

STATE OF OHIO)
)ss:
COUNTY OF MEDINA)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

MICHAEL MCGILL, et al.

C. A. No. 09CA0038-M

Appellees

v.

IMAGES SCAPES, LLC, et al.

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF MEDINA, OHIO
CASE No. 07 CIV 1462

Appellants

DECISION AND JOURNAL ENTRY

Dated: January 11, 2010

WHITMORE, Judge.

{¶1} Defendant-Appellants, Image Scapes, LLC, and Joshua Smith (collectively “Image Scapes”) appeal from the judgment of the Medina County Court of Common Pleas in favor of Plaintiff-Appellees, Michael and Lauren McGill (“the McGills”). This Court dismisses the appeal.

I

{¶2} In 2006, the McGills contracted with Image Scapes to install a new lawn and landscaping on their property. In May 2007, Image Scapes began landscaping the property and installing the lawn. Over time, the lawn failed to grow properly and the McGills’ yard began to develop bare patches and significant weeds. The McGills attempted to contact Image Scapes by phone and by mail to correct the problem, but never received a response.

{¶3} In September 2007, the McGills filed a five-count complaint based on their inability to resolve the matter with Image Scapes. The complaint alleged a violation of the

Consumer Sales Practices Act (“CSPA”) and the Home Solicitation Sales Act (“HSSA”), with the remaining counts alleging breach of contract, negligence, and individual liability against Smith. In February 2008, the McGills provided Image Scapes with written notice that they sought to cancel the parties’ contract and requested the return of the money they had paid to Image Scapes under the contract.

{¶4} In August 2008, the matter proceeded to a bench trial. At the start of trial, the McGills moved to dismiss their common law claims and sought leave to amend their complaint in order to proceed solely on their statutory causes of action. Image Scapes made a motion for a directed verdict under Civ.R. 50, arguing that the McGills’ complaint sought only compensatory damages as a remedy, which precluded them from pursuing or recovering at trial on the basis of cancellation under the HSSA. The trial court denied Image Scapes’ motion at the start of the trial and again when it was renewed at the close of the McGills’ evidence. The trial court did not, however, expressly rule on the McGills’ motion to dismiss or request for leave to amend their complaint.

{¶5} The McGills prevailed on their claims and in October 2008, the trial court awarded them \$2,102.13, an amount equal to the amount they had paid Image Scapes under their contract. Image Scapes appealed the award, but we dismissed the appeal for lack of a final, appealable order given that the issue of attorney fees remained pending before the trial court. In May 2009, the trial court determined that the fees were reasonable and awarded the McGills \$3,578.80 in attorney fees. Image Scapes appeals from this judgment, asserting one assignment of error for our review.

II

Assignment of Error

“PLAINTIFFS’ COMPLAINT IS AN ACTION FOR COMPENSATORY DAMAGES, NOT RECISION (sic) OR CANCELLATION.”

{¶6} In its sole assignment of error, Image Scapes argues that the trial court erred as a matter of law by permitting the McGills to proceed at trial on a cancellation theory when their complaint did not plead in the alternative. Image Scapes argues that, because the McGills’ complaint prayed for compensatory damages, they were precluded from recovering under a cancellation theory. Additionally, Image Scapes maintains that the trial court erred by entering judgment against Smith, as the McGills withdrew the count seeking recovery against him individually, and moreover, as a corporate officer, he cannot be held personally liable for acts performed within the scope of his employment.

{¶7} This Court has an obligation to raise jurisdictional issues sua sponte. *Lava Landscaping, Inc. v. Rayco Mfg., Inc.* (Jan. 26, 2000), 9th Dist. No. 2930-M, at *1, citing *Whitaker-Merrell Co. v. Geupel Constr. Co., Inc.* (1972), 29 Ohio St.2d 184, 186. This Court’s jurisdiction is limited to the review of final orders of lower courts. Ohio Const. Art. IV, § 3(B)(2). In the absence of a final, appealable order, this Court must dismiss the appeal for lack of jurisdiction. *Id.* See, also, *Lava Landscaping, Inc.*, at *1 “A judgment that ‘does not dispose of all the claims between all the parties, and does not contain an express determination that there is no just reason for delay *** is not a final, appealable order.’” *Edwards v. Vito Gironda Constr. Co.*, 9th Dist. No. 24322, 2008-Ohio-5974, at ¶9, quoting *Davis v. Chrysler Corp.* (Apr. 12, 2000), 9th Dist. No. 19525, at *1. Civ.R. 54(B) permits a trial court to “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.”

{¶8} The trial transcript reveals that at the start of trial, the McGills orally moved to dismiss their claims alleging breach of contract, negligence, and individual liability against Smith and requested leave to amend their complaint accordingly. The court did not, however, rule on either motion throughout the trial, nor did it address the dismissal of any counts in its October 2008 or May 2009 journal entries. The McGills never filed an amended complaint pursuant to Civ.R. 15(A). See *Pattison v. W.W. Grainger*, 120 Ohio St.3d 142, 2008-Ohio-5276, at ¶19. Furthermore, neither one of the trial court's orders included Civ.R. 54(B) language to indicate that they were final, appealable orders, in light of its failure to expressly dispose of the pending common law claims set forth in the McGills' complaint. See, e.g., *Foley v. Empire Die Casting Co., Inc.*, 9th Dist. No. 24588, 2009-Ohio-5539, at ¶4 (concluding that this Court had jurisdiction to consider the merits of an appeal where one of the plaintiff's counts remained pending following a notice of dismissal under Civ.R. 41(A), because the trial court included the requisite language pursuant to Civ.R. 54(B)). As such, the trial court's journal entries did not dispose of all claims against all parties. *Edwards* at ¶9, quoting *Davis*, at * 1. Consequently, there is no final, appealable order from which Image Scapes can appeal. Accordingly, this Court lacks jurisdiction to consider the merits of Image Scapes' appeal.

III

{¶9} This Court does not have jurisdiction to consider Image Scapes' assignment of error because they have not appealed from a final, appealable order. Consequently, this 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 Appellants.

BETH WHITMORE
FOR THE COURT

CARR, J.
MOORE, P. J.
CONCUR

APPEARANCES:

O. JOSEPH MURRAY, Attorney at Law, for Appellants.

ROBERT B. CAMPBELL, Attorney at Law, for Appellees.