

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

MARY S. SLIWINSKI

Appellant

v.

VILLAGE AT ST. EDWARDS, et al.

Appellees

C.A. Nos. 24284
 24442

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2006 10 6432

DECISION AND JOURNAL ENTRY

Dated: June 24, 2009

CARR, Judge.

{¶1} Appellant, Mary Sliwinski, executrix of the estate of Alice Sederak, appeals the judgment of the Summit County Court of Common Pleas. This Court dismisses the first appeal for lack of jurisdiction and vacates the judgment in regard to the second.

I.

{¶2} Ms. Sederak was hospitalized after suffering a stroke. Upon release from the hospital, she was admitted for rehabilitation to appellee, The Village at St. Edwards (the “Village”). Dr. Robert Norman was her attending physician while she remained at the Village. Ms. Sederak died during her residency at the Village. In late 2006, Ms. Sliwinski filed a complaint, and later an amended complaint, against the Village and Dr. Norman, alleging medical malpractice, wrongful death and violations of Ms. Sederak’s rights pursuant to R.C. 3721.17(I).

{¶3} Throughout the litigation, the parties were contentious and discovery disputes raged. On July 30, 2007, the Village filed a notice of demand for dismissal and intention to file good faith motion, pursuant to R.C. 2323.42. When more than 14 days elapsed with no dismissal or other response by Ms. Sliwinski, the Village filed its good faith motion for hearing to determine whether Ms. Sliwinski lacked a reasonable good faith basis upon which to assert her medical claims. Ms. Sliwinski filed a brief response in opposition to the motion. The Village replied, and the trial court scheduled a hearing on the motion for September 13, 2007.

{¶4} R.C. 2323.42 mandates that a trial court “shall award” court costs and reasonable attorney fees if it determines that the plaintiff lacked a reasonable good faith basis for asserting or continuing to assert the claim. On September 21, 2007, after an oral hearing on the motion, the trial court found that Ms. Sliwinski was unable to establish proximate causation, and therefore its prima facie case, as to the Village. Accordingly, the trial court granted the Village’s good faith motion. The trial court, however, did not address the issue of the award of court costs and attorney fees. Furthermore, the trial court did not include language pursuant to Civ.R. 54(B).

{¶5} Shortly thereafter, Ms. Sliwinski moved the trial court for clarification of its September 21, 2007 order. The Village filed evidence in support of an award for attorney fees and costs. Ms. Sliwinski filed a motion to strike the Village’s evidence in support. On October 23, 2007, the trial court clarified its prior order, stating, “As a result of the September 21, 2007 Judgment Entry, no claims remain pending against St. Edward’s in this litigation.” The trial court further scheduled a hearing “on the limited issues of attorney fees and costs” for November 29, 2007.

{¶6} Ms. Sliwinski filed a petition for a writ of prohibition, requesting that this Court order the trial judge to refrain from conducting further proceedings in regard to issues relevant to

R.C. 2323.42. This Court sua sponte dismissed the petition by journal entry. *State ex rel. Sliwinski, executrix v. Judge Burnham-Unruh* (November 28, 2007), 9th Dist. No. 23947. Ms. Sliwinski appealed to the Ohio Supreme Court which affirmed this Court's dismissal. *State ex rel. Sliwinski v. Burnham Unruh*, 118 Ohio St.3d 76, 2008-Ohio-1734. On April 17, 2008, the Village filed a motion for a hearing on attorney fees and costs pursuant to R.C. 2323.42.

{¶7} On May 27, 2008, Ms. Sliwinski voluntarily dismissed without prejudice her claims against the Village pursuant to Civ.R. 41(A). On May 30, 2008, the Village moved to strike the voluntary dismissal, and Ms. Sliwinski responded to the motion to strike. On May 30, 2008, Ms. Sliwinski voluntarily dismissed without prejudice her claims against the remaining defendant, Dr. Norman. Despite the dismissal of all her claims, Ms. Sliwinski moved on June 5, 2008, "to add defendant party [Diocese Insurance Service Corporation] nunc pro tunc." The Village moved to strike the motion to add a defendant nunc pro tunc. On June 20, 2008, the trial court issued a judgment entry, granting the Village's two motions to strike and scheduling a hearing on attorney fees and costs pursuant to R.C. 2323.42 for August 28, 2008.

{¶8} On June 23, 2008, Ms. Sliwinski filed a notice of appeal, docketed as appellate case number 24284. On August 28, 2008, the trial court held a hearing on the amount of attorney fees to award in connection with the Village's good faith motion. On September 15, 2008, the trial court issued a judgment entry, awarding attorney fees to the Village "under R.C. 2323.42" in the amount of \$15,000.00. Ms. Sliwinski filed a second notice of appeal, docketed as appellate case number 24442, on October 10, 2008.

II.

{¶9} Ms. Sliwinski raises numerous assignments of error which we decline to quote here.

{¶10} As a preliminary matter, this Court is “obligated to raise sua sponte questions related to our jurisdiction.” *Whitaker-Merrell Co. v. Geupel Constr. Co., Inc.* (1972), 29 Ohio St.2d 184, 186. This Court has jurisdiction to hear appeals only from final judgments. Article IV, Section 3(B)(2), Ohio Constitution; R.C. 2501.02. In the absence of a final, appealable order, this Court must dismiss the appeal for lack of subject matter jurisdiction. *Lava Landscaping, Inc. v. Rayco Mfg., Inc.* (Jan. 26, 2000), 9th Dist. No. 2930-M. “An order is a final appealable order if it affects a substantial right and in effect determines the actions and prevents a judgment.” *Yonkings v. Wilkinson* (1999), 86 Ohio St.3d 225, 229.

Appeal No. 24284

{¶11} Our research identified only three cases which mention R.C. 2323.42, and none address the statute in a manner relevant to this appeal. R.C. 2323.42(A) mandates that the trial court hold a hearing on a good faith motion filed hereunder. R.C. 2323.42(C) mandates an award of court costs and attorney fees if the trial court determines that there was no good faith basis for the claim. R.C. 2323.42(D) mandates that a defendant who intends to file a good faith motion must notify the plaintiff of that intent and give the plaintiff the opportunity to dismiss the claim within fourteen days.

{¶12} Because Ms. Sliwinski did not dismiss her claims within the time prescribed, the Village filed its good faith motion. In that motion, the Village requested that the trial court grant the motion, dismiss the claims and award attorney fees. Although the trial court never used any form of the word “dismiss” in its September 21, 2007, or October 23, 2007 judgment entries, it asserted in the latter order that “no claims remain pending against St. Edward’s in this litigation.”

{¶13} Ms. Sliwinski filed her notice of appeal after the trial court ruled, granting the good faith motion, but before it awarded the mandatory costs and attorney fees. In analogous

situations, a trial court's order granting a motion alleging ancillary wrongdoing but failing to impose sanctions has routinely been held not to be a final, appealable order. See, e.g., *Boston Hts. v. Cerny*, 9th Dist. No. 23331, 2007-Ohio-2886, at ¶22 (recognizing that a mere finding of contempt without the imposition of a sanction is not a final, appealable order); *Zimmerman v. Eberle* (Apr. 10, 1985), 9th Dist. No. 2008 (holding that the "mere adjudication of contempt of court is not a final appealable order until a sanction or penalty is also imposed."); *Blackwell v. Allstate Ins. Co.*, 8th Dist. No. 80485, 2003-Ohio-1823, at ¶35 (holding that a "trial court's order failing to impose sanctions under Civ.R. 37(A)(4) is not a final, appealable order."); *Williams v. Cordle* (Feb. 8, 1996), 10th Dist. No. 95APF08-978 (holding that a "trial court's order granting the motions for protective order without awarding attorney's fees is not a final, appealable order."); *Fleenor v. Caudill*, 4th Dist. No. 03CA2886, 2003-Ohio-6513, at ¶17 (holding that a "trial court's ruling on a Civ.R. 37(B)(2) sanction is not a final appealable order until the court rules on the attorney fee issue. The court either must award attorney fees or 'expressly find[] that the failure was substantially justified or that other circumstances make an award of expenses unjust.'"). R.C. 2323.42 mandates the award of attorney fees and costs if the trial court grants the good faith motion. Accordingly, this Court holds that a trial court's ruling granting a good faith motion pursuant to R.C. 2323.42 is not a final, appealable order until the trial court awards attorney fees and costs. Because the trial court had not imposed the required sanctions, its orders of September 21 and October 23, 2007, were merely interlocutory and not final, appealable orders.

{¶14} Moreover, we recognize that the trial court dismissed the claims against the Village within the context of the statutory parameters of R.C. 2323.42. Because the trial court had not yet disposed of all issues within that statutory framework, the dismissal of the claims

was also necessarily interlocutory. Accordingly, before issuing a judgment awarding attorney fees and costs, the trial court was not precluded from reconsidering its finding that there was no reasonable good faith basis for the claims. In such a case, the trial court could have properly vacated its prior dismissal of the claims.

{¶15} The trial court's September 21 and October 23, 2007 judgment entries are not final, appealable orders. Accordingly, this Court lacks jurisdiction to address appeal number 24284. The appeal is dismissed for lack of a final, appealable order.

Appeal dismissed.

Appeal number 24442

{¶16} Ms. Sliwinski filed her first notice of appeal on June 23, 2008, challenging the trial court's ruling on the R.C. 2323.42 good faith motion. Nevertheless, while the appeal was pending, the trial court held a hearing on August 28, 2008, on the issue of attorney fees and costs pursuant R.C. 2323.42, and issued a judgment entry awarding fees on September 15, 2008. Ms. Sliwinski filed the instant appeal on October 10, 2008. The trial court lacked the authority to proceed with the hearing on the determination and imposition of sanctions during the pendency of the appeal from the judgment granting the good faith motion.

{¶17} As we stated in *In re J.B.*, 9th Dist. No. 23307, 2007-Ohio-246, at ¶11:

“The Ohio Supreme Court has succinctly addressed the issue: ‘An appeal is perfected upon the filing of a written notice of appeal. R.C. 2505.04. Once a case has been appealed, the trial court loses jurisdiction except to take action in aid of the appeal. *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas* (1978), 55 Ohio St.2d 94, 97. The trial court retains jurisdiction over issues not inconsistent with the appellate court's jurisdiction to reverse, modify, or affirm the judgment appealed from. *Id.*; *Yee v. Erie Cty. Sheriff's Dept.* (1990), 51 Ohio St.3d 43, 44. *** Furthermore, the determination as to the appropriateness of an appeal lies solely with the appellate court.’ *In re S.J.*, 106 Ohio St.3d 11, 2005-Ohio-3215, at ¶9-10.”

{¶18} In this case, determination of an award of reasonable attorney fees warranted upon the earlier granting of the good faith motion during the pendency of an appeal from the order granting the motion “interferes and is inconsistent with the jurisdiction of the appellate court.” *In re S.J.* at ¶11. The trial court, therefore, lacked the jurisdiction to proceed with the hearing on attorney fees to be awarded. Because the trial court acted without jurisdiction by proceeding with the determination of attorney fees during the pendency of the initial appeal from the good faith motion, the trial court’s order granting attorney fees is void. See *id.* at ¶13. Accordingly, this Court vacates the September 15, 2008 judgment.

Judgment vacated.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

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.

DONNA J. CARR
FOR THE COURT

DICKINSON, P. J.
BELFANCE, J.
CONCUR

APPEARANCES:

JOHN WOOD, Attorney at Law, for Appellant.

STEVEN J. HUPP, and BRET C. PERRY, Attorneys at Law, for Appellee.