

[Cite as *Hoffmann v. Discount Drug Mart, inc.*, 2009-Ohio-2882.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92055

JOHANN HOFFMANN

PLAINTIFF-APPELLEE

vs.

DISCOUNT DRUG MART, INC.

DEFENDANT-THIRD-PARTY PLAINTIFF-APPELLEE

Appeal by:

SPACE BUILDING SYSTEMS, INC.

THIRD-PARTY DEFENDANT-APPELLANT

**JUDGMENT:
DISMISSED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-611272

BEFORE: Rocco, P.J., Dyke, J., and Celebrezze, J.

RELEASED: June 18, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) 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(C) 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(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

KENNETH A. ROCCO, P.J.:

{¶ 1} Third-party defendant-appellant, Space Building Systems, Inc., appeals from a common pleas court order vacating an order that dismissed the third-party complaint, without prejudice, pursuant to a notice of voluntary dismissal filed by defendant-third-party plaintiff, Discount Drug Mart, Inc. Despite the court's finding of no just reason for delay, this order was not final and appealable. Therefore, we dismiss this appeal.

{¶ 2} Plaintiff-appellee Johann Hoffmann filed his complaint on December 28, 2006. He alleged that he slipped, tripped, and fell on a sidewalk in front of the entrance to a Discount Drug Mart store which was under construction. As a result, he claimed injury to his buttocks, left leg, and left ankle. He alleged that Discount Drug Mart was negligent in allowing construction materials to remain on the sidewalk, and this negligence caused his injury. Discount Drug Mart answered, denying any negligence and asserting, as an affirmative defense, that plaintiff's injuries were caused by the acts of third persons and that plaintiff failed to join all necessary parties.

{¶ 3} Thereafter, Discount Drug Mart filed a third-party complaint against appellant in which it alleged that plaintiff's injuries were caused by the primary negligence of appellant and demanded indemnification. Alternatively,

Discount Drug Mart asserted that appellant was a joint tortfeasor who should be required to contribute to any judgment rendered in plaintiff's favor. Appellant answered the third-party complaint, denying its allegations and asserting numerous defenses to both the complaint and the third-party complaint.

{¶ 4} Discount Drug Mart filed a notice of voluntary dismissal of its third-party complaint, without prejudice, on November 27, 2007. The court so ordered on May 12, 2008 and dismissed the third-party claim without prejudice. However, in an entry filed August 18, 2008, the court vacated the dismissal order and reinstated the third-party claim against appellant. At the conclusion of this order, the court found that "there is no just cause for delay."

{¶ 5} We find this case to be indistinguishable from *Jarrett v. Dayton Osteopathic Hosp., Inc.* (1985), 20 Ohio St.3d 77. In *Jarrett*, the trial court entered a judgment against one of three defendants, but then granted that defendant's motion for relief from judgment pursuant to Civ.R. 60(B). The plaintiff appealed from the order granting relief from judgment. Both the appellate court and the Ohio Supreme Court determined that the order vacating the judgment was not final and appealable. The supreme court held that the original entry of judgment against the one defendant was not a final order because it did not adjudicate all claims or the rights and liabilities of all parties and did not include an express determination that there was no just reason for delay. Therefore, that order was subject to modification pursuant to Civ.R.

54(B). Then the court held that “[a]n order vacating a judgment that was entered against less than all parties and in which the trial court did not make an express determination that there was ‘no just reason for delay’ is not a final, appealable order.” *Jarrett*, at 78; see, also, *Fifth Third Bank v. Rose*, Gallia App. Nos. 07CA8, 07CA9, 2008-Ohio-3919, ¶12.

{¶ 6} Here, the court’s dismissal of the third-party complaint was not a final order. *State ex rel. Jacobs v. Mun. Ct. of Franklin Cty.* (1972), 30 Ohio St.2d 239, 243-44. The claims against Discount Drug Mart remained pending for adjudication. Without an express determination that there was no just reason for delay, this order was subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of the parties. Civ.R. 54(B). Consequently, the order vacating – that is, reconsidering – that judgment also was not final.

{¶ 7} The court’s inclusion of “no just reason for delay” language in the order *vacating* the non-final judgment did not make it final. Civ.R. 54(B) allows a trial court to make final a judgment as to one or more but fewer than all of the claims or parties by expressly determining that there is no just reason for delay. An order vacating a prior non-final order is not a judgment; it reopens an issue for further adjudication. Therefore, Civ.R. 54(B) by its terms does not apply to an order “vacating” a prior non-final order.

{¶ 8} The order vacating the dismissal of the third-party claims against appellant is not a final appealable order. Therefore, we lack jurisdiction in this matter. Having found that we lack jurisdiction, we decline to consider at this time whether the trial court itself had jurisdiction to vacate the dismissal order.

Dismissed.

It is ordered that appellees recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court 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, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., CONCURS
ANN DYKE, J., CONCURS IN JUDGMENT ONLY