

STATE OF MICHIGAN
COURT OF APPEALS

BARRY A. LEWIS,

Plaintiff-Appellant,

v

STATE OF MICHIGAN, MICHIGAN STATE
POLICE, and COLONEL MICHAEL DEAN
ROBINSON,

Defendants-Appellees.

UNPUBLISHED

February 1, 2002

No. 218786

Shiawassee Circuit Court

LC No. 94-003719-NO

Before: Jansen, P.J., and Doctoroff and Owens, JJ.

PER CURIAM.

This case arises out of plaintiff's complaint filed in the circuit court in April 1994 alleging race, sex, and age discrimination under the state Civil Rights Act, MCL 37.2101, *et seq.* Plaintiff, a white male, had been a Michigan State police trooper since 1973 and he filed suit against defendants because he was not promoted to sergeant. The crux of his complaint was that the affirmative action plan utilized by the State Police violated the Civil Rights Act, MCL 37.2210, and plaintiff alleged a claim under 42 USC 1983 against Colonel Robinson, the director of the State Police. During the course of the appellate proceedings, defendants filed a motion to dismiss for lack of jurisdiction contending that plaintiff's appeal is untimely. In an unpublished order entered on September 1, 1999, this Court held defendants' motion to dismiss in abeyance for submission to the case call panel to decide this issue in an opinion. We now dismiss plaintiff's appeal for lack of jurisdiction.

The procedural history surrounding this case is lengthy and complex. Plaintiff filed his complaint in the circuit court in April 1994 and, one year later, filed a separate action against the State of Michigan in the court of claims (lower court number 94-015734-CM) alleging a violation of his equal protection rights under the state constitution. In June 1995, the cases were consolidated before Shiawassee Circuit Court Judge Gerald Lostracco. With respect to the circuit court case, in August 1995, plaintiff amended his circuit court complaint and in April 1996, defendants filed a motion for summary disposition. The trial court denied the motion in November 1996, and shortly thereafter, plaintiff again amended his circuit court complaint. In December 1996, defendant filed an application for leave to appeal in this Court from the trial court's denial of their motion for summary disposition. This Court, in an unpublished order entered on January 29, 1997 (Docket No. 199713), peremptorily vacated the trial court's order and remanded for further proceedings, noting that to the extent that plaintiff's state law claims

were based on conduct or practices contained in affirmative action plans approved by the Civil Rights Commission, defendant were not subject to liability under the state Civil Rights Act.

Following remand, defendants renewed their motions for summary disposition with respect to both the circuit court and court of claims cases. At the hearing held on April 17, 1997, the trial court granted defendants' motion for summary disposition with respect to the circuit court action and the written order was entered on May 8, 1997. The order stipulating to the dismissal of the age discrimination claim was entered on May 19, 1997. With respect to the court of claims case, the trial court denied the motion for summary disposition and set the matter for trial before visiting Judge Martin Clements. The court of claims found in favor of plaintiff and entered the written judgment on June 17, 1997. An order awarding to plaintiff costs and fees was then entered on June 18, 1997.

Defendants appealed from the court of claims action only on July 7, 1997, but wrongly identified the final order as that entered on June 18, 1997, rather than June 17, 1997. Plaintiff purported to file a cross appeal but only to the extent that defendant timely and properly appealed the trial court's denial of their motion for summary disposition regarding the court of claims complaint. Plaintiff specifically stated that to the extent that defendants failed to properly and timely appeal from the court of claims judgment, then plaintiff made no cross appeal. Because defendants had in fact wrongly identified the final judgment in their claim of appeal, this Court on its own motion dismissed defendants' appeal for lack of jurisdiction in an unpublished order entered on March 19, 1998 (Docket No. 204525).

Defendants then filed a delayed application for leave to appeal on June 16, 1998, in the court of claims case only, and plaintiff again filed a contingent cross appeal on June 24, 1998. However, because defendants' appeal was not an appeal by right, a cross appeal is not properly filed until after the application is granted. See MCR 7.207(B)(2). In an unpublished order entered on November 16, 1998 (Docket No. 212396), this Court, in lieu of granting defendants' application for leave to appeal, peremptorily reversed the court of claims judgment and the order granting costs and fees and remanded for proceedings consistent with *Cremonte v Michigan State Police*, 232 Mich App 240; 591 NW2d 261 (1998). In *Cremonte*, this Court held that a claim for money damages against the state for discrimination in violation of the Equal Protection Clause of the state constitution because of affirmative action policies followed by the State Police was not an appropriate case in which to infer a damage remedy. Plaintiff's motion for rehearing was denied by this Court in an unpublished order entered on February 26, 1999.

On March 12, 1999, plaintiff filed an application for leave to appeal in the Supreme Court regarding the court of claims case. On March 26, 1999, the trial court purported to enter an order dismissing plaintiff's claims in the court of claims case pursuant to this Court's peremptory order. On April 12, 1999, plaintiff filed the present claim of appeal in this Court from the circuit court case, identifying the March 26, 1999, order as the final order. In the meantime, the Supreme Court granted plaintiff's application for leave to appeal from the peremptory order regarding the court of claims case on April 18, 2000. The Supreme Court decided the matter in an opinion on July 17, 2001, which affirmed the peremptory order, albeit using different reasoning. See *Lewis v Michigan*, 464 Mich 781; 629 NW2d 868 (2001).

At issue before us is whether we have jurisdiction to decide plaintiff's claim of appeal regarding the circuit court case. Defendants argue that plaintiff's appeal should be dismissed

because it is not timely regardless of whether the final order or judgment is considered to be the order granting summary disposition entered on May 8, 1997, or the court of claims judgment that ultimately disposed of all the claims on June 17, 1997. Plaintiff counters that the final order was the March 26, 1999, order entered by the trial court that ultimately dismissed the court of claims action pursuant to this Court's peremptory order.

This Court has jurisdiction over an appeal of right from a "final judgment or final order of the circuit court, court of claims, and recorder's court." MCR 7.203(A)(1). A final judgment or final order is defined as:

the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties, including such an order entered after reversal of an earlier final judgment or order [MCR 7.202(7)(a)(i).]

An appeal of right must be filed within twenty-one days after entry of the order or judgment appealed from, MCR 7.204(A)(1)(a), and a time limit for an appeal of right is jurisdictional, MCR 7.204(A).

This appeal is somewhat complicated by the fact that there were two consolidated cases in the lower court. Based on a reading of the court rules, we find that consolidated cases in the lower court should be considered as one for purposes of appeal. Indeed, the definition of final judgment or order in a civil case justifies this ruling because a final judgment or order is one that disposes of *all* the claims and adjudicates the rights and liabilities of *all* the parties. MCR 7.202(7)(a)(i). Moreover, MCR 2.604, which pertains to a judgment in actions involving multiple claims or multiple parties, provides in pertinent part:

[A]n order or other form of decision adjudicating fewer than all the claims, or the rights and liabilities of fewer than all the parties, does not terminate the action as to any of the claims or parties, and the order is subject to revision before entry of final judgment adjudicating all the claims and the rights and liabilities of all the parties. Such an order or other form of decision is not appealable as of right before entry of final judgment. A party may file an application for leave to appeal from such an order.

In the present case, the final judgment was that entered on June 17, 1997. Although the order entered on May 8, 1997, dismissed the claims against defendants in the circuit court case, the circuit court case was consolidated with a case in the court of claims that subsequently went to a bench trial and involved the same parties and factual situation. Therefore, we hold that the final judgment in this case was that entered on June 17, 1997, because it was not until that point that all of the claims, rights, and liabilities of all the parties were adjudicated.

Plaintiff has not appealed from the June 17, 1997, judgment, but has instead appealed from the March 26, 1999, order entered by the trial court pursuant to this Court's peremptory order as the "final order" entered in the matter. We reject plaintiff's contention that the March 26, 1999, order is the final order in this case. First, the trial court was without authority to enter this order because there was an application for leave to appeal pending in the Supreme Court at that time. Plaintiff filed his application for leave to appeal on March 12, 1999 from this Court's

November 16, 1998, peremptory order, and subsequent denial of his motion for rehearing of February 26, 1999.

Because leave to appeal was pending in the Supreme Court, the trial court was without authority to amend the final judgment that had been entered on June 17, 1997. The Supreme Court's decision in *People v George*, 399 Mich 638; 250 NW2d 491 (1977), controls this situation. In *George*, the defendant was convicted of second-degree murder and following an appeal of right to this Court, the conviction was reversed and remanded for a new trial. The prosecution then filed an application for leave to appeal in the Supreme Court. The trial court, while the application for leave to appeal was pending, set a date for a new trial in light of this Court's opinion reversing. The defendant then filed an interlocutory motion in the Supreme Court to determine the trial court's jurisdiction. The Supreme Court stated that if it denied the pending application for leave to appeal, then the Court of Appeals judgment would be the final adjudication of the case and could be enforced according to its terms. If the Supreme Court granted the pending application, then jurisdiction of the case would vest in the Supreme Court.¹ Jurisdiction would revert in the Court of Appeals or the circuit court upon issuance of any final order or judgment issued by the Supreme Court. The Supreme Court specifically held in *George, supra*, p 640, that the trial court did not have jurisdiction while the prosecution's application for leave to appeal was pending in the Supreme Court to retry the defendant. Accord *People v Phillips*, 416 Mich 63, 74-75; 330 NW2d 366 (1982) (also noting that a timely application for leave to appeal to the Supreme Court from a decision of the Court of Appeals effectively stays the Court of Appeals decision as a final adjudication).

The procedural situation in *George* is very similar to the present case. Here, the final judgment was entered on June 17, 1997, by the court of claims and this Court later peremptorily reversed and remanded on the authority of *Cremonte*. Plaintiff filed a timely application for leave to appeal in the Supreme Court, and the trial court purported to modify the June 17, 1997, judgment because of this Court's peremptory order. However, it is clear that the trial court did not have the authority to modify the June 17, 1997, judgment while the application for leave to appeal was pending in the Supreme Court. See also, MCR 7.302(F)(3). Consequently, the March 26, 1999, order cannot be deemed to be the final order entered by the trial court.

In addition to the fact that the trial court did not have authority to enter the March 26, 1999, order for the reasons that we have stated, in a civil case, the final order or judgment is the *first* order that disposes of all the claims of all the parties. MCR 7.202(7)(a)(i); *Allied Electrical Supply Co, Inc v Tenaglia*, 461 Mich 285, 288; 602 NW2d 572 (1999). Here, the first order that disposed of all the claims of all the parties was the judgment entered on June 17, 1997.

Further, we reject plaintiff's argument to accept this appeal based on judicial economy. First, plaintiff is well beyond the one-year time limit for filing a delayed application for leave to appeal in this Court. MCR 7.205(F)(3). Moreover, plaintiff clearly had other options to perfect an appeal in this Court. Initially, plaintiff could have filed an application for leave to appeal from the May 8, 1997, order (as the non-final order) of the trial court granting summary

¹ See MCR 7.302(F)(3), which corresponds to this holding.

disposition in the circuit court matter. MCR 7.203(B); MCR 7.205. Additionally, plaintiff could have filed a claim of appeal from the final judgment entered on June 17, 1997, as an appeal of right. Instead, plaintiff opted to file a contingent claim of cross appeal; however, we emphasize that plaintiff was not required to utilize this strategy. Plaintiff clearly could have perfected his claim of appeal from the June 17, 1997, judgment by filing his own appeal of right or by filing a proper cross appeal.

Accordingly, we conclude that we do not have jurisdiction to decide this appeal because it is not timely. MCR 7.204(A). The final judgment was that entered on June 17, 1997, because that was the first order disposing of all the remaining claims and adjudicating all the remaining rights and liabilities of all the parties and we specifically note that consolidated cases are considered as one for purposes of appeal. MCR 7.202(7)(a)(i); MCR 2.604. Plaintiff clearly had the right and opportunity to perfect an appeal of right after entry of the June 17, 1997, judgment. We cannot agree that the March 26, 1999, order is the final order, as identified by plaintiff, because the trial court did not have the authority to enter that order since an application for leave to appeal was pending in the Supreme Court at that time. MCR 7.208(A); MCR 7.302(F)(3). Moreover, the first judgment that disposed of all the claims and adjudicated the rights and liabilities of all the parties was the judgment entered by the court of claims on June 17, 1997. Consequently, plaintiff's claim of appeal filed on April 12, 1999, is untimely as an appeal of right and cannot be accepted within the one-year time period for a delayed application for leave to appeal. Because the time requirements for filing a claim of appeal are jurisdictional, MCR 7.204(A), and the appeal is untimely, we are without jurisdiction to decide this appeal.

Appeal dismissed for lack of jurisdiction.

/s/ Kathleen Jansen
/s/ Martin M. Doctoroff
/s/ Donald S. Owens