[Cite as *Ross v. Robert Lee Brown, Inc.*, 2013-Ohio-173.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Marcia M. Ross,	:	
Plaintiff-Appellant,	:	No. 12AP-302 (C.P.C. No. 11CVD-5487)
v.	:	(REGULAR CALENDAR)
Robert Lee Brown, Inc.,	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on January 24, 2013

Malek & Malek, *Douglas C. Malek* and *Matthew Teeter*, for appellant.

Dinsmore & Shohl, LLP, Michael L. Squillace and *Christen S. Hignett,* for appellee Robert Lee Brown, Inc./CBS Personnel Service.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶ 1} Plaintiff-appellant, Marcia M. Ross ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas granting the motion to dismiss filed by defendant-appellee, Robert Lee Brown, Inc./CBS Personnel Service ("appellee"), and defendant Dinsmore and Shohl, L.L.P. ("Dinsmore"). Because we conclude that the order granting the motion to dismiss is not a final, appealable order, we dismiss the appeal for lack of jurisdiction.

{¶ 2} Appellant filed a workers' compensation claim against appellee, which was allowed for lumbosacral strain/sprain. Appellant then sought an additional allowance for the condition of sacroilitis. The Bureau of Workers' Compensation referred this additional allowance claim to the Industrial Commission of Ohio ("Commission"). Following a hearing, a Commission district hearing officer ("DHO") disallowed the claim

for sacroilitis. A Commission staff hearing officer ("SHO") subsequently affirmed the DHO's order denying the claim. Appellant appealed the SHO order to the Commission, which refused to hear the appeal.

{¶ 3} Appellant then filed an appeal in the Franklin County Court of Common Pleas. Appellee and Dinsmore moved to dismiss the appeal, arguing that appellant failed to state a claim upon which relief could be granted. The common pleas court granted the motion to dismiss, concluding that appellant failed to demonstrate that she had exhausted her administrative remedies prior to filing the appeal and that Dinsmore was not a proper party because it had not employed appellant but merely acted as legal counsel for appellee.

{¶ 4} Appellant appeals from the judgment granting the motion to dismiss, assigning three errors for this court's review:

> [1.] The trial court erred, on March 7, 2012, to the prejudice of Plaintiff-Appellant in ruling that it was unable to determine that Plaintiff had exhausted her administrative remedies prior to filing her appeal such that it had jurisdiction to hear Plaintiff's appeal. This ruling constituted an abuse of discretion.
>
> [2.] The trial court erred, on March 7, 2012, to the prejudice of Plaintiff-Appellant in ruling that Plaintiff's failure to identify in some way a final appealable order from which her appeal was taken necessitated dismissal of Plaintiff's action.
>
> [3.] Lastly, the trial court erred, on March 7, 2012, to the prejudice of Plaintiff-Appellant in ruling that Plaintiff's action should be dismissed under Civ. R. 12(B)(6).

{¶ 5} A claimant or employer may appeal an order of the Commission deciding a claim or an order of the Commission refusing to hear an appeal of an SHO order by filing a notice of appeal with the court of common pleas. R.C. 4123.512(A). The notice of appeal must state the names of the claimant and the employer, the number of the claim, the date of the order appealed from, and the fact that the appellant appeals from that order. R.C. 4123.512(B). These jurisdictional requirements are satisfied by filing a timely notice of appeal that is in substantial compliance with the statutory requirements. *Fisher v. Mayfield*, 30 Ohio St.3d 9 (1987), paragraph one of the syllabus; *Brown v. Liebert Corp.*, 10th Dist. No. 03AP-437, 2004-Ohio-841, ¶ 11.

{¶ 6} The common pleas court noted that appellant included with her notice of appeal a partial copy of the SHO order denying her additional claim for sacroilitis. However, appellant failed to attach or otherwise identify any final order from the Commission denying that claim or refusing an appeal from the SHO order. Thus, the common pleas court held that it was unable to determine that appellant had exhausted her administrative remedies prior to filing the notice of appeal. The court granted the motion to dismiss and dismissed the appeal without prejudice.

{¶ 7} Because the common pleas court dismissed the appeal without prejudice, we begin by considering whether this court has jurisdiction over the appeal. Under the Ohio Constitution, courts of appeals have jurisdiction to review final orders of lower courts. Ohio Constitution, Article IV, Section 3(B)(2). Generally, an involuntary dismissal without prejudice is not a final, appealable order. *Straquadine v. Crowne Pointe Care Ctr.*, 10th Dist. No. 10AP-607, 2012-Ohio-1152, ¶ 9. A dismissal without prejudice may be a final, appealable order, however, if the plaintiff cannot refile the suit because the statute of limitations has lapsed and cannot refile under the savings statute. *White v. Unknown*, 10th Dist. No. 09AP-1120, 2010-Ohio-3031, ¶ 6. Appellee suggests that the dismissal order is a final, appealable order because appellant cannot refile her case under the savings statute. Therefore, we must determine whether appellant would have been able to refile her appeal in the common pleas court after the order dismissing the case without prejudice.

{¶ 8} In relevant part, the savings statute provides that "[i]n any action that is commenced or attempted to be commenced, if in due time a judgment for the plaintiff is reversed or if the plaintiff fails otherwise than upon the merits, the plaintiff * * * may commence a new action within one year after the date of the reversal of the judgment or the plaintiff's failure otherwise than upon the merits or within the period of the original applicable statute of limitations, whichever occurs later." R.C. 2305.19(A). In this case, the appellant seeks to appeal the Commission's refusal to hear her appeal from an SHO order. Pursuant to R.C. 4123.512(A), such an appeal may be taken by filing a notice of appeal with the common pleas court within 60 days after the date of the receipt of the order of the Commission refusing to hear the appeal of the SHO order. Thus, this type of action effectively has a 60-day statute of limitations.

{¶ 9} The Commission order refusing to hear appellant's appeal from the SHO order was mailed on March 2, 2011. Although there is no indication of the precise date that appellant received the refusal order, given standard postal delivery time it would appear that the period to file an appeal with the common pleas court expired in early May 2011. Appellant filed her notice of appeal in the common pleas court on May 3, 2011. Because appellee has not contested the timeliness of appellant's filing with the common pleas court, we will assume for purposes of analysis that it was timely filed. The common pleas court issued its order dismissing the appeal on March 7, 2012. The dismissal order was entered well beyond the 60-day filing period under R.C. 4123.512(A); therefore, the only way appellant could refile her appeal in the common pleas court would be under the savings statute. If appellant could not refile using the savings statute, then the dismissal order would be a final, appealable order, despite the fact that the case was dismissed without prejudice.

{¶ 10} Appellee argues that appellant may not rely on the savings statute and that the dismissal order should be treated as a final, appealable order. Appellee asserts that the case was never "commenced" because the notice of appeal was insufficient to establish the jurisdiction of the common pleas court. Appellee argues that, because the notice of appeal was insufficient to commence the case, appellant cannot take advantage of the savings statute, and the dismissal order is a final, appealable order. Thus, appellee argues in effect that we have jurisdiction over the appeal and should deny the appeal on the merits.

{¶ 11} R.C. 2305.17 provides that an action is "commenced" for purposes of the savings statute "by filing a petition in the office of the clerk of the proper court together with a praecipe demanding that summons issue or an affidavit for service by publication, if service is obtained within one year." In this case, appellant, acting pro se, filed a notice of appeal with the common pleas court. Although appellant did not file a formal demand for service, it appears that the notice was served by certified mail on all named defendants. Appellee does not contest that, under the definition provided in R.C. 2305.17, the action was commenced through appellant's filing in the trial court and service of that filing on the named defendants.

{¶ 12} However, appellee cites to this court's decision in *Cassidy v. Conrad*, 10th Dist. No. 99AP-603 (Mar. 16, 2000), in which we stated that "[a]pparently, the legislature has defined 'commencement' of the appeal/lawsuit as the filing of a notice of appeal which complies with the statutory requirements, regardless of service of process following the filing of the notice of appeal." Appellee argues that, because the notice of appeal failed to identify a final, appealable order from the Commission, it therefore failed to comply with the statutory requirements for an appeal under R.C. 4123.512. Thus, appellee claims that, under the definition set forth in *Cassidy*, the notice of appeal was insufficient to "commence" the action, and appellant would be unable to refile using the savings statute.

{¶ 13} The savings statute applies not only to actions that are commenced, but also an action that is "*attempted to be commenced*." (Emphasis added.) R.C. 2305.19(A). The savings statute " 'is a remedial statute and is to be given a liberal construction to permit the decision of cases upon their merits rather than upon mere technicalities of procedure.' " *Byers v. Robinson*, 10th Dist. No. 08AP-204, 2008-Ohio-4833, ¶ 51, quoting *Cero Realty Corp. v. American Mfrs. Mut. Ins. Co.*, 171 Ohio St. 82 (1960), paragraph one of the syllabus. Consistent with this principle, courts have applied R.C. 2305.19 to hold that parties attempted to commence cases even where they failed to meet certain technical requirements. *See, e.g., Marshall v. J & J's E. of the River Properties, L.L.C.*, 6th Dist. No. L-08-1101, 2008-Ohio-5635, ¶ 18 ("[C]learly appellant filed a complaint and demanded service on that complaint several times before the expiration of the statute of limitations. As a result, appellant attempted to commence this suit in a timely fashion."); *Cox v. Ohio Parole Comm.*, 31 Ohio App.3d 216 (10th Dist.1986), at syllabus ("Even though the Ohio Parole Commission was not named as a defendant in plaintiff's first case filed in the Court of Claims, but was named in plaintiff's second case filed in that court, R.C. 2305.19, the savings statute, applies to the second case since it is apparent that an action was 'attempted to be commenced' against the commission under R.C. 2305.19 where the plaintiff filed his first case against the members of the Parole Commission, and a parolee who had attacked him with a knife.").

{¶ 14} Accordingly, we conclude that appellant "attempted to commence" the action by filing a notice of appeal with the common pleas court and obtaining service on all the defendants named in that notice of appeal. Moreover, the notice of appeal clearly

indicated appellant's intent to appeal the denial of her claim, even if she failed to identify the final Commission order from which she was taking her appeal. Thus, even assuming for purposes of analysis that appellant's filing in the common pleas court was insufficient to "commence" the action, we believe that the savings statute could still permit appellant to refile her appeal in the court of common pleas. Because appellant was eligible to refile under the savings statute,[1] the common pleas court order dismissing the case without prejudice is not a final, appealable order.

{¶ 15} Based on the foregoing reasons, this appeal is sua sponte dismissed for lack of a final, appealable order.

Appeal sua sponte dismissed.

KLATT, P.J., and CONNOR, J., concur.

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[1] Appellee indicated in its brief that appellant had refiled the action in the common pleas court. Although we conclude that appellant could take advantage of the savings statute after the common pleas court dismissed her case, we take no position as to whether any subsequent refiling satisfies the requirements of the savings statute.