

IN THE SUPREME COURT OF OHIO

12-2135

Jack Dixon, et al.,

Appellees,

vs.

Residential Finance Corp. et al,

Appellant.

: On Appeal from the Madison County  
: Court of Appeals,  
: Twelfth Appellate District

: Court of Appeals  
: Case No.: CA2011-10-014  
:  
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MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT JACOB SHUMAKER

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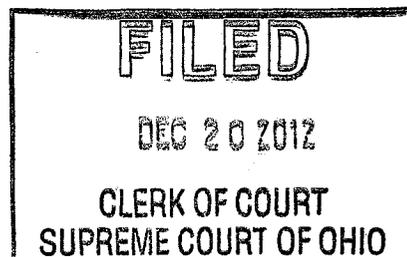
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**I. EXPLANATION OF WHY THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST**

This case presents a critical issue regarding a trial court's ability to simply designate a non-party as a defendant in a matter in which that non-party is not named. The Madison County Court of Common Pleas (trial court) in this matter ordered that Shumaker defend himself in a trial of an action in which the court recognized he was not named. The Twelfth District Court of Appeals dismissed Shumaker's appeal finding that the trial court's ruling was not a final appealable order. In so doing, the appellate court inherently blessed the court with unfettered discretion to tag any individual as a party.

This issue before this Court is critical because the ruling of the appellate court creates a situation where a trial court may compel an individual to participate in a case as a party without the ability to seek adequate redress in the appellate system. An order compelling a non-party to act as party in an action in which he is not named must be a final appealable order since appeal of the issue at a later time does not adequately protect the individual. Once an individual has been put in a position to defend himself in a matter in which he is not named, there is simply no way to undo the harm he will have suffered if it is later determined that he should not have been involved in the case in the first place. Accordingly, this matter is of great public and general interest and this Court should accept jurisdiction to review the issue herein.

**STATEMENT OF THE CASE AND FACTS**

This case arises from a March 28, 2006 civil complaint filed by Jack and Cheryl Dixon (Dixons) against Residential Finance Corporation (RFC). The Dixons alleged violations of the Ohio Consumer Sales Practices Act (CSPA) and the Ohio Mortgage Brokers Act (OMBA), breach of contract, fraud, breach of fiduciary duty and predatory practices against RFC as the

sole defendant. On June 15, 2006, Bank of New York filed a complaint in foreclosure against the Dixons. On August 14, 2006, the Dixons filed an answer to the foreclosure complaint with a counterclaim against Bank of New York and a third-party complaint against RFC and Appellant Jacob Shumaker (Appellant or Shumaker).

On April 12, 2007, the trial court issued an order consolidating the March 28, 2006 action instituted by the Dixons against RFC with the foreclosure action instituted by Bank of New York against the Dixons. On August 12, 2009, following a motion by Bank of New York, the trial court bifurcated the foreclosure matter from the Dixons' claims contained in the Dixons' March 28, 2006 complaint against RFC. As a result, the foreclosure action along with the associated counterclaim and third-party claims were stayed pending the resolution of the Dixons' complaint against RFC. The *only* action in which Shumaker was a named party was the foreclosure action as a third-party defendant. The *only* claims against Shumaker were the third-party claims contained in the foreclosure action.

Shumaker moved the trial court to acknowledge his non-party status with respect to the action the Dixons brought against RFC only. Shumaker pointed out that he was not named in the Dixons' complaint against RFC and since the foreclosure action was not being tried in conjunction with the action against RFC, there would be no claims for Shumaker to defend at the trial between the Dixons and RFC. On October 12, 2011, the trial court issued an order overruling Shumaker's motion and ordered that Shumaker be "denominated as a co-defendant" to RFC, thus forcing Shumaker to defend himself in an action in which he was not a party.

Shumaker immediately filed an appeal in the Madison County Court of Appeals seeking review of the trial court's decision.<sup>1</sup> On January 3, 2012, the Dixons filed a motion to dismiss

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<sup>1</sup> Shumaker also filed an original action seeking a writ of prohibition against the trial court because he was reluctant

Shumaker's appeal claiming that the trial court's October 12, 2011 entry was not a final appealable order. On January 11, 2012, Shumaker filed his memorandum in opposition to the Dixon's motion to dismiss and on February 15, 2012, the court of appeals issued an entry denying the Dixons' motion to dismiss. The Dixons subsequently filed a renewed motion to dismiss again claiming that the trial court's October 12, 2011 entry was not a final appealable order.<sup>2</sup> Shumaker filed his memorandum in opposition and on November 15, 2012, the court of appeals granted the Dixons' renewed motion to dismiss.

The court of appeals erred in finding that the trial court's October 12, 2011 was not a final appealable order. In support of his position on these issues, Appellant presents the following argument.

## II. ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

**PROPOSITION OF LAW: An order that designates a non-party as a co-defendant in a civil action constitutes a final appealable order.**

R.C. 2505.02(B) sets forth the classifications of orders that may be considered final and appealable. R.C. 2505.02 (B)(4) specifically applies in this instance. It provides that an order is final when it:

[G]rants 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 or 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.

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to rely solely on a notice of appeal due to timing concerns and the novel issues the matter involved.

<sup>2</sup> The appeal was initially stayed pending the court of appeals' ruling on Shumaker's petition for a writ of prohibition. The court subsequently denied the petition and removed the stay. It was at that point, that the Dixons filed their renewed motion to dismiss.

The court's order refusing to acknowledge Shumaker's non-party status and denominating him a co-defendant constituted a denial of a provisional remedy. A provisional remedy under R.C. 2505.04(B)(4) is a type of proceeding that is *ancillary* to an action, including, but not limited to a proceeding for a preliminary injunction, attachment, discovery of a privileged matter or suppression of evidence. R.C. 2505.02(A)(3). While "ancillary" is not defined in R.C. 2505.02, this Court in *State v. Muncie* (2001), 91 Ohio St.3d 440, 449, quoted the Black's Law Dictionary's definition of "ancillary" as "'aiding; attendant upon; describing a proceeding attendant upon or which aids another proceeding considered as principal. Auxiliary or subordinate.'" Id. at 449, quoting Black's Law Dictionary (5<sup>th</sup> Ed.1979) 78. Shumaker's motion for acknowledgment of his non-party status owes its "existence to the underlying action" but is a "definable offshoot[] from the main action." See *Community First Bank & Trust v. Dafoe* (2006), 108 Ohio St.3d 472, 476. The main action here is the Dixons' case against RFC, in which Shumaker was not a named party. The proceeding, initiated by Shumaker, requesting that the trial court recognize that he was not a party to the action was specifically derived from the Dixons' case against RFC. Furthermore, the proceeding aids the main action in that it identifies the parties for trial. See *Muncie*, 91 Ohio St.3d at 449. Thus, by denying Shumaker's motion for acknowledgment of non-party status, the trial court denied a *provisional remedy*.

The court's denial of this provisional remedy also meets the requirements of R.C. 2505.02(B)(4)(a)&(b) rendering the order final and appealable. First, the court's denial of the motion undeniably *determined the action* and *prevented judgment in favor of Shumaker with respect to the motion*. See *State v. Whaley*, (Feb.3, 2006), Trumbull App. No. 2005-T-0118, unreported, 2006 Ohio App. LEXIS 404(court held that when a court rules on a motion for disqualification of counsel, the resulting order determines the action with respect to the motion

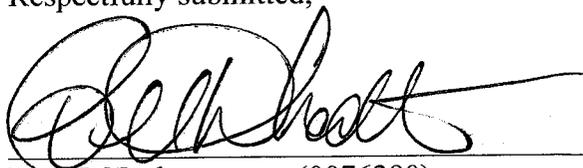
and prevents judgment in favor of appellant with respect to the motion). Second, Shumaker would be *deprived of a meaningful or effective remedy on appeal following a final judgment* as to the entire action because the harm and prejudice that he seeks to avoid will have already occurred, i.e., he will have defended himself in an action in which he was not party. If improperly forced to defend himself in an action in which he is not a defendant, Shumaker will suffer irreparable harm for which he cannot be later compensated. He will have endured the time, expense, inconvenience and stress of being involved in the trial and have no legitimate recourse to recover his damages as it will be impossible to “un-ring the bell.”

The trial court’s decision denying Shumaker’s motion and specifically denominating him as a party meets the criteria of a final appealable order as directed by R.C. 2505.02(B)(4) and as espoused by the relevant caselaw. Thus, the appellate court’s dismissal of Shumaker’s appeal based on the lack of a final appealable order was in error.

### CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest. This Court must examine whether a trial court’s ruling designating a non-party as a party constitutes a final appealable order. Without this Court’s judicial guidance, trial courts and appellate courts alike will be permitted to inject individuals into cases forcing them to defend themselves against non-existent claims without any meaningful right to appeal. Accordingly, Appellant Jacob Shumaker respectfully requests that this Court accept jurisdiction in this case so that this important issue will be reviewed on the merits.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Beth Nacht", written over a horizontal line.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via regular U.S. mail, postage prepaid, on this the 20<sup>th</sup> day of December, 2012, to the following:

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# APPENDIX

IN THE COURT OF APPEALS FOR MADISON COUNTY, OHIO

JACK DIXON, et al., : CASE NO. CA2011-10-014

Appellees, :

vs. :

ENTRY GRANTING RENEWED  
MOTION TO DISMISS

RESIDENTIAL FINANCE CORP., :  
et al., :

Appellants. :

FILED  
In The Court of Appeals  
Madison County, Ohio

NOV 15 2012

*Renee Grubbs*

The above cause is before the court pursuant to a renewed motion to dismiss Jacob Shumaker's appeal filed by counsel for appellees, Jack Dixon, et al., on October 9, 2012, and a memorandum in opposition filed by counsel for appellant, Jacob Shumaker, on October 10, 2012. The present appeal is taken from an entry filed in the Madison County Court of Common Pleas denying Shumaker's "motion for acknowledgment of non-party status for the trial commencing on October 17, 2011."

The factual background of this matter is as follows: On March 28, 2006, appellees filed a complaint against Residential Finance Corporation alleging; *inter alia*, violations under the Ohio Consumer Sales Practices Act with respect to refinancing of residential property. *Dixon, et al. v. Residential Finance Corp.*, Madison C.P. No. 2006CV-03-110. On June 15, 2006, Bank of New York filed a foreclosure complaint against appellees. *Bank of New York v. Dixon, et al.*, Madison C.P. 2006CV-06-183. On August 14, 2006, appellees filed an answer to the foreclosure complaint, a counterclaim against Bank of New York, and a third-party complaint against Residential Finance Corporation and Jacob Shumaker.

On April 12, 2007, the trial court consolidated both cases; however, on August 12, 2009, following a motion by Bank of New York, the trial court bifurcated the fore-

closure case from the Consumer Sales Practices Act case and set the foreclosure case for trial. Shumaker's counsel then filed the motion for acknowledgment of non-party status with respect to the Consumer Sales Practices Act action. The trial court denied the motion as follows:

In the totality of the circumstances from the filings, Dixons claim that Shumaker, as an agent of Residential Finance, engaged in the acts and omissions giving rise to the Dixons' claims. So that there is no confusion at trial, Shumaker will be denominated as a co-defendant to Residential Finance in the breach claims.

An order is a final appealable order if it affects a substantial right in an action and in effect determines the action and prevents a judgment. R.C. 2505.02(B)(1). "Determines the action and prevents a judgment" means that the order must dispose of the whole merits of the cause or some separate and distinct branch thereof and leave nothing for the determination of the court. *Hamilton Cty. Bd. of Mental Retardation v. Professionals Guild of Ohio*, 46 Ohio St.3d 147 (1989). The entry denying Shumaker's motion to acknowledge him as a non-party does not determine the underlying action or prevent a judgment. It arguably does not affect a substantial right.

An order may also be a final appealable order under R.C. 2505.02(B)(2) if it affects a substantial right in a special proceeding. A special proceeding is defined as an action or proceeding specially created by statute and that prior to 1853 was not denoted as an action or law or a suit in equity. R.C. 2505.02(A)(2). The trial court's denial of appellant's acknowledgment of non-party status does not meet the definition of a special proceeding.

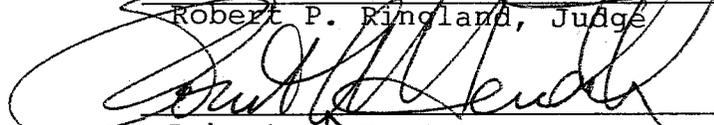
Finally, an order may be a final appealable order under R.C. 2505.02(B)(4) if it grants or denies a provisional remedy. A provisional remedy is defined as a proceeding ancillary to an action, including but not limited to preliminary injunction,

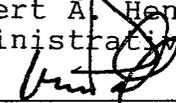
attachment, discovery of a privileged matter, or suppression of evidence. R.C. 2505.02(A)(3). The term "ancillary proceeding" is not defined by statute, but has been defined by the Ohio Supreme Court as a proceeding which is "attendant upon or aids another proceeding." *State v. Muncie*, 91 Ohio St.3d 440, 2001-Ohio-93. The trial court's decision denying appellant's motion or acknowledgment of non-party status does not fit the definition of ancillary proceeding.

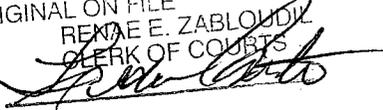
Based upon the foregoing, the renewed motion to dismiss the present appeal is GRANTED. This cause is hereby DISMISSED, costs to appellant, Jacob Shumaker.

IT IS SO ORDERED.

  
\_\_\_\_\_  
Robert P. Ringland, Judge

  
\_\_\_\_\_  
Robert A. Hendrickson,  
Administrative Judge

  
\_\_\_\_\_  
Michael E. Powell, Judge

I HEREBY CERTIFY THAT THIS  
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IN THE COURT OF APPEALS FOR MADISON COUNTY, OHIO

JACK DIXON, et al.,

Appellees,

vs.

RESIDENTIAL FINANCE  
CORPORATION, et al.,

Appellants.

CASE NO. CA2011-10-014  
REGULAR CALENDAR

ENTRY DENYING MOTION  
TO DISMISS APPEAL

**FILED**

In The Court of Appeals  
Madison County, Ohio

FEB 15 2012

*Renee M. Blordil*

The above cause is before the court pursuant to a motion to dismiss appeal and for App. R. 23 damages filed by counsel for appellees, Jack Dixon, et al., on January 3, 2012

Upon due consideration of the foregoing, IT IS HEREBY ORDERED that the motion is DENIED.

IT IS SO ORDERED.



Robert A. Hendrickson  
Administrative Judge