

[Cite as *Nationwide Mut. Ins. Co. v. Pragotrade, Inc.*, 2010-Ohio-5603.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94497

NATIONWIDE MUTUAL INSURANCE CO.

PLAINTIFF-APPELLANT

vs.

PRAGOTRADE, INC.

DEFENDANT-APPELLEE

**JUDGMENT:
DISMISSED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-619185

BEFORE: Sweeney, J.,* Rocco, P.J., and Stewart, J.

RELEASED AND JOURNALIZED: November 18, 2010

ATTORNEY FOR APPELLANT

Gregory E. O'Brien, Esq.
Cavitch, Familo & Durkin Co., L.P.A.
Twentieth Floor
1300 East Ninth Street
Cleveland, Ohio 44114

ATTORNEY FOR APPELLEE

Fred Wendell, III, Esq.
Stewart & DeChant Co., L.P.A.
The Standard Building, Suite 1440
1370 Ontario Street
Cleveland, Ohio 44113

JAMES D. SWEENEY, J.:

{¶ 1} Plaintiff-appellant, Nationwide Mutual Insurance Company (“Nationwide”), appeals from the order of the trial court that determined that Nationwide has a duty to defend defendant-appellant, Pragotrade, Inc. (“Pragotrade”) in connection with litigation pending in the Allegheny County, Pennsylvania Court of Common Pleas. For the reasons provided below, we dismiss this appeal for lack of a final appealable order.

{¶ 2} On March 20, 2001, Nationwide filed a complaint for declaratory judgment against its insured, Pragotrade, regarding its rights and responsibilities as it pertained to all claims filed by Terry and Valerie DuBois against Pragotrade in Allegheny County, Pennsylvania Court of Common Pleas Case No. 05-36901

(“DuBois lawsuit”). In the complaint, Nationwide requested the trial court to specifically declare the following: the policy excludes DuBois’ claims against Pragotrade; Nationwide has no duty to indemnify Pragotrade for compensatory or punitive damages in the DuBois lawsuit; Nationwide has not waived its right to assert any defenses under the policy; and Nationwide is entitled to recover costs of filing the instant lawsuit.

{¶ 3} After briefing on the matter, the trial court granted Nationwide summary judgment on January 23, 2008. The court declared that the policy at issue does not provide coverage, and thus, Nationwide was not required to defend or indemnify Pragotrade in the DuBois lawsuit. On appeal, we reversed the trial court’s judgment, finding “genuine issues of material fact exist as to whether or not ‘products-completed operations hazard’ coverage was excluded when Terry sustained his injury.” *Nationwide Mut. Ins. Co. v. Pragotrade, Inc.*, Cuyahoga App. No. 91053, 2008-Ohio-5125, at ¶20.

{¶ 4} Following reversal, the trial court conducted a bench trial of the matter on December 7, 2009. After trial, the court issued its Findings of Fact, Conclusions of Law, Opinion, and Order on December 14, 2009. In this document, the court concluded the following:

{¶ 5} “For the purpose of Allegheny County, Pennsylvania Common Pleas Court Case No. 05-36901 and any other litigation or claims arising from the incident in that case, such claims:

{¶ 6} “1) [A]rise out of ‘your product’ and/or ‘your work’ and fall within the ‘completed operations hazard [sic] provision in Nationwide Policy No. 92PR6740970-30010 and are claims for ‘bodily injury’ or ‘property damage’ included within the ‘products-completed operation hazard’ provision of that policy.

{¶ 7} “2) [I]nsurance for the claims in Case No. 05-36901 are not excluded by form Cas. 3871 or any other purported exclusion in Nationwide Policy No. 92PR674097-30010.

{¶ 8} “3) Nationwide has a duty to indemnify Pragotrade against any judgment or settlement for compensation damage in Case No. 05-36901 up to a maximum of \$2,000,000.

{¶ 9} “Nationwide has requested the Court to rule that it has no duty to indemnify Pragotrade for punitive damages; however, that issue has not been addressed by the parties either by testimony or in briefs. It will not be determined.”

{¶ 10} Nationwide now appeals this judgment and assigns the following four errors for our review:

{¶ 11} “I. THE TRIAL COURT ERRED IN CONCLUDING THAT THE POLICY INCLUDED PRODUCTS COMPLETED OPERATIONS COVERAGE WITH LIMITS OF \$2 MILLION.

{¶ 12} “II. THE TRIAL COURT ERRED IN CONCLUDING THAT THE DOCTRINE OF ESTOPPEL PROVIDED PRAGOTRADE WITH \$2 MILLION OF PRODUCTS COMPLETED OPERATIONS AGGREGATE COVERAGE.

{¶ 13} “III. THE TRIAL COURT ERRED IN FINDING THAT ZIVSAK’S ACTIONS BOUND NATIONWIDE UNDER THE DOCTRINE OF APPARENT AGENCY.

{¶ 14} “IV. THE TRIAL COURT ERRED IN CONCLUDING THAT NATIONWIDE DID NOT ADEQUATELY COMMUNICATE TO PRAGOTRADE THE EXCLUSION OF COVERAGE FOR CLAIMS WITHIN THE PRODUCTS COMPLETED OPERATIONS HAZARD.”

{¶ 15} Because we find that we are without jurisdiction to entertain this appeal, we decline to address the merits of Nationwide’s assignments of error, and instead, dismiss the appeal for lack of a final appealable order. Appellate jurisdiction is limited to reviewing lower courts’ final judgments. Section 3(B)(2), Article IV of the Ohio Constitution. To be a final appealable order, a judgment entry must meet the requirements of R.C. 2505.02 and, if applicable, Civ.R. 54(B). *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86, 88, 541 N.E.2d 64.

{¶ 16} R.C. 2505.02(B)(1) provides that a final appealable order is “[a]n order that affects a substantial right in an action that in effect determines the action and prevents a judgment.” The Supreme Court has held that “the duty to defend involves a substantial right to both the insured and the insurer.” *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.* (1989), 44 Ohio St.3d 17, 22, 540 N.E.2d 266. Additionally, it concluded that “[a] declaratory judgment action is a special proceeding pursuant to R.C. 2505.02[.]” *Id.* Accordingly, as this appeal

concerns a complaint for declaratory judgment, the requirements of R.C. 2505.02 are met.

{¶ 17} Next, we consider whether the trial court's judgment also satisfies the tenants of Civ.R. 54(B). Civ.R. 54(B) provides in relevant part, as follows:

{¶ 18} "When more than one claim for relief is presented in an action * * * 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 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 parties."

{¶ 19} This rule applies in multiple-claim or multiple-party actions where fewer than all the claims or fewer than all the parties are adjudicated. *Gen. Acc. Ins. Co.*, supra at 22. If a court enters final judgment as to some, but not all, of the claims and/or parties, the judgment is a final appealable order only upon the express determination that there is no just reason for delay. *Id.*

{¶ 20} In the instant case, the judgment does not comply with Civ.R. 54(B). The trial court expressly concludes that Nationwide had an obligation to provide insurance coverage to Pragotrade in the DuBois lawsuit as no exclusions apply under the insurance contract. The judgment further provides that Nationwide

had a duty to indemnify Pragotrade for all compensatory claims. The judgment, however, does not address whether Nationwide had a duty to indemnify Pragotrade for punitive damages, despite Nationwide's request in its complaint for such a declaration. In this regard, the court specifically states:

{¶ 21} “Nationwide has requested the Court to rule that it has no duty to indemnify Pragotrade for punitive damages; however, that issue has not been addressed by the parties either by testimony or in briefs.¹ ***It will not be determined.***” (Emphasis added.)

{¶ 22} Consequently, that portion of the declaratory judgment action remains pending before the trial court. Because the trial court failed to declare whether Nationwide has any obligation to indemnify Pragotrade for punitive damages as requested in its complaint and did not indicate that there is no just cause for delay pursuant to Civ.R. 54(B), we conclude that we are without jurisdiction to review the merits of Nationwide's appeal.

Appeal dismissed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

¹We note that the trial court may finalize the judgment in this case by dismissing the one pending declaratory judgment claim for failure to prosecute pursuant to Civ.R. 41(B)(4), which may have been the court's intent when it declined to rule on the claim, although is not entirely clear.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES D. SWEENEY, JUDGE*

KENNETH A. ROCCO, P.J., and
MELODY J. STEWART, J., CONCUR

*(Sitting By Assignment: Judge James D. Sweeney, Retired, of the Eighth District Court of Appeals)