ultimate disposition. *Id.* at ¶55. The Supreme Court of Ohio then accepted discretionary review of the City's appeal. In *Girard v. Youngstown Belt Ry. Co.*, 134 Ohio St.3d 79, 2012-Ohio-5370, the Court reversed this court and held the Trumbull County Court of Common Pleas had jurisdiction over the city's complaint for appropriation was not federally preempted under the ICCTA. *Id.* at ¶44. The matter was therefore remanded to the court of common pleas.

{¶4} Ultimately, the parties commenced discussions regarding a possible resolution of the city's appropriation claim. The city then attempted to enforce a purported settlement agreement through a motion to enforce. YBR, however, denied a settlement had been reached. A hearing was held and, on December 6, 2018, the trial court issued a decision denying the motion to enforce.

{¶5} On January 7, 2019, the city filed a motion to amend and supplement its complaint for appropriation to include the appropriation of two different rights-of-way. YBR opposed the motion, but the trial court granted the same. Subsequently, YBR filed

a motion to reconsider, asserting the additional appropriation(s) were preempted by the ICCTA. A hearing was held and, on August 9, 2019, the trial court granted YBR's motion concluding it lacked subject-matter jurisdiction to hear the new matters that were the subject of the amended complaint. The judgment entry stated it was a "final appealable order," but, notwithstanding the pending appropriation proceedings, did not include Civ.R. 54(B) language. The city filed a notice of appeal of both the December 6, 2018 judgment denying enforcement of a purported settlement agreement as well as the August 9, 2019 judgment. YBR subsequently filed its motion to dismiss for lack of a final appealable order, to which the city duly opposed; YBR, with leave of this court, filed a reply to the memorandum in opposition.

{¶6} Pursuant to Section 3(B)(2), Article IV of the Ohio Constitution, a judgment of a trial court can be immediately reviewed by an appellate court only if it constitutes a "final order" in the action. *Germ v. Fuerst,* 11th Dist. Lake No. 2003-L-116, 2003-Ohio-6241, ¶3. If a lower court's order is not final, then an appellate court does not have jurisdiction to review the matter, and the matter must be dismissed. *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.,* 44 Ohio St.3d 17, 20 (1989). For a judgment to be final and appealable, it must satisfy the requirements of R.C. 2505.02 and if applicable, Civ.R. 54(B). *See Children's Hosp. Med. Ctr. v. Tomaiko,* 11th Dist. Portage No. 2011-P-0103, 2011-Ohio-6838, ¶3.

{¶7} We first point out that the December 6, 2018 judgment is not properly before this court because the entry did not include proper Civ.R. 54(B) language. To the extent that judgment was otherwise final and appealable, Civ.R. 54(B) language was necessary because issues are still pending relating to the original appropriations

proceeding. We shall next consider whether the August 9, 2019 judgment is final and appealable.

{¶8} Pursuant to R.C. 2505.02(B), there are various categories of a "final order," and if the judgment of the trial court satisfies any of them, it will be deemed a "final order" and can be immediately appealed and reviewed by a court of appeals. YBR sets forth various bases in support of its argument that the underlying judgment is not a final, appealable order. The city, alternatively, does not make a specific argument that the order is final, per R.C. 2505.02(B); rather, it appears to presume finality and simply requests this court to temporarily remand this matter for the trial court to determine whether to affix the necessary Civ.R. 54(B) language. In its docketing statement, however, the city references R.C. 2505.02(B)(1), (2), (4), and (7) as bases for the appealability of the order.

{¶9} R.C. 2505.02(B) states, in relevant part:

> **{¶10}** 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:
>
> **{¶11}** (1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;
>
> **{¶12}** (2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;
>
> **{¶13}** * * *
>
> **{¶14}** (4) An order that grants or denies a provisional remedy and to which both of the following apply:
>
> **{¶15}** (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.

{¶16} (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.

{¶17} * * *

{¶18} (7) An order in an appropriation proceeding that may be appealed pursuant to division (B)(3) of section 163.09 of the Revised Code.

{¶19} Pursuant to R.C. 2505.02(B)(1) and (2), a final order is one that must "affect a substantial right." 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). "An order that affects a substantial right has been perceived to be one which, if not immediately appealable, would foreclose appropriate relief in the future." *DeAscentis v. Margello*, 10th Dist. Franklin No. 04AP-4, 2005-Ohio-1520, ¶19, citing *Bell v. Mt. Sinai Med. Ctr.* (1993), 67 Ohio St.3d 60, 63 (1993).

{¶20} The judgment denying the motion to amend did not "affect" a substantial right. Appellate review of the judgment will be meaningfully available once the original appropriation claim is resolved. While the trial court determined the new claim was federally preempted, the city is not required to pursue relief via the ICCTA immediately. Because the judgment does not affect a substantial right, we conclude it is not a final order under R.C. 2505.02(B)(1) or (2).

{¶21} Further, R.C. 2505.02(B)(4) first requires the judgment to grant or deny a provisional remedy. R.C. 2505.02(A)(3) defines a provisional remedy as "a proceeding ancillary to an action." The term "ancillary" is not defined in R.C. 2505.02 but has concluded that "'[a]n ancillary proceeding is one that is attendant upon or aids another proceeding.'" *State v. Muncie*, 91 Ohio St.3d 440, 449 (2001), quoting *Bishop v. Dresser*

Industries, 134 Ohio App.3d 321, 324 (1999). In this matter, no provisional remedy was denied. A motion to amend a complaint seeks to include an additional claim in an underlying action, it is not an offshoot of or subordinate to that action. Moreover, we previously concluded meaningful appellate review of the judgment will be available to the city after all issues relating to the original appropriation have been resolved. For these reasons, the judgment is not a final order pursuant to R.C. 2505.02(B)(4).

{¶22} Finally, R.C. 2505.02(B)(7) provides an order in an appropriation may be appealed under R.C. 163.09(B)(3). That subsection states:

> **{¶23}** *An owner* has a right to an immediate appeal if the order of the court is in favor of the agency in any of the matters the owner denied in the answer, unless the agency is appropriating property in time of war or other public exigency imperatively requiring its immediate seizure, for the purpose of making or repairing roads which shall be open to the public without charge, for the purpose of implementing rail service under Chapter 4981. of the Revised Code, or under section 307.08, 504.19, 6101.181, 6115.221, 6117.39, or 6119.11 of the Revised Code or by a public utility owned and operated by a municipal corporation as the result of a public exigency. (Emphasis added.)

{¶24} The foregoing, by its plain language, applies only to when an owner of private property seeks to appeal an adverse order relating to matters denied in its answer to the appropriation complaint. The city seeks to appeal the denial of its motion to amend. R.C. 2505.02(B)(7) is in no way applicable.

{¶25} In light of the above analysis, we conclude the August 9, 2019 order is not a final, appealable order. This appeal is therefore dismissed.

MARY JANE TRAPP, J., concurs,

TIMOTHY P. CANNON, J., concurs in judgment only.