

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Nationwide Mutual Fire Insurance Company,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 12AP-44
v.	:	(C.P.C. No. 10 CV 008542)
	:	
M.B. Roofing Systems, Inc.,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant,	:	
	:	
Action Builders, Inc.,	:	
	:	
Defendant-Appellee.	:	

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D E C I S I O N

Rendered on December 28, 2012

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*James E. Featherstone*, for defendant-appellant.

*Freund, Freeze & Arnold, Gordon D. Arnold and Carl L. Anthony*, for defendant-appellee.

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APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶ 1} Defendant-appellant, M.B. Roofing Systems, Inc. ("M.B. Roofing"), appeals from a judgment of the Franklin County Court of Common Pleas granting summary judgment on its cross-claim in favor of defendant-appellee, Action Builders, Inc. ("Action Builders"). Because we conclude that the summary judgment decision is not a final order, we dismiss the appeal for lack of jurisdiction.

{¶ 2} This case arises from the partial collapse of the roof at a Frontroom Furnishings, LLC ("Frontroom Furnishings"), retail store location in Columbus, Ohio, on

June 26, 2008. Approximately three years prior to the collapse, M.B. Roofing had been contracted to remove a portion of the roof of the building and re-install a new roof. M.B. Roofing entered into a subcontract agreement with Action Builders to perform the work necessary to complete the roof installation.

{¶ 3} The plaintiff in the underlying action, Nationwide Mutual Fire Insurance Company ("Nationwide"), insured this property and, following the roof collapse, pursuant to the insurance policy, made payments to Frontroom Furnishings and others on its behalf. Nationwide then filed an action in the Franklin County Court of Common Pleas against M.B. Roofing, Action Builders, one of the owners of Action Builders named Norman Arthur Meadows, Jr. ("Meadows"), and various John Doe defendants, asserting negligence and breach of warranty. M.B. Roofing filed a cross-claim against Action Builders, asserting that, in the event Nationwide was entitled to recover damages against M.B. Roofing, M.B. Roofing would be entitled to subrogation, indemnity, or contribution from Action Builders.

{¶ 4} Action Builders and Meadows moved for summary judgment on Nationwide's claims and M.B. Roofing's cross-claim. Before the trial court ruled on the motion for summary judgment, Nationwide voluntarily dismissed its claims against Action Builders and Meadows under Civ.R. 41(A)(1). The trial court limited its consideration to the cross-claim and concluded that there were no genuine issues of material fact due to the absence of any evidence that the roof collapse was caused by negligence committed by Action Builders. Based on this conclusion, the trial court granted summary judgment in favor of Action Builders on M.B. Roofing's cross-claim.

{¶ 5} M.B. Roofing appeals from the common pleas court's judgment, assigning three errors for this court's review:

I. The Trial Court erred granting summary judgment against Appellant on its cross-claims for indemnity and contribution when the Plaintiff's Complaint against co-Defendant/Appellee had been dismissed.

II. The Trial Court erred granting summary judgment to Action Builders because Action Builders and M.B. Roofing's Subcontract Agreement requires Action Builders to indemnify M.B. Roofing in the event Plaintiff proves M.B. Roofing liable for an "improper roof installation" causing Plaintiff's damage.

III. The Trial Court erred granting summary judgment to Action Builders by improperly considering unauthenticated expert reports, contrary to Civ. R. 56.

{¶ 6} We begin by considering whether this court has jurisdiction over M.B. Roofing's appeal. Even when the parties do not raise the question of jurisdiction, an appellate court may consider the issue on its own motion. *State ex rel. White v. Cuyahoga Metro. Hous. Auth.*, 79 Ohio St.3d 543, 544 (1997). Under the Ohio Constitution, courts of appeals have jurisdiction to review final orders of lower courts. Ohio Constitution, Article IV, Section 3(B)(2). Therefore, we must determine whether the order granting summary judgment on M.B. Roofing's cross-claim is a final order.

{¶ 7} A trial court order is final and appealable if it meets the requirements of R.C. 2505.02 and, if applicable, Civ.R. 54(B). *Eng. Excellence, Inc. v. Northland Assoc., L.L.C.*, 10th Dist. No. 10AP-402, 2010-Ohio-6535, ¶ 10. Therefore, appellate courts use a two-step analysis to determine whether an order is final and appealable. *Id.* at ¶ 11. First, the court determines if the order is final within the requirements of R.C. 2505.02. Second, the court determines whether Civ.R. 54(B) applies and, if so, whether the order being appealed contains a certification that there is no just reason for delay. *Id.*

{¶ 8} In relevant part, R.C. 2505.02 provides that an order is a final order when it "affects a substantial right in an action that in effect determines the action and prevents a judgment." R.C. 2505.02(B)(1). A substantial right is "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). "An order that affects a substantial right is one which, if not immediately appealable, would foreclose appropriate relief in the future." *Epic Properties v. OSU LaBamba, Inc.*, 10th Dist. No. 07AP-44, 2007-Ohio-5021, ¶ 13, citing *Bell v. Mt. Sinai Med. Ctr.*, 67 Ohio St.3d 60, 63 (1993).

{¶ 9} In *Eng. Excellence*, this court considered whether an order granting summary judgment on a cross-claim for indemnity or contribution was a final order. In that case, Retail Ventures, Inc. ("RVI"), entered into a lease agreement with Northland Associates, LLC ("Northland"), under which Northland agreed to lease a building to RVI for 20 years and to perform construction and improvements to the building. *Eng.*

*Excellence* at ¶ 2. Northland contracted with a general contractor for the construction project, and the general contractor hired various subcontractors. *Id.* at ¶ 3. Ultimately, the construction project was not completed and one of the subcontractors, Engineering Excellence, Inc. ("Engineering Excellence"), filed suit against Northland, RVI, and various other parties to enforce a mechanic's lien and for unjust enrichment. *Id.* at ¶ 6. Northland and RVI filed cross-claims against each other for indemnity and contribution. *Id.* Engineering Excellence and Northland filed motions for partial summary judgment, and RVI filed a motion for summary judgment on Northland's cross-claims. *Id.* at ¶ 7. The trial court denied Engineering Excellence and Northland's motions, but granted RVI's motion for summary judgment, concluding that RVI would not be required to indemnify Northland for any liability that might result in the case. *Id.* Northland appealed the trial court's grant of summary judgment to this court.

{¶ 10} On appeal, this court noted that, although the trial court had granted summary judgment in favor of RVI on Northland's indemnity claim, it had not determined whether any liability existed. *Id.* at ¶ 18. The court reasoned that, unless the plaintiff in the underlying action established a right to relief, the question of whether Northland or RVI was responsible for damages was moot. In addition, the court concluded that "Northland will not be denied effective relief, in the form of another appeal, should immediate review of the trial court's order not be available, but such review would be necessary only if the subcontractors succeed in establishing valid claims for relief." *Id.* Based on this reasoning, the court concluded that the trial court's order granting summary judgment in favor of RVI on Northland's cross-claims for indemnity or contribution was not a final order under R.C. 2505.02(B). *Id.* Further, the trial court's certification that there was no just reason for delay was irrelevant because such language could not convert a non-final order into a final order. *Id.* at ¶ 19. Because the judgment was not a final order, the court lacked subject-matter jurisdiction and dismissed the appeal. *Id.*

{¶ 11} Similar to *Eng. Excellence*, the present appeal involves a trial court judgment granting summary judgment in favor of a defendant on a cross-claim for indemnity or contribution, while the issue of liability on the main claim remains unresolved. The question of whether M.B. Roofing is entitled to indemnity or

contribution from Action Builders will be moot if Nationwide fails to establish that M.B. Roofing is liable for damages. If M.B. Roofing is found liable on Nationwide's claim, it will be able to seek review of that judgment through an appeal. Thus, M.B. Roofing will not be denied effective relief if the summary judgment order in favor of Action Builders is not subject to immediate review because it may seek review of that order as part of any appeal from a final judgment on Nationwide's claim. Under these circumstances, the summary judgment order on M.B. Roofing's cross-claim is not one that "affects a substantial right" by foreclosing appropriate relief in the future if it is not subject to immediate appeal. *Id.* at ¶ 12. Therefore, the order is not a final order under R.C. 2505.02(B)(1).<sup>1</sup> Concluding that, under these circumstances, the summary judgment order is not a final order also avoids the inequity of forcing M.B. Roofing to admit to or prove its own liability on Nationwide's claim in order to defeat Action Builders' motion for summary judgment on its cross-claim.

{¶ 12} We note that the trial court included language in its order indicating that there was no just reason for delay; however, this language does not convert the order into a final order. *Id.* at ¶ 19. Because there is no final order, we lack jurisdiction to consider the merits of the appeal. Accordingly, we sua sponte dismiss this appeal and remand the matter to the trial court for further proceedings.

*Appeal sua sponte dismissed; cause remanded.*

BROWN, P.J., and BRYANT, J., concur.

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<sup>1</sup> M.B. Roofing argues that the trial court should have dismissed its cross-claim against Action Builders without prejudice under Civ.R. 41. We note that because the order granting summary judgment in favor of Action Builders is not a final order, it would be subject to a motion to reconsider in the court below.