

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

Donald Gammon, II,	:	
	:	
Plaintiff-Appellant,	:	Case No. 17CA3621
	:	
v.	:	
	:	
Timothy A. Pollock,	:	<u>DECISION AND</u>
	:	<u>JUDGMENT ENTRY</u>
Defendant-Appellee.	:	
	:	RELEASED: 2/02/2018

Hoover, A.J.

{¶1} Plaintiff-Appellant Donald Gammon, II appeals a judgment dismissing his action without prejudice for failure to prosecute. Because an order dismissing an action without prejudice is ordinarily not a final, appealable order, we ordered Gammon to file a memorandum within ten days addressing whether we have jurisdiction. See Magistrate’s Order, Dec. 11, 2017. Gammon responded but his memorandum did not address the issue of whether the order was a final, appealable one.

{¶2} Because the order appealed from is not a final, appealable order we lack jurisdiction and **DISMISS** this appeal.

LEGAL ANALYSIS

{¶3} Appellate courts “have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district[.]” Ohio Constitution, Article IV, Section 3(B)(2). “R.C. 2505.03(A) limits the appellate jurisdiction of courts of appeals to the review of final orders, judgments, or decrees.” See *State ex rel. Bd. of State Teachers Retirement Sys. of Ohio v. Davis*, 113 Ohio St.3d 410, 2007–Ohio–2205, 865 N.E.2d

1289, ¶ 44. R.C. 2505.02(B) defines final orders, and under the part pertinent here, an order is final if it “affects a substantial right in an action that in effect determines the action and prevents a judgment[.]” R.C. 2505.02(B)(1). A “substantial right” is defined 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.” R.C. 2505.02(A)(1).

{¶4} “Ordinarily, a dismissal ‘other than on the merits’ does not prevent a party from refileing and, therefore, ordinarily, such a dismissal is not a final, appealable order.” *Natl. City Commercial Capital Corp. v. AAAA At Your Service, Inc.*, 114 Ohio St.3d 82, 2007–Ohio–2942, 868 N.E.2d 663, ¶ 8. Gammon’s action was “dismissed without prejudice,” which, by rule, is not a final, appealable order. *State ex rel. DeDonno v. Mason*, 128 Ohio St.3d 412, 2011–Ohio–1445, 945 N.E.2d 511, ¶ 2, citing Civ.R. 41(B)(3). A dismissal without prejudice divests the court of jurisdiction over the case, and the action is treated as if it had never been instituted, which means that the action neither affects a substantial right nor determines the action. *See generally Dill v. Athens*, 4th Dist. Athens No. 12CA30, 2013–Ohio–5888, ¶ 8–9, and cases cited therein; *see also State ex rel. Fifth Third Mtge. Co. v. Russo*, 129 Ohio St.3d 250, 2011–Ohio–3177, 951 N.E.2d 414, ¶ 17 (dismissal without prejudice terminates further action on the merits).

{¶5} More specifically, courts have held that if a plaintiff can refile a suit, an involuntary dismissal of a case without prejudice for failure to prosecute is not a final, appealable order. *See Isreal v. G–Core Automotive Corp.*, 10th Dist. Franklin No. 13AP201, 2013–Ohio–4461, ¶ 5–6; *Davis v. Paige*, 5th Dist. Stark No.2007 CA 00248, 2008–Ohio–6415, ¶ 41; *Ebbets Partners, Ltd. v. Day*, 171 Ohio App.3d 20, 2007–Ohio–

1667, 869 N.E.2d 110, ¶ 14 (2d Dist.). Here, Gammon has provided no evidence or argument that he is prevented from refiling his action. Therefore the trial court's entry is not a final, appealable order and we lack jurisdiction to consider the merits of Gammon's appeal. See *Smiley v. Prison Official, Inc.*, 4th Dist. Ross No. 13CA3408, 2014-Ohio-1100, ¶¶ 8-10.

{¶6} Accordingly, we **DISMISS** the appeal for lack of a final, appealable order.

APPEAL DISMISSED. COSTS TO APPELLANT.

{¶7} The clerk shall serve a copy of this order on all counsel of record and unrepresented parties at their last known addresses by ordinary mail and record service on the docket. **IT IS SO ORDERED.**

Harsha, J. & Abele, J.: Concur.

FOR THE COURT

Marie Hoover
Administrative Judge