

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

Jane Burchett, nka Wolfinger	:	Case No. 16CA3784
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	<u>ENTRY</u>
	:	
Keith Burchett,	:	
	:	
Defendant-Appellant.	:	RELEASED: 04/14/2017

HARSHA, A.J.,

{¶1} Appellee Jane C. Burchett, nka Wolfinger, filed a motion to dismiss Appellant Keith Burchett’s appeal arguing that the order appealed from is not a final appealable order. Wolfinger contends that the trial court dismissed Burchett’s post-divorce enforcement motions under Civ.R. 41(A), which governs voluntary dismissals by plaintiff, by parties’ stipulation, and by plaintiff’s motion. Wolfinger argues that under Civ.R. 41(A), the dismissal was without prejudice and Burchett can refile at any time. Therefore, Wolfinger argues that the order did not affect a substantial right or determine the action.

{¶2} Burchett argues that he did not voluntarily dismiss his motions under Civ.R. 41(A). Instead, the trial court considered the merits of his motions and denied and dismissed them. Therefore, Burchett argues that the order determined his claims and affected a substantial right.

{¶3} After reviewing the memoranda and the relevant law, we find that the entry appealed from is a final, appealable order made in a special proceeding under R.C. 2505.02(B)(2). We **DENY** appellee’s motion to dismiss the appeal.

I.

{¶4} Wolfinger and Burchett divorced in April 2000. The divorce decree awarded each party an interest in the other's pension. In 2009, the trial court issued a Division of Property Order (DOPO) to aid in the implementation of the pension division. In August 2016, Burchett filed a motion to enforce the divorce decree/DOPO and a contempt motion against Wolfinger.

{¶5} Burchett argued that Wolfinger had failed to comply with the divorce decree terms by refusing to elect to receive benefit payments under her pension fund. Burchett claimed that he is unable to access his interest in her pension until she makes this election. Burchett asked the trial court, in the alternative, to modify the terms of the DOPO.

{¶6} Wolfinger responded with a motion to dismiss, motion for sanctions and motion to strike. Wolfinger argued that she was not in violation of the divorce decree because it did not require her to elect to receive pension funds by a certain time or date. Wolfinger also argued that, although the trial court retained jurisdiction to enforce its orders and to construe an ambiguous decree, the trial court has no jurisdiction to modify, enlarge or diminish the relief embodied in the final decree. Thus, she asked the trial court to dismiss Burchett's request to modify the DOPO because he sought to include terms not embodied in the divorce decree.

{¶7} The trial court found Burchett's motions "not well-taken" and granted Wolfinger's motion to dismiss. The trial court also found Wolfinger's motion for sanctions and motion to strike "not well-taken" and dismissed them. Decision and Judgment Entry, Nov. 17, 2016. The trial court determined that Wolfinger was not in violation of the terms of the divorce decree. The court found that Wolfinger had not yet retired and that she could not elect to take her retirement benefits without suffering a reduction in benefits. The

court found that until Wolfinger elects to take her benefits, a secondary payee like Burchett cannot receive his benefit under the DOPO. The court also found that it has no jurisdiction to impose any additional requirements or restrictions on the parties concerning the pension benefits, though it acknowledged its continuing jurisdiction to enforce its prior orders.

{¶8} The trial court noted “[a]s an aside” that “any future scheme designed to deprive the Defendant of his court-ordered benefits may bring into play the issue of ‘ambiguity’ of prior orders.” However because Wolfinger had not yet retired, any such issues were not ripe for review. Decision and Judgment Entry, Nov. 17, 2016, p. 4.

{¶9} Burchett appealed. We now examine whether the order he appealed is a final appealable order.

II.

{¶10} It is well established that an order must be final before it can be reviewed by an appellate court. See Section 3(B)(2), Article IV of the Ohio Constitution. See, also, *General Acc. Ins. Co. v. Insurance Co. of North American*, 44 Ohio St.3d 17, 20, 540 N.E.2d 266 (1989). If an order is not final then an appellate court has no jurisdiction to review the matter and must dismiss the appeal. *Lisath v. Cochran*, 4th Dist. No. 92CA25, 1993 WL 120627 (Apr. 15, 1993); *In re Christian*, 4th Dist. No. 1507, 1992 WL 174718 (July 22, 1992). The relevant section of R.C. 2505.02 defines a final order as “[a]n order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment.” R.C. 2505.02(B)(2). 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). A “special proceeding” is “an action or proceeding this is specially created by statute and that prior to

1853 was not denoted as an action at law or a suit in equity.” R.C. 2505.02(A)(2). The Supreme Court has clarified that “it is the underlying action that must be examined to determine whether an order was entered in a special proceeding.” *Walters v. Enrichment Ctr. of Wishing Well, Inc.*, 78 Ohio St.3d 118, 121–22, 676 N.E.2d 890 (1997) (“The determining factor of *Polikoff* is whether the ‘action’ was recognized at common law or in equity and not whether the ‘order’ was so recognized. In making the determination courts need look only at the underlying action. The type of order being considered is immaterial.”).

{¶11} A divorce proceeding is a “special proceeding.” See *Wilhelm-Kissinger v. Kissinger*, 129 Ohio St.3d 90, 91, 2011-Ohio-2317, 950 N.E.2d 516 (“divorce, a statutory matter that did not exist at common law, qualifies as a special proceeding”); *State ex rel. Papp v. James*, 69 Ohio St.3d 373, 379, 1994-Ohio-86, 632 N.E.2d 889 (“There was no common-law right of divorce. Divorce is purely a matter of statute. * * * Divorce, therefore has been described as a ‘special statutory proceeding’ ”); *Davis v. Davis*, 4th Dist. Jackson No. 00CA28, 2001-Ohio-2527, *3 (“Divorce is a special statutory proceeding as are the ancillary claims such as a change of custody.”).

{¶12} Here, the order implicates a “substantial right” because the order involves “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). The contempt procedure in R.C. 2705.02 entitles Burchett to enforce his rights under the property division terms of the divorce decree. *Harris v. Harris*, 58 Ohio St.2d 303, 390 N.E.2d 789, 790 (1979), paragraph one of the syllabus (“A property settlement provision contained in a separation agreement, which is subsequently incorporated into a divorce decree, or a decree of dissolution, is enforceable by contempt proceedings.”).

{¶13} However, an order made in a special proceeding is final only if it *affects* a substantial right. R.C. 2505.02(B)(2). “An order affects a substantial right for the purposes of R.C. 2505.02(B)(2) only if an immediate appeal is necessary to protect the right effectively.” *Wilhelm-Kissinger v. Kissinger*, 129 Ohio St.3d 90, 2011-Ohio-2317, 950 N.E.2d 516, ¶ 7 (2011).

{¶14} Initially, we reject Wolfinger’s contention that the trial court’s order was dismissed under Civ.R. 41(A). Burchett did not voluntarily dismiss it, stipulated to its dismissal, or file a motion to dismiss it. Instead, the trial court considered the merits of his motions and rejected them as meritless.

{¶15} Next we address that portion of the trial court’s order that rejected Burchett’s motion to enforce the pension terms of the divorce decree. To be final the order must affect a substantial right. Burchett has a substantial right to have the pension terms of the divorce decree enforced. *See Noll v. Noll*, 9th Dist. Lorain Nos. 01CA7932, 01CA7976, 2002-Ohio-4154, ¶ 10 (order denying husband’s post-divorce enforcement motion regarding spousal support was a final appealable order). Appellate courts routinely review appeals from orders denying or granting post-divorce enforcement motions. *See Pontious v. Pontious*, 4th Dist. Ross No. 10CA3157, 2011-Ohio-40 (post-divorce enforcement motion); *Clay v. Clay*, 7th Dist. Belmont No. 06-BE-40, 2007-Ohio-4638 (post-divorce enforcement motion concerning pension fund). Therefore, the portion of the order denying and dismissing his motion to enforce the divorce decree’s pension terms is a final order under R.C. 2505.02(B)(2) and is properly before us.

{¶16} Burchett also appeals the trial court’s finding that Wolfinger was not in contempt of the court’s order and the dismissal of his contempt motion. “There is no right of appeal from a dismissal of a contempt motion when the party making the motion is not

prejudiced by the dismissal.” *Denovchek v. Bd. of Trumbull Cty. Commrs.*, 36 Ohio St.3d 14, 520 N.E.2d 1362 (1988), syllabus; *Miller v. Kutschbach*, 111 Ohio App.3d 157, 675 N.E.2d 1277 (4th Dist. 1996) (Harsha, J. dissented with opinion) (disagreeing with the application of *Denovchek* in post-divorce contempt proceeding because the party is clearly prejudiced); 17 Ohio Jurisprudence 3d, Contempt, Section 94, (3d. Ed., March 2017 update). However, the Supreme Court of Ohio recognized in *Denovchek, supra*, that domestic relation matters involve a special category of contempt cases in which appellate review is allowed because of the existence of prejudice. *Denovchek* at fn. 3 (“A special category of contempt cases, in which appeals have been allowed are those in domestic relations matters. In these cases the motion for contempt was directed at a party to the action, not a non-party witness, and, although the opinions are not always clear in this respect, the possibility of prejudice was present.”) (citations omitted).

{¶17} Here Burchett was prejudiced because he was seeking the enforcement of his pension rights under the divorce decree through a contempt motion against his former spouse, which distinguishes this case from *Denovchek, supra*, involving the dismissal of a contempt motion against a non-party witness. Thus, we find that the portion of the order denying Burchett’s contempt motion is a final order and is appealable under R.C. 2505.02(B)(2).

{¶18} In a supplement to her motion to dismiss, Wolfinger raises an additional ground for dismissal, i.e. Burchett’s failure to timely file his appellate brief. However, Burchett requested an extension of time and we granted it. Therefore, we **DENY** her motion to dismiss on this supplemental ground.

{¶19} Wolfinger filed a second supplement to her motion to dismiss arguing, in the

alternative, that the trial court dismissal order was made pursuant to Civ.R. 41(B)(4)(a) for lack of subject matter jurisdiction, and therefore is “otherwise than on the merits” and not a final, appealable order. Wolfinger’s characterization of the trial court’s entry is incorrect. The trial court did not dismiss the motion on the grounds that it lacked subject matter jurisdiction over Burchett’s motion. Instead, the trial court reviewed the merits and determined that Wolfinger’s decision not to elect benefits did not violate the divorce decree and she was not in contempt of court: “After review of the matter herein, the motions filed, and research conducted with legal counsel from the Ohio STRS, the Court **FINDS** the Defendant’s motion to be **NOT WELL-TAKEN** * * * she has not retired and cannot elect to take her retirement benefits from STRS without a reduction in her benefits * * * [Wolfinger is] not in contempt of any court order * * *.” (Emphasis sic), Decision and Judgment Entry, p. 3-4.

{¶20} Furthermore, the trial court expressly acknowledged the basic legal principle that a court has jurisdiction to enforce its own orders: “The Court maintains, however, its power to enforce its prior orders.” Decision and Judgment Entry, p. 4. And, even if we assume that the trial court dismissed the motion on the ground that the court lacked subject matter jurisdiction to enforce its own orders, such determination would be a final, appealable order if it prevented Burchett from filing future motions to enforce the divorce decree. *See Natl. City Commercial Capital Corp. v. AAAA at Your Serv., Inc.*, 114 Ohio St.3d 82, 2007 Ohio 2942, 868 N.E.2d 663, ¶1, 8 (Civ.R. 41(B)(4)(a) dismissal is a final appealable order when it prevents a party from refiling); *George v. State*, 10th Dist. Franklin Nos. 10AP–4, 10AP–97, 2010-Ohio-5262, ¶ 16 (even if dismissal under Civ.R. 41(B)(4)(a) for lack of subject-matter jurisdiction is labeled “without prejudice” such an order is appealable because if “the case is refiled in the same forum, it could only, by

operation of res judicata, be again dismissed on the same grounds, and there would never be the opportunity for subsequent appellate review of such rulings in a final order from that forum. There would be in such cases no mechanism to review the trial court's determination that it lacked jurisdiction over the matter in the first instance * * *").

{¶21} Therefore, we **DENY** her motion to dismiss on this second supplemental ground.

III.

{¶22} We conclude that the trial court's entry dismissing Burchett's motion to enforce the divorce decree/DOPO and motion to show cause is a final appealable order under R.C. 2505.02(B)(2) and we have jurisdiction to consider this appeal from that entry.

MOTION TO DISMISS DENIED.

{¶23} The clerk shall serve a copy of this order on all counsel of record at their last known addresses. **IT IS SO ORDERED.**

Abele, J. and McFarland, J.: Concur.

FOR THE COURT

William H. Harsha
Administrative Judge