

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CINDY McHENRY

Plaintiff-Appellee

-vs-

GLENN McHENRY, JR.

Defendant-Appellant

JUDGES:

Hon. W. Scott Gwin, P. J.

Hon. John W. Wise, J.

Hon. Craig R. Baldwin, J.

Case No. 2014 CA 00146

O P I N I O N

CHARACTER OF PROCEEDING:

Civil Appeal from the Court of Common
Pleas, Probate Division, Case No. 216246

JUDGMENT:

Dismissed

DATE OF JUDGMENT ENTRY:

June 22, 2016

APPEARANCES:

For Plaintiff-Appellee

KEVIN R. McMILLAN
JONATHAN F. SOBEL
KABAT, McMILLAN, MIELZINER
& SOBEL
30195 Chagrin Boulevard, Suite 300
Pepper Pike, Ohio 44124

For Defendant-Appellant

THOMAS C. LOEPP
MAISTROS & LOEPP
3580 Darrow Road
Stow, Ohio 44224

Wise, J.

{¶1}. Defendant-Appellant/Cross-Appellee Glenn McHenry, Jr. appeals the decision of the Stark County Court of Common Pleas, Probate Division, which ruled partially in favor of Plaintiff-Appellee/Cross-Appellant Cindy McHenry, his sister, in her suit for conversion, breach of trust, and other claims. The relevant facts leading to this appeal are as follows.

{¶2}. Appellee Cindy and Appellant Glenn, Jr. are the children of the late Glenn E. McHenry, Sr. (hereinafter "Glenn, Sr.").

{¶3}. On June 27, 2007, Glenn, Sr. executed a revocable living trust, which *inter alia* conveyed to said trust certain real property on Canton Road in Akron, Ohio, and Oaklynn Street in Uniontown, Ohio.

{¶4}. Also, on June 27, 2007, Glenn, Sr. executed a last will and testament. The will included the directive that all legally enforceable debts and funeral expenses be paid, with the remainder of the estate going to the aforesaid trust.

{¶5}. In addition, on December 23, 2010, Glenn, Sr. executed certain amendments to the revocable living trust.

{¶6}. Glenn, Sr. passed away on January 13, 2011. Appellee Cindy at first accepted trusteeship; however, she resigned as trustee on or about February 2, 2011. Appellant Glenn, Jr. thereupon became the trustee.

{¶7}. Appellee Cindy thereafter alleged, among other things, that she was deceived into placing certain monies into an account of the trust, and that she did not receive her full benefit from same and from the balance of the trust. On November 1, 2012, Appellee Cindy filed a lawsuit against Appellant Glenn, Jr. in the Stark County

Probate Court, alleging the following causes of action: (1) conversion (2) breach of duty to inform and report (R.C. 5808.13(B)(1)), (3) breach of duty to provide accountings (R.C. 5808.13(C)), (4) breach of trust/fiduciary duties re: real property transfer, (5) breach of trust/fiduciary duties re: expenditures (6) breach of trust/fiduciary duties re: distribution of trust property, (7) removal of appellant as trustee and naming of appellee as successor trustee, and (8) temporary and permanent injunctive relief. On the same day, the trial court granted a temporary restraining order.

{¶8}. On December 3, 2012, the trial court granted a preliminary injunction. Appellant Glenn, Jr., filed an immediate appeal of that ruling; however, this Court dismissed the appeal for want of a final appealable order on August 26, 2013. See *McHenry v. McHenry*, 5th Dist. Stark No. 2013CA00001, 2013-Ohio-3693.

{¶9}. The case proceeded to a bench trial on February 6 and 10, 2014.

{¶10}. On April 28, 2014, the trial court issued a twenty-seven-page judgment entry regarding most of appellee's complaint. The court did not address attorney fees, which were ordered to be reviewed at a scheduled hearing.

{¶11}. In essence, the trial court in the aforesaid judgment entry (1) denied Appellee Cindy's request for permanent injunction, (2) denied appellee's request for forfeiture, (3) denied appellee's request for economic damages for any delay in transferring certain property, (4) denied appellee's request for economic damages for failing to provide an accounting, (5) granted appellee a judgment in the amount of \$13,364.32, (6) denied appellee's request for punitive damages, (7) ordered the return of the grantor's Cadillac to the trust, (8) ordered the removal of Appellant Glenn, Jr. as trustee (with appellant to be discharged after trial court approval of a comprehensive

accounting by appellant of trust expenses and after appellant's filing of an amended estate tax return with payment of any additional taxes and penalties), and (8) ordered Appellant Glenn, Jr. to pay costs of the action, including attorney fees to be determined.

{¶12}. On July 9, 2014, following a hearing on June 3, 2014, the trial court issued a judgment entry awarding attorney fees to appellant in the amount of \$49,444.28.

{¶13}. On August 6, 2014, Appellant Glenn, Jr. filed a notice of appeal. He herein raises the following five Assignments of Error:

{¶14}. "I. THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING AND CONTINUING [SIC] THE PRELIMINARY INJUNCTION.

{¶15}. "II. THE TRIAL COURT'S DECISION AS TO THE CLAIM FOR CONVERSION IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶16}. "III. THE TRIAL COURT'S DECISION AS TO THE CLAIM FOR BREACH OF TRUST IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶17}. "IV. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION [SIC] IN FINDING THAT THE DEFENDANT HAD FAILED TO PROVIDE AN ACCOUNTING WHERE NONE WAS LEGALLY NECESSARY.

{¶18}. "V. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN AWARDING THE SUM OF \$49,444.28 IN ATTORNEY FEES."

{¶19}. Appellee Cindy filed a notice of cross-appeal on August 18, 2014, and herein raises the following assigned errors on her cross-appeal:

{¶20}. "I. THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO AWARD APPELLEE PUNITIVE DAMAGES FOR APPELLANT'S CONVERSION.

{¶21}. “II. THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO AWARD A FORFEITURE AS A RESULT OF APPELLANT'S BREACHES OF TRUST.”

Final Appealability

{¶22}. As an initial matter, we must consider whether the two judgment entries under appeal, taken as a whole, constitute a final appealable order.

{¶23}. The existence of a final appealable order is a jurisdictional question that an appellate court can raise sua sponte. *Savage v. Cody-Ziegler, Inc.*, 4th Dist. Athens No. 06CA5, 2006-Ohio-2760, 2006 WL 1514273, ¶ 31. As a general rule, a judgment that leaves issues unresolved and contemplates that further action must be taken is not a final appealable order. See *Moscarello v. Moscarello*, 5th Dist. Stark No. 2014CA00181, 2015-Ohio-654, ¶ 11, quoting *Rice v. Lewis*, 4th Dist. Scioto No. 11CA3451, 2012-Ohio-2588, ¶ 14 (additional citations omitted). An order of a court is a final appealable order only if the requirements of both R.C. 2505.02 and, if applicable, Civ.R. 54(B) are met. *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86, syllabus.

{¶24}. Civ.R. 54(B) provides, as follows:

{¶25}. "When more than one claim for relief is presented in an action * * * 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."

{¶26}. As indicated above, the main judgment entry under appeal in the case sub judice is the twenty-seven page decision of April 28, 2014, supplemented by the judgment entry addressing attorney fees issued July 9, 2014. Neither judgment entry includes a Civ.R. 54(B) certification by the trial court.

{¶27}. Our primary focus is presently on paragraph six of the April 28, 2014 judgment entry, which orders the following:

{¶28}. "6. That Defendant [Glenn, Jr.] be removed as trustee and *a suitable successor trustee be appointed by the Court* (Defendant shall be removed but will be discharged only after the Court approves the comprehensive accounting of Trust expenses referenced above and Defendant files the Amended Estate Tax Return);"

{¶29}. Judgment Entry, April 28, 2014, at 27 (emphasis added).

{¶30}. The above language thus leaves two significant matters for future action or determination by the trial court, namely, (1) the "approval" of the trust accounting and (2) the appointment of the successor trustee.

{¶31}. Regarding the accounting approval requirement, it is not clear to us whether the trial court intended to issue another judgment entry on that issue, although the record reveals that appellant did file an accounting via a "notice of compliance" on May 28, 2014.

{¶32}. More importantly, however, we find appellee's specific claim for appointment of herself as trustee (see "Seventh Cause of Action" at page 6 of the

complaint) has not been adjudicated, nor has the court in the alternative named someone else as the "suitable successor trustee" as suggested in paragraph 6, *supra*. Our review of the trial court docket reveals that at a hearing on a show cause motion several months after the commencement of the present appeal, appellee again requested the appointment of a successor trustee, which the trial court refused to pursue due to the pending appeal. See Judgment Entry, December 29, 2014, at 5. Other than a denial of a motion for stay pending appeal, also issued on December 29, 2014, the docket indicates the trial court has since issued no further rulings.

{¶33}. The Ohio Supreme Court has aptly recognized that "[f]or purposes of Civ.R. 54(B) certification, in deciding that there is no just reason for delay, the trial judge makes what is essentially a factual determination—whether an interlocutory appeal is consistent with the interests of sound judicial administration." *Wisintainer v. Elcen Power Strut Co.* (1993), 67 Ohio St.3d 352, 617 N.E.2d 1136, paragraph one of the syllabus. A trial court's use of such Civ.R. 54(B) certification is discretionary. *Dywidag Sys. Internatl., USA., Inc. v. Ohio Dept. of Transp.*, 10th Dist. Franklin No. 10AP–270, 2010–Ohio–3211, ¶ 26, citing *Noble v. Colwell* (1989), 44 Ohio St.3d 92, 540 N.E.2d 1381, f.n. 7.

{¶34}. Because the probate court's April 28, 2014 and July 9, 2014 judgment entries in the case sub judice have not disposed of all the claims in appellee's complaint, and neither contain Civ.R. 54(B) language, it is apparent the trial judge has determined *sub silentio* that this matter is not conducive to an interlocutory appeal pending her decision as to the successor trustee appointment. Furthermore, even if we were to view the request for appointment of a new trustee as merely a remedy within

one of the other claims, we would find such claim has not been fully adjudicated under the circumstances presented.

{¶35}. Accordingly, upon review, we hold a final appealable order does not exist warranting our review.

{¶36}. We therefore find the arguments raised in Appellant's and Appellee/Cross-Appellant's Assignments of Error are premature.

{¶37}. For the reasons stated in the foregoing opinion, the appeal of the judgment of the Court of Common Pleas, Probate Division, Stark County, Ohio, is dismissed.

By: Wise, J.

Gwin, P. J., and

Baldwin, J., concur.

JWW/d 0609

