[Cite as *Howell v. Park E. Care & Rehab.*, 2015-Ohio-2403.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102111

DAVID HOWELL, JR., ETC.

PLAINTIFF-APPELLEE

vs.

PARK EAST CARE & REHABILITATION, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
DISMISSED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-14-820136

BEFORE: Keough, P.J., Boyle, J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: June 18, 2015

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KATHLEEN ANN KEOUGH, P.J.:

{¶1} Defendants-appellants, Harborside of Cleveland Limited Partnership d.b.a. Park East Care and Rehabilitation Center, Genesis HealthCare, L.L.C., Arnold Whitman, 1995 Donna Reis Family Trust, GEN Management L.L.C., Sun Healthcare Group, Inc., FC-GEN Operations Investment, L.L.C., Gazelle GEN, L.L.C., and GEN Management, L.L.C. (collectively "Park East"), appeal from the trial court's decision denying their motion for a protective order. For the reasons that follow, we dismiss for lack of a final, appealable order.

{¶2} In January 2014, plaintiff-appellee, David Howell, Jr., as the personal representative of the Estate of Pauline Wilbourn (deceased) (hereinafter "Howell"), filed suit against Park East relative to the injuries Wilbourn suffered during her residency at the Park East Care and Rehabilitation Center nursing home.

{¶3} On April 4, 2014, Howell propounded his first set of interrogatories and first request for production of documents to each of the appellants. Included in the document request, Howell requested that Park East provide all records in its possession pertaining to and relative to Wilbourn's alleged assailant, another resident at Park East nursing home. Included in his interrogatories, Howell requested that Park East describe any and all instances where the alleged assailant acted in an abusive manner while residing at Park East nursing home.

{¶4} One week later, on April 11, 2014, Howell moved to compel Park East to provide responses to the first set of interrogatories and request for production of

documents. In response, Park East filed a brief in opposition asserting physician-patient privilege regarding the information about the alleged assailant and, subsequently, moved for a protective order. The basis for the protective order was to prevent the production of the medical and personal records in possession of Park East regarding the assailant, a non-party nursing home resident. Park East asserted that the information was privileged pursuant to R.C. 3721.13 and 2317.02(B)(1).

{¶5} Following a hearing, the trial court denied Park East's motion for a protective order. The trial court broadly stated in his written opinion,

> The physician-patient privilege only applies to specific communications between a patient and his or her physician, relative to the patient's medical care and treatment. It does not apply to communication made by persons other than a physician or patient to the other. It does not apply to communications that do not relate to the diagnosis or treatment of a patient.

The trial court's judgment entry did not grant Howell's motion to compel or order Park East to produce any documents.

{¶6} Park East appeals from the trial court's order denying the motion for a protective order. In its sole assignment of error, Park East contends that the "trial court erred by ordering production of privileged medical records pertaining to medical care and treatment of third parties." Howell, in its brief in opposition, requested dismissal of the appeal for lack of a final, appealable order and further requested reasonable sanctions for filing a frivolous appeal.

{¶7} Before addressing the assigned error, we must determine whether we have jurisdiction to review the merits of this appeal. The appellate jurisdiction of this court is

limited to review of final judgments or orders. Ohio Constitution, Article IV, Section 3(B)(2). "Final order" is defined in R.C. 2505.02(B)(1)-(7). The section applicable to the trial court's order in this case is R.C. 2505.02(B)(4).

{¶8} An order granting or denying a provisional remedy is final and appealable if it "(a) * * * determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy [and] (b) [t]he appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment * ** in the action." R.C. 2505.02(B)(4). A proceeding for "discovery of privileged matter" is a "provisional remedy" within the meaning of R.C. 2505.02(A)(3).

{¶9} The Ohio Supreme Court recently discussed in *Smith v. Chen*, Slip Opinion No. 2015-Ohio-1480, the issue of a final, appealable order as it pertains to an appeal of an order involving the discovery of privileged matter. In *Smith*, the court stated that a plain reading of R.C. 2505.02(B)(4) demonstrates that the order being appealed must meet the requirements of both R.C. 2505.02(B)(4)(a) and (b) to constitute a final, appealable order. *Id.* at ¶ 5. In applying both of these requirements to the trial court's order compelling discovery of attorney-work product, the court held that while the order determined the discovery issue against the defendants preventing judgment in their favor, the defendants failed to establish the second requirement of R.C. 2505.02(B)(4) — "'that an immediate appeal is necessary in order to afford a meaningful and effective remedy.'" *Id.* at ¶ 8, quoting R.C. 2505.02(B)(4)(b). Therefore, the court determined that the order was not

final and appealable. *Id.* The court clarified however, that "[a]n order compelling disclosure of privileged material that would *truly* render a postjudgment appeal meaningless or ineffective may still be considered on an immediate appeal." (Emphasis sic.) *Id.* at ¶ 9.

{¶10} In this case, the trial court's order denying Park East's motion for a protective order from discovery of a third-party's medical records determined a discovery issue that involved alleged privileged information, thus, preventing judgment in Park East's favor regarding this issue. R.C. 2505.02(B)(4)(a). Notably, the trial court's order at issue on appeal did not order or compel Park East to produce any documents. Arguably then, the trial court's order does not even deny a provisional remedy because the trial court's order broadly stated, without making any specific conclusions about the medical or personal records at issue, that not all communication is covered by the physician-patient privilege.

{¶11} Nevertheless, and assuming that the denial of the protective order alone is a provisional remedy, Park East has failed to withstand their burden of establishing that they would not be afforded a meaningful or effective remedy through an appeal after a final judgment is entered by the trial court resolving the entire case. R.C. 2505.02(B)(4)(b). At no point does Park East cite to, let alone address the requirement in R.C. 2505.02(B), except in their docketing statement filed with this court. Only referencing this section in the docketing statement was insufficient in *Smith*, and likewise insufficient in this case. *Smith* at ¶ 6.

{¶12} This court recently discussed the *Smith* decision in *Burnham v. Cleveland Clinic*, 8th Dist. Cuyahoga No. 102038, 2015-Ohio-2044. In *Burnham*, the Cleveland Clinic sought an appeal where the trial court ordered the Clinic to respond to Burnham's discovery requests and produce a SERS incident report. The Clinic filed an interlocutory appeal pursuant to R.C. 2505.02(B), contending that the SERS report was subject to the attorney-client privilege. Applying *Smith*, Slip Opinion No. 2015-Ohio-1480, this court determined that the Clinic did "not affirmatively establish that an immediate appeal is necessary, nor [did] it demonstrate how it would be prejudiced by the disclosure." *Burnham* at ¶ 13. This court held that "[w]ithout an indication that the requirement in R.C. 2505.02(B)(4)(b) has been met, we do not have a final, appealable order." *Id.*

{¶13} Unlike in *Burnham*, where the appellant at least argued that the proverbial "bell will have rung" once the alleged privileged document was disclosed, Park East makes no such argument here. Again, Park East does not make any attempt to establish the necessity of an immediate appeal or demonstrate prejudice to satisfy the requirements of R.C. 2505.02(B)(4)(b). Therefore, without a final, appealable order, we lack jurisdiction to consider the merits of this appeal.

{¶14} We next consider Howell's request for sanctions pursuant to R.C. 2323.51, App.R. 23, and Loc.R. 23. Our resolution of this case was determined in reliance on case law that was not available to the parties when the appeal was filed. Therefore, the request for sanctions is denied.

{¶15} Appeal dismissed.

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

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

KATHLEEN ANN KEOUGH, PRESIDING JUDGE

MARY J. BOYLE, J., and
SEAN C. GALLAGHER, J., CONCUR