COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NOS. 85706, 85707, 85723, 85731, 85732,
85733, 85743, 85744, 85745, 85776, 85777

PREFERRED CAPITAL, INC. Plaintiff-appellant vs. THOMAS E. STRELLEC, JR., et al. Defendants-appellees	:	JOURNAL ENTRY and OPINION
DATE OF ANNOUNCEMENT OF DECISION	:	MAY 26, 2005
CHARACTER OF PROCEEDING	:	Civil appeal from Cuyahoga County Common Pleas Court Case Nos. 542500, 544485, 542159, 540119, 543000, 542329, 542101,540101, 544566, 542102, 538120
JUDGMENT	:	DISMISSED.
DATE OF JOURNALIZATION	:	

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KENNETH A. ROCCO, J.:

We have no jurisdiction to review the common pleas court's decisions in these consolidated cases. Accordingly, we dismiss these appeals.

Appellant Preferred Capital, Inc. ("Preferred") is the assignee of the lessor's rights under a series of commercial equipment rental agreements. It filed these actions to recover rental payments it alleges are due from the lessees. Preferred, whose own offices are located in Brecksville, Ohio, filed these actions in the Cuyahoga County Common Pleas Court. The defendants are variously located in other states and commonwealths.[1]

In each case, the defendants filed a motion to dismiss for lack of personal jurisdiction. They all contended that the forum selection clause contained in the rental agreement was unenforceable.[2] The common pleas court granted these motions and dismissed the cases for lack of personal jurisdiction.

Preferred appealed each of those judgments. The cases were consolidated for briefing, hearing and disposition before this court.

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[1]Pennsylvania, Florida, New Jersey, North Carolina, Connecticut, Michigan, and Georgia.

[2]In addition, most of the defendants argued that they did not have sufficient contacts with Ohio to otherwise establish personal jurisdiction. Some defendants also argued that Cuyahoga County, Ohio was not a proper venue or was not a convenient forum.

Before these appeals were consolidated, appellees in Appeal No. 85777 moved the court to dismiss for lack of a final appealable order. After the consolidation, appellees in the remaining appeals filed a joint motion to dismiss on the same basis. These motions were referred to the merit panel for decision.

Pursuant to R.C. 2505.02(B), "[a]n order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

"(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

"(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

"(3) An order that vacates or sets aside a judgment or grants a new trial;

"(4) An order that grants 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 of 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.

"(5) An order that determines that an action may or may not be maintained as a class action."

Plainly, an order dismissing a case for lack of personal jurisdiction does not meet the criteria of section (B)(2), (3), (4) or (5). It does not vacate or set aside a judgment or grant a new trial, nor does it determine whether the action can be maintained as a class action. Dismissal of the entire action cannot be considered the grant or denial of a provisional remedy. Finally, an action for breach of contract is not a "special proceeding."

Thus, the only issue for our determination is whether the court's order "affects a substantial right in an action that in effect determines the action and prevents a judgment." R.C. 2505.02(B)(1). Pursuant to Civ.R. 41(B)(4)(a), a dismissal for lack of jurisdiction over the person operates as a failure "otherwise than on the merits." A dismissal without prejudice does not "determine the action" or "prevent a judgment" because it leaves the parties in the same position as if the plaintiff had not commenced the action. Therefore, it is not a final appealable order. See, e.g., *DiCorpo v. Kelley*, Cuyahoga App. No. 84609, 2005-Ohio-1863, ¶4; *Semenchuk v. MHSP, Inc.*, Cuyahoga App. No. 84614, 2005-Ohio-32, ¶3; *Smart Pages v. Ohio Mortgage*, Cuyahoga App. No. 83004, 2003-Ohio-7074, ¶5; *Century Business Services, Inc. v. Bryant*, Cuyahoga App. Nos. 80507, 80508, 2002-Ohio-2967, ¶15.

We are keenly aware of the plethora of cases deciding appeals from orders dismissing cases for lack of personal jurisdiction. See, e.g., *Kennecorp Mortgage Brokers, Inc. v. Country Club Convalescent Hosp., Inc.* (1993), 66 Ohio St.3d 173; *Kentucky Oaks Mall Co. v. Mitchell's Formal Wear, Inc.* (1990), 53 Ohio St.3d 73; *Barrett v. Picker Internat'l, Inc.* (1990), 68 Ohio App.3d 820. The question whether the order was final and appealable was not raised or decided in those cases.

We found only one case in which the issue was directly addressed by this court, *American Office Services, Inc. v. Sircal Contracting, Inc.*, Cuyahoga App. No. 82977, 2003-Ohio-6042, ¶8, where the court held:

"Although a grant of a Civ.R. 12(B)(2) motion is considered a disposition otherwise than on the merits, the dismissal is, nevertheless, final under R.C. 2505.02. The order prevents further litigation in Ohio and, therefore, the denial of personal jurisdiction must be considered either an order that "prevents a judgment" or an order that grants a "provisional remedy" and satisfies finality requirements. If the order were considered not final, no litigant would be able to appeal the grant of Civ.R. 12(B)(2) motion to dismiss."

We disagree with this analysis. First, it fails to address the substantial case law holding that a dismissal without prejudice

is not a final appealable order.[3] Second, the determination that the order "prevents a judgment" simply because it may prevent a judgment on the merits in *Ohio* reflects an undeserved lack of confidence in our sister courts in other states and reaches beyond the terms of R.C. 2505.02. If the legislature had meant to say "prevents a judgment *in Ohio*," it certainly could have done so. The court's complaint that if the order is not considered final, litigants will not be able to appeal dismissals for lack of personal jurisdiction is a mere tautology, not reasoned analysis. Faced with the conflict between *American Office Services*, on the one hand, and *DiCorpo, Semenchuk, Smart Pages, Century Business Services* and many others on the other, we are compelled to follow the great weight of authority that an involuntary dismissal without prejudice is not a final appealable order.

"We should prefer to reach the merits of [these] case[s], ***. We agree with the court in *Stafford [v. Hetman* (June 4, 1998), Cuyahoga App. No. 72825], supra, that reviewing dismissals without prejudice 'may be desirable, since absent appellate review trial

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[3]We are unsure what the court meant by its suggestion that a dismissal without prejudice might be final and appealable as the grant or denial of a "provisional remedy." We can only assume that this suggestion is an outgrowth of the analysis in *Overhead, Inc. v. Standen Contracting*, Lucas App. No. L-01-1397, 2002-Ohio-1191, in which the court found that the grant of a sixty-day stay for the purpose of allowing plaintiff to refile in another jurisdiction, after which the case would be dismissed for lack of venue, was an appealable grant of a provisional remedy. Whatever the status of a stay of proceedings may be, however, a dismissal is not ancillary to the action and therefore is not a "provisional remedy."

courts would have carte blanche in dismissing matters as long as they did so without prejudice.'" *Van American Ins. Co. v. Schiappa* (April 29, 1999), Jefferson App. Nos. 97-JE-42 and -46. However, we are constrained by the jurisdiction given to us by the Ohio Constitution and the legislature. Therefore, we must dismiss these appeals.

Appeals dismissed.

These causes are dismissed.

It is, therefore, considered that said appellees recover of said appellant their costs herein.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

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

JUDGE
KENNETH A. ROCCO

FRANK D. CELEBREZZE, JR., P.J. CONCURS

SEAN C. GALLAGHER, J. CONCURS IN JUDGMENT ONLY

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).