

IN THE SUPREME COURT OF OHIO

TIMOTHY MYNES, <i>et al.</i> ,)	Case No. : 09-0054
)	
Appellees,)	Certified Conflict from the
)	Scioto County Court of Appeals,
v.)	Fourth Appellate District
)	
JDG HOME INSPECTIONS, INC. d/b/a)	Court of Appeals
THE HOMETEAM INSPECTION)	Case No. 07CA3185
SERVICE, <i>et al.</i> ,)	
)	Scioto County Court of Common Pleas,
Appellants.)	Case No. 06-CIH-138

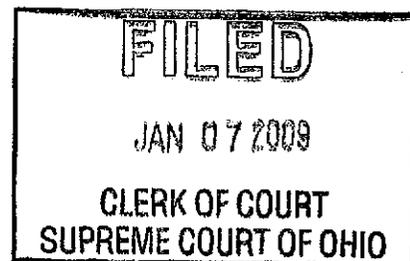
NOTICE OF CERTIFIED CONFLICT OF APPELLANT
JDG HOME INSPECTION, INC. d/b/a THE HOMETEAM INSPECTION SERVICE
AND TIM GAMBILL

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**Notice of Certified Conflict of Appellants JDG Home Inspections, Inc. d/b/a
The HomeTeam Inspection Service and Tim Gambill**

Pursuant to Ohio Supreme Court Rule of Practice IV, Appellants, JDG Home Inspections, Inc. d/b/a The HomeTeam Inspection Service and Tim Gambill, hereby give notice of a certified conflict to the Supreme Court of Ohio from the Scioto County Court of Appeals, Fourth Appellate District, entered in Court of Appeals No. 07CA3185 on December 12, 2008 (copy attached as Exhibit A). This judgment certified (copy attached as Exhibit B) is in conflict with the Court of Appeals for the Sixth and Eleventh District in *Stewart v. Searson Lehman Brothers, Inc.* (1992), 71 Ohio App.3d 305 and *Barnes v. Andover Village Retirement Community, Ltd.*, Ashtabula App. No. 2006-A-0039, respectively (copies attached as Exhibits C and D, respectfully).

Respectfully submitted,

Scott L. Braum, Counsel of Record

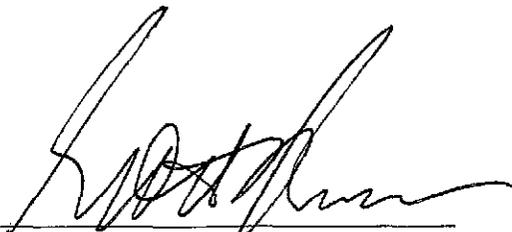


Scott L. Braum (0070733)

COUNSEL FOR APPELLANTS,
JDG Home Inspections, Inc. d/b/a The HomeTeam
Inspection Service and Tim Gambill

CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Certified Conflict was sent by ordinary U.S. mail to counsel for Appellees, Kristin E. Rosan, 1031 East Broad Street, Columbus, Ohio 43205 on January 6, 2009.

A handwritten signature in black ink, appearing to read 'Scott L. Braum', written over a horizontal line.

Scott L. Braum (0070733)

COUNSEL FOR APPELLANTS,
JDG Home Inspections, Inc. d/b/a The HomeTeam
Inspection Service and Tim Gambill

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

2009 DEC 12 PM 12:40

John D. ...
CLERK OF COURTS

TIMOTHY MYNES, et al.

Plaintiffs-Appellees,

v.

OTIS BROOKS, et al.,

Defendants-Appellants.

Case No. 07CA3185

ENTRY GRANTING MOTION
TO CERTIFY RECORD

Defendants-Appellants, JDG Home Inspections, Inc., d/b/a The HomeTeam Inspection Service and Tim Gambill (hereinafter collectively referred to as "the JDG defendants") move this court to certify the record of this case to the Supreme Court of Ohio for review and determination. They contend that our decision and judgment entry in *Mynes v. Brooks*, Scioto App. No. 07CA3185, 2008-Ohio-5613, conflicts with *Barnes v. Andover Village Retirement Community, Ltd.*, Ashtabula App. No. 2006-A-0039, 2007-Ohio-4112, *Complete Personnel Logistics, Inc. v. Patton*, Cuyahoga App. No. 86857, 2006-Ohio-3356, *Stewart v. Shearson Lehman Brothers, Inc.* (1992), 71 Ohio App.3d 305 and *Bakula v. Schumacher Homes Inc.*, Geauga App. No. 2000-G-2272.

The JDG defendants request that we certify the following question as a conflict between the judgments: "whether Civ.R. 54(B) language is required before an order pursuant to O.R.C. 2711.02 becomes final and appealable when an action involves multiple parties and claims which remain pending against other parties to the suit."

I.

Initially, we must set forth our standard for reviewing a motion to certify the record. Article IV, Section 3(B)(4) of the Ohio Constitution provides: "Whenever the

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judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination." The court in *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St.3d 594, 596 interpreted this provision to require at least three conditions to exist before and during certification: (1) the certifying court must find a conflict on the same question between its judgment and the judgment of another appellate district; (2) the conflict must be on a rule of law, instead of facts; and (3) the certifying court's entry or opinion must clearly set forth the rule of law in conflict.

II.

In *Mynes*, supra, this court concluded that "despite the provision of R.C. 2711.02(C), declaring that an order that grants or denies a stay of a trial pending arbitration is a final order reviewable by this court, such an order must still comply with the requirements of Civ.R. 54(B) in order to constitute a final appealable order." *Mynes* at ¶17, citing *Redmond v. Big Sandy Furniture, Inc.*, Lawrence App. No. 06CA15, 06CA19, 2007-Ohio-1024, ¶15, citing *Simonetta v. A&M Bldrs., Inc.* (Oct. 7, 1999), Cuyahoga App. No. 74622. Thus, we held that "orders granting or denying a stay of trial pending arbitration are not final, appealable orders if the action involves multiple parties and claims remain pending against other parties to the suit." *Id.*, citing *Redmond*.

III.

As noted above, the JDG defendants point us to four cases from other appellate districts they contend conflict with our determination in *Mynes* that, absent Civ.R. 54(B) language, "orders granting or denying a stay of trial pending arbitration are not final, appealable orders if the action involves multiple parties and claims remain pending against other parties to the suit."

The *Patton* case cited by the JDG defendants included claims made by Complete Personnel Logistics, Inc. ("CPL"), Complete Personnel Logistics, Inc. Health Plan, Minute Men, Inc., and Minute Men, Inc. Health Plan against Patton, Commerce Benefits Group, Inc. ("CBG") and South Lorain Merchants Association, Inc. ("SLMA"). CBG and Patton moved to compel arbitration pursuant to a clause in its contract with CPL and for a stay of proceedings pending arbitration. The trial court denied their requests and CBG and Patton appealed. There, the appellate court stated, that pursuant to R.C. 2711.02(C), "the trial court's order is final and appealable." *Patton* at ¶10.

The court in *Patton*, however, made no reference to Civ.R. 54(B) and the opinion makes no determination as to whether Civ.R. 54(B) was even applicable. Because the opinion in *Patton* states that the arbitration clause at issue was present only in the contract between CPL and CBG, we can only assume that CPL's claims against SMLA and the claims of all other plaintiffs against all of the defendants were unaffected by the arbitration clause. We are left to infer from the facts and circumstances that Civ.R. 54(B) was applicable and that the court found a Civ.R. 54(B) determination unnecessary in light of R.C. 2711.02. Absent any clear determination by the *Patton* court that Civ.R. 54(B) applied to the circumstances of the case, and that a determination of "no just

reason for delay" was unnecessary in light of R.C. 2711.02, it cannot be said that our decision and judgment entry in *Mynes*, supra, presents a conflict on the same question of law involved in *Patton*, supra.

In *Bakula*, Ante and Ivka Bakula contracted with Schumacher Homes, Inc. ("Schumacher") for the construction of a home for the Bakulas. When progress on construction did not meet the Bakulas' standards, they sued Schumacher alleging breach of contract, fraud, justifiable reliance and misrepresentation. Schumacher moved to dismiss or stay the proceedings pending arbitration based on an arbitration clause in the parties' contract. The trial court granted a stay pending arbitration and the Bakulas appealed. In determining whether a final appealable order existed, the Eleventh District Court of Appeals concluded that R.C. 2711.02 made the order granting a stay pending arbitration a final order. The court also noted that a "no just reason for delay" determination, pursuant to Civ.R. 54(B), was not required.

The *Bakula* case, however, is distinguishable from this case in that the granting of a stay pending arbitration in *Bakula* affected all claims asserted by all parties. Thus, Civ.R. 54(B) was not applicable in *Bakula*. As a result, our decision and judgment entry in *Mynes*, supra, does not present a conflict on the same question of law involved in *Bakula*, supra.

In *Stewart*, the Sixth District Court of Appeals held that "R.C. 2711.02, by its express terms, makes a partial judgment which denies a stay of a trial of any action pending arbitration final and not interlocutory." *Stewart* at 306. The court then concluded that a judgment entry denying a motion for stay of proceedings and to

compel arbitration "is already final pursuant to R.C. 2711.02" and, therefore, "there is no need for the trial court to make the express determination that there is no just reason for delay in entering final judgment on this issue pursuant to Civ.R. 54(B)." *Id.* We find that the Sixth District's express holding in *Stewart* directly conflicts with our conclusion in *Mynes*.

Further, the JDG defendants assert that the case of *Barnes*, *supra*, conflicts with our holding in *Mynes*. In *Barnes*, the estate of Robert Barnes sued Andover Village Retirement Community ("Andover") for personal injury and wrongful death. *Barnes*, *supra*, at ¶7. Andover answered and eventually moved for an order directing arbitration and a stay of trial pending arbitration pursuant to an arbitration clause set forth in paperwork completed by Barnes' father at the time of Barnes' admission to Andover. *Id.* at ¶¶4, 7, 9. Thereafter, the state of Ohio intervened as a party-plaintiff in the action. *Id.* at ¶10. The state was "not party to the agreement" between Barnes and Andover. *Id.* In ruling on Andover's motions, the court deemed the arbitration clause unenforceable and denied Andover's demand for arbitration and a stay of proceedings. *Id.* at ¶12. Andover appealed. *Id.*

On appeal, the Eleventh District Court of Appeals noted that the state's claims remained pending in the trial court despite the appeal. *Id.* at ¶10. The court further considered whether the trial court's order was a final, appealable order. *Id.* at ¶¶10, 14. The court in *Barnes* stated that "an order that grants or denies a motion to stay the proceedings pending arbitration does not require a certification under Civ.R. 54(B) that

there is 'no just reason for delay' to be final and appealable." Id. at ¶17. We find the Eleventh District's holding in *Barnes* in direct conflict with our conclusion in *Mynes*.

IV.

We find that this court's judgment in *Mynes v. Brooks*, Scioto App. No. 07CA3185, 2008-Ohio-5613, is in conflict with the same judgment pronounced on the same question by the Court of Appeals for the Sixth and Eleventh districts in *Stewart v. Shearson Lehman Brothers, Inc.* (1992), 71 Ohio App.3d 305 and *Barnes v. Andover Village Retirement Community, Ltd.*, Ashtabula App. No. 2006-A-0039, 2007-Ohio-4112.

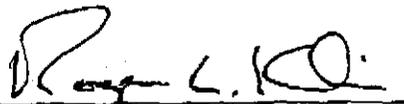
The rule of law on which the conflict exists is: whether R.C. 2711.02 orders, which are not applicable to all the parties or claims, are final appealable orders without Civ.R. 54(B) language.

Accordingly, the court certifies the record of this case to the Supreme Court of Ohio for review and final determination, under section 3(B)(4), Article IV, Ohio Constitution.

MOTION GRANTED.

Abele, P.J., Concur.
Harsha, J., Not Participating.

For the Court



Roger L. Kline, Judge

2007 OCT 27 PM 7:49

Scott L. Braum
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

TIMOTHY MYNES, et al.

Plaintiffs-Appellees,

v.

OTIS BROOKS, et al.,

Defendants-Appellants.

Case No. 07CA3185

DECISION AND
JUDGMENT ENTRY

APPEARANCES:

Scott L. Braum, Dayton, Ohio, for appellants, JDG Home Inspections, Inc., d/b/a The HomeTeam Inspection Service and Tim Gambill.

Kristin E. Rosan and Timothy G. Madison, Columbus, Ohio, for appellees.

Kline, J.:

{11} JDG Home Inspection, Inc., d/b/a the HomeTeam Inspection Service, and Tim Gambill (collectively "JDG") appeal the judgment of the Scioto County Court of Common Pleas in favor of Timothy and Janeen Mynes. The court granted the Mynes' Civ.R. 60(B) motion for relief from the court's earlier judgment granting JDG's motion for stay pending arbitration. On appeal, JDG raises one assignment of error. However, because we find that: (1) this action involves multiple parties; (2) the judgment from which relief from judgment was sought disposed of fewer than all of the parties; and (3) the judgment from which relief was sought failed to include an express determination that there is "no just reason for delay;" we conclude that the order JDG appeals is not final and appealable. Therefore, we lack the requisite jurisdiction to consider the merits of JDG's arguments. Accordingly, we dismiss this appeal for lack of jurisdiction.



I.

{12} The Mynes contracted to purchase a home in Portsmouth. Before the closing, the Mynes contracted with JDG to perform a general home inspection. The agreement between JDG and the Mynes specifically states that:

Any controversy or claim arising out of or related to this Agreement, its breach, or the Report must be settled by binding arbitration in accordance with the rules of the American Arbitration Association, and judgment upon any award rendered by the arbitrator may be entered in any court having jurisdiction.

{13} The Mynes filed a complaint against Otis and Judy Brooks ("Brooks"), Fort Hills Estate, Inc. ("Fort Hills"), John Estep, d/b/a John R. Estep Realty ("Estep"), The HomeTeam Inspection Service, d/b/a JDG Home Inspections, Inc., Tim Gambill, John Doe defendants and Carl Webster. Webster was later dismissed from the case. The complaint asserted claims of breach of fiduciary duties, failure to disclose, negligence, and respondeat superior against JDG. The complaint also asserted a number of other causes of action against the other defendants.

{14} JDG moved to stay the claims against them pending arbitration. The motion represented that the "requested stay does not affect [Mynes'] claims against the other defendants, and such can continue in the ordinary course." The court entered an agreed order granting JDG's motion requesting stay pending arbitration.

{15} The Mynes filed a Civ.R. 60(B) motion for relief from judgment and a motion for leave to file memoranda contra JDG's motion for stay pending arbitration. The court granted the Mynes' Civ.R. 60(B) motion and ordered JDG to participate in the lawsuit.

{16} JDG appeals and asserts the following assignment of error: "THE TRIAL

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COURT ERRED AS A MATTER OF LAW WHEN IT: 1) CONSIDERED AND THEN, WITHOUT A HEARING, GRANTED [MYNES'] CIVIL RULE 60(B) MOTION FOR RELIEF FROM THE AGREED TRIAL COURT ORDER OF SEPTEMBER 5, 2006, AND 2) WITHOUT ANY DISCOVERY, FULL BRIEFING, OR A HEARING, *SUA SPONTE*, DENIED [JDG'S] MOTION TO STAY CLAIMS PENDING ARBITRATION."

II.

{¶7} Initially, we address the threshold issue of whether JDG appealed a final, appealable order.

{¶8} Appellate courts have no "jurisdiction to review an order that is not final and appealable." *Oakley v. Citizens Bank of Logan*, Athens App. No. 04CA25, 2004-Ohio-6824, ¶6, citing Section 3(B)(2), Article IV of the Ohio Constitution; *General Acc. Ins. Co. v. Ins. Co. of N. America* (1989), 44 Ohio St.3d 17; *Noble v. Colwell* (1989), 44 Ohio St.3d 92. Further, "[a] trial court's finding that its judgment is a final appealable order is not binding upon this court." *In re Nichols*, Washington App. No. 03CA41, 2004-Ohio-2026, ¶6, citing *Ft. Frye Teachers Assn. v. Ft. Frye Local School Dist. Bd. of Edn.* (1993), 87 Ohio App.3d 840, 843, fn. 4, citing *Pickens v. Pickens* (Aug. 25, 1992), Meigs App. No. 459. This court has "no choice but to sua sponte dismiss an appeal that is not from a final appealable order." *Id.* at ¶6, citing *Whitaker-Merrell v. Geupel Constr. Co.* (1972), 29 Ohio St.2d 184.

{¶9} "An 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 in an action that in effect determines the action and prevents a judgment" or "[a]n order that affects a substantial right made in a special proceeding[.]" R.C. 2505.02(B). "A

Scioto App. No. 07CA3185

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.

{¶10} An order adjudicating "one or more but fewer than all the claims or the rights and liabilities of fewer than all the parties must meet the requirements of R.C. 2505.02 and Civ. R. 54(B) in order to be final and appealable." *Noble v. Colwell* (1989), 44 Ohio St.3d 92, at syllabus. However, when a trial court does not resolve an entire claim, regardless of whether the order meets the requirements of Civ.R. 54(B), the order is not final and appealable. See *Jackson v. Scioto Downs, Inc.* (1992), 80 Ohio App.3d 756, 758. Further, a judgment contemplating further action by the court is not a final appealable order. *Nationwide Assur. Inc, v. Thompson*, Scioto App. No. 04CA2960, 2005-Ohio-2339, ¶18, citing *Bell v. Horton*, 142 Ohio App.3d 694, 696, 2001-Ohio-2593.

{¶11} A trial court's decision regarding a proper Civ.R. 60(B) motion is final and appealable. See *GTE Automatic Electric v. ARC Industries* (1985), 47 Ohio St.2d 146. "However, a Civ.R. 60(B) motion is proper only with respect to final judgments." *Fleenor v. Caudill*, Scioto App. No. 03CA2886, 2003-Ohio-6513, ¶13, citing *Vanest v. Pillsbury Co.* (1997), 124 Ohio App.3d 525, 532; see, also, Civ.R. 60(B) ("[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment * * *.") (emphasis added); *Jarrett v. Dayton Osteopathic Hosp., Inc.* (1985), 20 Ohio St.3d 77, 78. "Thus, logically, 'Civ.R. 60(B) is not the proper procedural device a party should employ when seeking relief from a non-final order.'" *Id.*, citing *Vanest*, supra.

{¶12} Where the judgment from which relief is sought is not a final appealable order, "then the motion is properly construed as a motion to reconsider and the court's

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order granting that motion is interlocutory." *Id.* at ¶13, citing *Pitts v. Dept. of Transportation* (1981), 67 Ohio St.2d 378; *Vanest supra*; *Wolford v. Newark City School Dist. Bd. of Edn.* (1991), 73 Ohio App.3d 218; *Pinson v. Triplett* (1983), 9 Ohio App.3d 46; see, also, *State v. Huff* (Jan. 31, 1994), Scioto App. No. 2118 (Stephenson, J., concurring) ("[W]hen an order is not a final appealable order, the order declining to vacate that order is not a final appealable order"). "Interlocutory orders are not appealable until the trial court renders a final judgment." *Id.*, citing *Vanest, supra*.

{¶13} Thus, we must first determine if the trial court's order granting a stay of proceedings against JDG pending arbitration was a final order.

{¶14} R.C. 2711.02 provides, in relevant part, "Except as provided in division (D) of this section, an order under division (B) of this section that grants or denies a stay of a trial of any action pending arbitration, including, but not limited to, an order that is based upon a determination of the court that a party has waived arbitration under the arbitration agreement, is a final order and may be reviewed, affirmed, modified, or reversed on appeal pursuant to the Rules of Appellate Procedure and, to the extent not in conflict with those rules, Chapter 2505. of the Revised Code." R.C. 2711.02(C). This court has concluded that "R.C. 2711.02(C) provides that an order staying the trial of an action pending arbitration is final and appealable, even though it is not a final appealable order under R.C. 2505.02." *Redmond v. Big Sandy Furniture, Inc.*, Lawrence App. No. 06CA15 & 06CA19, 2007-Ohio-1024, ¶14.

{¶15} However, "[w]hile R.C. 2711.02(C) satisfies the first step in the determination of whether a judgment constitutes a final appealable order, it does not address the second step of that process, namely the application of Civ.R. 54(B) where multiple

Scioto App. No. 07CA3185

claims or parties exist." *Id.* at ¶15. Section 5(B), Article IV, of the Ohio Constitution, provides in part that, "[t]he supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. * * * All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."

{¶16} The Supreme Court of Ohio has stated that: "[t]his constitutional amendment recognizes that where conflicts arise between the Civil Rules or Appellate Rules and the statutory law, the rule will control the statute on matters of procedure and the statute will control the rule on matters of substantive law." *Morgan v. W. Elec. Co., Inc.* (1982), 69 Ohio St.2d 278, 281. (Citations omitted.) The Court has further recognized that "the effect of Civ.R. 54(B) is purely procedural[,] noting that while the rule "permits both the separation of claims for purposes of appeal and the early appeal of such claims, within the discretion of the trial court, * * * it does not affect either the substantive right to appeal or the merits of the claim. Questions involving the joinder and separation of claims and the timing of appeals are matters of practice and procedure within the rule-making authority of this court under Section 5, Article IV of the Ohio Constitution." *Alexander v. Buckeye Pipe Line Co.* (1977), 49 Ohio St.2d 158, 159-160.

{¶17} Thus, "despite the provision of R.C. 2711.02(C), declaring that an order that grants or denies a stay of a trial of any action pending arbitration is a final order reviewable by this court, such an order must still comply with the requirements of Civ.R. 54(B) in order to constitute a final appealable order." *Redmond* at ¶15, citing *Simonetta v. A&M Bldrs., Inc.* (Oct. 7, 1999), Cuyahoga App. No. 74622; but, c.f., *Stewart v. Shearson Lehman Brothers, Inc.* (1992), 71 Ohio App.3d 305, 306 (holding Civ.R. 54(B)

inapplicable where R.C. 2711.02 makes a judgment entry final). As a result, orders granting or denying a stay of trial pending arbitration are not final, appealable orders if the action involves multiple parties and claims remain pending against other parties to the suit. *Id.* at ¶¶17-18.

{¶18} Here, following the trial court's order granting a stay of proceedings against JDG pending arbitration, claims remained pending against a number of other parties. The court's order failed to include any Civ.R. 54(B) language. As such, pursuant to this court's holding in *Redmond*, it was not a final, appealable order. See, also, *Simonetta*, *supra*. The Mynes Civ.R. 60(B) motion for relief from the order, therefore, was simply a request for reconsideration of the order. The trial court's grant of the Mynes' motion for reconsideration was interlocutory. See *Fleenor*, *supra*.

{¶19} Further, JDG contends that the court's grant of Mynes motion for "relief," *sua sponte*, also acted as a denial of their initial motion for stay pending arbitration. Nevertheless, following such denial, claims remained pending against various other defendants, and the court's order did not contain Civ.R. 54(B) language. As a result, the court's ultimate "denial" of JDG's motion for stay pending arbitration also was not a final appealable order pursuant to *Redmond*.

{¶20} Finally, JDG requests this court to reconsider its holding in *Redmond*. We decline to do so.

{¶21} Accordingly, we dismiss this appeal for lack of jurisdiction.

APPEAL DISMISSED.

JUDGMENT ENTRY

It is ordered that the APPEAL BE DISMISSED and that costs herein be taxed to the appellants.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Court of Common Pleas to carry this judgment into execution.

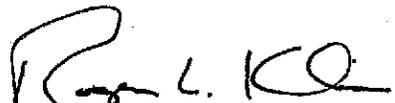
Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 for the Rules of Appellate Procedure. Exceptions.

Abele, P.J.: Concurs in Judgment and Opinion.

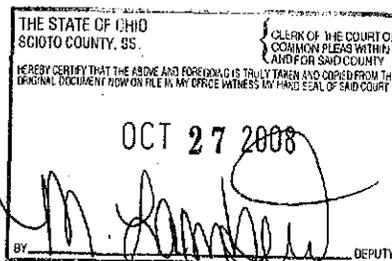
Harsha, J.: Not Participating.

For the Court

BY: 
 Roger L. Kline, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.



71 Ohio App.3d 305; Stewart v. Shearson Lehman Brothers, Inc.; 593 N.E.2d 403

STEWART ET AL., APPELLEES, V. SHEARSON LEHMAN BROTHERS, INC., APPELLANT.

[Cite as Stewart v. Shearson Lehman Brothers, Inc. (1992), 71 Ohio App.3d 305]*

* Reporter's Note: An appeal to the Supreme Court of Ohio of the December 30, 1991 decision was dismissed on application for dismissal in (1992), 63 Ohio St.3d 1414, 586 N.E.2d 122.

6th District Court of Appeals of Ohio, Huron County.

No. H-91-052.

Decided Feb. 6, 1992.

Patrick H. Boggs, for appellees.

Robert N. Rapp, for appellant.

Per Curiam.



This matter is before the court on appellant, Shearson Lehman Brothers, Inc.'s motion for reconsideration of this court's judgment entry which dismissed appellant's appeal for the reason that the trial court's judgment entry is not a final appealable order. The trial court's judgment entry stated, inter alia, that "defendant's motion to dismiss or stay proceedings and compel arbitration is not well taken and therefore denied." This court originally

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dismissed this appeal on the authority of General Electric Supply Co. v. Warden Electric, Inc. (1988), 38 Ohio St.3d 378, 528 N.E.2d 195, which held that an order denying a motion to stay proceedings pending arbitration is not a final appealable order. Subsequent to our dismissing this appeal, appellees, Ross E. Stewart et al., filed a motion to dismiss the appeal which is in substance the same as appellees' memorandum in opposition to appellant's motion for reconsideration. The court, having reviewed these motions and memoranda, finds the motion for reconsideration well taken and the motion to dismiss not well taken.

In its motion for reconsideration, appellant has referred this court to R.C. 2711.02, effective May 31, 1990, which states in part:

"An order * * * that grants or denies a stay of a trial of any action pending arbitration * * * is a final order and may be reviewed, affirmed, modified, or reversed on appeal pursuant to the Rules of Appellate Procedure and, to the extent not in conflict with those rules, [pursuant to] Chapter 2505. of the Revised Code." (Emphasis added.)

Thus, R.C. 2711.02 has overruled General Electric Supply Co. v. Warden Electric, Inc., supra.

Appellees argue that notwithstanding R.C. 2711.02, the order appealed by appellant is still not final since it does not contain an express determination that there is no just reason for delay pursuant to Civ.R. 54(B). Civ.R. 54(B) states, in essence, that a trial court's order which does not adjudicate all the

claims of all the parties in an action, in other words which does not dispense with the entire case, is interlocutory until the entire case is dispensed with unless the trial court makes an express determination that there is no just reason for delay, which language makes the interlocutory partial judgment final. However, R.C. 2711.02, by its express terms, makes a partial judgment which denies a stay of a trial of any action pending arbitration final and not interlocutory. Thus, since the judgment entry appealed is already final pursuant to R.C. 2711.02, there is no need for the trial court to make the express determination that there is no just reason for delay in entering final judgment on this issue pursuant to Civ.R. 54(B). The trial court's judgment entry has been made final by statute.

It is therefore ordered that this appeal be reinstated. Appellees' brief is due within twenty days of the date of this decision.

So ordered.

HANDWORK, P.J., GLASSER and SHERCK, JJ., concur.

OH

Ohio App.3d

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2007-Ohio-4112; Barnes v. Andover Village Retirement Community, Ltd.;

2007-Ohio-4112

[Cite as Barnes v. Andover Village Retirement Community, Ltd., 2007-Ohio-4112]

SCOTT ALLEN BARNES, ADMINISTRATOR OF THE ESTATE OF ROBERT L. BARNES, et al.,
Plaintiffs-Appellees,

v.

ANDOVER VILLAGE RETIREMENT COMMUNITY, LTD., et al., Defendant-Appellant.

CASE NO. 2006-A-0039

11th District Court of Appeals of Ohio, Ashtabula County
Decided on August 10, 2007

Civil Appeal from the Court of Common Pleas, Case No. 2003 CV 298.

Recommendation: Reversed and remanded.

Blake A. Dickson, 420 Enterprise Place, 3401 Enterprise Parkway, Beachwood, OH 44122 (For
Plaintiff-Appellee, Scott Allen Barnes).Mark Dann, Attorney General, State Office Tower, 17th Floor, 30 East Broad Street, Columbus, OH
43215 and Robert J. Byrne, 150 East Gay Street, 21st Floor, Columbus, OH 43215 (For Intervening
Plaintiff, Ohio Department of Job and Family Services).Jeffery E. Schobert, 3737 Embassy Parkway, #100, P.O. Box 5521, Akron, OH 44334 (For Defendant-
Appellant).

OPINION

CYNTHIA WESTCOTT RICE, P.J.



{¶1} Appellant, Andover Village Retirement Community, Ltd. appeals the judgment entry of the Ashtabula County Court of Common Pleas finding an arbitration provision in the subject Nursing Home Admission Agreement ("agreement") unconscionable and unenforceable. For the reasons that follow, we reverse and remand for further proceedings.

{¶2} Appellee, Scott Allen Barnes, is the court-appointed administrator of the estate of Robert L. Barnes, deceased. Following the submission by both parties of pertinent authority and affidavits, the trial court made findings of fact as outlined herein. Robert had been involved in a motor vehicle accident which left him a quadriplegic. Gary L. Barnes wanted to admit his son Robert into appellant's nursing home because it was his understanding that appellant's facility was the only one in the area that had a special bed which Robert required as a quadriplegic.

{¶3} On March 11, 2002, Gary brought Robert to appellant's facility in Andover, Ohio to admit him pursuant to a power of attorney Robert had executed in favor of his father.

{¶4} While Gary was in the process of admitting his son, nursing home staff gave Gary a substantial amount of documents to review and sign, including the eleven-page, single-spaced agreement containing

an arbitration provision. Gary is a retired truck driver with a high school education. Gary was not given sufficient time to review these documents prior to being told by staff to sign them. Staff informed Gary it was necessary for him to sign the documents for his son to be admitted. The provisions of these documents were not explained to him. He was not given any opportunity to consult with counsel concerning the agreement. He felt he was forced to sign the agreement because his son would not be admitted to appellant's nursing home unless he did so.

{¶5} The agreement requires binding arbitration before the American Health Lawyers Association for all disputes or claims, including contract and negligence claims and even claims alleging fraud in the inducement concerning the agreement itself. The arbitration provision requires any party to the arbitration to pay the attorney fees of the prevailing party and prejudgment interest, which are generally not available in civil actions.

{¶6} The agreement is a form agreement drafted by appellant. All residents are required to sign the agreement, and it does not provide any means by which a resident can reject the arbitration provision. Arbitration is thus a required condition for admission to appellant's facility.

{¶7} Appellee alleged in his complaint that as a result of the negligence of appellant, Robert sustained personal injury and wrongful death. Appellant filed its answer, which included as an affirmative defense that the trial court did not have subject matter jurisdiction over the case because the parties had signed the agreement which contained a provision requiring binding arbitration. The trial court assigned the case for hearing on July 16, 2003 to consider that affirmative defense. The parties submitted briefs and evidentiary materials in support of their respective positions.

{¶8} The trial court, in its judgment entry, dated October 9, 2003, found that appellant had failed to follow the statutory procedures at R.C. 2911.03 in raising the arbitration issue and set the case for pretrial. Instead of complying with those statutory procedures, on November 12, 2003, appellant filed an appeal from the trial court's judgment entry in *Barnes v. Andover Village Retirement Community*, 11th Dist. No. 2003-A-0122, 2004-Ohio-1705 ("Barnes I"). Appellee filed a motion to dismiss the appeal, arguing that it had not been timely filed and that the trial court had not entered a final appealable order. On March 12, 2004, this court dismissed the appeal as untimely.

{¶9} Thereafter, on November 17, 2003, appellant filed in the trial court a petition under R.C. 2711.03 for an order directing that arbitration proceed and an application under R.C. 2711.02 to stay the trial until arbitration was completed. Appellee challenged the arbitration provision as unconscionable.

{¶10} On December 31, 2003, the State of Ohio Job and Family Services ("state") filed a motion to intervene as a party-plaintiff. The court granted the motion. On January 8, 2004, the state filed its complaint in this action to recover the amounts it had expended from the defendants for medical services incurred by Robert arising from the occurrence alleged in appellee's complaint. The state is not a party to the agreement. Its claim remains pending in the trial court.

{¶11} The court set the matter for a status conference on May 17, 2004. Appellant states in his appellate brief that at this conference, the court "ordered that the parties submit briefs with there [sic] respective positions. However, rather than setting a briefing schedule which would allow the Appellant to respond to any arguments made by Appellee, the Court ordered that both parties [sic] briefs would be due on the same day, June 7, 2004." On June 7, 2004, appellant filed a brief in support of its motion for an order directing that arbitration proceed, and appellee filed a brief in opposition, arguing that the arbitration provision was unconscionable.

{¶12} On June 9, 2006, the trial court entered its judgment entry, finding the arbitration provision of the agreement unconscionable and unenforceable, overruling appellant's petition for an order directing that arbitration proceed, and ordering that this matter would proceed on the court's regular civil docket. This appeal follows. Appellant asserts two assignments of error. For its first assignment of error, appellant asserts:

{¶13} "THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED REVERSIBLE ERROR WHEN IT DENIED THE APPELLANT'S PETITION TO ORDER ARBITRATION WITHOUT HOLDING THE STATUTORILY MANDATED HEARING AND TRIAL PURSUANT TO R. C. 2711.03(A) AND R.C. 2711.03(B).

{¶14} Before we may consider the merits of an appeal, we must first determine that the judgment entry appealed from is a final appealable order. In the event that the parties to an appeal do not raise this jurisdictional issue, we must raise it sua sponte. *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86, 87.

{¶15} Appellate courts have jurisdiction to review only final orders or judgments of the inferior courts in their district. Ohio Constitution, Sec. 3(B)(2), Art. IV; R.C. 2505.02. If an order is not final and appealable, we have no jurisdiction to review the matter and must dismiss it. *General Acc. Ins. Co. v. Insurance Co. of North America* (1989), 44 Ohio St.3d 17, 20.

{¶16} The order appealed from denied appellant's motion to compel arbitration. R.C. 2711.02 provides in pertinent part: "An order under this section that grants or denies a stay of a trial of any action pending arbitration, *** is a final order and may be reviewed, affirmed, modified, or reversed on appeal pursuant to the Rules of Appellate Procedure and, to the extent not in conflict with those rules, Chapter 2505. of the Revised Code."

{¶17} In *Bakula v. Schumacher Homes, Inc.* (Feb. 23, 2001), 11th Dist. No. 2000-G-2272, 2001 Ohio App. LEXIS 688, this court held that, pursuant to *Stewart v. Shearson Lehman Bros. Inc.* (1992), 71 Ohio App.3d 305, an order that grants or denies a motion to stay the proceedings pending arbitration does not require a certification under Civ.R. 54(B) that there is "no just reason for delay" to be final and appealable. *Id.* at *3.

{¶18} Under its first assignment of error, appellant argues it was entitled to a hearing and summary trial under R.C. 2711.03(A) and (B), and that because the court did not conduct such proceedings, it is entitled to a reversal of the court's judgment. We agree.

{¶19} R.C. Chapter 2711 authorizes direct enforcement of arbitration agreements through an order to compel arbitration pursuant to R.C. 2711.03 and indirect enforcement pursuant to an order staying the trial pending appeal under R.C. 2711.02. A party may choose to move for a stay, petition for an order to proceed to arbitration, or seek both. *Maestle v. Best Buy Co.*, 100 Ohio St.3d 330, 333-334, 2003-Ohio-6465.

{¶20} R.C. 2711.03 provides in pertinent part:

{¶21} "(A) The party aggrieved by the alleged failure of another to perform under a written agreement for arbitration may petition any court of common pleas having jurisdiction of the party so failing to perform for an order directing that the arbitration proceed in the manner provided for in the written agreement. Five days' notice in writing of that petition shall be served upon the party in default. Service of the notice shall be made in the manner provided for the service of a summons. The court shall

hear the parties, and, upon being satisfied that the making of the agreement for arbitration or the failure to comply with the agreement is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the agreement.

{¶22} "(B) If the making of the arbitration agreement or the failure to perform it is in issue in a petition filed under division (A) of this section, the court shall proceed summarily to the trial of that issue. If no jury trial is demanded as provided in this division, the court shall hear and determine that issue. *** [I]f the issue of the making of the arbitration agreement or the failure to perform it is raised, either party, on or before the return day of the notice of the petition, may demand a jury trial of that issue. Upon the party's demand for a jury trial, the court shall make an order referring the issue to a jury *** If the jury finds that no agreement in writing for arbitration was made or that there is no default in proceeding under the agreement, the proceeding shall be dismissed. If the jury finds that an agreement for arbitration was made in writing and that there is a default in proceeding under the agreement, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with that agreement."

{¶23} R.C. 2711.03 thus provides for a two-step procedure when a party moves for an order to compel arbitration. Upon the filing of such motion, the court must conduct a hearing. If, following the hearing, the court is satisfied that the making of the agreement or the failure to comply with the agreement is not in issue, the court is required to enter an order directing the parties to proceed with arbitration.

{¶24} However, if either the making of the agreement or the failure to perform under it is in issue, the court is required to summarily try that issue either in a bench trial or, if either of the parties has timely requested a jury trial on that issue, a jury trial.

{¶25} In *Maestle*, supra, the Court noted that a motion to compel arbitration and a motion to stay are separate and distinct procedures. The court held that "[a] trial court considering whether to grant a motion to stay proceedings pending arbitration filed under R.C. 2711.02 need not hold a hearing pursuant to R.C. 2711.03 when the motion is not based on R.C. 2711.03." *Id.* at syllabus.

{¶26} The court in *Maestle* held that because R.C. 2711.02 does not on its face require a hearing, it would not read into this section a requirement for a hearing on a motion to stay. *Id.* at ¶19.

{¶27} However, R.C. 2711.03(A) specifically provides that the court shall hear the parties. As a result, pursuant to the plain language of R.C. 2711.03, a trial court is required to hold a hearing on a motion to compel arbitration. *Maestle*, supra; See, also, *Boggs Custom Homes, Inc. v. Rehor*, 9th Dist.No. 22211, 2005-Ohio-1129, at ¶16.

{¶28} The applicability of R.C. 2711.03 to an arbitration provision in a nursing home agreement claimed to be unconscionable was considered by the Twelfth Appellate District in *Barr v. HCF, Inc.*, 12th Dist. No. CA2005-02-008, 2005-Ohio-6040. In that case the administratrix of the deceased nursing home resident brought a wrongful death action against the nursing home following the resident's fall and death. The nursing home moved to compel arbitration. The court denied the motion and found the arbitration clause to be unconscionable. The home appealed. In reversing and remanding, the court held:

{¶29} "R.C. 2711.03(A) requires that a hearing be held to determine whether 'the making of the agreement for arbitration or the failure to comply with the agreement is not in issue.' If the court determines that the validity of the arbitration [provision] is in issue, then the statute requires the court proceed summarily to a jury trial on the sole issue of the validity of the arbitration provision. R.C.

2711.03(B); Benson v. Spitzer Mgt., Inc., Cuyahoga App. No. 83558, 2004-Ohio-4751." Id. at ¶20.

{¶30} The docket in this case reveals that the court scheduled a status conference on May 17, 2004. The court established a briefing schedule on the petition to compel arbitration, pursuant to which the parties were to present their submittals by June 7, 2004. The parties submitted authority, argument, and affidavits in support of their respective positions. While an oral hearing was not had, it is clear the parties agreed the court should consider their submittals. Appellant now complains that the court should have required appellee to submit his brief first, so it could have responded to the issues raised by appellee. However, appellant never objected to the court's briefing schedule and that issue is waived on appeal. We do not consider issues raised for the first time on appeal. *Sekora v. General Motors Corp.* (1989), 61 Ohio App.3d 105, 112-113.

{¶31} It must be noted that appellant was on notice of appellee's claims upon filing of his brief and affidavit. Appellant had two years in which to respond to the materials submitted by appellee, yet it did nothing. It never filed any authority or affidavits in opposition. It never filed a response of any kind to appellee's brief and evidentiary materials. Moreover, the court considered the arguments, legal authority, and evidentiary materials submitted by both parties. Based upon the record we hold that the court complied with the hearing requirement under R.C. 2711.03(A) and conducted a hearing under that statute.

{¶32} Further, while appellant does not challenge appellee's submission of affidavits, appellant challenges the sufficiency of Gary L. Barnes' affidavit. However, the proper procedure to challenge an affidavit is by way of objection or motion to strike filed in the trial court. *O'Brien v. Bob Evans Farms, Inc.*, 11th Dist. No. 2003-T-0106, 2004-Ohio-6948; *Douglass v. Salem Cmty. Hosp.*, 153 Ohio App.3d 350, 2003-Ohio4006. Appellant did neither and thus waived any challenge to Mr. Barnes' affidavit on appeal. *Sekora, supra*.

{¶33} Appellant in its reply brief on appeal states that it is not arguing that an oral hearing was required. In fact, it states that a nonoral hearing would have been sufficient. Rather, it argues that under the trial court's briefing schedule, it was not given an opportunity to respond to appellee's argument that the arbitration clause is unconscionable.

{¶34} While we hold that the trial court properly considered the parties' submittals at a hearing under R.C. 2711.03(A), appellant should be given an opportunity to present supplemental information at a continued hearing under R.C. 2711.03(A). This may be done on written submittals. Following that hearing, the court should either: (1) enter an order under R.C. 2711.03(A) directing the parties to proceed to arbitration, or (2) if the court determines the validity of the arbitration provision and/or the failure of its performance is in issue, proceed summarily to the trial solely on those issue(s) to the bench since neither party challenged service of the petition or demanded a jury pursuant to R.C. 2711.03.

{¶35} We reverse and remand today for the limited purpose stated herein, and we do not reach the merits of this case at this time.

{¶36} Appellant's first assignment of error is well-taken.

{¶37} For its second assignment of error, appellant asserts:

{¶38} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT WHEN IT RULED ON THE MERITS AND HELD THAT THE ARBITRATION CLAUSE IN THE NURSING HOME ADMISSION AGREEMENT WAS UNCONSCIONABLE AND UNENFORCEABLE, WHEN

APPELLEE FAILED TO PRESENT ANY COMPETENT EVIDENCE TO SUPPORT HIS CLAIM OF UNCONSCIONABILITY UNCONSCIONABILITY [SIC] AND WHERE THE FACTS AND CIRCUMSTANCES DEMONSTRATE THAT THE AGREEMENT WAS NOT UNCONSCIONABLE."

{¶39} Based upon our analysis and holding under appellant's first assignment of error, the second assignment of error is moot.

{¶40} For the reasons stated in the Opinion of this court, it is the judgment and order of this court that the judgment of the Ashtabula County Court of Common Pleas is reversed and the matter is remanded to the trial court for further proceedings consistent with this Opinion.

COLLEEN MARY O'TOOLE, J., concurs,

DIANE V. GRENDALL, J., concurs in judgment only.

OH

Slip Opinions

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