

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

KATHLEEN HELMSTEDTER

C. A. No. 24237

Appellee

v.

BARRY HELMSTEDTER, et al.

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. 2004-06-2363

Appellants

DECISION AND JOURNAL ENTRY

Dated: July 22, 2009

CARR, Judge.

{¶1} Appellant, Barry Helmstedter (“Husband”), appeals the purported judgment of the Summit County Court of Common Pleas, Domestic Relations Division. This Court dismisses the appeal for lack of a final, appealable order.

I.

{¶2} On June 15, 2004, Kathleen Helmstedter (“Wife”), filed a complaint for divorce. Husband answered. The trial court issued temporary orders.

{¶3} During the parties’ marriage, Husband’s father, George Helmstedter (“George”), loaned the couple a substantial sum of money. When the couple defaulted on the loan, George sued them and obtained a judgment. Meanwhile, Husband and Wife sold a piece of property pursuant to a land contract. The parties presented an agreed judgment entry to the court, which ordered the buyers of the property to make payments on the land contract payable to George to

facilitate the repayment of Husband's and Wife's debt. The trial court journalized the agreed entry on December 22, 2004.

{¶4} The matter proceeded in a contentious manner. On January 25, 2006, Wife filed a notice of filing under the bankruptcy code and a suggestion of stay. The domestic relations courts stayed proceedings pending resolution of the bankruptcy matter. Notwithstanding the stay and no record of its termination, the matter proceeded in the domestic relations court.

{¶5} On March 15, 2007, Wife moved to join George as a party who was claiming an interest in property owned by the parties. The trial court added George as a party the next day.

{¶6} The matter proceeded to trial on April 19, 2007. On May 30, 2007, the domestic relations court issued a purported final entry decree of divorce. On June 13, 2007, Wife filed a motion for new trial pursuant to Civ.R. 59(A)(5) and (6). She appended her affidavit in which she averred that George would receive overpayment in an amount in excess of \$50,000.00 from the land contract payments under the terms of the divorce decree. On July 26, 2007, Husband filed a motion for a new trial, asserting that the trial court overlooked various issues, "including but not limited to the allocation of approximately \$60,000.00 relating to the Land Contract where the Plaintiff and the Defendant are the Vendors." The trial court scheduled the matter for a new trial on May 1, 2008.

{¶7} On April 25, 2008, Wife filed a "motion to adopt judgment order nunc pro tunc" which she asserted would negate the need for a new trial. The matter proceeded before the court on May 1, 2008, at which time Wife presented her proposed "judgment order nunc pro tunc" and admitted that Husband and George did not agree with the content. Husband voiced his opposition to Wife's proposed order and presented one of his own. George also voiced his opposition to Wife's proposed order. Although no witnesses were sworn, the domestic relations

court inquired of counsel and parties regarding various factual issues. At the conclusion of the hearing, the trial court asserted that it would approve Wife's proposed order. On May 1, 2008, the trial court filed the purported "judgment order nunc pro tunc." Husband appealed, raising two assignments of error for review.

II.

ASSIGNMENT OF ERROR I

"THE TRIAL COURT INCORRECTLY AND PREJUDICIALLY ASSIGNED FINANCIAL MISCONDUCT TO THE DEFENDANT-APPELLANT BASED UPON HIS DAY-TRADING VOCATION."

ASSIGNMENT OF ERROR II

"THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ADOPTING A NUNC PRO TUNC ORDER FILED MAY 1, 2008."

{¶8} Husband argues that the trial court erred by assigning financial misconduct to him in the May 30, 2007 decree of divorce. He further argues that the trial court erred in its May 1, 2008 adoption of Wife's proposed judgment entry nunc pro tunc.

{¶9} 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 action and prevents a judgment." *Yonkings v. Wilkinson* (1999), 86 Ohio St.3d 225, 229.

{¶10} Civ.R. 75 addresses divorce, annulment and legal separation actions. Civ.R. 75(F) states, in relevant part:

“For purposes of Civ.R. 54(B), the court shall not enter final judgment as to a claim for divorce *** unless one of the following applies:

“(1) The judgment also divides the property of the parties, determines the appropriateness of an order of spousal support, and, where applicable, either allocates parental rights and responsibilities, including payment of child support, between the parties or orders shared parenting of minor children;

“(2) Issues of property division, spousal support, and allocation of parental rights and responsibilities or shared parenting have been finally determined in orders, previously entered by the court, that are incorporated into the judgment;

“(3) The court includes in the judgment the express determination required by Civ.R. 54(B) and a final determination that either of the following applies:

“(a) The court lacks jurisdiction to determine such issues;

“(b) In a legal separation action, the division of the property of the parties would be inappropriate at that time.”

See, also, *Wilson v. Wilson*, 116 Ohio St.3d 268, 2007-Ohio-6056 (recognizing the proscription of Civ.R. 75(F), but holding that the lack of QDRO does not render a decree non-final because the sole purpose of a QDRO is merely to implement the terms of the divorce decree relative to the division of property, not to create those terms).

{¶11} The version of R.C. 3105.171, applicable at the time relevant to the instant matter, states, in relevant part: “In divorce proceedings, the court shall *** determine what constitutes marital property and what constitutes separate property. In either case, upon making such a determination, the court shall divide the marital and separate property equitably between the spouses, in accordance with this section.” R.C. 3105.171(B). R.C. 3105.171(G) requires the domestic relations court to “make written findings of fact that support the determination that the marital property has been equitably divided[.]” Finally, R.C. 3105.171(I) states that “[a] division or disbursement of property or a distributive award made under this section is not subject to

future modification by the court.” Although the trial court retains jurisdiction to “clarify and construe its original property division so as to effectuate its judgment[,]” it retains no jurisdiction to modify its decision regarding the equitable division of property. *Cisco v. Cisco*, 4th Dist. No. 08CA8, Slip Opinion No. 2009-Ohio-884, at ¶11, quoting *Knapp v. Knapp*, 4th Dist. No. 05CA2, 2005-Ohio-7105, at ¶40.

{¶12} A land contract, also known as a contract for deed or installment land contract, is a “conditional sales contract for the sale of real property.” Black’s Law Dictionary (8 Ed. 2004), 343 and 894. R.C. 5313.01(A) defines “land installment contract” as “an executory agreement *** under which the vendor agrees to convey title in real property located in this state to the vendee and the vendee agrees to pay the purchase price in installment payments, while the vendor retains title to the property as security for the vendee’s obligation.” Accordingly, in this case, Husband and Wife retained a property interest in the underlying real property which they had sold pursuant to a land contract. The domestic relations court did not divide that property between Husband and Wife. Rather, the court merely ordered that the land contract payments, but not the underlying interest in the real property which was retained by Husband and Wife as the sellers, would be assigned to George without further explanation. The trial court then expressly stated that it “retains jurisdiction over this matter.” The trial court failed to equitably divide the couple’s interest in the real property they sold pursuant to a land contract as required by R.C. 3105.171(B). Accordingly, the May 30, 2007 divorce decree does not constitute a final, appealable order. See *Wilson*, supra.

{¶13} Civ.R. 59, which governs new trials, contemplates party requests for new trials and sua sponte orders for new trials within fourteen days after the entry of judgment. Because the domestic relations court had not entered judgment by way of its May 30, 2007 decree

because it failed to divide all of Husband's and Wife's property, the motions for new trial were improper. Rather, they were in the nature of motions for reconsideration.

{¶14} The trial court later exercised its inherent jurisdiction to reconsider its prior non-final order when it considered Husband's and Wife's issues regarding the allocation of funds yet to be received from payments on the land contract. In the May 1, 2008 purported "judgment order nunc pro tunc," the domestic relations court again failed to divide Husband's and Wife's property interest in the real property sold pursuant to a land contract, although it divided future payments on the land contract between Wife and George. The domestic relations court again asserted that it "shall continue to have jurisdiction over all of the above matters[.]" presumably so that it might eventually address the division of Husband's and Wife's property interest in the real property.

{¶15} While this Court here makes no determination regarding the character or effect of the "judgment order nunc pro tunc," it is clear that it cannot be construed as a final, appealable order. Not only does the order fail to effect the equitable division of property left unresolved by the May 30, 2007 decree, but it fails to address any other necessary issues delineated in Civ.R. 75(F). Therefore, the May 1, 2008 order also does not constitute a final, appealable order. Accordingly, this Court lacks jurisdiction to consider the merits of the appeal.

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.

DONNA J.CARR
FOR THE COURT

MOORE, P. J.
DICKINSON, J.
CONCUR

APPEARANCES:

KERRY O'BRIEN, Attorney at Law, for Appellant.

LESLIE S. GRASKE, Attorney at Law, for Appellee.