**[Cite as *Clifton v. Johnson*, 2015-Ohio-4246.]**

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

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| RONALD L. CLIFTON, et al., | : | |
| | : | Case No. 14CA22 |
| Plaintiffs-Appellees, | : | |
| | : | |
| vs. | : | DECISION AND JUDGMENT |
| | : | ENTRY |
| PEARL K. JOHNSON, et al., | : | |
| | : | |
| Defendants-Appellants. | : | **Released: 09/28/15** |

APPEARANCES:

James R. Kingsley, Kingsley Law Office, Circleville, Ohio, for Appellants.

Michael N. Beekhuizen, Carpenter Lipps & Leland LLP, Columbus, Ohio, for Appellees.

McFarland, A.J.

**{¶1}** This is an appeal from a Pickaway County Common Pleas Court grant of summary judgment in favor of Appellees, Ronald L. Clifton and Robert W. Hamman, and against Appellants, Pearl K. Johnson, as well as Johnson's corporation, American Eagle Air, Inc. On appeal, Appellants contend that 1) the trial court committed prejudicial error when it granted Appellees summary judgment upon unjust enrichment; and 2) the trial court committed prejudicial error in awarding damages. Because we conclude that Appellees' breach of contract claim remains pending, the order is not final

and appealable. Accordingly, we must dismiss this case for lack of jurisdiction.

FACTS

**{¶2}** Appellees, Ronald F. Clifton and Robert W. Hamman, filed a complaint against Appellants, Pearl K. Johnson and Johnson's corporation, American Eagle Air, Inc., alleging the formation of a partnership and that a joint venture was agreed upon whereby Clifton, Hamman and Johnson, using Clifton's plane, Hamman's camera equipment and Johnson's piloting skills, would jointly provide aerial imaging services for portions of the ATEX pipeline that was being routed through Ohio. Appellees' complaint contained claims for breach of contract and, alternatively, unjust enrichment, alleging that Johnson and American Eagle Air, Inc. collected more than $200,000 for work that was jointly performed by Appellees and Appellant Johnson, and that Appellants failed to pay Appellees for work the parties mutually performed. Specifically, Appellees alleged that they had each only been paid $5,000.00 and that Appellants kept the rest of the money.

**{¶3}** Appellees subsequently moved the court for summary judgment on the unjust enrichment claim alone, reserving the right to proceed on the breach of contract claim and alternatively the unjust enrichment claim at trial, in the event the motion for summary judgment was denied. Appellants

opposed the motion, arguing, among other things, that the court could not grant summary judgment on the equitable remedy of unjust enrichment when a breach of contract claim covering the same subject matter had been pled and was still pending. Appellants also argued that the work performed by the parties jointly was rejected by ATEX and that the "prototype" that was eventually accepted by ATEX was created using a camera, aircraft and personnel from MANN Mapping, a corporation completely unrelated to Appellees. Over the objection of Appellants, however, the trial court granted summary judgment in favor of Appellees on their unjust enrichment claim, and awarded them a joint share of the profits, in the amount of $68,282.00 each, for a total judgment of $136,564.00. It is from this decision and entry that Appellants now bring their appeal, assigning the following errors for our review.

ASSIGNMENTS OF ERROR

"I. DID THE TRIAL COURT COMMIT PREJUDICIAL ERROR WHEN IT GRANTED TO PLAINTIFFS SUMMARY JUDGMENT UPON UNJUST ENRICHMENT?

II. DID THE TRIAL COURT COMMIT PREJUDICIAL ERROR IN AWARDING DAMAGES?"

ASSIGNMENT OF ERROR I

**{¶4}** In their first assignment of error, Appellants contend that the trial court committed prejudicial error when it granted to Appellees summary

judgment based upon unjust enrichment. Appellants primarily argue that it was error to grant summary judgment based upon a claim of unjust enrichment when a claim for breach of contract was also filed and still pending concerning the same subject matter. Appellants further contend that even if summary judgment was not barred procedurally, it should not have been granted, as genuine issues of material fact exist which should have precluded summary judgment.

**{¶5}** Here, a review of the record indicates that Appellees filed a complaint alleging the formation of a joint venture that contained claims based upon breach of contract and alternatively, unjust enrichment. Rather than seeking a judgment based upon their primary claim, breach of contract, Appellees filed a motion for summary judgment on their alternative claim only, unjust enrichment. In moving the trial court for summary judgment based upon unjust enrichment only, Appellees made an express reservation in their motion as follows:

> "Breach of contract and unjust enrichment are alternative remedies. In the event this Court denies this motion, Plaintiffs reserve the right to present both their breach of contract and unjust enrichment claims, in the alternative, at the trial of this matter."

**{¶6}** Thus, Appellees did not dismiss their breach of contract claim when they moved for summary judgment on unjust enrichment, nor had the trial court ruled on the pending claim. Instead, the legal claim for breach of contract had not been resolved when the court considered the equitable remedy of unjust enrichment. Although we agree with Appellants' argument that the trial court erred in granting summary judgment based upon unjust enrichment while a claim for breach of contract, covering the same subject matter, was still pending and unresolved, we must address a threshold procedural matter regarding the finality of the order appealed from.[1]

**{¶7}** As set forth above, the breach of contract claim was expressly reserved below and remains pending and unresolved. Appellees claimed in their complaint that a contract was formed and that Appellants breached it. Appellants deny the existence of a contract. Appellees' expressly reserved the right to proceed upon the breach of contract claim and the trial court did not rule on that claim or otherwise dispose of it below. The claim for breach of contract, thus, has yet to be determined.

**{¶8}** Appellate courts "have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the

[1] Generally, a party cannot seek dual relief under contract and quasicontract theories. *HAD Enterprises v. Galloway, et al.*, 192 Ohio App.3d 133, 2011-Ohio-57, 948 N.E.2d 473, ¶ 10; see also *Ryan v. Rival Mfg. Co.*, 1st Dist. Hamilton No. C–810032, 1981 WL 10160 (Dec. 16, 1981) ("It is clearly the law in Ohio that an equitable action in quasi-contract for unjust enrichment will not lie when the subject matter of that claim is covered by an express contract or a contract implied in fact. The mere fact that issues exist as to the creation of the contract or the construction of its terms does not alter this rule."

courts of record inferior to the court of appeals within the district[.]" Ohio Constitution, Article IV, Section 3(B)(2); see R.C. 2505.03(A). If a court's order is not final and appealable, we have no jurisdiction to review the matter and must dismiss the appeal. *Eddie v. Saunders*, 4th Dist. Gallia No. 07CA7, 2008–Ohio–4755, ¶ 11. In the event that the parties do not raise the jurisdictional issue, we must raise it sua sponte. *Sexton v. Conley*, 4th Dist. Scioto No. 99CA2655, 2000 WL 1137463, *2 (Aug. 7, 2000).

**{¶9}** An order must meet the requirements of R.C. 2505.02 to constitute a final, appealable order. *Chef Italiano Corp. v. Kent State Univ.*, 44 Ohio St.3d 86, 88, 541 N.E.2d 64 (1989). Under R.C. 2505.02(B)(1), an order is a final order if it "affects a substantial right in an action that in effect determines the action and prevents a judgment[.]" To determine the action and prevent a judgment for the party appealing, the order "must dispose of the whole merits of the cause or some separate and distinct branch thereof and leave nothing for the determination of the court." *Hamilton Cty. Bd. of Mental Retardation & Dev. Disabilities v. Professionals Guild of Ohio*, 46 Ohio St.3d 147, 153, 545 N.E.2d 1260 (1989).

**{¶10}** Additionally, if the case involves multiple parties or multiple claims, the court's order must meet the requirements of Civ.R. 54(B) to qualify as a final, appealable order. See *Chef Italiano Corp*. at 88. Under

Civ.R. 54(B), "[w]hen 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." Absent the mandatory language that "there is no just reason for delay," an order that does not dispose of all claims is subject to modification and is not final and appealable. *Noble v. Colwell*, 44 Ohio St.3d 92, 96, 540 N.E.2d 1381 (1989); see Civ.R. 54(B). The purpose of Civ.R. 54(B) is " 'to make a reasonable accommodation of the policy against piecemeal appeals with the possible injustice sometimes created by the delay of appeals[,]' * * * as well as to insure that parties to such actions may know when an order or decree has become final for purposes of appeal * * *." *Pokorny v. Tilby Dev. Co.*, 52 Ohio St.2d 183, 186, 370 N.E.2d 738 (1977); quoting *Alexander v. Buckeye Pipeline*, 49 Ohio St.2d 158, 160, 359 N.E.2d 702 (1977).

**{¶11}** Here, the case presently before us involves multiple parties and claims, one of which remains pending, and contains no Civ.R. 54(B) language. Accordingly, we must dismiss the appeal for lack of a final, appealable order.

ASSIGNMENT OF ERROR II

**{¶12}** In their second assignment of error, Appellants contend that the trial court erred in awarding damages; however, in light of our disposition of Appellants' first assignment of error, which determined the order appealed from is not a final, appealable order, we lack jurisdiction over this appeal.

**APPEAL DISMISSED.**

**JUDGMENT ENTRY**

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

The Court finds there were reasonable grounds for this appeal.

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

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

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

Hoover, P.J.: Concurs in Judgment and Opinion.
Abele, J.: Concurs in Judgment Only.

For the Court,

BY: _____
Matthew W. McFarland,
Administrative 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.**