

[Cite as *Garber v. STS Concrete Co., L.L.C.*, 2011-Ohio-934.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95077

PATRICK GARBER

PLAINTIFF-APPELLEE

vs.

STS CONCRETE CO., L.L.C., ET AL.

DEFENDANTS-APPELLANTS

**JUDGMENT:
DISMISSED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-694321

BEFORE: Cooney, P.J., Rocco, J., and Keough, J.

RELEASED AND JOURNALIZED: March 3, 2011

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COLLEEN CONWAY COONEY, P.J.:

{¶ 1} Defendants-appellants, STS Concrete Co., L.L.C., et al. (“STS”), appeals the trial court’s granting of partial summary judgment in favor of plaintiff-appellee, Patrick Garber (“Garber”). For the following reasons, we dismiss for lack of a final, appealable order.

{¶ 2} In June 2008, Garber hired STS to install a new concrete driveway at his home.

STS performed the work and was paid in full by Garber. Garber alleges that the day after the driveway was poured, the concrete cracked. Garber asked STS to replace the cracked areas, and STS agreed. However, STS failed to replace the cracked areas and Garber demanded a full refund, which STS refused. Garber paid \$6,200 for the job.

{¶ 3} Garber filed suit against STS in May 2009, alleging breach of contract, negligence, and violations of the Consumer Sales Practices Act and the Home Solicitation Sales Act. Prior to trial, Garber was granted partial summary judgment on two counts of his complaint and awarded \$18,600. Garber filed a motion for leave to amend the complaint to dismiss the remaining counts, pursuant to Civ.R. 15(A). This motion for leave was unopposed and granted in March 2010. However, Garber never filed an amended complaint.

{¶ 4} STS now appeals, raising two assignments of error.

{¶ 5} As an initial matter, we must address whether the judgment from which STS appeals is a final, appealable order.

{¶ 6} This court’s jurisdiction is limited to the review of final orders of lower courts. Ohio Const. Art. IV, § 3(B)(2). “It is well-established that an order must be final before it can be reviewed by an appellate court. If an order is not final, then an appellate court has no jurisdiction.” *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.* (1989), 44 Ohio St.3d 17, 20, 540 N.E.2d 266.

{¶ 7} “A judgment that ‘does not dispose of all the claims between all the parties, and does not contain an express determination that there is no just reason for delay * * * is not a final, appealable order.’” *Edwards v. Vito Gironda Constr. Co.*, 9th Dist. No. 24322, 2008-Ohio-5974, at ¶9, quoting *Davis v. Chrysler Corp.* (Apr. 12, 2000), 9th Dist. No. 19525.

{¶ 8} Pursuant to Civ.R. 41(A)(1)(a), a plaintiff “may dismiss *all* claims asserted by that plaintiff against a defendant by * * * filing a notice of dismissal at any time before the commencement of trial” (emphasis added). The rule “does not allow for the dismissal of a portion of the claims against a certain defendant.” *Pattison v. W.W. Grainger Inc.*, 120 Ohio St.3d 142, 2008-Ohio-5276, 897 N.E.2d 126, ¶18; see, also, *Dohme v. Eurand Am., Inc.*, 121 Ohio St.3d 277, 2009-Ohio-506, 903 N.E.2d 1174, ¶13.

{¶ 9} In dicta, the *Pattison* court noted cases in which appellate courts stated “the proper procedure for a plaintiff to dismiss fewer than all claims against a single defendant is to amend the complaint pursuant to Civ.R. 15(A).” *Id.* at ¶19, citing *Reagan v. Ranger Transp., Inc.* (1995), 104 Ohio App.3d 15, 660 N.E.2d 1234; *Kildow v. Home Town Improvements*, 5th Dist. No. CT2001-0057, 2002-Ohio-3824; *Lewis v. J.E. Wiggins & Co.*, 10th Dist. No. 04AP-469, 2004-Ohio-6724.

{¶ 10} Civ.R. 15(A), which pertains to amended and supplemental pleadings, states:

{¶ 11} “A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within twenty-eight days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party. Leave of court shall be freely given when justice so requires. A party shall plead in response to an amended

pleading within the time remaining for response to the original pleading or within fourteen days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.”

{¶ 12} Thus, based on the record in the instant case, Garber properly initiated his attempt to dismiss some, but not all, of his original claims by filing a motion for leave to amend his complaint, pursuant to Civ.R. 15(A) and following *Pattison*. The court granted his motion for leave. However, Garber failed to subsequently file an amended complaint. The trial court’s decision to grant Garber leave to amend did not in and of itself dismiss the remaining claims. Garber’s failure to file an amended complaint has left the remaining counts unresolved and adjudicated.

{¶ 13} Garber failed to file an amended complaint. The court’s decision to grant partial summary judgment is, therefore, not a final, appealable order.

{¶ 14} Thus, this court lacks jurisdiction to consider the merits of this appeal.

{¶ 15} Accordingly, this appeal is dismissed.

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

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

COLLEEN CONWAY COONEY, PRESIDING JUDGE

KENNETH A. ROCCO, J., and
KATHLEEN ANN KEOUGH, J., CONCUR