[Cite as *Jeffrey Allen Industries, LLC v. Manco*, 2010-Ohio-5094.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
JEFFREY ALLEN INDUSTRIES, LLC	:	Julie A. Edwards, P.J.
	:	William B. Hoffman, J.
Plaintiffs-Appellants	:	John W. Wise, J.
	:	
-vs-	:	Case No. 2010 CA 0004
	:	
	:	
RONALD J. MANCO, et al	:	O P I N I O N
Defendants-Appellees		

CHARACTER OF PROCEEDING:	Civil Appeal from Richland County Court of Common Pleas Case No. 08 CV 1342
JUDGMENT:	Dismissed
DATE OF JUDGMENT ENTRY:	October 5, 2010
APPEARANCES:	
For Plaintiffs-Appellants	For Defendants-Appellees
JOSEPH T. OLECKI Weldon, Huston, & Keyser 76 North Mulberry Mansfield, Ohio 44902	JEFFREY N. KRAMER 24 West Third Street, Suite 300 Mansfield, Ohio 44902

Edwards, P.J.

{¶1} Plaintiffs-appellants, Jeffrey Allen Industries, LLC and Stacey Trimble and third-party defendant-appellant Jeffrey Benton, appeal from the December 9, 2009, Judgment Entry of the Richland County Court of Common Pleas.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellant Jeffrey Allen Industries, LLC was a cabinet-making business owned by appellant Stacey Trimble. Appellant Trimble's fiancé, appellant Jeffrey Benton, ran and managed the business. Ronald Manco was an employee.

{¶3} After appellants Benton and Trimble decided to close the cabinet-making business and sell its assets, Manco became interested in purchasing the business. Manco, however, did not have the financial means do so. For such reason, Manco approached appellee John Offenburger, an investment advisor, and suggested that if appellee Offenburger purchased the business, Manco would operate and manage the same.

{¶4} In late 2006, appellee Offenburger met with appellant Benton to tour the business. According to appellee Offenburger, at such time, appellant Benton told him that Benton's auctioneer had indicated that the assets of the business would sell for between $175,000.00 and $225,000.00 at auction. After receiving a complete list of the assets, appellee Offenburger consulted with an industrial equipment salesman who told him that the assets would sell for approximately $200,000.00 at auction.

{¶5} Based on the information that he had received, appellee Offenburger made an initial offer to purchase the business for $150,000.00. The offer was rejected by appellant Benton, who indicated that they were asking $300,000.00 for the assets.

Appellee Offenburger then offered to purchase the assets for $181,000.00. This second offer also was rejected. After weeks of negotiations, appellee Offenburger presented appellant Benton with a written Asset Purchase Agreement offering $200,000.00 for the assets and inventory.

{¶6} On March 16, 2007, appellant Stacey Trimble, both in a representative and an individual capacity, appellant Jeffrey Benton, appellee John Offenburger and Ronald Manco all signed the Asset Purchase Agreement. The Agreement stated that the purchase price for all of the assets was $200,000.00 payable in cash or certified check at the time of the closing. While the Agreement referred to Exhibits listing the assets that were being purchased, the Exhibits were not attached to the Agreement.

{¶7} On March 19, 2007, appellee Offenburger's banker prepared a credit request facility indicating that the purchase price for the assets was $250,000.00 with appellee Offenburger and Manco paying $50,000.00 in cash. The banker indicated that either appellee Offenburger or Manco had provided him with such information.

{¶8} At the closing on March 23, 2007, appellee Offenburger paid $200,000.00 to appellants Trimble and Benton for the assets of appellant Jeffrey Allen Industries, LLC. Appellee Offenburger and Manco contributed the assets to a new company, Stonybrook Cabinet Company, Inc.

{¶9} Shortly after the closing, appellant Jeffrey Benton, without Manco's or appellee Offenburger's consent or knowledge, went to three of Stonybrook's customers and arranged for them to give him checks that were intended to be final payments for projects that Stonybrook, rather than Jeffrey Allen Industries, had performed for them. Appellant Benton kept the $17,258.00 from the three checks. Manco then made a

criminal complaint against appellant Benton in the Crawford County Sheriff's Office. During his May 15, 2007, interview at the Sheriff's Office, which was transcribed, Manco stated that the parties had entered into a verbal agreement prior to the closing and that pursuant to such agreement, the parties agreed that appellants would be paid an additional $50,000.00 within one year after the closing.

{¶10} After he was called into the Sheriff's office for a recorded interview, on May 18, 2007, appellant Benton stated that he had converted the checks because appellees had agreed to pay an additional $97,000.00 for the assets above and beyond the $200,000.00 set forth in the Asset Purchase Agreement and had failed to do so.

{¶11} In February of 2008, Stonybrook Cabinet Co. closed for financial reasons.

{¶12} Thereafter, on July 8, 2008, appellants Jeffrey Allen Industries, LLC and Stacey Trimble filed a complaint against appellee John Offenburger, appellee Stonybrook Cabinet Co. and Ronald Manco. Appellants, in their complaint, alleged that the parties had agreed that an additional $97,000.00 was to be paid for the business assets, for a total purchase price of $297,000.00, and that appellees had breached such agreement. Appellants indicated that under the terms of such agreement for the additional $97,000.00, appellant Jeffrey Allen Industries was to retain $27,500.00 in customer deposits and a white truck worth $19,500.00, for a total of $47,000.00. The complaint further alleged that the remaining $50,000.00 due to appellant Jeffrey Allen Industries was to be placed in an escrow account and paid within one year. Appellant Jeffrey Allen Industries indicated in the complaint that it had retained customer deposits totaling $27,500.00 and the truck. Appellants further indicated that appellant Jeffrey

Allen Industries had retained additional customer payments totally $12,345.00, leaving a balance owed of $37,655.00 by appellees.

{¶13} Appellants also asserted claims for fraud, replevin and unjust enrichment. With respect to the unjust enrichment claim, appellants alleged that appellees had refused to pay appellant Jeffrey Allen Industries for utility bills during the period from March-May of 2007 "during which time [appellees] occupied the property and for which Jeffrey Allen Industries has been billed by the respective utilities in the amount of $5,329.36." Appellants, with respect to their replevin claim, asserted that appellees were in wrongful possession of a sander valued at $40,000.00.

{¶14} On September 10, 2008, appellees John Offenburger and Stonybrook Cabinet Co. filed an answer, counterclaim and a cross-claim against Ronald Manco. Appellees, in their counterclaim, alleged that appellant Jeffrey Allen Industries had converted $17,257.50 in payments owed to appellant Stonybrook and that appellant Jeffrey Allen Industries had committed civil theft. On September 15, 2008, appellees filed a third party complaint against appellants Benton and Trimble, alleging conversion, civil theft, and breach of a non-compete clause in the Asset Purchase Agreement. Appellees also sought permanent injunctive relief relating to the violation of the non-compete agreement. In their Third Party Complaint, appellees demanded judgment against both appellants Benton and Trimble. Thereafter, on October 10, 2008, appellees filed an amended cross-claim against Ronald Manco.

{¶15} On April 23, 2009, a Notice of Suggestion of Death of Ronald Manco was filed.

{¶16} Subsequently, appellees filed a Motion for Summary Judgment on September 16, 2009. As memorialized in a Judgment Entry filed on December 9, 2009, the trial court granted such motion. The trial court entered summary judgment against appellants on the claims in the complaint and entered judgment in favor of appellee Stonybrook Cabinet Co., Inc. and against appellant Benton in the amount of $17,258.00 plus interest. The trial court also dismissed all claims by or against Ronald Manco pursuant to Civ.R. 25(A).

{¶17} Appellants now raise the following assignments of error on appeal:

{¶18} "I. THE TRIAL COURT ERRED IN CONCLUDING THE PURCHASE AGREEMENT WAS A FULLY INTEGRATED AGREEMENT.

{¶19} "II. THE TRIAL COURT ERRED IN FAILING TO CONSIDER MANCO'S CLEAR DECLARATION AGAINST INTEREST IN DETERMINING WHETHER THE PURCHASE AGREEMENT WAS A FULLY INTEGRATED AGREEMENT.

{¶20} "III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO OFFENBURGER BASED ON HIS CLAIMED LACK OF KNOWLEDGE OF THE AGREEMENT BECAUSE, AT A MINIMUM, A GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO OFFENBURGER'S AWARENESS AND ASSENT TO THE AGREEMENT.

{¶21} "IV. THE TRIAL COURT ERRED IN HOLDING THAT DEFENDANTS ARE NOT LIABLE FOR UTILITY BILLS WHILE THEY OCCUPIED THE FORMER PREMISES OF JEFFREY ALLEN INDUSTRIES, LLC.

{¶22} "V. THE TRIAL COURT ERRED IN FINDING PLAINTIFFS WAIVED THEIR CLAIMS BY EXECUTING THE PURCHASE AGREEMENT.

{¶23} "VI. THE TRIAL COURT ERRED IN ENTERING SUMMARY JUDGMENT FOR DEFENDANTS ON THEIR CONVERSION CLAIM AGAINST JEFFREY BENTON."

{¶24} Before addressing the merits of the appellants' arguments, we must first consider whether we have jurisdiction over this appeal.

{¶25} Ohio Law provides that appellate courts have jurisdiction to review only final orders or judgments, Section III, (B)(2), Article IV, Ohio Constitution; R.C. 2505.02. If an order is not final and appealable, an appellate court has no jurisdiction to review the matter and it must be dismissed.

{¶26} To be final and appealable an order must comply with both R.C. 2505.02 and Civ. R. 54(B), if applicable.

{¶27} R.C. 2505.02 states in pertinent part:

{¶28} "(B) 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:

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

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

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

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

{¶33} "(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.

{¶34} "(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.* * "

{¶35} Civ. R. 54(B) provides: "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." (Emphasis added).

{¶36} Pursuant to this Rule, if a trial court's written decision fully disposes of fewer than all of the pending claims or parties in a civil action, then the decision will not be considered a "final judgment" unless the trial court also makes an express finding of no just reason for delay. *Smith v. Wyatt,* Stark App. No. 2003 CA 00233, 2005-Ohio-371, ¶ 10. Absent such a finding, the decision is interlocutory in nature, is not

immediately appealable, and can be revised by the trial court at any time prior to the final determination of the entire action. *Id.*

{¶37} In the case sub judice, appellees filed a Third Party Complaint against appellant Benton and appellant Trimble. Appellees, in Count One of their Third Party Complaint, set forth a claim against both appellant Benton and appellant Trimble for conversion and, in Count Two, set forth a claim against both for civil theft. In Count Three of their Third Party Complaint, appellees alleged that appellant Trimble and appellant Benton had breached a non-compete clause in the Asset Purchase Agreement. Finally, in Count Four of their Third Party Complaint, appellees asked for permanent injunctive relief relating to the alleged violation of the non-compete agreement.

{¶38} Appellees, in their Motion for Summary Judgment, specifically requested that the trial court enter summary judgment against appellant Jeffrey Allen Industries, LLC on its complaint and enter summary judgment in favor of appellee Stonybrook Cabinet Co., Inc. "on Count I [conversion] and/or Count II [civil theft] of its Third Party Complaint against Jeffrey Benton…" The trial court, as memorialized in a Judgment Entry filed on December 9, 2009, granted such motion. The only claim in the Third Party complaint addressed by the trial court in its decision was the claim against appellant Benton for conversion of checks totaling $17,258.00

{¶39} Thus, the claims set forth in Counts Three and Four of the Third-Party Complaint remain pending as to both appellant Trimble and appellant Benton. As is stated above, appellees, in Count Three, alleged that there was a violation of non-compete provision contained in the Asset Purchase Agreement and, in Count Four,

sought injunctive relieve. In addition, the claims set forth in Counts One and Two of the Third Party Complaint arguably remain pending against appellant Trimble. We note that the entry appealed from does not contain the "no just reason for delay" determination required by Civ.R. 54(B).

{¶40} Accordingly, we must dismiss this appeal for lack of jurisdiction.

By: Edwards, P.J.

Hoffman, J. and

Wise, J. concur

s/Julie A. Edwards

s/William B. Hoffman

s/John W. Wise

JUDGES

JAE/dr0715

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FIFTH APPELLATE DISTRICT

JEFFREY ALLEN INDUSTRIES, LLC	:	
Plaintiffs-Appellants	:	
-vs-	:	JUDGMENT ENTRY
RONALD J. MANCO, et al.,	:	
Defendants-Appellees	:	CASE NO. 2010 CA 0004

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Richland County Court of Common Pleas is dismissed. Costs assessed to appellants.

s/Julie A. Edwards

s/William B. Hoffman

s/John W. Wise

JUDGES