

[Cite as *Fahey Banking Co. v. United Tel. Credit Union, Inc.*, 2010-Ohio-2193.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The Fahey Banking Company, :
 :
 Plaintiff-Appellee, :
 :
 v. :
 :
 United Telephone Credit Union, Inc. et al., : No. 09AP-1130
 : (C.P.C. No. 09CVH8-13037)
 Defendants-Appellees, :
 : (ACCELERATED CALENDAR)
 (The Law Offices of Squire & Pierre-Louis, :
 LLC et al., :
 :
 Defendants-Appellants). :
 :

D E C I S I O N

Rendered on May 18, 2010

Kemp, Schaeffer & Rowe Co., LPA, Michael N. Schaeffer, and Scott N. Schaeffer, for appellee The Fahey Banking Company.

Pierre-Louis, LLC Attorney at Law, and Lloyd Pierre-Louis; Wright Law Practice, LLC, and Phil Wright, Jr., for appellants The Law Offices of Squire & Pierre-Louis, LLC, and Pierre-Louis, LLC Attorney at Law.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Defendants-appellants, The Law Offices of Squire & Pierre-Louis, LLC ("SPL") and Pierre-Louis, LLC Attorney at Law ("LPL"), appeal from the November 6,

2009 "Reinstated Order" of the Franklin County Court of Common Pleas ordering the clerk of that court to "retain and not disburse the said funds currently on deposit in Case No. 2005 CV 10728 until further Order from Judge Sheward in this case."

{¶2} The following facts and procedural history are taken from the record. On July 28, 2008, plaintiff-appellee, The Fahey Banking Company, recovered a judgment against SPL in Franklin County Court of Common Pleas Case No. 06CV-6804, in the sum of \$244,800.20 plus interest and court costs. That judgment remains unsatisfied.

{¶3} On August 27, 2009, appellee initiated a creditor's bill action, pursuant to R.C. 2333.01, to attach any funds to be paid SPL on its claims for unpaid attorney fees against United Telephone Credit Union, Inc. ("UTCU") in Franklin County Court of Common Pleas Case No. 05CVH09-10728 pending before Judge Guy Reece (the "Reece action"). Appellee is not a party in the Reece action. Appellee's creditor's bill action was assigned to Judge Richard Sheward (the "Sheward action").

{¶4} On August 28, 2009, the parties to the Reece action notified Judge Reece that a settlement had been reached. On September 3, 2009, Judge Reece filed a judgment entry ordering the parties to immediately comply with the terms of the settlement agreement. In that entry, Judge Reece averred that UTCU would not be liable for any amount purportedly due appellee, as proceeds of the settlement had not been designated as payable to SPL and there were other parties to the agreement.

{¶5} On September 4, 2009, appellee filed a motion for a temporary restraining order ("TRO") and preliminary injunction against UTCU to prohibit it from paying SPL any proceeds from the settlement agreement in the Reece action. In its motion, appellee asserted that it perfected service of process on UTCU on August 31, 2009, thereby

securing a lien on any proceeds payable by UTCU to SPL pursuant to the settlement agreement in the Reece action. On September 4, 2009, Judge Sheward issued the requested TRO, ordered appellee to post a \$100 bond, and set the matter for hearing on the motion for preliminary injunction.

{¶6} On September 10, 2009, SPL filed a motion to dissolve the TRO, claiming, among other things, that Judge Reece had exclusive jurisdiction over the settlement funds and that no funds were to be paid by UTCU to SPL pursuant to the settlement agreement. On the same day, SPL filed a motion to consolidate the Sheward action with the Reece action and transfer the Sheward action to Judge Reece.

{¶7} On September 17, 2009, appellee amended its complaint to add LPL as a defendant, and to assert a claim for fraudulent transfer of any funds received by SPL in the settlement agreement to LPL. On September 24, 2009, appellee filed a memorandum in opposition to SPL's motion to consolidate and transfer.

{¶8} On September 25, 2009, Judge Sheward held a hearing on appellee's motion for preliminary injunction. At that hearing, Judge Sheward orally denied SPL's motion to consolidate. In so doing, Judge Sheward noted that the Reece action was closed, that appellee was not a party to the Reece action and was therefore never under the jurisdiction of the Reece action, and that the Reece action involved different parties and different claims. (Tr. 10.) Judge Sheward averred that the action before him "ha[d] nothing to do per se with the settlement agreement." (Tr. 10.) He further stated that "[w]e are not claiming jurisdiction over the settlement agreement. But if there is a settlement agreement with monies that are paid in contravention of the creditor's bill, then it is within our jurisdiction." (Tr. 10.)

{¶9} Turning to the matter of the preliminary injunction, Judge Sheward was apprised that UTCU had deposited the settlement funds with the clerk of courts pursuant to a September 14, 2009 order in the Reece action. Judge Sheward averred that he was "concerned" about Judge Reece's averment in his September 3, 2009 order that UTCU would not be liable for any amount purportedly due appellee, given that appellee was not a party in the Reece action. (Tr. 13.) Counsel for UTCU explained that Judge Reece added this language in response to counsel's concern that UTCU might be liable to two separate parties – SPL, pursuant to the settlement agreement, and appellee, pursuant to the creditor's bill action. (Tr. 16.)

{¶10} Upon learning that the challenged funds resided with the clerk of courts, Judge Sheward, recognizing that the TRO and motion for preliminary injunction were moot, focused on the most appropriate means for ensuring that the funds that were subject to appellee's lien were not paid in contravention of that lien. Judge Sheward stated that "I see this lawsuit as pointed only directly towards those funds that may come in the direction of [SPL]." (Tr. 26.) To that end, Judge Sheward averred that "I think we ought to put on an entry that those [funds] not be disbursed until our case is concluded." (Tr. 24.) Counsel for SPL objected, arguing that the Reece action was still pending and involved parties other than SPL, and that an order freezing the funds would prejudice SPL's and LPL's ability to move forward in the Reece action. In response, counsel for UTCU maintained that the parties in the Reece action had an enforceable settlement agreement and that that case was concluded. Judge Sheward averred that he would order that the funds deposited by UTCU with the clerk of courts be held until the creditor's bill action could be determined.

{¶11} On October 8, 2009, LPL filed an answer, third-party complaint, and counterclaim in response to appellee's first amended complaint. In its third-party claim against the Ohio Division of Financial Institutions ("ODFI"), LPL asserted that it entered into a settlement agreement with UTCU and SPL, which was approved by ODFI and filed under seal pursuant to court order. LPL asserted that because ODFI approved the settlement agreement, it was liable to LPL for any judgment obtained by appellee on its fraudulent transfer claim against LPL. In its counterclaim against appellee, LPL alleged that appellee tortiously interfered with LPL's attorney fee contract with UTCU. Because of its third-party claim against ODFI, LPL, on October 8, 2009, removed the case to the Court of Claims of Ohio.

{¶12} On October 9, 2009, Judge Sheward, unaware that the case had been removed to the Court of Claims, issued an order noting that appellee had a valid lien on the funds subject to the settlement agreement in the Reece action and concluding that Judge Reece's September 3, 2009 order purporting to divest appellee of those funds was invalid. Judge Sheward further noted that Judge Reece filed a judgment entry on September 14, 2009 ordering that the funds subject to the settlement agreement be deposited with the clerk of courts, and that the settlement agreement be sealed. Judge Sheward averred that "[t]he net affect of the above proceedings is to allow the parties to ignore a perfected lien and allow for possible fraud upon the lien holder." Judge Sheward noted that appellee had neither asked nor implied that he exercise jurisdiction over the settlement agreement, but, rather, had merely filed a creditor's bill action to obtain any funds properly payable to SPL as a result of the settlement. Accordingly, Judge Sheward ordered that the clerk "shall retain and not disburse the said funds currently on deposit in

Case No. 2005 CV 10728 until further Order from Judge Sheward in this case." On the same day, Judge Sheward ordered UTCU and SPL to transmit a copy of the settlement agreement to counsel for appellee. Judge Sheward ordered that the settlement agreement remain confidential and be disclosed only to the court, counsel for appellee, appellee, and any pertinent employees and agents of appellee.

{¶13} On October 14, 2009, Judge Reece held a hearing on the disposition of the settlement funds in the Reece action. On October 30, 2009, Judge Reece filed a judgment entry striking from the record in the Reece action and rendering void any orders emanating from the Sheward action which affected the orders in the Reece action, including the order issued by Judge Sheward on October 9, 2009. Judge Reece further ordered that the funds deposited with the clerk of courts in accordance with the orders in the Reece action be disbursed pursuant only to an order from Judge Reece.¹

{¶14} On November 6, 2009, counsel for appellee filed a "Notice of Order of Remand," stating that on November 4, 2009, LPL voluntarily dismissed its claim against ODFI, and, accordingly, the Court of Claims remanded the case back to Judge Sheward. On the same day, noting that the October 8, 2009 removal of the action to the Court of Claims voided his October 9, 2009 order, Judge Sheward filed a "Reinstated Order" identical to that filed on October 9, 2009.

{¶15} Also on November 6, 2009, appellants moved to transfer the Sheward action to the Franklin County Court of Common Pleas commercial docket. By decision

¹ Appellants' January 8, 2010 motion for leave to supplement the record with the transcript of proceedings in the Reece action dated October 14, 2009 and an October 30, 2009 entry filed in the Reece action is granted.

and entry filed November 12, 2009, Judge Sheward denied the motion. On November 17, 2009, appellants appealed Judge Sheward's November 12, 2009 order to the administrative judge of the Franklin County Court of Common Pleas. On November 20, 2009, Judge Reece, the administrative judge, granted the appeal and ordered the matter transferred to the Franklin County Court of Common Pleas commercial docket. Thereafter, on November 25, 2009, appellants moved Judge Bessey, the commercial docket judge, to vacate Judge Sheward's November 6, 2009 "Reinstated Order."

{¶16} On December 4, 2009, appellants appealed Judge Sheward's November 6, 2009 "Reinstated Order" to this court. Appellants assign four errors for our review:

ASSIGNMENT OF ERROR 1

The November 6, 2009 Order Was Issued Without Subject Matter Jurisdiction.

ASSIGNMENT OF ERROR 2

The order is an Impermissible Collateral Attack on a coordinate branch of the same court, namely, orders in the Reece Action.

ASSIGNMENT OF ERROR 3

The November 6 Order is Improper by its Terms.

ASSIGNMENT OF ERROR 4

The Order is a Violation of LPL's Substantive Due Process Rights under Civ.R. 65.

{¶17} Before addressing the assigned errors, we must determine whether the order from which appellants appeal is a final appealable order. Appellants contend that the order is final and appealable pursuant to R.C. 2505.02(B)(1) and (3).

{¶18} Pursuant to Section 3(B)(2), Article IV, Ohio Constitution, and R.C. 2505.03, appellate courts have jurisdiction to review only final orders, judgments or decrees. *Browder v. Shea*, 10th Dist. No. 04AP-1217, 2005-Ohio-4782, ¶10, citing *State ex rel. Wright v. Ohio Adult Parole Auth.* (1996), 75 Ohio St.3d 82, 84. " [T]he entire concept of "final orders" is based upon the rationale that the court making an order which is not final is thereby retaining jurisdiction for further proceedings. A final order, therefore, is one disposing of the whole case or some separate and distinct branch thereof." *Noble v. Colwell* (1989), 44 Ohio St.3d 92, 94, quoting *Lantsberry v. Tilley Lamp Co.* (1971), 27 Ohio St.2d 303, 306. " 'A judgment that leaves issues unresolved and contemplates that further action must be taken is not a final appealable order.' " *State ex rel. Keith v. McMonagle*, 103 Ohio St.3d 430, 2004-Ohio-5580, ¶4, quoting *Bell v. Horton* (2001), 142 Ohio App.3d 694, 696. A trial court's order is final and appealable only if it meets the requirements of R.C. 2505.02 and, if applicable, Civ.R. 54(B). *Denham v. New Carlisle*, 86 Ohio St.3d 594, 595, 1999-Ohio-128, citing *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86, 88.

{¶19} Pursuant to R.C. 2505.02(B)(1), an order is final and appealable only if it "affects a substantial right in an action that in effect determines the action and prevents a judgment." Here, Judge Sheward's November 6, 2009 order meets neither branch of R.C. 2505.02(B)(1). The relief requested in the creditor's bill action requires determination of two matters: (1) that appellee, the judgment creditor, is entitled to the proceeds of the action in favor of SPL, if any; and (2) if necessary, that funds diverted by SPL to LPL constituted a fraudulent transfer and were subject to the creditor's bill action. Judge Sheward's order sequestering the funds with the clerk of courts did not "determine

the action," as the merits of appellee's creditor's action have yet to be determined. Rather, Judge Sheward's order preserved the court's ability to determine the action following appropriate proceedings.

{¶20} Moreover, the order does not "affect a substantial right." R.C. 2505.02(A)(1) defines "substantial right" as "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." Thus, "[a] substantial right is a legal right that is entitled to enforcement and protection by law." *Browder* at ¶13, citing *Chef Italiano Corp.* at 88. Although appellants do not expressly assert the substantial right sought to be enforced or protected, we presume appellants assert a substantial right in the proceeds payable by UTCU pursuant to the settlement agreement in the Reece action. However, the issue here is whether Judge Sheward's order *affects* the substantial right appellants assert. See *Browder* at ¶13. If it does not, the order is not final. *Id.*, citing *Burt v. Harris*, 10th Dist. No. 03AP-194, 2004-Ohio-756, ¶12. An order affects a substantial right "only if, in the absence of an immediate appeal, [the order] forecloses appropriate relief in the future[.]" *Kelm v. Kelm* (1994), 93 Ohio App.3d 686, 691, citing *Bell v. Mt. Sinai Med. Ctr.* (1993), 67 Ohio St.3d 60, 63.

{¶21} Here, Judge Sheward's order does not affect appellants' substantial right to the proceeds payable by UTCU pursuant to the settlement agreement in the Reece action. The order merely states that the funds in question are to remain on deposit with the clerk of courts and are not to be disbursed until further order from Judge Sheward in the creditor's bill action. Thus, appellants' right to the funds, if any, is not affected by Judge Sheward's order. Once the creditor's bill action is fully determined, appellants will

have the right to appeal, including any determination by Judge Sheward as to whether appellee is entitled to the challenged funds. Since Judge Sheward's order neither determines the action nor affects a substantial right, it is not final under R.C. 2505.02(B)(1).

{¶22} Nor is Judge Sheward's order final under R.C. 2505.02(B)(3). Pursuant to that section, an order is final and appealable only if it "vacates or sets aside a judgment or grants a new trial." Judge Sheward's order clearly does not grant a new trial or vacate a judgment in the creditor's bill action. Although appellants do not expressly so state, we presume appellants' argument to be that Judge Sheward's order effectively vacates or sets aside a judgment in the Reece action. We disagree. Judge Sheward's order does not include language indicating that he intended to vacate or set aside any judgment in the Reece action. All Judge Sheward's order states is that the funds deposited with the clerk of courts, pursuant to the Reece action, cannot be disbursed until the creditor's bill action is determined. Since Judge Sheward's order does not vacate or set aside a judgment or grant a new trial, it is not final under R.C. 2505.02(B)(3).

{¶23} Given the foregoing, we find Judge Sheward's order is not final and appealable. Because appellants' appeal is not taken from a final appealable order, this appeal is hereby dismissed.

*Motion for leave to supplement the record granted;
appeal dismissed.*

TYACK, P.J., and FRENCH, J., concur.
