[Cite as *Mathys v. Kuhlman*, 2009-Ohio-2420.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

Mark Mathys, et al.	Court of Appeals No. OT-08-037
Appellees	Trial Court No. 07CV259H
v.	
Lester Kuhlman, et al.	**DECISION AND JUDGMENT**
Appellants	Decided: May 22, 2009

* * * * *

John Swansinger and Drue Marie Skaryd for appellees.

Brian M. Fallon for appellants.

* * * * *

SINGER, J.

{¶ 1} Appellants appeal a summary judgment issued by the Ottawa County Court of Common Pleas in a contract dispute. For the reasons that follow, we affirm.

{¶ 2} Put-in-Bay is a resort area on South Bass Island in Lake Erie. In 2001, appellants, Lester and Judith Kuhlman, owned three parcels, totaling approximately 9.5 acres in Put-in-Bay Township. On November 7, 2001, appellants agreed to a lease-purchase option agreement on three acres of the Put- in-Bay property with Carl Weatherspoon. The course of this business relationship did not go well, resulting in a prolonged legal dispute between appellants and Weatherspoon. See *Weatherspoon v. Kuhlman*, 6th Dist. No. OT-05-057, 2006-Ohio-5903.

{¶ 3} As the Weatherspoon litigation proceeded, appellants entered into discussions with appellees, Mark Mathys, Edward Fitzgerald, and Paul Jeris. The result was an agreement between appellees and appellants to form a limited liability company. Pursuant to a written agreement, ownership of the company would be 25 percent for each of appellees and the remaining 25 percent to appellants. Appellees agreed to acquire $500,000 in financing with which the company would purchase appellants' land.

{¶ 4} At the property closing, however, something changed. According to an affidavit filed by the closing agent, on the day of the closing, she was requested to go to a bank at the last minute and wait while some of the closing papers were redrawn. The new documents transferred the land not to a limited liability company, but to appellees individually. The agent also averred to hearing appellee Jeris ask appellant Lester Kuhlman if he was sure he wanted to deed the land to appellees as individuals rather than the LLC.

{¶ 5} According to appellees, the parties had originally intended to develop the property, but unforeseen conditions made this impractical, forcing them to seek a buyer for the land. Appellants characterize the search for a buyer as beginning within weeks of the closing. Eventually, appellees agreed to sell the land to an organization known as One Parsec Ltd. for $1,750,000. A principal of One Parsec Ltd. is Carl Weatherspoon.

{¶ 6} Appellants objected to selling the property to an entity associated with Weatherspoon. Nevertheless, the sale was completed with, according to appellees, a net profit of $1,313,637.50. Appellees offered 25 percent of this, $328,418.38, to appellants, but they refused to accept it, insisting that they were entitled to 25 percent of the gross sale price.

{¶ 7} On May 7, 2007, appellees brought suit in the Ottawa County Court of Common Pleas, seeking a declaration that, after the agreement to form a limited liability corporation was extinguished, a partnership was created under the doctrine of novation. As a result, each of the partners, appellees individually and appellants, had a 25 percent interest in the net proceeds of the sale of the Put-in-Bay parcels.

{¶ 8} On July 31, 2007, appellants answered appellees' complaint, denying any novation and insisting that, by the terms of the original agreement, they were entitled to 25 percent of the gross sale price. Appellants interposed their own counterclaim for a declaratory judgment finding them entitled to 25 percent of the gross. Appellants also raised counterclaims alleging breach of contract and fraud.

{¶ 9} On August 3, 2007, appellees sought initial discovery, including a request for admissions. When the September 14, 2007 response date passed, appellees' counsel sent appellants' counsel a request that appellants respond. On November 5, 2007, appellees, pursuant to Civ.R.36(A), moved to have the requested admissions deemed admitted. On November 28, 2007, the court found well-taken appellees' motion to deem the requested admissions admitted.

{¶ 10} On December 12, 2007, appellees moved for summary judgment, arguing that, since all disputed facts had been deemed admitted, they were entitled to judgment as a matter of law. Appellants filed a memorandum in opposition on January 8, 2008. On January 17, 2008, the court granted summary judgment to appellees, declaring that appellants were entitled to 25 percent of the net sale proceeds in the amount of $328,418.38. The court did not expressly rule on appellants' counterclaims.

{¶ 11} On February 8, 2008, appellees filed a second motion for summary judgment or, alternatively, to dismiss appellants' counterclaims. Appellants filed a memorandum in opposition, a motion to strike appellees' motion, and a request for relief from the original interlocutory summary judgment. On May 15, 2008, the trial court dismissed appellants' fraud and breach of contract cross-claims. On May 23, 2008, the court denied appellants' motion for relief from judgment and rejected appellants' remaining motions as having already been resolved in the original summary judgment or the May 15 claim dismissals. On June 20, 2008, appellants initiated this appeal.

{¶ 12} Appellants set forth the following two assignments of error:

{¶ 13} "Assignment of Error No. I

{¶ 14} "The trial court erred by granting summary judgment on the plaintiffs/appellees' motion for summary judgment as to the issue of novation of the written contract and finding that the amount borrowed to pay for the property was a liability of the partnership.

{¶ 15} "Assignment of Error No. II

{¶ 16} "The trial court erred when it granted summary judgment to the plaintiffs/appellee [sic] as to the defendants/appellants counterclaim for an accounting, fraud, breach fo [sic] contract, and declaratory judgment."

{¶ 17} Appellees assert that appellants' appeal is not timely and should be dismissed. This is a threshold issue.

{¶ 18} Absent special circumstances, see Civ.R. 54(B) and R.C. 2525.02, a case is not ripe for appeal unless all of the parties' claims have been resolved and there is nothing else for the court to decide. *Miller v. First Internatl. Fid. & Trust Bldg., Ltd.*, 113 Ohio St.3d 474, 476, 2007-Ohio- 2457, ¶ 10. Once a trial court determines all issues of all parties, the order becomes final and appealable and an appeal must be perfected within 30 days by filing a notice of appeal. App.R. 4(A), App.R. 3, R.C. 2505.07, 2505.05. Failure to file a timely notice of appeal, pursuant to App.R. 4(A), is a jurisdictional

defect, *In re. H.F.*, 120 Ohio St.3d 499, 505, 2008-Ohio-6810, ¶ 17, and fatal to any appeal. *Bond v. Canal Winchester*, 10th Dist. No. 07AP-556, 2008-Ohio-945, ¶ 11.

{¶ 19} In this matter, appellees insist that all of appellants' claims were adjudicated in the summary judgment issued on January 17, 2008. There is no doubt that the January order settled appellants' interest in the proceeds of the property and set an amount certain they were due. This also necessarily resolved appellants' counter-claim for a declaration and the need for an accounting. It did not resolve appellants' counterclaims for fraud and breach of contract. Accordingly, the January judgment was not a final order.

{¶ 20} On May15, 2008, however, the court dismissed appellants' remaining counterclaims. Ordinarily, these rulings would have resolved all claims with respect to all parties and would have triggered the 30 day period within which a party must perfect an appeal. In this matter, however, there remained an undetermined resolution of appellants' challenge to the partial summary judgment that had already been issued. Appellants characterized the remedy they sought as "relief from judgment," but such remedy is unavailable under Civ.R. 60(B) unless there is a final judgment or Civ.R. 54(B) language. *Jarrett v. Dayton Osteopathic Hosp., Inc.* (1985), 20 Ohio St.3d 77, 78. As a result, we view appellant's motion as a motion for reconsideration of the interlocutory partial summary judgment issued in January.

{¶ 21} As we have stated, in our view, "* * * when a valid motion challenging an interlocutory judgment is filed, and prior to a ruling on that motion, the remaining claims

are dismissed or disposed of by the court or a party, the interlocutory judgment does not become final until the trial court has disposed of the motion challenging it." *O'Hara v. Lousiville Title,* 6th Dist. No. L-09-1028, 2009-Ohio-2289, ¶ 33. Consequently, the January 2008 judgment did not become final and appealable until May 23, 2008, making appellants' notice of appeal timely.

{¶ 22} With respect to the merits of appellants' appeal, all of the issues appellants claim operated to their prejudice were resolved in the admissions deemed admitted by the court. The novation, the parties' respective interests and the sum certain due appellants as their share were all part of the request for admissions to which appellants failed to respond. "It is * * * settled law in Ohio that unanswered requests for admission render the matter requested conclusively established for the purpose of the suit. *Dobbelaere v. Costco, Inc.*(1997), 120 Ohio App.3d 232, 244, quoting *Cleveland Trust Co. v. Willis* (1985), 20 Ohio St. 3d 66.

{¶ 23} Specifically deemed admitted in this matter was that (1) by novation the original agreement became a partnership with each of appellees and appellants holding a 25 percent stake, (2) money borrowed to pay for the partnership's purchase of real property became a liability of the partnership, (3) proceeds of the land sale were to be split four ways after payment of all partnership expenses, and (4) the amount to which appellants were entitled from the net profits was $328,418.38.

{¶ 24} Neither before the trial court, nor here have appellants suggested that the trial court's entry of these admissions was improper. Given these factual admissions, there was no dispute of material fact and, on their complaint for a declaration, appellees were entitled to judgment as a matter of law. Civ.R. 56. Accordingly, appellants' first assignment of error is not well-taken.

{¶ 25} Remaining is the trial court's decision to dismiss appellants' counterclaims. These included a claim for an accounting and a counter declaration of rights which were necessarily negated by the declaration of a sum certain due appellants, which was properly premised on the admissions. The only remaining counterclaims are breach of contract and fraud claims which the trial court found failed to state claims upon which relief may be granted. Civ.R. 12(B)(6). On appeal, appellants fail to put forward any argument with respect to these claims. Consequently, that portion of appellants' second assignment of error may be disregarded. App.R. 12(B). Accordingly, appellants' remaining assignment of error is not well-taken.

{¶ 26} On consideration whereof, the judgment of the Ottawa County Court of Common Pleas is affirmed. Appellants are ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE