

[Cite as *Icon Constr., Inc. v. Statman, Harris, Siegel & Eyrich, L.L.C.* , 2010-Ohio-2457.]

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

ICON CONSTRUCTION INC.,	:	APPEAL NO. C-090458
	:	TRIAL NO. A-0703704
Plaintiff,	:	
vs.	:	<i>DECISION.</i>
STATMAN, HARRIS, SIEGEL & EYRICH, LLC,	:	
	:	
Defendant/Third-Party Plaintiff- Appellant,	:	
vs.	:	
THOMAS H. BERGMAN,	:	
	:	
Third-Party Defendant-Appellee.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Appeal Dismissed

Date of Judgment Entry on Appeal: June 4, 2010

*Michael E. Maundrell and Schroeder, Maundrell, Barbieri & Powers*, for  
Defendant/Third-Party Plaintiff-Appellant,

*Anthony G. Covatta, Robert M. Smyth, and The Drew Law Firm Co., LPA*, for Third-  
Party Defendant-Appellee.

Note: We have removed this case from the accelerated calendar.

Per Curiam.

{¶1} We sua sponte dismiss this appeal for lack of jurisdiction.

{¶2} Icon Construction Inc. (“Icon”) filed a complaint against the law firm of Statman, Harris, Siegel & Eyrich, LLC, (“Statman Harris” or “the law firm”) alleging that Statman Harris had breached a purported fee agreement with Icon and owed Icon a refund of \$70,000 in legal fees. Statman Harris answered Icon’s complaint and filed a third-party complaint against Thomas H. Bergman, a former member of Statman Harris, alleging that Bergman had unilaterally, and without authority, negotiated the purported agreement with Icon and, again without authority, directed Greg Berberich, a contract-employee attorney at Statman Harris, to execute the agreement with Icon. Statman Harris sought from Bergman “indemnification” with respect to any possible judgment that Icon might obtain against Statman Harris.

{¶3} Bergman answered the third-party complaint and simultaneously filed a third-party counterclaim against Statman Harris for indemnification under a provision in the Statman Harris operating agreement that included an obligation to pay attorney fees. Bergman sought “a complete indemnification \* \* \* from and against all liability, including expenses involved in this litigation, as well as reasonable attorney fees.”

{¶4} Statman Harris moved to dismiss Bergman’s counterclaim for failure to state a claim because “there [was] no risk of loss or damage for the [f]irm to protect Bergman from.” Bergman filed an opposing memorandum, and the trial court presumably overruled Statman Harris’s motion sub silentio.

{¶5} The case proceeded to a two-day bench trial. The trial court issued an opinion and judgment entry in favor of Icon on its complaint and in favor of Bergman on Statman Harris’s third-party complaint for indemnification. But the trial court did not enter a judgment on Bergman’s third-party counterclaim against Statman Harris.

{¶6} Statman Harris now appeals, challenging only the judgment entered in favor of Bergman on Statman Harris’s third-party complaint. For the reasons that follow, we must dismiss the appeal.

{¶7} An order that adjudicates fewer than all of the claims or rights of the parties and that does not meet the requirements of R.C. 2505.02 and Civ.R. 54(B), if applicable, is not a final, appealable order.<sup>1</sup> At issue in this case is Civ.R. 54(B).

{¶8} Civ.R. 54(B) provides the following:

{¶9} “When more than one claim for relief is presented in an action whether as a claim, counterclaim, 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. In the absence of a determination that there is no just reason for delay, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties, shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.”

{¶10} In this case, the trial court did not enter judgment on Bergman’s third-party counterclaim against Statman Harris, and the court did not include in its entry the Civ.R. 54(B) language that there was no just reason for delay.

{¶11} Civ.R. 54(B) is not applicable to a judgment that is final under R.C. 2505.02 and that renders moot a claim that has not been adjudicated.<sup>2</sup> A part of

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<sup>1</sup> See *Noble v. Colwell* (1989), 44 Ohio St.3d 92, 540 N.E.2d 1381, syllabus; compare *Sullivan v. Anderson Twp.*, 122 Ohio St.3d 83, 2009-Ohio-1971, 909 N.E.2d 88, syllabus (“R.C. 2744.02[C] permits a political subdivision to appeal a trial court order that denies it the benefit of an alleged immunity from liability under R.C. Chapter 2744, even when the the order makes no determination pursuant to Civ.R. 54[B].”).

<sup>2</sup> *Wise v. Gursky* (1981), 66 Ohio St.2d 241, 421 N.E.2d 150, syllabus.

Bergman's claim for indemnification was rendered moot when the trial court determined that Statman Harris had no right to indemnification against Bergman and then entered judgment against Statman Harris on Statman Harris's third-party complaint. Thus, Civ.R. 54(B) would not have applied if Bergman's claim had been limited to indemnification for any liability owed to Icon.<sup>3</sup> But Bergman also sought indemnification for the expenses of litigation, including attorney fees. Bergman did not present evidence of his attorney fees at trial. Typically, however, a party that has requested attorney fees in the original pleadings may wait until the entry of a judgment on the other claims in the case to pursue those fees.<sup>4</sup>

{¶12} When attorney fees and other expenses of litigation are specifically requested in a counterclaim for contractual indemnification and the counterclaim is not rendered moot by the entry of judgment on the other claims, an order that does not dispose of the counterclaim and does not include, pursuant to Civ.R. 54(B), an express determination that there is no just reason for delay is not a final, appealable order.<sup>5</sup>

{¶13} Statman Harris has appealed from an interlocutory order. Since the trial court's judgment entry is not a final, appealable order, we dismiss this appeal for lack of jurisdiction.

Appeal dismissed.

**CUNNINGHAM, P.J., HILDEBRANDT and DINKELACKER, JJ.**

*Please Note:*

The court has recorded its own entry on the date of the release of this decision.

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<sup>3</sup> Id.

<sup>4</sup> See *Internatl. Bhd. of Electrical Workers, Local Union No. 8 v. Vaughn Industries, L.L.C.*, 116 Ohio St.3d 335, 2007-Ohio-6439, 879 N.E.2d 187, paragraph one of the syllabus.

<sup>5</sup> See id. at paragraph two of the syllabus.