

COURT OF APPEALS  
STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

NEXUS GAS TRANSMISSION, LLC	:	JUDGES:
	:	
Plaintiff-Appellee	:	Hon. W. Scott Gwin, P.J.
	:	Hon. John W. Wise, J.
-vs-	:	Hon. Patricia A. Delaney, J.
	:	
	:	Case No. 2015CV00167
	:	
CAMELBACK, LTD., ET AL.	:	
	:	
	:	
Defendants-Appellants	:	<u>OPINION</u>

CHARACTER OF PROCEEDING:	Appeal from the Stark County Court of Common Pleas, Case No. 2015CV01586
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JUDGMENT:	DISMISSED
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DATE OF JUDGMENT ENTRY:	February 16, 2016
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APPEARANCES:

For Plaintiff-Appellee:	For Defendants-Appellants:
JAMES J. HUGHES, III	DAVID A. MUCKLOW
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*Delaney, J.*

{¶1} Defendants-Appellants appeal the September 2, 2015 judgment entry of the Stark County Court of Common Pleas granting a temporary restraining order in favor of Plaintiff-Appellee Nexus Gas Transmission, LLC.

{¶2} This case comes to us on the accelerated calendar. App.R. 11.1, which governs accelerated calendar cases. The rule provides in pertinent part the following:

(E) Determination and judgment on appeal

The appeal will be determined as provided by App. R. 11.1. It shall be sufficient compliance with App. R. 12(A) for the statement of the reason for the court's decision as to each error to be in brief and conclusionary form.

The decision may be by judgment entry in which case it will not be published in any form.

{¶3} One of the important purposes of the accelerated calendar is to enable an appellate court to render a brief and conclusory decision more quickly than in a case on the regular calendar where the briefs, facts, and legal issues are more complicated. *Crawford v. Eastland Shopping Mall Association*, 11 Ohio App.3d 158, 463 N.E.2d 655 (10th Dist.1983).

{¶4} This appeal shall be considered in accordance with the aforementioned rules.

### **FACTS AND PROCEDURAL HISTORY**

{¶5} On July 31, 2015, Plaintiff-Appellee Nexus Gas Transmission, LLC filed a complaint and motion for temporary restraining order, preliminary injunction, and/or permanent injunction in the Stark County Court of Common Pleas. Count One of the

complaint requested declaratory judgment that under R.C. 1723.01, Nexus was a company organized for the purpose of transporting natural gas through tubing, pipes, or conduits. Count Two of the complaint requested declaratory judgment that Nexus had the right to enter the Defendants' properties for the purpose of conducting survey activities pursuant to R.C. 1723.01 and 163.03. Count Three of the complaint requested injunctive relief to immediately and permanently enjoin the Defendants from further denial of and interference with Nexus's statutory right to enter onto their properties for the purpose of conducting surveys.

{¶6} On July 31, 2015, the trial court granted the motion for temporary restraining order prohibiting Defendants from interfering with Nexus's statutory right to enter their property to conduct surveys for the proposed pipeline project and permitting Nexus to conduct the surveys. The temporary restraining order was to expire within 14 days of the judgment entry and a preliminary injunction hearing was set for August 13, 2015.

{¶7} The trial court extended the July 31, 2015 temporary restraining order until August 28, 2015 and the preliminary injunction hearing was rescheduled to August 27, 2015.

{¶8} Nexus filed an amended complaint and motion for temporary restraining order, preliminary injunction and/or permanent injunction on August 27, 2015. The amended complaint named additional Defendants. (Only the Defendants named in the amended complaint are appealing the trial court's decision.) Count One of the complaint requested declaratory judgment that under R.C. 1723.01, Nexus was a company organized for the purpose of transporting natural gas through tubing, pipes, or conduits. Count Two of the complaint requested declaratory judgment that Nexus had the right to

enter the Defendants-Appellants' properties for the purpose of conducting survey activities pursuant to R.C. 1723.01 and 163.03. Count Three of the complaint requested injunctive relief to immediately and permanently enjoin the Defendants-Appellants from further denial of and interference with Nexus's statutory right to enter onto their properties for the purpose of conducting surveys.

{¶9} The trial court held a hearing on September 1, 2015. On September 2, 2015, the trial court granted Nexus's request for a temporary restraining order. The trial court ordered the temporary restraining order would expire 14 days after the date of the judgment entry. A preliminary injunction hearing was set for September 23, 2015.

{¶10} Defendants-Appellants filed a notice of appeal of the September 2, 2015 judgment entry on September 11, 2015. Defendants-Appellants filed a motion to stay pending appeal with the trial court, which the trial court denied on September 15, 2015.

{¶11} The trial court extended the temporary restraining order until September 30, 2015.

{¶12} On October 7, 2015, Nexus voluntarily dismissed its amended complaint against the Defendants-Appellants pursuant to Civ.R. 41(A)(1). The voluntary dismissal was without prejudice.

### **ASSIGNMENTS OF ERROR**

{¶13} Defendants-Appellants raise six Assignments of Error:

{¶14} "I. THE COURT ERRED BY GRANTING A MOTION FOR TEMPORARY RESTRAINING ORDER WITHOUT COMPLIANCE WITH CIV.R. 65(D) AND CASE LAW BECAUSE NO RELIEF COULD BE GRANTED ON THE COMPLAINT, THE COURT DID NOT CONDUCT AN EVIDENTIARY HEARING TO DETERMINE COMPLIANCE WITH

R.C. 163.01 ET SEQ., TO DETERMINE A PUBLIC USE, TO DETERMINE WHETHER NEXUS WAS AUTHORIZED BY LAW TO CONDUCT SURVEY ACTIVITIES, AND TO REQUIRE PAYMENT IN ADVANCE FOR TEMPORARY USE AND POTENTIAL TAKINGS OF PROPERTY OWNERS.

{¶15} II. THE COURT ERRED BECAUSE NEXUS 'SURVEY ACTIVITIES' AS OUTLINED IN ITS COMPLAINT/MOTION FOR TRO CONSTITUTE TEMPORARY TAKINGS AND REQUIRE PAYMENT IN ADVANCE FOR RENT OR USE OF PRIVATE PROPERTY PURSUANT TO OHIO LAW.

{¶16} "III. JUDGE TARYN HEATH COMMITTED REVERSIBLE ERROR BY ISSUING HER ORDER GRANTING PLAINTIFF'S MOTION FOR TRO BECAUSE NEXUS FAILED TO FIRST ACQUIRE A CERTIFICATE OF CONVENIENCE AND NECESSITY FROM FERC AUTHORIZING IT TO ENGAGE IN APPROPRIATIONS ACTIVITIES INCLUDING A RIGHT OF ENTRY AGAINST PRIVATE PROPERTY OWNERS UNDER OHIO REVISED CODE.

{¶17} "IV. THE COURT ERRED BY CONCLUDING NEXUS WAS A PIPELINE COMPANY UNDER R.C. 1723.01 BECAUSE NEXUS HAS NOT ACQUIRED A 'PUBLIC USE' STATUS, AND CANNOT BECOME AUTHORIZED AS A PUBLIC UTILITY UNDER R.C. 163.01(G) UNTIL IT BECOMES 'AN AGENCY HOLDING A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY GRANTED BY THE FEDERAL AGENCY REGULATORY COMMISSION.'

{¶18} "V. THE COURT ERRED BECAUSE ONLY THE OHIO JUDICIARY CAN DETERMINE WHETHER A PRIVATE AGENCY IS ENGAGED IN A PUBLIC USE AND MAY ENGAGE IN APPROPRIATIONS ACTIVITIES, NOT EMPLOYEES, AND THE

COURT MUST MAKE INQUIRY TO DETERMINE WHETHER THE PRIVATE AGENCY IS IN FACT AUTHORIZED BY APPROPRIATE AUTHORITY BEFORE ALLOWING 'SURVEY ACTIVITIES' BECAUSE IT IS A PRIVATE AGENCY.

{¶19} "VI. THE COURT ERRED BY VIOLATING THE FUNDAMENTAL RIGHTS OF PROPERTY OWNERS UNDER ARTICLE 1 SECTION 19 OF THE OHIO CONSTITUTION BY GRANTING RELIEF UNDER A TEMPORARY RESTRAINING ORDER WITHOUT COMPLIANCE WITH OHIO LAW."

### ANALYSIS

{¶20} Before we address the merits of the appeal of the Defendants-Appellants, we must first determine whether the September 2, 2015 judgment entry was a final appealable order.

{¶21} An appellate court has jurisdiction to review and affirm, modify, or reverse judgments or final orders of the trial courts within its discretion. See Section 3(B)(2), Article IV, Ohio Constitution; see also R.C. 2505.02. If an order is not final and appealable, the appellate court is without jurisdiction to review the matter and must dismiss the appeal. *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.*, 44 Ohio St.3d 17, 20, 540 N.E.2d 266 (1989).

{¶22} Upon our review of the record, we find the September 2, 2015 judgment entry granting the temporary restraining order is not a final appealable order. The granting of a temporary restraining order, when the ultimate relief sought is a permanent injunction, is generally not a final appealable order. *Farmers Ins. Exchange v. Weemhoff*, 5th Dist. Richland No. 02-CA-26, 2002-Ohio-5570, ¶ 10.

{¶23} Further, Nexus voluntarily dismissed all claims against all Defendants-Appellants without prejudice pursuant to Civ.R. 41(A)(1). Nexus voluntarily dismissed the

complaint prior to the preliminary injunction hearing. The trial court denied the motion to stay pending appeal filed by the Defendants-Appellants and Defendants-Appellants did not file a motion to stay with this Court. The temporary restraining order expired on September 30, 2015.

{¶24} Pursuant to Civ.R. 41(A)(1), we find the voluntary dismissal without prejudice does not render the September 2, 2015 judgment entry a final appealable order. The granting of a temporary restraining order is generally not a final appealable order and in this case, the complaint was voluntarily dismissed before the preliminary injunction hearing and the temporary restraining order has since expired. The procedural history of this case provides no final adjudication of the merits for this Court to rule upon.

{¶25} Accordingly, we are without jurisdiction to consider the appeal of Defendants-Appellants.

**CONCLUSION**

{¶26} The appeal of the Defendants-Appellants is dismissed.

By: Delaney, J.,

Gwin, P.J. and

Wise, J., concur.