**[Cite as *Cooper State Bank v. Columbus Graphics Comm.*, 2012-Ohio-3337.]**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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| Cooper State Bank et al., | : | |
| Appellants-Appellants, | : | |
| | | No. 11AP-1069 |
| v. | : | (M.C. No. 2006 EVA 60024) |
| City of Columbus<br>Columbus Graphics Commission, | : | (REGULAR CALENDAR) |
| | : | |
| Appellee-Appellee. | : | |

D E C I S I O N

Rendered on July 24, 2012

*Jeffrey M. Lewis Co., LPA*, and *Jeffrey M. Lewis*, for appellants.

*Richard C. Pfeiffer, Jr.*, City Attorney, and *Joshua T. Cox*, for appellee.

APPEAL from the Franklin County Municipal Court, Environmental Division.

BROWN, P.J.

**{¶ 1}** Cooper State Bank ("bank") and W. Cooper Enterprises, LLC ("Enterprises"), appellants, have filed an appeal from the November 4, 2011 judgment of the Franklin County Municipal Court, Environmental Division. The city of Columbus, Ohio ("city"), appellee, has filed a motion to dismiss for lack of a final, appealable order.

**{¶ 2}** In 2005, Enterprises purchased a building and associated real estate in Columbus, Ohio. The site includes a billboard. The bank leases the building for its banking business. On November 7, 2005, the bank filed an application for variance with

the Columbus Graphics Commission ("commission"), seeking variances from Columbus City Code ("C.C.C.") 3378.01, which prohibits a billboard to be used as an on-premises sign, and C.C.C. 3377.04, which regulates the maximum size of on-premises signage. A hearing was held before the commission on February 21, 2006. The commission denied appellants' request for variance.

**{¶ 3}** On March 23, 2006, appellants filed an administrative appeal in the Franklin County Municipal Court, Environmental Division. Appellants were also granted a stay of the commission's order. On November 4, 2011, the court (1) vacated the decision of the commission regarding the C.C.C. 3378.01 variance, finding Columbus City Council ("city council"), not the commission, had jurisdiction over the requested variance, (2) remanded the commission's decision for findings of fact and conclusions of law regarding the C.C.C. 3377.04 variance, and (3) did not reach the constitutionality of the two city code provisions. Appellants appeal the decision of the municipal court, asserting the following assignments of error:

> [I.] The trial [court] erred in determining that the Columbus Graphics Commission lacked jurisdiction to grant Appellant Cooper State Bank a variance from Columbus City Code ("CCC") §3378.01.
>
> [II.] The trial court erred in not reversing the decision of the Columbus Graphics Commission when same was arbitrary, capricious, unreasonable, and unsupported by the preponderance of substantial, reliable, and probative evidence in the record as a matter of law.
>
> [III.] The trial court erred by not finding CCC §§3378.01 and 3377.04 unconstitutional as applied to Appellants.
>
> [IV.] The trial court erred by not reversing the decision of the Columbus Graphics Commission as Appellant Cooper State Bank was denied Fundamental Due Process in the Columbus Graphics Commission proceedings.
>
> [V.] The trial court erred by not allowing an evidentiary hearing so that Appellant Cooper State Bank could demonstrate that it was denied Fundamental Due Process in the Columbus Graphics Commission proceedings.

> [VI.] The trial court erred in remanding this case back to Commission, as that body's decision-making ability is now tainted, reducing or eliminating any chance for Appellants to receive Due Process.

**{¶ 4}** We first address the city's motion to dismiss for lack of a final, appealable order. Pursuant to Ohio Constitution, Article IV, Section 3(B)(2), 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.*, 27 Ohio St.2d 303, 306 (1971). 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), citing *Chef Italiano Corp. v. Kent State Univ.*, 44 Ohio St.3d 86, 88 (1989).

**{¶ 5}** 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. v. Ins. Co. of N. Am.*, 44 Ohio St.3d 17, 21 (1989). Civ.R. 54(B) does not alter the requirement that an order must be final before it is appealable. *Id.*, citing *Douthitt v. Garrison*, 3 Ohio App.3d 254, 255 (9th Dist.1981).

**{¶ 6}** R.C. 2505.02 defines a final order and provides, in pertinent part:

> (A) As used in this section:
>
> (1) "Substantial right" means 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.
>
> (2) "Special proceeding" means 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.
>
> (3) "Provisional remedy" means a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, suppression of evidence, a prima-facie showing

> pursuant to section 2307.85 or 2307.86 of the Revised Code, a prima-facie showing pursuant to section 2307.92 of the Revised Code, or a finding made pursuant to division (A)(3) of section 2307.93 of the Revised Code.
>
> (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.

**{¶ 7}** In the present case, the trial court vacated the decision of the commission regarding the C.C.C. 3378.01 variance. Thus, as an order that vacates a judgment, the trial court's order was final in this respect pursuant to R.C. 2505.02(B)(3). However, the trial court's order was not final with respect to the C.C.C. 3377.04 variance. The court remanded that issue to the commission for findings of fact and conclusions of law. It is well-established that a remand to an administrative agency for findings of fact and conclusions of law is not a final order. *See, e.g., Geisert v. Willoughby Zoning Bd.*, 11th Dist. No. 93-L-020 (Sept. 30, 1993) (no final order when common pleas court reversed the decision of the zoning board and remanded the matter to the board to make findings of fact and conclusions of law because nothing in the trial court's order prevents either

party from having the trial court review the board's ruling once it complies with the remand directive); *Lewis v. Village of New Albany*, 10th Dist. 96APE10-1370 (May 15, 1997) (indicating that the court previously dismissed an appeal from a court of common pleas order that remanded the case to city council for findings of fact because it was not a final, appealable order); *Route 20 Bowling Alley v. Mentor*, 11th Dist. No. 93-L-010 (Sept. 30, 1993) (no final order when trial court remanded matter to city planning commission for findings of fact and conclusions of law; the trial court's order neither determined the matter and prevented a judgment nor affected a substantial right because nothing prevented the parties from having the trial court review the commission's ruling once it complies with the remand directive); *Lyden Co. v. Mun. Planning Commissioner of Mentor*, 11th Dist. No. 92-L-193 (Sept. 17, 1993) (no final, appealable order when trial court remanded matter to zoning commission for findings of fact and conclusions of law). Thus, the trial court's order regarding the C.C.C. 3378.01 variance was final but was not final with regard to the C.C.C. 3377.04 variance.

**{¶ 8}** Pursuant to Civ.R. 54(B), a trial court may separate one or more claims from other pending claims for purposes of appellate review. *Ohio Millworks, Inc. v. Frank Paxton Lumber Co.*, 2d Dist. No. 14255 (June 29, 1994). The claims separated must otherwise have been finally adjudicated. *Id*. If the trial court expressly determines that there is no just reason for delay, then the claim or claims separated, pursuant to Civ.R. 54(B), may be reviewed on appeal even though other claims remain pending. *Id*. Specifically, 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.

**{¶ 9}** 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.* at 22; Civ.R. 54(B).

**{¶ 10}** The term "claim," as used in the context of Civ.R. 54(B), refers to a set of facts that give rise to legal rights, not to the various legal theories of recovery that may be based upon those facts. *Aldrete v. Foxboro Co.*, 49 Ohio App.3d 81, 82 (8th Dist.1988). Unless a separate and distinct recovery is possible on each claim asserted, multiple claims do not exist. *Id*. In the instant case, separate and distinct recoveries are possible in appellants' action: a variance under C.C.C. 3378.01 and 3377.04. In fact, as the case now stands, the commission may grant or deny appellants relief on one variance request, while city council may independently grant or deny appellants relief on the other variance request. Thus, there exist separate claims in this case.

**{¶ 11}** However, the trial court did not adjudicate both claims. The trial court vacated the decision of the commission regarding the C.C.C. 3378.01 variance; thus, the trial court adjudicated that issue, as its vacation of the commission's determination with respect to C.C.C. 3378.01 determined the merits of the claim and fully determined the parties' rights for purposes of the present action. The trial court did not, however, adjudicate the issue of the C.C.C. 3377.04 variance, as the court remanded the matter to the commission for findings of fact and conclusions of law. The trial court never addressed the merits of the C.C.C. 3377.04 variance and made no final adjudication as to that matter.

**{¶ 12}** Because this was a multi-claim case, and the court did not adjudicate both claims, there could be no final judgment with regard to either claim absent the "no just reason for delay" language from Civ.R. 54(B). Civ.R. 54(B) makes mandatory the use of the language " 'there is no just reason for delay.' " *Huntington Natl. Bank v. Troon Mgt., Ltd.*, 10th Dist. No. 10AP-655, 2011-Ohio-1194, ¶ 12, quoting *Noble v. Colwell*, 44 Ohio St.3d 92, 96 (1989). Thus, because the trial court made no determination that there was no just reason for delay, the trial court's order was not a final judgment subject to appeal.

Therefore, the entire matter, including both claims, must be remanded to the commission for findings of fact and conclusions of law as to the requested variance under C.C.C. 3377.04, pursuant to the trial court's decision, after which either party may file an administrative appeal to the municipal court regarding the portion of the order related to the C.C.C. 3377.04 variance. Since this appeal was filed prematurely, should appellants again appeal the judgment in one or both of the requested variances, the clerk shall re-docket the notice of appeal, with no additional costs, at such time and after the trial court journalizes a final judgment. For these reasons, we dismiss appellants' appeal.

**{¶ 13}** Accordingly, the city's motion to dismiss for lack of a final, appealable order is granted.

*Motion to dismiss granted;*
*appeal dismissed.*

FRENCH and DORRIAN, JJ., concur.

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