

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

PR Transportation, Inc., et al.

Court of Appeals No. L-09-1322

Plaintiffs

Trial Court No. CI-2007-1877

v.

Buddy R. McClure, et al.

Appellants

v.

Brian J. Hoch, et al.

DECISION AND JUDGMENT

Appellees

Decided: March 29, 2010

* * * * *

Gary E. Horn, for appellants.

Robert H. Eddy and Theresa A. Richthammer, for appellees.

* * * * *

PER CURIAM

{¶ 1} This matter is before the court on defendants/third-party defendants-appellees', Brian J. Hoch and Balk, Hess & Miller LLP, "Motion to Dismiss Appeal." Defendants/third-party plaintiffs-appellants, Buddy R. McClure, Kim McClure, R&M Express, LLC, B&K Express, and April Morales, filed their memorandum in opposition to appellees' motion to dismiss. This appeal arises from the trial court's December 2, 2009 judgment disqualifying attorney Dennis Strong from continuing to serve as counsel for appellants in the pending litigation.

{¶ 2} On November 25, 2009, the trial court held an evidentiary hearing on appellees' motion to disqualify Mr. Strong. Appellees alleged Mr. Strong was a "necessary witness" in this case, and was precluded from continuing to serve as appellants' counsel. At the disqualification hearing, the trial court stated it believed Mr. Strong's testimony as a witness in the pending litigation was "relevant," and Mr. Strong was subject to disqualification. In response to the court's comments, Mr. Strong advised the trial court he would withdrawal and make arrangements for appellants to obtain new counsel. Appellants have been represented by attorney Gary Horn since the time of the disqualification hearing.

{¶ 3} Following the disqualification hearing, the trial court issued its judgment finding Mr. Strong was a "necessary witness" to the litigation under Prof. Cond. Rule 3.7. The trial court formally disqualified him from serving as counsel to appellants for the remainder of this litigation.

{¶ 4} Appellees argue that when Mr. Strong withdrew as counsel during his colloquy with the court, this amounted to a judicial admission and acceptance of facts supporting his role as a necessary witness in this case.¹ Appellees also argue this "voluntary withdrawal" amounted to a "satisfaction of judgment," which renders this appeal moot. See, e.g., *Blodgett v. Blodgett* (1990), 49 Ohio St.3d 243 (satisfaction of judgment renders an appeal from that judgment moot).

{¶ 5} Appellants argue that given the totality of the facts in this litigation, Mr. Strong's withdrawal as counsel was not "voluntary" in the practical sense of the word. Appellants argue this appeal is not moot and should they prevail, Mr. Strong will not be barred from representing them in the proceedings below.

{¶ 6} Based upon our review of the record and applicable law, we concur with appellants. Appellants' appeal of the disqualification of Mr. Strong is not moot.

{¶ 7} Issues on appeal are "moot" as follows:

{¶ 8} "[W]hen they are or have become fictitious, colorable, hypothetical, academic or dead; the distinguishing characteristic of such issues is that they involve no actual genuine live controversy, the decision of which can definitely affect existing legal relations." *In re L.W.*, 168 Ohio App.3d 613, 2006-Ohio-644, ¶ 11.

¹The question currently before the court is whether this appeal is "moot" and should be dismissed. Appellees' argument that Mr. Strong's withdrawal as counsel was a binding judicial admission of his status as a "necessary witness" is a substantive argument going to the issue of whether this court should affirm the merits of the trial court's decision. That argument should be raised and addressed in appellees' merit brief, not in a procedural motion to dismiss. As such, the court will not examine that issue in this decision.

{¶ 9} The record in this case reflects the dispute between the parties over the potential disqualification of Mr. Strong is anything but moot. The only agreeable position between the parties on this issue is that they disagree. As noted by appellants, if the court decides this appeal in their favor, appellants would have the option of retaining Mr. Strong as counsel in the proceedings below. The record below reflects the parties have engaged in extensive litigation in the trial court on the issue of whether Mr. Strong is a necessary witness in the litigation and subject to disqualification. We decline to find Mr. Strong's compliance with the trial court's disqualification order extinguished the controversy of whether the trial court properly found Mr. Strong was subject to disqualification under Ohio Rule Prof. Cond. 3.7.

{¶ 10} Similarly, Mr. Strong's withdrawal as counsel following his colloquy with the trial court is not a satisfaction of judgment that moots this appeal. The trial court clearly advised Mr. Strong at hearing, that in its view, the evidence introduced at hearing subjected Mr. Strong to disqualification. The trial court then provided Mr. Strong the opportunity to withdraw as counsel and retain substitute counsel, so as not to prejudice his clients during the remainder of this litigation. Following the hearing, the trial court issued a formal judgment on appellees' motion disqualifying Mr. Strong.

{¶ 11} Were this court to find Mr. Strong's withdrawal under the facts of this case amounted to a "satisfaction of judgment," we would in effect be creating a rule in disqualification matters whereby counsel would be forced to choose between disregarding the trial court's judgment (and facing contempt, possible disciplinary action,

as well as sanctions against the client) and preserving the client's right to appeal the order disqualifying counsel. We decline to do so.

{¶ 12} Appellees' motion to dismiss is denied.² Accordingly, appellants are ordered to file their brief within ten days of this order. It is so ordered.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Keila D. Cosme, J.
CONCUR.

JUDGE

²As alternative relief, appellees are also asking this court to enter a stay of these proceedings on appeal and remand this case to the trial court for proceedings consistent with the trial court's January 27, 2010 order requiring an in camera inspection. Appellees argue any appeal from the in camera inspection can be consolidated in the interests of judicial economy with the instant appeal. We decline to remand this case. In the event the trial court enters a final appealable order relating to the production of allegedly privileged documents as a result of the in camera inspection, the parties will then have the opportunity appeal that judgment and to seek consolidation of appeals. See 6th Dist. Loc. R. 3(C).

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
