

[Cite as *Snyder v. Swick*, 2009-Ohio-5142.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

REBECCA SNYDER, et al.

Plaintiffs-Appellees

-vs-

ANTHONY SWICK, et al.

Defendants-Appellants

JUDGES:

Hon. Sheila G. Farmer, P. J.

Hon. John W. Wise, J.

Hon. Julie A. Edwards, J.

Case No. 2009 CA 0001

O P I N I O N

CHARACTER OF PROCEEDING:

Civil Appeal from the Court of Common
Pleas, Case No. 2008 CV 03929

JUDGMENT:

Dismissed

DATE OF JUDGMENT ENTRY:

September 28, 2009

APPEARANCES:

For Plaintiffs-Appellees

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Wise, J.

{¶1} Defendant-Appellant Anthony Swick appeals from the December 5, 2008, Judgment Entry of the Stark County Court of Common Pleas, denying his motion to vacate default judgment granted on November 10, 2008, in favor of Plaintiffs-Appellees Rebecca Snyder, et al.

STATEMENT OF THE FACTS AND CASE

{¶2} For purposes of this appeal, the relevant facts are as follows:

{¶3} On September 12, 2008, Plaintiffs-Appellees, Rebecca Snyder and Kyle Snyder, filed a Complaint with the Stark County Court of Common Pleas alleging that Defendant-Appellant Anthony Swick was responsible for Rebecca Snyder's permanent injuries, medical bills and loss of consortium following a severe automobile collision that occurred on September 15, 2006.

{¶4} On September 19, 2008, service of the Summons and Complaint was attempted on Appellant Swick via certified mail, return receipt requested, but it went "unclaimed."

{¶5} On October 15, 2008, a certificate of mailing for service was docketed stating that Appellant Swick was served with the Summons and Complaint by the Clerk of Courts via ordinary mail on October 9, 2008.

{¶6} On November 7, 2008, Appellees Snyder filed their motion for default judgment.

{¶7} On November 10, 2008, the trial court granted Appellees' default judgment motion against Appellant Swick. A damages hearing was set for December 1, 2008.

{¶18} On November 21, 2008, Appellant Swick filed a motion to vacate default judgment.

{¶19} On November 24, 2008, Appellees responded by filing Plaintiffs' Brief in Opposition to Defendant Anthony Swick's Motion to Vacate Default Judgment.

{¶10} On December 5, 2008, the trial court issued its Judgment Entry Denying Defendant's Motion to Vacate Default Judgment. The damages hearing was re-scheduled to January 9, 2009.

{¶11} On December 17, 2008, counsel for Plaintiffs-Appellees filed a motion to continue the damages hearing based on a scheduling conflict.

{¶12} By Order dated December 22, 2008, the trial court continued the damages hearing and re-set same for January 30, 2009.

{¶13} It is from the trial court's December 5, 2008, decision denying his 60(B) Motion to Vacate Default Judgment, that Appellant brings the instant appeal to this Court for further review, raising the following sole assignment of error for review:

ASSIGNMENTS OF ERROR

{¶14} "I. THE TRIAL COURT ERRED IN GRANTING DEFAULT JUDGMENT IN FAVOR OF APPELLEES, REBECCA SNYDER, ET AL., BECAUSE THE DEFAULT JUDGMENT WAS BEFORE THE DUE DATE FOR THE APPELLANT'S ANSWER TO THE COMPLAINT."

I.

{¶15} In his sole assignment of error, Appellant argues the trial court erred in not granting his motion to vacate default judgment.

{¶16} Upon review of the record in this matter, we find that the trial court continued the hearing on damages set in this matter and that damages have yet to be determined.

{¶17} A default judgment which determines the issue of liability but continues the matter for a determination of damages is not a final judgment, *Prather v. American Medical Response, Inc.*, 2002 Ohio 5261 at ¶ 10, citing *Schelich v. Theatre Effects, Inc.* (1996), 111 Ohio App.3d 271, 272-273.

{¶18} Section III, (B)(2), Article IV of the Ohio Constitution limits an appellate court's jurisdiction to the review of final orders or judgments. If an order is not final and appealable, then an appellate court has no jurisdiction to review the matter and it must be dismissed.

{¶19} Likewise, R.C. §2505.03(A) limits the jurisdiction of appellate courts to the review of final, appealable orders, judgments, or decrees. *State ex rel. Bd. of State Teachers Retirement Sys. of Ohio v. Davis*, 113 Ohio St.3d 410, 2007-Ohio-2205, ¶ 44. “ ‘A judgment that leaves issues unresolved and contemplates that further action must be taken is not a final appealable order.’ ” *Id.*, quoting *State ex rel. Keith v. McMonagle*, 103 Ohio St.3d 430, 2004-Ohio-5580, ¶ 4. Thus, a judgment that grants a default judgment as to liability only and leaves the issue of damages undetermined is not a final, appealable order. *Chitwood v. Zurich Am. Ins. Co.*, 10th Dist. No. 04AP-173, 2004-Ohio-6718, ¶ 9; *Lindsey v. Rumpke* (Nov. 16, 2000), 10th Dist. No. 00AP-426.

{¶20} Here, the trial court granted default judgment in its November 10, 2008, judgment entry, but it did not set a damage amount, setting a damages hearing for December 1, 2008. On November 21, 2008, Appellant filed his 60(B) motion to vacate

the default judgment. The trial court, in its December 5, 2008, judgment entry denying Appellant's motion to vacate, rescheduled the damages hearing for January 9, 2009. Then, by Order filed December 22, 2008, the trial court continued the damages hearing to January 30, 2009. To date, no damages hearing has been held in this matter.

{¶21} The trial court's ruling on the default judgment motion in this matter was interlocutory, and not final, because it addressed only the issue of liability; the issue of damages has never been decided with respect to Appellant. See *Pinson v. Triplett* (1983), 9 Ohio App.3d 46 (holding that entry of default judgment on issue of liability alone is not a final appealable order).

{¶22} We therefore find we lack jurisdiction over this matter, and accordingly, the appeal is dismissed.

By: Wise, J.

Farmer, P. J., concurs.

Edwards, J., concurs separately.

/S/ JOHN W. WISE_____

/S/ SHEILA G. FARMER_____

JUDGES

EDWARDS, J., CONCURRING OPINION

{¶23} I concur with the majority's disposition of the case sub judice.

{¶24} However, while the majority holds that there is no final, appealable order in this case because the issue of damages has never been addressed, I would note that appellant is appealing from the denial of his 60(B) Motion to Vacate Default Judgment.

{¶25} Generally, an order that denies a motion to vacate a judgment is final and appealable. *Colley v. Bazell* (1980), 64 Ohio St.2d 243, 416 N.E.2d 605. However, when the underlying order, in this case the order granting default judgment, is itself not a final appealable order, neither is the subsequent judgment denying a motion to vacate it. *Matrka v. Stephens* (1991), 77 Ohio App.3d 518, 602 N.E.2d 1191.

{¶26} In this case, since the entry granting the default judgment is not a final, appealable order, the order denying appellant's motion to vacate the default judgment is likewise not a final, appealable order.

/S/ JULIE A. EDWARDS_____

Judge Julie A. Edwards

JAE/dr/rmn

