[Cite as *Huntington Natl. Bank v. Troon Mgt., Ltd.*, 2011-Ohio-1194.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The Huntington National Bank,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-655 (C.P.C. No. 09CVE-12-17841)
Prep Academies, Inc. et al.,	:	
Defendants-Appellees,	:	(REGULAR CALENDAR)
Troon Management, Ltd.,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 15, 2011

Porter Wright Morris & Arthur, LLP, Craig R. Carlson, James P. Botti, and *Justin L. Root*, for The Huntington National Bank.

W. Vincent Rakestraw, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Troon Management, Ltd. ("Troon"), defendant-appellant, appeals from a judgment of the Franklin County Court of Common Pleas, in which the trial court granted the motion to dismiss Troon's counterclaim filed by The Huntington National Bank ("Huntington"), plaintiff-appellee. Huntington has filed a motion to dismiss Troon's appeal for lack of a final appealable order.

{¶2} In March 2007, Prep Academies, Inc. ("Prep") sought to refinance its operations. Huntington agreed to provide Prep financing with certain real estate acting as collateral. Troon, as well as others, held an interest in some of this real estate. To secure the financing, Prep allegedly asked Troon to subordinate its interest in such real estate, which Troon agreed to do. Therefore, Huntington then held the first mortgage on the real estate. Prep defaulted on the loan obligations.

{¶3} On December 1, 2009, Huntington filed a complaint for money judgment and foreclosure against Prep, the owners of Prep, and numerous other defendant entities having a claim on the subject property, including Troon. Also on December 1, 2009, certain defendants filed their answer to numerous counts of the complaint, and the court entered a cognovit final judgment as to those counts in favor of Huntington.

{¶4} On January 29, 2010, Troon filed an answer and counterclaim. Another defendant joined in Troon's answer and counterclaim, but that defendant subsequently dismissed its counterclaim. Troon alleged negligent misrepresentation in its counterclaim, asserting that Huntington supplied false information regarding the financing to Prep and other defendants. Troon claimed that Huntington represented that the financing would result in working capital in the amount of $750,000 at the time of closing that would allow Prep to maintain operations; however, the working capital never materialized. Troon asserted it relied upon false representations of Huntington, which were communicated to Troon through Prep, and Huntington knew that Troon would rely upon these representations in agreeing to subordinate its interest in the subject property. Troon alleged it suffered financial damages due to Huntington's negligent misrepresentation to Prep.

{¶5} On February 26, 2010, Huntington filed a motion to dismiss Troon's counterclaim pursuant to Civ.R. 12(B)(6). On June 10, 2010, the trial court granted Huntington's motion to dismiss. The court found that negligent misrepresentation requires the existence of a duty to provide accurate information that goes beyond the common-law duty to exercise reasonable care to prevent foreseeable harm, such as in the context of a fiduciary relationship. The court further found that Huntington owed Troon no duty higher than the common-law duty to exercise reasonable care and to prevent foreseeable harm in the context of a relationship between debtor and creditor or between a lender and third party with a pecuniary interest in the loan. On July 29, 2010, the trial court filed an entry journalizing the June 10, 2010 decision granting Huntington's motion to dismiss. Troon appeals the trial court's judgment, asserting the following assignment of error:

> THE TRIAL COURT ERRED IN GRANTING PLAINTIFF'S MOTION TO DISMISS DEFENDANT TROON'S COUNTERCLAIM.

{¶6} We first address Huntington's motion to dismiss Troon's appeal for lack of a final appealable order. Pursuant to Section 3(B)(2), Article IV of the Ohio Constitution, this court's appellate jurisdiction is limited to the review of final orders of lower courts. "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 Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86, 88.

{¶7} R.C. 2505.02(B) defines a final order, in pertinent part, as follows:

> 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.

{¶8} 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).

{¶9} 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. Id. at 21. Civ.R. 54(B) does not alter the requirement that an order must be final before it is appealable. Id., 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.

{¶10} In the present case, as to R.C. 2505.02(B)(2), R.C. 2505.02(A)(2) defines a special proceeding as an action or proceeding that is specially created by statute and that, prior to 1853, was not denoted as an action at law or a suit in equity. Because foreclosure actions were in existence prior to 1853, they are not special proceedings in the context of final appealable orders. *Fifth Third Bank (Central Ohio) v. Banks*, 10th Dist. No. 04AP-860, 2005-Ohio-4972, ¶16, citing *Higgins v. West* (1832), 5 Ohio 554; *Centex Home Equity Co., L.L.C. v. Williams*, 3d Dist. No. 6-06-07, 2007-Ohio-902, ¶15, citing *Second Natl. Bank of Warren v. Walling*, 7th Dist. No. 01-C.A.-62, 2002-Ohio-3852, ¶17, and *Higgins*. See also *Vinton Cty. Natl. Bank v. Hammond* (July 28, 1987), 4th Dist. No. 1337 (a complaint in foreclosure is not a special proceeding). Therefore, R.C. 2505.02(B)(2) does not apply.

{¶11} With regard to R.C. 2505.02(B)(1), the trial court's decision granting Huntington's motion to dismiss Troon's counterclaim meets neither branch of R.C. 2505.02(B)(1). The order did not determine the action because the merits of Huntington's complaint have not yet been resolved. In addition, the trial court's order does not affect a substantial right under R.C. 2505.02(A)(1), as "[a]n order affecting a substantial right is 'one which, if not immediately appealable, would foreclose appropriate relief in the

future.' " *Browder v. Shea*, 10th Dist. No. 04AP-1217, 2005-Ohio-4782, ¶13, quoting *Bell v. Mt. Sinai Med. Ctr.* (1993), 67 Ohio St.3d 60, 63. Once the merits of Huntington's complaint have been addressed and the action is fully determined in the common pleas court, Troon will have the right to appeal the entire action, including the trial court's granting Huntington's motion to dismiss Troon's counterclaim. See *Smith v. Williams*, 10th Dist. No. 09AP-732, 2010-Ohio-1381 (the trial court's decision granting the plaintiffs' motion to dismiss the defendant's counterclaim was not a final appealable order under R.C. 2505.02(B)(1) because it did not determine the action, as the merits of the complaint have yet to be resolved, and did not affect a substantial right, as the defendant may appeal the dismissal of its counterclaim after the court addresses the complaint). Therefore, the order granting Huntington's motion to dismiss Troon's counterclaim was not final within the requirements of R.C. 2505.02.

{¶12} Given the failure to satisfy the requirements of R.C. 2505.02, whether the trial court made a finding under Civ.R. 54(B) that "there is no just reason for delay" is irrelevant. However, we do note that Civ.R. 54(B) makes mandatory the use of the language "there is no just reason for delay." *Noble v. Colwell* (1989), 44 Ohio St.3d 92, 96. Unless those words appear where multiple claims and/or multiple parties exist, the order is subject to modification and it cannot be either final or appealable. Id., citing *Jarrett v. Dayton Osteopathic Hosp., Inc.* (1985), 20 Ohio St.3d 77, and *Whitaker-Merrell Co. v. Geupel Constr. Co.* (1972), 29 Ohio St.2d 184, syllabus. The required language puts the parties on notice when an order or decree has become final for purposes of appeal. Id., citing Staff Note to Civ.R.54 (B), and *Pokorny v. Tilby Dev. Co.* (1977), 52 Ohio St.2d 183. In the present case, the trial court did not indicate "there is no just reason for delay."

Therefore, the July 29, 2010 entry would also fail to constitute a final appealable order based upon this deficiency. For the above reasons, we lack jurisdiction to consider Troon's appeal.

{¶13} Accordingly, Huntington's motion to dismiss Troon's appeal is granted, as the decision from which Troon appeals was not a final appealable order.

Motion to dismiss granted;
appeal dismissed.

FRENCH and DORRIAN, JJ., concur.

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