J.A08029/12

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

ERIE INSURANCE EXCHANGE	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
L. GARY BRITCHER AND JANE BRITCHER, INDIVIDUALLY AND AS PARENTS AND NATURAL GUARDIANS OF MICHAEL BRITCHER, A MINOR AND L. GARY BRITCHER MASONRY, INC.	:	No. 2002 EDA 2011
Appellants	:	
v.	:	
BODY-BORNEMAN ASSOCIATES, INC.	:	

Appeal from the Judgment Entered August 10, 2011
In the Court of Common Pleas of Bucks County
Civil No(s).: 0805191-32-2

BEFORE: ALLEN, OLSON and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: Filed: February 6, 2013

Appellants, L. Gary Britcher and Jane Britcher, individually and as parents and natural guardians of Michael Britcher, a minor,[1] and L. Gary Britcher Masonry, Inc., appeal from the judgment entered in the Bucks County Court of Common Pleas in favor of Appellee, Erie Insurance Exchange [hereinafter Erie]. Appellants contend that, based upon an automobile insurance policy obtained by Body-Borneman Associates, Inc.

* Former Justice specially assigned to the Superior Court.

[1] Michael is not presently a minor.

[hereinafter BBA],[2] Erie was obligated to provide insurance coverage to them. Because of outstanding claims that render this appeal interlocutory, we quash.

The facts are generally not in dispute.

> The facts regarding this case begin in 1985, when Mr. Britcher hired BBA to act as his insurance expert and relied on BBA's professional opinion and expertise to tell him what coverage he needed to insure his masonry business, L. Gary Britcher doing business as L. Gary Britcher Masonry. BBA is a business that deals with prospective insureds, either corporate or individual, in order to procure insurance for them. BBA can secure coverage for prospective insureds with Erie, or eight or nine other insurance carriers.
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> Using BBA, Mr. Britcher submitted an Application for Auto Coverage. Erie accepted the application and issued a Commercial policy to L. Gary Britcher doing business as L. Gary Britcher Masonry for the term of August 27, 1985, through August 27, 1986. Initially the policy provided full coverage for Mr. Britcher and his relatives (namely his wife and two sons), because as a sole proprietor, Mr. Britcher was the individual named insured. Accordingly, the policy provided first party benefits for Mr. Britcher and his family while occupants in any car, whether named in the policy or not, or as pedestrians. Thereafter, the policy renewed annually.
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> In 1996, Mr. Britcher incorporated his business, changing the named insured from an 'individual' to a 'corporation,' Britcher Masonry, Inc. This change was set into motion by Mr. Britcher and Mr. Body, an agent of BBA. Mr. Body traveled to the insureds' home and discussed how to maintain the same insurance coverage, despite the business' corporate structure change. During that discussion, Mr. Britcher informed Mr. Body that he wanted to secure substantially similar coverage.

[2] We explain the status of BBA below.

> Contrary to Mr. Britcher's request, when his company underwent a corporate change, his Commercial Auto policy changed as well. Since a corporation is not an individual and thus cannot have relatives, the insureds no longer had the same coverage as before and thus only had first party benefits coverage and uninsured/underinsured motorist coverage while occupying only cars insured under the Commercial Auto Policy. No longer were the insureds covered as pedestrians or occupants in cars not covered under the policy. As a result, it is alleged that in procuring the policy at issue, BBA failed to take the actions necessary to add available endorsements to ensure that the same coverage existed as before, thus leaving a gap in coverage. At the time of the change, no conversations were ever held between Mr. Britcher and Erie, nor BBA and Erie's Underwriting Department, regarding the policy change; BBA never told Mr. Britcher that it was an agent for Erie, and Mr. Britcher never believed that BBA was acting on Erie's behalf. Further, Mr. Britcher testified that had he been informed of the additional endorsements available, he would have obtained it to secure substantially similar coverage.
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> The instant dispute arose on December 23, 2004, when Michael Britcher sustained serious, nearly fatal, injuries, in a car accident while riding as a passenger in an automobile operated by a friend. When the insureds initiated a claim for first party and underinsured motorist benefits, the claim was denied. Since the post-1996 policy covered the insureds **only** while occupying cars covered under the policy, Michael Britcher's claim[1] for coverage was denied.
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> [1] Since Michael Britcher was a minor at the time of the accident, the claim was initiated by his parents, on his behalf, as his natural guardians.

Trial Ct. Op., 9/19/11, at 1-3 (citations omitted). Erie filed a declaratory judgment action on March 24, 2005, seeking a determination that it was not obligated to provide coverage to Appellants.

On May 23, 2005, Appellants filed two pleadings. That morning, they filed a joinder complaint naming BBA as an additional defendant and raising a claim of negligence. That evening, Appellants filed an answer to Erie's complaint with a new matter and raised a claim—which they labeled a "counterclaim"—of negligence against BBA.

With respect to the declaratory judgment action, a bench trial was held on April 11, 2011. At trial, Appellants primarily presented two defenses to the claim that Erie was not obligated to provide insurance coverage. First, Appellants asserted that the insurance policy was ambiguous with respect to the coverage of the vehicles. Specifically, they maintained that because they leased—and did not own—the vehicles, there was no coverage under the policy. Appellants extrapolated that because they paid premiums for no coverage, the policy was illusory. Thus, Appellants concluded the ambiguous policy should be construed in favor of coverage. Second, Appellants suggested that BBA was an agent of Erie. Erie, Appellants theorized, therefore had an affirmative obligation to inform them of any coverage gap.

Initially, the court held that the policy was not ambiguous and therefore not illusory. Second, the court held that BBA was not an agent of Erie. Thus, the court opined, Erie did not have to provide insurance benefits to Appellants pursuant to the reasonable expectations doctrine, which examines whether the insured reasonably expected coverage.

Appellants filed a post-trial motion requesting an order compelling Erie to provide coverage. Erie opposed and, for the first time, alleged that Appellants settled their negligence claim against BBA:

> Interestingly, following the non-jury trial on the legal coverage issue, the [jury] trial of the negligence claims of [Appellants] against [BBA], was to begin. Just as trial was to begin, the claims of [Appellants] against [BBA], seeking recovery of damages, i.e. the first party benefits and UIM benefits, as a result of the failure of the broker to procure appropriate insurance coverage, was settled. The terms of the settlement were apparently confidential. However, the insurer for [BBA], made as a condition of the settlement the requirement that [Appellants] file these Post-Trial Motions and continue to pursue the coverage claims against . . . Erie. Apparently, [Appellants], who have been compensated for the loss, are pursuing this appeal only because the insurer for the broker required same as part of the settlement.

Mem. of Law of Erie in Opp'n to Mot. for Post-Trial Relief, 6/27/11, at 2 n.1. The docket and certified record reflects no discontinuance or other appropriate order disposing of Appellants' outstanding claims against BBA.

The court denied Appellants' post-trial motion on July 19, 2011. The court explained that the reasonable expectations "doctrine is only applied in very limited circumstances to protect [a] non-commercial insured from policy terms not readily apparent and from insurer deception." Order, 7/19/11, at 1. Appellants, the court observed, are a commercial insured. ***Id.*** Further, the court noted, BBA—and not Erie—made the representations regarding coverage. ***Id.*** The court also held that the insurance policy was not illusory because it did provide coverage for the insured vehicles. ***Id.*** at

1-2. Finally, the court opined that BBA's representations did not bind Erie because BBA was acting as an insurance broker and not as an agent of Erie. ***Id.*** at 2.

Appellants filed a notice of appeal on July 25, 2011. Judgment was entered in favor of Erie and against Appellants on August 10, 2011.[3] The record reflects no judgment or other court order disposing of Appellants' claims against BBA.

With respect to the declaratory judgment action, Appellants timely filed a court-ordered Pa.R.A.P. 1925(b) statement. Appellants raise the following issues:

> On these facts, was [BBA] an agent of Erie?
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> Under these circumstances, did [Appellants] have a reasonable expectation that Erie would notify them of the coverage loss?

Appellant's Brief at 4.

Appellants maintain that the record reflects an agency relationship between Erie and BBA. They suggest that the agency agreements between Erie and BBA imposed significant requirements on BBA. They claim the agreements authorized BBA to bind Erie on "revised policies or

[3] Although Appellants filed their notice of appeal prior to entry of judgment, it is well-settled that "even though the appeal was filed prior to the entry of judgment, it is clear that jurisdiction in appellate courts may be perfected after an appeal notice has been filed upon the docketing of a final judgment." ***Johnston the Florist, Inc. v. TEDCO Const. Corp.***, 657 A.2d 511, 513 (Pa. Super. 1995) (*en banc*).

endorsements to existing policies." ***Id.*** at 19 (citation omitted). The trial court erred, Appellants insist, by holding that BBA lacked the authority to make representations about coverage. Appellants claim the following cases support their position: ***Siple v. L.L. Logan***, 335 A.2d 758 (Pa. Super. 1975); ***Pa. Nat'l Mut. Cas. Ins. Co. v. Ins. Comm'r of Pa.***, 551 A.2d 368 (Pa. Commw. 1988); and ***Franklin Fire Ins. Co. v. Massey***, 33 Pa. 221 (1859). We cannot entertain Appellants' arguments because Appellants have outstanding claims against BBA and thus we quash their appeal as premature.

Because Appellants have outstanding claims, we examine the propriety of this appeal. Pennsylvania Rule of Appellate Procedure 341 defines a final order for purposes of appeal:

> **(a) General rule.** Except as prescribed in subdivisions (d), and (e) of this rule, an appeal may be taken as of right from any final order of an administrative agency or lower court.
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> **(b) Definition of final order.** A final order is any order that:
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> (1) disposes of all claims and of all parties . . . .
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> * * *
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> **(c) Determination of finality.** 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 an express determination that an immediate appeal would facilitate resolution of the entire case.

Pa.R.A.P. 341(a)-(c). "The key inquiry in any determination of finality is whether there is an outstanding claim." ***Levitt v. Patrick***, 976 A.2d 581, 588 (Pa. Super. 2009) (citing Pa.R.A.P. 341).

Pennsylvania Rule of Civil Procedure 229 provides that a "discontinuance **shall be the exclusive method** of voluntary termination of an action, in whole or in part, by the plaintiff before commencement of the trial." Pa.R.C.P. 229 (emphasis added).[4] "Because an original defendant (joining party) and additional defendant (joined party) are to be considered as plaintiff and defendant, respectively, it is proper under the general rule governing discontinuance of actions [for a court] to act upon the joining party's motion to discontinue as to the joined party." 7 Standard Pa. Practice § 39:18 (footnotes omitted). Indeed, marking a case as "settled" on the docket does not necessarily terminate the case. ***Cameron v. Great Atl. & Pac. Tea Co.***, 266 A.2d 715, 717-18 (Pa. 1970) (holding case was still pending given, *inter alia*, "tentative nature of the docket entry—'Case reported settled'").

In this case, Erie alleged Appellants have settled their negligence claims against BBA. Other than Erie's allegation, nothing in the certified record substantiates the resolution of Appellants' claims. Further, the certified record contains no praecipe to discontinue Appellants' negligence

[4] ***See also*** Fed. R. Civ. P. 41.

causes of action against BBA. The record also does not reflect any judgment or other appropriate order disposing of Appellants' negligence claims. Discontinuance is the only mechanism by which Appellants, as the joining party, can terminate their claims. ***See*** Pa.R.C.P. 229; 7 Standard Pa. Practice § 39:18. Because Appellants' claim of negligence remains outstanding, the August 10, 2011 judgment is not final as to all parties and all claims. Pa.R.A.P. 341(a)-(c); ***Levitt***, 976 A.2d at 588. Accordingly, we quash because the appeal is interlocutory. ***See Druot v. Coulter***, 946 A.2d 708, 709 (Pa. Super. 2008) (*per curiam*) (quashing appeal from order granting summary judgment adverse to all claims raised by plaintiffs but leaving unresolved defendants' counterclaims).

Appeal quashed.