

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Wayne M. Cook, Trustee of the
Wayne M. Cook Living Trust

Appellee

Court of Appeals No. L-23-1029

Trial Court No. CI0202204187

v.

Lucas D. Cook, et al.

Appellants

DECISION AND JUDGMENT

Decided: August 11, 2023

* * * * *

Peter A. Dewhirst and Lacey L. Riley, for appellee.

Eugene F. Canestraro, for appellant.

* * * * *

ZMUDA, J.

I. Introduction

{¶ 1} Appellants, Lucas D. Cook, personally and as trustee of the Lucas D. Cook Living Trust, and Lucas’s wife, Kristen Cook, appeal the judgment of the Lucas County Court of Common Pleas, reinstating claims previously dismissed voluntarily by appellee,

Wayne M. Cook, Trustee of the Wayne M. Cook Living Trust, and granting appellee leave to file his amended complaint. Because we find that the trial court's judgment was not a final appealable order under R.C. 2505.02, we dismiss this appeal.

A. Facts and Procedural Background

{¶ 2} In September 2011, the Wayne M. Cook Living Trust loaned Lucas, Wayne's son, \$250,000.00 to make repairs to and remodel his home. To secure the loan, Lucas, acting in his capacity as trustee of the Lucas D. Cook Living Trust, executed and delivered to appellee a promissory note and mortgage relating to the trust's real property in Sylvania, Ohio. The note and mortgage were recorded with the Lucas County Recorder's Office on September 28, 2011.

{¶ 3} On April 20, 2022, the Sylvania property secured by the mortgage was transferred from Lucas's trust to Lucas and Kristen, jointly with a right of survivorship. Meanwhile, Lucas allegedly defaulted on his obligations under the terms of the note by failing to make any payments, thereby also triggering a default under the mortgage. Thus, appellee filed a complaint in this action on October 31, 2022, seeking foreclosure and sale of the Sylvania property in order to satisfy appellants' obligations under the note and mortgage.

{¶ 4} On November 14, 2022, appellants responded to appellee's complaint by filing a motion to dismiss under Civ.R. 12(B)(6), arguing that the supporting title documentation attached to appellee's complaint demonstrated that appellee was not the

holder of the mortgage and, thus, lacked standing to pursue the claims contained in the complaint.

{¶ 5} While their motion to dismiss remained pending before the trial court, on November 28, 2022, at 8:31 a.m., appellants filed their answer to appellee's complaint. In their answer, appellants generally denied appellee's allegations and asserted several counterclaims based upon their allegation that appellee forged Lucas's signatures on the note and mortgage attached to appellee's complaint.

{¶ 6} Later on the same day, November 28, 2022, appellee filed a notice of dismissal, indicating appellee's decision to voluntarily dismiss "all claims asserted in this case without prejudice, pursuant to Rule 41(A) of the Ohio Rules of Civil Procedure."

{¶ 7} On December 20, 2022, appellee filed a motion for extension of time to respond to appellants' counterclaims. Notably, appellee made no mention of the prior voluntary dismissal of the action pursuant to Civ.R. 41(A) in the motion, but noted that "the Court currently has a few pending Motions in this matter and Plaintiff would like to have those Motions ruled upon before proceeding further in this matter." On December 21, 2022, the trial court granted appellee's motion and afforded appellee an additional 28 days to respond to appellants' counterclaims.

{¶ 8} On January 4, 2023, appellants requested leave to withdraw their Civ.R. 12(B)(6) motion to dismiss. In their filing, appellants indicated that their motion to dismiss was rendered moot by appellee's voluntary dismissal of the claims against them.

{¶ 9} Two days later, appellee filed a “motion to reinstate plaintiff’s claims and for leave to amend plaintiff’s complaint.” In the motion, appellee maintained that he filed his voluntary dismissal of his complaint only hours after appellants filed their answer and counterclaims. Appellee claimed that he had not yet been served with the answer and was thus unaware of the pending counterclaims when he filed his voluntary dismissal.

{¶ 10} Citing Civ.R. 41(A)(2), appellee acknowledged that appellants’ counterclaims “very much depend on adjudication of the claims contained in Plaintiff’s complaint.” Recognizing that appellants’ counterclaims were pled prior to his filing of the notice of dismissal and could not be adjudicated independent of his foreclosure claims, appellee sought reinstatement of his claims.

{¶ 11} Further, appellee agreed with the argument raised by appellants in their motion to dismiss, namely that the Wayne M. Cook Living Trust lacked standing to sue because it is not the holder and owner of the note and mortgage at issue in this case. Appellee acknowledged that the Linda S. Cook Living Trust was the holder and owner of the note and mortgage, and thus sought to “amend his complaint to name the current holder of the subject note and mortgage as the plaintiff in this action.” The amended complaint, which was attached to appellee’s motion, eliminated appellee as a plaintiff and substituted Linda S. Cook and Wayne M. Cook, Co-Trustees of the Linda S. Cook Living Trust dated March 14, 1994, as the new plaintiff. Notably, appellee cited no authority in

support of his request to substitute a new plaintiff in place of the Wayne M. Cook Living Trust by way of amendment of the complaint.

{¶ 12} Later on the same day as appellee filed his motion to reinstate, appellants filed a memorandum in opposition to appellee's motion. In their memorandum, appellants asserted two arguments as to why reinstatement of appellee's claims was unavailable. First, appellants argued that reinstatement would be improper because appellee's dismissal under Civ.R. 41(A) was self-executing and immediately effective upon filing. Appellants rejected appellee's assertion that the pending counterclaims could not be independently adjudicated, and insisted that said claims could "stand on their own, subject only to Plaintiff's defenses." Second, appellants argued that appellee could not reinstate the claims in order to assert claims on behalf of another trust where the Wayne M. Cook Living Trust admittedly has no standing to pursue the claims.

{¶ 13} On January 10, 2023, appellee filed his reply to appellants' memorandum in opposition, in which appellee asserted that appellants were engaged in "gamesmanship" and that "[t]he parties' claims must be adjudicated on the merits and the most efficient way to do so is for this court to reinstate plaintiff's claims and allow plaintiff to amend his complaint."

{¶ 14} Upon consideration of the parties' filings, the trial court issued its decision on appellee's motion to reinstate on January 12, 2023. Without analysis, the trial court deemed appellee's motion well-taken, reinstated appellee's claims, declared the voluntary

dismissal null and void, and granted appellee leave to file his amended complaint. The next day, appellee filed the amended complaint substituting party by naming Linda S. Cook and Wayne M. Cook, Co-Trustees of the Linda S. Cook Living Trust dated March 14, 1994 (the “Linda Cook Trust”), as the sole plaintiff.

{¶ 15} On January 17, 2023, appellants filed a motion asking the trial court to strike the amended complaint or, in the alternative, to reconsider its decision reinstating appellee’s claims. In support, appellants argued that the amended complaint was improper and without any legal authority insofar as it “improperly substitutes a new party plaintiff” rather than merely amending appellee’s complaint. Further, appellants argued that the reinstatement of appellee’s claims was improper in light of appellee’s admitted lack of standing. Notably, appellants indicated in their motion that the initial dismissal was proper notwithstanding their counterclaims, stating: “Of course, the counterclaim can stand-alone.”

{¶ 16} On January 19, 2023, the Linda Cook Trust filed a “motion for second extension of time to respond to defendants’ counterclaim,” seeking another 28 days to respond to appellants’ counterclaim. The trial court subsequently granted the motion and directed the Linda Cook Trust to file an answer to appellants’ counterclaims on or before February 20, 2023. Neither appellee nor the Linda Cook Trust have filed such an answer.

{¶ 17} On January 23, 2023, the Linda Cook Trust filed a memorandum in opposition to appellants’ motion to strike, arguing that the motion should be denied

because the relief sought, namely striking the amended complaint, was unavailable via a motion to strike under Civ.R. 12(F). Further, the Linda Cook trust contended that appellants failed to establish any entitlement to relief under Civ.R. 60(B).

{¶ 18} While appellants' motion to strike remained pending, on February 10, 2023, appellants filed a timely notice of appeal from the trial court's January 12, 2023 decision granting appellee's motion to reinstate and request for leave to amend the complaint. The trial court has not yet ruled on appellants' motion to strike.

B. Assignments of Error

{¶ 19} On appeal, appellants assign the following errors for our review:

1. The trial court committed reversible error and an abuse of discretion when it permitted the original Plaintiff who had voluntarily dismissed its case – upon the recognition it had no standing to assert the claims presented, to withdraw the Voluntary Dismissal and pursue an amended filing substituting a new party Plaintiff.

2. The trial court committed reversible error and an abuse of discretion when it permitted the original Plaintiff to amend its foreclosure complaint since the Plaintiff had admitted it was without authority or standing to initially file the foreclosure – having assigned the rights to another.

3. The trial court committed reversible error and an abuse of discretion when it permitted a substitution of Plaintiff once a properly filed counterclaim was pending against the original party Plaintiff.

II. Analysis

{¶ 20} In appellants' assignments of error, they argue that the trial court erred in reinstating appellee's claims and permitting appellee to amend his complaint to name a new plaintiff in place of the Wayne M. Cook Living Trust. Before considering the merits of appellants' arguments, we must first address an argument raised by appellee in his brief, wherein he contends that the trial court's January 12, 2023 decision was not a final appealable order and thus this court lacks jurisdiction to entertain this appeal.

{¶ 21} Under Section 3(B)(2), Article IV of the Ohio Constitution, appellate jurisdiction is limited to review of lower court's final judgments. To be a final, appealable order, a judgment entry must meet the requirements of R.C. 2505.02 and, if applicable, Civ.R. 54(B). *Chef Italiano Corp. v. Kent State Univ.*, 44 Ohio St.3d 86, 88, 541 N.E.2d 64 (1989). R.C. 2505.02(B) identified those orders that are reviewable on appeal. R.C. 2505.02(B)(1) and (3) are the only subsections that are arguably applicable in this case. They provide, in relevant part:

(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:

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

* * *

(3) An order that vacates or sets aside a judgment or grants a new trial.

{¶ 22} As to R.C. 2505.02(B)(1), the trial court’s reinstatement of appellee’s claims and amendment of the complaint does not determine the action and prevent a judgment. “‘For an order to determine the action and prevent a judgment for the party appealing, it must dispose of the whole merits of the cause or some separate and distinct branch thereof and leave nothing for the determination of the court.’” *State ex rel. Sands v. Culotta*, 165 Ohio St.3d 172, 2021-Ohio-1137, 176 N.E.3d 735, ¶ 8, quoting *Hamilton Cty. Bd. of Mental Retardation & Dev. Disabilities v. Professionals Guild of Ohio*, 46 Ohio St.3d 147, 153, 545 N.E.2d 1260 (1989).

{¶ 23} Here, the trial court’s decision merely facilitates further proceedings in this action and allows the parties to proceed toward an eventual judgment on the claims raised in the complaint and the counterclaims raised by appellants in their answer. The trial court’s decision does not prevent appellants from further litigating their counterclaims against appellee.

{¶ 24} “Under Ohio law, a proper and validly asserted counterclaim is not extinguished by a plaintiff’s voluntary dismissal of its claims when the court has jurisdiction to proceed on the counterclaim.” *Woods v. Progressive Direct Ins. Co.*,

2016-Ohio-8530, 79 N.E.3d 1248, ¶ 7 (6th Dist.), citing *CitiMortgage, Inc. v. Slack*, 8th Dist. Cuyahoga No. 94899, 2011-Ohio-613, ¶ 12. In such circumstances, the trial court “retains jurisdiction over the properly asserted counterclaim which the defendant may then pursue in that court.” *Abbyshire Const. Co. v. Ohio Civil Rights Comm.*, 39 Ohio App.2d 125, 129, 316 N.E.2d 893 (8th Dist.1974).

{¶ 25} Once appellants filed their counterclaims as part of their answer to appellee’s original complaint, appellee became a counterclaim defendant in this action. Appellants’ counterclaims have not yet been adjudicated, and thus remain pending before the trial court notwithstanding appellee’s voluntary dismissal of the original complaint and the trial court’s reinstatement of the action and acceptance of an amended complaint with a substituted plaintiff.

{¶ 26} Simply put, appellee’s dismissal of *his* claims under Civ.R. 41(A) did not extinguish appellants’ counterclaims against him. Thus, the trial court’s January 12, 2023 order did not determine the action and prevent a judgment in appellants’ favor on their counterclaims. Consequently, the trial court’s order was not final and appealable under R.C. 2505.02(B)(1). *See First Benefits Agency, Inc. v. Tri-County Bldg. Trades Welfare Fund*, 131 Ohio App.3d 29, 721 N.E.2d 479 (9th Dist.1998) (holding that a ruling on a motion to reinstate a pending case to the active docket following a bankruptcy stay was not a final appealable order because it did not determine the action or prevent a judgment).

{¶ 27} We note that appellants did not attempt to prevent appellee's voluntary dismissal of the claims brought under the original complaint. Indeed, appellants tacitly approved of the voluntary dismissal when they withdrew their motion to dismiss and acknowledged that appellee's voluntary dismissal rendered their motion moot. Had appellants wished to oppose the voluntary dismissal, they could have filed a motion to strike. *See Kuebler v. Kuebler*, 12th Dist. Fayette No. CA84-11-013, 1985 WL 8174 (Feb. 19, 1985) (affirming trial court's grant of defendant's motion to strike the plaintiff's voluntary dismissal under Civ.R. 41(A)). This would have permitted the trial court to consider whether dismissal was appropriate in light of appellants' counterclaims and, if the motion to strike was denied, would have generated a final order subject to appellate review. *Rohloff v. FedEx Ground*, 6th Dist. Lucas No. L-07-1182, 2007-Ohio-6530, ¶ 9-10 (concluding that an appeal from the trial court's denial of defendant's motion to strike a voluntary dismissal is a final appealable order). As it stands, however, appellee's voluntary dismissal went unchallenged.

{¶ 28} Next, we will examine the trial court's order in light of R.C. 2505.02(B)(3), which permits appellate review of an order that vacates or sets aside a judgment. As indicated in our recitation of the facts, appellee failed to identify a legal basis for the request to reinstate the previously dismissed complaint. For purposes of evaluating finality under R.C. 2505.02(B)(3), we will construe appellee's motion to reinstate as a motion for relief from judgment under Civ.R. 60(B). *See Servpro of Hancock County v.*

Gilbert, 9th Dist. Summit No. 22442, 2005-Ohio-4089, ¶ 10, citing *Anthony v. Wolfram*, 9th Dist. Lorain No. 98CA007129, 1999 WL 771601 (Sep. 29, 1999) (“although unconventionally captioned, this Court construes appellant’s July 27, 2004 request to reinstate the case to the trial court’s docket as a motion for relief from judgment pursuant to Civ.R. 60(B)”).

{¶ 29} Whether the trial court’s grant of appellee’s Civ.R. 60(B) motion is a final appealable order depends on whether the order from which appellee sought relief was a final appealable order. “A judgment granting or denying a motion to vacate an earlier judgment that was not a final order is likewise not a final order.” *JPMorgan Chase Bank v. Hudson*, 11th Dist. Ashtabula No. 2016-A-0049, 2017-Ohio-337, ¶ 18, citing *Lee v. Joseph Horne Co., Inc.*, 99 Ohio App.3d 319, 323, 650 N.E.2d 530 (8th Dist. 1995). Thus, to determine whether the trial court’s decision granting appellee’s motion to reinstate was final, we must examine whether the voluntary dismissal from which appellee sought relief was a final order. Clearly it was not.

{¶ 30} In general, a plaintiff’s voluntary dismissal of all claims against the defendant, without prejudice, does not create a final appealable order. Since a case that has been voluntarily dismissed is treated as though it had never been filed, “a voluntary dismissal pursuant to Civ.R. 41(A) does not adjudicate the merits of a claim, does not produce a prevailing party, and does not end in a final appealable order.” *Merino v. Salem Hunting Club*, 7th Dist. Columbiana No. 11 CO 2, 2012-Ohio-4553, ¶ 11, citing

Champion Mall Corp. v. Bilbo Freight Lines, Inc., 81 Ohio App.3d 611, 615, 611 N.E.2d 969 (11th Dist.1992); *see also Guernsey County Community Development Corp. v. Speedy*, 5th Dist. Guernsey No. 22-CA-18, 2023-Ohio-1026, ¶ 3 (“Because the voluntary dismissals at issue here are without prejudice, there is no final appealable order.”).

{¶ 31} The underlying order from which appellee sought relief was the voluntary dismissal of appellee’s claims against appellants. Since that dismissal was without prejudice, it was not a final order. By extension, the trial court’s decision granting relief from the voluntary dismissal and reinstating the action was likewise not a final appealable order under R.C. 2505.02(B)(3). *McKinzie v. Fry*, 6th Dist. Lucas No. L-21-1188, 2022-Ohio-2292, ¶ 16, citing *Anderson v. Schar*, 9th Dist. Wayne No. 97CA0004, 1997 WL 823970, *1 (Dec. 31, 1997) (“An order granting a Civ.R. 60(B) motion to set aside judgment is a final, appealable order so long as the underlying judgment was final.”).

{¶ 32} For the foregoing reasons, we find that the trial court’s January 12, 2023 order reinstating appellee’s claims and permitting amendment of the complaint is not a final appealable order. Consequently, we lack jurisdiction over this action and this appeal must be dismissed.

{¶ 33} We stress that our jurisdictional determination should be not be confused as an approval of the trial court’s handling of this case. Appellants argue that the trial court erroneously permitted appellee to reinstate its voluntarily dismissed claims and

compounded the error by accepting an amended complaint filed by appellee on behalf of the Linda Cook Trust when appellee acknowledged a lack of standing to bring the action in the first instance. Appellants may well be correct in their assertion that the trial court erred in permitting this course of action. However, we do not reach the merits of appellants' arguments because, again, we lack jurisdiction to do so since there is not a final appealable order for us to review.¹

III. Conclusion

{¶ 34} In light of our determination that the order from which appellants appeal is not a final appealable order, we find that we lack jurisdiction to review the order, and this appeal is hereby dismissed. Appellants are ordered to pay the costs of this appeal pursuant to App.R. 24.

Appeal dismissed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See also 6th Dist.Loc.App.R. 4.

¹ The authority relied upon by the concurrence sets forth the general principle that an appellate court has no jurisdiction to entertain an appeal from a legal nullity. While we do not dispute this basic principle, which oftentimes arises when an appellant wishes to appeal a trial court's denial of a motion for reconsideration, this case does not present the issue of whether, in fact, the trial court's reinstatement of appellee's action following a voluntary dismissal was a legal nullity. That issue was not raised and is not before us in light of our determination, on other bases, that there is no final appealable order for us to review.

Thomas J. Osowik, J.

JUDGE

Gene A. Zmuda, J.
CONCUR.

JUDGE

Christine E. Mayle, J.
CONCUR AND WRITES
SEPARATELY.

JUDGE

MAYLE, J.

{¶ 35} I concur in the majority’s decision to dismiss this case for lack of jurisdiction. But I would find that we lack jurisdiction to consider this appeal because the trial court’s January 12, 2023 order granting appellee’s “Motion to Reinstate Claims and For Leave to Amend Plaintiff’s Complaint” is a legal nullity.

{¶ 36} “Succinctly stated, the Rules of Civil Procedure specifically limit relief from judgments to motions expressly provided for within the same Rules.” *Pitts v. Ohio Dept. of Transp.*, 67 Ohio St.2d 378, 380, 423 N.E.2d 1105 (1981). That is, the rules provide for relief through Civ. R. 50(B) (motion notwithstanding the verdict), Civ. R. 59 (motion for a new trial) and Civ. R. 60(B) (motion for relief from judgment). *Id.* For that reason, a post-judgment motion “[w]ithout a specific prescription in the Civil Rules * * * must be considered a nullity.” *Id.* (finding that a motion for reconsideration is a legal

nullity). And, as this court has recognized, any order that a trial court issues on such a motion “is likewise a nullity” and “an appellate court cannot consider an appeal from a nullity.” *Johnson v. Geico Homeside, Inc.*, 6th Dist. Ottawa No. OT-17-003, 2017-Ohio-7273, ¶ 8 (dismissing appeal for lack of jurisdiction because the trial court’s order on a motion for reconsideration is a legal nullity); *State v. Beaudry*, 6th Dist. Lucas No. L-01-1288, 2001 WL 1346113 (Nov. 2, 2001) (dismissing appeal because the trial court’s judgment was “a nullity” and “a party cannot appeal from such a judgment.”)

{¶ 37} Accordingly, I would find that appellee’s post-dismissal motion was a legal nullity under *Pitts*, the trial court’s order granting that motion was “likewise a nullity,” and this appeal should be dismissed for lack of jurisdiction because “an appellate court cannot consider an appeal from a nullity.” *Johnson* at ¶ 8.

<p>This decision is subject to further editing by the Supreme Court of Ohio’s Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court’s web site at: http://www.supremecourt.ohio.gov/ROD/docs/.</p>
