[Cite as *Stonehill v. Jones,* 2009-Ohio-6052.]

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

STONEHILL, LTD,	:	
	:	
Plaintiff-Appellant,	:	Case No: 09CA1
	:	
v.	:	
	:	**DECISION AND**
SEAN JONES, et al.,	:	**JUDGMENT ENTRY**
	:	
Defendants-Appellees.	:	File-stamped date: 11-12-09

APPEARANCES:

W. Vincent Rakestraw, Columbus, Ohio, for Appellant.

Jonathan Sowash, Sowash, Carson & Ferrier, Athens, Ohio, for Appellees.

Kline, P.J.:

{¶1} Stonehill, Ltd. appeals the trial court's denial of its Civ.R. 60(B) motion for relief from the trial court's prior judgment, which had dismissed Stonehill's breach of contract, conversion, and unjust enrichment claims under Civ.R. 41(B)(1) for failure to prosecute after Stonehill had failed to respond to several of the opposing parties' motions. On appeal, Stonehill contends that the trial court erred when it denied its Civ.R. 60(B) motion for failure to allege operative facts showing excusable neglect. Stonehill maintains that it alleged facts showing that it had an agreement with the opposing parties to extend the trial court's deadline to respond to the motions in question. However, we find that the order Stonehill appeals from is not a final appealable order, and we therefore conclude we lack jurisdiction over this matter. Accordingly, we dismiss this appeal.

I.

{¶2} Stonehill is an Ohio corporation in the business of real estate development. Sean Jones is the owner of Rockside Construction, L.L.C. and NEZ, limited, which are both corporations in the construction business. In June of 2002, Stonehill entered into a contract with NEZ for the development of a property known as "the Plains."

{¶3} According to Stonehill, NEZ breached this contract because it (1) failed to complete foundations in a timely manner and (2) intentionally ordered mobile condominiums before they were needed for the purpose of manipulating billing. As such, on February 21, 2006, Stonehill filed a complaint accusing Jones, Rockside, and NEZ[1] of breach of contract, conversion, and unjust enrichment.

{¶4} After some initial motions, the defendants answered and indicated that Stonehill breached the contract first because Stonehill failed to (1) get the appropriate permits and (2) pay amounts due under the contract. The defendants filed eleven separate counterclaims against Stonehill and also included the owners of Stonehill as third party defendants.

{¶5} After more than a year had passed, the trial court held a status conference because the record showed no activity since the filing of the court's decision denying the defendants' motions to dismiss. Based on an entry in the record, it appears that a separate foreclosure action had stalled this action. Eventually, this case was referred to mediation, which failed.

{¶6} On September 26, 2008, the trial court filed an entry, which advised Stonehill that the court was considering the defendants' pending motions to dismiss Stonehill's

[1] Stonehill also included Avis America, Inc., and Rural Appalachian Housing Development, Inc., as defendants. These defendants are not relevant to Stonehill's Civ.R. 60(B) motion because they were no longer parties to the action below when the trial court considered any of the relevant motions.

claims for failure to prosecute under Civ.R. 41(B)(1). The entry also stated: "if Plaintiff wishes to respond to such motion before the Court determines it, Plaintiff must do so by filing a responsive pleading and serving it upon remaining Defendants' counsel by October 15, 2008." On October 23, 2008, Stonehill filed a stipulated entry, which indicated that the parties agreed that Stonehill should have until October 29, 2008 to respond to the motion to dismiss. On the same day and without a hearing, the trial court filed an entry that granted the defendants' motions to dismiss for failure to prosecute.

{¶7} On December 5, 2008, Stonehill filed a Civ.R. 60(B) motion to vacate the trial court's final judgment. The defendants filed a response to this motion. The trial court denied the motion without a hearing because, "although the motion meets the timeliness test, it otherwise fails to allege operative facts warranting relief."

{¶8} Stonehill appeals from this decision and asserts the following assignment of error: "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT AND ABUSED ITS DISCRETION, WHEN IT DENIED APPELLANT'S MOTION TO VACATE JUDGMENT, WITHOUT A HEARING, WHERE APPELLANT SOUGHT RELIEF FROM A RULE 41 (B) DISMISSAL, AND APPELLANT'S MOTION ASSERTED EXCUSABLE NEGLECT."

II.

{¶9} Before we consider Stonehill's assignment of error, we first must consider whether we have jurisdiction over the trial court's rulings.

{¶10} "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.

{¶11} "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.

{¶12} "When more than one claim for relief is presented in an action whether as a claim, counterclaim, cross-claim, or third-party claim, and whether arising out of the same or separate transactions, or when multiple parties are involved, the court may enter final judgment as to one or more but fewer than all of the claims or parties 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, and the order or other form of decision 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)

{¶13} Here, the defendants to the original action, Sean Jones, Rockside, and NEZ, filed numerous counterclaims against Stonehill. The defendants also added the owners of Stonehill as third party defendants. All of these claims remain pending. Under Civ.R. 54(B), unless the trial court includes an express determination that there is no just reason for delay, then these entries (no matter how designated) shall not terminate the action as to any of the claims or parties and are not final appealable orders. *Noble v. Colwell* (1989), 44 Ohio St.3d 92, 96. In this case, neither the trial court's entry on Stonehill's Civ.R. 60(B) motion nor the initial entry dismissing Stonehill's claims for failure to prosecute contain the "no just reason for delay" language. And both of these entries adjudicated fewer than all of the claims present in the action. Therefore, neither of these entries constitutes a final appealable order, and we lack jurisdiction to consider either of them.

{¶14} Accordingly, we dismiss this appeal for lack of jurisdiction.

APPEAL DISMISSED.

JUDGMENT ENTRY

It is ordered that the APPEAL BE DISMISSED, and appellant pay the 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 Athens County Court of Common Pleas to carry this judgment into execution.

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

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

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.