

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

ANDREW P. COOKE

Plaintiff-Appellee

-VS-

LOGAN INSULATING AND FOAM
SERVICE, LLC, ET AL.

Defendants-Appellants

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. John W. Wise, J.

Hon. Patricia A. Delaney, J.

Case No. 2014CA00067

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Fairfield County Court of
Common Pleas, Case No. 2013CV121

JUDGMENT:

Dismissed

DATE OF JUDGMENT ENTRY:

July 30, 2015

APPEARANCES:

For Plaintiff-Appellee

For Defendants-Appellants

ANDREW P. COOKE
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Hoffman, P.J.

{¶1} Defendants-appellants Logan Insulating and Foam Service, LLC, et al. appeal the November 21, 2014 Judgment Entry entered by the Fairfield County Court of Common Pleas. Plaintiff-appellee is Andrew P. Cooke.

STATEMENT OF THE CASE AND FACTS

{¶2} On February 6, 2013, Appellee filed a complaint against Appellants Logan Insulating and David Kornmiller, asserting six causes of action: breach of contract; civil theft pursuant to R.C. 2307.60; slander of title; an action to void and release an invalid and fraudulent mechanics' lien; an action to quiet title; and an action alleging violations of the Ohio Consumer Sales Practices Act.

{¶3} On April 15, 2013, Appellee filed a Motion for Judgement (sic) on the Pleadings Releasing the Mechanic's Lien of Defendant Logan Insulating and Foam Service, LLC, and a Motion for Default Judgment against Defendant Logan Insulating and Foam Service, LLC; Motion to Void Mechanic's Lien and to Set Damages Hearing. Appellants filed memoranda in opposition on May 15, 2013. Appellants filed a notice of recording of release of mechanic's lien on May 24, 2013. Via Entry filed June 3, 2013, the trial court denied Appellee's motion for default judgment; motion to void mechanic's lien and to set damages hearing.

{¶4} On December 20, 2013, Appellee filed a motion for summary judgment on the civil theft, slander of title, and Ohio CSPA claims, seeking damages as follows:

On the First Cause of Action [Appellee] seeks judgment in the amount of the theft, \$3,350.00, and liquidated damages of three times the amount of the theft, \$10,050.00; on the Second Cause of Action,

[Appellee] seeks judgment in the amount of \$5,052.44; on the Third Cause of Action, [Appellee] seeks judgment in the amount of \$3,350.00 plus \$5,052.44 plus treble and punitive damages for violations of the CSPA; plus attorneys [sic] fees, costs, interest and such relief as allowed by law.

{¶15} Appellee noted the claims for release of the mechanic's lien and to quiet title were moot since counsel for Appellant's released the mechanic's lien on or about May 18, 2013.

{¶16} Appellants filed a memorandum in opposition. Therein, Appellants specifically argued Appellee's civil theft claim was barred as a matter of law because Appellee failed to serve a written demand as required by R.C. 2307.61. Appellants further asserted Appellee was liable to them for their attorney fees pursuant to R.C. 2307.61(B) as Appellee was attempting to collect, although would not prevail, his own attorney fees through the deficient civil theft claim.

{¶17} The trial court denied Appellee's motion, finding "Reasonable minds cannot come to but one conclusion regarding the issues before the court." The matter proceeded to jury trial on November 18, 2014.

{¶18} The following evidence was adduced at trial. On February 27, 2012, Kevin Hoffman, Appellee's construction manager, contacted Appellants on behalf of Appellee to obtain an estimate for insulation work as part of renovations on Appellee's home. Appellants estimated the project would cost \$8,000. As part of the estimate, Appellants indicated a 50% deposit would be required prior to Appellants' commencing the work. Hoffman provided Appellants with Appellee's credit card information for payment.

{¶9} Appellants commenced work on the project on or about May 18, 2012. By May 26, 2012, two of the three phases of the insulation work had been completed. Due to irreconcilable differences, the contract between the parties was terminated on June 1, 2012. Hoffman, on Appellee's behalf, instructed Appellants to bill for the work completed to date and charge the amount to Appellee's credit card.

{¶10} Appellee claimed the work performed by Appellants was of inferior quality and did not meet specifications, time schedules, or the requirements of the parties' contract. Appellants failed to respond to repeated calls from Hoffman; therefore, the contract was terminated on June 1, 2012, due to non-performance. Appellants, without authority, billed Appellee's credit card \$7,350.00. Appellants only had authorization to charge the credit card the \$4,000.00, representing the 50% deposit.

{¶11} The jury unanimously decided in favor of Appellants and against Appellee on his breach of contract, civil theft, slander of title, and CSPA claims. The trial court memorialized the jury's verdict via Judgment Entry filed November 21, 2014. In the same judgment entry, the trial court closed the case and assessed costs to Appellee.

{¶12} On December 18, 2014, Appellants filed a motion for a hearing on attorney fees and costs pursuant to Civ. R. 60(A) and (B) in order to determine the reasonable attorney fees and costs Appellee owed to Appellants under R.C. 2307.61(B) and pursuant to the November 21, 2014 Judgment Entry. Appellants filed a Notice of Appeal from the November 21, 2014 Judgment Entry on December 22, 2014. Via Entry filed February 3, 2015, the trial court denied Appellants' motion for hearing on attorney fees and costs. Appellants filed a motion to supplement the appellate record with the February 3, 2015 Entry on February 11, 2015.

{¶13} Appellants assign as error:

{¶14} "I. THE TRIAL COURT ERRED AS A MATTER OF LAW BY FAILING TO AWARD COSTS AND REASONABLE ATTORNEY'S FEES TO DEFENDANTS-APPELLANTS ('APPELLANT'S') PURSUANT TO R.C. §2307.61(B) GIVEN THAT PLAINTIFF-APPELLEE ('APPELLEE') BROUGHT A CIVIL THEFT CLAIM AGAINST UNDER R.C. §2307.60 AND 2307.61(A)(2), ATTEMPTED TO COLLECT HIS COSTS AND ATTORNEY'S FEES IN A MOTION FOR SUMMARY JUDGMENT, WHICH THE TRIAL COURT DENIED, AND THE JURY UNANIMOUSLY REJECTED APPELLEE'S CIVIL THEFT CLAIM.

{¶15} "II. TO THE EXTENT THAT THE TRIAL COURT DID AWARD STATUTORY ATTORNEY'S FEES AS COSTS IN ITS JUDGMENT ENTRY, THE TRIAL COURT ERRED BY FAILING TO CLEARLY DEFINE THE COSTS ASSESSED AGAINST APPELLEE AND INCLUDE ATTORNEY'S FEES THEREIN."

{¶16} As a preliminary matter, we must first determine whether the order under review is a final appealable order. If an order is not final and appealable, then we have no jurisdiction to review the matter and must dismiss it. See *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.*, 44 Ohio St.3d 17, 20, 540 N.E.2d 266 (1989). In the event the parties to the appeal do not raise this jurisdictional issue, we must raise it sua sponte. See *Chef Italiano Corp. v. Kent State Univ.*, 44 Ohio St.3d 86, 541 N.E.2d 64 (1989), syllabus.

{¶17} Although in his motion for summary judgment, Appellee indicated his claims for release of the mechanic's lien and to quiet title were moot, neither Appellee nor the trial court dismissed those causes of action. Accordingly, we find the trial court's November 21, 2014 Judgment Entry did not dispose of all claims in the case or

otherwise note why there should be no just reason for delay. Therefore, this Court lacks a final, appealable order from which jurisdiction flows. *Whitaker–Merrell Co. v. Geupel Const. Co.*, 29 Ohio St.2d 184, 186, 280 N.E.2d 922 (1972).

{¶18} Because the order Appellants appealed from is not a final appealable order, we are compelled to dismiss Appellants' appeal.

By: Hoffman, P.J.

Wiise, J. and

Delaney, J. concur