[Cite as *Brisk v. Draf Industries, Inc.*, 2012-Ohio-777.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Paul Brisk,	:	
Plaintiff-Appellant,	:	
v.	:	No. 11AP-23 (M.C. No. 2010 CVF 031867)
Draf Industries, Inc. et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on February 28, 2012

Law Office of Jeffrey H. Jordan, and *Jeffrey H. Jordan*, for appellant.

Cavitch, Familo & Durkin Co., L.P.A., *Eric J. Weiss* and *Megan R. Miller*, for appellee Draf Industries, Inc.

APPEAL from the Franklin County Municipal Court

CONNOR, J.

{¶ 1} Plaintiff-appellant, Paul Brisk, appeals from a judgment of the Franklin County Municipal Court dismissing his complaint for failure to state a claim. Brisk sued defendant-appellee Draf Industries, Inc. and defendant Jeffrey L. Sachs, as maker and guarantor, respectively, of a cognovit promissory note. Sachs was never served with the complaint and is not a party to the current appeal.

{¶ 2} Draf Industries moved to dismiss Brisk's complaint, arguing that the complaint as drafted did not state a claim upon which relief could be granted. The motion alleged that, on its face, the complaint indicated that the action had been filed outside the applicable statute of limitations. The trial court entered judgment granting Draf Industries' motion to dismiss. The court further indicated that, because Sachs had yet to

be served, the case as to him would be placed on inactive status. While the trial court's judgment does contain language indicating that the court intended it to be a final appealable order, the judgment entry does not contain language indicating that "there is no just reason for delay" pursuant to Civ.R. 54(B).

{¶ 3} Brisk appealed the trial court's dismissal of the complaint as to Draf Industries and the parties have fully briefed the appeal. We are, however, compelled to dismiss the appeal for lack of a final appealable order.

{¶ 4} Ohio law provides that appellate courts have jurisdiction to review only final orders or judgments of inferior courts in their districts. Ohio Constitution, Article IV, Section 3(B)(2); R.C. 2505.02. If an order is not final and appealable, this court has no jurisdiction to review the matter and the appeal must be dismissed. When determining whether a judgment is final and appealable, we engage in a two-step analysis. First, we determine whether the order is final within the requirements of R.C. 2505.02; second, if the order complies with R.C. 2502.02, we must decide if compliance with Civ.R. 54(B) is required. *General Acc. Ins. Co. v. Ins. Co. of North America*, 44 Ohio St.3d 17, 20 (1989).

{¶ 5} It is the second prong of the test that applies to preclude review of the present case. 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.

{¶ 6} In the present case, Brisk sued both Draf Industries as the primary obligor and Sachs as guarantor. Brisk did not perfect service on Sachs. Draf Industries alone moved for a dismissal for failure to state a claim, which was granted. The action is still,

even absent service, pending against Sachs. While the trial court's order does clearly indicate an intent to render a final, appealable order, it lacks the compulsory determination that there is no just reason for delay. *See generally*, *Price v. Jillisky*, 10th Dist. No. 03AP-801, 2004-Ohio-1221. Were we to decide the appeal, our determination would be subject to attack and avoidance as having been rendered without jurisdiction. We are therefore compelled to sua sponte raise the question and find that we lack a final appealable order to continue with this appeal, which must be dismissed.

Appeal dismissed.

SADLER and TYACK, JJ., concur.
