[Cite as *Bussa v. Hadel Chem. Processing, L.L.C.*, 2016-Ohio-5718.]

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

ERIK BUSSA, et al.,	:	
Plaintiffs-Appellees,	:	Case No. 16CA865
vs.	:	
HADSEL CHEMICAL PROCESSING, LLC, et al.,	:	DECISION AND JUDGMENT ENTRY
Defendants-Appellant.[1]	:	

APPEARANCES:

Joshua Adam Engel and Anne Tamashasky, Mason, Ohio, and Justin R. Blume, Wheelersburg, Ohio, for appellant.

D. Joe Griffith, Lancaster, Ohio, for appellee.

CIVIL CASE FROM COMMON PLEAS COURT
DATE JOURNALIZED: 8-26-16
ABELE, J.

{¶ 1} This is an appeal from a Pike County Common Pleas Court judgment that overruled a purported Civ.R. 60(B) motion from relief from a default judgment entered in favor of Erik Bussa, Farryn Bussa, Joshua Whitley, and Erin Whitely, plaintiffs below and appellees herein, and against Robert Walton, Jr., defendant below and appellant herein. Appellant assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

[1] Only one of the defendants has appealed.

We further note that appellees' complaint spells "Hadsel" as "Hadsell," but the caption on the trial court's judgment entry that is the subject of this appeal spells it as "Hadsel." Our caption uses the same spelling that appears in the trial court's caption.

"THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ENTERED A DEFAULT JUDGMENT AGAINST DEFENDANT-APPELLANT ROBERT WALTON."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO GRANT A [SIC] DEFENDANT-APPELLANT ROBERT WALTON'S MOTION FOR RELIEF FROM A DEFAULT JUDGMENT."

{¶ 2} On September 3, 2015, appellees filed a complaint against (1) Hadsell Chemical Processing, LLC; (2) Relevant Compounding, LLC; (3) appellant (individually and in his various capacities with the two corporations); and (4) Don Hadsell, in his capacity as secretary of Relevant Compounding, LLC. On October 22, 2015, appellees filed a motion for default judgment against, inter alia, appellant.

{¶ 3} On December 4, 2015, Attorney Scott D. Evans entered his appearance on behalf of all defendants, including appellant. On January 7, 2016, Attorney Evans filed a motion to withdraw as counsel for appellant, in all capacities and individually, and as counsel for Don Hadsell, in his capacity as secretary of Relevant Compounding. On January 11, 2016, the trial court granted Attorney Evans' motion to withdraw as counsel for appellant and Hadsell.

{¶ 4} On February 4, 2016, the trial court granted appellees a default judgment against appellant.[2] The court found that appellant "failed to serve or file an Answer or other response as to the Complaint of the Plaintiffs." The court did not award damages, but instead, found that a damages hearing should be scheduled.

[2] It appears the trial court granted appellees default judgment against appellant in his individual capacity only, not in his corporate capacities.

{¶ 5} Appellant subsequently filed a memorandum in opposition to appellees' default judgment motion, a motion that requested the trial court to reconsider its decision granting appellees' default judgment, and a Civ.R. 60(B) motion for relief from judgment. Appellant alleged that he "did not receive actual service of the Complaint or Amended Complaint, reasonably believed that he was represented by counsel, and wishes to contest this matter and has retained the undersigned counsel."

{¶ 6} On March 21, 2016, the trial court denied appellant's Civ.R. 60(B) motion for relief from judgment. The court found that appellant filed the motion in a timely manner and that he demonstrated excusable neglect. The court determined, however, that appellant did not allege operative facts to show that he would have a meritorious defense to present if the court granted relief. This appeal followed.

{¶ 7} Before we can review the merits of appellant's assignments of error, we first must determine whether we have jurisdiction to do so. Courts of appeals have jurisdiction to "affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district." Section 3(B)(2), Article IV, Ohio Constitution. "As a result, '[i]t is well-established that an order [or judgment] must be final before it can be reviewed by an appellate court. If an order [or judgment] is not final, then an appellate court has no jurisdiction.'" Gehm v. Timberline Post & Frame, 112 Ohio St.3d 514, 2007–Ohio–607, 861 N.E.2d 519, ¶14, quoting Gen. Acc. Ins. Co. v. Ins. Co. of N. Am., 44 Ohio St.3d 17, 20, 540 N.E.2d 266 (1989). "An order is a final, appealable order only if it meets the requirements of both R.C. 2505.02 and, if applicable, Civ.R. 54(B)." Lycan v. Cleveland, 146 Ohio St.3d 29, 2016-Ohio-422, 51 N.E.3d 593, ¶21, citing Gehm at ¶15. In the event that the parties involved in the appeal do not raise this

jurisdictional issue, then the appellate court must sua sponte raise it. Chef Italiano Corp. v. Kent State Univ., 44 Ohio St.3d 86, 541 N.E.2d 64 (1989), syllabus; Whitaker-Merrell v. Geupel Co., 29 Ohio St.2d 184, 186, 280 N.E.2d 922 (1972).

{¶ 8} R.C. 2505.02 provides, in part:

> (B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:
>
> (1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment.
> * * * *

"A 'substantial right' for purposes of R.C. 2505.02 is a legal right enforced and protected by law." State ex rel. White v. Cuyahoga Metro. Hous. Auth., 79 Ohio St.3d 543, 545, 684 N.E.2d 72 (1997), citing State ex rel. Hughes v. Celeste, 67 Ohio St.3d 429, 430, 619 N.E.2d 412 (1993), and Noble v. Colwell, 44 Ohio St.3d 92, 94, 540 N.E.2d 1381 (1989). An order "determines the action and prevents a judgment" when it "'dispose[s] of the whole merits of the cause or some separate and distinct branch thereof and leave[s] nothing for the determination of the trial court.'" Natl. City Commercial Capital Corp. v. AAAA At Your Serv., Inc., 114 Ohio St.3d 82, 2007-Ohio-2942, 868 N.E.2d 663, ¶7, quoting 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); accord CitiMortgage, Inc. v. Roznowski, 139 Ohio St.3d 299, 2014-Ohio-1984, 11 N.E.3d 1140, ¶25.

{¶ 9} "A judgment overruling a Civ.R. 60(B) motion for relief from a default judgment is a final appealable order."[3] Colley v. Bazell, 64 Ohio St.2d 243, 416 N.E.2d 605 (1980), paragraph

[3] We note that the Colley court did not specify the provision of R.C. 2505.02(B) that applies to Civ.R. 60(B) decisions denying relief. The court, however, cited federal cases that seem to suggest an order denying

one of the syllabus; accord GTE Automatic Electric v. ARC Industries, 47 Ohio St.2d 146, 351 N.E.2d 113 (1985) (stating that an order granting a Civ.R. 60(B) motion to set aside a default judgment is a final order); Fleenor v. Caudill, 4th Dist. Scioto App. No. 03CA2886, 2003-Ohio-6513, ¶12 (stating that a trial court's decision regarding a proper Civ.R. 60(B) motion is final and appealable). The underlying presumption, however, is that the judgment from which the movant seeks relief is, in fact, a final order. Straquadine v. Crowne Pointe Care Ctr., 10th Dist. Franklin No. 10AP–607, 2012-Ohio-1152, ¶11; accord Fleenor at ¶12 ("However, a Civ.R. 60(B) motion is proper only with respect to final judgments."); Vanest v. Pillsbury Co., 124 Ohio App.3d 525, 532, 706 N.E.2d 825 (4th Dist. 1997); Civ.R. 60(B) ("On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment * * *.") (emphasis added); Jarrett v. Dayton Osteopathic Hosp., Inc., 20 Ohio St.3d 77, 78, 486 N.E.2d 99 (1985); accord Hack v. Keller, 9th Dist. Medina No. 14CA0036-M, 2015-Ohio-4128, ¶10 ("Where the underlying order is not itself a final judgment, Civ.R. 60(B) is not a proper procedural mechanism for relief and it cannot be used to convert an otherwise nonfinal judgment into a final appealable order."); State ex rel. DeWine v. Big Sky Energy, 11th Dist. Ashtabula No. 2012-A-0042, 2013-Ohio-437, ¶13 ("We note that the denial of a Civ.R. 60(B) motion is generally a final appealable order. However, in this case, there was no final order in the first place because the trial court had not issued a ruling on damages."); Close v. Perry, 5th Dist. Fairfield No. 11CA37, 2012-Ohio-2953, ¶ 20 ("If the judgment is not final, the decision overruling the Civ.R. 60(B) Motion is likewise, not final."); Painter and Pollis, Ohio Appellate Practice, Section 2:17

Civ.R. 60(B) relief from a final order affects a substantial right and in effect determines the action and prevents a judgment. Id. at 245 and cases cited.

(2015) (stating that "where there is no underlying final judgment, an order purporting to vacate a judgment is not a final order"). "Thus, logically, 'Civ.R. 60(B) is not the proper procedural device a party should employ when seeking relief from a non-final order.'" Fleenor at ¶12, quoting Vanest, 124 Ohio App.3d at 533. When the judgment from which relief is sought is not a final appealable order, "then the motion is properly construed as a motion to reconsider and the court's order granting that motion is interlocutory." Fleenor at ¶13 (citations omitted).

{¶ 10} In the case sub judice, appellant sought relief from the trial court's decision to grant appellees a default judgment. The court's default judgment does not, however, constitute a final order. The court's default judgment did not determine the amount of damages to which appellees are entitled, but instead stated that it would schedule a damages hearing in the future. Generally, orders that determine liability, but defer the issue of damages, do not affect a substantial right, determine the action, and prevent a judgment. E.g., White v. Cuyahoga Metro. Hous. Auth., 79 Ohio St.3d 543, 546, 684 N.E.2d 72 (1997); Scioto Twp. Zoning v. Puckett, 4th Dist. Pickaway No. 12CA5, 2013-Ohio-703, ¶8, quoting Shelton v. Eagles Foe Aerie 2232, 4th Dist. No. 99CA678, 2000 WL 203857 (Feb. 15, 2000), citing Horner v. Toledo Hospital, 94 Ohio App.3d 282, 640 N.E.2d 857 (6th Dist. 1993) ("This court has continuously held that '[a] determination of liability without a determination of damages is not a final appealable order because damages are part of a claim for relief, rather than a separate claim in and of themselves.'"). However, "[c]ourts have recognized an exception to the foregoing general rule. Under this exception, a judgment not completely determining damages is a final appealable order where the computation of damages is mechanical and unlikely to produce a second appeal because only a ministerial task similar to assessing costs remains." White, 79 Ohio St.3d at 546 (citations omitted).

{¶ 11} In the case sub judice, the record is not sufficiently developed concerning appellees' damages, but based upon the allegations contained in their complaint, the computation of damages does not appear to be a ministerial task similar to assessing costs. Thus, the White exception does not apply. Consequently, the trial court's decision to grant the appellees a default judgment, but to defer the issue of damages, does not constitute a final order under R.C. 2505.02. As such, the court's decision to deny relief from that non-final order is, itself, not a final order. Fleenor, supra; see Branham v. New Century Homes, 12th Dist. Clinton No. CA96-07-009, 1997 WL 10915, *1 (Jan. 13, 1997) (citations omitted) ("An entry granting a defendant's Civ.R. 60(B) motion to vacate a default judgment is not a final appealable order within the meaning of R.C. 2505.02 where the underlying default judgment does not adjudicate both liability and damages.").

{¶ 12} Moreover, the trial court's decision to grant the appellees a default judgment against appellant did not resolve all of the claims in the action and did not comply with Civ.R. 54(B). Civ.R. 54(B) states:

> 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.

{¶ 13} In the case at bar, the trial court's default judgment did not contain the "no just reason for delay" determination. Thus, in addition to deferring the issue of damages, the court entered a default judgment as to fewer than all of the claims or parties without an express determination that there is no just reason for delay. Painter and Pollis, supra, Section 2.9 (footnote omitted) ("[A]n order adjudicating some (but not all) of the claims in an action is not a final order by its nature but can become a final order if the trial judge invokes the 'no just reason for delay' language."). Consequently, even if the court's default judgment had determined damages, in the absence of the "no just reason for delay" language, it still would not qualify as a final order. Settlers Bank v. Burton, 4th Dist. Washington Nos. 11CA10, 11CA12, 11CA14, 2012-Ohio-2418, ¶14.

{¶ 14} We observe that the trial court did include an express "no just reason for delay" determination in its decision to overrule appellant's Civ.R. 60(B) motion for relief from judgment. However, "cases are legion that 'the mere incantation of [Rule 54(B)] language does not turn an otherwise non-final order into a final appealable order.'" Painter and Pollis, supra, Section 2:9 (footnotes omitted), quoting Noble v. Colwell, 44 Ohio St.3d 92, 96, 540 1381 (1989). As we previously discussed, the trial court's decision to overrule appellant's purported Civ.R. 60(B) motion is not a final order because the underlying default judgment is not a final order. Consequently, the trial court's use of the "no just reason for delay" language in its decision to deny appellant's purported Civ.R. 60(B) motion does not convert what is actually an interlocutory order overruling a motion to reconsider into a final order. See Fleenor at ¶13; Scioto Twp. Zoning v.

Puckett, 4th Dist. Pickaway No. 12CA5, 2013-Ohio-703, ¶11 ("[W]hen a trial court does not resolve an entire claim, regardless of whether the order meets the requirements of Civ.R. 54(B), the order is not final and appealable."). Thus, the February 4, 2016 decision to grant appellees a default judgment is not a final order. Therefore, the trial court's decision to deny appellant relief from that non-final order is not a final order.

{¶ 15} Accordingly, based upon the foregoing reasons, we lack jurisdiction to consider appellant's appeal and must dismiss the appeal.

APPEAL DISMISSED.

JUDGMENT ENTRY

It is ordered that the appeal be dismissed and that 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 Pike 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, J. & *Stautberg, 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.

*Judge Peter J. Stautberg, First District Court of Appeals, sitting by assignment of the Ohio Supreme Court in the Fourth Appellate District.