

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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| Ramakant Mandalaywala, | : | |
| Plaintiff-Appellant, | : | |
| v. | : | No. 09AP-696 (C.P.C. No. 96CVH-06-4424) |
| Omnitech Electronics et al., | : | (REGULAR CALENDAR) |
| Defendants-Appellees. | : | |

D E C I S I O N

Rendered on June 15, 2010

Dinsmore & Shohl, LLP, Andrew W. Owen and Martha Van Hoy Asseff, for appellant.

Onda, LaBuhn, Rankin & Boggs Co., LPA, and Patrick H. Boggs, for appellee Bogdan Zaleski.

Vorys Sater Seymour and Pease LLP, Carl D. Smallwood and Susan Barrett Harty, for Receiver, Frederick L. Ransier.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Plaintiff-appellant, Ramakant Mandalaywala, appeals from a decision of the Franklin County Court of Common Pleas that (1) sustained the motion of defendant-appellee, Bogdan Zaleski, to set aside and void the October 3, 1997 transfer of real estate to plaintiff and to allow defendant to recover back rent from September 26, 1996 to the present, and (2) referred the matter to a trial court magistrate to determine

adjustments that should be made regarding salaries, bonuses, and director's fees, as well as issues of back rent and interest. Because the trial court's decision is not a final appealable order, we dismiss for lack of jurisdiction.

I. Procedural History

{¶2} The lengthy procedural history of this matter underpins the issue this appeal presents, so we address it in some detail. Plaintiff and defendant were the sole shareholders and directors of Omnitech Electronics, Inc. ("Omnitech"), an Ohio corporation "engaged in the business of providing biomedical products to universities, pharmaceutical companies, and private research labs." *Mandalaywala v. Zaleski* (1997), 124 Ohio App.3d 321 ("*Mandalaywala I*"). On June 14, 1996, plaintiff filed a complaint seeking to force a judicial dissolution of Omnitech, alleging defendants made unauthorized payments and disbursements from Omnitech and denied plaintiff access to the books, records, accounts, and affairs of Omnitech.

{¶3} In an effort to resolve the dispute, the parties signed a letter of intent in September 1996, agreeing to an auction that a court-appointed receiver would conduct. The September 26, 1996 auction concluded with plaintiff offering the prevailing bid of \$810,000, pursuant to which plaintiff took possession of Omnitech's assets and real estate. A dispute immediately arose between plaintiff and defendant about the terms of the letter of intent and, in particular, the bidding terms and conditions.

{¶4} In *Mandalaywala I*, this court determined the trial court erred in granting plaintiff's motion to confirm the sale without first taking evidence on the meaning of the disputed terms in the parties' letter of intent. The trial court on remand held a two-day evidentiary hearing in which it concluded the parties did not have a meeting of the minds

concerning the terms and conditions of the letter of intent. The court determined defendant understood the auction terms to mean he would have to tender the full amount of the bid to the receiver; plaintiff, by contrast, believed he was required to pay the amount allocated to the corporation assets and only one-half of the bid amount allocated to the real property. The court vacated the sale and ordered the parties to rebid the purchase of Omnitech's business assets and its real estate.

{¶5} Plaintiff responded with a motion for reconsideration, contending Omnitech had been so irretrievably unwound that a rebid was impossible. To rebut plaintiff's contentions, defendant sought the opportunity to conduct discovery concerning the existence, condition, and location of Omnitech's assets. The trial court denied defendant's discovery requests, granted plaintiff's motion for reconsideration, and reconfirmed the sale conducted pursuant to the original auction. In *Mandalaywala v. Omnitech Electronics, Inc.* (Feb. 1, 2001), 10th Dist. No. 00AP-263 ("*Mandalaywala II*"), this court sustained defendant's three assignments of error that asserted the trial court wrongly vacated its decision ordering a rebid, wrongly denied defendant the opportunity to conduct discovery to prove rebid was possible, and wrongly concluded the issues in the case were moot; the case was remanded to the trial court.

{¶6} On remand, defendant attempted to conduct discovery, causing plaintiff to seek a protective order; defendant sought the court's assistance through motions to compel discovery. The trial court on March 1, 2004 denied defendant's several motions to compel discovery and to inspect the post-sale assets plaintiff held under the name AccuScan Instruments, Inc. ("AccuScan"). The trial court also ordered the receiver to

report on the possibility of rebidding the assets as they existed before September 29, 1996.

{¶7} Defendant responded with a motion for relief from the auction; defendant also filed a second motion that objected to allowing the receiver to determine whether a rebid was possible. The trial court on July 24, 2004 denied defendant's motion for relief, concluding defendant provided no support for his assertion that the assets of AccuScan should be included in the rebid. After the receiver on November 12, 2004 filed a report opining that plaintiff and defendant could not possibly be restored to their previous ownership positions, the trial court adopted the receiver's report in its entirety. Defendant appealed, contending the trial court erred in denying him the opportunity for discovery.

{¶8} In *Mandalaywala v. Omnitech Electronics, Inc.*, 10th Dist. No. 05AP-1216, 2006-Ohio-2872 ("*Mandalaywala III*"), we noted *Mandalaywala II* remanded the case for further proceedings, including allowing defendant to conduct discovery, a mandate with which the trial court was required to comply. *Mandalaywala III* further observed that this court "previously had invalidated" the auction and "already determined Zaleski is entitled to a re-bid," the remaining question being on which assets the rebid will be held. *Id.* at ¶10, 17. *Mandalaywala III* ultimately concluded "that the order of the trial court which permitted Zaleski to discovery only on those assets held by Omnitech before the sale was erroneous and contrary to our holding in Zaleski's second appeal, *Mandalaywala II*, supra. By limiting Zaleski's discovery only to those assets that existed until the date of the auction, the trial court failed to follow our previous ruling that Zaleski was entitled to full discovery." *Mandalaywala III* at ¶18.

{¶9} Pursuant to the dictates of *Mandalaywala III*, the parties on remand conducted discovery, presented briefs concerning the appropriate remedy, and per the trial court's entry, submitted hearing transcripts, deposition transcripts, affidavits, and numerous exhibits. To facilitate consideration of the issues, the trial court held a hearing on April 23, 2009 relating to technology issues concerning Omnitech and AccuScan. About the same time, defendant filed a motion to set aside and void the October 3, 1997 transfer; both plaintiff and defendant filed memoranda concerning the motion.

{¶10} The trial court issued a decision on June 30, 2009 that granted defendant's motion and noted a separate entry would be filed in the recorder's office to reflect "that the deed transferring Zaleski's interest in the Real Estate to [Mandalaywala], recorded on October 3, 1997 is voided and that Zaleski is restored as an equal owner of the Real Estate." See Proposed Entry Setting Aside and Voiding the October 3, 1997 Transfer of Real Estate. (R. 502.) The court determined the overwhelming evidence indicated AccuScan was a mere continuation of Omnitech and for several years had almost exclusively used and relied upon Omnitech's technology and products. Without them, the court decided, AccuScan "would probably not have survived."

{¶11} The court's decision ordered "a rebid of AccuScan as a mere continuation of Omnitech." The court, however, noted that "prior to any such rebid, certain adjustments must be made." Noting excessive salaries, bonuses, and directors' fees paid during some of the years in which plaintiff was operating AccuScan, the court ordered a separate hearing before a magistrate of the common pleas court "to determine the amount of back rent, adjusted for inflation, plus interest, that is owed to Zaleski from [Mandalaywala] and AccuScan."

II. Assignments of Error

{¶12} Plaintiff appeals, assigning three errors:

1. The Trial Court abused its discretion by setting aside the real estate transfer and voiding the quitclaim deed between the parties because, twelve years after the Trial Court approved the original transfer, the parties cannot be restored to their pre-transfer *status quo* positions.
2. The Trial Court abused its discretion by setting aside the real estate transfer and voiding the quitclaim deed between the parties where equitable considerations preclude such a result.
3. The Trial Court abused its discretion by setting aside the real estate transfer and voiding the quitclaim deed between the parties because, even if the parties could be restored to their pre-transfer positions, the Trial Court failed to return Mandalaywala to his pre-transfer *status quo* position.

III. Final Appealable Order

{¶13} On August 5, 2009, defendant filed a motion to dismiss and a motion for sanctions, contending plaintiff appealed from an order of the trial court that is not final and appealable. Because this court's jurisdiction depends on plaintiff's appealing from a final appealable order, we first address defendant's motion.

{¶14} Pursuant to Section 3(B)(2), Article IV, Ohio Constitution and R.C. 2505.03, appellate courts have jurisdiction to review only final orders, judgments or decrees. *Browder v. Shea*, 10th Dist. No. 04AP-1217, 2005-Ohio-4782, ¶10. R.C. 2505.02(B), in turn, defines a final order, specifying those orders which may be reviewed, affirmed, modified or reversed on review in a court of appeals. As relevant here, plaintiff contends R.C. 2505.02(B)(1)(2) and (4) support his contention that the order appealed from is final and appealable.

A. R.C. 2505.02(B)(1)

{¶15} An order is final and appealable under R.C. 2505.02(B)(1) if it "affects a substantial right in an action that in effect determines the action and prevents a judgment." Here, the trial court's order meets neither branch of R.C. 2505.02(B)(1). The order did not determine the action. To the contrary, the trial court referred the matter to a magistrate for additional proceedings pursuant to *Mandalaywala III*. " 'A judgment that leaves issues unresolved and contemplates that further action must be taken is not a final appealable order.' " *State ex rel. Keith v. McMonagle*, 103 Ohio St.3d 430, 2004-Ohio-5580, ¶4, quoting *Bell v. Horton*, 142 Ohio App.3d 694, 696, 2001-Ohio-2593.

{¶16} Moreover, the trial court's order does not affect a substantial right. R.C. 2505.02(A)(1) defines substantial right as "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." Thus "[a] substantial right is a legal right that is entitled to enforcement and protection by law." *Browder* at ¶13, citing *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86. Although plaintiff correctly asserts he has a substantial right in the trial court's decision ordering a rebid, the issue here is whether the trial court's order *affects* plaintiff's substantial right. See *Browder* at ¶13. If it does not, the order is not final. *Id.*, citing *Burt v. Harris*, 10th Dist. No. 03AP-194, 2004-Ohio-756, ¶12. "An order affecting a substantial right is 'one which, if not immediately appealable, would foreclose appropriate relief in the future.' " *Id.*, quoting *Bell v. Mt. Sinai Med. Ctr.* (1993), 67 Ohio St.3d 60, 63.

{¶17} The trial court's order does not affect plaintiff's substantial right. Delaying review of the trial court's decision will not deny plaintiff full and complete relief. Indeed, at

this point the trial court's order simply begins to implement the language from this court's decision in *Mandalaywala III*, where we stated we "already determined that Zaleski is entitled to a re-bid. The remaining question is upon which assets the re-bid will be held." *Id.* at ¶17. Once the action is fully determined in the common pleas court, plaintiff will have the right to appeal the entire decision, including the trial court's determination that rebid of the real estate is possible. The effectiveness of an appeal at the conclusion of the case to protect plaintiff's rights is evident in the appeals thus far which, after the trial court determined the issues, fully addressed the substantial rights involved in the parties' ongoing litigation. Plaintiff's appeal is not appealable under R.C. 2505.02(B)(1).

B. R.C. 2505.02(B)(2)

{¶18} R.C. 2505.02(B)(2) defines a final order as one that "affects a substantial right made in a special proceeding." R.C. 2505.02(A)(2) defines a special proceeding as "an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or suit in equity."

{¶19} Even if we assume, without deciding, the trial court's decision was made in a special proceeding, the trial court's order does not affect a substantial right because plaintiff has the opportunity for meaningful review, by way of appeal, after the trial court fully adjudicates all of the parties' rights and issues in the action. As a result, the trial court's order is not appealable pursuant to R.C. 2505.02(B)(2).

C. R.C. 2505.02(B)(4)

{¶20} R.C. 2505.02(B)(4) defines a final order as one "that grants or denies a provisional remedy," provided two conditions also are met. Initially, the order subject of appeal must determine the action with respect to the provisional remedy and prevent a

judgment in favor of the appealing party regarding the provisional remedy. R.C. 2505.02(B)(4)(a). Secondly, an appeal following judgment must not afford a meaningful and effective remedy to the appealing party. R.C. 2505.02(B)(4)(b).

{¶21} R.C. 2505.02(A)(3) defines a provisional remedy as "a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, suppression of evidence," or prima facie showing with respect to specified statutes. Neither plaintiff's original complaint, nor the trial court's application of this court's prior decision is specifically mentioned in R.C. 2505.02(A)(3). Nor are they like any of the other proceedings the legislature listed in R.C. 2505.02(A)(3) as examples of provisional remedies. Rather than being ancillary to plaintiff's complaint, the trial court's decision setting aside the original auction and sale goes to the heart of plaintiff's complaint and the letter of intent the parties entered into in an attempt to resolve the complaint. As a result, the trial court's decision arguably is not made in a proceeding ancillary to plaintiff's complaint.

{¶22} Even if we could conclude a provisional remedy is at issue here, plaintiff could not meet the requirements of R.C. 2505.02(B)(4)(a) and (b) because the trial court's order, as noted, neither determines the action nor deprives plaintiff of a meaningful and effective remedy on appeal following judgment. Accordingly, the trial court's decision does not present a final order under R.C. 2505.02(B)(4).

{¶23} Because plaintiff does not appeal from a final order of the trial court, this court lacks jurisdiction to consider plaintiff's assigned errors. We therefore grant defendant's motion to dismiss plaintiff's appeal for lack of jurisdiction. Because, however,

the issue of a final appealable order in this case is complicated by the litigation history, including the separate letter of intent, we deny defendant's motion for sanctions.

*Motion granted in part and
denied in part; appeal dismissed.*

KLATT and CONNOR, JJ., concur.
