MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

Holliday, LLC,
Appellant-Defendant,

v.

Anderson Mounds Theater, LLC,
Appellee-Plaintiff.

May 7, 2021

Court of Appeals Case No. 20A-PL-1816

Appeal from the Madison Circuit Court

The Honorable Mark K. Dudley, Judge

Trial Court Cause No. 48C06-1911-PL-148

Friedlander, Senior Judge.

[1] Holliday, LLC (Holliday) appeals from the trial court's amended judgment in favor of Anderson Mounds Theater, LLC (Theater) on the issues of liability and possession in an action for replevin and criminal conversion, alleging various errors by the court. For reasons we more fully explain below, we dismiss the appeal.

[2] Holliday asks several questions, but we address its single dispositive question: is the court's order a final and appealable judgment?

[3] Bayview Mounds, LLC, owned the Mounds Mall (Mall) and entered into a lease agreement with Mounds Theater Holdings, LLC (MTH) for the operation of a theater, commonly known as the Mounds 10 Theater (Mounds 10), at the Mall on May 1, 2004. The Mall owned the building where Mounds 10 was located. The lease explicitly stated that all furniture, fixtures, and equipment (FF&E) located in Mounds 10 belonged to the tenant, and the FF&E could be removed at any time prior to the expiration of the lease. In 2009, MTH assigned the lease to Theater along with its right and title to, and interest in all items of tangible personal property located on, attached to, or used in connection with the operation of Mounds 10. Additionally, in 2010 and 2012, Theater upgraded and replaced several pieces of FF&E, including projectors and sound systems, used in its operations. The Mall and Theater operated under this agreement for several years until the Mall fell delinquent in the payment of assessed property taxes.

[4] Holliday purchased the Mall at a tax sale on April 9, 2019. After the statutory redemption period passed, on September 30, 2019, the Madison Circuit Court No. 3 ordered the issuance of a tax deed to Holliday. An error was corrected by the court in an amended order, and the Madison County Auditor issued a tax deed to Holliday on October 25, 2019.

[5] On October 11, 2019, however, Holliday took possession of the Mall, changing the locks to Mounds 10 without notice to Theater. At the time Holliday took possession, Theater had property within the building and Holliday refused to allow it to remove its FF&E and other property. Many of the items were not affixed to the premises, some were plugged into outlets, and others were attached by bolts or screws. The items Theater sought to remove included projectors, sound systems, cabinets, supplies, storage racks, popcorn poppers, a nacho cheese dispenser, freezers, concession inventory items, an Icee Machine, movie posters, stanchions and ropes, and theater speakers, seats, and screens.[1] These items had been purchased by Theater or the prior tenant or were leased from vendors. Holliday did allow Theater to remove cash, computers, and other small items of personal property, but nothing more.

[6] On November 12, 2019, Theater filed a two-count complaint for replevin and criminal conversion against Holliday in Madison Circuit Court No. 6, requesting immediate possession of Theater's personal property in Holliday's possession, treble damages, costs, pre-judgment interest, and reasonable attorney's fees. Holliday filed a general denial and counterclaim, alleging criminal conversion and seeking a declaratory judgment, and asserted affirmative defenses. On January 13, 2020, the court entered an agreed order setting forth conditions for the security and preservation of the property that

[1] The complete list of items presented to the court at the bench trial is set out in Theater's Exhibit 5.

was the subject of the lawsuit and providing for its temporary possession by Holliday until the matter could be resolved. On January 24, 2020, the court scheduled a bench trial for August 31, 2020. Theater filed a general denial to Holliday's counterclaim on February 5, 2020.

[7] Show cause hearings were scheduled but then continued at the request of Holliday's counsel. Activity on the case continued, nonetheless, including the filing of the parties' final witness and exhibit lists. Holliday listed Mark Squillante, a member of Holliday, on its list.

[8] Holliday's counsel filed a motion to withdraw his appearance on July 20, 2020, and the court granted the motion that day. On August 27, 2020, new counsel entered his appearance on behalf of Holliday for the limited purpose of obtaining a continuance of the trial date. Theater objected to the continuance and the court denied the motion. New counsel was then allowed to withdraw his appearance.

[9] On August 31, 2020, the bench trial began with Theater represented by counsel, but Holliday appearing only by its member, Squillante. After the trial court asked counsel for Theater if he knew whether Squillante was an Indiana attorney, counsel for Theater responded that he did not believe Squillante was an attorney and noted that, as such, he could not represent the corporation at trial. Squillante confirmed that he was not an attorney, but nonetheless sought a continuance of the trial. The trial court denied his motion and explained that

he was protecting Squillante from the unauthorized practice of law by prohibiting him from acting as its counsel.

[10] During the bench trial, William Armstrong, who was a thirty-year employee of Elda Corporation, the business that owns the property upon which the Mall and Mounds 10 sit, and who also worked for the Mall and Theater, testified about the claims in Theater's complaint. Armstrong's testimony, along with photographs, and invoices, and other evidence established Theater's ownership of the various items listed on Exhibit 5 and Holliday's efforts to prevent Theater from their retrieval.

[11] On September 8, 2020, the court entered a "Judgment." Appellant's App. Vol. II, pp. 63-66. The CCS shows an entry on September 9, 2020, reading, "**Final Judgment entered**." *Id.* at 7. The court's judgment holds as follows:

> Mounds Theater has proved its replevin claim and the court orders Holliday to allow Mounds Theater access to the property to retrieve all the items listed in Mounds Theater's exhibit 1. Mounds Theater is to remove its property within thirty (30) days of this judgment. *The court reserves any damages entry pending Mounds Theater's retrieval of the listed property.*
>
> As to Mounds Theater's conversion claim, there was no evidence that equipment owned by Mounds Theater no longer exists or was removed from the theater, and as such, the Mounds Theater's conversion claim fails for lack of evidence of damages. This finding is also fatal to Mounds Theater['s] criminal conversion claim. There must be actual damages. The court finds against Holliday on its conversion claim and finds that the property listed in exhibit 1 are not fixtures annexed to the real estate owned by Holliday.

Id. at 65 (emphasis added).

[12] On October 1, 2020, Holliday filed a notice of appeal from the court's order. The next day, Theater filed a "Trial Rule 59 Motion To Correct Error." *Id.* at 14-16. In the motion, the relief sought by Theater was: (1) corrections involving additions and deletions concerning word choice, and (2) withdrawal of judgment on the criminal conversion claim, withholding judgment until later.

[13] On October 19, 2020, the court granted Theater's motion in part by issuing an amended judgment reflecting the semantical additions and deletions to the September 8, 2020 order. *Id.* at 10-13. The court denied Theater's request to withdraw and withhold judgment on its criminal conversion claim. That same day, the court entered a separate "Order on Plaintiff's Motion to Correct Error." *Id.* at 23. In this order the court said,

> The court points out that its September 8, 2020, Judgment is not a final order. The court expressly reserved the replevin damages issue for a further hearing. Put differently, the Judgment established liability and reserved the issue of damages for a subsequent hearing.

Id. An amended notice of appeal was filed on November 2, 2020.

[14] The matter is now before us on Holliday's assertion that it is appealing from a final, appealable order. Holliday's original notice of appeal in this matter reflected that it was appealing the court's September 8, 2020 judgment. *See* Appellant's App. Vol. II, pp. 70-73. Its amended notice of appeal indicated that Holliday was appealing both the September 8, 2020 judgment and October 19,

2020 judgment. *See id.* at 85-88. Both notices indicated to this Court that the basis for our appellate jurisdiction was that this was an appeal from a final judgment, as defined by Indiana Appellate Rules 2(H) and 9(I).

[15] This Court's authority to exercise appellate jurisdiction is generally limited to appeals from final judgments, certain interlocutory orders, and agency decisions. Ind. Appellate Rule 5; *In re D.W.*, 52 N.E.3d 839, 841 (Ind. Ct. App. 2016), *trans. denied*. Neither party says that this is an appeal from an agency, implicating Appellate Rule 9(I), or from an interlocutory order, implicating Appellate Rule 14.

[16] Instead, Holliday directs us to language from Appellate Rule 9(A)(1), which provides,

> A party initiates an appeal by filing a Notice of Appeal with the Clerk . . . within thirty (30) days *after the entry of a Final Judgment is noted in the Chronological Case Summary*. However, if any party files a timely motion to correct error, a Notice of Appeal must be filed within thirty (30) *days after the court's ruling on such motion is noted in the Chronological Case Summary* or thirty (30) days after the motion is deemed denied under Trial Rule 53.3, whichever occurs first.

(Emphasis added).

[17] In their appellate briefs, both parties contend that the court's order is a final appealable order or judgment, but with qualifiers. *See* Appellant's Br. pp. 24-27; Appellee's Br. p. 28; Appellant's Reply Br. p. 16. Holliday argues that if we find that the court had subject matter jurisdiction, then its order was final and appealable. Theater argues that the order is final and appealable only as to the

issues of liability and possession, but not as to the issue of damages. Holliday somewhat disingenuously replies that, "Theater agrees that the trial judge entered a final appealable judgment." Reply Br. at 16. Despite their "agreement" that the court entered a final appealable judgment, such cannot be the basis for rendering a decision in an appeal.

[18] A critical distinction that is fatal to Holliday's argument is the one drawn between the rules established *to initiate* an appeal and this Court's appellate jurisdiction *to decide* an appeal so initiated.

[19] Appellate Rule 9(A)(1) undeniably provides the method for and timing of initiating an appeal with this Court after (1) a final judgment has been entered and noted on the court's chronological case summary (CCS) or (2) a ruling on a motion to correct error has been entered and is noted on the CCS, or (3) has been deemed denied. The key is that a party must be appealing from a final judgment. Here, the CCS entry understandably caused the parties to act as though a final judgment had been entered and that the timeframe for review of the court's decision had begun. The language of the court's orders, however, unmistakably and explicitly informed the parties and this Court that its orders were not final. *See* Appellant's App. Vol. II, pp. 23 (order on motion to correct error stating judgment not a final order), 91 (judgment reserving issue of damages), 95 (amended judgment reserving issue of damages).

[20] Indiana Trial Rule 54(B) informs us of the requirements when a court enters judgment upon fewer than all claims or parties. Rule 54 says,

> When more than one [1] claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a 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 and upon an express direction for the entry of judgment*. *In the absence* of such determination and direction, *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. A judgment as to one or more but fewer than all of the claims or parties is final when the court in writing expressly determines that there is no just reason for delay, and in writing expressly directs entry of judgment, and an appeal may be taken upon this or other issues resolved by the judgment; but *in other cases a judgment, decision or order as to less than all the claims and parties is not final*.

(Emphasis added).

[21] "A final judgment is one which disposes of all issues as to all parties; it puts an end to the litigation." *First Fed. Sav. and Loan Ass'n of Gary v. Stone*, 467 N.E.2d 1226, 1231 (Ind. Ct. App. 1984). Rule 54(B)'s purpose is to "avoid piecemeal litigation and appeal of various issues in a case and to preserve judicial economy by protecting against the appeal of orders that are not yet final." *Front Row Motors, LLC v. Jones*, 5 N.E.3d 753, 757 (Ind. 2014). "Whether an order is a final judgment governs the appellate courts' subject matter jurisdiction." *Id.*

A "judgment which fails to determine damages is not final." *First Fed.*, 467 N.E.2d at 1231.

[22] The court stated its judgment was not a final order, its order did not include Rule 54(B)'s express determination that there is no just reason for delay and directing entry of a final judgment, and the court revised its September 8, 2020 judgment after Holliday's original notice of appeal had been filed. Each of these things individually and collectively leads us to conclude that the court has not entered a final judgment.

[23] *In re Adoption of O.R.*, 16 N.E.3d 965, 970 (Ind. 2014) is a case in which our Supreme Court cleared up the conflation of procedural errors with subject matter jurisdiction. A procedural error resulting in forfeiture of an appeal is not the same as appellate jurisdiction, which implicates the power and authority of the court. *Id.* "Stated somewhat differently, although a party forfeits its right to appeal based on an untimely filing of the Notice of Appeal, this untimely filing is not a jurisdictional defect depriving the appellate courts of authority to entertain the appeal." *Id.*

[24] Because the trial court's order is not a final appealable order or an appealable interlocutory order, Holliday's attempt to appeal the non-final order is untimely; indeed, it is taken prematurely. *See In re D.J. v. Indiana Dep't of Child Servs.*, 68 N.E.3d 574, 578-79 (Ind. 2017) (appellate court retains jurisdiction if notice of appeal is belated or premature). Because the circumstances here are different from those in *D.J.* and are not extraordinarily compelling, we decline

to use our discretion to address the merits of the trial court's non-final judgment, prematurely appealed. *See In re Adoption of O.R.*, 16 N.E.3d at 971 ("the question is whether there are extraordinarily compelling reasons why this forfeited right should be restored."); *Manley v. Zoeller*, 77 N.E.3d 1227, 1231 (Ind. Ct. App. 2017) ("We do not believe the *D.J.* opinion should be taken as an invitation to open the floodgates to premature appeals from non-final judgments.").

[25] Accordingly, we dismiss this appeal without prejudice to the right to file an appeal once a final judgment has been entered or the order has been certified for an interlocutory appeal. *See Truelove v. Kinnick*, 163 N.E.3d 344, 347 (Ind. Ct. App. 2021) ("we dismiss this appeal without prejudice to Truelove's right to file an appeal once a final judgment ha been entered or the order has been certified for an interlocutory appeal.") (citing *Indy Auto Man, LLC v. Keown & Kratz, LLC*, 84 N.E.3d 718, 722 (Ind. Ct. App. 2017) (dismissal of a non-final judgment without prejudice); and *Ramsey v. Moore*, 959 N.E.2d 246, 253 (Ind. 2012) (dismissing an appeal where there was "a clear absence of [Trial Rule] 54(B) language")).

[26] Dismissed.

Pyle, J., and Weissmann, J., concur.