NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

IHOR MALANCHUK,

Appellant

v.

ILYA SIVCHUK T/A FOUR BROTHERS CONSTRUCTION CO.,

Appellee

IN THE SUPERIOR COURT OF PENNSYLVANIA

IHOR MALANCHUK,

Appellant

v.

ALEX TSIMURA, INDIVIDUALLY AND T/A IMPRESSIVE WINDOWS AND ALEXIS IMPRESSIVE WINDOWS
AND
TATYANA TSIMURA, INDIVIDUALLY AND T/A IMPRESSIVE WINDOWS AND ALEXIS IMPRESSIVE WINDOWS AND ALEXIS IMPRESSIVE WINDOWS, INC.,

Appellees

No. 1379 EDA 2012

Appeal from the Order Entered March 26, 2012
In the Court of Common Pleas of Philadelphia County
Civil Division at No(s): 3249 May Term 2009, 4727 April Term, 2010

BEFORE: BOWES, OTT, and STRASSBURGER,* JJ.

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* Retired Senior Judge assigned to the Superior Court.

DISSENTING MEMORANDUM BY OTT, J.: **FILED DECEMBER 04, 2013**

Because I agree with the trial court that this is an interlocutory appeal taken without permission of the court and which, therefore, should be quashed, I am constrained to dissent from the learned majority.

The majority correctly notes that our Court may exercise jurisdiction over a final order or order certified as a final order. Additionally, we have jurisdiction over interlocutory orders appealable as of right, interlocutory orders appealable by permission, or collateral orders. I do not believe that any of these apply to the instant order.

The order at issue in this appeal granted partial summary judgment, dismissing all claims against defendant Tsimura, but allowing the claim of negligence against Ilya Sivchuk to proceed. "As a general rule, an order dismissing some but not all counts of a multi-count complaint is interlocutory and not appealable. In adhering to this policy, the courts have sought to avoid piecemeal litigation. This Court has held that an appeal will not lie from an order granting partial summary judgment." ***Bombar v. West American Ins. Co.***, 932 A.2d 78, 85 (Pa. Super. 2007) (citation omitted). ***See also*** Pa.R.C.P. 341 (defining final orders).

However, the majority relies on ***Kincy v. Petro***, 2 A.3d 490 (Pa. 2010) to support its position that because the current action was the product of consolidated claims, the claims against each defendant retained their separate identities, thereby rendering summary judgment against Tsimura a

final order. I believe this unnecessarily broadens the application of ***Kincy***, and unintentionally abrogates the definition of a final order. ***See*** Pa.R.A.P 341.

Kincy is distinguishable from this matter because the factual basis of ***Kincy*** is dissimilar. In ***Kincy***, one motor vehicle accident resulted in two plaintiffs,[1] each filing a separate action, each with separate allegations. One of the plaintiffs, Kincy, misidentified the owner of the tortfeasor's car, Nancy Petro (Petro), as the driver.[2] Therefore, Kincy's claim regarding the negligent operation of the vehicle was fatally flawed.

Because of the similarity of the issues and actions, the matters were consolidated. Claims involving the second plaintiff settled, leaving Kincy's negligence claims against the misidentified owner, Petro. Petro sought an order precluding Kincy from introducing any evidence other than that supporting the allegation in the complaint, that Petro had negligently operated the vehicle. The order was granted, and because Nancy Petro was not driving, no such evidence could be presented. Thereafter, the trial court granted Petro's motion for non-suit. Kincy claimed because the cases had been consolidated, Nixon's claims, which had correctly identified the driver, were merged into her complaint. A panel of our Court disagreed, determining that under the circumstances presented, each original case

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[1] Alice Kincy's brother, Jerome Nixon, was the other plaintiff.

[2] The actual driver was Anastasia Petro.

retained its identity and the cases were effectively consolidated simply for the convenience of trial. Therefore, the allegations found in one complaint did not merge into the allegations of the other.

Of particular note in ***Kincy*** is that at the time the trial court granted the nonsuit, the statute of limitations had expired. In fact, the statute of limitations had expired by the time consolidation was ordered. Therefore, if Kincy's argument had been accepted, it would have defeated the statute of limitations by effectively allowing Kincy to untimely amend her complaint adding a new cause of action. That result would have created a loophole in the statute of limitations.[3]

Moreover, ***Kincy*** never addressed the issue of what constitutes an appealable order, which is the threshold issue herein. ***Kincy*** involves the merger of complaints filed by separate plaintiffs, after the statute of limitations had expired. On the other hand, the case *sub judice* involves a single plaintiff bringing allegations against joint defendants.

Here, Malanchuk was injured while working on Sivchuk's residence. In May 2009, he filed suit against Sivchuk alleging negligence and products liability. Tsimura was also at the job site and was possibly in control of the jobsite. Malanchuk filed suit against Tsimura in April 2010, also alleging

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[3] I believe the statute of limitations is central to the disposition of ***Kincy***. Had the statute of limitations not expired, Kincy could have amended the complaint, and this issue would be moot.

negligence and products liability. The language of the claims against each defendant was identical. In June 2011, the two cases were consolidated under the May 2009 court term and number. The result of consolidation essentially created a four-count complaint, one count of negligence against each defendant, and one count of products liability against each defendant.[4]

There are multiple methods of bringing an action against multiple defendants. A plaintiff can file a single complaint naming all defendants and raising all claims against each defendant. However, through either discovery or inadvertence, all defendants are not always known or named in the first complaint. When this occurs, a plaintiff can seek to amend the complaint, naming a new party and detailing the allegations against that party or file a motion to join a party defendant. ***See Meadows v. Enoch***, 993 A.2d 912 (Pa. Super. 2010); Pa.R.C.P. 2232 (c). In each of these cases, all allegations against all defendants would be contained in a single complaint, under a single court term and number, just as if the claims had been originally filed.

If Malanchuk had brought his claims against Tsimura and Sivchuk using any of these methods, there would be no question that the order granting partial summary judgment was interlocutory and non-appealable.

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[4] It is unclear if the consolidation resulted in a claim of joint and several liability against the defendants or merely joint liability. I do not believe this distinction is dispositive to the issue at hand.

However, Malanchuk utilized a fourth method of adding a party defendant; he filed a separate action and consolidated the two cases. ***See*** Pa.R.C.P. 213. All four methods are acceptable under the rules of civil procedure. I see no reason to treat the instant order any differently simply because the claims against each defendant were initially filed separately and then consolidated into one action.

Pennsylvania Rule of Appellate Procedure 341 is designed to provide order and certainty to the determination of what orders constitute final orders, thereby limiting piecemeal determinations and the consequent protraction of litigation. ***See Hionis v. Concord Twp.***, 973 A.2d 1030 (Pa. Cmwlth. 2009).[5] Further,

> [t]he final order rule serves to maintain the appropriate relationship between the district and appellate courts ... by ensuring that [trial judges'] every determination is not subject to the immediate review of an appellate tribunal.... The consolidation of all contested rulings into a single appeal provides the circuit courts with an opportunity, furthermore, to consider a trial judge's actions in light of the entire proceedings below, thereby enhancing the likelihood of sound appellate review.

Rae v. Pennsylvania Funeral Directors Ass'n., 977 A.2d 1121, 1125 (Pa. 2009) (citation omitted).

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[5] I recognize that Commonwealth Court decisions are not binding upon our court. However, this concise statement by the Commonwealth Court is true and bears repeating.

Rule 341 clearly exempts orders granting partial summary judgment from finality. ***See*** Pa.R.A.P. 341(b)(1), (c).[6] The rule permits a trial court to specifically designate an order of partial summary judgment as final, thereby allowing for immediate appeal. The trial court in this matter did not determine its order granting partial summary judgment required immediate appellate review. Because the rules provide for the possibility of immediate appellate review, and there has been no demonstration of the need to avoid Rule 341, I see no reason to overrule the trial court's decision solely on the

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[6] Pa.R.A.P. 341(b)(c) states, in relevant part:

> (b) A final order is any order that:
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> > (1) disposes of all claims and of all parties;
> > (2) is expressly defined as a final order by statute; or
> >
> > (3) is entered as a final order pursuant to subdivision (c) of this rule.
>
> (c) When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim or when multiple parties are involved, the trial court or other governmental unit may enter a final order as to one or more but fewer than all of the claims and parties only upon express determination that an immediate appeal would facilitate resolution of the entire case. Such an order becomes appealable when entered. In the absence of such a determination and entry of a final order, any order or other form of decision that adjudicates fewer than all the claims and parties shall not constitute a final order.

Pa.R.A.P. 341 (b)(c).

basis of the manner the claims were originally presented. Therefore, I do not believe ***Kincy*** is applicable to the instant matter.

Having determined that the consolidation of claims against Sivchuk and Tsimura in this matter does not affect the interlocutory nature of the order in question, I would quash the appeal.

In light of the foregoing, I am constrained to dissent.[7]

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[7] Because I would quash the appeal as interlocutory, there is no need to comment on the grant of summary judgment in favor of Tsimura.