Amdo Development Co., Inc., and Doris B. Clement v. Woolpert Consultants and the Provident Bank, 012993 OHCA1, C-910951

AMDO DEVELOPMENT COMPANY, INC., and DORIS B. CLEMENT, Plaintiffs-Appellants

v.

WOOLPERT CONSULTANTS and THE PROVIDENT BANK, Defendants-Appellees

No. C-910951.

93-LW-0008 (1st)

Court of Appeals of Ohio, First District, Hamilton

January 29, 1993

TRIAL NO. A-9006072.

Civil Appeal From Hamilton County Court of Common Pleas.

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DECISION

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original papers from the Hamilton County Court of Common Pleas, the transcripts of the proceedings, and the briefs and arguments of counsel. We have sua sponte removed this appeal from the accelerated calendar.

Plaintiffs-appellants, AMDO Development Company and Doris B. Clement, appeal from an order granting summary judgment in favor of defendant-appellee Provident Bank ("Provident"). In her first assignment of error, Clement challenges the use of summary judgment to resolve two claims for relief: (1) her claim that Provident had a duty to install sewer lines on certain residential lots; and (2) Provident's counterclaim that she must pay the costs of a street extension near those tracts. On both claims, appellant contends that genuine issues of material fact existed at the time of judgment. In the second assignment of error, Clement challenges the attorney's fees awarded to Provident by the trial court. For the reasons that follow, we affirm the trial court's judgment in part and dismiss the appeal in part.

Summary judgment is proper if the nonmoving party has failed to produce evidence on each element of that person's claim. *Celotex Corp.* v. *Catrett* (1985), 477 U.S. 317, 324, 106 S. Ct. 2548, 2554. If the moving party can show that there is no genuine issue of a material fact, the trial court may properly grant summary judgment. *Mitseff* v. *Wheeler* (1988), 38 Ohio St. 3d 112, 114, 526 N.E.2d 798, 801. If, however, the nonmoving party has presented evidence on each element of its claim, genuine issues of material fact remain, and the court cannot grant summary judgment. Civ. R. 56(E); *Mitseff, supra* at 115, 526 N.E.2d at 801.

On July 7, 1989, Robert Campbell, a North Avondale pastor and part-time real-estate developer, entered into a contract with Provident. That contract provided that, until December 1989, Campbell had the option to buy from Provident several residential lots in Colerain Township. If Campbell exercised the option, the terms of the contract provided that: the price would be $10,000; the lots would be purchased "as is"; and Campbell would complete street improvements as required by Colerain Township and Hamilton County. (T.d. 23, Exh. A.)

Shortly thereafter, on August 3, 1989, Campbell entered into a separate agreement with Clement, in which she would pay him $12,000 when she purchased those same lots. (T.d. 23, Exh B.) Campbell did not, however, mention the Provident-Campbell option to Clement because, as he testified, he wanted to conceal the 120 percent premium she was paying for the lots. (T.d. 22, at 19.) On August 8, 1989, Clement purchased the lots for $10,000 from Provident at which time she also paid Campbell $12,000 for a total purchase price of $22,000. (T.d 22, at 16-18.) At the closing, Clement received the deed to the lots from Provident. In challenging the trial court's judgment on the sewer-line, street-extension, and attorney-fee disputes that rose from these transactions, Clement now brings two assignments of error.

In her first assignment of error, Clement claims that the trial court erred by granting summary judgment on the liability issues concerning the sewer lines and the improvements to Cranfield Drive. In the first branch of Clement's claim regarding the sewers, she maintains that Provident induced her to buy the lots by representing that lateral sewer lines would be built to service newly constructed residences. The record contains no evidence to demonstrate her assertion. Therefore, Clement's first branch of the argument fails.

Clement's second branch of the argument contends that, because she had to install the lateral sewer lines, Provident breached its warranty to convey the lots free of encumbrances. This argument, however, misconstrues the meaning of the term "encumbrance." An encumbrance is a lien, assessment, or levy that a second owner inherits from a prior owner. See, *e.g., Andrews Espy Realty Co.* v. *Burton-Rodgers* (1952), 94 Ohio App. 417, 420-21, 116 N.E.2d 14, 15-16. For instance, a property owner may surreptitiously tap into a municipal sewer line to obtain its use without paying assessments on the land. *Id.* at 419, 116 N.E.2d at 15. When a new owner subsequently seeks to receive legal sewer service, and the municipality orders that person to pay the prior owner's newly discovered debt, the unpaid assessment is an encumbrance on the property. *Id.* at 422, 116 N.E.2d at 16-17.

Here, by contrast, Clement herself created a debt by constructing the lateral sewer lines. Accordingly, there was no encumbrance on the land. Consequently, the portion of the first assignment of error dealing with Clement's sewer-line claim fails, and, to that extent, the trial court's summary judgment is appropriate.

Concerning the portion of the first assignment of error relating to Provident's counterclaim, this court does not have jurisdiction to hear the appeal. In multiple-claim actions between single parties, the court must engage in a two-step analysis to determine if the claim or counterclaim is appropriate for appellate review: (1) the order must be final when examined under the requirements of R.C. 2505.02; (2) the order must contain Civ. R. 54(B) language,"there is no just reason for delay."[1] *Chef Italiano Corp.* v. *Kent State Univ.* (1989), 44 Ohio St. 3d 86, 541 N.E.2d 64, syllabus; *General Acc. Ins. Co.* v. *Ins. Co. of North America* (1989), 44 Ohio St. 3d 17, 540 N.E.2d 266. To satisfy R.C. 2505.02, the order must: (1) affect a substantial right; (2) determine the action; (3) and prevent judgment.[2] If the court resolves the issue of

liability, but not damages, the action is not "determined" within the meaning of R.C. 2505.02. *Noble* v. *Colwell* (1989), 44 Ohio St. 3d 92, 96, 540 N.E.2d 1381, 1384.

In this case, the trial court held a hearing to fix the amount required to finish Cranfield Drive, but never reached a definitive figure. The uncertainty existed because Provident stated at the hearing, "(W)e won't know exactly what the costs are" and it might be necessary to "come back with another punch list" to add further expenses. (T.p., Dec. 13, 1991, at 20.) Because expenses could not be ascertained, the trial court ordered Clement to pay "any and all costs" to Provident to finish Cranfield Drive.[3] (T.d. 41.)

Therefore, this open-ended order, even with its incantation of the Civ. R. 54(B) language, does not meet the requirements of R.C. 2505.02 and is not appealable.[4] *Noble, supra* at 94, 540 N.E.2d at 1383. That portion of the first assignment of error that deals with Provident's counterclaim cannot be reviewed.

In Clement's second assignment of error, she claims that the trial court wrongfully awarded attorney's fees to Provident. When a party has multiple claims against another and one or more remain outstanding, the action is not determined, and an order of the trial court is not final and appealable. See, generally, R.C. 2505.02; *Chef Italiano, supra* at 88-89, 541 N.E.2d at 67-68. Here, because Provident still has a claim outstanding against Clement-*i.e.*, the unresolved counterclaim-the action is not determined.[5] Consequently, the order to pay attorney's fees is not final and appealable, and we do not reach the merits of the second assignment of error.

We affirm the trial court's summary judgment on Clement's claim against Provident and dismiss those parts of the appeal that concern Provident's counterclaim and the award of attorney's fees.

HILDEBRANDT, P.J., UTZ and GORMAN, JJ.

Notes:

[1] Civ. R. 54(B) reads in pertinent part:

+E,#Mxgjphqw#Xsrq#Pxowlsoh#Fodlpv#ru#Lqyroylqj#Pxowlsoh#Sduwlhv1#Zkhq#pruh#wkdq#rqh#fodlp#iru#uholhi#lv#suhvhqwhg#lq#dq#dfwlrq/#
zkhwkhu#dv#d#fodlp/#frxqwhufodlp/#furvv0fodlp#ru#wklug0sduw|#fodlp/#dqg#zkhwkhu#dulvlqj#rxw#ri#wkh#vdph#ru#vhsdudwh#
wudqvdfwlrqv/#ru#zkhq#pxowlsoh#sduwlhv#duh#lqyroyhg/#wkh#frxuw#pd|#hqwhu#ilqdo#mxgjphqw#dv#wr#rqh#ru#pruh#exw#ihzhu#wkdq#doo#ri#
wkh#fodlpv#ru#sduwlhv#rqo|#xsrq#dq#h{suhvv#ghwhuplqdwlrq#wkdw#wkhuh#lv#qr#mxvw#uhdvrq#iru#ghod|1

[2] R.C. 2505.02 reads in pertinent part:

Dq#rughu#wkdw#diihfwv#d#vxevwdqwldo#uljkw#lq#dq#dfwlrq#zklfk#lq#hiihfw#ghwhuplqhv#wkh#dfwlrq#dqg#suhyhqwv#d#mxgjphqw/#dq#rughu#
wkdw#diihfwv#d#vxevwdqwldo#uljkw#pdgh#lq#d#vshfldo#surfhhglqj#ru#xsrq#d#vxppdu|#dssolfdwlrq#lq#dq#dfwlrq#diwhu#mxgjphqw/#ru#dq#
rughu#wkdw#ydfdwhv#ru#vhwv#dvlgh#d#mxgjphqw#ru#judqwv#d#qhz#wuldo#lv#d#ilqdo#rughu#wkdw#pd|#eh#uhylhzhg/#diiluphg/#prglilhg/#ru#
uhyhuvhg/#zlwk#ru#zlwkrxw#uhwuldo1

In this case, only the first of the three types of final appealable orders is applicable. The special proceeding scenario does not apply because there is no substantial right that would be impracticable to review after judgment. See, generally, *Humphry* v. *Riverside Methodist Hosp.*

(1986), 22 Ohio St. 3d 94, 96, 488 N.E.2d 877, 878-79. Additionally, the third scenario does not apply because the court did not vacate or set aside a judgment or grant a new trial.

[3] The parties could argue that, under the rule of liberal construction, the trial court treated this case as a declaratory judgment to construe a contract before or after breach. Civ. R. 1(B); R. C. 2721.04; see, also, *Blackwell* v. *Internatl. Union, United Auto Workers* (1983), 9 Ohio App. 3d 179, 458 N.E.2d 1272 (party seeking injunctive relief before breach of contract is seeking declaratory judgment). In this case, however, Provident's counterclaim sounds in breach of contract. Specifically, Provident seeks a determination of appellant's liability and damages to complete Cranfield Drive. (T.d. 5.) Not only did Provident seek damages, but the trial court further illustrated the breach-of- contract nature of this cause when it held a hearing and attempted to determine the amount of damages. (T.p., Dec. 13, 1991, at 7.)

Even if this had been treated as a declaratory judgment, it probably would have been invalid because Campbell, as a party who would have a claim or interest affected by the declaration, was not joined in the action. R.C. 2721.12; *Gannon* v. *Perk* (1976), 46 Ohio St. 2d 301, 348 N.E.2d 342.

[4] By dismissing Provident's counterclaim and ruling on the merits of Clement's original claim, we necessarily implicate the Civ. R. 54(B) abuse-of-discretion issue raised in *Noble, supra* at 97, 540 N.E.2d at 1385, fn. 7. Certification of a Civ. R. 54(B) claim for appeal may be an abuse of discretion when its facts are intertwined with an unresolved counterclaim. *Id.* (citing *Curtiss-Wright Corp* v. *General Electric Co.* [1980), 446 U.S. 1, 100 S. Ct. 1460). In a close circumstance, the trial court must weigh the contending factors on a case-by-case basis. *Curtiss-Wright, supra* at 12-13, 100 S. Ct. at 1467. Further, the court of appeals will not dismiss the appeal absent an abuse of discretion. *Id.* Here, where certification is reasonable, we do not dismiss the appeal of Clement's claim.

[5] At first glance this holding may seem to conflict with *Beck* v. *Trane Co.* (Dec. 19, 1990), Hamilton App. Nos. C-890610 C-890623, unreported. In *Beck*, however, the plaintiff brought two warranty claims against defendant, and the trial court dismissed one on summary judgment. This court held that it did have jurisdiction to hear the dismissed warranty claim to avoid a duplicative trial. *Id.* (citing *Alexander* v. *Buckeye Pipe Line Co.* [1977], 49 Ohio St. 2d 158, 359 N.E.2d 702).

In this case, there is nothing to be gained by way of judicial economy by considering the collateral issue of attorney's fees when the underlying issue of damages has not been determined for appeal.