[Cite as *Molz v. Gearhart*, 2009-Ohio-2824.]

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

KENNETH F. MOLZ, [et al.,]	:	
	:	
Plaintiffs-Appellees,	:	Case No. 07CA16
	:	
v.	:	**DECISION AND**
	:	**JUDGMENT ENTRY**
LESLIE A. GEARHART, [et al.,]	:	
	:	
Defendants-Appellants.	:	File-stamped date: 5-28-09

APPEARANCES

Richard D. Wetzel and Jeffrey D. Houser, Columbus, Ohio, for appellants.

Mark J. Molz, Hainesport, New Jersey, and Christopher E. Tenoglia, Pomeroy, Ohio, for appellees.

Kline, P.J.:

{¶1} Defendants Leslie A. Gearhart and Century Well Services, Inc. (collectively "Defendants") appeal the trial court's discovery order suppressing their pleadings for failure to comply with the trial court's prior discovery orders. However, we find that the discovery order is not a final appealable order, and so we lack jurisdiction to consider it. Accordingly, we dismiss this appeal.

I.

{¶2} This action arose out of a contract dispute. Defendants entered into a contract with plaintiffs Kenneth F. Molz, Allswell, LLC, Redvers, LLC, Trak 9, LLC, Trak 10, LLC and Trak 11, LLC (collectively "Plaintiffs") to drill three oil wells on property owned by Plaintiffs. Plaintiffs filed a complaint against Defendants asserting claims of breach of contract, fraud, and negligence related to the performance of the contract.

Defendants answered and filed a counterclaim. This case then stalled as the parties became locked in a disagreement over discovery.

{¶3} On November 21, 2007, the trial court entered an order compelling the discovery of disputed financial documents. "Defendants shall provide true copies of the following documents in their entirety within 7 (seven) days hereof or Defendants' answer and counterclaim will be suppressed with prejudice."

{¶4} Defendants appeal this discovery order and assert the following two assignments of error: I. "The Trial Court Erred To The Prejudice of The Defendants By Acting on Matters That Are Before the Court Of Appeals and No Longer in the Trial Court's Jurisdiction." And, II. "The Trial Court Erred To The Prejudice of The Defendants By Sanctioning The Defendants For Failure To Produce Documents When The Sanction Motion Was Filed Prematurely."

II.

{¶5} Before the Court considers Defendants' assignments of error, we must determine whether we have jurisdiction over the appeal.

{¶6} "Ohio law provides that appellate courts have jurisdiction to review the final orders or judgments of inferior courts in their district." *Caplinger v. Raines*, Ross App. No. 02CA2683, 2003-Ohio-2586, at ¶2, citing Section 3(B)(2), Article IV, Ohio Constitution; R.C. 2505.02. If an order is not final and appealable, then we have no jurisdiction to review the matter. "In the event that this jurisdictional issue is not raised by the parties involved with the appeal, then the appellate court must raise it sua sponte." Id., citing *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86, syllabus; *Whitaker-Merrell v. Geupel Co.* (1972), 29 Ohio St.2d 184, 186.

{¶7} "An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is * * * [a]n order that affects a substantial right in an action that in effect determines the action and prevents a judgment" or "[a]n order that affects a substantial right made in a special proceeding[.]" R.C. 2505.02(B)(1)&(2). "A final order * * * is one disposing of the whole case or some separate and distinct branch thereof." *Lantsberry v. Tilley Lamp Co.* (1971), 27 Ohio St.2d 303, 306.

{¶8} We find that the discovery order appealed in this case is not a final appealable order for the two following reasons.

{¶9} First, the order itself compelled Defendants to turn over the requested documents within seven days or their pleadings would be suppressed. Civ.R. 37(B)(2) authorizes a court to sanction "any party * * * [who] fails to obey an order to provide or permit discovery[.]" A court may enter "[a]n order striking out pleadings or parts thereof[.]" Civ.R. 37(B)(2)(c). There is no provision in Rule 37 that would allow a court to order discovery, and to predetermine a sanction for noncompliance that will take effect without further order of the court. Rather, the sanction must relate to an infraction that has already occurred. At the time the trial court entered the order in this case, the trial court clearly did not intend to strike the pleadings based on Defendants' previous noncompliance. Instead, the trial court determined future noncompliance would justify an order striking out the pleadings of Defendants, and gave Defendants ample notice of the probable consequences of further non-compliance. This order merely compels discovery with a warning for future noncompliance. Orders compelling discovery are generally not appealable. However, this general rule has exceptions. For example, an order by a court compelling the disclosure of privileged information may under certain

circumstances be a final appealable order. *Ingram v. Adena Health Sys.* (2001), 144 Ohio App.3d 603; R.C. 2505.02(A)(3).

{¶10} Here, Defendants repeatedly refer to the documents at issue as confidential and privileged, and this might support appellate jurisdiction under *Ingram*. However, Defendants provide neither argument nor authority for this conclusion. And so, we disregard this issue as not adequately supported. *Loukinas v. Roto-Rooter Servs. Co.*, 167 Ohio App.3d 559, 2006-Ohio-3172, at ¶9.

{¶11} Second, even if we suppose the discovery order struck out the pleadings in this case, nonetheless, it is not a final appealable order. The order would in effect leave Defendants in default. The complaint requests damages but never specifies a particular dollar amount. Among other claims, Plaintiffs allege Defendants are liable for the tort of fraud. Default judgment in a tort action requires a further determination concerning damages, and this determination must be supported by evidence. *Haddad v. English* (2001), 145 Ohio App.3d 598, 606 (further determination required for tort action). Default judgment, which does not fix an award of damages, is not a final appealable order. *Wolford v. Newark City School Dist. Bd. Of Edn.* (1991), 73 Ohio App.3d 218, 219-20; *Miller v. Biggers* (2001), Scioto App. No. 00CA2751, citing *Pinson v. Triplett* (1983), 9 Ohio App.3d 46.

{¶12} Even the portion of the order that struck out Defendants' counterclaim is not a final appealable order. "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.*, Jackson App. No.

05CA13, 2006-Ohio-3674, at ¶ 9, citing *Noble v. Colwell* (1989), 44 Ohio St.3d 92, 96. Here, presuming the order struck the counterclaim, as noted in the previous paragraph, it was not a final order with regard to striking out the answer, and the trial court did not include the required language from Civ.R. 54(B).

{¶13} Therefore, for the above two reasons, we conclude we lack jurisdiction to consider Defendants' assignments of error.

{¶14} Accordingly, we dismiss this appeal.

APPEAL DISMISSED.

JUDGMENT ENTRY

It is ordered that the APPEAL BE DISMISSED and that appellants shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

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

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

Harsha, J. and Abele, J.: Concur in Judgment Only.

For the Court

BY:_____
Roger L. Kline, Presiding Judge

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.