

STATE OF OHIO)
)ss:
COUNTY OF WAYNE)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

P. N. GILCREST LTD PARTNERSHIP

C.A. No. 09CA0051

Appellant

v.

DOYLESTOWN FAMILY PRACTICE,
INC., ET AL.

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF WAYNE, OHIO
CASE No. 07-CV-0221

Appellees

DECISION AND JOURNAL ENTRY

Dated: April 26, 2010

WHITMORE, Judge.

{¶1} Plaintiff-Appellant, P.N. Gilcrest Limited Partnership (“P.N. Gilcrest”), appeals from the judgment of the Wayne County Court of Common Pleas, granting summary judgment in favor of Doylestown Family Practice, Inc. (“Doylestown Family”), Dr. Kathleen Scroggins, and Neil Scroggins (collectively “the Scroggins”). This Court dismisses.

I

{¶2} This dispute arose as a result of a crumbling business relationship between doctors performing services at a medical office owned by P.N. Gilcrest. P.N. Gilcrest is a limited partnership whose sole general partner is P. Gilcrest Limited Liability Company. P.N. Gilcrest apparently leased its medical office to Phillip N. Gilcrest, M.D. Inc. (“Gilcrest Inc.”), whose sole shareholder, Dr. Phillip N. Gilcrest, used the office to operate as a solo medical practitioner. Subsequently, Dr. Kathleen Scroggins, the principal shareholder of Doylestown Family, entered into an agreement with Gilcrest, Inc. whereby she agreed to provide medical

services at the medical office as an independent contractor. Dr. Scroggins later recruited Dr. Douglas Wenger to work as another practitioner at the medical office.

{¶3} At some point, Doylestown Family and the Scroggins remodeled P.N. Gilcrest's medical office to create additional space for more physicians. P.N. Gilcrest claims it did not agree to the remodeling and that Dr. Scroggins misrepresented her intention to join Gilcrest Inc. for the purpose of later taking over the medical practice and continuing to operate it as a solo practice. On May 28, 2007, P.N. Gilcrest brought suit against Doylestown Family, the Scroggins, and Dr. Wenger, arguing that they caused damage to the property and were liable for trespass and negligence. A plethora of claims ensued.

{¶4} On September 13, 2007, Dr. Wenger filed his answer as well as a third-party complaint against Gilcrest, Inc. and Dr. Gilcrest for indemnification and contribution. On September 17, 2007, Doylestown Family and the Scroggins filed their answer as well as counterclaims against P.N. Gilcrest for breach of contract, unjust enrichment, and abuse of process. On October 12, 2007, Doylestown Family and the Scroggins also filed a third-party complaint against Gilcrest, Inc. and Dr. Gilcrest for indemnity, contribution, and abuse of process. Thus, the suit consisted of the original claims for trespass and negligence, the counterclaims for breach of contract, unjust enrichment, and abuse of process, the third-party claims for indemnification and contribution asserted by Dr. Wenger, and the third-party claims for indemnification, contribution, and abuse of process asserted by Doylestown Family Practice and the Scroggins.

{¶5} On May 14, 2008, Dr. Wenger filed a motion for summary judgment on P.N. Gilcrest's claims for trespass and negligence. Doylestown Family and the Scroggins filed their own motion for summary judgment on the same claims on May 29, 2008. P.N. Gilcrest filed a

memorandum in opposition to Doylestown Family and the Scroggins' motion for summary judgment, but did not respond to Dr. Wenger's motion. Subsequently, several discovery issues caused the court to hold a hearing and issue discovery orders. As a result of the court's order, Doylestown Family and the Scroggins re-filed their motion for summary judgment and P.N. Gilcrest responded with a memorandum in opposition.

{¶6} On November 24, 2008, P.N. Gilcrest filed a notice of voluntary dismissal with prejudice, pursuant to Civ.R. 41(A), as to its trespass and negligence claims against Dr. Wenger. On December 11, 2008, the trial court issued a judgment entry, granting Doylestown Family and the Scroggins' motion for summary judgment on P.N. Gilcrest's claims for trespass and negligence. On December 15, 2008, Doylestown Family and the Scroggins filed a notice of dismissal without prejudice, pursuant to Civ.R. 41(A) and (C), only as to their abuse of process claim against Gilcrest, Inc. and Dr. Gilcrest. On December 18, 2008, Dr. Wenger filed his own notice of dismissal with prejudice, pursuant to Civ.R. 41(A), as to his indemnification and contribution claims against Gilcrest, Inc. and Dr. Gilcrest.

{¶7} On April 13, 2009, P.N. Gilcrest filed a motion for summary judgment on Doylestown Family and the Scroggins' counterclaim for abuse of process. The trial court granted the motion on May 7, 2009. P.N. Gilcrest filed its notice of appeal on June 8, 2009, seeking to challenge the trial court's December 2008 decision, granting summary judgment to Doylestown Family and the Scroggins based on P.N. Gilcrest's claims for trespass and negligence. Due to a finality issue, the parties sought to dismiss the appeal, and this Court obliged them. See *P.N. Gilcrest Ltd. Partnership v. Doylestown Family Practice, Inc., et al.*, 9th Dist. No. 09CA0038. Upon remand, Doylestown Family and the Scroggins filed a notice of dismissal without prejudice, pursuant to Civ.R. 41(A) and (C), as to their remaining

counterclaims against P.N. Gilcrest for breach of contract and unjust enrichment. P.N. Gilcrest then filed its notice of appeal in this Court, raising three assignments of error for our review. We consolidate the assignments of error.

II

Assignment of Error Number One

“THE TRIAL COURT ERRED IN GRANTING APPELLEE’S MOTION FOR SUMMARY JUDGMENT AS TO APPELLANT’S TRESPASS CLAIM.”

Assignment of Error Number Two

“THE TRIAL COURT ERRED IN GRANTING APPELLEES’ MOTION FOR SUMMARY JUDGMENT, AS TO APPELLANT’S NEGLIGENCE CLAIM.”

Assignment of Error Number Three

“THE TRIAL COURT ABUSED ITS DISCRETION BY REFUSING TO GRANT PNGLP’S MOTION TO COMPEL.”

{¶8} In its assignments of error, P.N. Gilcrest argues that the trial court erred by granting Doylestown Family and the Scroggins’ motion for summary judgment and by refusing to grant its motion to compel. Because we lack jurisdiction, we cannot consider the merits of P.N. Gilcrest’s appeal.

{¶9} The Ohio Constitution limits this Court’s appellate jurisdiction to the review of final judgments or orders of lower courts. Section 3(B)(2), Article IV, Ohio Constitution. “Pursuant to R.C. 2505.02, an order is both final and appealable if it resolves all claims against all parties or it resolves at least one full cause of action in a multiple claim case with an express certification that there is no just reason for delay pursuant to Civ.R. 54(B).” (Internal quotations and citations omitted.) *David Moore Builders, Inc. v. Hudson Village Joint Venture*, 9th Dist. No. 21702, 2004-Ohio-1592, at ¶5. “Where applicable and necessary, the omission of 54(B) language by the trial court in its judgment entry “is fatal not only to the order’s finality, but also

this Court’s jurisdiction.” *Cuda v. Lorain Cty. Children Servs.*, 9th Dist. No. 08CA009476, 2009-Ohio-2296, at ¶7, quoting *David Moore Builders, Inc.* at ¶7.

{¶10} This Court has held that Civ.R. 41(A) does not permit a party to dismiss less than all of its claims against another party. *Ningard v. Shin-Etsu Silicones of Am., Inc.*, 9th Dist. No. 24524, 2009-Ohio-3171, at ¶7, quoting Civ.R. 41(A)(1)(a) (providing that, by taking certain measures, “a plaintiff *** may dismiss all claims asserted by that plaintiff against a defendant”). Moreover, the Ohio Supreme Court has held that:

“[W]hen a plaintiff has asserted multiple claims against one defendant, and some of those claims have been ruled upon but not converted into a final order through Civ.R. 54(B), the plaintiff may not create a final order by voluntarily dismissing pursuant to Civ.R. 41(A) the remaining claims against the same defendant.” *Pattison v. W.W. Grainger, Inc.*, 120 Ohio St.3d 142, 2008-Ohio-5276, at ¶1.

When faced with such an appeal, an appellate court must dismiss for lack of a final, appealable order. *Id.* at ¶20-22.

{¶11} The trial court’s December 11, 2008 journal entry, granting summary judgment in favor of Doylestown Family and the Scroggins, does not contain Civ.R. 54(B) language. Accordingly, unless all of the claims below were resolved, P.N. Gilcrest has not appealed from a final, appealable order. *David Moore Builders, Inc.* at ¶5.

{¶12} The record reflects that neither the parties, nor the trial court, ever acted upon Doylestown Family and the Scroggins’ third-party claims against Gilcrest, Inc. and Dr. Gilcrest for indemnity and contribution. Thus, those third-party claims remain pending below. Additionally, Doylestown Family and the Scroggins’ attempted dismissal of their abuse of process claim against Gilcrest, Inc. and Dr. Gilcrest, pursuant to Civ.R. 41(A), was ineffective. Doylestown Family and the Scroggins brought three claims against Gilcrest, Inc. and Dr. Gilcrest in their third-party complaint: claims for indemnity, contribution, and abuse of process. They

then attempted to dismiss only one of the claims on December 15, 2008. Civ.R. 41(A), however, only permits the dismissal of all claims asserted against a particular party. *Ningard* at ¶7. As such, Doylestown Family and the Scroggins' December 15, 2008 dismissal was ineffective and their abuse of process claim also remains outstanding. *Id.* Accord *Perez Bar & Grill v. Schneider*, 9th Dist. No. 09CA009573, 2010-Ohio-1352, at ¶7. Finally, the record reflects that upon the dismissal of the prior appeal in this case, Doylestown Family and the Scroggins dismissed, without prejudice and pursuant to Civ.R. 41(A), their remaining counterclaims against P.N. Gilcrest for breach of contract and unjust enrichment, so as to create a final, appealable order. A party may not voluntarily dismiss its claims without prejudice so as to create a final, appealable order. *Pattison* at ¶1.

{¶13} P.N. Gilcrest has not appealed from a final, appealable order. Consequently, this Court cannot address the merits of its assignments of error.

III

{¶14} This Court lacks jurisdiction to consider P.N. Gilcrest's assignments of error because it has not appealed from a final, appealable order. As such, the appeal is dismissed.

Appeal dismissed.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETH WHITMORE
FOR THE COURT

DICKINSON, P. J.
BELFANCE, J.
CONCUR

APPEARANCES:

DAVID J. WIGHAM, TIMOTHY B. PETTORINI, and LUCAS K. PALMER, Attorney at Law,
for Appellant.

NATHAN D. VAUGHAN, Attorney at Law, for Appellee.

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