[Cite as *May v. PSI Affiliates, Inc.*, 2009-Ohio-2996.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

SUE ELLEN MAY	C. A. No. 24444
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
PSI AFFILIATES, INC., et al.	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellants	CASE No. CV 2003 04 2383

DECISION AND JOURNAL ENTRY

Dated: June 24, 2009

BELFANCE, Judge

{¶1} Cross-claim Plaintiff/Appellant the Akron Board of Education ("Akron BOE") appeals the decision of the Summit County Court of Common Pleas granting Cross-claim Defendant/Appellee the State Teachers Retirement Board's ("STRB") motion for judgment on the pleadings. We dismiss the appeal, as we lack jurisdiction to consider it.

PROCEDURAL HISTORY

{¶2} Plaintiff/Cross-claim Defendant-Intervener/Appellee Sue Ellen May ("May") is a registered nurse who was employed by Defendants PSI Affiliates, Inc., PSI Associates, Inc., and Steven L. Rosenberg to work in Akron Public Schools.

{¶3} On April 17, 2003, May filed a complaint in the Summit County Court of Common Pleas against Defendants PSI Affiliates, Inc., PSI Associates, Inc., Steven L. Rosenberg, and Akron Board of Education seeking: (1) declaratory judgment that she was eligible to participate in the State Teachers Retirement System of Ohio ("STRS"); (2) mandamus

ordering the Akron BOE to complete the enrollment paperwork for STRS; (3) an order requiring Defendants to make employer contributions to STRS; (4) damages for breach of contract; (5) unjust enrichment; (6) retaliatory discharge; (7) compensatory damages; (8) prejudgment interest; and (9) attorney fees. On July 19, 2005, May amended her complaint and added the State Teachers Retirement Board as a party.

{¶4} Essentially much of the ensuing litigation turned on whether May was a "teacher" as defined by the Ohio Revised Code and thus entitled to enrollment in the State of Ohio's retirement plan. On June 16, 2006, STRS/STRB determined that May met the statutory definition of a "teacher" provided by R.C. 3307.01 and therefore was entitled to membership in STRS. On October 3, 2006, Akron BOE filed a motion to file instanter an amended answer and a cross-claim in mandamus against STRB. The cross-claim challenged the determination that May was entitled to membership in STRS. In December 2006, May dismissed her claims against the "Akron Public Schools" (an entity not a party to the action) and her mandamus action against "STRS" (an entity not a party to the action). The claims set forth in the complaint and first amended complaint against the PSI defendants and Rosenberg remained in place.

{¶5} In January 2007, May filed a motion to intervene in Akron BOE's cross-claim mandamus action. In February 2007, May filed a motion to file a second amended complaint instanter naming only the PSI Affiliates, Inc., PSI Associates, Inc. and Rosenberg as defendants. "STRS" then moved for judgment on the pleadings on Akron BOE's cross-claim. The trial court granted both of May's motions in August 2007. In February 2008, May dismissed her claims against the PSI defendants and Rosenberg.

{¶6} In September 2008, the trial court granted STRB's motion for judgment on the pleadings. The trial court's judgment entry did not contain Civ.R. 54(B) language, perhaps due

to the trial court's belief that no claims remained pending. Akron BOE timely appealed asserting one assignment of error, namely that the trial court erred in granting STRB's motion for judgment on the pleadings.

FINAL APPEALABLE ORDER

{¶7} The Ohio Constitution limits this Court's appellate jurisdiction to the review of final judgments or orders of lower courts. Section 3(B)(2), Article IV, Ohio Constitution. "Pursuant to R.C. 2505.02, an order is both final and appealable if it resolves all claims against all parties or it resolves at least one full cause of action in a multiple claim case with an express certification that there is no just reason for delay pursuant to Civ.R. 54(B)." (Internal quotations and citations omitted.) *David Moore Builders, Inc. v. Hudson Village Joint Venture*, 9th Dist. No. 21702, 2004-Ohio-1592, at ¶5. Where applicable and necessary, the omission of Civ.R. 54(B) language by the trial court in its judgment entry "is fatal not only to the order's finality, but also this Court's jurisdiction." Id. at ¶7.

{¶8} May has raised the issue of finality in her motion to dismiss filed in this Court. While we denied her motion, we noted that an ultimate decision concerning the finality of the order would be decided after reviewing the entire record on appeal. Upon examining the entire record, this Court now concludes that the order from which Akron BOE appeals is not a final appealable order for reasons set forth below.

{¶9} The trial court did not include Civ.R. 54(B) language in its order and it appears from the record that there are still outstanding claims. First, May's claim for declaratory judgment is still pending. In the caption of both May's complaint and first amended complaint, and in her prayer for relief, May requests a declaratory judgment. In her prayer for relief she

states that she seeks "[a] declaratory judgment that she is eligible for participation in STRS for the period of time she was employed by Defendants PSI and Rosenb[e]rg."

{¶10} May filed two notices of dismissal in December 2006. In one, she dismissed her claims against "Akron Public Schools," an entity not a party to the action, and stated in that notice that "[t]he only claims remaining in this case are the claims against Defendants Rosenberg and PSI * * *." In the other notice of dismissal, May dismissed her mandamus action against "STRS" and in a footnote stated that "[t]his will leave only her claims as to Defendants PSI and Rosenberg remaining * * * ." While, STRB is a party to the action, "STRS," is not. Nothing in the record indicates that this claim for declaratory judgment was ever dismissed or ruled upon, and thus it remains pending.

{¶11} Second, Akron BOE's cross-claim in mandamus is outstanding as to May. In October 2006, Akron BOE filed a motion to file instanter an amended answer and a cross-claim in mandamus against STRB. The cross-claim challenged STRB's determination that May was entitled to membership in STRS. May moved to intervene in the cross-claim in January 2007 and the motion was subsequently granted. "STRS" moved for judgment on the pleadings as to Akron BOE's cross-claim in mandamus. May did not file an answer to the cross-claim in mandamus.[1] In September 2008, the trial court granted STRB's motion for judgment on the pleadings and stated in its entry that Akron BOE "fail[ed] to state a claim entitling Akron to relief on its claim for mandamus * * *." Generally, a dismissal for failure to state a claim filed by one party would not necessarily warrant a dismissal in favor of a non-moving co-defendant.

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[1] May included an answer when she moved to intervene, but never subsequently filed it, and as such it never became operative. See *Eady v. East Ohio Gas* (May 10, 2000), 9th Dist. No. 19598, at *1.

This would be so given that the legal relationship of one defendant to the plaintiff is not necessarily identical to that of the co-defendant. The trial court did not expressly terminate the mandamus cross-claim as to May and thus the mandamus cross-claim was pending given that May was permitted to intervene and had yet to file her answer to the cross-claim.

CONCLUSION

{¶12} Thus, for reasons discussed above, we dismiss this appeal for lack of subject matter jurisdiction.

Appeal dismissed.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

EVE V. BELFANCE
FOR THE COURT

DICKINSON, P. J.
CONCURS, SAYING:

{¶13} "Acronyms are mainly for the convenience of the writer or speaker. Don't burden your reader or listener with many of them, especially unfamiliar ones." Antonin Scalia & Bryan A. Garner, *Making Your Case* 120 (2008). Actually, what we are dealing with in this case are

initialisms, but Scalia and Garner's point is a good one. This case demonstrates both how the use of initialisms or acronyms interferes with readability and how the confusion they cause can lead to problems.

CARR, J.
DISSENTS, SAYING:

{¶14} I respectfully dissent, as I believe that all claims have been resolved and that this matter should be determined on its merits.

{¶15} First, I disagree that May's voluntary dismissals were ineffective to dismiss the intended parties. Although May's notices mislabeled STRB and Akron BOE, the notices were sufficiently clear to constitute notice dismissals. As this court has held, "Notice dismissals are unilateral and self-executing, requiring neither agreement between the parties nor further action on the part of the trial court to effect dismissal. See *Stern v. Stern*, 11th Dist. No. 2006-G-2743, 2007-Ohio-3473, at ¶3. Consequently, the intention of a plaintiff to dismiss by notice must be clear from the form and content of the document." *Price v. Matco Tools*, 9th Dist. No. 23583, 2007-Ohio-5116, at ¶15.

{¶16} Here, May's labeling of the parties was consistent with the manner in which STRB and Akron BOE had referred to themselves throughout the proceedings. The record reveals that STRB and Akron BOE labeled themselves interchangeably as STRS and Akron Public Schools in various pleadings. Akron BOE, for instance, captioned its answer to May's complaint as "*Defendant Akron Public Schools*' Answer to Plaintiff's First Amended Complaint." STRB's answer to May's complaint stated, "Now comes the Defendant, State Teachers Retirement Board (*STRS*), and responds to Plaintiff's Amended Complaint * * *." STRB also continued to refer to itself as STRS throughout the answer. In addition, while Akron

BOE filed a cross claim against STRB, it was *STRS* not STRB that answered. And when May moved to intervene, the trial court permitted her to do so in a cross claim against *STRS* not STRB. Given that the names were used interchangeably throughout this action, May's notices were sufficiently clear as to which defendants she had dismissed.

{¶17} Furthermore, to the extent the labels may have caused confusion, the dismissals also stated unequivocally which parties remained after dismissal: "The only claims remaining in this case are the claims against Defendants Rosenberg and PSI * * *." Thus, May's notices removed any ambiguity as to what was being dismissed by indicating what was to remain. Because the dismissals provided adequate notice of the dismissed parties, I would consider them valid.

{¶18} I also disagree with the majority's conclusion that the trial court has yet to determine Akron BOE's mandamus cross claim as it pertains to May. Akron raised only one claim in its cross claim -- a claim in mandamus seeking a determination that STRB abused its discretion. In its September 11, 2008, order, the trial court concluded that the mandamus claim failed: "Thus, the Court finds that Akron fails to state a claim entitling Akron to relief on its claim for mandamus * * *."

{¶19} While the majority would require the trial court to additionally resolve this claim as it relates to May, I am not persuaded that May's intervention as a defendant in any way changed or added to Akron's claim. Rather, with or without May's intervention, Akron raised only one claim: a claim in mandamus. When the trial court resolved that claim by concluding that Akron had failed to state a claim entitling it to relief on its claim for mandamus, the trial court fully determined Akron's cross claim and left nothing for future determination.

{¶20} Because all matters have been determined and there remains nothing for the trial court to resolve, I would conclude that this Court has jurisdiction over this appeal and I would determine this matter on the merits.

APPEARANCES:

RONALD J. HABOWSKI and CHAD MURDOCK, Attorneys at Law, for Appellant.

RICHARD CORDRAY, Attorney General of Ohio, and JOHN PATTERSON, Assistant Attorney General for Appellee.

DENNIS R. THOMPSON, and CHRISTY B. BISHOP, Attorneys at Law, for Appellee.