[Cite as *McKibben v. U.S. Restoration & Remodeling, Inc.*, 2015-Ohio-1241.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Lisa McKibben,	:	
Plaintiff-Appellant,	:	
Mark Mercer,	:	No. 14AP-737 (C.P.C. No. 12CV-1815)
Plaintiff-Appellee,	:	(REGULAR CALENDAR)
v.	:	
U.S. Restoration & Remodeling, Inc. et al.	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on March 31, 2015

Kevin O'Brien & Associates, Co., LPA, Kevin O'Brien and *Jeffrey A. Catri*, for appellant.

Tyack, Blackmore, Liston & Nigh Co. LPA, James P. Tyack and *Ryan L. Thomas*, for appellees.

APPEAL from the Franklin County Court of Common Pleas

BRUNNER, J.

{¶ 1} Plaintiff-appellant, Lisa McKibben, seeks to appeal a decision of the Franklin County Court of Common Pleas that granted summary judgment to defendants-appellees U.S. Restoration & Remodeling, Inc. ("U.S. Restoration"), Karen T. Chumley, Daniel L. Sechriest, and Joshua Kanode, as to all of McKibben's claims against them. The trial court's decision on summary judgment does not contain "no just reason for delay" language required by Civ.R. 54(B) for us to review an interlocutory order. McKibben has raised the issue in her own appeal that the summary judgment motion appealed may not

be a final appealable order. Appellees assert that it is, citing their Civ.R. 41(A) voluntary dismissal of their counterclaims against one plaintiff (who is not a party to this appeal). Implicit in appellees' argument in favor of our jurisdiction is the argument that, because McKibben appears to have obtained a discharge of defendants' judgment on their counterclaims against her in a Chapter 7 bankruptcy, we may proceed to determine this appeal on its merits as to the trial court's granting of summary judgment against McKibben. However, the trial court also granted judgment on defendants' counterclaims as against plaintiffs' counsel for frivolous conduct, pursuant to R.C. 2323.51, and the matter of damages, including attorney fees, is yet unresolved by the trial court. We heard oral argument in the appeal and gained further information on whether we could move forward on the substantive issues of the appeal. Because we find no final appealable order permitting review, we lack jurisdiction and the appeal is dismissed.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} In 2009, McKibben was the owner and resident of a house on Ward Road, in Columbus, Ohio that had a leaky roof, apparently due to a windstorm. After the storm, McKibben received a call from U.S. Restoration soliciting roof repair business. She informed the caller that she did have a leaky roof, and within several days defendant Sechriest visited her. Unbeknownst to McKibben, Sechriest was the subject of a consent judgment with the Ohio Attorney General's office that permanently enjoined him from engaging in this type of business absent advance notification to the Consumer Protection Section of the Ohio Attorney General's office. This judgment also permanently enjoined him from "[a]ccepting money from consumers for the delivery and completion of certain home remodeling goods and/or services and then failing to deliver the goods and/or services." Moreover, the consent judgment ordered him to "immediately release" certain mechanics' liens he had filed against customers' property.

{¶ 3} Apparently not aware of the consent judgment and Sechriest's consumer practice history, McKibben, at Sechriest's direction, signed an agreement with U.S. Restoration; together they contacted her insurer to make a claim for repairs. The agreement with U.S. Restoration included a provision that McKibben had three days to cancel the transaction without any penalty or obligation. Shortly after McKibben's initial

meeting with Sechriest, U.S. Restoration placed a tarp on her roof as a temporary measure to stop the leaking.

{¶ 4} McKibben's insurer, approximately one week after McKibben signed the contract with U.S. Restoration, approved an estimated replacement cost of $9,974.25 for the roof. With this cost established, McKibben's insurer calculated recoverable depreciation at $2,709.82. McKibben also had a $1,000 deductible. Accordingly, the insurer indicated that it would allow McKibben an upfront replacement reimbursement of $6,264.43. When the job was completed, McKibben's insurer would reimburse McKibben for the depreciation originally withheld up to the total approved replacement cost (less deductible) or McKibben's actual replacement cost (less deductible), whichever amount was smaller. The insurer specifically indicated that it was McKibben's option to "decide to do the work [her]self."

{¶ 5} Eventually, McKibben contracted with another party to complete the work, and U.S. Restoration performed no further work on McKibben's roof other than to have initially placed a tarp there. However, McKibben never paid U.S. Restoration, even for the tarp.

{¶ 6} On May 18, 2009, Chumley, office manager of U.S. Restoration, filed a mechanic's lien against McKibben's property for $10,000. The affidavit in support of this lien claimed that work was furnished and completed on April 6, 2009, and that there was "justly and truly due" from McKibben to U.S. Restoration "the sum of $10,000.00." Approximately two years later, on April 15, 2011, U.S. Restoration released the mechanic's lien.

{¶ 7} On February 10, 2012, McKibben and the holder of her mortgage, Mark Mercer,[1] filed a lawsuit against U.S. Restoration, Chumley, Sechriest, and a director of U.S. Restoration, Joshua Kanode. Following two amended complaints, motions to dismiss and to strike, and orders from the trial court, the operative complaint upon which her action moved forward was the first amended complaint. McKibben alleged four causes of action in her first amended complaint: (1) "breach of [the] Home Solicitation Act" in that defendants had failed to give McKibben a number of notices allegedly

[1] Mercer is not a party to this appeal.

required by the act; (2) violations of the "Ohio Consumer Sales Practices Act" in that defendants had failed to provide the work they were contracted to provide, and to the extent they had performed work, had not performed it properly; (3) "fraud" in that defendants had not, in fact, replaced or repaired the roof as they had promised to do in the contract and yet had filed a mechanic's lien for $10,000; and (4) "slander of title" in that defendants filed a mechanic's lien having provided no labor and materials, did not serve notice of the lien, and caused damages thereby.

{¶ 8} Defendants filed an answer and counterclaims on May 30, 2013. They asserted counterclaims for breach of contract, unjust enrichment, quantum meruit, and sanctions, including attorney fees, under R.C. 2323.51. Defendants asserted all four counterclaims against McKibben. They asserted all claims except breach of contract against Mercer. In addition, defendants asserted the claim for sanctions and attorney fees against plaintiffs' counsel and, in their prayer for relief, requested attorney fees from McKibben, Mercer, and plaintiffs' counsel.

{¶ 9} Also on May 30, 2013, after the close of the trial court's case schedule period for discovery, all defendants jointly filed a motion for summary judgment to which they attached excerpts of the depositions of both McKibben and her mortgage holder, Mercer, as well as copies of the contract with U.S. Restoration, documents from McKibben's insurer, receipts for materials used by the person who repaired McKibben's roof, and documents regarding the mechanic's lien. Neither McKibben nor Mercer filed a timely response to the motion or submitted any evidence in opposition to summary judgment.[2],[3]

{¶ 10} The trial court granted summary judgment to defendants as to all plaintiffs' claims on August 7, 2013. It found that all plaintiffs' claims, except for the fraud claim, were time-barred and that, "[v]iewing the evidence in a light most favorable to Plaintiffs, there are no genuine issues of material fact concerning Plaintiffs' fraud claim," and

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[2] A number of responses to interrogatories and requests for admission were already before the trial court as a result of a discovery dispute; however, the interrogatories were not sworn to or signed by the responding party. Civ.R. 33(A)(3).

[3] On August 16, 2013, one of McKibben's attorneys, Jeffrey Catri, filed an affidavit in which he explained the missed deadline. Notwithstanding this explanation, McKibben never filed a response in opposition to summary judgment (even a late one) or filed a motion for reconsideration. McKibben's other attorney, Kevin O'Brien, never filed any statement explaining his failure to meet the deadline though he mentioned in the text of one pleading that he was on vacation and did not check his e-mail.

thereby the fraud claim failed. The trial court did not terminate the case after granting defendants' motion for summary judgment, as counterclaims remained pending.

{¶ 11} On August 26, 2013, following plaintiffs' and their counsels' failure to timely answer defendants' counterclaims, defendants obtained a default judgment on all of their counterclaims. The trial court set a damages hearing before its magistrate for September 26, 2013. One day before this scheduled hearing, on September 25, 2013, McKibben filed a suggestion of stay with the trial court, having commenced a Chapter 13 bankruptcy proceeding in the Southern District of Ohio.[4] In her suggestion of stay, McKibben quoted relevant sections of the United States Code governing bankruptcy proceedings, including sections stating that the stay applied to all entities of a judicial proceeding against McKibben to recover a claim against her, including the enforcement of a judgment. The record reflects that the bankruptcy court discharged her from her debts and liabilities on January 22, 2014, but the two-page discharge order does not specifically indicate that defendants' counterclaims against McKibben were discharged by the bankruptcy court. Nor do we have information from the record whether defendants appeared as creditors in that matter.

{¶ 12} Although defendants (appellees herein) inaccurately represented at oral argument that they had dismissed all counterclaims, the record shows that these counterclaims were defaulted on by plaintiffs and their counsel, with the trial court awarding judgment to defendants on August 26, 2013. Mercer, after engaging new counsel, obtained an order, on April 18, 2014, relieving him from judgment as to defendants' counterclaims. Defendants voluntarily dismissed their counterclaims against Mercer, pursuant to Civ.R. 41(A), four months later, on August 18, 2014. In their dismissal, defendants represented in a footnote that "[t]he filing of this Motion will dispose of all claims still pending before this Honorable Court" and noted that motions for sanctions were "now ripe for consideration."

{¶ 13} On the same day defendants dismissed their counterclaims against Mercer, August 18, 2014, the trial court referred to its magistrate the matter of an evidentiary

[4] McKibben's petition was at some point in those proceedings converted to a Chapter 7, through which that court granted her discharge from her debts and liabilities. On November 4, 2013, defendants were granted relief from the stay by the U.S. Bankruptcy Court to continue to pursue their counterclaims against Mercer.

hearing on three matters: first, Mercer's motion to enjoin the defendants from pursuing attorney fees, filed November 8, 2013; second, McKibben's motion for sanctions, filed March 12, 2014; and third, defendants' motion for sanctions, filed April 18, 2014. On September 16, 2014, McKibben filed a supplemental motion for sanctions against defendants and their counsel. One day after filing the supplemental sanctions motion, on September 17, 2014, McKibben, through one of her counsel against whom the court had previously granted default judgment as to R.C. 2323.51, filed the notice of appeal now under consideration.[5] McKibben stated in her notice of appeal that "Plaintiff notes that these decisions have become final, appealable orders by virtue of the filing of the Defendants' Notice of Voluntary Dismissal against co-Plaintiff, Mark Mercer, filed on August 18, 2014."

II. ASSIGNMENTS OF ERROR

{¶ 14} McKibben advances two assignments of error for our review:

> I. THE TRIAL COURT'S DECISION AND ENTRY OF AUGUST 7, 2013, GRANTING THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT MAY NOT BE A FINAL, APPEALABLE ORDER AS THE DECISION AND ENTRY LACKS REQUIRED CIV.R. 54(B) LANGUAGE.[6]
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> II. IF THE TRIAL COURT'S DECISION AND ENTRY OF AUGUST 7, 2013, GRANTING THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IS A FINAL, APPEALABLE ORDER, THE TRIAL COURT ERRED IN SUSTAINING THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.

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[5] Mercer did not appeal, but Mercer was also represented by the same counsel as McKibben until attorney Charley Hess filed a notice of appearance on November 21, 2013 on Mercer's behalf, after attorney Kevin O'Brien had filed a motion on behalf of plaintiffs to enjoin defendants from pursuing attorney fees in the case.

[6] We note that McKibben and her attorney argue against their own notice of appeal based on jurisdiction. It appears that she and her attorney believe that defendants' voluntary dismissal of counterclaims against Mercer has some effect on what she claims to be a final appealable order and the counterclaim judgment granted against her and her counsel. S*ee, e.g.*, *Denham v. New Carlisle*, 86 Ohio St.3d 594, 596-97 (1999) ("voluntary dismissal of one or more parties d[oes] not nullify all the claims brought against each and every defendant, but instead nullifie[s] only those claims brought against the parties dismissed under Rule 41(a)(1)").

III. DISCUSSION

{¶ 15} "If an order is not final and appealable, then an appellate court has no jurisdiction to review the matter and the appeal must be dismissed." *Assn. of Cleveland Firefighters, # 93 v. Campbell*, 8th Dist. No. 84148, 2005-Ohio-1841, ¶ 6, citing *McKenzie v. Payne*, 8th Dist. No. 83610, 2004-Ohio-2341. In part of her first assignment of error, McKibben argues against her own notice of appeal, suggesting that the trial court's summary judgment order may not be final and appealable. Though our reasoning differs from McKibben's, we agree that there is not yet a final appealable order from the trial court.

{¶ 16} Civ.R. 54(B) requires that, in order for a judgment to be final and appealable as to fewer than all claims or parties, it must, in addition to meeting one of the categories set forth in R.C. 2505.02(B), express the court's determination that there is "no just reason for delay." *See also State ex rel. Bushman v. Blackwell*, 10th Dist. No. 02AP-419, 2002-Ohio-6753, ¶ 16. Absent such a stated determination, a decision on fewer than all claims or parties 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." Civ.R. 54(B). The trial court's summary judgment order of August 7, 2013 disposed of all McKibben's claims against all defendants but did not dispose of all claims against all parties; defendants' counterclaims remained pending. The trial court's order on summary judgment did not include language that there was "no just reason for delay," as counterclaims remained not yet adjudicated.

{¶ 17} In the ordinary course, when the last of the counterclaims are dismissed, the interlocutory orders in a case will merge with the final judgment and become appealable. *See, e.g., Lingo v. Ohio Cent. RR., Inc.*, 10th Dist. No. 05AP-206, 2006-Ohio-2268, ¶ 17; *see also* App.R. 4(A)(2); *Denham v. New Carlisle*, 86 Ohio St.3d 594, 596-97 (1999). Counsel for defendants asserted several times at oral argument that they had dismissed all their counterclaims, pursuant to Civ.R. 41(A), and that a final appealable order was before this appellate court. We find that assertion to be incorrect based on our review of the record.

{¶ 18} In their answer to plaintiffs' first amended complaint, defendants brought counterclaims against McKibben, Mercer, and plaintiffs' counsel. On August 18, 2014,

defendants filed a voluntary dismissal of all "pending counterclaims against Plaintiff Mark Mercer." After defendants obtained a default judgment on their counterclaims against plaintiffs and their counsel (the latter as to defendants' claims pursuant to R.C. 2323.51), defendants' counterclaim judgments were extinguished against the two plaintiffs but not against their counsel. First, during the period of stay because of McKibben's bankruptcy, Mercer obtained new counsel and eventually obtained relief from the August 26, 2013 default judgment against him. However, defendants released their claims against Mercer with their Civ.R. 41(A) dismissal on August 18, 2014. Second, McKibben was discharged in bankruptcy from liability for the judgment on defendants' counterclaims on January 22, 2014.[7] However, no release, discharge or relief from judgment for defendants' counterclaims for frivolous conduct against her counsel has ever occurred. In fact, when the matter of sanctions and frivolous conduct, among other motions, including the issue of attorney fees, was referred to a magistrate, the only remaining litigant, counsel for McKibben, filed this appeal rather than proceed with the hearing. That appeal is in error because unresolved matters still lay before the trial court.

{¶ 19} McKibben's bankruptcy discharge protected only her and not her attorneys from the frivolous conduct claims pled in defendants' counterclaims. While defendants' counsel posited at oral argument that their counterclaims for sanctions and frivolous conduct were void ab initio because R.C. 2323.51 requires that such claims be brought by motion, we find authority to support that such claims may be brought by pleading without penalty. The fact that subsequent, similar *motions* for sanctions and frivolous conduct

[7] *See, e.g.*, 11 U.S.C. 101(5, 12) (defining "debt" as "liability" for a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured"); 11 U.S.C. 727(a-b) (granting the right to discharge debts); 11 U.S.C. 523(a)(3)(A) (allowing the discharge of even unscheduled debts where the creditor had timely notice or actual knowledge of the bankruptcy case). Moreover, there is precedent for discharging debts that were not (at least initially) fixed amounts. *See, e.g., United States v. Whizco, Inc.*, 841 F.2d 147, 149-51 (6th Cir.1988) (an injunction order was partially dischargeable in Chapter 7 bankruptcy where, although it did not facially require payment of a certain sum of money, its practical effect was to require the expenditure of money to reclaim mined land). Thus, we conclude that McKibben was discharged from liability for defendants' counterclaims because of her discharge in Chapter 7 bankruptcy.

also remain pending before the trial court is of interest, but that factor is not determinative of whether we have jurisdiction to hear this appeal.[8]

{¶ 20} The Supreme Court of Ohio has made clear that:

> When 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, Local Union No. 8 v. Vaughn Industries, L.L.C., 116 Ohio St.3d 335, 2007-Ohio-6439, paragraph two of the syllabus. Further, other districts in Ohio have recognized that claims for sanctions and frivolous conduct may be brought via pleading and are not solely limited to motions. *See, e.g.*, *Texler v. Papesch*, 9th Dist. No. 18977 (Sept. 2, 1998), citing *Burrell v. Kassicieh*, 3d Dist. No. 13-97-54 (June 5, 1998), *Buettner v. Estate of Bader*, 6th Dist. No. L-97-1106 (Jan. 9, 1998), and *Jones v. Billingham*, 105 Ohio App.3d 8 (2d Dist.1995) ("Although the statute does not specify whether a party can make a claim for attorney's fees in the form of a counterclaim, the case law makes clear that it is an accepted method."); *accord Craine v. ABM Servs., Inc.*, 11th Dist. No. 2011-P-0028, 2011-Ohio-5710, ¶ 10; *see also* R.C. 2323.51(B)(2) (allowing a court to award costs, expenses, and fees for frivolous conduct "on the court's own initiative").

{¶ 21} Because counterclaims, pursuant to R.C. 2323.51, remain unresolved against plaintiffs' counsel, there is not yet a final order in the case. Further, in keeping with *Vaughn Industries*, at paragraph two of the syllabus, the trial court also had not yet resolved attorney fee claims that existed in both pleadings and motions; *see also Harris v. Conrad*, 12th Dist. No. CA2001-12-108, 2002-Ohio-3885, ¶ 12. The motion for summary judgment remains an interlocutory order that has not yet merged into a final judgment. *Denham* at 596-97; *Lingo* at ¶ 17; App.R. 4(A)(2); Civ.R. 54(B). Until frivolous conduct and sanctions against plaintiffs' counsel in the counterclaim and related claims for

[8] We note that a pending motion for sanctions does not generally impede the finality of a judgment. *Zappola v. Rock Capital Sound Corp.*, 8th Dist. No. 100055, 2014-Ohio-2261, ¶ 21, citing *Linetsky v. DeJohn*, 8th Dist. No. 98370, 2012-Ohio-6140; *Crenshaw v. Integrity Realty Group, L.L.C.*, 8th Dist. No. 100031, 2013-Ohio-5593, ¶ 3.

attorney fees are resolved, there is no final appealable order on summary judgment. R.C. 2505.02; Ohio Constitution, Article IV, Section 3(B)(2).

{¶ 22} For want of a final appealable order, we lack jurisdiction. All assignments of error are rendered moot, and the appeal is dismissed.

IV. CONCLUSION

{¶ 23} Because we find that counterclaims for sanctions and frivolous conduct along with claims for attorney fees were not disposed of at the trial level, and the entry granting summary judgment did not contain the language required by Civ.R. 54(B), there is no final appealable order, and we therefore lack jurisdiction and this appeal is dismissed.

Appeal dismissed.

KLATT and SADLER, JJ., concur.