

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 89941

FRANK A. MITRI, ET AL.

PLAINTIFFS-APPELLANTS

vs.

**PREMIER MORTGAGE FUNDING OF
OHIO, INC., aka PREMIER MORTGAGE
FUNDING, INC., ET AL.**

DEFENDANTS

**JUDGMENT:
DISMISSED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-610303

BEFORE: Sweeney, A.J., Cooney, J., and Stewart, J.

RELEASED: April 17, 2008

JOURNALIZED:

[Cite as *Mitri v. Premier Mtge. Funding of Ohio, Inc.*, 2008-Ohio-1821.]

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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).

[Cite as *Mitri v. Premier Mtge. Funding of Ohio, Inc.*, 2008-Ohio-1821.]
JAMES J. SWEENEY, A.J.:

{¶ 1} Sua sponte, this appeal is dismissed for lack of a final appealable order.

{¶ 2} The record reflects that plaintiffs-appellants Frank and Michele Mitri's advanced causes of action against Premier Mortgage Funding of Ohio, Inc., aka¹ Premier Mortgage Funding, Inc. and the other defendants-appellees. Although Premier Mortgage Funding of Ohio, Inc. answered the complaint, claims against it were never resolved by the trial court.

{¶ 3} Plaintiffs seek to appeal the trial court's order that granted the motions for judgment on the pleadings of defendants-appellees Lee Bachman and Countrywide Home Loans, Inc. with prejudice as well as the denial of their motion to amend their complaint. Although the trial court's order disposed of fewer than all of the claims against all of the parties, it did not contain Civ.R. 54(B) language.²

{¶ 4} Premier Mortgage Funding of Ohio, Inc. did not move for judgment on the pleadings nor move to dismiss the complaint against it and the claims against it could not be dismissed sua sponte by the trial court. E.g., *Mayor v. Ford Motor Co.*,

¹Premier Mortgage Funding, Inc. was not named as a separate corporation.

²Civil Rule 54(B) provides: "[w]hen more than one claim for relief is presented in an action whether as a claim, counterclaim, cross-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 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."

Cuyahoga App. No. 81835, 2003-Ohio-2869, ¶¶3 and 7 (a trial court’s “order granting the motions to dismiss did not determine the action nor prevent a judgment because not all of the defendants joined in the motions to dismiss” notwithstanding the fact that the trial court’s order “dismissed the case.”)

{¶ 5} During the pendency of this appeal, Premier Mortgage Funding, Inc. filed a suggestion of bankruptcy and plaintiffs dismissed that entity. Plaintiffs did not dismiss Premier Mortgage Funding of Ohio, Inc., which remains a party in the trial court with unresolved claims. Therefore, this Court lacks jurisdiction to address the appeal at this time due to a lack of a final, appealable order. Id. at ¶11.

Appeal dismissed.

It is ordered that appellees recover from appellants their costs herein taxed.

It is ordered that a special mandate issue out of this Court directing the 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.

JAMES J. SWEENEY, ADMINISTRATIVE JUDGE

COLLEEN CONWAY COONEY, J., CONCURS
MELODY J. STEWART, J., DISSENTS

MELODY J. STEWART, J., DISSENTING:

{¶ 6} The journal entry granting judgment on the pleadings states:

{¶ 7} “Defendant Lee Bachman’s motion for judgment on the pleadings and/or motion to dismiss is granted. Defendant Countrywide Home Loans, Inc.’s motion for judgment on the pleadings is granted. *Case is dismissed with prejudice at plaintiff’s costs.*” (Emphasis added.)

{¶ 8} In *National City Commercial Capital Corp. v. AAAA At Your Service, Inc.*, 114 Ohio St.3d 82, 2007-Ohio-2942, the supreme court stated at ¶7:

{¶ 9} “To be final, however, ‘an order must also determine an action and prevent a judgment.’ *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86, 88, 541 N.E.2d 64, citing *Gen. Elec. Supply Co. v. Warden Elec., Inc.* (1988), 38 Ohio St.3d 378, 528 N.E.2d 195, syllabus; R.C. 2505.02(B)(1). ‘For an order to determine the action and prevent a judgment for the party appealing, it must dispose of the whole merits of the cause or some separate and distinct branch thereof and leave nothing for the determination of the court.’ *Hamilton Cty. Bd. of Mental Retardation & Developmental Disabilities v. Professionals Guild of Ohio* (1989), 46 Ohio St.3d 147, 153, 545 N.E.2d 1260. See *State ex rel. Downs v. Panioto*, 107 Ohio St.3d 347, 2006-Ohio-8, 839 N.E.2d 911, ¶20.”

{¶ 10} The court’s journal entry dismissed the entire “case.” As used by the court, the word “case” is synonymous with “action.” See *In re Appeal of Sergeant* (C.P.1976), 49 Ohio Misc. 36, 38. Consequently, the court’s dismissal

encompassed all of Mitri's claims and not just those claims against Bachman and Countrywide Home Loans, Inc. Moreover, the dismissal was an adjudication on the merits under Civ.R. 41(B)(3), which provides that "[a] dismissal under division (B) of this rule and any dismissal not provided for in this rule *** operates as an adjudication upon the merits unless the court, in its order for dismissal, otherwise specifies." Although I agree that the trial court erroneously disposed of all the claims against Premier Mortgage Funding of Ohio, Inc. because no dispositive motions had been filed by that party, the "case is dismissed" language used by the court was an adjudication on the merits as to all of those claims. It constituted a final judgment because it disposed of all the claims against Premier Mortgage Funding of Ohio, Inc. and left nothing else for adjudication. Pursuant to Civ.R. 54(B), we have jurisdiction to hear this appeal.

{¶ 11} *Mayor v. Ford Motor Company*, Cuyahoga App. No. 81835, 2003-Ohio-2869, is not persuasive authority for the proposition that an unintended or sua sponte dismissal of a claim for relief is not a final disposition of that claim. The issue of finality for purposes of Civ.R. 54(B) is not dependent on whether the court had a dispositive motion before it when rendering judgment. For example, the supreme court has held that a court generally errs by entering summary judgment sua sponte in favor of a nonmoving party because "Civ.R. 56 does not authorize courts to enter summary judgment in favor of a non-moving party." *Marshall v. Aaron* (1984), 15 Ohio St.3d 48, syllabus. See, also, *State ex rel. J.J. Detweiler Ent. v. Warner*, 103

Ohio St.3d 99, 2004-Ohio-4659. But in no case has the supreme court questioned the *finality* of an erroneous sua sponte judgment. *Mayor* appears to confuse the “correctness” of a judgment with “finality.” Obviously, an incorrect judgment does not affect the finality of that judgment. I respectfully dissent from the dismissal of the appeal.