[Cite as *Siegel v. Boss*, 2015-Ohio-689.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101934

CHRISTIE SIEGEL, ETC., ET AL.

PLAINTIFFS-APPELLANTS

vs.

KRISTIN KAE BOSS, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
DISMISSED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-14-826326

BEFORE: Stewart, J., Keough, P.J., and E.A. Gallagher, J.

RELEASED AND JOURNALIZED: February 26, 2015

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MELODY J. STEWART, J.:

{¶1} This appeal arises from a fatal automobile accident in Michigan and the court's conclusion that Cuyahoga County was an inconvenient forum to litigate claims stemming from the accident. Because the court dismissed the action without prejudice, a preliminary question regarding the finality of the court's order has been referred to this panel. We conclude that we lack a final order and dismiss the appeal.

{¶2} Plaintiff-appellant, Christie Siegel, individually, and as executor of the estate of her deceased children, Marc and Dawn, along with other plaintiffs (for convenience, we will refer to all plaintiffs by reference to "Siegel"), brought this wrongful death action against the driver who allegedly caused the accident, defendant-appellee Kristin Kae Boss. Siegel also filed suit against defendant-appellee Prestige Delivery Systems, Inc., for whom Boss was either an employee or independent contractor, and defendant-appellee Garrett Brown, whose vehicle Boss was driving at the time of the accident. Venue was established in Cuyahoga County pursuant to Civ.R. 3(B) because Prestige is headquartered in Cuyahoga County.

{¶3} The defendants filed a motion to dismiss the action on forum non conveniens grounds. They argued that Cuyahoga County had virtually no nexus to the litigation apart from being the location where Prestige is headquartered. Siegel and the other plaintiffs are all Michigan residents, the accident occurred in Michigan, and the parties agree that resolution of liability would require the application of Michigan law. Boss and Garrett live in Millbury, Ohio (outside of Toledo). The motion to dismiss also offered evidence that the estate originally filed the wrongful death action in West Virginia, but voluntarily dismissed that action before filing in Cuyahoga County.

{¶4} The question referred to us is whether the court's decision to dismiss the action without prejudice on forum non conveniens grounds is a final order pursuant to R.C. 2505.02.

{¶5} Our jurisdiction as an appellate court is to review "judgments or final orders of the courts of record inferior to the court of appeals within the district." Article IV, Section 3(B)(2) of the Ohio Constitution. "If an order is not final, then an appellate court has no jurisdiction." *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.*, 44 Ohio St.3d 17, 20, 540 N.E.2d 266 (1989).

{¶6} Orders or judgments must be both final and appealable. *State ex rel. Scruggs v. Sadler*, 97 Ohio St.3d 78, 2002-Ohio-5315, 776 N.E.2d 101, ¶ 5. As relevant here, R.C. 2505.02(B)(1) provides that an order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is "[a]n order that affects a substantial right in an action that in effect determines the action and prevents a judgment." Ordinarily, a dismissal without prejudice is not a final order because it does not determine the action. *Denham v. New Carlisle*, 86 Ohio St.3d 594, 597, 1999-Ohio-128, 716 N.E.2d 184 (1999). We have said that "[a] dismissal without prejudice relieves the court of all jurisdiction over the matter, and the action is treated as though it had never been commenced." *Stafford v. Hetman*, 8th Dist. Cuyahoga No. 72825, 1998 Ohio App. LEXIS 2402, *2 (June 4, 1998), citing *Zimmie v. Zimmie*, 11 Ohio St.3d 94, 95, 464 N.E.2d 142 (1984); *DeVille Photography, Inc. v. Bowers*, 169 Ohio St. 267, 272, 159 N.E.2d 443 (1959); *Conley v. Jenkins*, 77 Ohio App.3d 511, 517, 602 N.E.2d 1187 (4th Dist.1991).

{¶7} In *Century Bus. Servs., Inc. v. Bryant*, 8th Dist. Cuyahoga Nos. 80507 and 80508, 2002-Ohio-2967, we held that a dismissal on grounds of forum non conveniens that did not specify whether it was with or without prejudice was not a final order because it was not made in a special proceeding, the order of dismissal was not a provisional remedy, and the order of dismissal did not vacate a judgment or grant a new trial. *Id*. at ¶ 15. *Century* has not been overruled, so it is binding on us.

{¶8} Siegel argues that *Century* does not apply in light of *Natl. City Commercial Capital Corp. v. AAAA at Your Serv., Inc.*, 114 Ohio St.3d 82, 2007-Ohio-2942, 868 N.E.2d 663 (2007). That case held that an order that prevents a party from refiling an action constitutes a final order. *Id*. at ¶ 8. The dismissal in this case, however, is without prejudice and does not prevent Siegel from refiling her action in the trial court. The dismissal was not based on any jurisdictional defect — forum non conveniens assumes proper jurisdiction and venue. *See Chambers v. Merrill-Dow Pharmaceuticals, Inc.*, 35 Ohio St.3d 123, 126, 519 N.E.2d 370 (1988). Refiling in Cuyahoga County may not be futile — forum non conveniens is not a self-executing proposition but a judicial determination of convenience. Nothing says that a second dismissal will invariably follow if the estate were to refile its complaint, particularly if the estate can establish better grounds for convincing the court that the action should proceed in Cuyahoga County. And there is little question that Michigan would be a proper forum for the resolution of the estate's claims given that the accident occurred in that state. The estate has given us no reason to believe that it could not refile its action in Michigan.

{¶9} It is true that the Supreme Court in *Natl. City* stated that "[a]lthough it is not common for us to review cases that have been dismissed other than on the merits, we have done so when — as in this case — justice so requires." *Id*. at ¶ 11. In addition, the Supreme Court noted that in *Chambers* "we reviewed a dismissal based upon the doctrine of forum non conveniens." *Id*.

{¶10} To that we have two related observations. First, the quoted language makes it clear by use of the words "we" and "us" that the Supreme Court was referring to its own authority to exercise jurisdiction when justice so requires. Second, the Supreme Court made no mention of the constitutional limitations on appellate jurisdiction when saying that it could

review cases when "justice" so requires. We cannot assume that the authority the Supreme Court exercised on its own to review cases when justice so requires must by extension apply to the appellate courts. This is especially so when the Ohio Constitution limits the jurisdiction of the courts of appeals to "final" orders but contains no similar limitation on the Supreme Court's jurisdiction. *See* Section 2, Article IV of the Ohio Constitution.

{¶11} *Century*, 8th Dist. Cuyahoga Nos. 80507 and 80508, 2002-Ohio-2967, is binding authority from this appellate district. We thus conclude that the court's order dismissing this action without prejudice on grounds of forum non conveniens is not a final order. We therefore lack jurisdiction to hear this appeal.

{¶12} Appeal dismissed.

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.

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MELODY J. STEWART, JUDGE

KATHLEEN ANN KEOUGH, P.J., and
EILEEN A. GALLAGHER, J., CONCUR