IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

THE CHILI COMPANY, INC.,	:	APPEAL NO. C-160700 TRIAL NO. A-8904841
and	:	*JUDGMENT ENTRY.*
WILLIAM and GEORGIA POULOS d.b.a. THE CHILI COMPANY,	:	
Plaintiffs-Appellants,	:	
vs.	:	
GEORGE R. HAMMERLEIN AGENCY, INC.,	:	
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.

This is an appeal from the trial court's denial of a Civ.R. 60(B) motion to vacate a judgment that had dismissed a negligence action without prejudice. Because we conclude that the order appealed from is not a final, appealable order, we do not have jurisdiction to consider this appeal and therefore dismiss it.

In 1989, The Chili Company ("the company") and its owners, William and Georgia Poulos, sued their insurance agency for negligence for failing to secure fidelity insurance for the company. During the case, both the Pouloses and the company filed for bankruptcy. Due to the bankruptcies, the case was stayed in September 1990. Nothing happened in the case until May 1993, when the trial court

entered on the record an "order of dismissal (bankruptcy)," stating that "this case is dismissed other than on the merits and without prejudice."

Sixteen years later, in 2009, the Pouloses' daughter, Catherine Kasidonis, as executor of William Poulos's estate, moved to reopen the original case. The trial court denied the motion. In 2015, Kasidonis, as executor and personally, and her brother, Peter Poulos, moved to reopen the case. Following a hearing, the trial court denied the motion. In its decision, the trial court treated the motion to reopen as a Civ.R. 60(B) motion to vacate the 1993 judgment that had dismissed the original case without prejudice. Kasidonis, as executor and personally, and Peter Poulos (collectively "Kasidonis"), now appeal the denial of the motion to vacate, setting forth two assignments of error.

Before addressing the assignments of error, we must first determine if the order appealed from is a final appealable order. An appellate court's jurisdiction is limited to review of final appealable orders. Ohio Constitution, Article IV, Section 3(B)(2); R.C. 2505.02. A final order is defined, in relevant part, as an "order that affects a substantial right in an action that in effect determines the action and prevents a judgment." R.C.2505.02(B)(1).

Initially, we note that the trial court properly considered Kasidonis's motion under Civ.R. 60(B) because the civil rules do not provide for a "motion to reopen" a case that has been dismissed. Civ.R. 60(B), which governs motions to vacate, only permits a trial court to vacate a "final judgment, order or proceeding." As a general rule, a dismissal without prejudice is not a final, appealable order as it ordinarily constitutes a dismissal other than on the merits, which allows the plaintiff to refile the complaint. *Smirz v. Smirz*, 2014-Ohio-3869, 18 N.E.3d 868 (9th Dist.), citing *State ex rel. De Dono v. Mason*, 128 Ohio St.3d 412, 2011-Ohio-1445, 945 N.E.2d 45,

¶ 2. Notably, a dismissal without prejudice relieves the court of all jurisdiction over the matter, and the action is treated as though it had never been commenced. *See Zimmie v. Zimmie*, 11 Ohio St.3d 94, 95, 464 N.E.2d 142 (1984).

Here, the trial court dismissed the case without prejudice in May 1993. Although the dismissal occurred after the statute of limitations had expired to assert a negligence claim, the original plaintiffs still had the opportunity to refile the complaint within one year of the dismissal under Ohio's saving statute. *See* R.C. 2305.19(A). They did not do so. Because there was the opportunity to refile the complaint under Ohio's saving statute, the dismissal without prejudice was not a final order or judgment. *Selmon v. Crestview Nursing & Rehab. Ctr., Inc.*, 184 Ohio App.3d 317, 2009-Ohio-5078, 920 N.E.2d 1017 (7th Dist.) (holding that an involuntary dismissal without prejudice and without notice was not a final, appealable order because even though the statute of limitations had expired the plaintiff had one year from the date of the dismissal to refile the complaint under the savings statute).

Because the 1993 dismissal was not a final judgment, Kasidonis could not properly move for relief from that judgment under Civ.R. 60(B). *See Stafford v. Hetman*, 8th Dist. Cuyahoga No. 72825, 1998 WL 289383, (June 4, 1998) (holding that a dismissal without prejudice does not constitute a final judgment from which a party could properly move for relief under Civ.R. 60(B)). Essentially, the dismissal without prejudice left the parties in a position as if the case had never been commenced, thus the motion for relief from judgment was a nullity, which rendered the trial court's ruling on that motion a nullity. Because the trial court's judgment denying Kasidonis's motion to vacate was a nullity, an appeal from that judgment is

precluded. *Levy v. Ivie*, 195 Ohio App.3d 251, 2011-Ohio-4055, 959 N.E.2d 588 (10th Dist.); *Stafford*.

Accordingly, we dismiss Kasidonis's 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. Costs shall be taxed under App.R. 24.

MOCK, P.J., CUNNINGHAM and **MYERS, JJ.**

To the clerk:

Enter upon the journal of the court on September 27, 2017

per order of the court _____.

Presiding Judge