[Cite as *Eng. Excellence Inc. v. Northland Assoc. L.L.C.*, 2010-Ohio-6535.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Engineering Excellence Incorporated,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-402 (C.P.C. No. 06CVE11-14910)
Northland Associates, LLC,	:	(REGULAR CALENDAR)
Defendant-Appellant,	:	
Retail Ventures, Inc. et al.,	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on December 30, 2010

Roetzel & Andress, LPA, Thomas L. Rosenberg, and *Klodiana Basko,* for appellant.

Vorys, Sater, Seymour, and Pease, LLP, and *William A. Sieck,* for appellee Retail Ventures, Inc.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Defendant-appellant, Northland Associates, LLC ("Northland"), appeals the judgment of the Franklin County Court of Common Pleas granting summary

judgment in favor of defendant-appellee, Retail Ventures, Inc. ("RVI"), on Northland's cross-claims alleging the right to indemnity and/or contribution from RVI.

{¶2} This action arises out of a construction project to convert a portion of the former Northland Mall in Columbus, Ohio, to office space. Effective February 11, 2004, Northland, which owns the building located at 1649 Morse Road (the "building"), entered into an Amended and Restated Lease Agreement (the "Lease") with RVI, by which Northland agreed to lease the building to RVI for 20 years, for use as RVI's corporate headquarters. The Lease required Northland to perform, or cause to be performed, construction and improvements to the building, and RVI's obligation to pay rent was to commence upon completion of construction. Under the Lease, RVI was permitted to submit change orders with respect to the construction and was required to pay change order costs by depositing the total cost of the change orders with Northland's construction lender, Charter One Bank, N.A. ("Charter One"). During the year after the effective date of the Lease, RVI issued several change orders and transmitted completion deposits for each change order to Charter One.

{¶3} On or about February 11, 2004, Northland contracted with Construction Plus, Inc. ("Construction Plus") to serve as the general contractor on the construction project and recorded a notice of commencement pursuant to R.C. 1311.04. Construction Plus hired defendants Engineering Excellence, Inc. ("Engineering Excellence"), Roehrenbeck Electric, Inc. ("Roehrenbeck"), Knollman Construction, LLC ("Knollman"), and Paint Masters, Inc. ("Paint Masters"), as subcontractors. Each of these subcontractors has filed mechanic's liens on the building based on Construction

Plus's alleged failure to pay the amounts due under the various subcontracts. With respect to mechanic's liens, the Lease provided, at Section 7(a), as follows:

> * * * If, because of any act or omission of [RVI] or anyone claiming by or through [RVI], any mechanic's lien or other lien, charge or order for the payment of money shall be filed against the Premises or any portion thereof, [RVI], at its own cost and expense, shall cause the same to be discharged of record within sixty (60) days of the filing thereof; and [RVI] shall indemnify and save harmless [Northland] against and from all costs, liabilities, suits, penalties, claims and demands, including attorneys' fees, on account thereof.

{¶4} Prior to the completion of construction, RVI decided not to occupy the building, and, as a result, Northland and RVI signed a letter amendment to the Lease (the "Letter Agreement"), effective February 18, 2005. Pursuant to the Letter Agreement, Northland was to cease construction work on the third floor and, for purposes of the Lease, the third floor was deemed completed and delivered to RVI, and RVI's rent obligation was to commence in March 2005. Northland agreed, however, to complete certain construction items described on a punch list and to complete work on the building systems required by the Lease. Under the Letter Agreement, RVI was permitted to sublet the building and to initiate change orders in connection with the subleases. As with change orders under the Lease, RVI was required to deposit the cost of any subtenant change order with Charter One "for use in the same manner as monies heretofore deposited by [RVI] with such lender in connection with this project." The Letter Agreement states that none of the costs of the subtenant change orders are Northland's obligation. The necessity of Northland's approval of any sublease and/or of

any subtenant change order was to be determined in accordance with the Lease. The Letter Agreement states as follows:

> 9. Nothing related to the Subtenant Change Order shall affect [RVI's] obligations under the Lease and if any dispute or other controversy arises with respect to the performance of the Subtenant Change Order, [RVI] shall resolve same directly with Construction Plus and shall not seek recovery from [Northland] with respect thereto.

Finally, the Letter Agreement states that the parties "ratify and confirm the Lease and agree that nothing [in the Letter Agreement] shall be deemed a waiver of any of [RVI's] or, except to the extent expressly set forth herein, [Northland's], obligations under the Lease."

{¶5} After execution of the Letter Agreement, RVI submitted two subtenant change orders and deposited the costs of those change orders with Charter One.

{¶6} On November 13, 2006, plaintiff, Engineering Excellence, filed a complaint in the Franklin County Court of Common Pleas for foreclosure of its mechanic's lien and unjust enrichment. The complaint named as defendants Northland, RVI, Charter One, Paint Masters, Knollman, Roehrenbeck, the state of Ohio, and the Franklin County Treasurer. Paint Masters, Knollman, and Roehrenbeck subsequently filed counterclaims and cross-claims to foreclose on their own mechanic's liens. Northland and RVI filed cross-claims against each other, each claiming that it was entitled to indemnity and/or contribution from the other. Northland also sought damages from RVI for any loss it would suffer if the trial court ordered foreclosure. The central issue in

Northland and RVI's cross-claims is which party is ultimately liable, should the subcontractors succeed in establishing a right to recover on their mechanic's liens.

{¶7} In August 2007, Engineering Excellence and Northland filed motions for partial summary judgment, and RVI filed a motion for summary judgment on Northland's cross-claims. In a decision filed January 7, 2010, the trial court denied Engineering Excellence and Northland's motions for partial summary judgment and granted RVI's motion for summary judgment. Although it has not determined the validity of the mechanic's liens or the existence of any liability arising out of the construction project, the trial court determined that RVI would not be required to indemnify Northland for any liability that may arise. On March 30, 2010, the trial court filed an entry, consistent with its January 7, 2010 decision, in which it dismissed with prejudice Northland's cross-claims against RVI. The court's entry states: "This is a final appealable order. There is no just reason for delay."

{¶8} Northland filed a notice of appeal from the trial court's March 30, 2010 entry and now asserts the following assignments of error:

> 1. The trial court committed error when it granted summary judgment to [RVI] and denied [Northland's] Motion for Partial Summary Judgment and ruled that RVI is not responsible for payment of the claims of subcontractors [Knollman, Paint Masters, and Roehrenbeck] pursuant to the Letter Agreement of February 18, 2005, entered into between RVI and Northland.
>
> 2. The trial court committed error when it granted Summary Judgment to RVI and denied Northland's Motion for Partial Summary Judgment and ruled that RVI was not liable to indemnify Northland for any and all liability Northland may have to the subcontractors, [Engineering Excellence,

> Knollman, Paint Masters, and Roehrenbeck] pursuant to the Letter Agreement of February 18, 2005.
>
> 3. The trial court committed error when it granted Summary Judgment to RVI and denied Northland's Motion for Partial Summary Judgment when it did not find that RVI assumed responsibility for the mechanic's liens of the subcontractors, upon entering into the Letter Agreement of February 18, 2005.

{¶9} At oral argument, this court questioned counsel about whether this appeal is taken from a final, appealable order, and we first address that issue. An appellate court may raise the jurisdictional question of whether an order is final and appealable sua sponte and must dismiss an appeal that is not taken from a final, appealable order. *Englert v. Nutritional Sciences, LLC*, 10th Dist. No. 07AP-305, 2007-Ohio-5159, ¶5, citing *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86, 87; *Epic Properties v. OSU LaBamba, Inc.*, 10th Dist. No. 07AP-44, 2007-Ohio-5021, ¶10; *In re Dissolution of Ohio Queen Breeders*, 10th Dist. No. 08AP-373, 2008-Ohio-5113, ¶7. At this court's request, the parties have submitted supplemental briefing on the issue of whether the trial court's March 30, 2010 entry is a final, appealable order.

{¶10} Section 3(B)(2), Article IV of the Ohio Constitution limits this court's jurisdiction to the review of final orders. A final order "is one disposing of the whole case or some separate and distinct branch thereof." *Lantsberry v. Tilley Lamp Co.* (1971), 27 Ohio St.2d 303, 306. A trial court's order is final and appealable only if it satisfies the requirements of R.C. 2505.02 and, if applicable, Civ.R. 54(B). *Denham v. New Carlisle*, 86 Ohio St.3d 594, 596, 1999-Ohio-128, citing *Chef Italiano* at 88. R.C. 2505.02(B) sets forth categories of final orders, and Civ.R. 54(B) provides as follows:

> 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. 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.

Thus, in multiple-claim or multiple-party actions, if the court enters judgment as to some, but not all, of the claims and/or parties, the judgment is a final, appealable order only upon the express determination that there is no just reason for delay. *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.* (1989), 44 Ohio St.3d 17, 22; Civ.R. 54(B).

{¶11} When determining whether a judgment or order is final and appealable, an appellate court engages in a two-step analysis. First, we must determine if the order is final within the requirements of R.C. 2505.02. Second, if the order satisfies R.C. 2505.02, we must determine whether Civ.R. 54(B) applies and, if so, whether the order contains a certification that there is no just reason for delay. *Gen. Acc. Ins. Co.* at 21. Civ.R. 54(B) does not alter the requirement that an order must be final before it is appealable. Id. at 21, citing *Douthitt v. Garrison* (1981), 3 Ohio App.3d 254, 255. Therefore, the presence of a Civ.R. 54(B) certification is relevant only if the trial court's order first qualifies as a final order under R.C. 2505.02.

{¶12} Northland contends that the trial court's entry is a final order, pursuant to R.C. 2505.02(B)(1), which states that a final order includes "[a]n order that affects a substantial right in an action that in effect determines the action and prevents a judgment." A substantial right is 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). Unless the order *affects* a substantial right, it is not a final order. *DeAscentis v. Margello*, 10th Dist. No. 04AP-4, 2005-Ohio-1520, ¶19, citing *Burt v. Harris*, 10th Dist. No. 03AP-194, 2004-Ohio-756, ¶12. "An order that affects a substantial right is one which, if not immediately appealable, would foreclose appropriate relief in the future." *Epic Properties* at ¶13, citing *Bell v. Mt. Sinai Med. Ctr.* (1993), 67 Ohio St.3d 60, 63. RVI disputes Northland's assertion that the trial court's entry is a final order, pursuant to R.C. 2505.02(B)(1), and argues that the denial of an immediate appeal would not foreclose relief to Northland at a later time, namely if and when liability is found to exist, after the trial court determines the validity of the subcontractors' liens.

{¶13} Although we have found no case directly on point with the present set of facts, we deem instructive several cases discussing the finality of orders involving indemnity in other contexts, most notably in the context of insurance coverage. *Elkins v. Access-Able, Inc.*, 10th Dist. No. 04AP-101, 2004-Ohio-4101, involved claims that arose out of a collision involving Elkins' vehicle, which had been specially outfitted by Access-Able, Inc. ("Access-Able"), with equipment manufactured by EMC, Inc. ("EMC"), to permit Elkins, a paraplegic, to accelerate, decelerate, and stop the vehicle without

using her legs. Elkins alleged that components that regulated acceleration and deceleration malfunctioned and caused the accident. Elkins' liability insurer, State Farm Mutual Automobile Insurance Company sued Access-Able, which filed a third-party complaint against EMC, asserting causes of action for indemnity, contribution, tort liability, and breach of express and implied warranties. EMC moved for summary judgment, but the trial court denied the motion, and certified that there was no just reason for delay. After EMC appealed, this court addressed whether the trial court's denial of EMC's motion for summary judgment was a final order, pursuant to R.C. 2505.02(B), and concluded that, in the absence of immediate review, EMC could be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, and claims in the action. Because EMC did not demonstrate that it would be denied effective relief in the future absent immediate review, and also finding that the trial court's entry did not prevent a judgment, we concluded that the trial court's entry did not comply with the requirements of R.C. 2505.02. Accordingly, we sua sponte dismissed the appeal for lack of jurisdiction.

{¶14} In the insurance context, the Supreme Court of Ohio recently held, "[a]n order that declares that an insured is entitled to coverage but does not address damages is not a final order as defined in R.C. 2505.02(B) * * * because the order does not affect a substantial right." *Walburn v. Dunlap*, 121 Ohio St.3d 373, 2009-Ohio-1221, syllabus. In that case, the trial court's order declared that the plaintiffs were entitled to uninsured or underinsured motorist ("UM") coverage under a policy issued to one plaintiff's employer. Although the court ordered that the plaintiffs were entitled to UM

coverage, the trial court had not addressed the plaintiffs' claim for damages, which they were required to establish in order to receive UM benefits. The Supreme Court acknowledged its prior holding in *Gen. Acc. Ins. Co.*, that a decision regarding an insurer's duty to defend its insureds immediately affects a substantial right of both the insurer and insured, but held that a decision that an insured is entitled to UM coverage, without a determination of damages, does not. See also *Tinker v. Oldaker*, 10th Dist. No. 03AP-671, 2004-Ohio-3316, ¶14 (a holding that plaintiffs were entitled to UM coverage did not affect a substantial right where trial court did not address plaintiffs' primary damage claim; "[w]e find that if review is delayed until after [plaintiffs'] action is fully adjudicated, [the insurer] still has appropriate relief available to it in the future, in the form of another appeal").

{¶15} This court recently examined *Walburn* while addressing circumstances similar to those in this case in *Dywidag Sys. Internatl., USA, Inc. v. Ohio Dept. of Transp.*, 10th Dist. No. 10AP-270, 2010-Ohio-3211 ("*DSI*"). There, ODOT contracted with DSI to supply various materials, including epoxy-coated steel wire strands, for a bridge construction project, and DSI subcontracted the supply of the wire strands to Insteel. A dispute arose after DSI discovered that the strands supplied by Insteel were defective, and DSI purchased new wire strands from another source at an additional cost when Insteel refused to replace the defective strands. DSI filed a complaint for declaratory and monetary relief against ODOT, and ODOT counterclaimed against DSI for breach of contract. DSI then filed a third-party complaint against Insteel, seeking indemnity/contribution, declaratory judgment, and alleging various other claims. The

trial court granted summary judgment in favor of Insteel on certain of DSI's claims, including its claim for contractual indemnity, and dismissed the remaining claims in the third-party complaint for failure to state a claim. The trial court incorporated Civ.R. 54(B) language into its judgment entry, although it had not yet determined the claims and counterclaims between DSI and ODOT regarding principal liability.

{¶16} When DSI appealed, Insteel moved to dismiss the appeal for lack of a final, appealable order. In our discussion of whether the trial court's entry satisfied R.C. 2505.02(B)(1), we reviewed, and found instructive, recent case law involving insurance coverage issues, including *Walburn* and *Tinker*. Based on those cases, we stated, "it would seem to follow that if the issue here was strictly one of indemnification, even though in this case the 'coverage' or indemnification rights were denied, since the issue of liability and damages has not yet been adjudicated, DSI's substantial rights may not be affected and there may be no final order pursuant to R.C. 2505.02(B)(1)." *DSI* at ¶20. DSI's third-party complaint, however, alleged that Insteel contractually agreed, not only to indemnify, but also to defend DSI. Relying on *Gen. Acc. Ins. Co.*, we held that, because the trial court's order effectively determined that Insteel was not required to defend DSI, the order affected a substantial right and was final pursuant to R.C. 2505.02(B)(1). See also *Braelinn Green Condominium Unit Owner's Assn. v. Italia Homes, Inc.*, 10th Dist. No. 09AP-1144, 2010-Ohio-2371 (trial court's dismissal of insurer's new-party complaint for a declaratory judgment that it had no obligation to provide coverage, a defense or indemnity to the defendants was a final order based on

Gen. Acc. Ins. Co.); *Walburn* at ¶27 ("[c]ases in which an insured seeks both a defense and indemnification are controlled by *Gen. Acc.*[*Ins. Co*.]").

{¶17} In its cross-claims against RVI, Northland alleged that it "is entitled to indemnity and/or contribution from * * * RVI for any and all sums it may owe to * * * [the subcontractors] for any reason whatsoever including but not limited to the Affidavit for Mechanic's Lien or the claim of unjust enrichment." In its prayer for relief, Northland requested "indemnity and/or contribution for any and all sums, obligations, or other liability * * * Northland may owe to [the subcontractors]." Nowhere in its cross-claims does Northland allege that RVI was obligated to provide it with a defense to the subcontractors' claims. Thus, this case is distinguishable from *DSI* and is more akin to *Walburn*.

{¶18} Although the trial court determined that RVI was not required to indemnify Northland from liability on the subcontractors' claims, the court has not determined whether any liability, in fact, exists. Unless the subcontractors establish a right to relief, the question of whether Northland or RVI is ultimately responsible for the damages is moot. Moreover, Northland will not be denied effective relief, in the form of another appeal, should immediate review of the trial court's order not be available, but such review would be necessary only if the subcontractors succeed in establishing valid claims for relief. Accordingly, we conclude that the trial court's order does not affect a substantial right and does not qualify as a final order under R.C. 2505.02(B).

{¶19} Because the trial court's judgment does not qualify as a final order under R.C. 2505.02(B), the trial court's certification that there was no just reason for delay is

irrelevant because Civ.R. 54(B) certification does not change a non-final order into a final, appealable order. See *Gen. Acc. Ins. Co.* at 21. Having determined that the trial court's entry is not a final order, we lack jurisdiction to consider the merits of this appeal. Accordingly, we dismiss this appeal and remand the matter to the trial court for further proceedings.

Appeal dismissed and cause remanded.

TYACK, P.J., and BRYANT, J., concur.