

[Cite as *Yeckley v. Yeckley*, 2010-Ohio-4252.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94358

THOMAS D. YECKLEY

PLAINTIFF-APPELLEE

vs.

THOMAS D. YECKLEY, ET AL.

DEFENDANTS-APPELLEES

(APPEAL BY RICHARD A. YECKLEY)

**JUDGMENT:
DISMISSED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-611861

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

RELEASED AND JOURNALIZED: September 9, 2010
ATTORNEY FOR APPELLANT

Edwin V. Hargate III
18519 Underwood Avenue
Cleveland, Ohio 44119

ATTORNEY FOR APPELLEE KEYBANK NATIONAL ASSOCIATION

Pamela S. Petas
Manley Deas Kochalski LLC
P.O. Box 42728
Cincinnati, Ohio 45242

ATTORNEY FOR APPELLEE THOMAS D. YECKLEY

James W. Tekavec
38106 Third Street
Willoughby, Ohio 44094

ATTORNEYS FOR APPELLEE CUYAHOGA COUNTY TREASURER

William D. Mason
Cuyahoga County Prosecutor

BY: Gregory B. Rowinski
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

ATTORNEY FOR APPELLEE STATE OF OHIO

Alan H. Weinberg
Weltman, Weinberg & Reis Co., L.P.A.
Lakeside Place, Suite 200
323 Lakeside Avenue, West
Cleveland, Ohio 44113

ATTORNEY FOR APPELLEE THOMPSON ELECTRIC, INC.

John M. Herrnstein
527 Portage Trail
Cuyahoga Falls, Ohio 44221

ATTORNEY FOR APPELLEE DENNIS G. YECKLEY

Dennis J. Polke
394 Walworth Avenue
Euclid, Ohio 44132

ATTORNEY FOR APPELLEE LINDA L. YECKLEY

Bryan S. Freeman
17413 Detroit Avenue
Lakewood, Ohio 44107

KENNETH A. ROCCO, P.J.:

{¶ 1} Defendant-appellant, Richard D. Yeckley, appeals from a common pleas court order granting a motion to vacate the default judgment entered against defendant-appellee, KeyBank National Association. Although KeyBank argued its motion as a motion for relief from judgment pursuant to Civ.R. 60(B), KeyBank's motion was in fact merely a motion for reconsideration of a non-final order. See *Lee v. Joseph Horne Co.* (1995), 99 Ohio App.3d 319, 650 N.E.2d 530. Claims

remain pending in the common pleas court. Therefore, this order is not final and appealable.

Procedural History

{¶ 2} The pleadings in this case are tortuous. Appellee Thomas D. Yeckley originally filed his complaint for partition on January 4, 2007. A second amended complaint was deemed to have been filed July 31, 2007. The second amended complaint sought to partition real property that Thomas, Linda, Dennis, and Richard Yeckley and Nena DePalma held as tenants in common. The second amended complaint also asserted that KeyBank, Thompson Electric, and the Cuyahoga County Treasurer may claim an interest in the property. In addition to the partition claim, the complaint also asserted that Thomas Yeckley had other interests in the real property, including a fractional interest in rent due from Linda Yeckley and two John Doe defendants.

{¶ 3} Thompson Electric filed an answer, counterclaim, and cross-claim to the second amended complaint in which it asserted that it had a mechanic's lien on the premises. The Cuyahoga County Treasurer answered and cross-claimed, asserting a lien for taxes, assessments, and penalties. The state of Ohio was given leave to intervene and filed an answer and cross-claim to recover Medicaid benefits paid to the decedent from whom the parties acquired their interests in the property.

{¶ 4} None of the individual defendants answered the second amended complaint, but they did answer the original complaint and/or the first amended

complaint. Linda Yeckley also sought to recover payments she made on a mortgage on the premises, as well as taxes, interest, insurance, and maintenance she paid for. Richard Yeckley demanded to recover assets he inherited from his mother that were still on the premises, and Thomas Yeckley asked for judgment for repair work he performed on the premises.¹

{¶ 5} KeyBank was served with the original complaint by certified mail and was later served with the first and second amended complaints by ordinary mail. It did not file an answer. Thomas Yeckley moved for default judgment against KeyBank on October 30, 2007. On January 25, 2008, the magistrate granted this motion and barred KeyBank from asserting any right, title, or interest to the premises.

{¶ 6} In that same decision, the magistrate determined that Thomas, Richard, and Dennis Yeckley each owned an undivided 1/5 interest in the property, and Linda Yeckley owned an undivided 2/5 interest. The magistrate found plaintiff was entitled to partition and ordered the partition to be made. The magistrate ordered that one “suitable disinterested person” be appointed commissioner to make the partition, and if the commissioner determined that the premises could not be divided by metes and bounds without injuring its value, then the commissioner was to make a just valuation of the property. Finally, the magistrate determined that the interests of Richard, Dennis, Thomas, and Linda

¹ Claims against Nena DePalma and Rafael DePalma were dismissed by stipulation because they no longer had any interest in the property.

Yeckley were “subject to any unpaid taxes, assessments, penalties and interests that may be due and payable.”

{¶ 7} On February 22, 2008, the court adopted the magistrate’s decision and entered a decree of partition in favor of plaintiff. The court also appointed a commissioner.

{¶ 8} On March 11, 2008, the court entered the following order:

“* * * Parties with remaining pending claims including claims for set-offs to file an intent to proceed within 30 days * * * from the date of this order. Failure to file said intent to proceed will result in a dismissal without prejudice of all remaining claims including claims for set-offs. Furthermore, parties to submit stipulated entry regarding distribution of funds derived from election process or sheriff sale. Said entry to be submitted within 30 days from the date of this order.”

{¶ 9} On May 29, 2008, KeyBank filed a combined motion for relief from judgment and motion for leave to file an answer. Both Thomas and Richard Yeckley opposed this motion. On August 22, 2008, the magistrate granted the motion, vacated the judgment against KeyBank, and granted KeyBank leave to answer. The court subsequently overruled Thomas and Richard Yeckley’s objections to this order, adopted the magistrate’s decision, vacated the default judgment against KeyBank, and deemed its answer filed as of the date of the court’s order, January 5, 2009.

{¶ 10} Richard Yeckley appealed from this order. This court dismissed his appeal sua sponte, citing R.C. 2505.02 and *In re Zinni*, Cuyahoga App. No. 89599, 2008-Ohio-581. After the dismissal of the appeal, the trial court entered the following order:

“The court’s order of 01/05/2009 is amended to read as follows: Upon an independent review of the objections to the magistrate’s decision of plaintiff and defendant Richard A. Yeckley, filed 09/29/2008, the court hereby overrules said objections. By this separate and distinct instrument, the court finds that finds that [sic] KeyBank National Association is entitled to relief from the default judgment rendered against it pursuant to Civ.R. 60(B)(5) and hereby adopts the magistrate’s decision, dated 08/22/2008, attached hereto and incorporated herein. KeyBank National Association’s motion to vacate default judgment is granted. The answer of KeyBank National Association is deemed filed as of the date of this order. The decree of partition issued 02/22/2008 is amended to indicate that KeyBank National Association has filed an answer. The court makes no findings as it relates to the validity and/or priority of the alleged interests of KeyBank National Association at this time except to note that said interests are hereby ordered transferred to the proceeds derived from the sale of the subject premises. Said rights to be determined by further court order.”

{¶ 11} Richard Yeckley filed the present appeal from this order.

Law and Analysis

{¶ 12} The proceedings in the underlying action were not completed before KeyBank filed its motion to vacate the default judgment entered against it, and still have not been completed. Although the trial court determined that the property should be partitioned, there are still outstanding counterclaims and cross-claims that have not been resolved. Consequently, the order granting default judgment against KeyBank was an interlocutory order, subject to modification at any time. See Civ.R. 54(B). KeyBank did not have to comply with Civ.R. 60(B) when it asked the court to vacate that order; its motion was simply a motion for reconsideration. *Lee v. Joseph Horne Co., Inc.* (1995), 99 Ohio App.3d 319, 323, 650 N.E.2d 530.

{¶ 13} “An order vacating a judgment that was entered against less than all the 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 v. Dayton Osteopathic Hosp., Inc.* (1985), 20 Ohio St.3d 77, 486 N.E.2d 99, syllabus. Accordingly, we have no jurisdiction to consider this matter and must dismiss this appeal.

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., and
LARRY A. JONES, J., CONCUR