

IN THE COURT OF APPEALS OF OHIO
SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

Joseph A. Green

Court of Appeals No. 21 MA 00118

Appellant

Trial Court No. 20 CV 1359

v.

Nicholas Bell, et al.

DECISION AND JUDGMENT

Appellees

July 27, 2023

* * * * *

Kevin Daley, for appellant.

James E. Lanzo, for appellee.

* * * * *

DUHART, J.

{¶ 1} Appellant, Joseph Green, appeals from the judgment entered by the Mahoning County Court of Common Pleas, granting appellee Nicholas Bell’s motion to dismiss for failure of Green to timely perfect service on Bell in accordance with the Ohio Civil Rules. For the reasons that follow, this appeal is dismissed for lack of a final appealable order.

Statement of the Case and Relevant Facts

{¶ 2} Green filed his complaint against Bell and a second defendant, Einstein Home Inspection, LLC (“Einstein”), on August 19, 2020. On August 24, 2020, a summons and complaint were issued via certified mail to each defendant. The service to Bell was sent to 19 Centennial Drive, Poland, Ohio, and the service to Einstein was sent to a separate residential address, in Boardman, Ohio.

{¶ 3} The service on Einstein was successful, but the service on Bell was not. Service on Bell was attempted a second time -- this time, by regular mail sent to the same Centennial Drive address -- on December 14, 2020. On or about January 12, 2021, that, too, came back as failure of service with the following notation: “Return to sender, not deliverable as addressed, does not live here.” No further attempts at service were ever made.

{¶ 4} On May 19, 2021, a mediation conference took place, during which Bell appeared with counsel and participated in the mediation.

{¶ 5} On May 28, 2021, counsel for Green sent an email to Bell’s counsel asking whether Bell’s counsel was accepting service on behalf of his client or, alternatively, that he provide a current address for his client. Green alleges that Bell’s counsel “provided an oral response that he would accept service on behalf of his client.”

{¶ 6} On June 2, 2021, counsel for Bell filed a notice of appearance, an answer asserting the defense of failure of service of process, and a counterclaim.

{¶ 7} On September 13, 2021, Bell filed a motion to dismiss for lack of service, wherein he alleged that he had not resided at the Centennial Drive address since September 3, 2019, nearly a year prior to the filing of the current action.

{¶ 8} On November 29, 2021, the trial court dismissed the case against Bell for failure of service, concluding simply, “Defendant Nicholas Bell’s Motion to Dismiss is hereby sustained.” Although defendant Einstein never contested service and never moved for dismissal on any grounds, the clerk’s record shows that the entire case was marked “closed.”

Assignments of Error

{¶ 9} Green asserts the following assignments of error on appeal:

- I. Is Dismissal proper for lack of service when a party has appeared, filed an Answer and counterclaim, and has agreed to accept service?
- II. Is Dismissal proper on a party who has not moved for dismissal, has been Properly served, and against whom claims for relief are asserted?

Analysis

{¶ 10} Green alleges in his first assignment of error that dismissal against Bell was improper where: (1) Bell “availed himself to this action through his participation in the mediation conference and the filing of an answer and counterclaim;” and (2) defense counsel “orally stipulated to accepting service” on behalf of his client. Green argues in his second assignment of error that the trial court improvidently dismissed the case against defendant Einstein when it dismissed the case against Bell.

{¶ 11} We find that the trial court’s judgment is not yet final and appealable with respect to either of the issues raised in Green’s two assignments of error. The law is well-established that “[t]his court has jurisdiction to hear appeals only from final orders.” *Kinzel v. Ebner*, 2020-Ohio-4165, 157 N.E.3d 898, ¶ 90 (6th Dist.), citing Ohio Constitution, Article IV, Section 3(B)(2). “Whether an order is final and appealable is a jurisdictional question that this court can – and must – raise sua sponte. *Kinzel* at ¶ 90, citing *Turner & Son Funeral Home v. Hillsboro*, 2015-Ohio-1138, 28 N.E.3d 1279, ¶ 8 (4th Dist.).

{¶ 12} In Ohio, “[a]n order which adjudicates one or more but fewer than all the claims or the rights and liabilities of fewer than all of the parties must meet the requirements of R.C. 2505.02 and Civ.R. 54(B) in order to be final and appealable.” *Kinzel* at ¶ 91, quoting *Noble v. Colwell*, 44 Ohio St.3d 92, 540 N.E.2d 1381 (1989), syllabus. R.C. 2505.02(B) provides that 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;
- (2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

* * *

{¶ 13} Under Civ.R. 54(B), “[w]hen more than one claim for relief is presented in an action whether as a claim, counterclaim, cross-claim, or third-party claim, and whether

arising out of the same or separate transactions, or when multiple parties are involved, the court may enter final judgment as to one or more but fewer than all of the claims or parties *only upon an express determination that there is no just reason for delay. * * *.*” (Emphasis added.); *see also Kinzel* at ¶ 92.

{¶ 14} In the instant case, the trial court’s dismissal order dealt only with Bell’s motion to dismiss and had nothing to do with defendant Einstein. Because there is no order dismissing defendant Einstein, we are without jurisdiction to consider Green’s second assignment of error challenging dismissal of that defendant. *See* R.C. 2505.02. Because the dismissal order, pertaining only to Bell, failed to contain an express determination that there is no just reason for delay, it was neither final nor appealable. As a result, we are also without jurisdiction to consider Green’s first assignment of error. *See* Civ.R. 54(B).

Conclusion

{¶ 15} For the foregoing reasons, the matter is dismissed for lack of jurisdiction. Appellant is ordered to pay the costs of 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.

Christine E. Mayle, J.

JUDGE

Gene A. Zmuda, J.

JUDGE

Myron C. Duhart, P.J.
CONCUR.

JUDGE

Judges Christine E. Mayle, Gene A. Zmuda, and Myron C. Duhart, Sixth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio

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