

COURT OF APPEALS
SUMMIT COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CHAMPAIGN NATIONAL BANK	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
	:	Hon. Julie A. Edwards, J.
Appellee	:	Hon. Patricia A. Delaney, J.
and	:	
	:	
FIRSTMERIT BANK	:	Case No. 24180
	:	
Appellant	:	
	:	<u>OPINION</u>

-VS-

PREFERRED CAPITAL, INC.

Appellee

CHARACTER OF PROCEEDING: Civil appeal from the Summit County Court
of Common Pleas, Case No. CV-2005-03-
1651

JUDGMENT: Dismissed

DATE OF JUDGMENT ENTRY: December 17, 2009

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Gwin, P.J.

{¶1} Appellant FirstMerit Bank, a creditor of appellee Preferred Capital, Inc. appeals a judgment of the Court of Common Pleas of Summit County, Ohio, which directed appellee's Receiver, appellee Kathryn A. Belfance, to pay outstanding expenses and wind up the receivership in the best interest of the secured creditors.

{¶2} The judgment entry states in pertinent part: "*** In winding down the receivership, the Receiver shall transfer to each secured creditor all litigation, civil proceedings, collection proceeds, pending appellate proceedings, assets, leases, files, and documents pertaining to or owned by each secured creditor. Each secured creditor shall be entitled to retain any outstanding funds that they (sic) recover and shall be responsible for the cost of any defense in any litigation, civil proceedings, collection proceedings, or pending appellate proceedings transferred pursuant to this Order.

{¶3} "If the Receiver informs the Court the receivership is insolvent prior to completion of the winding down process, the Court shall determine how any deficiencies shall be apportioned if the secured creditors cannot reach agreement on said issue." Judgment Entry of March 28, 2008, at Page Two.

{¶4} The record indicates the court appointed appellee Belfance as Receiver for Preferred Capital on April 14, 2005. She received the authority to prosecute and defend litigation, hire necessary professionals, and liquidate, manage, protect, and administer the assets of Preferred Capital, Inc. The order also provided the Receiver would be paid from rents, issues, profits, income, revenues, accounts and lease payments collected or received by the receiver and approved by the court. No appeal

was taken from this order, although it was final and appealable, see, e.g. *Strauss v. Strauss*, Cuyahoga App. No. 92615, 2009-Ohio-5493 at paragraph 3.

{¶5} Thereafter, the matter proceeded and eventually encompassed over 700 cases in litigation, ongoing settlements and settlement attempts, and involved, among many others, Attorneys General of several states. From time to time, the Receiver submitted reports to the court and also requests for her compensation, and to pay the various persons assisting the Receiver in this action.

{¶6} On November 3, 2006, appellant FirstMerit appealed from the trial court's order overruling FirstMerit's motion to compel the Receiver to distribute funds to FirstMerit and allowing the Receiver to pay legal fees from the proceeds she held. On January 16, 2007, the Court of Appeals dismissed the appeal, finding it was not a final appealable order. *Champaign National Bank v. Preferred Capital, Inc.*, Summit App. No. 23470.

{¶7} Subsequent to the filing of the present appeal, appellee Belfance filed a motion to dismiss this appeal as well. She argues, inter alia, that this present appeal deals with essentially the same issue as the 2006 appeal. This court denied the motion to dismiss for the time, but deferred the issue until final determination of the appeal.

{¶8} Ohio law provides that appellate courts have jurisdiction to review only final orders or judgments. See, generally, Section III, (B)(2), Article IV, Ohio Constitution; R.C. 2505.02. If an order is not final and appealable, then an appellate court has no jurisdiction to review the matter, and it must be dismissed.

{¶19} R. C. 2505.02 states in pertinent part:

{¶10} “(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

{¶11} “ (1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

{¶12} “ (2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

{¶13} “ (3) An order that vacates or sets aside a judgment or grants a new trial;

{¶14} “ (4) An order that grants or denies a provisional remedy and to which both of the following apply:

{¶15} “ (a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

{¶16} “(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action. ***”

{¶17} In *Hall v. Hall*, Geauga App. No. 2001-G-2393, 2002-Ohio-4363, the 11th District Court of Appeals reviewed a case where a claimant moved for payment of wages from a receiver who was managing a business until it could be liquidated. The court of appeals found the denial of the motion was not a final appealable order. The court noted the receivership was not closed or terminated, and the court’s order did not resolve all of the remaining issues or contain a finding of no just reason for delay. The court concluded the trial court had not yet terminated the receivership, which would

generate the final appealable order. *Id.* at paragraph 9-10. See also *Tillimon v. Great Lakes Funding, Ltd.*, Lucas App. No. L-05-1240, 2006-Ohio-2484. “A receivership terminates when the court having jurisdiction over the receivership enters an order terminating the receivership and discharging the receiver.” *Tillimon* at paragraph 11, citations deleted.

{¶18} We find the judgment from which FirstMerit appeals is not a final appealable order. On the face of the judgment, the court anticipates further action by the Receiver, in winding up the receivership and distributing the remaining assets of Preferred Capital, Inc., including litigation, some of which presumably has future value. The judgment appealed from does not actually award any assets to any party. In the entry, the court indicates if the receivership becomes insolvent this will require further action by the parties and the court.

{¶19} For the foregoing reasons, the appeal is dismissed for lack of jurisdiction.

By Gwin, P.J.,

Edwards, J., and

Delaney, J., concur

HON. W. SCOTT GWIN

HON. JULIE A. EDWARDS

HON. PATRICIA A. DELANEY

IN THE COURT OF APPEALS FOR SUMMIT COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CHAMPAIGN NATIONAL BANK	:	
	:	
Appellee	:	
	:	
and	:	
	:	
FIRSTMERIT BANK	:	
	:	
Appellant	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
PREFERRED CAPITAL, INC.	:	
	:	
	:	
Appellee	:	CASE NO. 24180

For the reasons stated in our accompanying Memorandum-Opinion, the within appeal is dismissed for lack of jurisdiction. Costs to FirstMerit.

HON. W. SCOTT GWIN

HON. JULIE A. EDWARDS

HON. PATRICIA A. DELANEY