[Cite as *Kierland Crossing, L.L.C. v. Ruth's Chris Steak House, Inc.*, 2011-Ohio-5626.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Kierland Crossing, LLC,	:	
Plaintiff-Appellant,	:	
		No. 11AP-627
v.	:	(C.P.C. No. 09CVH-11-17786)
Ruth's Chris Steak House, Inc. et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on November 1, 2011

Squire, Sanders & Dempsey (US) LLP, *C. Craig Woods*, *Jessica D. Goldman*, *Jolene S. Griffith*, and *Colter Paulson*, for appellant.

Benesch Friedlander Coplan & Aronoff LLP, *John F. Stock*, and *Diana E. Hawkins*, for appellees.

ON MOTION TO DISMISS

FRENCH, J.

{¶1} Defendants-appellees, Ruth's Hospitality Group, Inc., fka Ruth's Chris Steak House, Inc., RHG Fish Market, Inc. (together, "RHG Parties"), and Cameron Mitchell Restaurants ("CMR") (collectively, "appellees"), move this court to dismiss the appeal of plaintiff-appellant, Kierland Crossing, LLC ("Kierland"), for lack of a final

appealable order and, accordingly, lack of jurisdiction. Kierland opposes appellees' motion.

{¶2} Kierland commenced this action in the Franklin County Court of Common Pleas by filing a complaint against the RHG Parties and CMR for breach of two commercial leases. The RHG Parties filed an answer and counterclaims, in which they alleged that Kierland's claims were barred by a previously executed settlement and release agreement, whereby Kierland agreed to terminate the subject leases and release all claims arising from the leases in exchange for the RHG Parties' payment of $500,000. In their counterclaims for declaratory judgment and specific performance, the RHG Parties requested, in part, a declaration that the settlement and release agreement was a valid and binding contract that extinguished Kierland's claims under the leases, a declaration that Kierland breached the settlement and release agreement, and an order that Kierland perform its obligations thereunder. The RHG Parties subsequently amended their counterclaims to add a request for attorney fees, as compensatory damages, to their prayer for relief. CMR filed an answer and cross-claim, but CMR dismissed its cross-claims with prejudice on April 21, 2011.

{¶3} The RHG Parties, CMR, and Kierland each moved for summary judgment, and, on May 3, 2011, the trial court granted the RHG Parties and CMR's motions for summary judgment and denied Kierland's motion for summary judgment. The trial court concluded that the settlement and release agreement was a valid and binding contract that precluded Kierland's claims under the leases. The parties agree that the trial court's decision determined all pending claims except the RHG Parties' request for

attorney fees. On June 22, 2011, the trial court issued a Final Judgment Entry, which dismissed Kierland's complaint and granted judgment in favor of the RHG Parties on their amended counterclaims for declaratory judgment and specific performance. The trial court retained jurisdiction to rule upon any motion for attorney fees. The judgment entry states, "THERE IS NO JUST REASON FOR DELAY."

{¶4} The RHG Parties now argue that this court lacks jurisdiction to hear Kierland's appeal because the June 22, 2011 judgment entry, which did not determine their entitlement to attorney fees, is not a final appealable order. The RHG Parties filed a motion for attorney fees as compensatory damages for Kierland's breach of the settlement and release agreement on July 19, 2011, three days before Kierland filed its notice of appeal. The motion for attorney fees remains pending in the trial court.

{¶5} Section 3(B)(2), Article IV, Ohio Constitution limits an appellate court's jurisdiction to the review of final orders. See also *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.* (1989), 44 Ohio St.3d 17, 20. " 'A final order * * * is one disposing of the whole case or some separate and distinct branch thereof.' " *Noble v. Colwell* (1989), 44 Ohio St.3d 92, 94, quoting *Lantsberry v. Tilley Lamp Co.* (1971), 27 Ohio St.2d 303, 306. An appellate court must dismiss an appeal taken from an order that is not final and appealable. *Farmers Mkt. Drive-In Shopping Ctrs. v. Magana,* 10th Dist. No. 06AP-532, 2007-Ohio-2653, ¶10, citing *Renner's Welding & Fabrication, Inc. v. Chrysler Motor Corp.* (1996), 117 Ohio App.3d 61, 64. See also *McClary v. M/I Schottenstein Homes, Inc.*, 10th Dist. No. 03AP-777, 2004-Ohio-7047, ¶15.

{¶6} The Supreme Court of Ohio has set forth a two-step analysis for determining whether an order is final and appealable. See *Gen. Acc. Ins. Co.* at 21. First, the appellate court must determine whether the order constitutes a final order as defined by R.C. 2505.02. If the order is final under R.C. 2505.02, the court must determine whether Civ.R. 54(B) applies. Civ.R. 54(B) provides, in part, as follows:

> * * * 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.

If Civ.R. 54(B) language is required, the court must determine whether the order contains a certification that "there is no just reason for delay." Where an order adjudicates fewer than all claims in a case, it must meet the requirements of both R.C. 2505.02 and Civ.R. 54(B) to be final and appealable. *Noble* at syllabus.

{¶7} Although the judgment entry here contains Civ.R. 54(B) language, the RHG Parties nevertheless argue that it is not a final appealable order. Civ.R. 54(B) cannot affect the finality of an order, but it permits the separation of claims for purposes of appeal and the early appeal of such claims, within the trial court's discretion. *Alexander v. Buckeye Pipe Line Co.* (1977), 49 Ohio St.2d 158, 159. Thus, in determining whether an appeal certified under Civ.R. 54(B) is a final appealable order, an appellate court should first focus on whether the order is final under R.C. 2505.02. *Wisintainer v. Elcen Power Strut Co.*, 67 Ohio St.3d 352, 1993-Ohio-120.

{¶8} A final order must fit into at least one of the categories set forth in R.C. 2505.02(B), which include the following: "(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment; [or] (2) An order that affects a substantial right made in a special proceeding." See *Noble* at 96. The judgment entry here qualifies as a final order under R.C. 2505.02(B). First, a declaratory judgment action is a special proceeding, which is defined 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." R.C. 2505.02(A)(2); *Gen. Acc. Ins. Co.* at 22. Second, the judgment entry, at least as to Kierland, affects a substantial right, which is defined 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." R.C. 2505.02(A)(1). The concept of a substantial right involves the notion of a legal right that will be enforced and protected by law. *Noble* at 94, citing *N. v. Smith* (1906), 73 Ohio St. 247, 249. The right to enforcement and performance of a contract involves a substantial right. *Niehaus v. Columbus Maennerchor*, 10th Dist. No. 07AP-1024, 2008-Ohio-4067, ¶19. Accordingly, the parties' rights to enforcement and performance of both the commercial leases and the settlement and release agreement are substantial rights that are affected by the trial court's judgment. Finally, the trial court's entry determined Kierland's action and prevents a judgment in Kierland's favor.

{¶9} The RHG Parties maintain that a judgment entry is not final and appealable where the trial court has not determined the issue of attorney fees. Undisputedly, in the absence of Civ.R. 54(B) language, a judgment entry that leaves a

pleaded issue of attorney fees unresolved is not a final appealable order. See *State ex rel. Bushman v. Blackwell*, 10th Dist. No. 02AP-419, 2002-Ohio-6753, ¶16 (declaration that a statute was unconstitutional, but which did not address a claim for attorney fees under 42 U.S.C. 1988, and did not contain Civ.R. 54(B) language, was not a final appealable order). The Supreme Court of Ohio recently held that "[w]hen attorney fees are requested in the original pleadings, an order that does not dispose of the attorney-fee claim *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." *Internatl. Bhd. of Electrical Workers, Loc. Union No. 8 v. Vaughn Industries, L.L.C.*, 116 Ohio St.3d 335, 2007-Ohio-6439, paragraph 2 of the syllabus. (Emphasis added.)

{¶10} Based on *Internatl. Bhd.*, this court has distinguished between entries that contain Civ.R. 54(B) language and those that do not, where an issue regarding entitlement to or the amount of attorney fees remains pending in the trial court. In *Green v. Germain Ford of Columbus, LLC*, 10th Dist. No. 08AP-920, 2009-Ohio-5020, ¶25-26, we concluded that the trial court's judgment was not final and appealable where the issue of attorney fees remained unresolved and the judgment entry contained no Civ.R. 54(B) language. We held, at ¶26, that "[w]ithout the Civ.R. 54(B) certification, this matter falls squarely within the purview of *Internatl. Bhd.*" See also *Wright v. Wright*, 10th Dist. No. 07AP-595, 2008-Ohio-544, ¶8 (stating that "[a] judgment deferring final adjudication of a request for attorney fees is not a final appealable order," but noting that the judgment entry there did not contain Civ.R. 54(B) language). On the other hand, in *Niehaus*, we held that a trial court's entry, which declared the rights of the

parties vis-à-vis a contract, but did not determine the plaintiff's entitlement to attorney fees, was a final appealable order, where the trial court expressly certified that there was no just reason for delay. We stated that the *Internatl. Bhd.* syllabus implicitly recognizes that an order that disposes of some claims, but does not dispose of an attorney fee claim, may be a final appealable order if it contains Civ.R. 54(B) language.

{¶11} In *Niehaus*, we also concluded that the trial court did not err by including Civ.R. 54(B) language in its judgment entry. In that regard, we stated, at ¶23, as follows:

> Niehaus' potential recovery of attorney fees is entirely dependent upon the validity of the trial court's conclusions regarding the enforceability of the purchase contract. A reversal of the trial court's determination * * * would eradicate Niehaus' basis for arguing entitlement to attorney fees. Accordingly, we find that it would be unjust to require the parties to litigate Niehaus' entitlement to attorney fees and the amount of those fees prior to finality on the merits * * *.

The same concerns apply here, where reversal of the trial court's determination that a valid and binding settlement and release agreement bars Kierland's contract claims would eradicate the basis for the RHG Parties' claim for attorney fees.

{¶12} The RHG Parties acknowledge the precedent of *Niehaus* and *Internatl. Bhd.*, but urge this court to follow another line of cases, which they contend demands a determination that the trial court's judgment entry is not a final appealable order. They generally argue that "a judgment entry that leaves the issue of the award of damages or attorneys' fees unresolved in a case is not a final appealable order." (Motion to Dismiss at 6.) (Emphasis sic.)

{¶13} The RHG Parties cite several cases involving the finality of an order that left unresolved issues regarding attorney fees. Those cases, in which Ohio courts have concluded that orders were not final and appealable, however, are either distinguishable or were decided prior to *Internatl. Bhd.* For example, in *Bushman*, at ¶16, this court held that the unresolved issue of attorney fees, which was part of the relators' claims for damages, precluded the trial court's judgment entry from qualifying as a final appealable order, but we expressly noted that the judgment entry did not contain Civ.R. 54(B) language. See also *Green*. That holding is consistent with *Internatl. Bhd.* Other cases, including *Columbus v. AAAA Ents., Inc.* (Mar. 31, 1997), 10th Dist. No. 96APE09-1240, and *Eleven Ten Parkway Co. v. K. Amalia Ents., Inc.* (Feb. 11, 1997), 10th Dist. No. 96APE09-1151, do not indicate whether the judgment entry appealed contained Civ.R. 54(B) language. As noted above, pursuant to *Internatl. Bhd.*, in the absence of Civ.R. 54(B) language, a judgment that leaves the issue of attorney fees unresolved is not a final appealable order. Without any indication of the presence of Civ.R. 54(B) language there, we cannot determine that those cases support dismissal of Kierland's appeal. Finally, the RHG Parties cite *Std. Plumbing & Heating Co. v. Hartman*, 5th Dist. No. 2003CA0091, 2004-Ohio-3964, ¶115, in which the appellate court held that an order finding a violation of the Consumer Sales Practice Act was not final, despite the inclusion of Civ.R. 54(B) language, because the issue of attorney fees due as a result of the violation remained pending in the trial court. Because that case was decided before *Internatl. Bhd.*, however, it is unpersuasive.

{¶14} The RHG Parties also cite cases holding that a determination of liability without an adjudication of damages is not a final appealable order, even if the trial court employed Civ.R. 54(B) language. The Supreme Court of Ohio noted this general rule in *Noble* at 96. See also *Penske Truck Leasing, Inc. v. TCI Ins.*, 8th Dist. No. 87549, 2006-Ohio-5256. In *Penske*, the plaintiff filed a complaint containing two claims, one for breach of contract and one for negligence. The contract claim asserted that the defendant breached the contract in several respects. The trial court granted partial summary judgment in favor of the plaintiff, finding for the plaintiff on only one of its breach of contract theories, and included Civ.R. 54(B) certification in its judgment entry. The appellate court held that the trial court's use of Civ.R. 54(B) language did not create a final appealable order where its entry "did not dispose of an entire claim." Id. at ¶10. Although the court did not cite R.C. 2505.02(B), it essentially determined that the trial court's entry did not constitute a final order under that statute. The court held that the trial court's judgment did not dispose of any of the plaintiff's claims because the trial court "did not finally determine [the plaintiff's] damages on the one breach of contract theory as to which it found [the defendant] liable [and because] the alleged breaches of contract are all interrelated." Id. at ¶13.

{¶15} In *Triplett v. Rosen* (Apr. 5, 1988), 10th Dist. No. 87AP-72, this court held that a judgment for the plaintiff was not a final appealable order because the trial court had not addressed the issue of damages. There, the plaintiffs filed an action against the owner of an apartment building, alleging that the owner was negligent in failing to fulfill his obligations as a landlord under the Ohio Revised Code and the Columbus City

Code and was negligent in failing to maintain the apartment in a fit, habitable, and safe condition. The parties, however, dismissed all claims except the plaintiffs' claim of negligence based on a violation of the Columbus City Code. The trial court granted summary judgment in favor of the plaintiff as to liability on the claim arising out of the alleged Columbus City Code violation.

{¶16} In *Triplett*, we first noted that Civ.R. 56 expressly states that a summary judgment on the issue of liability alone is " '*interlocutory in character*' " and not a final order. (Emphasis sic.) We also stated that, although Civ.R. 54(B) permits a court to enter final judgment as to one or more, but fewer than all, the claims or parties in an action by a certification of no just reason for delay, that rule does not authorize a court " 'to enter such a final judgment on one or more, but fewer than all, of the issues presented in an action.' " Id., quoting *Greeler v. Law* (June 13, 1972), 10th Dist. No. 72AP-60. We also relied on this court's prior holding in *Fireman's Fund Ins. Cos. v. BPS Co.* (1982), 4 Ohio App.3d 3, 4. There, we held as follows:

> Where a separate trial on the issue of liability is held, and the issue of liability is determined in favor of the plaintiff, an entry of judgment by the trial court in favor of the plaintiff on the issue of liability which leaves the amount of damages to be awarded unresolved until some future time, does not constitute a final judgment which may then be treated as an appealable order. * * * Civ.R. 54(B) is designed to be used only in those cases where there are multiple claims or parties and there is an otherwise final adjudication of less than all of the claims or of the rights of less than all of the parties.

{¶17} As the RHG Parties note, this court has previously likened a judgment that lacks a determination of attorney fees to a judgment of liability where damages have not

been determined. See *Eleven Ten Parkway Co.* After a bench trial in that case, the trial court found the plaintiff in default under a lease agreement, awarded damages for unpaid rent and specific expenses incurred by the plaintiff, and held that, pursuant to the lease, the plaintiff was entitled to recover reasonable attorney fees as part of its damages. The trial court stated that it would determine the amount of attorney fees at a subsequent hearing. The attorney fees due under the lease in that case were "part of the underlying contract action." Therefore, the court equated the situation to a negligence action wherein liability is determined but the issue of damages is deferred.

{¶18} This case is distinguishable from *Eleven Ten Parkway Co.* and the other cases the RHG Parties cite, which dealt with orders regarding liability and damages. In those cases, the courts' rationale was that the issue of damages was part of the claim for relief and that, by not determining damages, the trial court had not completely determined the claim for relief. See *Triplett*. The courts reasoned that no claim had been determined in its entirety and that there was no final order, regardless of whether the trial court employed Civ.R. 54(B) language.

{¶19} Here, on summary judgment, the trial court was faced with multiple claims, including Kierland's claims for breach of contract against appellees, and the RHG Parties' counterclaims for declaratory judgment and specific performance, including their request for attorney fees. Even were we to determine that the amount of attorney fees is an integral part of the RHG Parties' claims, the trial court's decision and judgment entry, which held that the parties' valid and binding settlement and release agreement barred any claims on the underlying commercial leases, determined Kierland's claims

for breach of contract in their entirety, leading the court to dismiss Kierland's complaint. Thus, here, the trial court entirely determined one or more, but less than all, the claims in this action. Accordingly, Civ.R. 54(B) applies and permitted the trial court to certify that there was no just reason for delay. Further, because counsel for all parties approved the judgment entry signed by the trial court at least as to form, it cannot be argued that the trial court abused its discretion by including Civ.R. 54(B) language.

{¶20} For these reasons, we conclude that the trial court's judgment entry is a final appealable order. We therefore deny the RHG Parties' motion to dismiss.

Motion to dismiss denied.

BRYANT, P.J., and SADLER, J., concur.