[Cite as *Ohio Farmers Ins. Co. v. Stark Cty. Bd of Commrs.*, 2011-Ohio-2942.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Ohio Farmers Insurance Company,	:	
Plaintiff-Appellant,	:	
v.	:	No. 10AP-164 (C.P.C. No. 08CVH-04-5532)
The Board of County Commissioners of Stark County, Ohio et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on June 16, 2011

McDonald Hopkins LLC, *Jerome W. Cook* and *Glenn D. Southworth*, for appellant.

Michael DeWine, Attorney General, *Paul A. Russell* and *David M. Bridenstine*, for appellees.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Plaintiff-appellant, Ohio Farmers Insurance Company ("OFIC"), appeals from the judgment of the Franklin County Court of Common Pleas denying OFIC leave to file an amended complaint with regard to its claims against defendant-appellee, the Ohio Department of Transportation ("ODOT"). Because the judgment from which appellant appeals is not a final, appealable order, we dismiss this appeal.

{¶2} This case presents OFIC's efforts to obtain declaratory, monetary, and injunctive relief against ODOT, TAB Construction Company, Inc. ("TAB"), the Board of Commissioners of Stark County and the Stark County Engineer (collectively "Stark County"). The facts concern a construction project known as the Cleveland Avenue Widening Phase II ("the project"). Portions of the financing came from federal funds associated with The United States Department of Transportation's financial assistance program to promote participation by disadvantaged business enterprises ("DBE"). The program is established by and subject to federal law, which sets an aspirational goal that ten percent of the authorized funds be spent on DBE. With regard to the project, ODOT was to serve as the local administrator for the federal funds to be received by Stark County.

{¶3} In 2004, Stark County solicited bids for the project. Northern Valley Contractors, Inc. ("NVC") submitted the successful bid and contracted with Stark County for the completion of the project. As a result, NVC requested from OFIC a Bid Guaranty and Performance/Payment Bond ("the bond"). OFIC issued the bond, which identified NVC as the principal and Stark County and ODOT as the obligees.

{¶4} At some point, it became clear that NVC was going to be unable to meet the ten percent DBE participation goal. As a result, it requested a partial waiver from ODOT. Apparently, by way of a July 9, 2004 letter directed to NVC, ODOT found that NVC had undertaken good-faith efforts to meet the goal and, as a result, ODOT waived 7.34 percent of the ten percent goal.

{¶5} NVC contracted with TAB for various portions of the project. Apparently, TAB also contracted with another supplier with regard to some of the materials it was to provide.

{¶6} In the midst of performance, NVC began experiencing financial difficulties. As a result, OFIC intervened and began making certain voluntary financial accommodations to NVC, including the submission of payments to vendors, such as TAB. Apparently, the project completed ahead of schedule. However, OFIC allegedly made $62,137.61 in payments to TAB that it never received from ODOT and/or Stark County.

{¶7} As a result, OFIC filed its initial complaint asserting separate breach of contract claims against ODOT, Stark County and TAB, in addition to seeking declaratory and injunctive relief. By way of its complaint, OFIC alleged that ODOT and/or Stark County have refused to pay it $62,137.61, to which it is entitled as the assignee of amounts payable to NVC under its contract with Stark County. OFIC also alleged that the appellees are threatening to return these funds to the United States Department of Transportation as a liquidated damage penalty for the alleged failure to meet DBE participation goals.

{¶8} According to its pleading, Stark County is currently in possession of the $62,137.61 and is unsure who is entitled to the funds. Accordingly, it filed a counterclaim against OFIC and a cross-claim against ODOT to attempt to avoid double liability for improperly distributing the funds.

{¶9} ODOT filed a motion to dismiss and argued that the Franklin County Court of Common Pleas lacked subject-matter jurisdiction over it because OFIC's claims

against ODOT were for money damages and were required to be brought in the Ohio Court of Claims. The trial court agreed and dismissed OFIC's claims against ODOT.

{¶10} OFIC appealed, and we dismissed the appeal because there was no final, appealable order underlying the appeal. See *Ohio Farmers Ins. Co. v. Stark Cty. Bd. of Commrs.*, 10th Dist. No. 08AP-892, 2009-Ohio-2163, ¶13, 15.

{¶11} Upon presenting back to the trial court, OFIC filed a motion for leave to file an amended complaint. The trial court denied such leave based upon its finding that it lacked subject-matter jurisdiction. By way of a motion filed on January 10, 2010, OFIC sought Civ.R. 54 certification that there was "no just reason for delay" with respect to the decision denying its motion for leave to amend. On February 5, 2010, the trial court granted OFIC's motion for Civ.R. 54 certification. OFIC has timely appealed and presents the following assignments of error:

> 1. The trial court erred by characterizing Appellant Ohio Farmers Insurance Company's claims against Appellee The Ohio Department of Transportation as claims for "money due on a contract" subject to the exclusive jurisdiction of the Court of Claims where Appellant has not alleged that either Appellant or its principal had a contract with The Ohio Department of Transportation and the claims asserted against The Ohio Department of Transportation are equitable claims to recover funds wrongfully withheld by The Board of County Commissioners of Stark County, Ohio as a result of Appellee's improper administration of the U.S. Department of Transportation's financial assistance program to promote participation by certain disadvantaged business enterprises.
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> 2. The trial court erred by relinquishing jurisdiction over Appellant Ohio Farmers Insurance Company's claims against Appellee The Ohio Department of Transportation because subject matter jurisdiction with the Franklin County Court of Common Pleas is proper under O.R.C. §5501.22 and the jurisdictional priority rule prohibits the trial court from relinquishing jurisdiction over Appellant's Claims against Appellee The Ohio Department of Transportation.

{¶12} In its appellate brief, ODOT again argues that there is no final, appealable order supporting this appeal. We therefore address this preliminary issue.

{¶13} An appellate court has jurisdiction to review and affirm, modify, or reverse judgments or final orders of the trial courts within its district. See Section 3(B)(2), Article IV, Ohio Constitution; see also R.C. 2505.02; and *Fertec, LLC v. BBC & M Engineering, Inc*., 10th Dist. No. 08AP-998, 2009-Ohio-5246. As an appellate court, we are permitted to review judgments only when we are presented with an order that is both final and appealable, as defined by R.C. 2505.02. *Salata v. Vallas*, 159 Ohio App.3d 108, 2004-Ohio-6037, ¶17. An appellate court has no jurisdiction if an order is not final. *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.* (1989), 44 Ohio St.3d 17, 20.

{¶14} R.C. 2505.02(B) defines a final order as any 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[.]

{¶15} R.C. 2505.02(A) defines a "substantial right" as "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." It further 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."

{¶16} 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.

R.C. 2505.02 must also be read in conjunction with Civ.R. 54(B). See *Kopp v. Associated Estates Realty Corp*., 10th Dist. No. 08AP-819, 2009-Ohio-2595, ¶9, citing *Denham v. New Carlisle*, 86 Ohio St.3d 594, 596, 1999-Ohio-128. Civ.R. 54(B) provides the mechanism for creating a final, appealable order where "some * * * distinct branch" of a case is adjudicated, but the whole case is not. See *Noble v. Colwell* (1989), 44 Ohio St.3d 92, fn 3. Civ.R. 54(B) provides:

> 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.

{¶17} Therefore to qualify as final and appealable, the trial court's order must satisfy the requirements of R.C. 2505.02, and if the action involves multiple claims and the order does not enter a judgment on all the claims, the order must also satisfy Civ.R. 54(B) by including express language that "there is no just reason for delay." *Internatl. Bhd. of Electrical Workers, Local Union No. 8 v. Vaughn Indus., L.L.C*., 116 Ohio St.3d 335, 2007-Ohio-6439, ¶7, citing *State ex rel. Scruggs v. Sadler*, 97 Ohio St.3d 78, 2002-Ohio-5315, ¶5-7.

{¶18} The Supreme Court of Ohio has established a two-step process for determining whether an order is both final and appealable. *Gen. Acc. Ins. Co*. In the first

step, the appellate court must determine whether the order fits within one of the categories set forth in R.C. 2505.02(B) and thus constitutes a final order. *Olive Branch Holdings, L.L.C. v. Smith Technology Dev., L.L.C.*, 181 Ohio App.3d 479, 2009-Ohio-1105, ¶13, citing *Noble* and *Gen. Acc. Ins. Co*. If the order satisfies R.C. 2505.02(B), then the second step requires the court to determine whether Civ.R. 54(B) language is required. Id. at ¶14. In the absence of express Civ.R. 54(B) language, an appellate court may not review an order disposing of fewer than all claims. *Internatl. Bhd. of Electrical Workers* at ¶8, citing *Scruggs* at ¶6. However, "the mere incantation of the required language does not turn an otherwise non-final order into a final appealable order." *Noble* at 96.

{¶19} Generally, a decision denying leave to file an amended complaint is not a final, appealable order. *Siemaszko v. FirstEnergy Operating Co*., 187 Ohio App.3d 437, 2010-Ohio-2121, ¶9. This general principle can change, however, when Civ.R. 54(B) language is included. Id. Where a trial court denies a motion to amend and includes Civ.R. 54(B) language, such a denial constitutes a final, appealable order with respect to new claims sought to be added in the proposed amended complaint. Id., citing *Germ v. Fuerst*, 11th Dist. No. 2003-L-116, 2003-Ohio-6241, ¶7; see also *River Oaks Homes, Inc. v. Krann*, 11th Dist. No. 2008-L-166, 2009-Ohio-5208, ¶35; *Worthington v. Wells Fargo Bank Minn., N.A.*, 5th Dist. No. 10 CA 40, 2010-Ohio-4541, ¶31; and *Kennedy v. Wiley* (Sept. 10, 1998), 10th Dist. No. 97APE12-1569. It is as if the trial court allowed the new claims and thereafter dismissed them. *Germ* at ¶7. (Internal citations omitted.)

{¶20} Based upon the assignments of error and arguments presented, this appeal regards the trial court's decision denying OFIC's motion for leave to file an amended

complaint. The trial court denied such leave and included Civ.R. 54(B) language. Upon our review of the proposed amended complaint, however, no new claims were raised in it. OFIC essentially concedes this by stating that it merely sought to "clarify the pleadings." (Appellant's brief, at 2.) Instead of asserting new claims, OFIC merely sought to omit references to ODOT in its claims for money damages against TAB and Stark County.

{¶21} Without asserting new claims in the proposed pleading, no claims were decided when the trial court denied leave. OFIC is not prevented from obtaining judgment on any claim or claims as a result of the denied leave. See R.C. 2505.02(B)(1). No portion or "distinct branch" of the case was decided when the trial court denied leave. See *Lantsberry* at 306. These findings all go to the finality of the judgment under R.C. 2505.02. Indeed, what we have before us is an appeal from a non-final order. The trial court's inclusion of Civ.R. 54(B) language could not convert this non-final order into a final, appealable one. See *Noble* at 96.

{¶22} Though the argument was never advanced, it might be suggested that the trial court's dismissal of OFIC's claims against ODOT in its September 11, 2008 entry caused each and every claim raised in the proposed amended complaint against ODOT to be considered new. However, because the trial court never provided Civ.R. 54(B) language with respect to the September 11, 2008 entry, this dismissal is still an interlocutory order that may be revisited by the trial court. See *Cherry Lane Dev., LLC v. Walnut Twp*., 5th Dist. No. 10-CA-28, 2011-Ohio-425, ¶20 (where entries left claims unresolved and there was no Civ.R. 54(B) certification, a "decision is interlocutory in nature, is not immediately appealable, and can be revised by the trial court at any time prior to the final determination of the entire action"); see also *GreenPoint Mtge. Funding,*

Inc. v. Kutina, 9th Dist. No. 24275, 2011-Ohio-2241, ¶4, citing *Whitaker-Merrell Co. v. Geupel Constr. Co.* (1972), 29 Ohio St.2d 184, 186 ("if Rule 54(B) is applicable, a judgment must comply with it to be appealable"); see also *Ohio Farmers* at ¶13-15.

{¶23} Because the order underlying this appeal is not a final order within the confines of R.C. 2505.02, our jurisdiction is lacking. See *Gen. Acc. Ins. Co.* at 20. We accordingly dismiss this appeal because it lacks a final, appealable order.

Appeal dismissed.

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