

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

KELLY J. BENCIVENNI, et al.,	:	MEMORANDUM OPINION
Plaintiffs-Appellants,	:	
- vs -	:	CASE NO. 2010-L-098
MARILYN V. DIETZ, INDIVIDUALLY, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Court of Common Pleas, Case No. 08 CV 003815.

Judgment: Appeal dismissed.

Michael R. Bencivenni, 1810 The Standard Building, 1370 Ontario Street, Cleveland, OH 44113, *John M. Gundy, Jr.* and *Jill C. Chodkowski*, The Gundy Law Firm, Commerce Park, Building IV, 23240 Chagrin Boulevard, #450, Beachwood, OH 44122, and *Clark D. Rice*, Koeth, Rice & Leo Co., L.P.A., 1280 West Third Street, Third Floor, Cleveland, OH 44113-1514 (For Plaintiff-Appellant, Kelly J. Bencivenni).

Michael R. Bencivenni, 1810 The Standard Building, 1370 Ontario Street, Cleveland, OH 44113 (Plaintiff-Appellant)

Jeffrey R. Lang and *Shawn W. Maestle*, Weston, Hurd, Fallon, Paisley & Howley, L.L.P., 1900 The Tower at Erieview, 1301 East Ninth Street, Cleveland, OH 44114-1862 (For Defendants-Appellees, Marilyn V. Dietz, Individually and as Trustee of Trust Dated May 5, 1997).

Mark R. Meterko and *Karl H. Schneider*, MaGuire & Schneider, L.L.P., 250 Civic Center Drive, #500, Columbus, OH 43215-5086 (For Defendants-Appellees, Realty One, Inc., Realty One/Real Living, and Connie McCann).

DIANE V. GRENDELL, J.

{¶1} On August 17, 2010, appellants, Kelly J. Bencivenni and Michael R. Bencivenni, by and through counsel, filed a notice of appeal. This appeal emanates from a July 20, 2010 entry of the Lake County Court of Common Pleas, which made certain rulings against appellants and in favor of appellees, Marilyn V. Dietz, Individually and as Trustee of Trust Dated May 5, 1997 (“Dietz”).

{¶2} The record in this matter reveals that appellants filed a complaint against appellees, Dietz, Realty One, Inc., Realty One/Real Living (“Real Living”) and Connie McCann (“McCann”). Dietz filed a counterclaim against appellants for malicious prosecution, abuse of process, defamation, slander, civil harassment, and frivolous conduct. Realty One, Inc., Real Living and McCann along with Dietz filed motions for summary judgment. Appellants filed a motion for summary judgment as to Dietz’s counterclaims.

{¶3} In the July 20 entry, the trial court granted appellants’ motion for summary judgment as to Dietz’s counterclaims for abuse of process, malicious prosecution, defamation, slander and civil harassment. The trial court denied appellants’ motion for summary judgment as to Dietz’s claims for frivolous conduct. The trial court also granted the motions for summary judgment of Dietz, Realty One, Inc., Real Living and McCann. In that same entry, the trial court found that there were no genuine issues of material fact and ordered that appellees were entitled to judgment as a matter of law and dismissed appellants’ complaint.

{¶4} Appellees, Realty One, Inc., Real Living and McCann, filed a motion to dismiss the appeal on October 7, 2010. In their motion, appellees allege that this court

lacks jurisdiction to hear this appeal since the July 20 entry is not a final appealable order pursuant to Civ.R. 54(B). Appellant filed no response to the motion to dismiss.

{¶5} Civ.R. 54(B) provides that:

{¶6} “When more than one claim for relief is presented in an action whether as a claim, counterclaim, cross-claim, or third-party claim, and whether arising out of the same or separate transactions, 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. In the absence of a determination that there is no just reason for delay, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties, shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.”

{¶7} This court has held that where there are multiple claims and/or parties involved, an entry that enters final judgment as to one or more but fewer than all of the claims is not a final appealable order in the absence of Civ.R. 54(B) language stating that “there is no just reason for delay[.]” *Montello v. Ackerman*, 11th Dist. No. 2009-L-111, 2009-Ohio-6383, at ¶6. See, also, *Kessler v. Totus Tuus, L.L.C.*, 11th Dist. No. 2007-A-0028, 2007-Ohio-3019, at ¶7.

{¶8} In the instant matter, while the trial court granted the motions for summary judgment of Dietz, Realty One, Inc., Real Living and McCann, and granted appellants’ motion for summary judgment as to six of the seven claims contained in Dietz’s

counterclaims, it is clear that one of the claims in the counterclaim, frivolous conduct, is still pending against appellants. Furthermore, the July 20 judgment entry that was appealed from does not contain any Civ.R. 54(B) language.

{¶9} Based upon the foregoing analysis, the motion to dismiss is granted, and this appeal is hereby dismissed due to lack of a final appealable order.

{¶10} Appeal dismissed.

MARY JANE TRAPP, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.