

[Cite as *Gary Moderalli Excavating, Inc. v. Trimat Constr., Inc.*, 2015-Ohio-2475.]

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

GARY MODERALLI EXCAVATING, INC., :

Plaintiff-Appellant, : Case No. 13CA14

vs. :

DECISION AND JUDGMENT ENTRY

TRIMAT CONSTRUCTION, INC., et al.,

:
Defendants-Appellees.

APPEARANCES:

COUNSEL FOR APPELLANT: Shirley J. Smith, 1399 East Western Reserve Road, Ste. 2,
Poland, Ohio, 44514¹

COUNSEL FOR APPELLEE, Douglas W. Little, Little, Sheets &
FARMERS BANK AND Barr, L.L.P., 211-213 East Second
SAVINGS COMPANY: Street, Pomeroy, Ohio, 45769

CIVIL APPEAL FROM COMMON PLEAS COURT

DATE JOURNALIZED:6-5-15

ABELE, J.

{¶ 1} This is an appeal from a Gallia County Common Pleas Court judgment that disbursed the proceeds from a sale of assets seized on behalf of Gary Moderalli Excavating, Inc. (Moderalli), plaintiff below and appellant herein, to Farmer's Bank and Savings Company (Farmers), defendant below and appellee herein. Moderalli assigns the following errors for review:

¹ Appellant's brief lists Tracey A. Laslo, 325 East Main Street, Alliance, Ohio 44601 as counsel. Laslo, however, did not enter an appearance in this particular portion of the case, nor sign appellant's brief.

FIRST ASSIGNMENT OF ERROR:

“THE TRIAL COURT ERRED IN ITS ENFORCEMENT AND DISPOSITION OF THE PROPERTY OBTAINED THROUGH PLAINTIFF’S WRITS OF EXECUTION.”

SECOND ASSIGNMENT OF ERROR:

“THE TRIAL COURT ERRED IN FAILING TO REQUIRE THE PROCEEDS OF SALE OF SUCH PROPERTY BE DEPOSITED TO THE CLERK OF COURTS FOR DISTRIBUTION.”

THIRD ASSIGNMENT OF ERROR:

“THE TRIAL COURT ERRED IN FAILING TO REQUIRE FARMERS BANK AND SAVINGS COMPANY TO SET FORTH WHY THEY HAD SOLD PROPERTY HELD UNDER EXECUTION WITHOUT AUTHORITY OF THE COURT AND FURTHER FAILED TO ACCOUNT FOR PROCEEDS OF THE SAME.”

FOURTH ASSIGNMENT OF ERROR:

“THE TRIAL COURT ERRED IN FAILING TO AWARD PLAINTIFF ITS FEES AND COSTS ASSOCIATED WITH THE EXECUTION OF PROPERTY ON PROCEEDS OF SALE.”

FIFTH ASSIGNMENT OF ERROR:

“THE TRIAL COURT ERRED IN FINDING THAT PROPERTY SOLD BY FARMERS BANK AND SAVINGS COMPANY WAS NOT PART OF THE PROPERTY OBTAINED PURSUANT TO PLAINTIFF’S WRIT OF EXECUTION.”

SIXTH ASSIGNMENT OF ERROR:

“THE TRIAL COURT ERRED IN ITS CONFIRMATION OF THE PROPERTY.”

{¶ 2} Moderalli was previously awarded judgments against Trimat Construction,

Inc. (Trimat) in excess of \$1 million.² On March 19, 2012, Moderalli filed a writ of execution to be levied on that judgment. The trial court entered an order that directed the Gallia County Sheriff to seize "all cash on hand, inventory, fixtures, furnishings, equipment, vehicles, and all other personal property" found at any of three Trimat locations in Gallia County. The Sheriff's office carried out the writ of execution, and apparently seized many assets believed to belong to Trimat.

{¶ 3} That seizure prompted a flurry of property owners and creditors to intervene to protect their own interests in assets that Moderalli claimed to belong to Trimat. Todd A. Bryant (Bryant) filed a motion to intervene and claimed, inter alia, that some of the "vehicles, equipment and other property" levied upon are, in fact, his property rather than Trimat's. Ronald Toler, Teresa Toler and Patricia Toler (the Toler) filed the next motion to intervene and asked to vacate the writ of execution. They claimed, inter alia, that the Sheriff seized a vehicle owned by Teresa Toler, as well as various other equipment and machinery in which Ronald Toler held a security interest, all of which were located on Patricia Toler's real property. Farmers filed the next motion to intervene and claimed that it had a security interest in various seized properties. Likewise, Ohio Valley Bank Company (Ohio Valley) filed a motion to intervene and claimed that it had a security interest in some of the seized property. Eventually, the trial court granted all motions to intervene. Inasmuch as this appeal concerns only the disposition of security interests claimed by Farmers, we will not discuss the other claims.

{¶ 4} What followed is an array of motions and memoranda contra filed by various

² The record suggests that this judgment was originally awarded in Tuscarawas County, Ohio.

creditors concerning the priority of liens in chattel claimed by Trimat's creditors for the satisfaction of their security interests.³ Farmers' security interests were set out in a U.C.C. financing statement attached to its motion:

A 1992 Kamatso D68 Cargo Winch; serial no. 45750

A Caterpillar 330 CL Excavator; serial no. DKY02370

A 1986 Caterpillar D8K Certified Rebuild; serial no. 77V75216

Five Kundel Trench Boxes; serial nos. SN3296, SN3242, SN3528, SN3265 & SN3279

Five Kundel Manhole Boxes; serial nos. SN3286, SN3242, SN3258, SN3265 & SN3279

Two Kundel Gravel Boxes; serial nos. M486 & T670⁴

{¶ 5} The matter apparently came on for hearing on May 14, 2012 with regard to “pending motions.” There is no transcript of this hearing, but we are aware of it because it is referenced in a June 7, 2012 entry. In light of the fact that the trial court had granted the motions to intervene on April 19, 2012, one purpose for this hearing could have been to make a determination as to the priority of claimants' interests in the seized property, especially because

³ Trimat filed its own motion to “Vacate Writ of Execution and Writ of Levy,” but it does not appear that the trial court ruled on this motion. We mention this to indicate the confusion that surrounds all of the various claims and interests.

⁴ The print on the Farmer's U.C.C. Financing Statement is difficult to read and the serial numbers we list for the Manhole Boxes and Gravel Boxes may be inaccurate. Farmer's brief sets out the serial numbers for the first four listed items (that we could verify), but did not do so with regard to the last two items.

the court phrased its June 7th order as considering pending “motions” (in the plural). However, Bryant is the only claimant addressed in the June 7th Entry. Thus, we are unclear as to whether any determination of Farmers interest occurred.

{¶ 6} On October 22, 2012, the trial court entered judgment that stated that Farmers appears to have a security interest “in some of the property” seized from Trimat, and ordered the Sheriff to conduct a sale of those assets and to hold the proceeds for further consideration as to distribution. Another entry (filed April 26, 2013) allowed Farmers to conduct a sale the following day, although it ordered the sale proceeds to be held in escrow.⁵

{¶ 7} Farmers' June 26, 2013 motion asked the court to release the \$10,000 it held from sale of “trench boxes” and order the Sheriff to disburse the net proceeds of the sale of the Caterpillar Excavator (presumably to Farmers as the superior lien holder).⁶ The trial court granted this request on October 30, 2013 by two entries, filed a minute apart. The first entry, filed at 3:36 PM, although styled as an entry, gives the appearance of being a decision on Farmers' motion for the distribution of proceeds. The trial court appears to agree with Farmers that it is entitled to the net proceeds of the sale of the Caterpillar Excavator, as well as the ten

⁵ Neither of these orders specified the precise property involved, or why some property was to be sold by the Sheriff and other property by Farmers. A subsequent motion by Farmers filed on May 7, 2013 reported that it had sold “ten trench boxes” for \$10,000. We note, however, that only five trench boxes were listed in Farmer’s U.C.C. financing statement. We suppose that it is possible that Farmers mischaracterized the other five “manhole boxes” listed in that statement as “trench boxes.” Another motion filed by Farmers on June 26, 2013 contained a Sheriff’s return showing that the Caterpillar Excavator had been sold for \$60,000.

⁶ The net proceeds of the sale were \$59,041 (the remainder of the gross proceeds after subtracting \$959.00 in Sheriff’s fees and

“trench boxes.” Acknowledging Moderalli's prior request that some “fees and costs” should be deducted from the proceeds payable to Farmers, the court noted that “[c]ourt costs are of course the first priority.” The court then noted:

“It may be appropriate to assess some part of the court costs to {Farmers} and the Court reserve that matter for further consideration after all of the property has been sold by the Sheriff. Subject to this reservation, the Court will approve by separate entry the two sales and order distribution of the proceeds. * * *

{Moderalli's} request for reimbursement of expenses will be further considered when the remainder of the property is sold by the Gallia County Sheriff.”
(Emphasis added.)

The separate entry, to which the trial court referred, was filed one minute later at 3:37 PM. That entry ordered all of the sale proceeds to be released to Farmers as the first lienholder. What was not reiterated, however, is the court's ruling (made only a minute earlier) that it would hold Moderalli's request for fees and costs to be deducted from proceeds of assets until after all assets were sold. Instead, what was set forth was the declaration that this judgment is a “final order.” Moderalli filed its Notice of Appeal from these two judgments.

{¶ 8} Before we address the merits of Moderalli's assignments of error, we first address a threshold jurisdictional issue. A notice of appeal must be filed thirty days after (1) entry of the judgment, or (2) service of notice of the judgment entry. App.R. 4(A). This requirement is jurisdictional. See *Autovest, L.L.C. v. Strickland*, 11th Dist., Portage No. 2015-P-0022, 2015-Ohio-1408, at ¶2; *Robinette v. Bryant*, 4th Dist. Lawrence No. 14CA28, 2015-Ohio-119, at ¶36; *Chase v. Gersten*, 4th Dist. Ross No. 12CA3314, 2013-Ohio-252, at ¶11. In other words, an appeal must be dismissed if it is not commenced within the time provisions of App.R. 4(A). See

costs) .

e.g. *Rios v. Rios*, 11th Dist. Trumbull No. 2014– T–0076, 2015-Ohio-1072, at ¶11; *In re 2009 Harley Davidson*, 4th Dist. Meigs No. 11CA4, 2012-Ohio-2018, at ¶11.

{¶ 9} Farmers argues that Moderalli filed its appeal outside the App.R. 4(A) time limit. We agree. The trial court entered the judgments on October 30, 2013. By our calculation, the Notice of Appeal should have been filed no later than November 29, 2013. Moderalli, however, filed its Notice of Appeal on December 2, 2013. Also, Moderalli filed no reply brief to contest Farmers App.R. 4(A) argument, as App.R. 16(C) permits. This appears to resolve the issue and require a dismissal for lack of jurisdiction, provided, of course, that either entry constitutes a final, appealable order. Obviously, the App.R. 4(A) time requirement assumes the existence of a final, appealable order. See generally *Galmish v. Cicchini*, 5th Dist. Stark Nos. 2001CA00247 & 2001CA00267, 2002-Ohio-3595, at ¶10. If, however, no final order exists, the appeal must nevertheless be dismissed for the failure to meet the R.C. 2505.02 requirements, rather than the failure to comply App.R. 4(A).

{¶ 10} The ramifications of dismissal on these two grounds are radically different. Dismissal for the failure to comply with R.C. 2505.02 preserves the potential for the alleged errors to be reviewed in the future, whereas a dismissal for the failure to comply with the terms of App.R. 4(A) does not. A failure to timely file a notice of appeal removes the chance of appellate review of any alleged trial court error, whereas the dismissal for failure to comply with R.C. 2505.02 may simply delay the consideration of the alleged error for another day.

{¶ 11} Thus, the issue before us is whether the October 30, 2013 judgments constitute final appealable orders. We agree with Farmers that the first “judgment” is not a final order. Farmers argues that the first October 30, 2013 entry reserved the issue of court costs for further

consideration, and thus contemplated further action by the court after the remainder of Farmers' security was sold. However, if the judgment filed a minute later constitutes a final, appealable order, as Farmers' asserts, the 3:36 PM interlocutory order would merge into the 3:37 PM final order. See *USA Freight, L.L.C. v. CBS Outdoor Group, Inc.*, 2nd Dist. Montgomery App. No. 26425, 2015-Ohio-1474, at ¶15; *Dolan v. Glouster*, 4th Dist. Athens Nos. 11CA18, 12CA1, 11CA19, 12CA6 & 11CA33, 2014-Ohio-2017, at ¶33. In short, the first October 30th judgment would otherwise be reviewable provided (1) the second judgment is final and appealable, and (2) Moderalli filed a timely Notice of Appeal. Thus, the central question is whether the second judgment is final and appealable. For the following reasons, we hold that it is.

{¶ 12} R.C. 2505.02(B)(2) defines a final order as one that, inter alia, “affects a substantial right made in a special proceeding or upon a summary application in an action after judgment[.]” (Emphasis added.) Our Eighth and Ninth District colleagues have concluded that orders in the aid of execution on a judgment are ones made on a summary application after judgment. See *Golden Goose Properties, L.L.C. v. Leizman*, Eighth Dist. Cuyahoga No. 101002, 2014-Ohio-4384, ¶15-19; *MBNA American Bank v. Bailey*, 9th Dist. Summit No. 22912, 2006–Ohio–1550, ¶7. While these cases involved a garnishment rather than asset seizure, we see no reason why the same principle should not apply.

{¶ 13} Next, we must determine if the second order (filed at 3:37 PM) affects a “substantial right.” R.C. 2505.02(A)(1) defines this as “a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.” Moderalli’s judgment against Trimat is a property interest that it is entitled to protect (collect) under law. Whatever funds are recovered upon the execution of

that judgment will be diminished by the payment of court costs. Thus, it is in Moderalli's interests that Farmers be required to pay as much court costs as possible. We therefore conclude that the second October 30, 2013 entry affected a substantial right.

{¶ 14} We do not know why these two entries, filed one minute apart, appear to be opposed to one another on the issue of whether further proceedings will be contemplated concerning court costs due from Farmers. But they are. Moreover, if further proceedings are conducted on this issue in the future, and those proceedings prompt further appeals, our decision would weigh against the longstanding policy of discouraging piecemeal appeals. See generally, *In the Matter of B.M.*, 4th Dist. Hocking No. 14CA12, 2015-Ohio-1504, at ¶12; *Turner & Son Funeral Home v. Hillsboro*, 4th Dist. Highland No. 14CA16, 2015-Ohio-1138, at ¶11. Consequently, consistent with our colleagues in other districts, we conclude that the second entry filed at 3:37 PM on October 20, 2013 constitutes a final order pursuant to R.C. 2505.02(B)(2).

{¶ 15} Accordingly, because Moderalli filed its Notice of Appeal outside the App.R. 4(A) deadline, we are without jurisdiction to review this case and the appeal must be dismissed.

APPEAL DISMISSED.

JUDGMENT ENTRY

It is ordered that the appeal be dismissed and appellee recover of appellant 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 Gallia County Common Pleas Court to carry this judgment into execution.

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

Hoover, P.J. & Harsha, J.: Concur in Judgment & Opinion
For the Court

BY: _____
Peter B. Abele, 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.