

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

WILLIAM FEARS,	:	APPEAL NO. C-170493
	:	TRIAL NO. A-1503340
Plaintiff-Appellant,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
KIP DUNAGAN,	:	
	:	
Defendant-Appellee.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Plaintiff-appellant William Fears appeals the trial court's dismissal of his complaint pursuant to Civ.R. 41(B)(1). In two assignments of error, Fears argues that the trial court erred by dismissing his complaint and that its judgment was against the manifest weight of the evidence.

We do not reach the merits of Fears's assignments of error because we lack jurisdiction to entertain his appeal. This court's appellate jurisdiction is limited to the review of final orders, judgments, or decrees of lower courts. *See* Ohio Constitution, Article IV, Section 3(B)(2). When the record transmitted for our review does not contain a final appealable order, we must dismiss the appeal for lack of subject-matter jurisdiction. *See Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.*, 44 Ohio St.3d 17, 20, 540 N.E.2d 266 (1989).

In this case, where the trial court dismissed the case under Civ.R. 41(B)(1) for failure to prosecute and the dismissal entry did not indicate that the dismissal was otherwise than on the merits, the dismissal was not on the merits and was without

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prejudice. *See Thomas v. Freeman*, 79 Ohio St.3d 221, 680 N.E.2d 997 (1997). An involuntary dismissal without prejudice under Civ.R. 41(B)(1) is not a final order where the claims can be timely refiled. *Chase Home Fin., L.L.C. v. Literski*, 1st Dist. Hamilton Nos. C-130404 and C-130433, 2014-Ohio-615, ¶ 22.

According to the appellee, the trial court’s order is final and appealable because Fears’s action could not be timely refiled, as it would be barred by the two-year statute of limitations for negligence claims. We conclude that, although Fears labeled his claim as a “complaint for negligence,” the gist of his complaint is that his personal property was taken without consent, so the four-year statute of limitations in R.C. 2305.09 would apply. *See Palm Beach Co. v. Dun & Bradstreet, Inc.*, 106 Ohio App.3d 167, 174-175, 665 N.E.2d 718 (1st Dist.1995) (in determining the applicable statute of limitations, courts must look to the underlying nature of the action, rather than rely on the form of the pleading).

Because Fears’s action could be refiled within the time period provided by R.C. 2305.19, the savings statute, the involuntary dismissal without prejudice under Civ.R. 41(B)(1) is not a final order. *See Hall v. Cleveland State Univ.*, 129 Ohio App.3d 767, 719 N.E.2d 54 (8th Dist.1998). The judgment appealed from is not a final order, and we lack jurisdiction. Therefore, we dismiss the appeal.

Further, a certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27.

MOCK, P.J., CUNNINGHAM and DETERS, J.J.

To the clerk:

Enter upon the journal of the court on April 18, 2018
per order of the court _____.
Presiding Judge