

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

LaSalle Institutional Realty Advisors, LLC	:	
et al.,	:	
	:	
Plaintiffs-Appellants,	:	No. 11AP-402
	:	(C.P.C. No. 11CVH-2-2074)
v.	:	
	:	
Nantucket on Montgomery Road, Ltd.	:	(REGULAR CALENDAR)
et al.,	:	
	:	
Defendants-Appellees.	:	

D E C I S I O N

NUNC PRO TUNC

Rendered on August 16, 2011

Houston Legal Counsel, Inc., LPA, and Michael R. Houston,
for appellants.

Zeiger, Tigges & Little, LLP, Marion H. Little, Jr., and
Matthew S. Zeiger, for appellees.

ON MOTION TO DISMISS

DORRIAN, J.

{¶1} Plaintiffs-appellants, LaSalle Institutional Realty Advisors, LLC ("LaSalle"), Wise Real Estate, Inc. ("Wise"), Realty World-Rewards, Inc. ("World-Rewards"), and Sperry Van Ness Commercial Real Estate Advisors ("Sperry") (collectively "appellants"), appeal from an order of the Franklin County Court of Common Pleas denying the motion of John D. Younesi to appear pro hac vice (the "April 14 order"), and from an order dismissing certain claims in appellants' complaint and excluding certain evidence (the

"March 31 order"). Defendants-appellees, Nantucket on Montgomery Road, Ltd., et al. ("appellees"), filed a motion to dismiss the appeal of the March 31 order for lack of a final appealable order.¹

{¶2} Appellants' complaint asserts seven causes of action against 16 defendants, arising from the sale of two groups of properties referred to as the "Nantucket Properties" and the "Edwards Student Housing Properties." Appellants seek to recover under theories of (1) breach of oral contract, (2) breach of written contract, (3) promissory and equitable estoppel, (4) unjust enrichment, (5) quantum meruit, (6) fraud, and (7) civil conspiracy. Appellees filed a motion to dismiss the complaint or, in the alternative, to compel appellants to comply with Civ.R. 10(D). In that motion, appellees asserted that appellants referred in the complaint to multiple written documents that were not attached in support of the complaint.

{¶3} In the March 31 order, the trial court issued a detailed ruling on appellees' motion to dismiss. In that ruling, the court dismissed in full Sperry's breach of written contract claim. The court also dismissed LaSalle, Wise, and World-Reward's breach of written contract claims against 14 of the 16 named defendants. The court dismissed all claims for breach of written contract other than those based on the documents attached as Exhibits B and D to the complaint. Finally, the court issued an in limine order excluding all written instruments other than those included as Exhibits B and D to the complaint and expressly excluding as not relevant certain documents referenced in the complaint as irrelevant. Appellants appealed the March 31 order, and appellees have moved to dismiss the appeal.

¹ Appellees concede that the April 14 order denying the Younesi pro hac vice motion is appealable pursuant to *Guccione v. Hustler Magazine, Inc.* (1985), 17 Ohio St.3d 88, syllabus.

{¶4} Under Section 3(B)(2), Article IV of the Ohio Constitution, this court's appellate jurisdiction is limited to the review of final orders of lower courts. An order is final and appealable only if it satisfies the requirements of R.C. 2505.02 and, in cases involving multiple claims or multiple parties, Civ.R. 54(B). *Denham v. New Carlisle*, 86 Ohio St.3d 594, 596, 1999-Ohio-128.

{¶5} R.C. 2505.02(B) defines a final order, in relevant part, as follows:

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;

* * *

(4) An order that grants or denies a provisional remedy and to which both of the following apply:

(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

{¶6} Civ.R. 54(B) provides that "[w]hen more than one claim for relief is presented in an action * * * 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."

{¶7} Determining whether an order is final and appealable requires a two-step analysis. First, the reviewing court must determine if the order meets the requirements of

R.C. 2505.02. Second, the court 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. *Huntington Natl. Bank v. Troon Mgt., Ltd.*, 10th Dist. No. 10AP-655, 2011-Ohio-1194, ¶9, citing *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.* (1989), 44 Ohio St.3d 17, 22.

{¶8} With respect to R.C. 2505.02(B)(1), the March 31 order does not determine the action and prevent a judgment. As discussed below, six of the seven claims for relief and portions of the remaining claim (breach of written contract) remain unresolved after the trial court's order. Further, the March 31 order does not affect a substantial right, as defined in R.C. 2505.02(A)(1), because "[a]n order affecting a substantial right is 'one which, if not immediately appealable, would foreclose appropriate relief in the future.' " *Browder v. Shea*, 10th Dist. No. 04AP-1217, 2005-Ohio-4782, ¶13, quoting *Bell v. Mt. Sinai Med. Ctr.* (1993), 67 Ohio St.3d 60, 63. Once the merits of appellants' remaining claims have been addressed and the action is fully determined in the trial court, appellants will have the right to appeal the entire action, including the court's dismissal of certain claims and exclusion of certain evidence. *Huntington Natl. Bank* at ¶11. The trial court's order is not a final order pursuant to R.C. 2505.02(B)(1).

{¶9} With respect to R.C. 2505.02(B)(2), 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 a suit in equity." A breach of contract claim is not a "special proceeding." *Scioto Bay Properties v. Ezell*, 10th Dist. No. 02AP-645, 2002-Ohio-5414, ¶19. See also *Hayes v. White*, 7th Dist. No. 01 CO 00, 2001-Ohio-3467 (holding that breach of contract claims were known at common law prior to 1853, and, therefore, R.C. 2505.02(B)(2) does not apply to such claims). Thus, the March 31

order is not a final order pursuant to R.C. 2505.02(B)(2) because the cause of action is not a special proceeding.

{¶10} With respect to R.C. 2505.02(B)(4), 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, a prima-facie showing pursuant to section 2307.85 or 2307.86 of the Revised Code, a prima-facie showing pursuant to section 2307.92 of the Revised Code, or a finding made pursuant to division (A)(3) of section 2307.93 of the Revised Code." Although the statute provides that "suppression of evidence" is a provisional remedy that may be a final appealable order, the trial court's in limine exclusion of certain evidence under the March 31 order does not constitute a final appealable order. Generally, "[a] trial court's decision to grant a motion in limine is an interlocutory order that is not final and appealable." *Kirkpatrick v. Willows*, 10th Dist. No. 07AP-893, 2008-Ohio-2300, ¶6, citing *Gable v. Gates Mills*, 103 Ohio St.3d 449, 2004-Ohio-5719, ¶35. This is because a motion in limine is a "tentative, interlocutory, precautionary ruling by the trial court reflecting its anticipatory treatment of the evidentiary issue." *State v. Grubb* (1986), 28 Ohio St.3d 199, 201-02. "In virtually all circumstances finality does not attach when the motion is granted." *Id.* at 202. The trial court remains "at liberty '* * * to consider the admissibility of the disputed evidence in its actual context [at trial].'" *Id.*, quoting *State v. White* (1982), 6 Ohio App.3d 1, 4. Moreover, this is not a situation where appellants "would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action." R.C. 2505.02(B)(4)(b). As explained above, once all of appellants' claims are resolved by the

trial court, they will have the opportunity to raise these issues on appeal.

{¶11} In addition to failing to satisfy the requirements of R.C. 2505.02(B), the March 31 order lacks the required language under Civ.R. 54(B) that "there is no just reason for delay." "Unless those words appear where multiple claims and/or multiple parties exist, the order is subject to modification and it cannot be either final or appealable." *Huntington Natl. Bank* at ¶12. This case involves both multiple claims and multiple parties. The March 31 order clearly dismisses some but not all of appellants' claims for relief. Although appellants assert that the trial court dismissed all of the breach of written contract claims, a careful reading of the court's order indicates that it did not dismiss LaSalle, Wise, and World-Reward's breach of written contract claims against Nantucket on Montgomery Road, Ltd., and The Edwards Land Company. Likewise, the trial court did not dismiss appellants' remaining six causes of action against all appellees. Although appellants assert that the March 31 order effectively disposes of all the remaining claims, appellants fail to establish how the in limine order limiting the evidence prevents them from winning a judgment on some or all of these remaining claims. Therefore, the March 31 order is not a final appealable order because it lacks the "no just reason for delay" language required under Civ.R. 54(B).

{¶12} Accordingly, appellees' motion to dismiss the appeal of the trial court's order of March 31, 2011 is granted. However, the appeal of the trial court's order of April 14, 2011 denying the motion of John D. Younesi to appear pro hac vice remains pending.

Motion to dismiss granted in part.

FRENCH and CONNOR, JJ., concur.
