[Cite as *Hanick v. Ferrara*, 2019-Ohio-880.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

ROBERTA HANICK,

Plaintiff-Appellant,

v.

THOMAS P. FERRARA, ET AL.,

Defendants-Appellees.

OPINION AND JUDGMENT ENTRY
Case No. 18 MA 0073

Civil Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 17 CV 313

BEFORE:
Kathleen Bartlett, Gene Donofrio, Carol Ann Robb, Judges.

JUDGMENT:
DISMISSED

Atty. Irene Makridis, 155 South Park Avenue, Suite 160, Warren, Ohio, 44482, for Appellant and

Atty. Brian Nally, 101 Prospect Avenue West, Suite 1400, Cleveland, Ohio, 44115, for Appellee.

Dated: February 4, 2019

PER CURIAM.

{¶1} This matter comes before the Court upon consideration of whether Plaintiff-Appellant Roberta M. Hanick (Hanick) has properly invoked the jurisdiction of this Court. The proceedings stem from Hanick's lawsuit against Defendant-Appellee Thomas P. Ferrara (Ferrara), an insurance agent, and three different life insurance and/or annuity companies, Defendants-Appellees, Aviva Life and Annuity Co. n.k.a. Athene Life and Annuity Company (Athene), Financial Concept Group (FCG), and ING USA Annuity and Life Insurance Company n.k.a. Voya Financial Inc. (Voya).

{¶2} According to the complaint filed below, Hanick is described as an individual who is more than 65 years of age, single, has no children, and subsides on a fixed income of social security and pension benefits. Hanick alleges Ferrara unnecessarily and improperly canceled an existing annuity she held with Old Mutual Life Insurance causing her to incur a significant early withdrawal penalty. She contends he then later used those funds along with other funds provided by her to him to purchase on her behalf seven annuities/life insurance policies from Athene, FCG, and Voya; companies for which he was an alleged agent. She further alleged he used funds from some of those investments to pay the premiums on the others, without her knowledge. Lastly, she alleges she executed a personal loan agreement with Ferrara, loaning him $3,500.00, which he later defaulted on. When she later discovered he had used $2,000 of her investment funds to make a payment on her loan to him, she reported him to the police.

{¶3} On February 6, 2017, Hanick sued Ferrara for negligent misrepresentations (Count I), fraud and deceit (Count II), and special relationship (Count III). Included with those claims were counts against the life insurance and/or annuity companies – Athene, FCG, and Voya – under theories of agency (Count IV & VII) and vicarious liability (Count V & VIII) and against FCG alone for negligent hiring, retention, and supervision (Count VI). Ferrara, Athene, FCG, and Voya, each filed separate answers, and the case proceeded to discovery and other pretrial matters.

{¶4} Regarding an August 28, 2009 annuity policy and a June 2, 2010 life insurance policy issued by Voya and allegedly sold to Hanick, Voya filed a motion for judgment on the pleadings arguing all of Hanick's claims were time-barred by the statute of limitations. Voya also contended it was not vicariously liable because the company that issued the August 28, 2009 annuity policy identified and attributed to it by Hanick was issued by a "cousin entity," Security Life of Denver Insurance Company. Additionally, as an aside, Voya stated that although it was immaterial due to the statute of limitations defense, it maintained that Jeffrey Cook, not Ferrara, was the agent that sold her the June 2, 2010 life insurance policy. Three days later, Ferrara filed a motion for partial judgment on the pleadings arguing Hanick's claims regarding five of the seven policies were time-barred under the statute of limitations.

{¶5} On January 22, 2018, Hanick filed a responsive brief in opposition arguing her claims should proceed under the discovery-rule exception to the statute of limitations defense or, because of the fraud alleged, Ferrara and the life insurance and/or annuity companies should be prevented from raising a statute of limitations defense under the doctrine of equitable estoppel. She also included a request for leave to amend the complaint to add Security Life of Denver Insurance Company and Jeffrey Cook as party defendants. Voya filed a response in opposition to Hanick's motion for leave to amend arguing it would be futile to amend the complaint for a claim which is time-barred by the statute of limitations. Meanwhile, Athene and FCG each filed similar motions to dismiss arguing all of Hanick's claims are time-barred under the statute of limitations and similar briefs in opposition to Hanick's motion to amend her complaint.

{¶6} On March 26, 2018, the trial court issued a judgment entry dismissing all of Hanick's claims with the exception of the one claim concerning a May 17, 2013 insurance policy issued by Athene and allegedly sold to her by Ferrara. It noted:

> The statute of limitations for professional negligence in Ohio is four years. R.C. 2305.09(D). For claims of negligent misrepresentation based on financial products, the claims accrue and the limitations period begins to run at the time the product is sold. *Castillo v. Nationwide Fin. Servs.,* 2003 Ohio App LEXIS 4295, (10th Dist. Sept. 9, 2003); and *Creaturo v. Duko,* 2005 Ohio App. LEXIS 1296 (7th Dist. Mar. 14, 2005).

> Furthermore, such claims are not subject to the discovery rule to otherwise toll the running of the limitations period. *Flagstar Bank, F.S.B. v. Airline Union's Mortg. Co.,* 947 N.E. 2d 672. [sic] 675 (Ohio 2011).

{¶7} In that same entry, the trial court also overruled Hanick's motion for leave to amend her complaint to substitute the proper party defendants because any claims regarding that particular policy would be time-barred under the statute of limitations. Even though the trial court included a Civ.R. 54(B) certification, Hanick did not appeal the decision.

{¶8} On May 14, 2018, Hanick filed a renewed, successive motion to amend her complaint to add Security Life of Denver Insurance Company and Jeffrey Cook as party defendants, same as the one she had previously filed on January 22, 2018, and which the trial court overruled in its March 26, 2018 judgment entry which Hanick did not appeal despite the trial court's Civ.R. 54(B) certification of its decision.

{¶9} Approximately two weeks later on May 29, 2018, the trial court filed a judgment entry addressing pending motions filed by Ferrara and Hanick. Hanick had earlier caused a subpoena to be issued to J.P. Morgan Chase Bank, N.A. seeking copies of all of Ferrara's bank records. The trial court granted Ferrara's request to quash the subpoena as overbroad and determined it would cause an undue burden to the bank. The trial court also overruled Hanick's May 14, 2018 renewed, successive motion for leave to amend her complaint as untimely. As it did in its March 26, 2018 judgment entry overruling Hanick's first motion for leave to amend her complaint, the court included a Civ.R. 54(B) certification.

{¶10} Thereafter, the trial court referred Hanick's remaining claims against Ferrara and Athene concerning the May 17, 2013 insurance policy to a magistrate. On June 14, 2018, the magistrate filed an order addressing the briefing and hearing schedule relative to outstanding summary judgment motions, and sustained Athene's motion to strike Hanick's expert witness and overruled her motion to further extend the discovery deadlines. The magistrate noted the deadlines and dates were previously established by the Court with the consent of all counsel and Hanick failed to disclose the identity of her expert until well over four months after the expiration of the discovery deadline.

{¶11} Hanick then filed a notice of appeal with this Court directed to two separate trial court rulings. The first is the trial court's May 29, 2018 judgment entry in which it quashed the subpoena issued to Ferrara's bank and overruled her renewed, successive motion for leave to amend her complaint. The second is the magistrate's June 14, 2018 order addressing the summary judgment motion briefing and hearing schedule, and sustaining Athene's motion to strike Hanick's expert and overruling her motion to further extend the discovery deadlines.

{¶12} Ferrara subsequently filed with this Court a motion to dismiss this appeal for lack of a final appealable order. Athene and FCG each filed a notice of joinder in Ferrara's motion to dismiss. After this Court granted her an extension of time, Hanick filed a response containing a memorandum contra the motions to dismiss. Ferrara filed a reply in support of his motion to dismiss. Athene filed a notice of joinder in Ferrara's reply.

{¶13} Shortly thereafter, Hanick then filed a motion for leave to supplement the record, attempting to add to the record a November 6, 2018 life insurance policy issued by Western & Southern Financial Group which was allegedly sold to her by Ferrara. Ferrara filed a response in opposition to Hanick's motion for leave to supplement the record. Hanick then filed a reply in support of her motion.

{¶14} Defendant Voya has not filed a notice of appearance in this appeal.

{¶15} A court of appeals has appellate review jurisdiction over judgments only when it is presented with an order that is both final and appealable as defined by R.C. 2505.02 and other relevant procedural rules. Ohio Constitution, Article IV, Section 3(B)(2); *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86, 541 N.E.2d 64, syllabus; R.C. 2505.01 et seq. If an order is not final and appealable, then an appellate court has no jurisdiction to review the matter and it must be dismissed. *Renner's Welding & Fabrication, Inc. v. Chrysler Motor Corp.*, 117 Ohio App.3d 61, 63, 689 N.E.2d 1015 (4th Dist.1996).

Trial Court Judge's May 29, 2018 Judgment Entry

{¶16} As indicated, the trial court judge's May 29, 2018 judgment entry included a Civ.R. 54(B) certification. When multiple parties and/or claims are involved, Civ.R. 54(B) provides that the trial court "may 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*." The May 29, 2018 judgment entry contains the Civ.R. 54(B)'s "no just reason for delay" certification language at the end of the entry. Although there is no requirement to do so, it is worth noting the trial court did not expressly designate the entry as a final order, which has become a common practice among trial courts entering such judgments pursuant to Civ.R. 54(B).

{¶17} Appellate courts review a purported final order that disposes of some, but not all claims in an action by applying a two-step analysis. *Wisintainer v. Elcen Power Strut Co.*, 67 Ohio St.3d 352, 354, 617 N.E.2d 1136 (1993). First, the order must be final within the requirements of R.C. 2505.02. *General Acc. Ins. Co. v. Ins. Co. of N. America,* 44 Ohio St.3d 17, 21, 540 N.E.2d 266 (1989). If the order meets the criteria of R.C. 2505.02, then the court ascertains whether Civ.R. 54(B) was applicable and whether it was properly applied. *Id.* at 22, 540 N.E.2d 266.

{¶18} R.C. 2505.02(B) defines "final order" by identifying seven categories of orders as final and, thus, appealable:

> (1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;
>
> (2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;
>
> (3) An order that vacates or sets aside a judgment or grants a new trial;
>
> (4) An order that grants or denies a provisional remedy * * *.
>
> (5) An order that determines that an action may or may not be maintained as a class action;
>
> (6) An order determining the constitutionality of any changes [made by the General Assembly to a variety of sections of the Revised Code not implicated by the case herein];
>
> (7) An order in an appropriation proceeding * * *.

R.C. 2505.02(B)(1)-(7).

{¶19} Inclusion of the "no just reason for delay" language is not a mystical incantation which transforms a nonfinal order into a final appealable order. *Chef Italiano Corp. v. Kent State Univ.*, 44 Ohio St.3d 86, 541 N.E.2d 64 (1989); *see also Wisintainer v. Elcen Power Strut Co.*, 67 Ohio St.3d 352, 617 N.E.2d 1136 (1993). Moreover, the Ohio Supreme Court has cautioned that trial courts should avoid a mechanical application of the Civ.R. 54(B) language. *Wisintainer*, 67 Ohio St.3d at 355, 617 N.E.2d 1136.

{¶20} The trial court judge's May 29, 2018 judgment entry denied two of Hanick's pretrial requests. First, Hanick caused a subpoena to be issued to J.P. Morgan Chase Bank, N.A. seeking copies of all of Ferrara's bank records from January 1, 2009 through February 6, 2017, in its possession. Ferrara filed a motion to quash the subpoena and the trial court found Hanick had failed to establish the relevance of the requested discovery, the request was overbroad and would cause an undue burden to the bank, and noted lastly the "discovery deadline passed long ago." Second, the trial court overruled Hanick's successive motion for leave to add new party defendants and to file an amended complaint instanter as untimely.

Sustaining of Motion to Quash Non-Party Subpoena

{¶21} Concerning Hanick's appeal of the trial court's decision to quash the subpoena issued J.P. Morgan Chase Bank, N.A., it does not implicate subsections (1), (2), (3), (5), (6), or (7) of R.C. 2505.02(B); but does require an examination of R.C. 2505.02(B)(4) which defines an order that grants or denies a provisional remedy as a final order if both of the following apply:

> (a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.
>
> (b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

{¶22} A provisional remedy is defined, in relevant part, as "a proceeding ancillary to an action, including, *but not limited to*, a proceeding for a preliminary

injunction, attachment, discovery of privileged matter, or suppression of evidence * * *." (Emphasis added.) R.C. 2505.02(A)(3). An ancillary proceeding is one that aids another proceeding. *Bishop v. Dresser Industries, Inc.*, 134 Ohio App.3d 321, 324, 730 N.E.2d 1079 (3d Dist.1999). Although the order Hanick is appealing concerns discovery, it does not concern discovery of privileged matters as is specifically referenced in R.C. 2505.02(A)(3).

{¶23} But, by its express terms, the statute does not set forth an all-inclusive listing of ancillary proceedings. Therefore, there is the possibility that there may be other ancillary proceedings that are provisional remedies other than those listed in the statute. For example, some appellate districts have concluded an appeal from a decision denying a non-party's motion to quash a subpoena is a final appealable order. *Future Communications, Inc. v. Hightower*, 10th Dist. No. 01AP-1175, 2002-Ohio-2245, ¶ 13; *see*, *e.g.*, *Coates v. Ottawa Cty. Bd. Of Revision*, 6th Dist. No. OT-01-041, 2002 WL 471695 (Mar. 22, 2002); *Bonewitz v. Red Ferris Chevrolet, Inc.*, 9th Dist. No. 01CA0006 (Sept. 19, 2001); *Conforte v. LaSalla*, 8th Dist. No. 79358, 2001 WL 1398406 (Nov. 1, 2001).

{¶24} The reasoning behind those decisions hinges on the second requirement under R.C. 2505.02(B)(4): "The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action." R.C. 2505.02(B)(4)(b). When there is an order denying a motion to quash a non-party subpoena, the appellant or non-party would not have a meaningful or effective remedy by appealing the decision following the final judgment in the action because appellant or non-party would have already produced the disputed documents. Additionally, an appellant or non-party should not have to incur the penalties of contempt in order to pursue an appeal.

{¶25} In this instance, though, the trial court *sustained* Ferrara's motion to quash the subpoena issued to J.P. Morgan Chase Bank, N.A. for his bank records. While it is true that R.C. 2505.02(B)(4) defines an order that *grants* or denies a provisional remedy as a final order, it still must meet the requirement set forth in subsection (b) that "[t]he appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action."

We conclude Hanick can be afforded a meaningful and effective remedy at the conclusion of the case in this instance. If Hanick can establish that the motion to quash should have been overruled, then this Court can reverse and remand the matter for further discovery proceedings and renewed summary judgment or trial proceedings. *In re Estate of Adkins*, 4th Dist. No. 16CA22, 2016-Ohio-5602, ¶ 13; *see also In the Matter of Tracy M.*, 6th Dist. No. H-04-028, 2004-Ohio-5756 (order granting high school's motion to quash subpoena for alleged assault victim's school records was not final appealable order because any error could be remedied by ordering a new trial).

Overruling of Motion for Leave to Amend Complaint

{¶26} The other ruling contained within the trial court's May 29, 2018 judgment entry was its decision to overrule Hanick's successive May 14, 2018 motion for leave to add new party defendants and file an amended complaint instanter as untimely. Hanick's May 14, 2018 motion for leave to add new party defendants and file an amended complaint instanter was the same as the one she had previously filed on January 22, 2018, and which the trial court overruled in its March 26, 2018 judgment entry which Hanick did not appeal despite the trial court's Civ.R. 54(B) certification of its decision.

{¶27} Beginning with the first step in the two-step analysis as set forth in *Wisintainer v. Elcen Power Strut Co.*, 67 Ohio St.3d 352, 354, 617 N.E.2d 1136 (1993), we examine whether the denial of a motion for leave to amend a complaint to add new party defendants is a final order within the meaning as set forth in R.C. 2505.02(B). Such a decision does not fall within the scope subsections (2)-(7) of R.C. 2505.02(B). However, R.C. 2505.02(B)(1) defines a final order to include "[a]n order that affects a substantial right in an action that in effect determines the action and prevents a judgment."

{¶28} Generally, a decision denying leave to file an amended complaint is not a final appealable order. *Siemaszko v. FirstEnergy Operating Co.*, 187 Ohio App.3d 437, 932 N.E.2d 414, 2010-Ohio-2121, ¶ 9. However, an exception arises when the trial court includes a Civ.R. 54(B) certification of the decision. *Id*. The denial constitutes a final appealable order with respect to new claims sought to be added in the proposed amended complaint. *Id.,* citing *Germ v. Fuerst,* 11th Dist. No. 2003-L-116, 2003-Ohio-

6241, ¶ 7; *see also River Oaks Homes, Inc. v. Krann,* 11th Dist. No. 2008-L-166, 2009-Ohio-5208, ¶ 35; *Worthington v. Wells Fargo Bank Minn., N.A.*, 5th Dist. No. 10 CA 40, 2010-Ohio-4541, ¶ 31; and *Kennedy v. Wiley*, 10th Dist. No. 97APE12-1569, 1998 WL 598105 (Sept. 10, 1998). As the Tenth District observed, "[i]t is as if the trial court allowed the new claims and thereafter dismissed them." *Ohio Farmers Ins. Co. v. Stark Cty. Bd of Commrs.*, 10th Dist. No. 10AP-164, 2011-Ohio-2942, ¶ 19, citing *Germ* at ¶ 7. (Internal citations omitted.)

{¶29} In this instance, Hanick's motion for leave to amend her complaint to add new party defendants was substantively and legally akin to a motion for leave to amend her complaint to add new claims. However, even if we were to hold that a decision denying a motion for leave to amend a complaint to add new party defendants containing a Civ.R. 54(B) certification was a final appealable order, the present appeal relates to the trial court's May 29, 2018 judgment entry denying her May 14, 2018 renewed motion for leave to amend her complaint to add new party defendants. Hanick had previously filed the same motion on January 22, 2018, and the trial court overruled it in its March 26, 2018 judgment entry and included a Civ.R. 54(B) certification of its decision. Hanick did not appeal the trial court's March 26, 2018 judgment entry.

{¶30} Consequently, Hanick's May 14, 2018 renewed motion for leave to amend her complaint to add new party defendants was nothing more than a motion for reconsideration. It is well settled that a motion for reconsideration from a final appealable order at the trial court level is a nullity. *Pitts v. Dept. of Transp.*, 67 Ohio St.2d 378, 423 N.E.2d 1105 (1981). In other words:

> Where a party to an action submits a motion to the court that is substantially the same as another previously denied, which denial was a final, appealable order, and the time of appeal of such order has elapsed, no appeal may be had from the ruling on the second motion.

City of Cincinnati v. Glassmeyer, 28 Ohio App.2d 39, 273 N.E.2d 901 (1st Dist.1971), syllabus.

Magistrate's June 14, 2018 Order

{¶31} The second order Hanick's notice of appeal is directed to is the magistrate's June 14, 2018 order addressing the summary judgment motion briefing and hearing schedule, and sustaining Athene's motion to strike Hanick's expert and overruling her motion to further extend the discovery deadlines. It is well settled caselaw that a magistrate's decision is not a final appealable order, because it does not determine the action and prevent a judgment. *See* Civ.R. 53(D)(4)(a) ("A magistrate's decision is not effective unless adopted by the court") and (e) ("A court that adopts, rejects, or modifies a magistrate's decision shall also enter a judgment or interim order"); *In re Adoption of S.R.A.,* 189 Ohio App.3d 363, 2010-Ohio-4435, 938 N.E.2d 432, ¶ 17 (10th Dist.) ("Orders do not constitute court orders unless certain formalities are met, and only judges, not magistrates, can terminate claims or actions by entering judgment").

Hanick's Motion for Leave to Supplement the Record

{¶32} Hanick has filed a motion for leave to supplement the record, attempting to add to the record a November 6, 2018 life insurance policy issued by Western & Southern Financial Group which was allegedly sold to her by Ferrara.

{¶33} In the present case, it is undisputed the documents Hanick is attempting to supplement the record with were not before the trial court. This is not a situation in which the items were not made a part of the record by mistake or accident; rather, the documents are new materials being submitted to augment the appellate record. App.R. 9(E) does not permit the supplementation of the record under such circumstances. Therefore, we may not consider the new evidence submitted by Hanick, and we deny her motion for leave to supplement the record.

{¶34} Accordingly, appeal dismissed for lack of a final appealable order. Costs taxed against Hanick.

{¶35} Copy to counsel of record, Judge R. Scott Krichbaum, and Magistrate Timothy G. Welsh (Mahoning Common Pleas Court Case No. 2017 CV 00313).

JUDGE KATHLEEN BARTLETT

JUDGE GENE DONOFRIO

JUDGE CAROL ANN ROBB