

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

DAIMLERCHRYSLER FINANCIAL
SERVICES NORTH AMERICA LLC

C.A. No. 24815

Appellee

v.

HURSELL UNLIMITED, INC., et al.

Appellants

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2006-11-7201

DECISION AND JOURNAL ENTRY

Dated: February 9, 2011

CARR, Judge.

{¶1} Appellant, Donald Hursell, appeals the order of the Summit County Court of Common Pleas, which denied his “Second Motion for Void Judgment.” This Court affirms.

I.

{¶2} In 2006, appellee, DaimlerChrysler Financial Services North America, LLC (“DaimlerChrysler”), filed a complaint against Hursell and Hursell Unlimited, Inc. for money due under a direct purchase money loan and security agreement. At most times during the pendency of the action below, Hursell represented himself pro se. On January 16, 2007, Hursell filed a “Reply to Complaint” which failed to respond to the allegations in the complaint. On March 7, 2007, Hursell filed an “Amended Reply to the Complaint” which again failed to respond to the specific allegations in the complaint. On March 23, 2007, on behalf of himself and purportedly on behalf of Hursell Unlimited, Inc., Hursell filed a “Second Amended Answer” to the complaint, along with counterclaims against DaimlerChrysler for negligence, intentional

tort, and a violation of Ohio's "Lemon Law," R.C. 1345.72. Upon DaimlerChrysler's motion, the trial court ordered stricken all counterclaims purportedly filed on behalf Hursell Unlimited, Inc. by Hursell, a non-attorney. Along with his answer and counterclaims, Hursell filed third-party claims which he characterized as "cross claims" against Select Trucks of Cleveland and Freightliner, LLC. The issue of proper service of his third-party claims remained in dispute until Hursell filed a notice of dismissal of those claims pursuant to Civ.R. 41(A). Select Trucks of Cleveland and Freightliner, LLC are not parties to this appeal.

{¶3} On March 22, 2007, DaimlerChrysler filed a motion for summary judgment solely on its claim for money due against Hursell. Hursell filed a brief in opposition. On May 21, 2007, the trial court granted summary judgment in favor of DaimlerChrysler. On June 5, 2007, Hursell filed a motion for reconsideration of the order granting summary judgment, invoking Civ.R. 60(B). Hursell raised the issue of DaimlerChrysler's lack of standing to sue, arguing that the entity was not registered with the Ohio Secretary of State. The trial court addressed Hursell's motion as both a motion for reconsideration and motion to vacate the judgment pursuant to Civ.R. 60(B), and denied both.

{¶4} On May 30, 2007, DaimlerChrysler filed a motion to dismiss Hursell's counterclaims for failure to state a claim upon which relief could be granted, pursuant to Civ.R. 12(B)(6). Hursell filed a brief in opposition. On July 12, 2007, the trial court granted DaimlerChrysler's motion to dismiss the counterclaims and noted that there was no just reason for delay pursuant to Civ.R. 54(B). At that time, all claims regarding DaimlerChrysler and Hursell were resolved and the July 12, 2007 order constituted a final, appealable order. Hursell did not appeal from that order.

{¶5} On August 6, 2007, Hursell filed a motion to reconsider the order dismissing his counterclaims, referencing Civ.R. 60(B), but failing to offer any argument whatsoever. On the same day, he filed a “Memorandum in Reconsideration of Order to Dismiss for Failure to State a Claim,” wherein he invoked Civ.R. 8(D), 11, 12(A)(6), 12(B)(6), and 56(G). He did not move to vacate pursuant to Civ.R. 60(B). In his motion, Hursell challenged both the order granting summary judgment to DaimlerChrysler on its claim and the order dismissing his counterclaims for failure to state a claim upon which relief could be granted. Hursell again challenged DaimlerChrysler’s standing to bring the claim against him but he did not allege a lack of subject matter jurisdiction. The trial court did not address the motion for reconsideration.

{¶6} DaimlerChrysler filed various motions and other documents in furtherance of execution of its judgment. On December 10, 2007, the trial court referred the case to the magistrate to address pending issues.

{¶7} On December 26, 2007, Hursell, now represented by counsel, filed a motion to vacate the order granting summary judgment pursuant to Civ.R. 60(B). He again asserted that DaimlerChrysler did not have standing to sue. Hursell did not challenge the subject matter jurisdiction of the court. Moreover, he did not address the order dismissing his counterclaims. DaimlerChrysler filed a brief in opposition to the motion to vacate, and Hursell filed a reply.

{¶8} On January 30, 2008, the magistrate held a hearing to determine whether any issues remained pending. On March 12, 2008, the magistrate issued a decision noting that the case was concluded and that no issues remained for determination. Nevertheless, on January 29, 2009, Hursell filed a pro se motion to dismiss DaimlerChrysler’s claim pursuant to Civ.R. 41(B)(4)(a) for lack of subject matter jurisdiction, although he made no argument whatsoever regarding the lack of subject matter jurisdiction. Instead, Hursell argued hardship and

impossibility in regard to his ability to pay the judgment. He further argued for involuntary dismissal pursuant to Civ.R. 41(B)(1) based on DaimlerChrysler's alleged failure to comply with civil rules and court orders. In addition, he invoked Civ.R. 60(B) but he did not make any arguments in regard to vacating the judgment. On March 3, 2009, Hursell moved for default judgment based on DaimlerChrysler's failure to respond to his January 29, 2009 motion to dismiss. On March 30, 2009, the trial court issued an order regarding a post-judgment discovery dispute and further noted that Hursell's continued motions attacking the validity of the final judgment were nullities and that DaimlerChrysler need not respond to any of them. Hursell did not appeal from this order.

{¶9} On April 20, 2009, Hursell filed a "Second Motion for Void Judgment" pursuant to Civ.R. 60(B). Although captioned a second motion, this Court notes that Hursell filed no fewer than five motions invoking Civ.R. 60(B). Hursell argued that the judgment should be vacated on the basis of fraud because DaimlerChrysler lacked standing to sue; because the trial court lacked subject matter jurisdiction because DaimlerChrysler lacked standing to sue; because DaimlerChrysler's complaint failed to state a claim upon which relief could be granted; and because the trial court abused its discretion by awarding summary judgment to DaimlerChrysler and in its management of the case. Hursell confined his arguments to issues arising out of the award of summary judgment to DaimlerChrysler and did not discuss his counterclaims. On May 27, 2009, the trial court issued the following order: "This cause came before the Court upon [Hursell's] Second Motion for Void Judgment. Upon consideration, this Court finds [Hursell's] motion not well taken. Therefore, [Hursell's] motion is DENIED." Hursell filed a timely appeal.

II.

{¶10} Hursell raises 16 assignments of error which we decline to restate here. In most, he assigns error to the trial court's award of summary judgment in favor of DaimlerChrysler on its claim and its dismissal of his counterclaims against DaimlerChrysler. He raises various issues including a lack of evidence and the allowance of hearsay evidence. To the extent that Hursell challenges the trial court's orders granting summary judgment to DaimlerChrysler and dismissing his counterclaims, we decline to address those issues as he has not appealed from the final order disposing of those claims. App.R. 3(D) requires that the notice of appeal "shall designate the judgment, order or part thereof appealed [sic] from[.]" As discussed below, the final order disposing of all claims and counterclaims is the trial court's March 30, 2009 order.

{¶11} The trial court issued a final, appealable order on July 12, 2007, wherein it resolved all the claims and counterclaims between DaimlerChrysler and Hursell. Although Hursell had filed "cross claims" against two other entities, the trial court entered a final judgment on July 12, 2007, pursuant to Civ.R. 54(B) when it made the express determination that there was no just reason for delay. Accordingly, Hursell had thirty days from July 12, 2007, in which to appeal. See App.R. 4(A). He declined to do so.

{¶12} Civ.R. 60(B) allows a party to move the trial court for an order relieving the party from a final judgment. Hursell filed five motions which invoked Civ.R. 60(B). Although Hursell filed what might have been construed as a Civ.R. 60(B) motion on June 5, 2007, challenging the court's May 21, 2007 award of summary judgment to DaimlerChrysler, that order did not constitute a final judgment because additional claims remained pending and the trial court had not expressly determined that there was no just reason for delay. Accordingly,

although the trial court disposed of Hursell's June 5, 2007 motion in part as a motion for relief from judgment, it did not properly do so.

{¶13} Hursell's next attempt to move for relief from judgment came on August 6, 2007, after the trial court issued its final, appealable order disposing of DaimlerChrysler's claim and all of Hursell's counterclaims and expressly determining that there was no just reason for delay. He filed two documents that day. In the first, captioned as a motion for reconsideration, he purportedly moved for relief from the final judgment dismissing his counterclaims pursuant to Civ.R. 60(B) but he made no argument in that regard. The second document consisted of a memorandum in support of his motion for reconsideration. Although he addressed Civ.R. 8(D), 11, 12(A)(6), 12(B)(6), and 56(G) in the memorandum, he failed to mention Civ.R. 60(B) or make any arguments in that regard. Accordingly, the trial court properly declined to address Hursell's motion for reconsideration of a final order. See *Pitts v. Ohio Dept. of Transp.* (1981), 67 Ohio St.2d 378, 379 (stating that "motions for reconsideration of a final judgment in the trial court are a nullity.")

{¶14} On December 26, 2007, Hursell, through counsel, filed a motion to vacate the award of summary judgment pursuant to Civ.R. 60(B). He did not address the dismissal of his counterclaims. Because his June 5, 2007 motion was premature and, therefore, did not constitute a Civ.R. 60(B) motion, the December 26, 2007 motion was the first motion for relief from summary judgment pending before the court. After a hearing, the magistrate issued a decision in which he concluded that all matters were resolved. Accordingly, the magistrate did not address the pending Civ.R. 60(B) motion. The trial court, however, never adopted the magistrate's decision and it, therefore, had no effect. Civ.R. 53(D)(4)(a) states that "[a] magistrate's decision is not effective unless adopted by the court." Accordingly, the magistrate's conclusion that

“there is no matter left for adjudication by the trial court” did nothing to nullify the December 26, 2007 Civ.R. 60(B) motion and it remained pending for the trial court’s determination.

{¶15} Notwithstanding the pending Civ.R. 60(B) motion of December 26, 2007, Hursell filed another motion on January 29, 2009. Although he captioned it as a “Motion to Dismiss,” he invoked Civ.R. 60(B) and, as a practical matter, requested that the trial court vacate the summary judgment against him.

{¶16} On March 30, 2009, the trial court issued an order arising out of a post-judgment discovery dispute. Within that order, however, the trial court further “note[d] that all motions filed by [Hursell] attacking the validity of the judgment rendered against him are, in effect, legal nullities.” The trial court, therefore, disposed of Hursell’s pending Civ.R. 60(B) motion, albeit on an incorrect legal basis. At that time, all matters regarding DaimlerChrysler’s claim and Hursell’s counterclaims were disposed, and Hursell could have appealed that final order. He did not.

{¶17} “Civ.R. 60(B) may not be used as a substitute for appeal.” *Doe v. Trumbull Cty. Children Servs. Bd.* (1986), 28 Ohio St.3d 128, 131. This Court has repeatedly held that “[e]rrors that could have been corrected by a timely appeal cannot be the predicate for a motion for relief from judgment.” *Murphy-Kesling v. Kesling*, 9th Dist. No. 24176, 2009-Ohio-2560, at ¶15, quoting *In re S.J.*, 9th Dist. No. 23199, 2006-Ohio-6381, at ¶24, citing *Ward v. Hengle* (1999), 134 Ohio App.3d 347, 350. However, we do not here determine whether the December 26, 2007 motion to vacate the judgment pursuant to Civ.R. 60(B) was simply being used as a substitute for appeal because that issue is not before us given that Hursell has not appealed from the March 30, 2009 order disposing of the motion. Furthermore, we do not here decide whether an appeal from the March 30, 2009 order would be untimely pursuant to App.R. 4(A).

{¶18} Instead of appealing the trial court’s final order disposing of the case, however, Hursell filed his “Second Motion for Void Judgment” pursuant to Civ.R. 60(B) on April 20, 2009. Successive motions for relief from judgment, which address issues which were or could have been raised in the prior motion, are barred by the doctrine of res judicata. See *Coulson v. Coulson* (1983), 5 Ohio St.3d 12, 17. Hursell’s “Second Motion for Void Judgment,” in as much as it again challenges the award of summary judgment on substantive grounds, can only be construed as a motion for reconsideration of a final order. This Court recognizes the Ohio Supreme Court’s holding that “a motion for reconsideration of a final judgment is a nullity.” *Easley v. Alltronics, Inc.* (Oct. 1, 1997), 9th Dist. No. 18200, citing *Pitts*, 67 Ohio St.2d at 379. Accordingly, Hursell’s “Second Motion for Void Judgment” was a nullity so far as it challenged the award of summary judgment on substantive grounds. Accordingly, Hursell’s assignments of error in which he argues for reversal on substantive grounds are overruled.

{¶19} Hursell, however, challenged the subject matter jurisdiction of the trial court for the first time in his April 20, 2009 “Second Motion for Void Judgment.” Any order issued disposing of a motion which is a nullity is itself a nullity. *State v. Myers*, 9th Dist. No. 08CA0041, 2009-Ohio-2082, at ¶9, citing *Kauder v. Kauder* (1974), 38 Ohio St.2d 265, 267. Because any ruling by the trial court on Hursell’s challenges to the substantive validity of the award of summary judgment raised in his motion would have been a nullity, this Court presumes that the trial court issued its ruling solely in regard to Hursell’s challenges regarding subject matter jurisdiction. In that regard, neither the motion nor the order was a nullity.

{¶20} In discussing subject matter jurisdiction, the Ohio Supreme Court has stated:

“Because subject-matter jurisdiction goes to the power of the court to adjudicate the merits of a case, it can never be waived and may be challenged at any time. It is a condition precedent to the court’s ability to hear the case. If a court acts without jurisdiction, then any proclamation by that court is void.” (Internal

citations and quotations omitted.) *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, at ¶11.

{¶21} Hursell argues on appeal that the trial court lacked subject matter jurisdiction over the case because DaimlerChrysler failed to state a claim upon which relief could be granted pursuant to Civ.R. 12(B)(6) and because DaimlerChrysler lacked standing or capacity to sue. In addition, he argues that, assuming *arguendo* the trial court initially had jurisdiction to hear the case, it lost jurisdiction by: (1) failing to comply with the Rules of Civil Procedure; (2) failing to comply with the Rules of Evidence; (3) failing to comply with its oath of office; (4) refusing to schedule hearings on all motions; and (5) strongly and ineloquently directing Hursell to answer questions during a show cause hearing.

{¶22} This Court has stated:

“The subject matter jurisdiction of a court is that power, conferred upon it by law, by which it is authorized to hear, determine, and render a valid, enforceable final judgment in a particular action. See 20 American Jurisprudence 2d (1995), Courts, Section 70. In Ohio, judicial authority flows generally from Section 1, Article IV of the Ohio Constitution. The jurisdictional foundation for the courts of common pleas is specifically set forth in Section 4(B) of Article IV:

“‘The courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters ***’

“The Constitution itself does not confer jurisdiction upon the common pleas courts; they are only given the capacity to exercise whatever jurisdiction may be expressly granted to them by the legislature. *In re Seltzer* (1993), 67 Ohio St.3d 220, 222.” *Nielsen v. Ford Motor Co.* (1996), 113 Ohio App.3d 495, 499.

{¶23} R.C. 2305.01 confers original jurisdiction upon the court of common pleas “in all civil cases in which the sum or matter in dispute exceeds the exclusive original jurisdiction of county courts ***[.]” County courts have exclusive original jurisdiction in civil actions “for the recovery of sums not exceeding five hundred dollars[.]” R.C. 1907.03(A). The instant matter involved a civil complaint for money due in excess of five hundred dollars. Accordingly, the trial court had subject matter jurisdiction over the case. Neither errors regarding the trial court’s

proper application of rules and law, due process concerns, and docket management issues, nor ethical violation, serve to divest a court of subject matter jurisdiction accorded to it by statute. Moreover, “[l]ack of standing challenges the capacity of a party to bring an action, not the subject matter jurisdiction of the court.” *State ex rel. Ralkers, Inc. v. Liquor Control Comm.*, 10th Dist. No. 04AP-779, 2004-Ohio-6606, at ¶35. Accordingly, Hursell’s assignments of error regarding the trial court’s alleged lack of subject matter jurisdiction are overruled.

III.

{¶24} Hursell’s assignments of error are overruled. The May 27, 2009 order of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

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

MOORE, J.
DICKINSON, P. J.
CONCUR

APPEARANCES:

DONALD E. HURSELL, II, pro se, Appellant.

JENNIFER M. MONTY, Attorney at Law, for Appellee.