

[Cite as *Nejman v. Charney*, 2015-Ohio-4087.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102584

SHOSHANA NEJMAN, ET AL.

PLAINTIFFS-APPELLEES

vs.

JACK G. CHARNEY, ET AL.

[Appeal by Henderson, Caverly,
Pum & Charney L.L.P.]

DEFENDANTS-APPELLANTS

**JUDGMENT:
DISMISSED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-14-834138

BEFORE: E.T. Gallagher, P.J., S. Gallagher, J., and Blackmon, J.

RELEASED AND JOURNALIZED: October 1, 2015

ATTORNEYS FOR APPELLANTS

Dennis R. Rose
Casey J. McElfresh
Hahn, Loeser & Parks, L.L.P.
200 Public Square, Suite 2800
Cleveland, Ohio 44114

ATTORNEYS FOR APPELLEES

Joel Levin
Aparesh Paul
Mark M. Mikhael
Levin & Associates Co., L.P.A.
1301 East 9th Street, Suite 1100
Cleveland, Ohio 44114

For First Realty Property, Etc.

Scott H. Kahn
Scott J. Orille
Susan M. White
Kahn & Kruse Co., L.P.A.
1301 East Ninth Street, Suite 2200
Cleveland, Ohio 44113

For Keybank, N.A.

Joseph S. Simms
Corey Noel Thrush
Michael N. Ungar
Ulmer & Berne, L.L.P.
Skylight Office Tower
1660 West 2nd Street, Suite 11
Cleveland, Ohio 44113

EILEEN T. GALLAGHER, P.J.:

{¶1} Defendants-appellants, Henderson, Caverly, Pum, & Charney L.L.P.

(“Henderson”), appeals the denial of its motion to dismiss for lack of personal jurisdiction and assigns one error for our review:

The trial court erred by denying appellants, Henderson, Caverly, Pum & Charney L.L.P.’s motion to dismiss for lack of personal jurisdiction despite appellee’s failure to satisfy the requirements of R.C. 2307.382 and constitutional due process.

{¶2} After reviewing the record and the applicable law, we dismiss this appeal for lack of a final, appealable order.

I. Facts and Procedural History

{¶3} Appellees Shoshana Nejman, Carolyn Naiman, and Matthew Naiman (collectively “appellees”), are beneficiaries of six trusts. Jack G. Charney (“Charney”), a partner at Henderson, was the trustee of the trusts. Appellees filed suit in the Cuyahoga County Court of Common Pleas against Charney, Henderson, and other defendants, alleging they misappropriated and mismanaged trust assets located in Ohio. The complaint also alleged that Henderson, as appellees’ counsel, withheld financial information related to the trusts from appellees and failed to protect appellees’ interests in the trust assets. The complaint asserts claims for breach of fiduciary duty, legal malpractice, and conversion.

{¶4} Charney is a lawyer in California and his firm, Henderson, is a California firm. Henderson filed a motion to dismiss for lack of personal jurisdiction, arguing it

lacked sufficient contacts with Ohio to fall within Ohio's long arm statute. Henderson further argued that the exercise of personal jurisdiction over the firm would violate its constitutional right to due process. The trial court denied the motion. Henderson now appeals from that judgment.

II. Final, Appealable Order

{¶5} Henderson's notice of appeal states, in part: "The trial court's order is a final, appealable order under Ohio R.C. 2505.02(B)(4)." In support of this assertion, Henderson cites *Huegemann v. VanBakel*, 12th Dist. Fayette No. CA2013-08-022, 2014-Ohio-1888, ¶ 17-24. However, this court has held that the denial of a motion to dismiss for lack of personal jurisdiction is generally not a final, appealable order. *Bressan v. Secura Ins. Co.*, 8th Dist. Cuyahoga No. 64997, 1994 Ohio App. LEXIS 1800.

{¶6} Although appellees have not filed a motion to dismiss this appeal, they argue in their merit brief that this appeal should be dismissed for lack of a final, appealable order. Henderson contends appellees' jurisdictional arguments should be ignored because they failed to raise them by motion as required by App.R. 15(A).¹ However, this court lacks subject matter jurisdiction to consider Henderson's appeal in the absence of a final, appealable order. *CitiMortgage, Inc. v. Roznowski*, 139 Ohio St.3d 299, 2014-Ohio-1984, 11 N.E.3d 1140, ¶ 10. Therefore, before addressing the substantive

¹ App.R. 15(A) provides, in relevant part:

Unless another form is prescribed in these rules, an application for an order or other relief shall be made by motion.

merits of Henderson’s appeal, we must determine whether the denial of a motion to dismiss for lack of personal jurisdiction is a final, appealable order.

{¶7} The Ohio Constitution limits appellate jurisdiction to the review of final judgments of lower courts. Ohio Constitution, Article IV, Section 3(B)(2). R.C. 2505.02(B)(4) lists the types of orders that qualify as final, appealable orders.

A. Provisional Remedy

{¶8} Henderson argues the denial of its motion to dismiss is a final, appealable order pursuant to R.C. 2505.02(B)(4). To qualify as a final, appealable order under R.C. 2505.02(B)(4), the journal entry being appealed must satisfy three statutory requirements (1) the order must grant or deny a “provisional remedy,” as that term is defined in the statute, (2) the order must in effect determine the action with respect to the provisional remedy, and (3) the appealing party would not be afforded a meaningful review of the decision if that party had to wait for final judgment as to all proceedings in the action. *State v. Anderson*, 138 Ohio St.3d 264, 2014-Ohio-542, 6 N.E.3d 23, ¶ 43.

{¶9} Henderson argues the trial court’s order overruling its motion to dismiss for lack of personal jurisdiction is a final, appealable order because the motion determined the action with respect to a “provisional remedy,” and it will not be afforded a meaningful and effective remedy if it must wait until the final judgment to bring its appeal. In support of its argument, Henderson relies on *Anderson* and *Huegemann*, 12th Dist. Fayette No. CA2013-08-022, 2014-Ohio-1888.

{¶10} In *Huegemann*, the court held that a motion to dismiss for lack of personal jurisdiction qualified as a provisional remedy under R.C. 2505.02(B)(4) and was a final, appealable order. The court reasoned that the motion to dismiss was an ancillary proceeding as defined by R.C. 2505.02(A) because (1) it “grew out of” the plaintiff’s case, (2) determined the action with respect to the provisional remedy (i.e., dismissal of the complaint) because it allowed the plaintiffs to proceed with the action, and (3) a delayed review would deprive the defendants of a meaningful remedy because they lived in Germany. However, the *Huegemann* decision is distinguishable from the facts of this case, where the defendants reside in the United States.

{¶11} R.C. 2505.02(A)(3) defines “provisional remedy” as “a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, [and] suppression of evidence.” This statutory definition does not specifically refer to proceedings to dismiss a complaint for lack of jurisdiction. However, because the list of examples of ancillary proceedings is non-exclusive, we turn to case law for guidance.

{¶12} In *Duryee v. Rogers*, 8th Dist. Cuyahoga No. 74963, 1999 Ohio App. LEXIS 6043 (Dec. 16, 1999), we held that a motion to transfer venue was not a final, appealable order because it is not an “ancillary proceeding.” We concluded that the “ancillary proceedings” listed in R.C. 2505.02(A)(3) share the common objective of “protecting one party against irreparable harm by another party during the pendency of the litigation.” *Id.* at * 12. We further found that a motion to transfer venue was not

consistent with this goal because it “[did] not involve protection of a party’s ability to enforce a final judgment or preservation of the status quo during the pendency of the action.” *Id.*

{¶13} In *Mansfield Family Restaurant v. CGS Worldwide, Inc.*, 5th Dist. Richland No. 00-CA-3, 2000 Ohio App. LEXIS 6187 (Dec. 28, 2000), the Fifth District Court of Appeals similarly held that the denial of a request for change of venue does not involve the same degree of risk of irreparable harm to a party as the ancillary actions listed in R.C. 2505.02(A)(3). In reaching this conclusion, the court explained:

The types of provisional remedies listed under 2505.02(A)(3) include decisions that, made preliminarily, could decide all or part of an action or make an ultimate decision on the merits meaningless or cause other irreparable harm. For instance, a preliminary injunction could be issued against a high school football player preventing him from playing football his senior year based on recruiting violations. The trial court could grant the attachment of property for which the owner has a ready buyer. Discovery of privileged material could force a person to divulge highly personal and sensitive information. If evidence critical to the prosecution of a criminal case is suppressed, the state could lose any meaningful chance at successful prosecution of a criminal.

{¶14} The examples listed in *Mansfield Family Restaurant* illustrate the danger of irreparable harm that could result from ancillary actions in the absence of immediate review. In distinguishing a motion to change venue from the ancillary actions listed in R.C. 2505.02(A)(3), the court further reasoned:

The decision to deny a change of venue does not result in any of the types of irreparable harm just listed. There is an adequate legal remedy from a decision denying a change of venue, after final judgment. In other words, it may be expensive to get the cat back in the bag, if a trial court errs when it denies a change of venue, but it can be done. Whereas, when the types

of decisions listed in 2505.02(A)(3) are made, the cat is let out of the bag and can never be put back in.

Id. at * 7.

{¶15} The denial of a motion to dismiss for lack of personal jurisdiction is not an ancillary action because such a dismissal does not protect the defendant from irreparable harm in the same way as would the denial of a preliminary injunction or the disclosure of sensitive and confidential material. There are times when “a party seeking to appeal from an interlocutory order would have no adequate remedy from the effects of that order on appeal from final judgment.” *State v. Muncie*, 91 Ohio St.3d 440, 451, 746 N.E.2d 1092 (2001). This is not one of those cases. An error in deciding personal jurisdiction can be corrected after the final judgment.

{¶16} Henderson asserts that by forcing it to wait until final judgment to bring an appeal would deny it “a meaningful or effective remedy.” In *Huegemann*, the court found that the litigation costs and delay in recovery the German residents would experience by being haled in to a foreign jurisdiction was sufficient to establish the absence of a meaningful remedy for purposes of R.C. 2505.02(4)(b). However, the *Huegemann* court determined that the cost of litigating claims from overseas was more detrimental to the German defendants than to American defendants defending against claims from different states. *Huegemann v. VanBakel*, 12th Dist. Fayette No. CA2013-08-022, 2014-Ohio-1888, ¶ 23-24.

{¶17} Indeed, the *Huegemann* court acknowledged that its holding deviated from the majority rule that litigation costs and delay in recovery are not sufficient to show the

absence of a meaningful and effective remedy. *Id.* at ¶ 24, citing *Katherine's Collection, Inc. v. Kleski*, 9th Dist. Summit No. 26477, 2013-Ohio-1530, ¶ 13. A delay in obtaining monetary relief is the necessary consequence of most civil litigation, and that delay does not render the ultimate remedy ineffective or unmeaningful under R.C. 2505.02(B)(4)(b). *State ex rel. Kingsley v. State Emp. Relations Bd.*, 130 Ohio St.3d 333, 2011-Ohio-5519, 958 N.E.2d 169, ¶ 20. The denial of Henderson's motion to dismiss does not deprive it of a meaningful or effective remedy.

{¶18} Henderson also relies on *State v. Anderson*, 138 Ohio St.3d 264, 2014-Ohio-542, 6 N.E.3d 23. In *Anderson*, the Ohio Supreme Court held that the denial of a motion to dismiss an indictment on double jeopardy grounds is immediately appealable as a final, appealable order. The court reasoned that such motions are "special proceedings" because they "raise[] an issue entirely collateral to the guilt and innocence of the defendant." *Id.* at ¶ 32, quoting *State v. Thomas*, 61 Ohio St.2d 254, 400 N.E.2d 897 (1980). Double jeopardy determines the action with respect to the provisional remedy because "it permits or bars the subsequent prosecution." *Id.* at ¶ 52.

The court further explained:

"[The] protections [of the Double Jeopardy Clause] would be lost if the accused were forced to "run the gauntlet" a second time before an appeal could be taken; even if the accused is acquitted, or, if convicted, has his conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit. Consequently, if a criminal defendant is to avoid exposure to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs."

Id. at ¶ 56, quoting *Abney v. U.S.*, 431 U.S. 651, 662, 97 S.Ct. 2034, 52 L.Ed.2d 651. (Emphasis and notes deleted.) For these reasons, the *Anderson* court held that a motion to dismiss on double jeopardy grounds is a final, appealable order.

{¶19} Since double jeopardy bars a subsequent prosecution, it conclusively determines the action on the merits, and the defendant cannot be subjected to another prosecution in the same or any other jurisdiction. In this case, appellees could file another action against Henderson in another jurisdiction if their complaint was dismissed for lack of personal jurisdiction. A ruling on a motion to dismiss for lack of personal jurisdiction does not conclusively determine the action with respect to a provisional remedy. Therefore, Henderson’s motion to dismiss for lack of personal jurisdiction is not a final, appealable order under R.C. 2505.02(B)(4).

B. Due Process

{¶20} Henderson also argues the trial court’s exercise of personal jurisdiction over it violates its constitutional right to due process. “[A]n Ohio court cannot exercise personal jurisdiction over a defendant if doing so would violate his constitutional right to due process.” *Kauffman Racing Equip., L.L.C. v. Roberts*, 126 Ohio St.3d 81, 2010-Ohio-2551, 930 N.E.2d 784, ¶ 45.

{¶21} The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution “protects an individual’s liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful ‘contacts, ties, or relations.’” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d

528 (1985), quoting *Intl. Shoe Co. v. Washington*, 326 U.S. 310, 319, 66 S.Ct. 154, 90 L.Ed. 95 (1945). As such, one's right to due process of law is a "substantial right" as contemplated by R.C. 2505.02(B)(1) and 2505.02(B)(2), and may be a final, appealable order if certain conditions are met. *State v. Anderson*, 7th Dist. Mahoning No. 11-MA-43, 2012-Ohio-4390, ¶ 31 (DeGenaro, J., concurring), *aff'd*, *State v. Anderson*, 138 Ohio St.3d 264, 2014-Ohio-542, 6 N.E.3d 23.

{¶22} R.C. 2505.02(B) provides, in relevant part, that an order is a final order and may be reviewed, affirmed, modified, or reversed when it is one of the following:

- (1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;
- (2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment.

{¶23} R.C. 2505.02(A)(2) defines "special proceeding" as "an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity." Appellees' claims for legal malpractice, conversion, and breach of fiduciary duty are common law actions. *See Krahn v. Kinney*, 43 Ohio St.3d 103, 107, 538 N.E.2d 1058 (1989) (Legal malpractice is a common-law action, grounded in tort); *State v. Aguirre*, Slip Opinion No. 2014-Ohio-4603, ¶ 35 (conversion is a common law action); *Miller v. Coldwell Banker Hunter Realty*, 8th Dist. Cuyahoga Nos. 93529 and 93662, 2010-Ohio-5840, ¶ 32 (Breach of fiduciary duty is both a common law and statutory claim.).

{¶24} As common law causes of action, appellees' claims are not subject to special proceedings. Further, the trial court's order denying Henderson's motion to dismiss was not a "summary application in action *after* judgment." R.C. 2505.02(B)(2). (Emphasis added.) Therefore, the trial court's order is not a final, appealable order under R.C. 2505.02.

{¶25} To be a final, appealable order under R.C. 2505.02(B)(1), the "'order must determine an action and prevent a judgment.'" *Natl. City Commercial Capital Corp. v. AAAA at Your Serv., Inc.*, 114 Ohio St.3d 82, 2007-Ohio-2942, 868 N.E.2d 663, ¶ 7, quoting *Chef Italiano Corp. v. Kent State Univ.*, 44 Ohio St.3d 86, 88, 541 N.E.2d 64 (1989). "'For an order to determine the action and prevent a judgment for the party appealing, it 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.'" *Id.*, quoting *Hamilton Cty. Bd. of Mental Retardation & Dev. Disabilities v. Professionals Guild of Ohio*, 46 Ohio St.3d 147, 153, 545 N.E.2d 1260 (1989).

{¶26} A ruling on a motion to dismiss does not prevent a judgment, nor does it determine an action; it either allows the case to proceed on the merits, or requires the action to proceed somewhere else. Thus, the denial of Henderson's motion to dismiss is not a final, appealable order under R.C. 2505.02(B)(1).

{¶27} This court has long held that an order denying a motion to dismiss for lack of personal jurisdiction does not determine the action, does not prevent judgment, and is not a final, appealable order. *Bressan v. Secura Ins. Co.*, 8th Dist. Cuyahoga No. 64997,

1994 Ohio App. LEXIS 1800 (Apr. 28, 1994); *Lakewood v. Pfeifer*, 83 Ohio App.3d 47, 51, 613 N.E.2d 1079 (8th Dist.1992); *Freskakis v. The Higbee Co.*, 8th Dist. Cuyahoga No. 43462, 1981 Ohio App. LEXIS 10470 (May 21, 1981).

{¶28} Accordingly, we dismiss this appeal for lack of a final, appealable order.

It is ordered that appellees recover of appellants costs herein taxed.

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

EILEEN T. GALLAGHER, PRESIDING JUDGE

SEAN C. GALLAGHER, J., and
PATRICIA ANN BLACKMON, J., CONCUR