J-A12014-13

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

IN RE: ESTATE OF WILLIAM E. HOLLOBAUGH, II, DECEASED	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
APPEAL OF: PAUL A. HOLLOBAUGH AND WILLIAM E. HOLLOBAUGH, III	:	No. 864 WDA 2012

Appeal from the Order Entered April 30, 2012
In the Court of Common Pleas of Clarion County
Civil Division at No. 273 OC 2009

BEFORE: BENDER, J., GANTMAN, J. AND OLSON, J.

MEMORANDUM BY BENDER, J.: FILED: June 6, 2013

Paul A. Hollobaugh and William E. Hollobaugh, III, (Appellants) appeal from the order, dated April 27, 2012, and entered on April 30, 2012, that granted in part and denied in part their motion to compel production of electronically stored information from the files of Bryan D. Huwar, Esq., (Huwar) and the law firm of Garbarino, Neely, Hindman & Huwar (GNHH), by Scott Ardisson (Ardisson), Appellant's independent forensic computer expert.[1] Appellants' motion was filed in connection with their challenge to the probate of the will of William E. Hollobaugh, II (Decedent), wherein they allege that Walter Hollobaugh (Nephew), Decedent's nephew, used undue influence to persuade Decedent to execute his July 16, 2008 will. Because we conclude that the trial court's order was not collateral within the meaning of Pa.R.A.P. 313, we quash this appeal.

[1] Huwar and GNHH are not parties to this lawsuit, but Huwar is a potential witness.

The trial court's Pa.R.A.P. 1925(a) opinion provides the following background information:

> This is a case where the [Appellants] are challenging the probate of the Last Will and Testament of [Decedent] dated July 16, 2008. [Appellants] assert that during the last two years of his life[,] the [D]ecedent was in an extremely weakened state of mind as a result of the onset of Alzheimer's disease, Parkinson's disease and other physical and mental health problems. [Appellants] further allege that during this time [Nephew] … maintained a confidential relationship with the [D]ecedent and used this relationship along with other undue influence to persuade the [D]ecedent into executing the July 16, 2008 last will and testament. ([Appellants] erroneously refer to [Nephew] as "Respondent" in their pleadings. [Nephew] is named in the [D]ecedent's will of July 16, 2008, as a co-executor with Northwest Savings Bank, and was also named as a residuary beneficiary of 2.5% of the [D]ecedent's estate. [Appellants] were named as residuary beneficiaries of 85% of the [D]ecedent's estate.)
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> Attorney Brian Huwar is a partner in the firm Garbarino, Neely, Hindman and Huwar (GNHH) and the scrivener of the July 16, 2008 last will and testament as well as a personal attorney of [Nephew]. In the investigation of their claim the [Appellants] sought all documentation of the communications between Attorney Huwar and [Nephew] for the time period from January 1, 2008 to December 31, 2009. GNHH has provided many emails between Attorney Huwar and [Nephew] and at this point claim there are no emails which have not been produced.
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> On September 21, 2011, pursuant to Pa.R.Civ.P. 4009, the [Appellants] filed a Motion to Compel Production of Electronically Stored Information. In their Motion to Compel[,] the [Appellants] sought 153 emails identified by GNHH to be between Attorney Huwar and [Nephew]. They also requested that their forensic IT expert [Ardisson] be permitted to conduct an electronic search of GNHH's electronic database. An evidentiary hearing on the Motion to Compel was held on April 11, 2012. By Memorandum Opinion and Order dated April [27], 2012, this court denied the [Appellants'] request to search the computer of Attorney Huwar and the server of GNHH. This court

> did order the 153 emails identified by GNHH to be turned over to the [Appellants].

Trial Court Opinion, 7/27/12, at 1-2 (unnumbered). In the trial court's opinion and order, dated April 27, 2012, the trial court explained its reasons for denying Appellants' discovery request, stating:

> At the hearing held April 11, 2012[,] the [Appellants] introduced the testimony of William Scott Ardisson who was admitted as an expert forensic computer examiner. Mr. Ardisson testified that "tools" used by GNHH to examine attorney Huwar's computer and the firm's server to find the requested documents were inadequate and that that is the reason that five different searches conducted by GNHH to attempt to comply with the subpoena have had varied results. The last such search, conducted by the law firm's IT person but using the protocol of Mr. Ardisson identified 153 e-mails which the firm was prepared to deliver to the [Appellants'] counsel at the hearing.
>
> While the protocol presented by Mr. Ardisson appears to be comprehensive and fair and offers a maximum of protection to the security of GNHH files, I believe the process has gone far enough when there has been no factual allegation to support the theory that such evidence exits. The five searches conducted by GNHH have yielded no evidence to substantiate the allegations of [Appellants] and there is no evidence to support the theory that such e-mails exist, therefore I see no reason to further impose on GNHH as a witness to undergo the expense and inconvenience as well as possible compromise of data security and confidentiality to placate the suspicion of [Appellants].

Trial Court Memorandum Opinion and Order, 4/27/12, at 1-2 (unnumbered).

As a result of the denial of their motion to compel, Appellants filed the instant appeal, and now raise the following five questions for our review:

> 1. Whether the order denying discovery of electronically stored information is an appealable, collateral order?

> 2. Whether the lower court committed an error of law or abused its discretion by placing the burden of proof on [Appellants] for Respondent's two objections to the discovery request?
>
> 3. Whether the evidence is sufficient to support the lower court's conclusion of April 27, 2012 that the discovery request would unduly compromise data security and breach the confidentiality of other clients' files?
>
> 4. Whether the evidence is sufficient to support the lower court's conclusion of April 27, 2012 that Respondent has been compliant with the release of all discoverable emails to [Appellants]?
>
> 5. Whether the lower court erred and abused its discretion by finding, in its Memorandum Opinion and Order of April 27, 2012, that [Appellants] made no factual allegations to support the "theory" that additional correspondences exist between [Nephew] and the testator's attorney despite earlier within the same Opinion and order stating the testator's attorneys had produced some 153 additional responsive correspondences?

Appellants' brief at 5. Appellants' first issue concerns the appealability of the April 27, 2012 order denying their discovery request. They contend that the order is appealable as a collateral order pursuant to Pa.R.A.P. 313, because it meets all three requirements of that rule.

We recognize that a "question of appealability implicates the jurisdiction of our court." ***Jacksonian v. Temple Health System Foundation***, 862 A.2d 1275, 1279 (Pa. Super. 2004). Orders that would otherwise be deemed interlocutory are appealable as collateral order pursuant to Pa.R.A.P. 313. Rule 313 provides as follows:

> **Rule 313. Collateral Orders**
>
> **(a) General rule.** An appeal may be taken as of right from a collateral order of an administrative agency or lower court.

> **(b) Definition.** A collateral order is an order separable from and collateral to the main cause of action where the right involved is too important to be denied review and the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost.

Pa.R.A.P. 313. Moreover,

> In interpreting Pa.R.A.P. 313, we have held that **all three elements of Rule 313(b) must be met**, namely that the order is: (1) separable from and collateral to the main cause of action where, (2) the right involved is too important to be denied review, and (3) the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost. ***Nemirovsky v. Nemirovsky***, 776 A.2d 988, 991 (Pa. Super. 2001). Pa.R.A.P. 313 is to be narrowly construed to prevent the collateral order doctrine from subsuming the fundamental precept that only final orders are appealable. ***Van der Laan v. Nazareth Hosp.***, 703 A.2d 540, 541 (Pa. Super. 1997).

Gunn v. Automobile Ins. Co. of Hartford, 971 A.2d 505, 509 (Pa. Super. 2009) (emphasis added). In other words, if one of the elements is not met, this Court does not have jurisdiction and the appeal must be quashed. ***See Jacksonian***, 862 A.2d at 1282 (quashing the appeal because the order failed the importance prong and the court did "not need to address the third prong of the collateral order rule").

We also examine ***Buckman v. Verazin***, 54 A.3d 956 (Pa. Super. 2012), a typical case dealing with the collateral order rule, wherein the trial court granted broad discovery in a medical malpractice case that would have allowed disclosure of confidential medical information belonging to third parties. Specifically, the order in ***Buckman*** dealt with a discovery order directed at Dr. Verazin and Wilkes-Barre General Hospital to produce "all

operative notes redacted for patient names/medical record number[s], for all sigmoid colectomy and/or lower anterior resection procedures done in the past five (5) years" by Dr. Verazin. ***Id.*** at 958. In ***Buckman***, the trial court granted the discovery request, and the doctor and the hospital appealed. We stated:

> We begin our review by recognizing that the December 20, 2011 order involving discovery is not a final order and, therefore, not appealable. ***See Jones v. Faust***, 852 A.2d 1201, 1203 (Pa. Super. 2004) (stating, "in general, discovery orders are not final, and are therefore unappeable"). However, such an order is appealable under Pa.R.A.P. 313(b) as a collateral order. ***Id.*** Rule 313(b) states: "A collateral order is an order separable from and collateral to the main cause of action where the right involved is too important to be denied review and the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost." As in ***Jones***, the discovery order here compels the production of private and confidential medical information of non-parties and "once disclosed, the confidentiality attaching to this information is lost." ***Id.*** Accordingly, we conclude that the discovery order involved in this case is appealable as a collateral order;....

Id. at 959.

It is evident that the ***Buckman*** court concluded that the order at issue met all three prongs of the collateral order rule, emphasizing the third prong of the collateral order test because the trial court's order required the release of privileged medical data of third parties. If the issue had been postponed, the claim would have been irreparably lost. ***Compare Berkeyheiser v. A-Plus Investigations***, 936 A.2d 1117 (Pa. Super. 2007) (concluding that the trial court orders granting broad discovery were

immediately appealable pursuant to the collateral order rule in that they could impact attorney/client confidential information).

Here, we focus on the third prong of Pa.R.A.P. 313, *i.e.*, "if review [of the question] is postponed until final judgment in the case, the claim will be irreparably lost." Pa.R.A.P. 313(b). Since the discovery order in the instant case was **not** granted, no confidential information would be released by way of an examination of Huwar's and the law firm's electronic files by Appellants' expert and, thus, there is no need for an immediate, collateral appeal. Similar to the ***Buckman*** decision, the cases relied upon by Appellant are antithetical to the present situation in that those cases involved appeals from orders granting the discovery requests. Accordingly, we conclude that in light of the trial court's denial of the discovery request, the claim will not be irreparably lost if it is postponed until final judgment. Appellants are not precluded from raising this claim again at the conclusion of the case, once a final order is entered.

Based upon the above, we hold that the order does not meet the Rule 313 collateral order test and the appeal must be quashed.

Appeal quashed.

Judgment Entered.

Nicholas V. Cusatti

Deputy Prothonotary

Date: June 6, 2013