**[Cite as *Madfan, Inc. v. Makris*, 2015-Ohio-1316.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION
**No. 102179**

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## MADFAN, INC., ET AL.

PLAINTIFFS-APPELLEES

vs.

## DINO MAKRIS, ET AL.

DEFENDANTS-APPELLANTS

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**JUDGMENT:**
DISMISSED

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Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-11-749225

**BEFORE:** Keough, J., Jones, P.J., and Blackmon, J.

**RELEASED AND JOURNALIZED:** April 2, 2015

**APPELLANT**

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KATHLEEN ANN KEOUGH, J.:

**{¶1}** Defendant-appellant, Michael Westerhaus ("Westerhaus"), appeals the trial court's judgment, rendered after a jury verdict, finding him liable to plaintiffs-appellees, Madfan, Inc., Alexander Stewart, Andrew Peloza, Fred Cieslik, Michael Allen, and Northern Frozen Foods, Inc., in the amount of $300,000. Westerhaus contends that the trial court erred in denying various motions and that the jury verdict is not supported by the weight of the evidence. However, because appellees' claim for injunctive relief remains undecided, the trial court's judgment does not constitute a final, appealable order. Thus, we lack jurisdiction to consider this appeal and must dismiss it.

**{¶2}** On February 23, 2011, Madfan, Inc. filed a complaint for compensatory and punitive damages, as well as injunctive relief, against Westerhaus and Dino Makris, Nick Makris, Olympic Investment Limited, Inc., Richard Madison, Pizza King, Inc., and Buy Greek Islands, Inc. Madfan asserted claims for violations of the federal and state RICO statutes, conspiracy, due process violations, fraud, and conversion. In addition, Madfan sought a permanent injunction (1) prohibiting the defendants from opening and/or operating Route 42 Rich's Roadhouse restaurant, or any other business, pending satisfaction of all debts, tax liens, and loans owed by Madfan, (2) granting it immediate access to its business premises, (3) appointing a temporary receiver, (4) freezing all of the defendants' assets, including those relating to Route 42 Rich's Roadhouse, (5) and prohibiting defendants from destroying, altering, concealing, or transferring any records in their possession. On February 24, 2011, the trial court entered a stipulated temporary

restraining order.

**{¶3}** On April 19, 2011, appellees filed an amended complaint and demand for injunctive relief that added Stewart, Peloza, Cieslik, and Allen as plaintiffs. Subsequently, on April 25, 2011, appellees filed a second amended complaint, substituting the Estate of Nick Makris for Nick Makris as a defendant. The second amended complaint stated that appellees were withdrawing their "motion for a temporary restraining order that had been filed in conjunction with the original complaint." The remainder of appellees' second amended complaint was the same as the original complaint: it stated claims for RICO violations, conspiracy, due process violations, fraud, and conversion, and it again sought compensatory and punitive damages, as well as the injunctive relief set forth above.

**{¶4}** Westerhaus filed an answer and a counterclaim that he later dismissed during trial. Prior to trial, appellees dismissed Richard Madison with prejudice, as well as their claims for due process violations and conversion. The trial court granted the motion of Northern Frozen Foods for leave to intervene to assert its interest in a judgment it had obtained against Madfan. The trial court also granted default judgment against Pizza King, Inc., Olympic Investment Limited, Inc., and Dino Makris.

**{¶5}** During trial, appellees dismissed their claim for punitive damages and the Estate of Nick Makris. The jury found for appellees, and the trial court entered judgment in favor of appellees in the amount of $300,000. Westerhaus appealed, but this court dismissed the appeal for lack of a final, appealable order, finding that the trial court's

judgment entry granting default judgment did not determine the amount of damages, the trial court's entry following trial did not delineate against what party damages in the amount of $300,000 were entered, and appellees' claims against Buy Greek Islands, Inc. were still pending. On remand, the trial court entered default judgment in the amount of $300,000 against Pizza King, Inc., Dino Makris, Olympic Investment Limited, Inc., and Buy Greek Islands, Inc., jointly and severally, and clarified that the judgment of $300,000 in favor of appellees was against Westerhaus, who then filed a second appeal. Unfortunately, however, we still do not have a final, appealable order.

**{¶6}** An order must meet the requirements of both R.C. 2505.02 and Civ.R. 54(B), if applicable, to constitute a final, appealable order. *Chef Italiano Corp. v. Kent State Univ.*, 44 Ohio St.3d 86, 88, 541 N.E.2d 64 (1989). Under R.C. 2505.02(B)(1), an order is a final order if it "affects a substantial right in an action that in effect determines the action and prevents a judgment." To determine the action and prevent a judgment, the order "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 & Develpmental Disabilities v. Professionals Guild of Ohio*, 46 Ohio St.3d 147, 153, 545 N.E.2d 1260 (1989).

**{¶7}** Additionally, if the case involves multiple parties or multiple claims, the court's order must meet the requirements of Civ.R. 54(B) to qualify as a final, appealable order. Under Civ.R. 54(B):

> When 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. (Emphasis added.)

**{¶8}** Thus, absent the mandatory language that "there is no just reason for delay," an order that does not dispose of all claims is subject to modification and is not final and appealable. *Noble v. Caldwell*, 44 Ohio St.3d 92, 96, 540 N.E.2d 1381 (1989); *Deutsche Bank Natl. Co. v. Caldwell*, 196 Ohio App.3d 636, 2011-Ohio-4508, 964 N.E.2d 1093, ¶ 9 (8th Dist.).

**{¶9}** This case involves multiple claims, i.e., appellees' claims for damages as well as for injunctive relief. However, although the trial court resolved appellees' claims for damages, it did not rule on their claim for a permanent injunction. The statement in appellees' second amended complaint that they were withdrawing their "motion for a temporary restraining order" did not withdraw their request in the second amended complaint for a permanent injunction.

**{¶10}** Moreover, the trial court did not include in its judgment the mandatory Civ.R. 54(B) language that there was no just reason for delay. Thus, the court's judgment is not a final, appealable order. *Thomas v. Roush*, 4th Dist. Gallia No. 10CA9, 2011-Ohio-1705; *Ranallo v. First Energy Corp.*, 11th Dist. Lake No. 2003-L-201,

2004-Ohio-2918, ¶ 5; *Limbert v. Gross*, 2d Dist. Shelby No. 17-85-20, 1987 Ohio App. LEXIS 6698, *2 (May 8, 1987).

**{¶11}** Article IV, Section 3(B)(2) of the Ohio Constitution limits appellate jurisdiction to the review of final judgments. Without a final, appealable order, we lack jurisdiction to consider this appeal and, accordingly, must dismiss it.

**{¶12}** Dismissed.

It is ordered that appellees recover from appellants 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.

KATHLEEN ANN KEOUGH, JUDGE

LARRY A. JONES, SR., P.J., and
PATRICIA ANN BLACKMON, J., CONCUR