

TENTH APPELLATE DISTRICT

Braelinn Green Condominium Unit Owner's Association,	:	
	:	
Plaintiff-Appellee,	:	
	:	
The Cincinnati Insurance Company,	:	No. 09AP-1144
	:	(C.P.C. No. 08CVH-03-3321)
New Party Plaintiff-Appellant,	:	(ACCELERATED CALENDAR)
v.	:	
	:	
Italia Homes, Inc. et al.,	:	
	:	
Defendants-Appellees.	:	
	:	

D E C I S I O N

Rendered on May 27, 2010

Cory D. Thompson, for appellant.

*Roetzel & Andress, LPA, Brian E. Dickerson, and
Jonathan R. Secrest*, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} New party plaintiff-appellant, The Cincinnati Insurance Company ("CIC"), appeals the judgment of the Franklin County Court of Common Pleas dismissing CIC's complaint for a declaratory judgment that it has no duty to defend or indemnify

defendants-appellees, Italia Homes, Inc. ("Italia"), T&R Properties, Inc. ("T&R"), and Today Homes ("Today") (collectively, "defendants"), in this action brought by plaintiff-appellee, Braelinn Green Condominium Unit Owner's Association ("plaintiff").

{¶2} Plaintiff is a unit owners association under R.C. 5311.08, whose members are owners of 72 condominium units and related common areas and facilities of the Braelinn Green Condominiums, developed by Italia and built by T&R, through Today. Defendants built and developed the Braelinn Green condominiums and sold individual units to plaintiff's members. On March 4, 2008, plaintiff filed a complaint against defendants, alleging four claims, captioned as follows: (1) Improper Workmanship and Failure to Use Ordinary Care; (2) Fraudulent Non-Disclosure; (3) Violation of Duties Under R.C. 5311.26; and (4) Breach of Contract.

{¶3} CIC insured defendants under an insurance policy providing Commercial General Liability coverage. On June 10, 2009, CIC moved the trial court for leave to intervene as a new party plaintiff, pursuant to Civ.R. 24(B), and to file a complaint for a declaratory judgment that CIC has no obligation to provide coverage, a defense or indemnity to defendants as a result of the allegations in plaintiff's complaint. The trial court granted CIC's motion to intervene on July 16, 2009, and ordered CIC's complaint for declaratory relief deemed filed as of that date.

{¶4} On August 17, 2009, defendants filed a motion to dismiss CIC's complaint for failure to state a claim upon which relief could be granted, pursuant to Civ.R. 12(B)(6), and CIC opposed the motion. On November 12, 2009, the trial court issued a decision and entry granting defendants' motion to dismiss CIC's complaint. The trial court concluded that plaintiff's allegations of fraudulent non-disclosure and defective

workmanship stated claims within the CIC policy and that, as a result, CIC has a duty to defend on all claims raised by plaintiff's complaint. Although the trial court did not expressly distinguish between an insurer's duty to provide a defense to its insureds and the insurer's duty to indemnify its insureds, the court dismissed CIC's complaint for declaratory relief in its entirety. Although the trial court dismissed CIC's complaint for declaratory relief, plaintiff's claims against defendants remain pending. The trial court's November 12, 2009 decision and entry does not contain an express determination that there is no just reason for delay pursuant to Civ.R. 54(B).

{¶5} CIC filed a notice of appeal from the trial court's dismissal of its complaint for declaratory relief and now raises the following assignments of error:

First Assignment of Error

The trial court erred when it granted the Motion to Dismiss because it is error to dismiss a request for declaratory judgment at the pleadings stage.

Second Assignment of Error

The trial court erred when it explicitly determined that the Fraudulent Concealment claim constituted an "occurrence" under the CIC policy.

Third Assignment of Error

The trial court erred when it explicitly determined that the allegations of faulty workmanship constitute an "occurrence" under the CIC policy.

Fourth Assignment of Error

The trial court erred when it implicitly determined that the allegations of faulty workmanship constitute "property damage" under the CIC policy.

Fifth Assignment of Error

The trial court erred when it implicitly determined that the allegations concerning violations of R.C. 5311.26 constitute "property damage" instead of economic loss.

Sixth Assignment of Error

The trial court erred when it failed to address the applicability of the "damage to property," "your work," "contractual liability" and "your product" exclusions.

{¶6} At oral argument, this court questioned counsel about the existence of a final, appealable order in this matter. The question of whether an order is final and appealable is jurisdictional, and an appellate court may raise the issue sua sponte. *Englert v. Nutritional Sciences, LLC*, 10th Dist. No. 07AP-305, 2007-Ohio-5159, ¶5, citing *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86, 87. Moreover, we must sua sponte dismiss an appeal that is not from a final, appealable order. *Epic Properties v. OSU LaBamba, Inc.*, 10th Dist. No. 07AP-44, 2007-Ohio-5021, ¶10; *In Re Dissolution of Ohio Queen Breeders*, 10th Dist. No. 08AP-373, 2008-Ohio-5113, ¶7.

{¶7} Section 3(B)(2), Article IV of the Ohio Constitution limits this court's jurisdiction to the review of final orders of lower courts. A final order "is one disposing of the whole case or some separate and distinct branch thereof." *Lantsberry v. Tilley Lamp Co.* (1971), 27 Ohio St.2d 303, 306. A trial court's order is final and appealable only if it satisfies the requirements of R.C. 2505.02 and, if applicable, Civ.R. 54(B). *Denham v. New Carlisle*, 86 Ohio St.3d 594, 596, 1999-Ohio-128, citing *Chef Italiano* at 88. R.C. 2505.02(B) sets forth categories of final orders, whereas Civ.R. 54(B) provides as follows:

When 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. In the absence of a determination that there is no just reason for delay, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties, shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

{¶8} When determining whether a judgment or order is final and appealable, an appellate court engages in a two-step analysis. First, we must determine if the order is final within the requirements of R.C. 2505.02. Second, if the order satisfies the requirements of R.C. 2505.02, we must determine whether Civ.R. 54(B) applies and, if so, whether the order contains a certification that there is no just reason for delay. *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.* (1989), 44 Ohio St.3d 17, 21.

{¶9} To constitute a final order, an order must fit into one of the categories in R.C. 2505.02(B). Pursuant to R.C. 2505.02(B)(2), "[a]n order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is * * * [a]n order that affects a substantial right made in a special proceeding." The Supreme Court of Ohio has held that a declaratory judgment action is a special proceeding pursuant to R.C. 2505.02 and that an order entered in a declaratory judgment action that affects a substantial right is a final order under R.C. 2505.02(B)(2). *Gen. Acc. Ins. Co.* at 22. A substantial right is "a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect."

R.C. 2505.02(A)(1). It involves the notion of a right that will be protected by law. *Noble v. Colwell* (1989), 44 Ohio St.3d 92, 94; *Gen. Acc. Ins. Co.* at 21. In *Gen. Acc. Ins. Co.*, at 22, the court concluded that an insurer's duty to defend claims against its insured involves a substantial right to both the insured and the insurer. Thus, the court determined that the trial court's order in that case, declaring that an insurer owed no duty to defend its insured with respect to a third-party's claims against the insured, constituted a final order under R.C. 2505.02(B)(2).

{¶10} The Supreme Court of Ohio continued its analysis in *Gen. Acc. Ins. Co.* by considering the applicability of Civ.R. 54(B). Civ.R. 54(B) was created to strike a balance between "the policy against piecemeal appeals [and] the possible injustice sometimes created by the delay of appeals." *Alexander v. Buckeye Pipe Line Co.* (1977), 49 Ohio St.2d 158, 160. In multiple-claim or multiple-party actions, if the court enters a final judgment as to some, but not all, of the claims and/or parties, the judgment is a final, appealable order only upon the express determination that there is no just reason for delay. *Gen. Acc. Ins. Co.* at 22; Civ.R. 54(B). In *Gen. Acc. Ins. Co.*, where the trial court's ruling declared that an insurance company owed no duty to defend, but left certain other claims unresolved, the Supreme Court concluded that Civ.R. 54(B) applied because the case involved multiple claims and multiple parties. The court determined, however, that the trial court complied with Civ.R. 54(B) by expressly determining that there was no just reason for delay. Accordingly, the Supreme Court held that the trial court's judgment was a final, appealable order.

{¶11} Turning to this case, for the reasons stated in *Gen. Acc. Ins. Co.*, we conclude that the trial court's decision and entry granting defendants' motion to dismiss

CIC's declaratory judgment complaint affected a substantial right in a special proceeding and was, thus, a final order under R.C. 2505.02(B)(2). We must therefore consider whether Civ.R. 54(B) applies and, if so, whether it has been satisfied. Although the trial court dismissed CIC's complaint for declaratory relief in its entirety, plaintiff's underlying tort and contract claims have yet to be addressed or finally adjudicated. Where an order adjudicates fewer than all claims in a case, it must meet the requirements of both R.C. 2505.02 and Civ.R. 54(B) to be final and appealable. *Noble*, syllabus. Thus, like in *Gen. Acc. Ins. Co.*, Civ.R. 54(B) applies here.

{¶12} Although CIC suggested at oral argument that a trial court's decision regarding an insurer's duty to defend and/or indemnify its insured is immediately appealable, even in the absence of Civ.R. 54(B) language, Ohio case law does not support CIC's argument. In support of its argument, CIC cited *Gen. Acc. Ins. Co.*, but that case is easily distinguishable because the trial court order in that case contained an express certification that there was no just reason for delay, thus satisfying Civ.R. 54(B). Furthermore, other Ohio appellate courts have specifically determined that resolution of an insurer's duty to defend and/or indemnify is not final and appealable in the absence of Civ.R. 54(B) language where other claims remain pending. See *Allstate Ins. Co. v. Soto* (Nov. 30, 2000), 8th Dist. No. 78114; *Roberts v. Reyes*, 9th Dist. No. 9CA009576, 2010-Ohio-1086 (no final, appealable order where trial court entered judgment on insurer's declaratory judgment action, but did not rule on underlying tort claims against the insured); *Dickens v. Ogdin* (Nov. 24, 1993), 4th Dist. No. 498 (although declaratory judgment effectively required insurer to defend insured, and thus satisfied R.C. 2505.02, judgment was not immediately appealable in the absence of Civ.R. 54(B) language

where cross-claims and counterclaims remained pending). See also *Morton Internatl., Inc. v. Aetna Cas. & Sur. Co.* (Oct. 2, 1991), 1st Dist. No. C-900283 (entry declaring parties' rights and obligations with respect to the duty-to-defend and duty-to-indemnify issues was a final, appealable order, *upon the trial court's Civ.R. 54(B) certification*).

{¶13} Here, although the trial court's dismissal of CIC's complaint is a final order under R.C. 2505.02(B)(2), other claims remain pending in the trial court. Accordingly, the trial court's order would be immediately appealable only upon compliance with Civ.R. 54(B) by an express determination that there was no just reason for delay. The trial court's entry contains no such determination. In the absence of a determination that there is no just reason for delay, the trial court's entry is not immediately appealable and remains subject to revision by the trial court at any time before the entry of judgment adjudicating all of the claims pending in this action. See Civ.R. 54(B). Because the trial court's judgment did not satisfy the requirements of Civ.R. 54(B), it is not a final, appealable order, and we must, therefore, dismiss this appeal for lack of jurisdiction.

Appeal dismissed.

KLATT and McGRATH, JJ., concur.
