

[Cite as *Servpro v. Kinney*, 2010-Ohio-3494.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

SERVPRO

Appellee

v.

ALLEN KINNEY, et al.

Appellants

C.A. No. 24969

APPEAL FROM JUDGMENT
ENTERED IN THE
AKRON MUNICIPAL COURT
COUNTY OF SUMMIT, OHIO
CASE No. 08CV06419

DECISION AND JOURNAL ENTRY

Dated: July 28, 2010

CARR, Judge.

{¶1} Appellants, Allen and Carrie Kinney, appeal the judgment of the Akron Municipal Court, which dismissed their motion for attorney fees based on frivolous conduct. This Court reverses.

I.

{¶2} On May 23, 2008, appellees, Servpro, “c/o” Aaron, Derek, Carter and Stein, LLC, (collectively “Servpro”), filed a complaint against the Kinneys in the small claims division of the Akron Municipal Court. Servpro alleged that the Kinneys failed to pay for services provided. The claim form was signed by Derek Wooten in his individual capacity. There was nothing on the claim form to indicate that Wooten was an attorney. On June 2, 2008, the Kinneys filed a motion to transfer the case from the small claims division to the regular docket of the municipal court pursuant to R.C. 1925.10, and requesting an extension of time in which to file an answer. The municipal court transferred the case to its regular docket the same day.

{¶3} On June 16, 2008, Servpro, by and through Derek Wooten A/R Manager, gave notice of satisfaction against the Kinneys and dismissed its claim. Servpro stated that the notice of satisfaction was “without prejudice.” Servpro failed to certify service of the dismissal on the Kinneys.

{¶4} On June 17, 2008, the Kinneys filed an answer, counterclaim, and cross-claim. The Kinneys raised numerous defenses, including that the “collection agency of Aaron, Derek, Carter and Stein, LLC, through its employee Derek Wooten have engaged in the unauthorized practice of law by signing fraudulent affidavits in court swearing that they are the plaintiff herein.” The Kinneys further alleged claims alleging violations of the Consumer Sales Practices Act and Home Solicitations Act, and fraud. The Kinneys prayed for damages in excess of the jurisdictional limit in the municipal court.

{¶5} On July 2, 2008, the Kinneys filed a motion for attorney fees based on Servpro’s frivolous conduct pursuant to R.C. 2323.51. They alleged that “Servpro” is not an entity. Rather, the entity is Professional Restoration Services, Inc., dba Servpro of Southeastern Cuyahoga County. The Kinneys further alleged that Derek Wooten, who filed the small claim for Servpro, is not an attorney. Rather, he is a collections agent, presumably representing the interests of Servpro and engaging in the unauthorized practice of law. The Kinneys asserted that they had no contract with Servpro, and that no services were rendered to them. The Kinneys requested a hearing on their motion. On July 24, 2008, Professional Restoration Services, Inc. filed an opposition to the motion for attorney fees.

{¶6} On July 30, 2008, notwithstanding Servpro’s dismissal of the claim prior to the Kinney’s answer, counterclaims, and cross-claims, the municipal court ordered the transfer of the case to the Summit County Court of Common Pleas because the counterclaims exceeded the

monetary limits of the municipal court. The common pleas court docketed the transfer on August 8, 2008.

{¶7} On August 15, 2008, Professional Restoration Services, Inc. filed an answer to the cross-claims in the common pleas court. On August 28, 2008, Aaron, Derek, Carter and Stein, LLC, and Derek Wooten (collectively “ADCS”), filed an answer to the cross-claims. On September 12, 2008, ADCS filed a memorandum in opposition to the Kinneys’ motion for attorney fees based on frivolous conduct. The case proceeded in the common pleas court for nearly eight months, with the parties participating in discovery, and the trial court conducting pre-trials and referring the matter to mediation. On March 12, 2009, however, the common pleas court issued an order finding all pending motions in the case moot because no case had been properly transferred to the common pleas court prior to Servpro’s dismissal of its claim. The common pleas court dismissed the case. The Kinneys moved to have the physical file transferred back to the municipal court.

{¶8} On July 6, 2009, the municipal court held a hearing on the Kinneys’ motion for attorney fees based on frivolous conduct. Counsel for the parties summarized their clients’ proposed version of the facts underlying Servpro’s original claim. Counsel for Professional Restoration Services, Inc. informed the court that the Kinneys had filed a separate complaint in the common pleas court against it alleging violations of the Consumer Sales Practices Act and Home Solicitation Sales Act and raising the same issues pending before the municipal court. Counsel for the Kinneys argued that it was seeking attorney fees for time expended in the instant case based on Servpro’s conduct in this case, specifically, the filing of the claim by a non-attorney and the claim for money due on services that were never rendered. Counsel for the Kinneys argued that, while the underlying facts in this case and their newly filed case in the

common pleas court are the same, the frivolous conduct by Servpro only took place in this case. Accordingly, he argued, he could not seek fees for frivolous conduct in a separate case in the newly pending common pleas court case. At the conclusion of hearing, the municipal court opined that “it does not seem to me that this case is appropriate for this court given the nature of the claim.”

{¶9} On August 12, 2009, the municipal court issued a judgment entry in which it found that the common pleas court had dismissed the Kinneys’ counterclaims/cross-claims, along with any pending motion for attorney fees. The municipal court asserted that it had no authority to overturn the decision of the common pleas court. In addition, the municipal court found that “the material facts underlying the alleged frivolous conduct have not been determined *** [because t]his case was not tried before a judge or a jury.” The trial court found that, because the Kinneys had another lawsuit then pending in the common pleas court on “the same issues and facts,” it could not address the motion for attorney fees because that would be tantamount to making “factual determinations that are the subject matter of another lawsuit.” The municipal court “dismissed” the Kinneys’ motion for attorney fees and advised them that they may either try to amend their complaint in the pending common pleas court case to include a prayer for attorney fees, or they may transfer their motion back to the common pleas court which previously found the motion to be moot for reconsideration. In any event, the municipal court did not address the merits of the motion for attorney fees based on frivolous conduct. The Kinneys appealed, raising one assignment of error for review.

II.

ASSIGNMENT OF ERROR

“THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY NOT CONDUCTING AN EVIDENTIARY HEARING ON APPELLANTS’ MOTION FOR ATTORNEY FEES FOR APPELLEES’ FRIVOLOUS CONDUCT[.]”

{¶10} The Kinneys argue that the trial court erred by failing to conduct an evidentiary hearing on their motion for attorney fees for frivolous conduct pursuant to R.C. 2323.51. This Court agrees.

{¶11} Both the Kinneys and Professional Restoration Services, Inc. cite our decision in *Ponder v. Kamienski*, 9th Dist. No. 23270, 2007-Ohio-5035, at ¶31, for the proposition that this Court reviews a trial court’s decision regarding the imposition of attorney fees pursuant to R.C. 2323.51 for an abuse of discretion. In this case, however, the municipal court did not grant or deny attorney fees. Rather, it concluded that it did not have the authority to address the issue. A trial court’s authority to determine a matter in controversy is a question of law, which this Court reviews de novo. *Ohio Dept. of Taxation v. Kroeger*, 11th Dist. No. 2006-L-175, 2007-Ohio-2859, at ¶8, citing *Burns v. Daily* (1996), 114 Ohio App.3d 693, 701 (“[t]he existence of the court’s own subject-matter jurisdiction in a particular case poses a question of law which *** [w]e review *** de novo”). Moreover, a trial court’s dismissal of a matter for lack of subject-matter jurisdiction “inherently raises questions of law,” which this Court reviews de novo. See *Exchange St. Assoc., LLC v. Donofrio*, 9th Dist. No. 24806, 2010-Ohio-127, at ¶4. Accordingly, this Court reviews this matter de novo.

{¶12} R.C. 1901.17 states, in relevant part: “A municipal court shall have original jurisdiction only in those cases in which the amount claimed by any party *** does not exceed fifteen thousand dollars[.]” R.C. 1901.22(E) provides: “In any action in a municipal court in

which the amount claimed by any defendant in any statement of counterclaim exceeds the jurisdictional amount, the judge shall certify the proceedings in the case to the court of common pleas[.]” See, also, Civ.R. 13(J). Based on the amount prayed for by the Kinneys in their purported counterclaims and cross-claims, the municipal court transferred the case to the common pleas court. The municipal court, however, had lost jurisdiction to transfer the matter.

{¶13} When a case has been voluntarily dismissed, “the trial court patently and unambiguously lacks jurisdiction to proceed[.]” *Page v. Riley* (1999), 85 Ohio St.3d 621, 623. Although Servpro used the words “without prejudice” in its June 16, 2008 dismissal, it gave notice of satisfaction of its claim against the Kinneys, thereby indicating that its claim had been fully resolved. Accordingly, there was no case pending on June 17, 2008, when the Kinneys purported to file counterclaims and cross-claims. Civ.R. 13(A), (B), and (G) authorize the filing of counterclaims and cross-claims against parties. Once Servpro dismissed its claim, no parties existed against whom the Kinneys could file counter- or cross-claims. Because the original claim has been dismissed, and because there were no counter- and cross-claims properly before the court, the municipal court lacked further jurisdiction over the matter. Moreover, there was no case in existence to transfer to the common pleas court. Accordingly, because there was no case properly before it, the common pleas court order finding the Kinneys’ motion for attorney fees moot and dismissing the case had no effect. Therefore, the municipal court erred when it concluded that it was bound by the common pleas court’s order dismissing the Kinneys’ motion for attorney fees.

{¶14} The Ohio Supreme Court has recognized several exceptions to the general rule that a trial court loses jurisdiction upon dismissal of an action. Notwithstanding the voluntary dismissal of a claim, “a trial court may consider certain collateral issues not related to the merits

of the action.” *State ex rel. Hummel v. Sadler*, 96 Ohio St.3d 84, 2002-Ohio-3605, at ¶23. The high court specifically cited *Grossman v. Mathless & Mathless, C.P.A.* (1993), 85 Ohio App.3d 525, 528, for the proposition that a “trial court may entertain an R.C. 2323.51 motion to impose sanctions for frivolous conduct even though underlying case has been voluntarily dismissed.” *Sadler* at ¶23. This Court, too, has recognized the trial court’s continuing, yet limited, jurisdiction to address motions for attorney fees pursuant to R.C. 2323.51 after the plaintiff has voluntarily dismissed his complaint. *Baker v. USS/Kobe Steel Co.* (Jan. 5, 2000), 9th Dist. No. 98CA007151. In *Baker*, we stated:

“While a voluntary dismissal under Civ.R. 41(A)(1) generally divests a court of jurisdiction, *** a hearing on sanctions is considered collateral to the underlying proceedings, and a trial court therefore retains jurisdiction *for the limited purpose* of applying Civ.R. 11 and R.C. 2323.51.” (Emphasis added.) *Id.*, quoting *Lewis v. Celina Fin. Corp.* (1995), 101 Ohio App.3d 464, 470; see, also, *Ohio Civ. Rights Comm. v. GMS Mgt. Co., Inc.* (June 28, 2000), 9th Dist. No. 19814.

{¶15} R.C. 2323.51 allows a party to move for attorney fees as a sanction for frivolous conduct “at any time not more than thirty days after the entry of final judgment in a civil action[.]” R.C. 2323.51(B)(1). In this case, Servpro filed its notice of satisfaction of its claim and dismissed the action on June 16, 2008. The Kinneys filed their motion for attorney fees pursuant to R.C. 2323.51 on July 2, 2008, well within thirty days of the final judgment in this matter.

{¶16} R.C. 2323.51(B)(2) allows a court to award attorney fees but only after scheduling a date for hearing, giving notice to the parties of the date of hearing, and then conducting a hearing. R.C. 2323.51(B)(2)(a)-(c). Moreover, R.C. 2323.51(B)(2)(c) mandates that the court “allow[] the parties and counsel of record involved to present any relevant evidence at the hearing[.]”

{¶17} R.C. 2323.51 does not expressly require a hearing before a court may deny a motion for attorney fees, and it has been held that a court need not conduct a hearing before denying the motion where the motion does not demonstrate arguable merit. See, e.g., *Donaldson v. Todd*, 174 Ohio App.3d 117, 2007-Ohio-6504, at ¶9. In this case, however, the municipal court did not deny the Kinneys’ motion for attorney fees. Rather, it dismissed it upon concluding that it had no authority to consider it.

{¶18} The municipal court lacked jurisdiction to transfer the underlying case to the common pleas court because no case existed at the time for transfer. The dissent asserts at ¶25 that “[t]he transfer vested jurisdiction in the common pleas court.” However, the municipal court had been divested of jurisdiction over any matter it could properly transfer. The common pleas court’s order dismissing the Kinneys’ motion for attorney fees, therefore, was a nullity and had no effect because there was no case properly before it. The Kinneys timely filed a motion for attorney fees pursuant to R.C. 2323.51, and the municipal court had limited jurisdiction to consider the motion. Accordingly, the municipal court erred by either failing to hold a hearing on the motion or by denying it upon finding that the motion failed to demonstrate arguable merit. Accordingly, the Kinneys’ assignment of error is sustained.

III.

{¶19} The Kinneys’ assignment of error is sustained. The judgment of the Akron Municipal Court is reversed and the cause remanded for further proceedings consistent with this opinion.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Akron Municipal Court, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

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 Appellees.

DONNA J.CARR
FOR THE COURT

MOORE, J.
CONCURS

BELFANCE, P. J.
DISSENTS, SAYING:

{¶20} I respectfully dissent. I would affirm the decision of the Akron Municipal Court because the court correctly determined that it had no authority to overturn the decision of the Summit County Common Pleas Court. The question before this Court focuses on the municipal court's jurisdiction to act.

{¶21} Servpro invoked the municipal court's jurisdiction when it filed its complaint. Its voluntary dismissal did not completely divest the trial court of jurisdiction. As this Court has held, motions for attorney fees "are collateral and independent of the primary action; the

voluntary dismissal of the complaint does not deprive the court of the jurisdiction to decide whether sanctions are appropriate under the rule.” *Lorain v. Elbert* (Jan. 24, 1996), 9th Dist. No. 95CA006159, *1. By filing their motion for attorney fees, the Kinneys extended the municipal court’s jurisdiction. Although the municipal court’s jurisdiction was limited to deciding the attorney fees motion, the key point is that it had jurisdiction.

{¶22} The Ohio Supreme Court has defined “[j]urisdiction” as “the courts’ statutory or constitutional power to adjudicate the case.” (Internal quotations and citation omitted.) *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, ¶11. “Jurisdiction” includes both “jurisdiction over the subject matter and over the person.” *Id.* “[S]ubject-matter jurisdiction goes to the power of the court to adjudicate the merits of a case, [and] it can never be waived and may be challenged at any time.” *Id.* If a court acts without jurisdiction, its order is void. *Id.*

{¶23} “[J]urisdiction” has also been used to refer “to a court’s exercise of its jurisdiction over a particular case.” *Id.* at ¶12. This type of jurisdiction “encompasses the trial court’s authority to determine a specific case within that class of cases that is within its subject matter jurisdiction.” (Internal quotation and citation omitted.) *Id.* The *Pratts* Court concluded with two points that are critical to my analysis of this case. First, a court’s order is void “only when the trial court lacks subject matter jurisdiction.” (Internal quotations and citation omitted.) *Id.* Second, “lack of jurisdiction over the particular case merely renders the judgment voidable.” (Internal quotations and citations omitted.) *Id.* The Supreme Court’s ultimate conclusion is especially important here – when a court has jurisdiction over both the subject matter of a proceeding, and the parties to it, “the right to hear and determine is perfect; and the decision of every question thereafter arising is but the exercise of the jurisdiction thus conferred.” (Internal quotations and citation omitted.) *Id.*

{¶24} There is no dispute that the municipal court had subject matter jurisdiction and jurisdiction over the parties to the action, even if, at the time of the transfer, it was limited to the question of attorney fees presented in the Kinneys' R.C. 2323.51 motion. In its exercise of that jurisdiction, the municipal court ordered the transfer of the case to the common pleas court. By ordering the transfer of the case, the municipal court erred in the exercise of its jurisdiction. Although the municipal court erred, the municipal court's order was not void or a nullity as the majority suggests.

{¶25} The transfer vested jurisdiction in the common pleas court. The common pleas court exercised jurisdiction over the case until it determined that the case had been erroneously transferred. It then dismissed the entire case, including the Kinneys' R.C. 2323.51 motion. Because the common pleas court dismissed the case, and the motion, there was no longer a pending motion for the municipal court to consider.

{¶26} In my view, the Kinneys should have timely appealed the common pleas court's dismissal of their R.C. 2323.51 motion asking the appellate court to reverse the dismissal of their motion and requiring the common pleas court to *transfer* the motion back to the municipal court. Upon dismissal of the proceedings, the motion was no longer pending and the municipal court had nothing before it to consider when the proceedings were returned to the municipal court. The municipal court correctly concluded that it could not overturn the dismissal ordered by the common pleas court. Accordingly, I dissent.

APPEARANCES:

KENNETH L. TUROWSKI, Attorney at Law, for Appellant.

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DONALD C. WILLIAMS, Attorney at Law, for Appellees.