

[Cite as *Brogdon v. Sibley Murray, L.L.C.*, 2010-Ohio-539.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

RUBY D. BROGDON

Plaintiff-Appellant

-vs-

SIBLEY MURRAY, LLC

Defendant-Appellee

JUDGES:

Hon. Sheila G. Farmer, P. J.

Hon. W. Scott Gwin, J.

Hon. John W. Wise, J.

Case No. 2009 CA 00139

OPINION

CHARACTER OF PROCEEDING:

Civil Appeal from the Canton Municipal
Court, Case No. 2007 CVF 9844

JUDGMENT:

Reversed and Vacated

DATE OF JUDGMENT ENTRY:

January 4, 2010

APPEARANCES:

For Plaintiff-Appellant

For Defendant-Appellee

TIMOTHY J. JEFFRIES
437 Market Avenue North
Canton, Ohio 44702

PERCY SQUIRE
514 South High Street
Columbus, Ohio 43215

Wise, J.

{¶1} Appellant Ruby D. Brogdon appeals the decision of the Canton Municipal Court, Stark County, which granted summary judgment in favor of Appellee Sibley Murray, LLC. The relevant facts leading to this appeal are as follows.

{¶2} On October 24, 2008, appellant, as the purported seller of a certain Cadillac automobile, filed an amended complaint against appellee in the Canton Municipal Court, alleging breach of a purchase agreement and promissory note.

{¶3} On January 8, 2009, appellee filed a motion to dismiss the complaint. On April 22, 2009, the trial court converted appellee's said motion to dismiss into a motion for summary judgment. The court further set a non-oral hearing regarding summary judgment for May 8, 2009.

{¶4} On May 8, 2009, appellant filed a notice of voluntary dismissal under Civ.R. 41(A)(1)(a). Later that same day, the trial court issued a judgment entry granting summary judgment in favor of appellee and dismissing appellant's complaint with prejudice.

{¶5} Appellant filed a notice of appeal on June 8, 2009, and herein raises the following sole Assignment of Error:

{¶6} "1. THE TRIAL COURT WAS IN ERROR IN GRANTING THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DISMISSING APPELLANT'S CLAIMS WITH PREJUDICE AFTER A VOLUNTARY NOTICE OF DISMISSAL HAD BEEN FILED BY PLAINTIFF.

I.

{¶7} In her sole Assignment of Error, appellant argues the trial court erred in granting summary judgment subsequent to appellant's notice of voluntary dismissal. We agree.

{¶8} Civ.R. 41(A)(1)(a) reads as follows: "Subject to the provisions of Civ.R. 23(E), Civ.R. 23.1, and Civ.R. 66, a plaintiff, without order of court, may dismiss all claims asserted by that plaintiff against a defendant by *** filing a notice of dismissal at any time before the commencement of trial unless a counterclaim which cannot remain pending for independent adjudication by the court has been served by that defendant."

{¶9} A plaintiff's notice of voluntary dismissal made pursuant to Civ.R. 41(A)(1) is self-executing; it requires no court action and is effective on the date of filing. *James v. Allstate Ins. Co.* (March 16, 2000), Cuyahoga App.No. 75993, 2000 WL 284221 (additional citations omitted). Generally, where a case has been voluntarily dismissed under Civ.R. 41(A)(1), the trial court patently and unambiguously lacks jurisdiction to proceed. See *State ex rel. Hummel v. Sadler*, 96 Ohio St.3d 84, 2002-Ohio-3605, ¶ 22.

{¶10} Appellee has not filed a brief in the present appeal, but has filed a motion to dismiss on the basis that appellant's voluntary dismissal in the trial court means that no final appealable order exists.

{¶11} Generally, a Civ.R. 41(A)(1)(a) voluntary dismissal without prejudice is not a final appealable order. See, e.g., *In re A.E.*, Franklin App.No. 08AP-59, 2008-Ohio-4552, ¶24. However, appellant herein does not attempt to rely on the voluntary dismissal in order to invoke our jurisdiction; rather, she challenges the trial court's subsequent summary judgment entry on the basis that said court lacked jurisdiction and

thus erred in granting same. We thus find appellee's responsive request to dismiss this appeal to be without merit.

{¶12} Under the unusual circumstances of this case, appellant's notice of voluntary dismissal, of which the trial court judge had most likely not become aware prior to rendering summary judgment, effectively deprived the court of jurisdiction to proceed in the absence of any counterclaims. Appellant's sole Assignment of Error is therefore sustained.

{¶13} For the foregoing reasons, the May 8, 2009 summary judgment of the Canton Municipal Court, Stark County, Ohio, is hereby reversed and vacated.

By: Wise, J.

Farmer, P. J., and

Gwin, J., concur.

/S/ JOHN W. WISE_____

/S/ SHEILA G. FARMER_____

/S/ W. SCOTT GWIN_____

JUDGES

JWW/d 1221

