

[Cite as *Brannon v. Persons*, 2016-Ohio-8591.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

DWIGHT D. BRANNON, et al.

Plaintiffs-Appellees

v.

DONNA K. PERSONS, et al.

Defendants-Appellant

Appellate Case No. 27266

Trial Court Case Nos. 2015 CV 01473
2015 CV 03889

(Civil Appeal from the
Common Pleas Court)

DECISION AND FINAL JUDGMENT ENTRY

December 20, 2016

PER CURIAM:

{¶ 1} Donna K. Persons appealed the trial court's August 25, 2016 Judgment Entry partially resolving the underlying cases. This is Persons' second appeal; she previously appealed the trial court's May 2, 2016 "Orders on Motions for Summary Judgment" in the same cases. See Montgomery Appellate Case No. 27151. We dismissed that appeal on November 1, 2016 for lack of a final appealable order. *Brannon v. Persons*, 2d Dist. No. 27151, ___-Ohio-___ ("*Brannon I*"). The August 25 Judgment Entry appears to be intended to be such a final order.

{¶ 2} However, the trial court entered the August 25 Judgment Entry while the previous appeal was pending. Because it appeared to this court that the trial court lacked jurisdiction to enter the August 25 Judgment Entry, we ordered Persons to show cause why this appeal should not be dismissed.

{¶ 3} Persons filed a response on November 8, 2016. She argues mainly about the appealability of the trial court's May 2, 2016 decision that was the subject of *Brannon I* but is not at issue here. Persons also makes several arguments concerning the merits of the underlying cases generally and about her entitlement to a stay of the lower court's decisions in particular. She also argues that substantial constitutional rights are affected by the current order. Persons does not address the narrow issue before the court at this time, i.e., whether the trial court had jurisdiction to enter the August 25 Judgment Entry while the previous appeal was pending.

{¶ 4} The Supreme Court of Ohio has held that once an appeal is perfected, "the trial court is divested of jurisdiction over matters that are inconsistent with the reviewing court's jurisdiction to reverse, modify, or affirm the judgment." *State ex rel. Electronic Classroom of Tomorrow v. Cuyahoga Cty. Court of Common Pleas*, 129 Ohio St.3d 30, 2011-Ohio-626, 950 N.E.2d 149, ¶ 13 (internal citation and quotation omitted). This is so even where the previous appeal was dismissed for lack of a final appealable order. *In re C.C.*, 2d Dist. Montgomery No. 26606, 2015-Ohio-3048, ¶ 5, citing *Electronic Classroom* at ¶ 15-17; *In re G.S.*, 4th Dist. Pike No. 14CA852, 2015-Ohio-1285, ¶ 9, citing *Electronic Classroom* at ¶ 16 ("Even when an appeal is taken from an order that the court of appeals ultimately determines is not a final appealable order, the filing of the notice of appeal divests the trial court of jurisdiction to proceed on claims that could be affected by the

appeal”).

{¶ 5} Here, the Judgment Entry was entered on the same claims that were pending before this court in *Brannon I*, making the Judgment Entry inconsistent with this court’s jurisdiction to reverse, modify, or affirm the earlier judgment on those claims. *Brown v. Potter*, 2d Dist. Montgomery Nos. 26774, 26775, 2015-Ohio-4289, ¶ 8-9 (trial court lacked jurisdiction to enter judgment resolving the case while appeal from summary judgment decision was pending). We conclude that the trial court lacked jurisdiction to enter the August 25 Judgment Entry while *Brannon I* was pending.

{¶ 6} An order entered without jurisdiction under these circumstances is not a final appealable order. See *In re C.C.*, 2d Dist. Montgomery No. 26606, 2015-Ohio-3048, ¶ 5, citing *State v. Smith*, 2d Dist. Greene No. 2010-CA-63, 2011-Ohio-5986, ¶ 9-10 (“Any inconsistent orders issued while this appeal is pending will be a nullity”). Because the August 25 Judgment Entry is not a final order, we must dismiss this appeal. We have jurisdiction to review only final orders or judgments of the lower courts in our district. Section 3(B)(2), Article IV, Ohio Constitution; R.C. 2505.02. We have no jurisdiction to review an order or judgment that is not final, and an appeal therefrom must be dismissed. *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.*, 44 Ohio St.3d 17, 20, 540 N.E.2d 266 (1989). Accordingly, this appeal, Montgomery Appellate Case No. 27266, is DISMISSED.

{¶ 7} After this appeal is dismissed, the trial court may re-enter the Judgment Entry and resolve the underlying cases. Should the trial court issue a final appealable order¹ after this appeal is dismissed, the parties may file a new appeal from that order,

¹ We observe that the trial court ordered escrowed funds to remain with the clerk “pending further order of the court,” which may prevent the finality of claims to such funds. See *PNC Bank, N.A. v. Creative Cabinet Sys., Inc.*, 2d Dist. Darke Nos. 2013-CA-14, 2013-CA-15, 2014-Ohio-3264, ¶ 11 (order not final where “escrow funds have not yet been definitively allocated - the order does not actually award the funds to anyone”).

and may thereafter request that the previous record(s) be transferred to that appeal.

{¶ 8} Pursuant to Ohio App.R. 30(A), it is hereby ordered that the Clerk of the Montgomery County Court of Appeals shall immediately serve notice of this judgment upon all parties and make a note in the docket of the mailing.

{¶ 9} SO ORDERED.

MIKE FAIN, Judge

JEFFREY M. WELBAUM, Judge

MARIE HOOVER, Judge
(Sitting by assignment of the Chief Justice of the
Supreme Court of Ohio)

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