[Cite as *Rhodes v. Paragon Molding, Ltd.*, 2010-Ohio-6110.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

ROY RHODES, et al.	:	
Plaintiffs-Appellants/ Cross-Appellees	:	C.A. CASE NO. 23969
v.	:	T.C. NO. 06 CV 1427
PARAGON MOLDING, LTD., et al.	:	(Civil appeal from Common Pleas Court)
Defendants-Appellees/ Cross-Appellants	:	
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O P I N I O N

Rendered on the 10th day of December, 2010.

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McFARLAND, J. (by assignment)

{¶ 1} This is an appeal from a Montgomery County Common Pleas Court partial grant of summary judgment in an action brought by Roy Rhodes, et. al., Appellants/Cross-Appellees, against Paragon Molding, LTD, et al.,

Appellees/Cross-Appellants. Rhodes et al. assert on appeal that the trial court's entry of summary judgment in favor of Paragon et al. on their claim for breach of fiduciary duty was error. Further, Paragon et al. asserts that the trial court erred when it denied their motion for summary judgment as to Jimmie Rhodes' complaint for damages and declaratory relief with respect to a $50,000.00 promissory note. With respect to the sole cross-assignment of error, we conclude that Rhodes et al.'s action seeking a declaratory judgment against Paragon has yet to be resolved. Until that time, there is no final appealable order. Accordingly, this appeal is dismissed and we remand the matter to the trial court for further proceedings. As such, we do not reach the merits of Rhodes et al.'s assignment of error.

FACTS

{¶ 2} This appeal stems from Paragon Molding Limited's acquisition of the corporate assets of Huntin' Buddy Industries, LLC by virtue of a "Contract for Purchase of Corporate Assets" executed by Roy and Jimmie Rhodes, as shareholders of Huntin Buddy, and Vickie and James Miller, as majority and minority owners of Paragon Molding Limited, on September 25, 2004. Huntin' Buddy Industries, LLC did business as Roy Rhodes Championship Calls. Of relevance to our consideration of this matter, the contract provided as follows:

{¶ 3} "6. Purchase Price: The purchase price is $250,000.

{¶ 4} "a. Buyer will pay $200,000.00 less the $5,000 deposit at the time of closing. The $50,000.00 balance will be paid as specified in Section 10 of this agreement."

{¶ 5} Section 10 of the agreement provided as follows:

{¶ 6} "10. Promissory Note: At closing, the Buyer will give to Seller a

promissory note for $50,000.00 to be paid at the required time. The promissory note will include the following terms:

{¶ 7} "The unpaid balance will be due:

{¶ 8} "A1. When the business is sold,

{¶ 9} "A2. Or at the end of five years the principal plus 6% interest is due."

{¶ 10} The record reveals that, at the closing on October 8, 2004, a promissory note was executed by Jimmie Rhodes and James and Vickie Miller, stating that:

{¶ 11} "For value received, Paragon Molding Ltd. Will pay to Jimmy Rhodes:

{¶ 12} "The total of $50,000.00 payable five years from the date of this document on October 8, 2009. Annual interest of 6% of unpaid balance is due annually on the anniversary date of this document. Paragon Molding Ltd. may prepay all or any part of the principal without penalty."

{¶ 13} A separate contract was also executed providing for Roy Rhodes' continued employment with Roy Rhodes Championship Calls, which was, by the terms of the asset purchase agreement, to be carried on as a division of Paragon Molding Limited.

{¶ 14} On February 23, 2006, Roy Rhodes and Huntin' Buddy Industries, LLC filed a complaint against Paragon Molding, LTD., James and Vickie Miller and Jayson Demmitt. The complaint set forth nine claims, including: 1) breach of employment contract; 2) failure to pay Roy Rhodes under the employment agreement; 3) breach of fiduciary duty; 4) commission of the civil crimes of arson and conspiracy to commit arson resulting in damage to plaintiffs; 5) intentional interference with business relationships; 6) retaliatory discharge; 7) conversion; 8) payment on the promissory note; and 9) request for

declaratory judgment as to the promissory note. The matter proceeded through discovery and eventually the claims related to the alleged arson were voluntarily dismissed.

{¶ 15} Subsequently, an amended complaint was filed on April 16, 2008, deleting Jayson Demmit from the list of named defendants, and substituting Jimmie Rhodes in place of Huntin' Buddy Industries, LLC.[1] Of importance here, the claims for breach of fiduciary duty and also both claims related to the promissory note survived; however, it was claimed that the money due under the promissory note was owed to Jimmie Rhodes rather than Huntin' Buddy Industries, LLC. The primary claim on the promissory note was re-worded to demand interest due on the note and the declaratory judgment action was simply re-asserted.

{¶ 16} On November 12, 2008, Paragon et al. moved the court for summary judgment as to Roy Rhodes' retaliatory discharge and breach of fiduciary duty claims only. However, in the memorandum in support of their motion, Paragon et al. additionally argued that the promissory note at issue was unenforceable because Jimmie Rhodes provided no personal consideration on the note. It was further argued that because the note was unenforceable, the trial court need not even address the pending declaratory judgment action. Ultimately, the trial court entered a decision and entry sustaining in part the motion for summary judgment. Of relevance, the trial court granted summary judgment in favor of Paragon et al. on Roy Rhodes' breach of fiduciary duty claim. Further, the trial court stated in its decision that it "finds that consideration was given in exchange for the promissory note

[1]This was done after defendants brought to the trial court's attention the fact that Huntin' Buddy Industries, LLC was dissolved sometime after the filing of the complaint.

at issue, and is unaware of any authority establishing that this note is deficient because it is made out to Jimmie Rhodes, a non-party to the subject contract." The court overruled the motion "as to all claims relative to the note" and stated "these claims shall proceed to trial as scheduled along with Plaintiff's claims for breach of employment agreement, payment of salary prior to termination, and conversion. "

{¶ 17} As a result, the matter proceeded to a jury trial on February 10, 2009. However, other than the jury verdict results, nothing related to the trial has been made part of the record on appeal. Specifically, we have not been provided with the jury instructions or the trial transcript. All we can glean from the record is that, with respect to the claims on the promissory note, the jury awarded Jimmie Rhodes the interest he alleged he was owed on the promissory note, totaling $13,322.31, with interest after February 8, 2009 at the rate of $1.97 per day. Roy Rhodes was also awarded $258,125.00, based upon the judgment entry on jury verdict contained in the record.

{¶ 18} Although Rhodes et al. originally filed a notice of appeal on March 5, 2009, that appeal was delayed because of Paragon et al.'s subsequent filing of a motion for new trial, or in the alternative, motion for remittitur, as to the award in favor of Roy Rhodes. Thus, after those motions were resolved, Appellant Rhodes, et al., timely filed the current appeal and Cross-Appellants, Paragon Molding, LTD, et al., timely filed their cross-appeal.

Assignment of Error

{¶ 19} "THE TRIAL COURT'S ENTRY OF SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS JAMES AND VICKI MILLER ON PLAINTIFF ROY RHODES'S CLAIM FOR BREACH OF FIDUCIARY DUTY WAS ERROR."

Cross-Assignment of Error

{¶ 20} "THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT PARAGON MOLDING SUMMARY JUDGMENT AS TO JIMMIE RHODE'S [SIC] COMPLAINT FOR DAMAGES AND DECLARATORY RELIEF WITH RESPECT TO A $50,000.00 PROMISORRY NOTE."

CROSS ASSIGNMENT OF ERROR

{¶ 21} Because our resolution of the cross-assignment of error is dispositive of this appeal, we address it first, out of order. In their sole cross assignment of error, Paragon et al. contends that the trial court erred when it denied their motion for summary judgment as to Jimmie Rhodes's complaint for damages and declaratory relief with respect to a $50,000.00 promissory note. However, before we are able to examine the assignment of error on its merits, we must first conduct a final appealable order analysis.

{¶ 22} Under Ohio law, if an order is not final and appealable, appellate courts have no jurisdiction to review it. *General Accident Insurance. Co. v. Insurance Co. of North America* (1989), 44 Ohio St.3d 17, 20. Even if the parties do not address the lack of a final appealable order, the reviewing court must raise the issue sua sponte. *Englefield v. Corcoran*, Ross App. No. 06CA2906, 2007-Ohio-1807, at ¶ 24; *Whitaker-Merrell Co. v. Geupel Construction Co.* (1972), 29 Ohio St.2d 184, 186.

{¶ 23} An order is a final appealable order when it is " * * * [a]n order that affects a substantial right in an action that in effect determines the action and prevents a judgment * * *." R.C. 2505.02(B)(1). Additionally, when an action involves multiple claims, it must comply with Civ.R. 54(B) which states, in pertinent part:

{¶ 24} "When more than one claim for relief is presented in an action * * * the court may enter final judgment as to one or more but fewer than all of the claims * * * only upon an express determination that there is no just reason for delay. In the absence of a determination that there is no just reason for delay, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties, shall not terminate the action as to any of the claims or parties * * *." Civ.R. 54(B).

{¶ 25} "When an action includes multiple claims or parties and an order disposes of fewer than all of the claims or rights and liabilities of fewer than all of the parties without certifying under Civ.R. 54(B) that there is no just cause for delay, the order is not final and appealable." *Dodrill v. Prudential Insurance. Co.*, Jackson App. No. 05CA13, 2006-Ohio-3674, at ¶ 9, citing *Noble v. Colwell* (1989), 44 Ohio St.3d 92.

{¶ 26} In the case sub judice, Rhodes et al. filed an amended complaint on April 16, 2008, setting forth seven claims for relief. At issue are claims six and seven. In claim six, it was alleged that Paragon executed a promissory note promising to pay Jimmie Rhodes "$50,000 on or before October 8 of each year after 2004 through 2009" and that Paragon had not made the annual interest payments contemplated by the note. Plaintiffs requested further relief in the form of a declaratory judgment action in claim seven, alleging that "an actual and substantial controversy exists as to when or whether Paragon remains liable to Jimmie for the $50,000 face amount of the note and for future interest payments."

{¶ 27} The record reveals that Paragon et al., moved the trial court for partial summary judgment as to certain of Rhodes et al.'s claims. Specifically, Paragon et al's

motion for summary judgment stated that it was limited to counts three and four of the complaint, which involved Roy Rhodes' claims for retaliatory discharge and for breach of fiduciary duty. However, the motion for summary judgment went on to argue that Jimmie Rhodes was not entitled to recover under the promissory note, claiming that the note was a contract that lacked consideration and was therefore unenforceable, as a matter of law.

{¶ 28} The trial court issued a decision and entry sustaining in part the motion for summary judgment. While the decision itself was seven pages in length, only one sentence dealt with the issue of the promissory note. Specifically, the trial court stated as follows:

{¶ 29} "The Court finds that consideration was given in exchange for the promissory note at issue, and is unaware of any authority establishing that this note is deficient because it is made out to Jimmie Rhodes, a non-party to the subject contract."

{¶ 30} In its conclusion, the trial court further stated that "Defendants [sic] motion is overruled as to Plaintiff's *claims* relative to the note. These *claims* shall proceed to trial as scheduled along with Plaintiff's claims for breach of employment agreement, payment of salary prior to termination, and conversion." (Emphasis added).

{¶ 31} Based upon a review of the record, it appears that Plaintiffs' sixth claim for relief, which requested interest due on the promissory note, was presented to a jury and that the jury issued a verdict in favor of Jimmie Rhodes for "$13,322.31, with interest after February 8, 2009 at the rate of $1.97 per day." However, at no point in the proceedings below did the trial court make a determination regarding the declaratory judgment action related to the underlying promissory note, specifically determining "*when* or whether Paragon remains liable to Jimmie for the $50,000 face amount of the note."

{¶ 32} "The denial of a motion for summary judgment generally is considered an interlocutory order not subject to immediate appeal." *Stevens v. Ackman*, 91 Ohio St.3d 182, 2001-Ohio-249, at 186; see, also, *Darrow v. Zigan*, Hocking App. Nos. 07CA25 and 07AP25, 2009-Ohio-2205 at ¶27. Thus, a denial of summary judgment is not generally a final appealable order. "This is because the denial of the motion does not determine the outcome of the case. The parties both still have the opportunity to prove their case at trial and a judgment in either party's favor is not precluded." *International Brotherhood of Electrical Workers, Local Union No. 8 v. Vaughn Industries*, Wood App . No. WD-05-091, 2006-Ohio-475, at ¶ 21.

{¶ 33} Further, Rhodes et al. sought a declaratory judgment against Paragon et al. yet the trial court has made no declarations of the parties' rights and obligations. "As a general rule, a trial court does not fulfill its function in a declaratory judgment action when it fails to construe the documents at issue. Hence the entry of judgment in favor of one party or the other, without further explanation, is jurisdictionally insufficient; it does not qualify as a final order." *Highland Business Park, LLC v. Grubb & Ellis Co.*, Cuyahoga App. No. 85225, 2005-Ohio-3139, at ¶ 23; Darrow at ¶28. "Generally, a trial court does not fulfill its function in a declaratory judgment action when it disposes of the issues by journalizing an entry merely sustaining or overruling a motion for summary judgment without setting forth any construction of the document under consideration." *Alea London Ltd. v. Skeeter's 19th Hole, Inc.*, Geauga App. No.2007-G-2803, 2007-Ohio-6013, at ¶ 4.

{¶ 34} Despite the trial court's finding in its decision denying summary judgment, that consideration was given in exchange for the note, the trial court did not make any

declarations as to the rights and duties of the parties with respect to the note, and specifically rendered no decision on *when* the note would become due.[2] And, although there are references made to the underlying promissory note elsewhere in the record, such as in Rhodes et al.'s final brief on appeal, where in a footnote it is suggested that because the note did not have an acceleration clause only a cause of action on the interest could proceed to trial, there is nothing in the record evidencing that the trial court made any such determination.

{¶ 35} Further, Paragon et al. has not provided this Court with a copy of the trial transcript and as such, we cannot determine how or if this claim was presented to the jury. While the fact that there is a jury verdict on the interest issue suggests that it was determined at some point along the way that Paragon et al. were liable on the note, but not until some point in the future, that is mere speculation on our part. Such speculation by this Court would be improper.

{¶ 36} Thus, we conclude that Rhodes et al.'s action seeking a declaratory judgment against Paragon et al. has yet to be resolved. Until that time, there is no final appealable order. Accordingly, this appeal is dismissed and we remand the matter to the trial court for further proceedings.

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BROGAN, J. and GRADY, J., concur.

(Hon. Matthew W. McFarland, Fourth District Court of Appeals, sitting by assignment of

[2]In the original complaint, Rhodes et al. theorized that because a fire had destroyed the assets of the business, it had in effect been "sold" as per the asset purchase agreement and claimed balance of note was due.

the Chief Justice of the Supreme Court of Ohio).

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