

[Cite as *Gordon v. Shallow Creek Dev.* , 2009-Ohio-6791.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

PAUL GORDON

Plaintiff-Appellant

-vs-

SHALLOW CREEK DEVELOPMENT
CO., et al.

Defendants-Appellees

JUDGES:

Hon. John W. Wise, P. J.

Hon. Julie A. Edwards, J.

Hon. Patricia A. Delaney, J.

Case No. 2009 CA 00115

OPINION

CHARACTER OF PROCEEDING:

Civil Appeal from the Court of Common
Pleas, Case No. 2008 CV 03908

JUDGMENT:

Dismissed

DATE OF JUDGMENT ENTRY:

December 22, 2009

APPEARANCES:

For Plaintiff-Appellant

For Defendants-Appellees

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Wise, P. J.

{¶1} Plaintiff-Appellant Paul Gordon appeals from the December 2, 2008, Judgment Entry of the Stark County Court of Common Pleas, granting summary judgment in favor of Appellees Shallow Creek Development Co. and Clarence George.

STATEMENT OF THE FACTS AND CASE

{¶2} On February 13, 2003, Beulah Cook (“Cook”) entered into a construction contract with Appellee Shallow Creek Development Co. (“Shallow Creek”). Shortly after she purchased the home from Shallow Creek, Cook sold the home to Appellant, Paul Gordon (“Appellant”). Appellee, Clarence George (“George”), the owner of Shallow Creek, was also named as a defendant in the underlying trial court action.

{¶3} On November 4, 2008, Appellees filed a Motion for Summary Judgment.

{¶4} On December 2, 2008, the trial court granted summary judgment in favor of both Appellees on all Gordon’s claims, Cook’s breach of contract claim, breach of warranty claim, negligent damage to personal property claim, and CSPA claim. The Court also dismissed all claims against Appellee Clarence George. Accordingly, the only claim that survived Summary Judgment was Cook’s claim for negligent damage to real property.

{¶5} On March 5, 2009, Appellees filed a motion for summary judgment on the remaining claim in this case.

{¶6} On March 20, 2009, Appellees supplemented its Motion for Summary Judgment and also filed a Motion for Sanctions based upon a home inspection that did not proceed according to the agreement of counsel.

{¶17} On the same day, Cook filed a Notice of Dismissal of her remaining claims against Appellees, with prejudice. Contemporaneously with Cook's Notice of Dismissal, Appellant filed a Motion for Clarification and/or Reconsideration of the Trial Court's December 2, 2008, Judgment Entry granting summary judgment in favor of Appellees as to all of Appellant's claims.

{¶18} By Judgment Entry filed March 31, 2009, the trial court denied Appellant's Motion for Clarification and/or Reconsideration.

{¶19} On April 7, 2009, the trial court filed a Judgment Entry denying Appellees' Motion for Sanctions.

{¶10} On May 7, 2009, Appellant filed his Notice of Appeal.

{¶11} Appellant now raises the following sole assignment of error for review:

ASSIGNMENTS OF ERROR

{¶12} "I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN GRANTING SUMMARY JUDGMENT BECAUSE A SUBSEQUENT VENDEE CAN MAINTAIN A NEGLIGENCE ACTION AGAINST A VENDOR OF REAL PROPERTY EVEN THOUGHT THE VENDEE IS NOT IN PRIVITY OF CONTRACT."

I.

{¶13} In his sole assignment of error, Appellant argues that the trial court erred in Appellee's motion for summary judgment.

{¶14} We are required to first consider the issue of this Court's jurisdiction. App.R. 4(A) provides that "[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.” The time limit contained in App.R. 4(A) is jurisdictional and cannot be waived. *State ex rel. Boardwalk Shopping Ctr., Inc. v. Court of Appeals for Cuyahoga Cty.* (1990), 56 Ohio St.3d 33, 36.

{¶15} The Ohio Rules of Civil Procedure do not provide for a motion for reconsideration after final judgment in the trial court, and the application for such is a nullity. The thirty day time limit set forth in App.R. 4(A) may be extended only by those exceptions recognized in App.R. 4(B)(2). Pursuant to such rule, a motion for reconsideration does not effect or toll the time for appeal.

{¶16} We likewise find that a motion for sanctions which is collateral to and independent of the primary action, as is the case here, does not extend or toll the time for appeal. Given that sanctions in this matter relate to a discovery problem, such are collateral and incidental to the underlying action and it is possible for a trial court to enter a final judgment settling the claims of the parties to an action and retain for future determination a motion for sanctions. The filing of a motion for sanctions cannot extend the time in which to appeal from a final judgment that fully adjudicates the claims of the parties. While unquestionably the trial court's failure to determine a motion for sanctions before entering a final judgment means that an issue remains pending before it, determination of that issue is incidental to the adjudication of the parties' claims and cannot change the final judgment determining those claims. Therefore, the pendency of such a motion in the trial court does not render an otherwise final adjudication of the parties' claims interlocutory. *Dailey v. State Farm Mut. Auto. Ins. Co.* (1994), 2nd Dist.

App. No. 14632; See also *Painter v. Midland Steel Products Co.* (1989), 65 Ohio App.3d 273.

{¶17} Because Appellant failed to file a timely notice of appeal within thirty (30) days after Appellant Cook filed her Notice of Dismissal which effectively disposed of all remaining issues in this action, we find this Court lacks jurisdiction to determine the merits of Appellant's appeal. Accordingly, we dismiss this appeal for lack of jurisdiction.

By: Wise, P. J.

Edwards, J., and

Delaney, J., concur.

/S/ JOHN W. WISE_____

/S/ JULIE A. EDWARDS_____

/S/ PATRICIA A. DELANEY_____

JUDGES

JWW/d 1112

