[Cite as *DiCorpo v. Kelley*, 2005-Ohio-1863.]

COURT OF APPEALS OF OHIO EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 84609

MICHAEL J. DICORPO, ET AL.	:	
	:	
Plaintiffs-Appellants	:	
	:	JOURNAL ENTRY
vs.	:	and
	:	OPINION
MICHAEL V. KELLEY, ET AL.	:	
	:	
Defendants-Appellees	:	
	:	
DATE OF ANNOUNCEMENT OF DECISION	:	APRIL 21, 2005
CHARACTER OF PROCEEDING	:	Civil appeal from
	:	Cuyahoga County Court of
	:	Common Pleas
	:	Case No. CV-517948
JUDGMENT	:	DISMISSED.
DATE OF JOURNALIZATION	:	

APPEARANCES:

For Plaintiffs-Appellants:

STEVEN D. BELL
ANN-MARIE AHERN
The Simon Law Firm, LLP
1717 Penton Media Building
1300 East Ninth Street
Cleveland, Ohio 44114-1503

For Defendants-Appellees:

ROBERT J. FOGARTY
YURI R. LINETSKY
ANDREW S. POLLIS
Hahn, Loeser & Parks
3300 BP TOWER
200 Public Square
Cleveland, Ohio 44114-2301

KENNETH A. ROCCO, J.:

{¶ 1} Appellant Michael DiCorpo appeals the trial court's order that dismissed his action, which raised claims of breach of contract, age discrimination, and wrongful discharge against appellee Michael Kelley and Kelley's law firm.

{¶ 2} Appellees have filed a motion to dismiss this appeal for lack of a final, appealable order. Although this court initially denied the motion, it has permitted them to file a "reply" in further support of the motion. Appellees' motion is granted.

{¶ 3} The trial court's order indicates that the dismissal in this case was one for lack of jurisdiction over the subject matter of the complaint. The trial court stated a Florida court already had acquired jurisdiction over the claims raised.

{¶ 4} Pursuant to Civ.R. 41(B)(4), a dismissal for lack of subject matter jurisdiction is one other than on the merits, i.e., without prejudice. A dismissal without prejudice is not a final appealable order, and this court lacks jurisdiction to consider an appeal from a non-final order. R.C. 2505.02. This identical issue previously has been addressed in *Century Business Services, Inc. v. Bryant*, Cuyahoga App. Nos. 80507, 80508, 2002-Ohio-2967; its decision, therefore, is determinative of this case.

{¶ 5} Accordingly, this appeal is dismissed.

It is ordered 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 Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KENNETH A. ROCCO
JUDGE

SEAN C. GALLAGHER, J. CONCURS

PATRICIA ANN BLACKMON, A.J. DISSENTS
(SEE SEPARATE DISSENTING OPINION)

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

COURT OF APPEALS OF OHIO EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 84609

MICHAEL J. DICORPO, ET AL.	:	
	:	
Plaintiffs-Appellants	:	
	:	D I S S E N T I N G
-vs-	:	
	:	O P I N I O N
MICHAEL V. KELLEY, ET AL.	:	
	:	
Defendants-Appellees	:	
	:	

DATE: APRIL 21, 2005

PATRICIA ANN BLACKMON, A.J., DISSENTING:

{¶ 6} I respectfully dissent from the Majority Opinion and I understand why it has taken the position that a dismissal without prejudice is not a final, appealable order. I note in 1962 in *Karam v. McElroy* (1962), 116 Ohio App. 288, that the court held a dismissal without prejudice is a final, appealable order. Other courts have held the same. *Passig v. Ossing* (1935), 51 Ohio App. 215; *Svoboda v. Brunswick* (1983), 6 Ohio St.3d 348, *McCann v. Lakewood* (1994), 95 Ohio App.3d 226. These cases are, on their facts, quite distinguishable from this case. However, I point them out to negate and dispell the notion that as a matter of law a blanket rule exists that a dismissal without prejudice is not reviewable by an appellate court and thus not a final, appealable order.

{¶ 7} Accordingly, I would conclude that this is the ideal case to review the trial court's dismissal. The trial court's entry stated the following:

> **Defendants' motion to dismiss, filed 2/4/2004, is well-taken and granted. The court finds that a circuit court in Florida first obtained jurisdiction of this matter, with the right to adjudicate the parties' dispute. The court also finds that the claims in the second-filed Ohio suit arises from the same transaction and occurrence, and involve the same set of operative facts. Plaintiffs' claims can be brought as compulsory counterclaims in the Florida action. Accordingly, defendants' motion to dismiss is granted. *Therapy Partners of Am., v. Health Providers, Inc.* (1998), 129 Ohio App.3d 572.**

{¶ 8} It is unquestionable in this case that both Ohio and Florida have subject matter and personal jurisdiction over this case. The only reason for the dismissal of the Ohio case was judicial convenience and propriety as evidenced by the trial court's entry.

{¶ 9} Dismissal of a matter because of concurrent jurisdiction between Ohio and a sister state as a matter of law is incorrect. In *Carlin v. Mambuca* (1994), 96 Ohio App.3d 500 which involved a similar set of facts, this court held that the trial court has two options when faced with concurrent jurisdiction of a matter pending in Ohio and a sister state. The trial court may proceed or stay the matter pending resolution in the sister state, but, it may not dismiss the Ohio action, citing *Hoppel v. Greater Iowa Corp.* (1980), 68 Ohio App.2d 209.

{¶ 10} Other courts have held the same. In *Commercial Union Ins. v. Wheeling Pittsburg Corp.* (1995), 106 Ohio App.3d 477, the court held in order to avoid duplicity and in the interest of comity, the trial court in its discretion may stay the matter pending resolution in the sister state.

{¶ 11} Nevertheless, the trial court in this case sought to resolve this matter under Ohio's "rule of priority of jurisdiction," and thereby dismissed the Ohio case. In *Hoppel v. Greater Iowa Corp.*, we held the Ohio "rule of priority of jurisdiction" applies to actions pending in different Ohio courts that have concurrent jurisdiction; it does not apply to an action pending in a sister state. Id. 210. Ultimately, courts have concluded the rule of priority is a rule of jurisdiction and not one of judicial convenience and propriety. *Long v. Grill* (2003), 155 Ohio App.3d 135.

{¶ 12} Consequently, I would have reversed and remanded this case and ordered the trial court to proceed or stay the matter until the Florida case was resolved. I reach this conclusion because both Florida and Ohio have jurisdiction over this matter, and the trial court should not be allowed to avoid this fact by dismissing the case without prejudice.