[Cite as *Abdalla v. Wilson*, 2018-Ohio-500.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

GEORGE ABDALLA

Plaintiff-Appellant

-vs-

DONALD T. WILSON

Defendant-Appellee

JUDGES:
Hon. Patricia A. Delaney, P. J.
Hon. John W. Wise, J.
Hon. Craig R. Baldwin, J.

Case No. 17 CA 0056

O P I N I O N

CHARACTER OF PROCEEDING: Civil Appeal from the Municipal Court, Case No. 16 CVI 00297

JUDGMENT: Dismissed

DATE OF JUDGMENT ENTRY: January 31, 2018

APPEARANCES:

For Plaintiff-Appellant

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Wise, J.

{¶1} Plaintiff-Appellant George Abdalla appeals the decision of the Licking County Municipal Court, which granted judgment against Defendant-Appellee Donald T. Wilson in appellant's small-claims action for damages to rental property. The relevant facts leading to this appeal are as follows.

{¶2} Appellant was the landlord of a residence on Lake Drive in Thornville, Ohio, which he allegedly rented to appellee from 2014 to 2016. On September 28, 2016, appellant filed a civil complaint in the Licking County Municipal Court, Small Claims Division (hereinafter "trial court"), against appellee, seeking more than $4,000.00 for damages allegedly caused to the aforementioned rental property. The trial court set the matter for a mediation conference, which was scheduled for November 1, 2016. Appellee did not appear, but he subsequently claimed he had not received his summons in time. After a rescheduled mediation conference, the parties were unable to resolve the dispute.

{¶3} An evidentiary hearing was ultimately scheduled before a municipal court magistrate on February 23, 2017. At no time did appellee file any counterclaims. The trial went forward before the magistrate as scheduled.

{¶4} On March 9, 2017, the magistrate issued a decision, essentially finding that appellee had caused $459.03 in damages, but ruling that a $450.00 security deposit held by appellant would be applied to offset these damages. Thus, judgment was granted in favor of appellant for the sum of $9.03.

{¶5} On March 15, 2017, appellee, in lieu of filing an objection to the magistrate's decision, filed a request for "reconsideration," urging that the "$450.00" security deposit mentioned in the above decision was actually in the amount of $750.00, citing one of the

trial exhibits. Appellee on the same day also filed a request for the magistrate to issue findings of fact and conclusions of law.[1]

{¶6} On April 4, 2017, the magistrate issued an “order” modifying his March 9, 2017 decision to grant judgment in favor of appellee and against appellant in the amount of $290.97. It reads in its entirety as follows: "Upon Defendant's motion for reconsideration the Court finds it to be well-taken and hereby modifies its prior decision to reflect that Defendant's security deposit was $750.00 of which Plaintiff has a Judgment for $459.03. Plaintiff is not entitled to remaining $290.97 which Plaintiff must return to Defendant."

{¶7} On April 13, 2017, appellant filed a motion to set aside said magistrate's order. He therein maintained *inter alia* that Appellee Wilson could not obtain a judgment on a claim he did not plead or assert during pre-trial or trial.

{¶8} On April 20, 2017, the magistrate, rather than the trial court judge, issued an entry saying simply "denied."

{¶9} On May 23, 2017, the trial court issued a judgment entry, signed by the trial court judge, affirming and adopting the magistrate's April 4, 2017 “order” and awarding judgment in favor of appellee for $290.97. The judgment entry does not make any direct reference to appellant’s aforementioned motion to set aside the magistrate's order.

{¶10} On June 20, 2017, appellant filed a notice of appeal. He herein raises the following two Assignments of Error:

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[1] It does not appear this was subsequently accomplished by the magistrate as outlined in Civ.R. 53(D)(3)(a)(ii). However, appellee has not filed a brief in this appeal, and we find any issues in that regard to be waived.

{¶11} "I. THE TRIAL [COURT] ERRORED [SIC] BY FAILING TO INDEPENDENTLY REVIEW AND RULE ON APPELLANT'S MOTION TO SET ASIDE MAGISTRATE'S ORDER.

{¶12} "II. THE TRIAL COURT ERRORED [SIC] BY ENTERING JUDGMENT ON APPELLEE'S NON-ASSERTED COUNTERCLAIM."

I., II.

{¶13} Before we reach the merits of appellant's arguments, it is incumbent that we consider our jurisdiction to hear this appeal. The existence of a final appealable order is a jurisdictional question that an appellate court can raise *sua sponte*. *McHenry v. McHenry*, 5th Dist. Stark No. 2014 CA 00146, 2015-Ohio-2479, ¶ 23, citing *Savage v. Cody–Ziegler, Inc.,* 4th Dist. Athens No. 06CA5, 2006–Ohio–2760, 2006 WL 1514273, ¶ 31. As a general rule, a judgment that leaves issues unresolved and contemplates that further action must be taken is not a final appealable order. *See Moscarello v. Moscarello,* 5th Dist. Stark No. 2014CA00181, 2015–Ohio–654, ¶ 11, quoting *Rice v. Lewis,* 4th Dist. Scioto No. 11CA3451, 2012–Ohio–2588, ¶ 14 (additional citations omitted).

{¶14} We first note R.C. 1925.16 states in pertinent part: "Except as inconsistent procedures are provided in this chapter or in rules of court adopted in furtherance of the purposes of this chapter, all proceedings in the small claims division of a municipal court are subject to the Rules of Civil Procedure * * *." Specifically, "[s]mall claims matters are subject to the requirements of Civ.R. 53." *Manninen v. Alvarez*, 12th Dist. Butler No. CA2013-06-106, 2014-Ohio-75, f.n. 4.

{¶15} The judgment entry of May 23, 2017 under appeal in the case *sub judice* is, by its own terminology, the trial court's affirmance and adoption of the magistrate's *order*

of April 4, 2017. As noted in our recitation of facts, the April 4, 2017 magistrate's order resulted from appellee's request for "reconsideration" of the magistrate's decision of March 9, 2017, which had recommended judgment in favor of appellant for $9.03. However, Civ.R. 53(D)(2)(a)(i), addressing "orders" by magistrates, states that "[s]ubject to the terms of the relevant reference, a magistrate may enter orders without judicial approval if necessary to regulate the proceedings and *if not dispositive of a claim or defense of a party*." (Emphasis added). Thus, a magistrate's ability to issue "orders" is limited to regulatory, non-dispositive orders. *In re H.R.K.*, 8th Dist. Cuyahoga No. 97780, 2012-Ohio-4054, ¶ 8.

{¶16} A magistrate's "decision" is interlocutory in nature, and remains so, unless and until the trial court adopts it as a final order or determines there is no just reason for delay. *Price v. Klapp,* 9th Dist. Summit No. 27343, 2014–Ohio–5644, ¶ 7. While the Civil Rules apparently neither specifically permit nor forbid a motion for a magistrate to "reconsider" a dispositive decision prior to its adoption by the trial court, we find the only acceptable procedure in such a situation would be the issuance of an amended magistrate's *decision*, rather than a magistrate's order. A party disagreeing with the amended decision could then duly pursue an objection under Civ.R. 53(D)(3)(b).

{¶17} Here, the magistrate indeed issued an "order" on April 4, 2017 as a means of modifying his decision of March 9, 2017. We hold this procedural mechanism was out of conformity with the Civil Rules and constituted a nullity. As such, appellee's motion to "reconsider" the original magistrate's decision remains pending, and the trial court's judgment entry of May 23, 2017 affirming and adopting the magistrate's order of April 4, 2017 was therefore premature, if not a nullity as well. In a similar vein, the magistrate's

utilization of an order on April 4, 2017, in lieu of an amended decision, has effectively impeded the trial court from properly taking action to adopt or reject the magistrate's decision of March 9, 2017, as required by Civ.R. 53(D)(4).

{¶18} This Court has recognized that procedures in small claims court are generally more "elastic" in order to accommodate *pro se* litigants. *See McDonald v. Ohio Packaging Corp.*, 5th Dist. Stark No. 7390, 1988 WL 48600. Nonetheless, the lack of a final appealable order goes to the issue of subject matter jurisdiction, which cannot be waived. *Galloway v. Firelands Local School Dist. Bd. of Edn.*, 9th Dist. Lorain No. 12CA010208, 2013-Ohio-4264, ¶ 6.

{¶19} We therefore will not further address appellant's arguments, on grounds of prematurity.

{¶20} For the reasons stated in the foregoing opinion, the appeal of the judgment of the Municipal Court, Licking County, Ohio is hereby dismissed, with directions to the magistrate to issue an amended decision in regard to appellee's motion to reconsider.

By: Wise, J.

Delaney, P. J., and

Baldwin, J., concur.

JWW/d 0108