UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 743

September Term, 2016

THE HARBOR BANK OF MARYLAND

v.

KRAMON & GRAHAM, P.A.

Eyler, Deborah S.,
Graeff,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Harrell, J.

Filed: May 8, 2017

FACTS[1] AND LEGAL PROCEEDINGS

On 27 June 2008, Waterland Fisheries, Inc. ("Waterland") granted Appellant, Harbor Bank ("HB"), a mortgage on real property in Hurlock, Maryland. A note and recorded deed of trust ("2008 DOT") recited the terms for the original $750,000 loan. In its complaint filed in the Circuit Court for Dorchester County on or about 22 December 2015, HB alleged that Waterland submitted to its insurer, Selective Insurance Company of America/Selective Way Insurance Company ("Selective"), in 2012 a property fire damage claim concerning the security for the HB loan. Selective denied the claim initially. Waterland obtained legal representation from Kramon and Graham, P.A. ("K&G") to sue Selective. A settlement agreement for $800,000 was reached between Waterland and Selective. K&G deposited the settlement check in its escrow account, deducted its attorneys' fees and costs, and distributed the remainder to Waterland. For all that we or the circuit court know, nary a penny of the funds turned-over to Waterland found its way to HB.

HB's 2015 complaint alleged conversion, civil conspiracy, and tortious interference with contractual relations against Waterland and K&G. The complaint stated that the loan documents "required [Waterland] to have obtained . . . casualty, commercial liability[,] and property damage insurance coverage for the [secured] Property that listed [HB] as mortgagee, loss payee[,] and additional insured." Quoting from the 2008 DOT, § 1.4.1(g),

[1] Because we are granting Appellee's motion to dismiss this appeal, our usual compulsion to recite fulsomely the "facts" is restrained somewhat.

HB alleged also that "[a]ll insurance proceeds paid for each casualty loss to collateral securing any of the OBLIGATIONS shall be paid directly to [HB]."

The loan was amended and consolidated, on 25 July 2013, as reflected by an amended note and deed of trust ("2013 DOT"), in a new total loan amount of $1,049,365.45. Section 1.10 of the 2013 DOT preserved Waterland's duty to maintain insurance, but stated that "[a]ny insurance company which insures the Trust Property is hereby authorized and directed to make payment for any losses directly to and to the order of [HB]." Explaining in its brief the effect of the DOT, HB stated:

> The Deed of Trust also provided [HB] with a first priority security interest in any insurance proceeds arising from the Property, as reflected in a UCC Financing Statement filed with the Michigan Secretary of State on January 16, 2009, and recorded among the Land Records of Dorchester County, Maryland at Liber 876, folio 21.

K&G filed in the circuit court a Motion to Dismiss HB's complaint. HB filed a Response in Opposition to Appellee's Motion to Dismiss and Request for Hearing, arguing that "[K&G] has no legal or factual basis to support a dismissal of [HB's] Complaint." K&G responded with a Reply in Support of Its Motion to Dismiss, averring that "[HB's]

claims remain legally impossible," and that "[t]his is not a case where discovery could provide additional facts that might flesh out a plaintiff's lean allegations."[2, 3]

A judge of the circuit court held a hearing on April 4 on K&G's motion to dismiss. At the end of the hearing, he dismissed HB's complaint and denied leave to amend the complaint.

> The Court: . . . [Y]ou're alleging conversion, civil conspiracy, and tortious interference with contract.
>
> [HB's Attorney]: That's correct.
>
> The Court: [A]ssuming the truth of everything you've alleged and even all the inferences to be drawn from that, I don't consider those viable causes of action. Therefore I do think the Motion to Dismiss should be granted, and that's what I'll do. The Motion to Dismiss is granted.
>
> * * *
>
> The Court: . . . [W]ere there a document to show any type of notice on the part of Kramon and Graham in existence before today's hearing it should have been filed as a part of your response to the Motion to Dismiss. I'm not, I don't think I would have ruled any differently, but it probably should have been brought to the Court's attention.
>
> [HB's Attorney]: So there's no leave to amend then?
>
> The Court: No leave to amend.

[2] On what factual predicate K&G was alleged to have actual or sufficient constructive notice of HB's claim of a superior interest in the proceeds, before it disbursed the settlement proceeds to Waterland, was left unclear in the complaint. Paragraph 26 of the complaint alleged baldly notice, but no factual averments in support of that conclusory statement were offered.

[3] During this tit-for-tat between HB and K&G, on 5 February 2016, Waterland filed with the circuit court a Notice of Dissolution.

A written order to like effect was entered that day. In response, HB filed, on 14 April 2016, a Motion to Alter or Amend Judgment. HB argued that the judge should have granted HB leave to amend its complaint, most prominently, because of documentary evidence of K&G's imputed knowledge of HB's interest in the settlement proceeds that emerged from a separate lawsuit between HB and Selective's agent, in which K&G was neither a party nor counsel.[4] K&G filed an Opposition to HB's Motion to Alter or Amend the Judgment, contending that the additional evidence would not cure HB's "hopelessly defective complaint." On May 20 (entered May 23), the judge denied by order HB's motion. HB did not ask the circuit court to certify its dismissal of HB's claims against K&G as a judgment that could be appealed immediately. HB noted its appeal to this Court on June 7. Two weeks later (on June 21), it filed in the circuit court a notice of dismissal without prejudice of its claims against Waterland.[5, 6]

HB's brief presented the following inquiries for our potential consideration:

I. Was the trial court legally correct in granting Appellee's Motion to Dismiss?

II. Did the trial court abuse its discretion in denying Appellant leave to file an Amended Complaint?

[4] None of the documents appended to HB's Motion to Alter or Amend Judgment appear to reflect on their faces that K&G received or saw them prior to disbursal of the settlement proceeds to Waterland. Thus, at best, HB's argument was one of inference and imputation that some of the facial recipients of the documents, which involved other law firms representing Waterland, passed them along to K&G at a material time in the course of events.

[5] Waterland did not participate in the present appeal.

[6] HB did not file a second (or "protective") order of appeal after it dismissed its claims against Waterland.

III. Did the trial court abuse its discretion in denying Appellant's Motion to Alter or Amend Judgment?

In its appellate brief, K&G included a motion to dismiss HB's appeal as an unauthorized appeal from a non-final judgment.

ANALYSIS

HB Did Not Appeal a Final Judgment And We Decline to Enter a Final Judgment.

K&G argues at the threshold that "[t]his court should dismiss this appeal for lack of a final appealable judgment" because the circuit court had not yet disposed of HB's claims against Waterland when HB appealed on 7 June 2016 the court's dismissal of its complaint as to K&G. Two weeks later, HB filed a notice of dismissal, without prejudice, of its claims against Waterland. K&G maintains that HB's dismissal of the claims against Waterland was an after-the-fact attempt to manufacture an appealable final judgment upon realizing the premature nature of its earlier and only duly noted appeal. HB replies that it appealed indeed from a final judgment, but that, if the judgment was non-final, HB requests that we enter a final judgment pursuant to Md. Rule 8-602(e)(1) and reach the merits. This is permissible, according to HB, because Waterland was not the main defendant and, in any event, HB dismissed its claims against Waterland, precluding any risk of continued trial proceedings mooting the appeal.

We hold that HB's June 7 appeal was from a non-final judgment.[7] Although we have the discretion, in limited circumstances, to enter a final judgment and review such an appeal on its merits, we elect not to do so in this case, for reasons to be explained.

Md. Code, Courts & Judicial Proceedings (CJP) Art., § 12-301 (2013 Repl. Vol.), states: "The right of appeal exists from a final judgment entered by a court in the exercise of original, special, limited, statutory jurisdiction, unless in a particular case the right of appeal is expressly denied by law." "[A]n order or other form of decision, however designated, that adjudicates fewer than all of the claims in an action . . . , or that adjudicates less than an entire claim, or that adjudicates the rights and liabilities of fewer than all the parties to the action . . . is not a final judgment." Md. Rule 2-602(a).

> In considering whether a particular court order or ruling constitutes an appealable judgment, we assess whether any further order was to be issued or whether any further action was to be taken in the case.
>
> An order that is not a final judgment is considered to be an interlocutory order and ordinarily is not appealable unless it falls within one of the statutory exceptions set forth in Md. Code (1974, 2002 Repl.Vol.), § 12–303 of the Court and Judicial Proceedings Article . . . .[8]

[7] No argument is advanced that the dismissal of HB's claims against K&G was an interlocutory judgment for which an immediate appeal was authorized under the Md. Rules, statutes, or common law.

[8] Md. Code, Courts and Judicial Proceedings Art. (CJP), § 12-303 (2013 Repl. Vol.) enumerates the appealable categories of non-final, interlocutory orders:

> A party may appeal from any of the following interlocutory orders entered by a circuit court in a civil case:
>
> (1) An order entered with regard to the possession of property with which the action is concerned or with reference to the receipt or charging of the income, interest, or dividends therefrom, or the refusal to modify, dissolve, or discharge such an order;

In re Samone H., 385 Md. 282, 298, 869 A.2d 370, 379 (2005) (citation omitted).

(2) An order granting or denying a motion to quash a writ of attachment; and

(3) An order:

(i) Granting or dissolving an injunction, but if the appeal is from an order granting an injunction, only if the appellant has first filed his answer in the cause;

(ii) Refusing to dissolve an injunction, but only if the appellant has first filed his answer in the cause;

(iii) Refusing to grant an injunction; and the right of appeal is not prejudiced by the filing of an answer to the bill of complaint or petition for an injunction on behalf of any opposing party, nor by the taking of depositions in reference to the allegations of the bill of complaint to be read on the hearing of the application for an injunction;

(iv) Appointing a receiver but only if the appellant has first filed his answer in the cause;

(v) For the sale, conveyance, or delivery of real or personal property or the payment of money, or the refusal to rescind or discharge such an order, unless the delivery or payment is directed to be made to a receiver appointed by the court;

(vi) Determining a question of right between the parties and directing an account to be stated on the principle of such determination;

(vii) Requiring bond from a person to whom the distribution or delivery of property is directed, or withholding distribution or delivery and ordering the retention or accumulation of property by the fiduciary or its transfer to a trustee or receiver, or deferring the passage of the court's decree in an action under Title 10, Chapter 600 of the Maryland Rules;

(viii) Deciding any question in an insolvency proceeding brought under Title 15, Subtitle 1 of the Commercial Law Article;

(ix) Granting a petition to stay arbitration pursuant to § 3-208 of this article;

(x) Depriving a parent, grandparent, or natural guardian of the care and custody of his child, or changing the terms of such an order; and

(xi) Denying immunity asserted under § 5-525 or § 5-526 of this article.

In the current dispute between HB and K&G, the circuit court denied, on 20 May 2016, HB's Motion to Alter or Amend its complaint, which had been dismissed as to K&G on April 4 for failure to state a claim. HB's claims against Waterland remained unadjudicated when HB noted this appeal on June 7. It was not until June 21 that HB dismissed, without prejudice, its claims against Waterland. Because HB's claims against Waterland remained pending when HB appealed, a "further order was to be issued or . . . further action was to be taken in the case." *In re Samone H.*, 385 Md. at 298, 869 A.2d at 379. The appeal, therefore, was from a non-final judgment. CJP § 12-303, moreover, does not authorize the interlocutory appeal of a non-final order dismissing a complaint as to but one of multiple defendants for failure to state a claim. HB argues, however, that we have limited discretion under Md. Rule 8–602(e)(1) to review an appeal of a non-final judgment:

> **(e) Entry of Judgment Not Directed Under Rule 2-602.**
> (1) If the appellate court determines that the order from which the appeal is taken was not a final judgment when the notice of appeal was filed but that the lower court had discretion to direct the entry of a final judgment pursuant to Rule 2-602(b), the appellate court, as it finds appropriate, may (A) dismiss the appeal, (B) remand the case for the lower court to decide whether to direct the entry of a final judgment, (C) enter a final judgment on its own initiative or (D) if a final judgment was entered by the lower court after the notice of appeal was filed, treat the notice of appeal as if filed on the same day as, but after, the entry of the judgment.

As this Court reasoned in *McCormick v. Medtronic, Inc.*, 219 Md. App. 485, 504, 101 A.3d 467, 478 (2014) (quoting Md. Rule 8–602(e)(1)(C)), "if this Court confronts an improper, interlocutory appeal in a case where the circuit court could have certified its ruling as final and appealable under Rule 2–602(b), then Rule 8–602(e) authorizes this Court, among other things, to 'enter a final judgment on its own initiative.' The question

thus becomes whether the circuit court could have certified its ruling as final and appealable under Rule 2–602(b)."

Md. Rule 2-602(b) states:

> **(b) When Allowed.** If the court expressly determines in a written order that there is no just reason for delay, it may direct in the order the entry of a final judgment:
> (1) as to one or more but fewer than all of the claims or parties; or
> (2) pursuant to Rule 2-501(f)(3), for some but less than all of the amount requested in a claim seeking money relief only.

The circuit court could have considered certification for appeal from its order dismissing HB's complaint as against K&G, if "there [was] no just reason for delay." HB argues that this is the current situation also based on two lines of reasoning. First, HB notes that, we in *Medtronic*, and the Court of Appeals in *Barclay v. Briscoe*, 427 Md. 270, 47 A.3d 560 (2012), "approved the exercise of discretion under Maryland Rule 2-602(b) where the circuit court had disposed of all claims against the central defendant and left only the claims against a minor defendant." To bolster its argument that this principle applies here, HB identifies three supporting facts: 1) Waterland filed a notice of dissolution with the circuit court; 2) Waterland was not "actively involved in the proceedings in the Circuit Court in any other manner;" and, 3) HB had obtained a one million dollar-plus judgment against Waterland in another case.

In addition, HB summarizes several factors analyzed by this Court in *Doe v. Sovereign Grace Ministries, Inc.*, 217 Md. App. 650, 94 A.3d 264 (2014), to determine whether the trial court certified properly an order under Md. Rule 2-602(b). The *Doe* Court stated:

> We identified as the most prominent factor a harsh economic effect caused by delaying the right to appeal until the entire case is over. For example, in a case in which the plaintiff obtained a large liquidated damages judgment on his claim, requiring him to wait months or years for numerous counterclaims to be resolved would cause him to suffer a severe daily financial loss. Other relevant factors include the danger that the same issues will have to be considered by the appellate court on successive appeals; the possibility that the determination of the remaining issues before the trial court might utterly moot the need for the review now being sought; and whether entertaining the present appeal upon the merits would require us to determine questions that are still before the trial court.

Doe, 217 Md. at 667, 94 A.3d at 274 (citations and quotation marks omitted). Applying these considerations to the present situation, HB maintains:

> First, there is no danger that the same issues will have to be considered by this Honorable Court on successive appeals. Appellant has dismissed its claims against the Borrower. The Borrower has dissolved itself and, to the best of Appellant's knowledge, has no further assets. Appellant has already obtained a separate money judgment against the Borrower, a large portion of which remains outstanding.

During oral argument before us on 12 April 2017, K&G responded to these arguments, positing, among other things, that the circuit court had no valid reasons to certify the order for appeal, and that it had, in fact, valid reasons not to expedite an appeal of the interlocutory order granting K&G's motion to dismiss. Stating that trial courts rarely certify non-final orders, and generally do so only to avoid a very harsh, unfair result, K&G argues that considerations of equity in this case do not run in favor of HB. The agreements between HB and Waterland, according to K&G, provided that Waterland provide continual proof of insurance and proof that it was a loss payee on the policy. HB failed apparently to police these requirements. K&G argued additionally that HB failed to protect its rights through provision of explicit and direct notice of its interest to any material

party, including K&G, or by amending its complaint to add specificity subsequent to the filing of K&G motion to dismiss in the circuit court, based on newly discovered "evidence." In Maryland, moreover, K&G asserted that, following the dissolution of a business entity, its officers and directors may become trustees of the entity's assets and substituted as parties, undermining potentially HB's argument that Waterland's dissolution, standing alone, demonstrates Waterland to be an impecunious and/or superfluous party.

Rule 2-602(b) "is reserved for the infrequent harsh case." *Smith v. Lead Indus. Ass'n, Inc.*, 386 Md. 12, 26, 871 A.2d 545, 553 (2005) (quotation marks and citations omitted). We do not find that dismissal of this appeal forces HB to face a harsh or unfair disposition, because, if there was indeed no just reason to delay appeal, it could have requested the trial court to certify the order for appeal while HB's claims against Waterland remained pending and a better record made why that was the better course of action. Alternatively, HB could have waited to appeal until a final judgment was docketed. The following is illustrative:

> If a party believes that the circumstances warrant an immediate appeal, the request should ordinarily be presented first to the trial court-the preferred "dispatcher" – for consideration. That court not only has greater knowledge than an appellate court regarding the overall effect of an immediate appeal but a greater interest in whether the case remaining before it should be "put on ice" while an interlocutory appeal proceeds.

Smith, 386 Md. at 26, 871 A.2d at 553.

HB appealed a non-final order and then, rather than filing a second, "protective" appeal after a final judgment was entered, tried to render final the otherwise non-final order by simply dismissing its claims against Waterland. This Court has reasoned that, in

general, "parties cannot transform an otherwise interlocutory ruling into an appealable final judgment through the voluntary dismissal, without prejudice, of the adjudicated aspects of a case." *Medtronic*, 219 Md. App. at 503, 101 A.3d at 478 (citing *Miller & Smith at Quercus, LLC v. Casey PMN, LLC*, 412 Md. 230, 248–53, 987 A.2d 1, 11-14 (2010)).

Although the *Medtronic* Court entered ultimately a final judgment for the purpose of appeal, it had obvious good reason to do so: in that case, the trial court appeared to have "intended to permit an immediate appeal, but used the wrong rule." *Medtronic*, 219 Md. App. at 506, 101 A.3d at 479. In the current case, the trial judge's reasoning bears no traces of such a procedural misunderstanding. Additionally, the Court of Appeals's opinion relied upon by the *Medtronic* Court found dispositive the combination of the "financial hardship" likely to result from continued pre-appeal litigation and the low risk of appellate redundancy, wherein "an appellate court would be presented with the same issues in multiple appeals." *Barclay v. Briscoe*, 427 Md. 270, 279, 47 A.3d 560, 565 n.6 (2012). We have no indicia that HB would have suffered "financial hardship" had it waited three weeks to appeal when no pending claims remained.

> The discretionary power to direct entry of final judgment under Rule 2–602(b)(1) is to be used sparingly. . . . Courts that exercise discretion to certify a non-final judgment for appeal should balance the exigencies of the case before them with the policy against piecemeal appeals and then only allow a separate appeal in the very infrequent harsh case.

Waterkeeper All., Inc. v. Maryland Dep't of Agriculture, 439 Md. 262, 287–88, 96 A.3d 105, 120 (2014) (quotation marks and citations omitted). The only exigency in this case is self-created, and the scant common law supporting certification in such an instance

involved other good reasons (absent in the current case) to enter a final judgment to permit appellate review of the merits.

Our ability to enter a final judgment under Md. Rule 8–602(e)(1) is conditioned on Md. Rule 2-602(b)'s requirements for a trial court to certify a non-final order for appeal. "Absent an express determination that there is no just reason for delay, an order directing the entry of a final judgment pursuant to Rule 2-602(b) is invalid." *Miller Metal Fabrication, Inc. v. Wall*, 415 Md. 210, 221, 999 A.2d 1006, 1013 (2010) (quotation marks and citations omitted). We hold that the trial court could not have determined, based on the record before it, "that there is no just reason for delay" in this case, and, therefore, we decline to exercise our discretion under Md. Rule 8–602(e)(1).

APPEAL DISMISSED. COSTS TO BE PAID BY APPELLANT.