

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

TOM PINKERMAN, et al.,	:	
	:	
Plaintiffs-Appellants,	:	Case No. 06CA42
	:	
vs.	:	Released: January 7, 2008
	:	
BOONE COLEMAN	:	<u>DECISION AND JUDGMENT</u>
CONSTRUCTION, INC., et al.,	:	<u>ENTRY</u>
	:	
Defendants-Appellees.	:	

APPEARANCES:

Marty J. Stillpass, Stillpass, Delawder & Heald, Ironton, Ohio, for Plaintiffs-Appellants.

J. Stephen Teetor and Paul A. MacKenzie, Isaac, Brant, Ledman & Teetor, LLP, Columbus, Ohio, for Defendants-Appellees.

McFarland, J.:

{¶1} Plaintiffs-Appellants, Tom and Patricia Pinkerman, appeal the entry of the Lawrence County Court of Common Pleas granting summary judgment in favor of Defendants-Appellees, Boone Coleman Construction Inc. and Boone Coleman. Appellants raise three assignments of error for our review. However, because the trial court's entry did not completely dispose of Appellants' claims and, further, did not certify that there was no just reason for delay, as required by Civ.R. 54(B), we are unable to address the

merits of Appellants' assignments of error. Accordingly, we find the trial court's entry was not a final appealable order and we dismiss this appeal.

I. Facts

{¶2} In August of 2004, Appellees were trying to procure fill dirt for a construction project. Appellees approached Appellants and offered to buy and excavate approximately 10,000 cubic yards of fill dirt from their property. Instead of selling the dirt to Appellees, Appellants agreed to allow the excavation of the fill dirt in return for Appellees making certain improvements on the land.

{¶3} In exchange for the dirt, Appellants allege that Appellees agreed to 1) construct ramps abutting a pre-existing bridge; 2) remove brush and sandbars along the length of a creek; 3) fill in existing holes on the property; 4) clean up loose soil and brush resulting from the excavation, and; 5) stabilize the hillside from which the fill dirt was removed. All discussions and negotiations between the parties, concerning the transaction, were verbal. Both parties acknowledge there was no written agreement.

{¶4} Appellees excavated and removed the fill dirt, but Appellants allege they did not complete the agreed upon improvements on the property. Specifically, Appellants state Appellees did not completely clean out the creek, did not fill in all the holes on the property, did not remove loose topsoil and brush and did not stabilize the hillside.

{¶15} In January of 2006, Appellants filed a complaint alleging breach of contract and negligence. Appellees answered the complaint and filed a motion for summary judgment. In November of 2006, the trial court granted the motion for summary judgment. The trial court's entry states the agreement between the parties was unenforceable because R.C. 1335.05 requires contracts involving land to be in writing. The trial court did not address Appellees' negligence claim. On December 16, 2006, Appellees filed the current appeal.

II. Assignments of Error

- {¶16} 1. THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFFS-APPELLANTS WHEN IT GRANTED DEFENDANTS-APPELLEES MOTION FOR SUMMARY JUDGMENT.
- {¶17} 2. THE TRIAL COURT FAILED TO CONSIDERED (SIC) PLAINTIFFS-APPELLANTS NEGLIGENCE CLAIM WHEN SUMMARY JUDGMENT WAS GRANTED IN FAVOR OF THE DEFENDANTS-APPELLEES.
- {¶18} 3. DEFENDANTS-APPELLEES FAILED TO SHOW THAT NO GENUINE AS TO ANY MATERIAL FACT REMAINS TO BE LITIGATED, THAT THEY ARE ENTITLED TO A JUDGMENT AS A MATTER OF LAW, AND THAT IT APPEARS FROM THE EVIDENCE THAT REASONABLE MINDS CAN COME TO BUT ONE CONCLUSION.

III. Final Appealable Order

{¶19} Before we can consider the merits of Appellees' appeal, we must first determine whether the trial court's entry constitutes a final

appealable order. Under Ohio law, if an order is not final and appealable, appellate courts have no jurisdiction to review it. *General Acc. Ins. Co. v. Insurance Co. of North America* (1989), 44 Ohio St.3d 17, 20, 540 N.E.2d 266. Even if the parties do not address the lack of a final appealable order, the reviewing court must raise the issue sua sponte. *Englefield v. Corcoran*, 4th Dist. No. 06CA2906, 2007-Ohio-1807, at ¶24; *Whitaker-Merrell Co. v. Geupel Const. Co.* (1972), 29 Ohio St.2d 184, 186, 58 O.O.2d 399, 280 N.E.2d 922.

{¶10} An order is a final appealable order when it is “ * * * [a]n order that affects a substantial right in an action that in effect determines the action and prevents a judgment * * * .” R.C. 2505.02(B)(1). Additionally, when an action involves multiple claims, it must comply with Civ.R. 54(B). Civ.R. 54(B) states, in pertinent part: “When more than one claim for relief is presented in an action * * * the court may enter final judgment as to one or more but fewer than all of the claims * * * 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 * * * .”

{¶11} “When an action includes multiple claims or parties and an order disposes of fewer than all of the claims or rights and liabilities of fewer than all of the parties without certifying under Civ.R. 54(B) that there is no just cause for delay, the order is not final and appealable.” *Dodrill v. Prudential Ins. Co.*, 4th Dist. No. 05CA13, 2006-Ohio-3674, at ¶9, citing *Noble v. Colwell* (1989), 44 Ohio St.3d 92, 540 N.E.2d 1381.

{¶12} In the case sub judice, Appellants’ complaint presents claims for both breach of contract and negligence. In their motion for summary judgment, Appellees argue, because the dispute sounds solely in contract, Appellants are unable to maintain a tort claim. In their memorandum contra, Appellants argue the negligence claim is separate and independent of the claim sounding in contract. The trial court’s entry granting summary judgment states: “The court finds the alleged oral contract to be one involving an interest in land. Ohio law (O.R.C. 1335.05) requires that contracts related to land must be in writing to be enforceable. This oral agreement was not, it involved an interest in land and is not therefore enforceable. There is no exception as would apply to a case wherein, as here, the plaintiffs seek monetary damages, based upon a party’s failure to complete a contract involving a land interest.” The entry makes no mention of Appellants’ negligence claim.

{¶13} Because Appellants' complaint contains multiple claims, Civ.R. 54(B) applies. Because the trial court's entry only addresses the contract claim, it does not completely dispose of Appellants' claims against Appellees. Under Civ.R. 54(B), a trial court can enter final judgment as to fewer than all of a party's claims only upon an express determination that there is no just reason for delay. Here, the trial court made no such determination. As such, we find that the trial court's entry does not constitute a final, appealable order. Accordingly, we lack the requisite jurisdiction to consider the merits of Appellants' assignments of error.

IV. Conclusion

{¶14} Though neither party addressed the lack of a final appealable order, we are required to raise the issue sua sponte. We find the trial court's entry granting Appellants' motion for summary judgment is not a final appealable order and, thus, we are without jurisdiction to consider the merits of the appeal. Accordingly, based upon the foregoing reasons, the appeal is dismissed and this cause is remanded to the trial court for further proceedings consistent with this opinion.

APPEAL DISMISSED.

JUDGMENT ENTRY

It is ordered that the APPEAL BE DISMISSED and that the Appellees recover of Appellants costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Lawrence County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Ohio Supreme Court an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Ohio Supreme Court in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Harsha, J. and Kline, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Judge Matthew W. McFarland

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk