

STATE OF MICHIGAN
COURT OF APPEALS

JENNIFER GLEASON,

Plaintiff-Appellee,

v

HORACE MANN INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED

September 28, 2004

No. 248510

Ingham Circuit Court

LC No. 01-094282-CK

Before: Bandstra, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

In this action for declaratory relief, defendant Horace Mann Insurance Company seeks to appeal as of right the trial court's order granting summary disposition in favor of plaintiff Jennifer Gleason on the question whether defendant was obligated to defend and indemnify plaintiff in an underlying action brought against plaintiff and denying defendant's cross-motion for summary disposition.¹ Because we agree with plaintiff that this Court lacks jurisdiction, we dismiss this appeal.

Plaintiff argues that this Court lacks jurisdiction to hear the present appeal because after the trial court granted partial summary disposition in favor of plaintiff, which resolved the liability issues against defendant, the parties agreed to a consent order resolving the remaining issues in the case, and defendant failed to specifically reserve the right to appeal the trial court's prior order on the issue of liability.

The record reveals that on April 24, 2003, a settlement conference was held on the question of damages only. At that time, the parties reached an agreement regarding damages. Before the parties placed their agreement on the record, the trial court stated:

¹ After the trial court entered the initial summary disposition order, defendant filed a motion entitled "Defendant's motion to allow the filing of summary disposition motions as to the issue of coverage." In its brief in support of the motion, defendant relied on MCR 2.116(E) for authority for filing the motion. In an order entered February 4, 2003, the trial court denied this motion, which in essence was a motion for reconsideration.

Defense attorney may proceed. For the record, we had an opportunity to have a settlement conference before the non-jury trial. First, I'd like to commend the attorneys. You were very reasonable to work with, *the compromising was*, in my opinion, extremely professional and warranted, and because of that the non-jury trial isn't necessary. So if you put the terms of the agreement on record, we may proceed. [Emphasis supplied.]

The agreement that the parties stated on the record was reduced to writing in the form of an order that the trial court entered on April 28, 2003. That order states in pertinent part:

IT IS HEREBY ORDERED AND DECLARED as follows:

1. In accordance with the settlement reached, the Defendant is to reimburse and indemnify the Plaintiff in the amount of \$50,256.53.
2. In accordance with the settlement reached, all of Plaintiff's claims asserted herein against Defendant are dismissed in their entirety with prejudice.

The order also states:

THE UNDERSIGNED PARTIES HEREBY CONSENT TO AND APPROVE BOTH THE FORM AND CONTENT OF THIS ORDER[.]

The record further shows that defendant did not reserve the right to challenge on appeal the trial court's earlier order granting summary disposition in favor of plaintiff on the question of defendant's obligation to defend and indemnify.

Generally, one may not appeal from a consent judgment, order or decree. *CAM Constr v Lake Edgewood Condominium Ass'n*, 465 Mich 549, 556; 640 NW2d 256 (2002); *Dora v Lesinski*, 351 Mich 579, 582; 88 NW2d 592 (1958); *Dybata v Kistler*, 140 Mich App 65, 68; 362 NW2d 891 (1985). However, an appeal of right is available from a consent order for which the right to appeal has been specifically reserved. *Travelers Ins v Nouri*, 456 Mich 937, 937; 575 NW2d 561 (1998); *Vanderveen's Importing Co v Keramische Industrie M deWit*, 199 Mich App 359, 360; 500 NW2d 779 (1993); *Field Enterprises v Dep't of Treasury*, 184 Mich App 151, 153; 457 NW2d 113 (1990); *Smith v City of Westland*, 158 Mich App 132, 134; 404 NW2d 214 (1986).

Here, the April 28, 2003 order provides for dismissal with prejudice in exchange for the payment of an agreed upon amount of money. Further, the comments of the trial court at the hearing to place the settlement on the record indicate that the settlement was the result of compromise. As such, the parties' dispute was resolved by compromise and settlement, and therefore the April 28, 2003 order of the trial court in this case is a consent order. See *Ahrenberg Mechanical Contracting, Inc v Howlett*, 451 Mich 74, 78; 545 NW2d 4 (1996) (review is appropriate where there is no indication that the parties have stipulated to the outcome). As such, it is not appealable. *CAM Constr, supra*; *Dora, supra*; *Dybata, supra*.

Nevertheless, defendant maintains that because the record shows that it never agreed that it had a duty to defend and indemnify plaintiff, it should be permitted to challenge that ruling on

appeal. Defendant's argument is unavailing. To reserve the right to appeal upon entry of a consent order requires the order to contain an affirmative statement of the reservation of the right to appeal. *Travelers, supra*. Here, defendant only relies on the absence in the record of any agreement to liability. That no agreement to liability is evident in the record is not an affirmative reservation of the right to appeal the consent order, particularly when the record shows that the trial court's order resulted from the parties' ultimately compromising and settling their dispute.

Dismissed for lack of jurisdiction.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra