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COURT OF APPEALS

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HAMILTON COUNTY



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COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO

BODY POWER INC.	:	Appeal No. C-060847
Plaintiff-Appellee,	:	
vs.	:	
JOSEPH B. MANSOUR , et al.	:	
Defendants-Appellants.	:	

APPEAL FROM THE HAMILTON COUNTY COURT OF COMMON PLEAS

AMENDED BRIEF OF DEFENDANTS-APPELLANTS
JOSEPH B. MANSOUR, et al.

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HAMILTON COUNTY, OH
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 AND
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STATEMENT OF THE CASE

A. PROCEDURAL POSTURE

On October 28, 1993, Plaintiff-Appellee, Body Power, Inc. (“Body Power”), filed a Complaint for Appointment of Receiver and Money Damages against, the three Defendants-Appellants herein, Joseph Mansour, L.M. Inc. and INF Enterprises, Inc., (“INF”) (T. d. 1). A receiver is appointed the same day without notice to Appellants, (T. d. 2, 3). A final judgment entry is filed on February 24, 1995, (T. d. 64). This Court reversed the Judgment and remanded the case back to the Trial Court for further proceedings, (T. d. 92). Appellants filed a Joint Motion for Summary Judgment, (T. d. 102). On September 13, 1996 the Trial Court granted Appellants Summary Judgment, (T. d. 107). Appellants filed a Motion to Enforce the Judgment, (T. d. 135). The Trial Court filed a corrected Entry overruling Appellants Motion to Enforce the Judgment, (T. d. 143). A Notice of Appealable Judgment under Civil Rule 58 is filed on September 11, 2006, (T. d. 155). A Notice of Appeal is filed on behalf of Appellants on October 6, 2006, (T. d. 158). The case then proceeded to the Accelerated Calendar scheduling in this Court.

B. STATEMENT OF FACTS

1. On October 28, 1993, Body Power filed a Complaint for Appointment of Receiver without notice to take over the business of Appellants Joseph B. Mansour and INF Enterprises, Inc. (“INF”), (T. d. 1, 2, 3).
2. On February 24, 1995, Body Power received a judgment against INF and the INF business was transferred to Body Power, (T. d. 64). INF then

appealed the Judgment. The First Appellate District overturned the judgment of February 24, 1995, in a decision dated February 16, 1996, Case No. C950281, (T. d. 92), and remanded the case to the Trial Court for full consideration of all issues.

3. On July 15, 1996, INF moved for Summary Judgment (T. d. 102), and the Court granted that motion on September 13, 1996, (T. d. 107). This judgment exonerated INF from all of Body Power's allegations.
4. On October 17, 1996, INF filed a Motion for the Turnover of the Business, (T. d. 111). INF followed up with letters to Body Power to return the business of INF.
5. On August 22, 1997 the Receivership is terminated, (T. d. 130).
6. Body Power did not respond to the letters, and on May 26, 1999, INF filed a second Motion to enforce the INF Judgment (T. d. 135) and compel Body Power to turn over the INF business.
7. On July 28, 1999, the court filed a corrected entry denying the Motion to Enforce the Judgment on the basis that: "****the above-captioned litigation case was dismissed as a result of Defendants' Motion for Summary Judgment. Hence, there is no case pending and no judgment which can be enforced", (T. d. 143 at 2.).
8. On September 11, 2006 a Notice of Appellable Judgment is filed under Civil Rule 58, closing the case, (T. d 155). A Notice of Appeal is then filed by Appellants on October 6, 2006, (T. d. 158).

FIRST ASSIGNMENT OF ERROR

The Trial Court erred to the prejudice of Appellants by denying Appellants

Motion for Turnover of the Business stating the case is dismissed.

ISSUE PRESENTED FOR REVIEW AND ARGUMENT

The Order issued on September 13, 1996 when appellants were granted Summary Judgment, did not state the required phrase under Civil Rule 54(B) "No just reason for delay." Appellants filed a Motion for Turnover of the Business. The Trial Court denied Appellants Motion stating the case is dismissed as a result of the Order of September 13, 1996. Did the Trial Court Err to the prejudice of Appellants?

STANDARD OF REVIEW

A Court of Appeals has jurisdiction only over orders that are both final under Civ.R. 54(B) and appealable under R.C. 2505.02¹. A final order is determined under R.C. 2505.02. The Court under Civil Rule 54(B) is allowed to determine the appealability of a partial final judgment, with respect to a claim, counterclaim, cross-claim, or third party claim², or when multiple parties are involved.

ARGUMENT

R.C. 2505.02 in pertinent part states:

"(B) An 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."

¹ See *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86, 541 N.E.2d 64, syllabus.

² *Watkins, Bates, Handwork, Gross, Mills & Guthrie v. Upp*, 1984 WL 14377 (Ohio Ct. App. 6th Dist. Lucas County 1984) (original claim and counterclaim).

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In applying the facts of this case under the relevant portion of R.C. 2505.02, for the Trial Court's Order of September 13, 1996, to be final it must (1) affect a substantial right, (2) prevent a judgment, and (3) determine the action. The Order of September 13, 1996 did not determine the action as the Receiver was still appointed by the Court and performing his duties as of September 13, 1996. The receivership was not terminated until August 22, 1997, (T. d. 130). Therefore, R.C. 2505.02 does not apply. Ohio courts have consistently refused to review non-final orders or orders disposing of fewer than all the claims and all the parties, in the interest of considering all the alleged errors at one time after judgment. The exception to this rule is where the trial court expressly determines there is no just reason for delay under Civ.R. 54(B). Thus, a strong policy against piecemeal appeals has emerged in Ohio³.

Civ.R. 54(B) states:

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.

³ See *Inabnitt v. Salzar* M.D., Ob-Gyn, Inc. and Richard Wolf Medical Instruments Corporation, (1st App. Dist. 1986), Hamilton App. No. C-850740, 1986 WL 10251 citing, *State ex rel Celebrezze v. K & S Circuits, Inc.* (1983), 6 Ohio 3d 354, 453 N.E.2d 653; and *Bernbaum v. Silverstein* (1980), 62 Ohio St.2d 445, 406 N.E.2d 532.

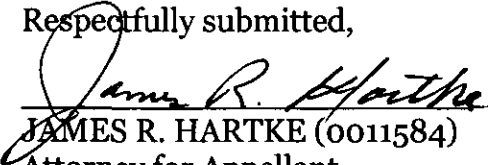
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In examining the Order of September 13, 1996, the Order does not contain the specific language, "no just reason for delay". If the judgment entry does not contain the required phrase, the decision is merely an interlocutory order⁴, subject to revision by the court at any time prior to termination of the entire action⁵. Therefore, Civil Rule 54(B) does not apply.


CONCLUSION

For the foregoing reasons, the Trial Court erred to the prejudice of Appellants and the Judgment of July 28, 1999 should be reversed. Appellants respectfully request this Court to grant Appellants Motion for Turnover of the Business and return all assets from Body Power to INF.

Respectfully submitted,


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auth on 1-4-07)


Joseph B Mansour
Appellant- Pro Se

⁴ *Stewart v. Midwestern Indem. Co.*, (1989), 45 Ohio St. 3d 124,543 N.E. 2d 1200; *Walter v Allied Signal Inc.* (1999), 131 Ohio App. 3d 253, 722 N.E. 2d 164 (3d Dist. Wyandot County)


⁵ *Comer v. Calim*, (1st App. Dist 1998), 128 Ohio App. 3d 599, 716 N.E. 2d 245.

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CERTIFICATION

I hereby certify that a copy of the foregoing was served upon **George Parker**, Attorney for Plaintiff-Appellee, P.O. Box 432 Mason, Ohio, 45040, Phone no. 513-678-6427, Fax no. 513-489-2794 by U.S. First Class mail, postage prepaid the 4th day of January, 2007.



Joseph B. Mansour

RECORDED
SEP 08 2006

COURT OF COMMON PLEAS
CIVIL DIVISION
HAMILTON COUNTY, OHIO

JUDGE ROBERT P. RUEHLMAN
Court of Common Pleas
Hamilton County, Ohio

BODY POWER INC.

CASE NO.: A9308903

JUDGE ROBERT P RUEHLMAN

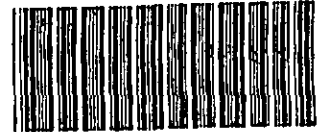
Plaintiffs,

v.

FINAL ENTRY CLOSING CASE

JOSEPH MANSOUR et al.

Defendants



D69935531

The entry to close this case previously issued on July 28, 2006 is void, ab initio, because the Clerk of Courts never issued service to any of the parties or attorneys as required under Civ R. 58. This Entry is the Final Entry Closing this case under Civ R. 58 and is the Final Appealable entry. The Clerk is to issue a notice of this Entry to all parties and attorneys, as listed below.

SO ORDERED.

COURT OF COMMON PLEAS
ENTER
~~HON. ROBERT P. RUEHLMAN~~
Judge Robert P. Ruehlman
THE CLERK SHALL SERVE NOTICE TO PARTIES PURSUANT TO CIVIL RULE 58 WHICH SHALL BE TAXED AS COSTS HEREIN.

Copies sent by the Clerk of Courts to:

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IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO
CIVIL DIVISION



BODY POWER, INC.

Plaintiff,

v.

JOSEPH MANSOUR, et al.

Defendant.

Case No. A9308903

Judge David Davis

ENTRY AND ORDER OVERRULING
DEFENDANT JOSEPH MANSOUR
AND DEFENDANT INF ENTERPRISE,
INC'S MOTIONS TO ENFORCE THE
JUDGEMENT AND FOR LEAVE OF
COURT TO SUE ON RECEIVER'S
BOND

On May 26, 1999, Defendants Joseph Mansour and INF Enterprise, Inc., joined in the filing of two motions, to wit: a Motion to Enforce the Judgement and a Motion for Leave of Court to Sue on Receiver's Bond. These matters came on for hearing on June 30, 1999.

Prior to the hearing the Court read the supporting briefs and exhibits submitted by counsel and reviewed pertinent portions of the case file. During the hearing, all counsel and Joseph Mansour, *pro se* were given full opportunity to address the issues set forth in the subject motions.

The court being fully advised in the premises, it is hereby ORDERED, as follows:

1. Defendants' Motion for Leave of Court to Sue on Receiver's Bond is OVERRULED on the basis that the favorable ruling for Defendants on their September, 13, 1996 Motion for Summary Judgement resulted in a dismissal of the above-captioned lawsuit, such that there is no case now pending before the Court.

2. Defendants' Motion to Enforce the Judgement is likewise OVERRULED on the basis that the above-captioned litigation was dismissed as a result of Defendant's Motion for Summary Judgement. Hence, there is no case pending and no judgement which can be enforced.



Davis

Honorable David P. Davis

7/19/98

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**THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO**

BODY POWER, INC.	:	Case No. A9308903
Plaintiff	:	Judge David P. Davis
vs.	:	CORRECTED ENTRY AND ORDER OVERRULING DEFENDANTS JOSEPH MANSOUR AND INF ENTERPRISE, INC'S MOTIONS TO ENFORCE THE JUDGMENT AND FOR LEAVE TO SUE ON THE RECEIVER'S BOND
JOSEPH MANSOUR, et al.	:	
Defendants	:	

On May 26, 1999, Defendants Joseph Mansour and INF Enterprise, Inc., joined in the filing of two motions, to wit: a Motion to Enforce the Judgment and a Motion to for Leave of Court to Sue on Receiver's Bond. These matters came before this Court for a hearing on June 30, 1999.

Prior to the hearing the Court read the supporting briefs and exhibits submitted by counsel and reviewed pertinent portions of the case file. During the hearing, all counsel and Joseph Mansour, pro se, were given the opportunity to address those issues set forth in the subject motions.

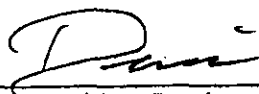
The Court being fully advised in the premises, it is hereby ORDERED that:

1. The Defendants' Motion for Leave of Court to Sue on Receiver's Bond is OVERRULED on the basis that the favorable ruling for Defendants on their September 13, 1996 Motion for Summary Judgment resulted in a dismissal of the above-captioned law suit, such that there is no case now pending before the Court.

2. Further, the Court finds that these issues are presently being litigated in another action before this Court, to wit: the Court of Common Pleas, Hamilton County, Ohio, Case No. A9702088.

3. The Defendants' Motion to Enforce the Judgment is likewise **OVERRULED** on the basis that the above-captioned litigation was dismissed as a result of Defendants' Motion for Summary Judgment. Hence, there is no case pending and no judgment which can be enforced.

IT IS SO ORDERED.



Judge David P. Davis

7-26-99

Date

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