

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

Wesley C. Vincent,

Plaintiff-Appellant,

V.

Scott Nusbaum, et al.,

Defendants-Appellees.

Case No. 16CA3552

DECISION & JUDGMENT ENTRY

RELEASED: 11/16/16

APPEARANCES:

Wesley C. Vincent, Chillicothe, Ohio, *pro se* Appellant.

Michael L. Benson, Benson & Sesser, LLC, Chillicothe, Ohio, for Appellees Scott Nusbaum, Michael Ater, Nicholas H. Holmes, Jr. and Leonard F. Holzapfel.

Hoover, J.

{¶¶1} Appellant Wesley C. Vincent filed an appeal from an entry of the Ross County Court of Common Pleas “granting partial summary judgment and declaring the plaintiff a vexatious litigator.” After reviewing the notice of appeal, we issued an order directing Vincent to file a memorandum addressing whether we have jurisdiction to consider this matter because issues are still pending before the trial court. Vincent did not comply with this order; however, Appellees Scott Nusbaum, Michael Ater, Nicholas H. Holmes, Jr., and Leonard F. Holzapfel (collectively, “the Judges”) filed a motion to dismiss appeal on the same basis and Vincent filed a response to the motion. Upon consideration, we conclude that the challenged entry is not a final appealable order and **GRANT** the motion to

dismiss appeal.

I.

{¶2} In September 2015, Vincent filed a complaint against the Judges – current and retired trial judges – as well as other defendants. In response to the complaint, the Judges filed a counterclaim asserting that Vincent filed a frivolous lawsuit pursuant to R.C. 2323.51, that Vincent willfully violated Civ.R. 11, that the Judges were entitled to a permanent injunction against Vincent, and that Vincent should be declared a vexatious litigator pursuant to R.C. 2323.52. The trial court granted the motions to dismiss of the other defendants and Vincent later dismissed the complaint against the Judges, but their counterclaim remained pending. Thereafter, the Judges filed a motion for summary judgment as to certain counts of their counterclaim.

{¶3} The trial court found that the complaint and supplement to complaint filed by Vincent are “vexatious conduct” pursuant to R.C. 2323.52(A)(2)(a) and (b) and that the pleadings were not warranted under existing law and cannot be supported by a good faith argument to extend, modify, or reverse existing law. The trial court also found that Vincent is a “vexatious litigator” pursuant to R.C. 2323.52(B) because he has habitually, persistently, and without reasonable grounds engaged in vexatious conduct in a civil action in the common pleas court. The court noted that it found Vincent to be a “vexatious litigator” regarding the filing of future civil actions and “will issue the appropriate statutory order separately.”

{¶4} The court also found that Vincent violated Civ.R. 11 in that he signed the complaint and supplemental complaint without good grounds to support the allegations, and initiated the lawsuit with the knowledge that the allegations and legal propositions contained therein had been rejected numerous times. The court concluded that “[i]f [the Judges] seek to have [Vincent] enjoined from filing future civil actions and legal actions in the criminal case against them, they must provide supporting legal authority. Also, * * * [the Judges] shall provide relevant legal authority to support the proposition that plaintiff’s ‘vexatious litigator’ status is insufficient to support what they want to accomplish with an injunction.”

{¶5} The court then ordered as follows:

1. That plaintiff is declared a “vexatious litigator pursuant to R.C. 2323.52 regarding the filing of future civil lawsuits and other civil actions. **[The Judges] shall prepare a judgment entry which conforms to R.C. 2323.52(D), et seq.**
2. That plaintiff has willfully violated Civ.R. 11 and that **[the Judges’] claim for attorney’s fees and expenses shall be scheduled for a hearing separately.**
3. **That the Court reserves** ruling on that part of [the Judges’] motion regarding the applicability of R.C. 2323.52 for [Vincent’s] filing of future actions in the criminal case and an injunction to enjoin plaintiff from filing future civil actions and motions in the criminal case against them.
4. **That [the Judges] shall file the legal authority requested above in 20 days and plaintiff may respond within 14 days thereafter.**

(Emphasis added.)

II.

{¶6} Appellate courts in Ohio have jurisdiction to review the final orders or judgments of inferior courts within their district. Section 3(B)(2), Article IV of the Ohio Constitution; R.C. 2501.02. A final appealable order is one that affects a “substantial right” and either determines the action or is entered in a special proceeding. R.C. 2505.02(B)(1) & (2). An order that grants or denies a provisional remedy is also a final appealable order if: (1) the order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy, and (2) the appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action. R.C. 2505.02(B)(4). If a judgment is not final and appealable, then an appellate court has no jurisdiction to review the matter and must dismiss the appeal. *Production Credit Assn. v. Hedges*, 87 Ohio App.3d 207, 210, 621 N.E.2d 1360, 1362 at fn. 2 (4th Dist. 1993); *Kouns v. Pemberton*, 84 Ohio App.3d 499, 501, 617 N.E.2d 701, 702 (4th Dist. 1992).

A.

{¶7} Judgments declaring an individual to be a vexatious litigator are generally final appealable orders under R.C. 2505.02(B)(4). *Askin v. Askin*, 10th

Dist. Franklin No. 13AP-404, 2013-Ohio-5606, at ¶12; *Whipps v. Ryan*, 10th Dist. Franklin No. 12AP-685, 2013-Ohio-4382, at ¶16. A vexatious litigator proceeding is ancillary to the underlying proceeding and therefore meets the definition of of “provisional remedy” in R.C. 2505.02(A)(3). *Whipps* at ¶14. Moreover, an entry declaring an individual to be a vexatious litigator is usually a final determination as to that person’s status as a vexatious litigator and a later attempt to appeal that declaration would not afford a meaningful or effective remedy. *Id.*

{¶8} However, in this case, although the trial court declared Vincent to be a vexatious litigator pursuant to R.C. 2323.52 it ordered the Judges to “prepare a judgment entry which conforms to R.C. 2323.52(D), et seq.” Therefore, the court clearly anticipated future action and further declarations affecting Vincent’s status as a vexatious litigator. Because the “final” entry has not yet been issued, Vincent would still be able to obtain a meaningful and effective remedy by appeal in the future, i.e. by filing an appeal from the “final” entry issued by the trial court clearly defining the limitations placed on Vincent due to his vexatious litigator status. Accordingly, the trial court’s entry is not a final appealable order under R.C. 2505.02(B)(4).

B.

{¶9} Generally, judgments that determine liability, but defer the issue of damages for later determination, are not final appealable orders. See *State ex rel. White v. Cuyahoga Metro. Hous. Auth.*, 79 Ohio St.3d 543, 546, 684 N.E.2d 72, 72 (1997). Damages are part of a claim rather than a separate claim in and

of themselves. *Evans v. Rock Hill Local School Dist. Bd. of Edn.*, 4th Dist. Lawrence No. 04CA39, 2005-Ohio-5318, at ¶ 15. Likewise, when attorney fees are requested in the original pleadings, an order that does not resolve the attorney fee claim is not a final appealable order. *Scioto Twp. Zoning v. Puckett*, 4th Dist. Pickaway No. 12CA5, 2013-Ohio-703, at ¶ 8, citing *Intl. Bhd. of Electrical Workers, Local Union No. 8 v. Vaughn Industries, LLC*, 116 Ohio St.3d 335, 2007-Ohio-6439, 879 N.E.2d 187.

{¶10} Here, the Judges specifically requested attorney's fees and expenses in their counterclaim, asserting that Vincent had violated Civ.R. 11. The trial court agreed and stated that the Judges' "claim for attorney's fees and expenses shall be scheduled for a hearing separately." Accordingly, because the issue of the amount of attorney's fees and expenses remains pending, the challenged entry is not a final appealable order.

C.

{¶11} In addition to meeting the requirements of R.C. 2505.02, an appealed entry must meet the requirements of Civ.R. 54(B), if applicable, to constitute a final appealable order. 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 “there is no just reason for delay” language, an order that does not dispose of all claims is subject to modification and is not a final appealable order. *Noble v. Colwell*, 44 Ohio St.3d 92, 96, 540 N.E.2d 1381 (1989); Civ.R. 54(B).

{¶12} Here, the case obviously involved multiple parties as well as a counterclaim with multiple components. Although Vincent dismissed his complaint, the counterclaim remained pending and - in the entry being appealed - the trial court reserved ruling on the Judges’ “motion regarding the applicability of R.C. 2323.52 for [Vincent’s] filing of future actions in the criminal case and an injunction to enjoin [Vincent] from filing future civil actions and motions in the criminal case against them.” The court ordered the Judges to file legal authority within 20 days and that Vincent may respond within 14 days thereafter. And, the court did not include Civ.R. 54(B) “there is no just reason for delay” language.

{¶13} Because the trial court’s entry does not resolve all pending claims and does not include Civ.R. 54(B) language, the entry is not a final appealable order subject to review at this time.

III.

{¶14} Because we conclude that the entry appealed from is not a final appealable order, we **GRANT** Appellees’ motion to dismiss appeal.

{¶15} The clerk shall serve a copy of this order on all counsel of record and unrepresented parties at their last known addresses by ordinary mail.

APPEAL DISMISSED. COSTS TO APPELLANT. SO ORDERED.

Abele, J. & McFarland, J.: Concur.

FOR THE COURT

Marie Hoover
Judge