

**COURT OF APPEALS  
THIRD APPELLATE DISTRICT  
ALLEN COUNTY**

**FARMERS COMMISSION CO.**

**PLAINTIFF-APPELLEE**

**CASE NUMBER 1-2000-07**

**v.**

**O P I N I O N**

**KENNETH W. CUPP D.B.A.  
BIG OAK FARM**

**DEFENDANT-APPELLANT**

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**CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas  
Court.**

**JUDGMENT: Appeal dismissed and cause remanded.**

**DATE OF JUDGMENT ENTRY: June 2, 2000.**

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**ATTORNEYS:**

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For Appellant.**

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For Appellee.**

**SHAW, J.** This matter involves an appeal from summary judgment rendered to plaintiff-appellee, The Farmers Commission Co., in its action against defendant-appellant, Kenneth W. Cupp, dba Big Oak Farm ("appellant") upon which the Allen County Court of Common Pleas has ordered that there is no just reason for delay pursuant to Civ.R. 54(B).

On October 23, 1998, appellee filed a complaint alleging claims of breach of oral contract, promissory estoppel, and unjust enrichment due to appellant's failure to pay for the application of chemicals to the fields on appellant's farm. The complaint demanded judgment for \$3,401.79 plus interest and costs. Appellant filed an answer and counterclaim. The basis of appellant's counterclaim was appellee's negligence and breach of the implied warranty of purpose in spraying the farm fields for weeds. Appellant sought judgment in the amount of \$30,000 plus interest and attorney fees.

Thereafter, appellee filed a motion for summary judgment. In its entry dated September 10, 1999, the trial court granted summary judgment in favor of appellee in the amount of \$3,401.79 plus interest and declared that appellant's counterclaim remained to be determined. Appellee then initiated proceedings in aid of execution on the judgment. On December 10, 1999, appellant filed a motion to stay the proceedings pursuant to Civ.R. 62(E). On December 23, 1999, appellee moved the trial court for a Civ.R. 54(B) determination that "there is no

just reason for delay" as to the order granting summary judgment. On December 29, 1999, the trial court entered an order in which it amended its previous entry granting summary judgment to include a no just reason for delay determination pursuant to Civ.R. 54(B) and denied appellant's motion for stay.

On appeal, appellant raises the following three assignments of error:

**The court erred in granting plaintiff's motion for summary judgment, as there are genuine issues of material fact regarding plaintiff's claim.**

**The court erred in denying defendant's request for a stay of proceedings.**

**The court erred in granting plaintiff's request for an express determination of no just reason for delay be added to the court's entry of summary judgment.**

We will first address appellant's third assignment of error because we find appellant's challenge to the finality of the trial court's order to be dispositive of this appeal.

Civ.R. 54(B) provides, in pertinent part:

**When more than one claim for relief is presented in an action whether as a claim, counterclaim, cross-claim, or third-party claim, and whether arising out of the same or separate transactions, or when multiple parties are involved, the 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.**

Our review of whether an order which adjudicates fewer than all the claims is subject to an immediate appeal under Civ.R. 54(B) involves a two-step inquiry.

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*Wisintainer v. Elcen Power Strut Co.* (1993), 67 Ohio St.3d 352, 354-355. The first step is to determine whether the order appealed was "final" as defined in R.C. 2505.02. The next step is to review the trial court's factual determination required by Civ.R. 54(B) as to whether an interlocutory appeal is consistent with the interests of sound judicial administration.

The first clause of R.C. 2505.02(B) defines a final order as "an order that affects a substantial right in an action that in effect determines the action and prevents a judgment." In *Noble v. Colwell* (1989), 44 Ohio St.3d 92, 95, the Ohio Supreme Court recognized that "an order fully adjudicating a claim and accompanied by a Rule 54(b) determination and direction is final and appealable despite the fact that a counterclaim \*\*\* remains pending." However, in view of the separate concurring opinions in *Noble*, there is no final order where the complaint and counterclaim arise from the same set of circumstances. See, also, *Frasure v. Knoop* (Aug. 16, 1991), Shelby App. No. 17-90-19, unreported, 1991 WL 217660.

Here, we have multiple claims between appellant and appellee and the counterclaim of appellant remains pending. Appellant asserts in his brief that the claims set forth in the counterclaim are similar to those alleged in the complaint. Although it would appear that there is some discrepancy between the pleadings regarding the dates of the claims, the circumstances set forth in appellant's

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counterclaim are such that they essentially arise out of the same set of circumstances as the complaint. Thus, the trial court's order granting summary judgment as to appellee's complaint does not prevent a judgment as required under R.C. 2505.02 since appellant could still be awarded a judgment. Further, the action has not been determined between the parties. Therefore, the order which is being appealed is not a final appealable order.

However, even assuming that the trial court's order meets the finality requirements of R.C. 2505.02, the facts of this case do not suggest that an immediate appeal could lead to judicial economy. This is because appellant's counterclaim arises out of the same circumstances as the complaint and an immediate appeal would invite potential piecemeal litigation or appeals of this case.

For the foregoing reasons, this appeal is dismissed for lack of jurisdiction and the cause is remanded to the trial court for further proceedings.

*Appeal dismissed  
and cause remanded.*

**HADLEY, P.J., and WALTERS, J., concur.**  
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