

83-LW-1459 (10th)

The Huntington National Bank, Plaintiff-Appellee

v.

Ewing Lumber Company, Inc., Charles W. Ewing and Charlotte Ann Ewing, Defendants-Appellants, (Central Savings and Loan Company, et al., Defendants-Appellees).

No. 82AP-785 (REGULAR CALENDAR).
10th District Court of Appeals of Ohio, Franklin County.
Decided on April 5, 1983.

APPEAL from the Franklin County Common Pleas Court.

MESSRS. PORTER, WRIGHT, MORRIS & ARTHUR, and MR. CHARLES M. COBBE and MR. CRAIG D. BARCLAY, for appellee Huntington National Bank.

MR. JOHN H. LEWIS, for appellants.

OPINION

REILLY, J.

Plaintiff-appellee (hereinafter appellee) filed this action against appellants for replevin and for the recovery of an indebtedness of the corporation as well as individual appellants. Subsequently, an action in foreclosure was added by an amended complaint.

The trial court granted the Fairfield County Sheriff an order to take possession of appellants' inventory. The order did not refer specifically to appellants' indebtedness to appellee following the sale of the inventory, which was replevied, or the claim of foreclosure, and did not contain any determination pursuant to Civ. R. 54(B) that there was "no just cause for delay."

The court scheduled a trial for September 20, 1982. Appellants, on September 13, 1982, moved, pursuant to Civ. R. 60(B), to vacate the prior order and continue the trial. Appellants also moved to dismiss the case or limit appellee's claim for reasons which were not related to the replevin order. The trial court overruled both motions and included a statement that there was "no just cause for delay."

Appellants advance two assignments of error:

"I. The trial court erred by refusing to grant defendants-appellants' motion to vacate its order of replevin.

"II. The trial court erred by refusing to grant defendants-appellants' motion to dismiss or in the alternative to limit plaintiff-appellee's action to ten percent of its claim."

Appellee has filed a motion to dismiss this appeal and appellants have responded by a memorandum contra. At any rate, Mories v. Hendy (1965), 1 Ohio App. 2d 349, 354 states the following:

"* * * Under Section 2505.02, Revised Code, an order to be final must affect a substantial right and have the effect of determining the action and preventing final judgment. Humphrys v. Putnam (1961), 172 Ohio St. 456, 457. In Judge Hart's words in Hoffman v. Knollman, 135 Ohio St. 170, at 184:

"* * * There must be a dismissal of the action or some judgment in the broadest sense, determining the ultimate rights of the parties. * * *"

Further, Ryan v. The Kroger Grocery & Baking Co. (1937), 56 Ohio App. 469, 476-477, reads as follows:

"The distinction between an interlocutory order, from which no appeal may be taken, and a judgment or final order, from which an appeal may be taken, is clearly stated in 2 American Jurisprudence, 860 et seq. At page 862, it is said:

"In other words, a final judgment is one which operates to divest some right in such a manner as to put it beyond the power of the court making the order to place the parties in their original condition after the expiration of the term; that is, it must put the case out of court, and must be final in all matters within the pleadings."

The denial of a motion to dismiss does not determine the primary action or prevent a judgment. The trial court, herein, has not placed the case beyond its power to determine the merits. The court's ruling merely preserved the remaining issues for trial. The same is true of the trial court's refusal to limit appellee's action to ten percent of the claim and to continue the trial. Thus, the denial of appellants' motion does not constitute a final appealable order. Therefore, the appeal therefrom must be dismissed, which, in effect, disposes of appellants' second assignment of error.

As to appellants' first motion, filed September 13, 1982, although the court's order contains the Civ. R. 54(B) language, presumably pursuant to Civ. R. 60(B), that part of the court's order affecting appellants' first motion is appealable because of the additional consideration that the order affects a substantial right in a special proceedings; as it involves a pre-judgment replevin which allegedly related to the seizure of property unconstitutionally, which is an alleged due process right violation. The issues, however, involving the replevin order are moot because it was executed as a result of the sale of the seized property. The only remaining issue is the amount of credit to be given, due to the replevin sale, which has yet to be decided by the trial court. Furthermore, any question of damages for an alleged unconstitutional replevin is a separate matter which can also still be decided by the trial court.

Therefore, the appeal from that portion of the trial court's order disposing of the September 13, 1982 motion must be dismissed as being moot, which also disposes of appellants' first assignment of error.

For the foregoing reasons, the appeal is dismissed.

Appeal dismissed.

WHITESIDE, P.J., and MOYER, J., concur.