

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

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| Residential Finance Corp.,         | : |   |
| Plaintiff-Appellant,               | : |   |
| v.                                 | : | No. 09AP-497<br>(C.P.C. No. 09CVH1-322) |
| Greenpoint Mortgage Funding, Inc., | : | (REGULAR CALENDAR)                      |
| Defendant-Appellee.                | : |   |

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D E C I S I O N

Rendered on March 30, 2010

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*Stein, Chapin & Associates, LLC, Lance Chapin, and Beth J. Nacht*, for appellant.

*Shumaker, Loop & Kendrick, LLP, Michael A. Snyder, and Scott Branam*, for appellee.

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APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Appellant, Residential Finance Corporation ("appellant"), filed this appeal seeking reversal of a judgment by the Franklin County Court of Common Pleas granting a motion to dismiss for lack of jurisdiction filed by appellee, Greenpoint Mortgage Funding, Inc. ("appellee").

{¶2} Appellant filed this action in the Franklin County Court of Common Pleas seeking a declaratory judgment that a debt in the amount of \$308,288.55 that appellee has asserted is owed by appellant is not a valid legal debt. Appellee's assertion of the debt arose from appellee's funding of a mortgage covering certain property in Worcester, Massachusetts pursuant to an application received from appellant, a mortgage broker, and one of its customers. According to appellee, a Broker's Agreement entered into between it and appellant required appellant to repurchase the mortgage. After appellee made some attempts to have appellant repurchase the mortgage, appellant filed this action seeking a declaratory judgment. In its complaint, appellant sought a declaratory judgment that it does not owe the alleged debt because there is no contractual basis for appellee to demand the repurchase.

{¶3} Appellee filed a motion to dismiss, pursuant to Civ.R. 12(B)(2), 12(B)(3), and 3(D), arguing that the purported Broker's Agreement between the two parties contained a forum selection clause requiring any action under the agreement to be filed in Marin County, California. Appellee's motion argued that the action should be dismissed for lack of jurisdiction or, in the alternative, should be stayed for a period of 60 days in order to allow appellant to file an action in California under the contract. Appellee attached to its motion an affidavit executed by Elizabeth Mossina, an employee of appellee. The affidavit incorporated what purported to be a copy of the Broker's Agreement, an unsigned copy of the last page of the agreement that was more legible than the last page of the purportedly signed agreement, and an enlarged copy of the signature portion of the last page of the purportedly signed agreement.

{¶4} In its memorandum contra, appellant argued that the validity of the purported agreement, including the forum selection clause, was in dispute, and it was necessary to conduct further discovery before the validity of the agreement could be determined. Appellant attached to the memorandum contra an affidavit executed by David K. Stein, appellant's vice-president, in which Stein stated that all contracts entered into by appellant had to be signed by him, that he had no recollection of signing the purported Broker's Agreement containing the forum selection clause, that he did not have a copy of the purported agreement with his signature, and that he had never received a copy of the purported agreement signed by any representative of appellee.

{¶5} The trial court issued a decision and entry granting appellee's motion to dismiss, finding that the forum selection clause was valid, and the action therefore had to be maintained in California. In reaching this decision, the trial court considered the affidavits of Mossina and Stein. The court noted its opinion that the signature appearing on the signature line of the purported Broker's Agreement appeared to match the signature appearing on Stein's affidavit. The court further concluded that, while Stein stated in his affidavit that he did not recall signing the Broker's Agreement, this did not equate to an outright denial that Stein had signed the agreement, nor did Stein deny that the signature on the purported agreement was his. Finally, the court noted that Stein had not denied that appellee funded mortgages for appellant, or asserted that there was no other agreement between the parties.

{¶6} In addition to granting appellee's motion to dismiss for lack of personal jurisdiction, the trial court ordered the action stayed for 60 days in order to allow appellant to file the action in Marin County, California. The court further ordered that, within 20

days of the filing of the decision and entry, appellee was to certify to the court that it: (1) consented to jurisdiction in Marin County, California; (2) waived any objection to venue in that court; and (3) agreed that for purposes of the California statute of limitations, the date of filing of this action in Franklin County would be the date of commencement of the California action. The trial court stated in the entry that appellee's failure to file the required certification would result in the stay being lifted and the action proceeding in Franklin County.

{¶7} Prior to expiration of the 20-day period, appellant filed its notice of appeal.

Appellant asserts a single assignment of error:

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING DEFENDANT GREENPOINT MORTGAGE FUNDING, INC'S 12(B) MOTION TO DISMISS FOR LACK OF JURISDICTION AS IT PREMATURELY DETERMINED THE EXISTENCE OF THE CONTRACT AT ISSUE.

{¶8} In its brief, appellee argues that we should dismiss this appeal for lack of a final appealable order, although appellee did not file a separate motion to dismiss the appeal. The basis for appellee's argument that there is no final appealable order is that the trial court granted appellee's motion to dismiss based on the forum selection clause in the purported contract, but then stayed the action pending further actions that were to be taken: specifically, appellee's certification to the court regarding its recognition of jurisdiction and venue in California, and appellant's filing the action in California within 60 days pursuant to Civ.R. 3(D).

{¶9} As set forth in R.C. 2505.02(B):

An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

- (1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;
- (2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;
- (3) An order that vacates or sets aside a judgment or grants a new trial;
- (4) An order that grants or denies a provisional remedy and to which both of the following apply:
  - (a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.
  - (b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

{¶10} Generally, a dismissal based on lack of personal jurisdiction is not a final order under R.C. 2505.02(B) because such a dismissal is without prejudice, and therefore does not prevent a judgment as set forth in R.C. 2502.02(B)(1), and none of the other provisions in R.C. 2505.02(B) applies to that type of dismissal. *DiCorpo v. Kelley*, 8th Dist. No. 84609, 2005-Ohio-1863. Some courts have concluded that this includes cases in which the lack of personal jurisdiction is based on a forum selection clause in a contract because, while a forum selection clause may prevent litigation of a case in the courts of Ohio, R.C. 2505.02(B)(1) does not limit its consideration to prevention of a judgment in Ohio courts. *Preferred Capital, Inc. v. Strellec*, 161 Ohio App.3d 346, 2005-Ohio-2607. However, other courts have reached the conclusion that dismissal based on a forum selection clause, combined with an order staying the action under Civ.R. 3(D), does result

in a final appealable order because such an order involves the grant of a provisional remedy that, if followed, avoids appellate review of the order. *Overhead, Inc. v. Standen Contracting*, 6th Dist. No. L-01-1397, 2002-Ohio-1191.

{¶11} However, in this case, we conclude that the issue of whether the trial court's decision and entry resulted in a final appealable order is governed by the decision of the Supreme Court of Ohio in *Natl. City Commercial Capital Corp. v. AAAA At Your Serv., Inc.*, 114 Ohio St.3d 82, 2007-Ohio-2942. That case involved a breach of contract action in which the contract at issue contained a forum selection clause requiring any litigation to be conducted in Butler County, Ohio. The trial court found that, notwithstanding the forum selection clause, it could not exercise jurisdiction over the out-of-state defendants pursuant to Civ.R. 4.3. The Supreme Court accepted the case as a certified conflict, with the issue being "[w]hether a dismissal other than on the merits which prevents re-filing in the trial court is a final, appealable order." *Id.* at ¶1.

{¶12} The court recognized the general rule that dismissal without prejudice generally does not result in a final appealable order. *Id.* at ¶8. However, the court found that under those circumstances, the order declining to apply the forum selection clause resulted in a final appealable order because, "[i]n essence, a final judgment has been rendered against National City because the cause has been disposed of and there is nothing left for the determination of the trial court." *Id.*

{¶13} This case is distinguishable from *National City* because, rather than declining to enforce a forum selection clause, the trial court did enforce a forum selection clause. Similarly, this case is distinguishable from those cases such as *Preferred Capital* and *Standen Contracting* that involved dismissals based on forum selection clauses

because those cases involved only whether the forum selection clause itself was enforceable. In this case, the initial dispute is whether the purported contract including the forum selection clause is itself a valid contract.

{¶14} In reaching its decision that the forum selection clause would apply and that the case should have been filed in California, the trial court necessarily concluded that the Broker's Agreement was a valid, enforceable contract. In reaching this conclusion, the trial court effectively denied the claim appellant sought in its claim for declaratory judgment: a judgment that there was no valid, enforceable contract between appellant and appellee that would require appellant to repurchase the mortgage at issue. Therefore, as in *National City*, the decision left nothing further to be determined by the trial court. Thus, the trial court's decision prevented the judgment sought by appellant, and it did constitute a final appealable order.

{¶15} The next issue for our determination is whether the trial court appropriately dismissed the action for lack of personal jurisdiction. Initially, we question whether the issue before the court was amenable to resolution through a Civ.R. 12(B)(2) motion to dismiss for lack of personal jurisdiction based on the forum selection clause. As discussed above, there was disagreement on the question of whether the purported Broker's Agreement containing the forum selection clause was a valid, enforceable agreement. In addition, appellant's complaint did not specifically seek a declaration that the purported Broker's Agreement containing the forum selection clause was invalid, but rather claimed more generally that there was no contractual relationship between the parties that would require appellant to repurchase the mortgage at issue. Because the court's application of the forum selection clause necessarily decided appellant's claim that

there was no contractual agreement between the parties, a motion to dismiss based on the assumption that there was a valid contract appears to have been premature.

{¶16} Furthermore, even assuming that resolution of this case could be accomplished through a Civ.R. 12(B)(2) motion based on the forum selection clause, it does not appear that the trial court properly considered the motion as required under Civ.R. 12(B)(2). If a trial court decides the issue of jurisdiction without holding an evidentiary hearing, the court must consider the allegations in the pleadings, as well as any other evidentiary materials, in a light most favorable to the party seeking to establish personal jurisdiction, and determine whether that party has set forth a prima facie case for jurisdiction. *Meglan, Meglan & Co., Ltd. v. Abante Corp.*, 10th Dist. No. 07AP-130, 2007-Ohio-5013.

{¶17} Here, because the trial court elected to consider appellee's Civ.R. 12(B)(2) motion without holding a hearing, the court was required to consider appellant's complaint, and the evidentiary materials offered regarding appellee's motion, in a light most favorable to appellant as the party claiming that jurisdiction was appropriate. We emphasize that the issue before the trial court was not whether the forum selection clause was enforceable, but whether there was any contractual relationship between appellant and appellee that would support appellee's claim that it was entitled to have appellant repurchase the mortgage. In reaching the conclusion that the forum selection clause applied, the trial court necessarily determined that the Broker's Agreement containing the forum selection clause was a valid, enforceable agreement.

{¶18} The court reached this conclusion by, among other things: (1) comparing the handwriting on the signature line of the purported Broker's Agreement with the

handwriting on the signature line of the affidavit executed by David K. Stein in support of appellant's memorandum contra appellee's motion to dismiss, and concluding that the two matched; and (2) concluding that Stein's statement that he did not recall signing the agreement did not constitute an outright denial of appellee's allegation that he did. Consequently, it does not appear that the trial court viewed the competing evidentiary materials in a light most favorable to appellant as the party seeking to assert jurisdiction because appellant's complaint, and their evidentiary materials offered in opposition to appellee's motion, denied the existence of any contractual relationship between appellant and appellee that would require appellant to repurchase the mortgage at issue. Thus, assuming that Civ.R. 12(B)(2) was the correct method for determination of the validity of the purported Broker's Agreement, the trial court could not have weighed the evidence in the manner it did without holding a hearing.

{¶19} Thus, we sustain appellant's assignment of error, reverse the judgment of the Franklin County Court of Common Pleas, and remand this matter to that court for further proceedings on appellant's claim for declaratory judgment.

*Judgment reversed,  
cause remanded.*

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

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