NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

GARY WADSWORTH Appellee v. HOSPITAL SERVICE ASSOCIATION OF NORTHEASTERN PA D/B/A BLUE CROSS OF NORTHEASTERN PENNSYLVANIA AND HIGHMARK, INC., D/B/A HIGHMARK BLUE SHIELD Appellants	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 613 MDA 2012

Appeal from the Order Entered February 29, 2012
In the Court of Common Pleas of Lackawanna County
Civil Division at No(s): 2008-CV-0057

BEFORE: SHOGAN, J., LAZARUS, J., and OTT, J.

MEMORANDUM BY LAZARUS, J. Filed: January 9, 2013

Hospital Service Association of Northeastern Pennsylvania, d/b/a Blue Cross of Northeastern Pennsylvania, and Highmark, Inc., d/b/a Highmark Blue Shield (Highmark/insurer) appeal from the trial court's order granting Appellee Gary Wadsworth's (Wadsworth) second motion to enforce a contempt order, denying additional sanctions against Highmark, and issuing a stay pending appeal. More than three and one-half years have elapsed since the parties first engaged in a discovery dispute in the underlying case. On appeal, Highmark claims that the trial court abused its discretion by entering the order to enforce without first requiring Wadsworth to prove that

four Highmark emails sought in discovery had been redacted or altered in some way. We quash the appeal.

Highmark raises the following issues on appeal:

(1) Whether the trial judge erred by failing to hold a hearing at which Wadsworth was required to present evidence to meet his burden of proving that Highmark was in contempt for producing four emails in redacted or altered form.

(2) Whether the trial judge erred by refusing to allow Highmark's witnesses to testify at the February 28, 2012 hearing to establish that Highmark had not redacted or altered the four emails at issue.

(3) Whether the trial judge erred by concluding that the proceedings were for civil rather than criminal contempt and by applying the less stringent criteria for a finding of civil contempt.

(4) Whether the trial judge erred by failing to require evidence of contempt beyond a reasonable doubt once Highmark alleged and proffered evidence that it was impossible for Highmark to produce any other versions of the four emails at issue.

FACTS

Wadsworth filed the underlying action, alleging breach of contract, fraud and bad faith against Highmark for its failure to pay approximately $34,100 in medical bills associated with Wadsworth's two May 2007 back surgeries. At the time, Wadsworth was insured for health benefits by Highmark. After Wadsworth made several requests for the production of documents, including emails, Highmark objected to the request alleging that much of the claimed documents were privileged information protected by the attorney-client privilege and/or work product doctrine. On November 5,

2008, the trial court overruled Highmark's objections and ordered the insurer to respond within 20 days. When no additional discovery was forthcoming, the trial court ordered Highmark to produce the requested documents; Highmark represented that all discoverable documents had been produced. Depositions were taken and Wadsworth again requested the production of documents from Highmark. When Highmark responded that certain documents were privileged and confidential, Wadsworth filed a motion for sanctions on April 1, 2010. On April 19, 2010, the trial court issued an order finding that sanctions were warranted due to Highmark's refusal to comply with its November 2008 order. In its April order, the trial court specifically precluded Highmark from offering any evidence or testimony related to the documents that it improperly failed to produce. In response, Wadsworth filed a motion to reconsider the April order, asking the court to instead impose a $100.00/day sanction against Highmark for its willful failure to comply with the discovery orders, until such time as it complied.

On June 22, 2010, a special master reviewed 916 pages of unredacted documents, after which he concluded that the requested documents were discoverable[1] and should be turned over to Wadsworth. Highmark appealed

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[1] The Master determined that the documents were not protected by the work product doctrine. Rather, he found that the documents' entries consisted of regular business activity between Highmark employees.

the special master's order; the trial court affirmed the master's order on November 15, 2010. No further appeal was taken. On February 18, 2011, the trial court issued an order finding Highmark in contempt for failing to turn over the requested documents from Wadsworth's discovery requests. That order specified that Highmark was directed to turn over "all requested discovery [including any relevant emails] within 10 days to purge themselves of the contempt." Failure to turn over the documents would result in Highmark paying $500/day to Wadsworth until all documents were turned over. This order was never appealed.

On April 26, 2011, Wadsworth filed a motion to enforce the February 18, 2011 order, claiming that four emails turned over had been redacted. Highmark failed to produce any witnesses, despite a continuance granted by the court for Highmark to secure them, to demonstrate that the emails had not been redacted or that what was produced was in its original form. N.T. Proceedings, 2/28/2012, at 4. On July 15, 2011, the trial court ordered Highmark to pay Wadsworth $68,000 within 10 days of the date of the order and pay Wadsworth's attorney's fees; the order also stated that Highmark would continue to incur contempt costs at $500/day until it produced the unredacted emails. On July 25, 2011, Highmark paid the $68,000 in contempt sanctions. Highmark appealed this order; however, that appeal was quashed as untimely filed.

On December 1, 2011 Wadsworth filed a second motion to enforce the court's original contempt order and a motion for additional sanctions in the

form of $500/day from July 25, 2011 (date of Highmark's alleged failure to produce unredacted documents), attorney's fees and the imprisonment of Highmark's Chief Executive Officer. Four days later, Highmark paid the ordered attorney's fees to Wadsworth. On February 28, 2012, the trial court heard oral argument, precluding Highmark from presenting witnesses to testify regarding the documents at issue. The following day, on February 29, 2012, the trial court entered the instant order from which Highmark appeals. The February 29, 2012 order grants Wadsworth's second motion to enforce the court's prior contempt order against Highmark, denies Wadsworth's motion for additional sanctions, and issues a stay pending appeal.

On March 30, 2012, Highmark filed a petition for permission to appeal with the lower court, asking the trial judge to amend his February 29 order to include the following language:

> That the order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter.

42 Pa.C.S. § 702(b). The trial court denied the certification request on April 26, 2012. On May 25, 2012, Highmark filed a petition for review in this

Court. ***See*** Pa.R.A.P. 1513 (petition for review).[2] On July 9, 2012, a motion's panel of this Court denied the petition.[3]

DISCUSSION

Before we reach the merits of the appeal, we must rule upon a motion to quash filed by Wadsworth.[4] In his motion, Wadsworth claims that the order from which Highmark appeals is not final, but rather simply enforces a prior contempt order and again directs Highmark to pay a previously imposed sanction.

It is well established that the appealability of an order goes directly to the jurisdiction of the court asked to review the order. ***Fried v. Fried***, 501 A.2d 211 (Pa. 1985). An appeal may be taken from: (1) a final order or an order certified as a final order, ***see*** Pa.R.A.P. 341, 42 Pa.C.S.A. § 702(b); (2) an interlocutory order as of right, ***see*** Pa.R.A.P. 311; (3) an interlocutory order by permission, ***see*** Pa.R.A.P. 312, 1311; or (4) a collateral order, ***see***

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[2] ***See*** Pa.R.A.P. 1311, note (where lower court refuses to amend order to include section 702(b) certification language, petition for review is proper mode of determining whether case is so egregious as to justify prerogative appellate correction of exercise of discretion by lower tribunal).

[3] ***See*** *Per Curiam* Order, 47 MDM 2012, (Pa. Super.) (filed July 9, 2012).

[4] In a prior order, a motion's panel denied Wadsworth's motion to quash without prejudice and reserved him the right to raise the issue before the merits panel. ***See*** *Per Curiam* Order, 613 MDA 2012 (Pa. Super.) (filed May 22, 2012). Wadsworth has chosen to again raise the issue regarding the appealability of the order from which Highmark appeals in his brief. Thus, we will address the issue on appeal.

Pa.R.A.P. 313. An order is considered final if it disposes of all parties or all claims, is expressly defined as a final order by statute, or is entered as a final order pursuant to the trial court's determination. Pa.R.A.P. 341(b).

Instantly, the order from which Highmark appeals grants Wadsworth's second motion to enforce a prior contempt order. This order neither disposes of all claims or all parties in the underlying bad faith/contract action and the trial court refused to make a determination that the order was final. Pa.R.A.P. 341. Accordingly, in order to invoke this Court's jurisdiction, Highmark must show how this non-final, interlocutory order is immediately appealable – either as of right, by permission or as a collateral order.[5]

The trial court denied Highmark's request to include the section 702(b) certification language for purposes of a petition for permission to appeal. Pa.R.A.P. 1311. Moreover, our Court denied Highmark's petition for review. Pa.R.A.P. 1513. Finally, the order does not qualify as one that is appealable as of right. Pa.R.A.P. 311. Therefore, the only way that our Court could have jurisdiction to review this interlocutory order is if it qualifies as a collateral order under Rule 313.

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[5] For purposes of immediate appealability, we are convinced that the trial court's contempt finding was civil, and not criminal, in nature where it was based upon Highmark's refusal to comply with the trial court's discovery order and the proceedings were to enforce compliance with the trial court's order imposing sanctions. ***See Commonwealth v. Griffiths***, 15 A.3d 73 (Pa. Super. 2010). ***Cf. Diamond v. Diamond***, 715 A.2d 1190 (Pa. Super. 1998) (criminal contempt order is immediately appealable as a collateral order under Rule 313).

A collateral order is an order that: (1) is separable and collateral to the main cause of action; (2) involves a right that it too important to be denied review; and (3) presents a question such that if review is postponed until final judgment in the case, the claim will be irreparably lost. Pa.R.A.P. 313. Our Supreme Court has explained that Rule 313 must be interpreted narrowly, and the requirements to analyze whether an order is collateral are stringent "in order to prevent undue corrosion of the final order rule." ***Melvin v. Doe***, 836 A.2d 42, 47 (Pa. 2003). Moreover, to qualify as a collateral order under Rule 313, it is not sufficient that an issue under review is important to a particular party; it must involve "rights deeply rooted in public policy going beyond the particular litigation at hand." ***Stahl v. Redcay***, 897 A.2d 478 (Pa. Super. 2006) (citation omitted).

Highmark has neither claimed in the past nor argued here that the instant order is a collateral order. Specifically, Highmark does not assert that the emails contain privileged information that must be redacted for purposes of its defense. ***Compare Ben v. Schwartz,*** 729 A.2d 547 (Pa. 1999) (interlocutory discovery order compelling production of putatively privileged documents considered collateral order on appeal where determination of whether documents were subject to executive or statutory privilege implicated rights rooted in public policy and affected individuals other than those involved in particular litigation). In fact, Highmark's repeated assertion that the produced emails were in unredacted form cuts against this argument. Moreover, Highmark does not explain how the order

involves such important public policy concerns that it would reach beyond the bounds of the underlying litigation. ***See generally McManus v. Chubb Group of Insurance Companies***, 493 A.2d 84, 87 (Pa. Super. 1985) (final prong of Rule 313 not met as generally the Court will not provide interim supervision of discovery proceedings conducted in connection with litigation pending in trial courts in absence of unusual circumstances).

Highmark had the opportunity to challenge the trial court's contempt finding by appealing from the February 18, 2011 contempt order that imposed sanctions; this was a final order. ***See Stahl v. Redcay***, 897 A.2d 478 (Pa. Super. 2006) (civil contempt orders imposing sanctions generally constitute final, appealable orders); ***see generally Rhoades v. Pryce***, 874 A.2d 148, 151 (Pa. Super. 2005) (generally order finding party in contempt is interlocutory and not appealable unless it imposes sanctions). Highmark also had the occasion to prove that the emails were not redacted and had been produced in original form by presenting witnesses at the hearing on Wadsworth's first motion to enforce. Despite the trial court's grant of additional time to secure such witnesses, Highmark did not present any witnesses to support its position; rather it waited until the *second* motion to enforce proceedings to attempt to offer witnesses' testimony on the issue. ***See*** N.T. Proceedings, 2/28/2012, at 15, 21; ***see also*** Trial Court Opinion, 6/5/2012, at 13.

Because Highmark had the opportunity to appeal from prior, final orders and has not proven that the instant interlocutory order is otherwise

appealable, we must quash. The instant appeal is no more than an attempt to re-raise the same issues involved in this long-lasting discovery dispute below.

Appeal quashed.