SJC-13124

CP 200 STATE, LLC vs. CIEE, INC.

Suffolk. November 1, 2021. - January 18, 2022.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Summary Process, Appeal. Contract, Settlement agreement. Practice, Civil, Summary process, Interlocutory appeal, Review of interlocutory action.

Summary Process. Complaint filed in the Superior Court Department on June 10, 2020.

A motion to enforce a settlement agreement was heard by Michael P. Doolin, J.

An application for leave to prosecute an interlocutory appeal was allowed in the Appeals Court by Gregory I. Massing, J., and questions of law were reported by him to the Appeals Court. The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

John A. Woodcock, III, for the defendant.
Joseph E. Ruccio, III, for the plaintiff.
Jennifer A. Creedon, for Massachusetts Defense Lawyers Association, amicus curiae, submitted a brief.
Ben Robbins & Martin J. Newhouse, for New England Legal Foundation, amicus curiae, submitted a brief.

WENDLANDT, J. This case presents the question whether the doctrine of present execution permits an interlocutory appeal from a Superior Court judge's order denying a motion to enforce an alleged settlement agreement. We conclude that it does not.[1]

1. Background. The following facts are undisputed by the parties. In June 2020, CP 200 State, LLC (CP 200), commenced this action in the Superior Court, asserting claims for summary process eviction and breach of contract against CIEE, Inc. (CIEE), regarding CIEE's lease of office space in Boston from CP 200. The parties' counsel engaged in settlement negotiations via e-mail. CIEE contends that e-mail messages exchanged on August 25, 2020, resulted in a binding settlement agreement whereby CIEE agreed to pay CP 200 $245,000 to resolve the parties' dispute; CP 200 contends that the parties did not reach an agreement.

Following the e-mail exchange, CIEE moved to enforce the alleged settlement agreement. The motion judge denied the motion. CIEE filed a petition for interlocutory review with a single justice of the Appeals Court, pursuant to G. L. c. 231, § 118, first par., contending that its interlocutory appeal was permissible under the doctrine of present execution.

[1] We acknowledge the amicus briefs submitted by the Massachusetts Defense Lawyers Association and the New England Legal Foundation.

The single justice determined that the "application of the doctrine of present execution in this context is an open question" deserving of appellate review. The single justice reported the following questions:

> "Question one. Does the doctrine of present execution permit an immediate appeal from the judge's order denying the motion to enforce the settlement agreement?
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> "Question two. If the doctrine of present execution applies, did the e-mail communications between the plaintiff and defendant create an enforceable settlement agreement?"

This court transferred the case sua sponte from the Appeals Court.

2. Discussion. The first reported question, whether the doctrine of present execution applies to allow an appeal from an interlocutory order denying a motion to enforce a settlement agreement, presents a question of law, which we consider de novo. Johnson v. Kindred Healthcare, Inc., 466 Mass. 779, 782 (2014). See, e.g., Borman v. Borman, 378 Mass. 775, 779-781 (1979) (examining de novo appropriateness of review of interlocutory order under doctrine of present execution).

"As a general rule, there is no right to appeal from an interlocutory order unless a statute or rule authorizes it."[2]

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[2] Of course, in connection with an appeal from a final judgment under Mass. R. Civ. P. 54, as amended, 382 Mass. 829 (1981), an alleged error in an interlocutory order may be ventilated. See G. L. c. 231, § 113. Additionally, a party may appeal before the entry of a final judgment under Mass. R. Civ.

Maddocks v. Ricker, 403 Mass. 592, 597 (1988). "The policy underlying this rule is that a party ought not to have the power to interrupt the progress of the litigation by piecemeal appeals that cause delay and often waste judicial effort in deciding questions that will turn out to be unimportant" (quotation omitted). Marcus v. Newton, 462 Mass. 148, 151 (2012), quoting Fabre v. Walton, 436 Mass. 517, 521 (2002), S.C., 441 Mass. 9 (2004).

The doctrine of present execution is a long-standing exception to this principle, applicable in limited circumstances. Maddocks, 403 Mass. at 598. See Vincent v. Plecker, 319 Mass. 560, 564 n.2 (1946) ("Though part of a single controversy remains undetermined, if the decree is to be executed presently, so that appeal would be futile unless the decree could be vacated by the prompt entry of an appeal in the full court, the decree is a final one"). "The doctrine is intended to be invoked narrowly to avoid piecemeal appeals from

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P. 64 (a), as amended, 423 Mass. 1403 (1996), pursuant to which the party may ask the judge to report the interlocutory finding or order to the Appeals Court where the finding or order "so affects the merits of the controversy that the matter ought to be determined by the [A]ppeals [C]ourt before any further proceedings in the trial court." And a party may seek permission to appeal from an interlocutory order pursuant to G. L. c. 231, § 118, first par., which affords the single justice of the Appeals Court discretion to permit an appeal. See Patel v. Martin, 481 Mass. 29, 31-32 (2018) (discussing mechanisms available for appellate review of interlocutory orders).

interlocutory decisions that will delay the resolution of the trial court case, increase the over-all cost of the litigation, and burden our appellate courts." Patel v. Martin, 481 Mass. 29, 32 (2018).

In civil cases, we have allowed an appeal before final judgment pursuant to the doctrine when the interlocutory order is "collateral to the rest of the controversy," Estate of Moulton v. Puopolo, 467 Mass. 478, 485 (2014), citing Maxwell v. AIG Dom. Claims, Inc., 460 Mass. 91, 106 n.12 (2011), and the order "interfere[s] with rights in a way that cannot be remedied on appeal from a final judgment." Estate of Moulton, supra, quoting Commonwealth v. Al Saud, 459 Mass. 221, 227 n.15 (2011). We have allowed an immediate appeal under the doctrine "where protection from the burden of litigation and trial is precisely the right to which [a party] asserts an entitlement." Patel, 481 Mass. at 33, quoting Estate of Moulton, supra.

In determining whether to allow an appeal under the doctrine, we must balance "the harm to cost-effective litigation arising from piecemeal interlocutory appeals against the harm that a litigant may suffer from a trial court order that is irremediable on postjudgment appeal." Patel, 481 Mass. at 37. In applying this "balancing act," we have considered whether the "sheer volume of potential appeals" resulting if an immediate appeal is permitted, as well as the "inevitable adverse impact

on judicial efficiency, outweighs the intrinsic harm that potentially might be suffered by an aggrieved party who is denied an immediate right to appeal." Id. "[M]erely causing a party to be subjected to the delay and expense inherent in further litigation does not make such an order 'effectively unreviewable.'" Mooney v. Warren, 87 Mass. App. Ct. 137, 139 (2015), quoting R.J.A. v. K.A.V., 34 Mass. App. Ct. 369, 374 (1993).

Applying these guiding principles, we have concluded, for example, that defenses based on government and statutory immunities are immediately appealable. See Estate of Moulton, 467 Mass. at 485-486 (order denying motion to dismiss based on statutory immunity under exclusive remedy provision of Workers' Compensation Act, G. L. c. 152, § 24, is immediately appealable); Kent v. Commonwealth, 437 Mass. 312, 316-317 (2002) (doctrine of present execution applies to denial of motion to dismiss based on immunity under Massachusetts Tort Claims Act, G. L. c. 258); Brum v. Dartmouth, 428 Mass. 684, 686, 688 (1999) (same). We have reasoned that these legislatively created immunities evince the express purpose of keeping the parties out of court. See Lynch v. Crawford, 483 Mass. 631, 635-636 (2019) (describing immunities under various statutes). They create a right to be free from suit -- a right that will be lost unless determined at the outset -- and reflect a significant public

interest in "protect[ing] public officials from the burden of litigation itself" and from the chilling effect of litigation itself. Patel, 481 Mass. at 33.

By contrast, we have concluded that a defense based on res judicata is not immediately appealable. Matter of Hamm, 487 Mass. 394, 402 (2021). Similarly, we have held that a discovery order requiring disclosure of privileged matters is not immediately appealable. See Patel, 481 Mass. at 37.

CIEE maintains that the alleged settlement agreement, like a statutory immunity, created a right to be free from litigation and trial that cannot be remedied on appeal from a final judgment because CIEE will already have spent time and resources on the trial.[3] But as the United States Supreme Court stated when declining a similar invitation to allow an immediate appeal from the denial of a motion to enforce a settlement agreement, "virtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a 'right not to stand trial.'" See Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 873 (1994) (acknowledging that permitting immediate appeal of pretrial motions, such as

[3] We agree with CIEE that the issue whether a settlement agreement was reached between it and CP 200 is collateral to the underlying merits of CP 200's claim that CIEE committed a breach of its lease. See Maddocks, 403 Mass. at 596 ("An issue is collateral to the underlying dispute if it is one that will not have to be considered at trial").

those asserting that action is barred by claim preclusion, or that no material fact is in dispute and moving party is entitled to judgment as matter of law, or that complaint fails to state claim, would frustrate purpose of final judgment rule). Rather than rely on such characterizations, we must be guided by the aforementioned balancing of interests.

In this regard, we agree with CP 200 that the denial of a motion to dismiss on the basis of res judicata and the denial of a motion for a protective order in a discovery dispute provide more apt analogies than the statutorily conferred immunities. We do not face here a situation where the absence of an immediate appeal has a chilling effect on public employees. Compare Estate of Moulton, 467 Mass. at 485-486; Kent, 437 Mass. at 316-317; Brum, 428 Mass. at 686, 688. Instead, a party seeking to enforce a settlement agreement, like a party pursuing a defense of res judicata, contends that it has, in effect, "bought" the right to be free from litigation. In regard to res judicata, the party has done so by virtue of having already litigated the claim, often at considerable expense, in a prior action; in regard to a settlement agreement, the party has negotiated a settlement of the dispute, creating a right to be free from liability in excess of that price.

Significantly, as is the case for res judicata and a discovery order, each of which we have held is not subject to

the doctrine of present execution, there are alternative avenues of redress for a party seeking to enforce a settlement agreement. Obviously, the party may appeal the issue of the settlement agreement after final judgment and, if successful, effectively have the judgment capped at the price negotiated in any valid agreement. Additionally, the party could negotiate a prevailing party provision[4] in connection with any agreement to settle, see Sea Breeze Estates, LLC v. Jarema, 94 Mass. App. Ct. 210, 219 (2018), in order to ameliorate some, if not all, of the harm caused by being required to continue to litigate the matter through trial. Further, the party could seek summary judgment, see Basis Tech. Corp. v. Amazon.com, Inc., 71 Mass. App. Ct. 29, 42-43 (2008), citing Correia v. DeSimone, 34 Mass. App. Ct. 601, 602 (1993), or pursue a breach of contract claim, see Thomas v. Massachusetts Bay Transp. Auth., 39 Mass. App. Ct. 537, 540 n.6, 544-545 (1995). While imperfect, "this collection of alternative remedies will adequately protect the rights of litigants" under the settlement agreement while also preventing "the sheer volume of potential appeals that would be permitted by including [enforcement of settlement agreements] within the doctrine of present execution, and the inevitable adverse impact

[4] Such a provision could, for example, allow the prevailing party "to recover reasonable counsel fees, court costs and other direct litigation expenses" from the opposing party. Sea Breeze Estates, LLC, v. Jarema, 94 Mass. App. Ct. 210, 219 (2018).

on judicial efficiency." Patel, 481 Mass. at 37-38. The delay and expense caused to CIEE by further litigation does not outweigh the interest in judicial efficiency. Id. at 37. See Mooney, 87 Mass. App. Ct. at 139.

We find instructive the Federal jurisprudence pursuant to which an immediate appeal from a settlement agreement is not permitted.[5] See Digital Equip. Corp., 511 U.S. at 884 (reasoning that "denying effect to the sort of [asserted] contractual right at issue [in connection with a settlement agreement] is far removed from those immediately appealable decisions involving rights more deeply rooted in public policy, and the rights . . . assert[ed] may, in the main, be vindicated through means less disruptive to the orderly administration of justice than immediate, mandatory appeal"). Courts in other States addressing the issue similarly have denied an immediate appeal. See, e.g., Herman Trust v. Brashear 711 Trust, 22 Neb. App. 758,

[5] "Our doctrine of present execution is similar to the Federal 'collateral order doctrine,' which permits full appellate review of a small class of collateral interlocutory decisions 'that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action.'" Patel, 481 Mass. at 32-33, quoting Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 106 (2009). Thus, we have often found the treatment of interlocutory orders under the Federal doctrine to be instructive. See, e.g., Borman, 378 Mass. at 780 (noting treatment of interlocutory order as immediately appealable under Federal collateral order doctrine, "a doctrine closely analogous to our rule of present execution").

767-770 (2015) (comparing private tolling agreement to settlement agreement and holding both not immediately appealable); Geniviva v. Frisk, 555 Pa. 589, 599 (1999) (concluding denial of motion to approve settlement not immediately appealable).

Accordingly, we answer the first reported question "no." Having concluded that CIEE is not entitled to an interlocutory appeal under the doctrine of present execution, "[w]e can exercise our discretion under our superintendence authority to reach the merits of this appeal, where the issue 'has been briefed fully by the parties . . . [and] raises a significant issue' . . . 'and addressing it would be in the public interest' . . . [o]r we can dismiss the appeal." Patel, 481 Mass. at 38, quoting Marcus, 462 Mass. at 153. Because the question whether these particular private parties entered into an enforceable settlement agreement by virtue of the e-mail messages exchanged by their counsel does not raise an issue of public concern, cf. Digital Equip. Corp., 511 U.S. at 879 (issues concerning right secured by private agreement generally are not of public importance), we decline to exercise our discretion to consider the merits and do not reach the second reported question. Accordingly, the defendant's appeal is dismissed.

So ordered.