

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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|-------------------------------|---|--------------------|
| Thomas Arthur Fougere, | : | |
| Plaintiff-Appellant, | : | |
| v. | : | No. 11AP-791 |
| The Estate of Arthur Fougere, | : | (P.C. No. 539946A) |
| Defendant-Appellee. | : | (REGULAR CALENDAR) |

D E C I S I O N

Rendered on October 18, 2012

Thomas Arthur Fougere, pro se.

*Carlile, Patchen & Murphy LLP, Carl A. Aveni, II, and
Brandon A. Borgmann, for appellee.*

APPEAL from the Franklin County Probate Court

CONNOR, J.

{¶ 1} Plaintiff-appellant, Thomas Arthur Fougere ("appellant"), appeals from a judgment entered by the Franklin County Probate Court ("probate court") denying appellant's motion for summary judgment regarding a creditor claim filed against defendant-appellee, the Estate of Arthur Fougere ("the estate"). Because the judgment from which appellant has appealed is not a final appealable order, we dismiss this appeal for lack of jurisdiction.

I. Facts and Procedural Background

{¶ 2} Arthur Fougere died testate on January 12, 2010, as a resident of Franklin County, Ohio. Susan P. Yoshida was appointed executor of the estate in accordance with the terms of the will. Appellant, a beneficiary of the estate, subsequently filed an application for removal of Ms. Yoshida as the executor due to misconduct. On July 9,

2010, appellant presented a claim against the estate in the amount of \$166,848.46. The claim was based upon a promissory note executed by Arthur Fougere and payable to appellant. On July 12, 2010, a magistrate of the probate court issued a decision removing Ms. Yoshida as executor of the estate upon the appointment of a successor independent fiduciary, to be selected by the probate judge. On August 4, 2010, the probate judge, the Honorable Alan S. Acker, issued an entry approving and adopting the decision of the magistrate and appointing a successor administrator. However, on July 27, 2010, during the period of time when the application for removal was pending and before Judge Acker adopted the magistrate's decision and appointed a successor administrator, Ms. Yoshida issued a rejection (in whole) of appellant's claim made in the amount of \$166,848.46. Appellant filed a memorandum in response to the rejection of claim on July 30, 2010.

{¶ 3} Following the appointment of Robert B. Barnett, Jr., as the new administrator, Mr. Barnett filed a motion to extend the time to file an answer to appellant's complaint for the creditor's claim, asserting that additional time was needed to fully assess the merits of the claim and to accept or reject the claim following that assessment. On September 8, 2010, the probate court granted the requested extension. On October 4, 2010, the probate court granted a second extension of time for Mr. Barnett to fully assess the claim and file an answer, making the answer due on or before December 3, 2010. On October 12, 2010, appellant filed a combined motion for summary judgment and a memorandum objecting to the second extension of time to file an answer. Mr. Barnett filed a response in opposition to the summary judgment motion on November 19, 2010. On December 2, 2010, the probate court denied the October 12, 2010 motion for summary judgment on the basis that the motion was premature, since Mr. Barnett still had time to file his answer to the complaint and because the motion failed to comply with the requirements of Civ.R. 56.

{¶ 4} On April 29, 2011, Mr. Barnett filed a partial rejection of appellant's claim for payment of \$166,848.46. Pursuant to that filing, the administrator rejected \$66,018.63 of appellant's claim and proposed to pay a part of the claim equal to \$100,842.12.¹ On May 9, 2011, appellant filed a memorandum in response to the partial

¹ We are cognizant of the fact that the rejected amount and the amount proposed to be paid by the administrator, when added together, do not equal the total amount of the claim (\$166,848.46). These amounts as stated are based upon the amounts specifically listed in the administrator's April 29, 2011 filing captioned "Partial Rejection of Claim." (R. 17.)

rejection of the claim. On June 24, 2011, appellant filed the motion for summary judgment at issue in this appeal, moving the probate court to grant judgment in his favor as to the rejected portion of his claim. The record does not contain any response filed by Mr. Barnett.

{¶ 5} On August 16, 2011, the probate court issued a decision and entry denying appellant's motion for summary judgment on the grounds that, after a claim has been rejected, the probate court lacks subject-matter jurisdiction to enter an order adjudicating the claim. Consequently, the probate court simultaneously issued an order dismissing the action. This timely appeal now follows.

II. Assignment of Error

{¶ 6} Appellant's brief, filed pro se, fails to set forth a succinct statement of the assignment of error(s) presented for review. Nevertheless, appellant's brief appears to generally assert that the probate court erred by failing to grant judgment in his favor, disapproving the partial rejection by the administrator that allowed a portion of the claim, and dismissing the action.

III. Final Appealable Order

{¶ 7} In response to appellant's assignment of error, appellee asserts the trial court's decision and entry denying appellant's motion for summary judgment and dismissing the action is not a final appealable order. As a result, appellee questions this court's jurisdiction to hear this appeal.

{¶ 8} An appellate court has jurisdiction to review and affirm, modify, or reverse judgments or final orders of the trial courts within its district. *See* Ohio Constitution, Article IV, Section 3(B)(2); *see also* R.C. 2505.02 and *Fertec, LLC v. BBC&M Engineering, Inc.*, 10th Dist. No. 08AP-998, 2009-Ohio-5246. As an appellate court, we are permitted to review judgments only when we are presented with an order that is both final and appealable, as defined by R.C. 2505.02. *Salata v. Vallas*, 159 Ohio App.3d 108, 2004-Ohio-6037, ¶ 17 (7th Dist.). An order is final and appealable only if it satisfies the requirements of R.C. 2505.02 and, if applicable, Civ.R. 54(B). *In the Estate of L.P.B.*, 10th Dist. No. 11AP-81, 2011-Ohio-4656, ¶ 6, citing *Denham v. New Carlisle*, 86 Ohio St.3d 594 (1999). However, "the presence of Civ.R. 54(B) certification is relevant only if the trial court's order first qualifies as a final order under R.C. 2505.02." *In the Estate of L.P.B.* at ¶ 10.

{¶ 9} R.C. 2505.02 defines a final order in relevant part as follows:

(A) As used in this section:

(1) "Substantial right" means a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.

(2) "Special proceeding" means an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity.

(3) "Provisional remedy" means a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, suppression of evidence, a prima-facie showing pursuant to section 2307.85 or 2307.86 of the Revised Code, a prima-facie showing pursuant to section 2307.92 of the Revised Code, or a finding made pursuant to division (A)(3) of section 2307.93 of the Revised Code.

(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

(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 and to which 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.

(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 to the Revised Code made by Am. Sub. S.B. 281 of the 124th general assembly, * * * or any changes made by Sub. S.B. 80 of the 125th general assembly, * * *;

(7) An order in an appropriation proceeding that may be appealed pursuant to division (B)(3) of section 163.09 of the Revised Code.

{¶ 10} In the instant case, appellee argues this court lacks subject-matter jurisdiction over this appeal because none of the criteria set forth in R.C. 2505.02 have been satisfied to make the order at issue a final order. In contesting whether the probate court's judgment entry is final and appealable, appellee focuses on R.C. 2505.02(B)(1). Because we believe consideration of R.C. 2505.02(B)(2) is also warranted, we shall address both provisions.

{¶ 11} Upon review, we conclude that the order at issue on appeal is not a final order under either R.C. 2505.02(B)(1) or (2). The order does not affect a substantial right in an action that effectively determines the action and prevents a judgment. Furthermore, the order does not affect a substantial right made in a special proceeding.

{¶ 12} " 'Under both R.C. 2505.02(B)(1) and (B)(2), an order is a final order only if it affects a substantial right.' " *In re Adoption of M.P.*, 10th Dist. No. 07AP-278, 2007-Ohio-5660, ¶ 22, quoting *Epic Properties v. OSU LaBamba, Inc.*, 10th Dist. No. 07AP-44, 2007-Ohio-5021, ¶ 13. As stated above, a "substantial right" is a right the United States or Ohio Constitutions, a statute, the common law, or a rule of procedure entitles one to enforce or protect. The standard for determining whether a substantial right is "affected" is set forth in *Bell v. Mt. Sinai Med. Ctr.*, 67 Ohio St.3d 60, 63 (1993). "An order which affects a substantial right has been perceived to be one which, if not immediately appealable, would foreclose appropriate relief in the future." *Id.* See also *Wilhelm-Kissinger v. Kissinger*, 129 Ohio St.3d 90, 2011-Ohio-2317, ¶ 7 ("An order affects a substantial right for the purposes of R.C. 2505.02(B)(2) only if an immediate appeal is necessary to protect the right effectively."). Thus, in order to prevail on an assertion that an order affects a substantial right, " 'appellants must demonstrate that in the absence of

immediate review of the order they will be denied effective relief in the future.'" *Id.*, quoting *Bell* at 63.

A. R.C. 2505.02(B)(1)

{¶ 13} We find the order at issue does not in effect determine the action and prevent a judgment. Although the order involves a substantial right (*e.g.*, it involves a right protected by statute) it does not affect that right by determining the action and preventing a judgment. This is because appellant does have an available avenue for relief, specifically the avenue set forth in R.C. 2117.12. For an order to determine the action pursuant to R.C. 2505.02(B)(1), " 'it must dispose of the merits of the cause or some separate and distinct branch thereof and leave nothing for the determination of the court.' " *State ex rel. Sawicki v. Ct. of Common Pleas of Lucas Cty.*, 121 Ohio St.3d 507, 2009-Ohio-1523, ¶ 16, quoting *VIL Laser Sys., L.L.C. v. Shiloh Industries, Inc.*, 119 Ohio St.3d 354, 2008-Ohio-3920, ¶ 8. As a result, the probate court's order dismissing appellant's claim does not determine the action and prevent a judgment.

{¶ 14} Pursuant to R.C. 2117.12, if a properly presented claim is rejected in whole or in part by an executor, the statute requires the claimant to file an action challenging the rejection within two months after the rejection. If the claimant fails to do so, he is "forever barred from maintaining an action on the claim or part of the claim that was rejected." R.C. 2117.12; *see also Beckler v. Bacon*, 170 Ohio App.3d 612, 2007-Ohio-1319, ¶ 7 (1st Dist.). R.C. 2117.12 further provides that if the executor is removed within that two-month period and before action is commenced on the claim that was rejected, the action may be commenced within two months after the appointment of the successor.

{¶ 15} After a claim against an estate has been rejected, the probate court lacks subject-matter jurisdiction to enter an order adjudicating the claim. *In re Estate of Vitelli*, 110 Ohio App.3d 181, 183 (2d Dist.1996). "A probate court lacks subject matter jurisdiction to enter an order adjudicating a claim against an estate where that claim has been rejected by the estate. The only remedy for the claimant in such a case is an action in a court of general jurisdiction." *Id.*, citing 33 Ohio Jurisprudence 3d, Decedents' Estates, Section 1574 (1982, Supp.1995).

{¶ 16} Here, the probate court's denial of appellant's motion for summary judgment, which included the dismissal of his claim against the estate due to a lack of jurisdiction based upon the fact that the claim had been rejected by the estate, did not

dispose of the merits of his claim nor determine the action and prevent a judgment. Despite the dismissal of the claim, R.C. 2117.12 provides an avenue for appellant to challenge the rejection of his claim in the general division of the common pleas court.²

{¶ 17} Consequently, we find the order at issue is not a final order pursuant to R.C. 2505.02(B)(1). We now turn our focus to the provision in R.C. 2505.02(B)(2).

B. R.C. 2505.02(B)(2)

{¶ 18} Under R.C. 2505.02(B)(2), an order is a final order if it affects a substantial right made in a special proceeding. Accordingly, we first consider whether or not the order at issue was made in a special proceeding.

{¶ 19} In *Polikoff v. Adam*, 67 Ohio St.3d 100 (1993), the Supreme Court of Ohio considered the issue of whether a particular order was entered in a special proceeding and affected a substantial right, and therefore constituted a final order. It determined that "[o]rders that are entered in actions that were recognized at common law or in equity and were not specially created by statute are not orders entered in special proceedings pursuant to R.C. 2505.02[(B)(2)]." *Id.* at syllabus. R.C. 2505.02(A)(2) defines a "special proceeding" as "an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity." The Supreme Court later clarified that "it is the underlying action that must be examined to determine whether an order was entered in a special proceeding." *Walters v. Enrichment Ctr. of Wishing Well, Inc.*, 78 Ohio St.3d 118, 121-22 (1997).

² There is a question as to whether appellant can successfully challenge the rejection of his claim against the estate in the common pleas court pursuant to the provisions set forth in R.C. 2117.12. Appellee contends any action is time-barred because appellant missed the two-month window for permitting a challenge based upon the first administrator's rejection of the claim. Appellant, on the other hand, contends the two-month time limit began to run from the date the successor administrator filed a partial rejection of the claim because the initial rejection was not plain and unequivocal, due to the fact the successor administrator repeatedly requested extensions of time to consider the claim and eventually approved the claim in part and rejected it in part. See *Hawkes Hosp. of Mt. Carmel v. Colley*, 2 Ohio St.3d 40 (1982) ("A rejection of a creditor's claim against an estate by a personal representative pursuant to the provisions of R.C. 2117.11 must be plain and unequivocal."). See also *In re Estate of Liggons*, 187 Ohio App.3d 750, 2010-Ohio-1624 (6th Dist.) (if at the time of rejection the administrator says or does anything from which the claimant can reasonably infer that the rejection is not final, the rejection is not effective). This issue is not one for us to decide. However, appellant has asserted that he has filed a claim against the estate in the general division of the common pleas court. A review of the common pleas court's docket reveals that a complaint has been filed by appellant and that the general division recently denied a motion for summary judgment filed by appellee requesting judgment in favor of the estate on the grounds that the two-month time period for filing such an action had expired. See *Fougere v. Estate of Arthur J. Fougere*, Franklin C.P. No. 11CVH-06-7782 (Aug. 8, 2012). See also *State v. Raymond*, 10th Dist. No. 08AP-78, 2008-Ohio-6814, ¶ 16 (appellate courts may take judicial notice of findings in other cases in Ohio).

{¶ 20} Some Ohio courts have determined that probate estate administration proceedings are *not* "special proceedings" under R.C. 2505.02(A)(2) because these proceedings existed at common law. *See In re Estate of Endslow*, 5th Dist. No. 99CA-F-07-37 (Apr. 12, 2000); *In re Estate of Adams*, 6th Dist. No. OT-98-047 (Dec. 30, 1999); *In re Estate of Packo*, 6th Dist. No. L-99-1350 (Feb. 15, 2000); *In re Estate of Sneed*, 166 Ohio App.3d 595, 2006-Ohio-1868 (6th Dist.); and *In re Estate of Pulford*, 122 Ohio App.3d 88 (11th Dist.1997). On the other hand, other courts have provided authority to the contrary and held that probate proceedings *are* "special proceedings" under R.C. 2505.02 and are therefore final and appealable, provided that the order being appealed affects a substantial right. *See In re Myers*, 107 Ohio App.3d 489 (1st Dist.1995); *In re Estate of Nussbaum*, 1st Dist. No. C-990527 (July 21, 2000); *In re Estate of Depugh*, 2d Dist. No. 94 CA 43 (Mar. 31, 1995); *Palmer v. Wheeler*, 2d Dist. No. 94-CA-18 (Mar. 31, 1995); *In re Estate of Knauff*, 4th Dist. No. 96CA623 (May 27, 1997); *In re Estate of Smith*, 4th Dist. No. 06CA2915, 2007-Ohio-3030; *In re Estate of Slavens*, 4th Dist. No. 06CA11, 2006-Ohio-6699; and *In re Estate of Lilley*, 12th Dist. No. CA99-07-083 (Dec. 20, 1999). In addition, an appeal from the removal of an executor has been found to be a final appealable order on the grounds it is an appeal from a special proceeding and affects a substantial right. *See In re Putka*, 8th Dist. No. 77986 (Mar. 1, 2001).

{¶ 21} While numerous courts of appeal have considered this issue and reached conflicting results, our court of appeals has never specifically decided the issue. In *In re Estate of Nardiello*, 10th Dist. No. 01AP-281 (Oct. 30, 2001), we were faced with the issue of whether a probate court's decision to remove a fiduciary was a final appealable order, which caused us to contemplate whether probate proceedings were "special proceedings." Upon noting the existence of a nearly equal split of authority and concluding there was no conclusive or binding precedent for either side on the question of whether probate estate administration proceedings were "special proceedings," we looked to R.C. 2505.02(B)(4) for guidance in determining whether the probate court's order was final and appealable.

{¶ 22} Consequently, we determined the removal of an executor fell within the category of provisional remedies for which no meaningful or effective remedy could be granted upon an appeal following final resolution of the estate, and therefore we concluded the order constituted a final appealable order. As a result of determining the final and appealable nature of the order via a different provision, it was unnecessary for us

to decide whether probate estate administration proceedings were "special proceedings." Additionally, we note that despite several courts having certified this issue as a conflict, the Supreme Court of Ohio has not addressed the issue of whether probate estate administration proceedings are "special proceedings." Thus, we are without binding or conclusive authority upon which to rely. *See Guardianship & Protective Servs., Inc. v. Setinsek*, 11th Dist. No. 2010-T-0099, 2011-Ohio-6515, ¶ 37 (Trapp, J., dissenting) ("the Supreme Court of Ohio has chosen not to weigh in on a certified conflict as to whether probate estate proceedings * * * were known at common law and are, therefore, special proceedings under R.C. Section 2505.02").

{¶ 23} Nevertheless, even if we were to decide that probate proceedings are "special proceedings" within the meaning of R.C. 2505.02, we hold that the order at issue is not a final appealable order because it does not affect a substantial right.

{¶ 24} As noted above, a "substantial right" under R.C. 2505.02(A)(1) is "a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect." And as previously stated, the standard for determining whether an order "affects" a substantial right is whether the order "has been perceived to be one which, if not immediately appealable, would foreclose appropriate relief in the future." *Bell* at 63. Applying this rule to the instant case, we find the probate court's order does not foreclose appropriate relief for appellant in the future, due to the provisions set forth in R.C. 2117.12 as explained above. Following the filing of the executor's rejection of the claim, appellant can (and apparently did) file a lawsuit in the general division of the common pleas court to challenge the rejection of his claim against the estate. Because the issue addressed in the order on appeal here may be litigated in another action, the probate court's order does not affect a substantial right and is not appealable. *See generally, Gehm v. Timberline Post & Frame*, 112 Ohio St.3d 514, 2007-Ohio-607 (where the purpose for which intervention is sought may be litigated in another action, the denial of a motion to intervene does not affect a substantial right and is not appealable.).

{¶ 25} Furthermore, the probate court's order leaves the merits of the claim unresolved by recognizing the lack of jurisdiction to determine the action. *See generally, In re Adoption of M.P.* at ¶ 26. In the instant case, appellant may pursue other avenues, such as a lawsuit in the general division of the common pleas court, to address any

improprieties that may occur. A timely action filed in the common pleas court would be a proper vehicle by which to evaluate the merits of the appeal. In light of the possibility of future relief, the order does not affect a substantial right as set forth in R.C. 2505.02(B)(2). See *In re Estate of Smith* at ¶ 12. The effect here is not irreversible, and therefore, an immediate appeal is not required to protect a substantial right. Accordingly, we find the probate court's order is not a final order pursuant to R.C. 2505.02(B)(2).

IV. Conclusion

{¶ 26} Upon review, we find none of the remaining provisions under R.C. 2505.02(B) regarding final orders are applicable. Because the order sub judice does not satisfy at least one of the seven provisions set forth in R.C. 2505.02(B), it is not a final order, and therefore we are without jurisdiction to determine this action. As a result, we dismiss this appeal for lack of a final appealable order.

Appeal dismissed.

BRYANT and KLATT, JJ., concur.
