

[Cite as *Samsel Rope & Marine Supply Co. v. Burgess*, 2006-Ohio-709.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 86477

SAMSEL ROPE & MARINE SUPPLY :  
CO. :

Plaintiff-Appellant :

vs. :

BARBARA BURGESS, Executrix :  
of the Estate of Robert L. : OPINION  
Soltz, Deceased :

Defendant-Appellee/ :  
Cross-Appellant :

vs. :

HAROLD D. GRAY, et al. :  
Third-Party Defendant/ :  
Cross-Appellee :

DATE OF ANNOUNCEMENT  
OF DECISION:

February 16, 2006

CHARACTER OF PROCEEDING:

Civil appeal from  
Common Pleas Court  
Case No. CV-523314

JUDGMENT:

DISMISSED

DATE OF JOURNALIZATION:

APPEARANCES:

For Plaintiff-Appellant:

R. ERIC SMEARMAN  
Smith Marshall, LLP  
1965 East 6<sup>th</sup> Street  
Cleveland, Ohio 44114

For Defendant-Appellee:

JONATHAN F. SOBEL

JOURNAL ENTRY

and

OPINION

(Barbara Burgess, Executrix)

Kabat, Mielziner & Sobel  
25550 Chagrin Blvd., #403  
Beachwood, Ohio 44122

For Third-Party Defendant/  
Cross-Appellee:  
(Harold D. Gray)

DANIEL J. KOLICK  
MICHELLE A. YANOK  
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Westlake, Ohio 44145

COLLEEN CONWAY COONEY, J.:

{¶ 1} Plaintiff-appellant, Samsel Rope & Marine Supply Co. (“Samsel”), appeals the trial court’s decision granting summary judgment in favor of defendant-appellee, Barbara Burgess, Executrix of the Estate of Robert L. Stolz (“the Estate”). The Estate, as third-party plaintiff/cross-appellant, appeals the trial court’s decision dismissing its complaint against third-party defendant/ cross-appellee, Harold Gray (“Gray”). For the reasons that follow, we dismiss for lack of a final appealable order.

{¶ 2} In 2004, Samsel filed a complaint against the Estate asserting his right to enforce claims he made against the Estate. The Estate denied liability and filed a third-party complaint against Gray and Old River Road Restaurant Company (“Old River”), seeking indemnity for any losses incurred as a result of Samsel’s claim and reimbursement for attorney fees and costs. Both Gray and Old River received certified mail service of the third-party complaint; however, only Gray filed an answer.

{¶ 3} Samsel, the Estate, and Gray filed motions for summary judgment. The trial court denied Samsel’s motion, granted the Estate’s motion, and dismissed the third-party complaint, stating:

“Accordingly, Defendant Executrix’ [sic] Motion for Summary Judgment is granted.

Judgment is hereby entered in favor of said Defendant and against Plaintiff on Plaintiff's Complaint. As a result, Defendant Executrix's third-party complaint against Gray is dismissed."

{¶ 4} Section 3(B)(2), Article IV of the Ohio Constitution provides: "Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district." R.C. 2505.02(B) further provides that "[a]n order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial," when it "affects a substantial right in an action that in effect determines the action and prevents a judgment."

{¶ 5} Where there are multiple claims and/or multiple parties to an action, an order of a court is a final appealable order only if the requirements of both R.C. 2505.02 and Civ.R. 54(B) are met. *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86, 541 N.E.2d 64, syllabus. Civ.R. 54(B) provides:

"When more than one claim for relief is presented in an action whether as a 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. In the absence of a determination that there is no just reason for delay, any order \* \* \* 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 \* \* \*."

{¶ 6} In the absence of a final appealable order, the appellate court does not possess jurisdiction to review the matter, and must dismiss the case sua sponte. *St. Rocco's Parish Fed. Credit Union v. America Online, Inc.*, 151 Ohio App.3d 428, 2003-Ohio-420, 784 N.E.2d 200; *Young v. Cincinnati Ins. Co.*, Cuyahoga App. No. 82395, 2003-Ohio-4196.

{¶ 7} In the instant case, the trial court's judgment entry did not include third-party defendant, Old River, or contain the "no just reason for delay" language of Civ.R. 54(B). Therefore, the entry is not a final appealable order because the claim against Old River is still pending. Accordingly, we lack jurisdiction to consider the appeal and cross-appeal.

Appeal dismissed.

It is ordered that appellee recover of appellant the costs herein taxed.

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

FRANK D. CELEBREZZE, JR., P.J. and

KENNETH A. ROCCO, J. CONCUR

JUDGE  
COLLEEN CONWAY COONEY

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).