

IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,502

7-11-86

NORM BURG CONSTRUCTION CORP.,

Petitioner,

vs.

JUPITER INLET CORP., et.al.,

Respondents,

FILED
SID J. V.
JUN 18 1986
CLERK, SUPREME COURT
By _____
Deputy Clerk

BRIEF OF RESPONDENT, JUPITER INLET CORP. AND
JUPITER INLET LIMITED PARTNERSHIP #1

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STATEMENT OF THE CASE AND FACTS

INTRODUCTION

This case is before the Court pursuant to a question certified by the District Court of Appeal, Fourth District, which the District Court stated as follows:

"Does a Notice of Appeal filed after jury verdict, and before an appropriate final judgment remain in limbo as to any aspect of the jury verdict which was not reflected in such final judgment filed thereafter, but is eventually in a subsequently rendered final judgment."

The following symbol will be used in this brief:

(A) -- Appendix filed simultaneously herewith.

CASE AND FACTS

In this case, Marguarita Brocard, wife and Personal Representative of the Estate of George Brocard, sued Jupiter Inlet Corp. and Jupiter Inlet Limited Partnership #1, hereinafter referred to as "Jupiter Inlet". Jupiter Inlet was the owner/builder of a condominium called, The Everglades, where the Plaintiff's decedent fell to his death while the project was under construction. Jupiter Inlet sued Norm Burg Construction Corp., hereinafter "Burg", the form contractor and employer of George Brocard for common law and contractual indemnification.

Prior to trial, Brocard filed a motion to sever the claim for contractual indemnification since the trial court would decide that issue, whereas, the jury would decide the common law indemnification issue. (A-1,2). At trial, the parties stipulated that the contractual indemnification issue would be determined post-trial by the trial court. (A-3,4).

The jury was given an interrogatory style form of verdict, covering the issue of common law indemnity. (See jury's answer to Special Instruction No. 4, where the jury found that Jupiter Inlet's responsibility was not based solely upon the negligence of Norm Burg to carry out its delegated responsibilities, i.e., that Jupiter Inlet was, itself, actively negligent and therefore, not entitled to common law indemnification.) (A-5,6).

After the jury verdict was entered on Feb. 15, 1985, the trial court entered a Feb. 15, 1985 final judgment which stated

simply that it was, "pursuant to the verdict rendered." (A-7). That judgment, prepared by the Plaintiff, simply incorporated the jury's award in favor of the Plaintiff's survivors and against Jupiter Inlet. It failed to incorporate the jury's ruling on the common law indemnification claim. (A-7). The attorney for Burg admitted before the Court that his interpretation of the verdict form meant that there was no verdict for Jupiter Inlet on common law indemnity. (A-8) The attorney for Jupiter Inlet stated that she was in agreement that judgment must be entered on common law indemnity because of the jury verdict. (A-9) The Court asserted its preference for one judgment. (A-9) Jupiter Inlet's attorney understood the ruling to be that the judgment would reflect the jury's verdict on the issue of the claim of Brocard against Jupiter Inlet, and Jupiter Inlet's claim against Norm Burg on the common law indemnity issue. Jupiter Inlet's attorney agreed to a separate judgment on contractual indemnification, since there was to be a post-trial motion hearing for argument on the law.

Jupiter Inlet filed a Motion for New Trial on Feb. 25, 1985, which argued in Paragraphs 5,6 and 7 that Jupiter Inlet was entitled to a new trial on the claim for common law indemnity, and it was those very issues that were raised in Jupiter Inlet's initial brief before the Fourth District Court of Appeal. (A-10-15)

Jupiter Inlet's Motion for New Trial was heard March 4, 1985, and at that time, Burg's attorney argued against that Motion for New Trial on the same issues raised in Jupiter Inlet's initial brief at the District Court level. The Motion for New Trial was denied by Court Order dated March 13, 1985. (A-16) On April 9,

1985, Jupiter Inlet appealed from the final judgment dated Feb. 15, 1985, which was rendered or made final by the trial court denying Jupiter Inlet's Motion for New Trial, (which addressed the common law indemnity claim). (A-17) The Fourth District Court of Appeal entered on April 12, 1985, an Order directing Jupiter Inlet to, "furnish this Court within ten (10) days, a copy of the trial court's Order being appealed." (A-18) Jupiter Inlet filed with this Court a notice of filing dated April 15, 1985, which advised the Court that its final judgment of Feb. 15, 1985, the March 13, 1985 Order denying Jupiter Inlet's Motion for New Trial, and an Order denying summary judgment on common law indemnity were being appealed and attached copies of those Orders. (A-19-22) The notice of filing referenced the common law indemnification issue and contained Burg's name on the style of the case.

The hearing on contractual indemnification was held post-trial. At that hearing, Jupiter Inlet stated to the Court that the hearing had nothing to do with the common law indemnification issue, which had already been ruled on by the jury, and argued at the Motion for New Trial. (A-23) At the conclusion of the hearing, the trial court asked the parties to submit proposed final judgments on the issues. (A-24) Each party did. The trial court signed the Order drafted by the attorney for Burg. (A-25) The first paragraph of said Order states that the matter before the Court was the entry of judgment on the claim, "for contractual (not common law) indemnification." (A-25) The second paragraph makes a finding that there was no contractual

indemnification. (A-25) In the third paragraph, however, the final judgment was drafted to refer not only to contractual indemnification, but common law indemnification as well. (A-25) That was not an issue heard by or determined by the Court. Common law indemnity had been determined by the jury and any error in regard to the jury's finding was already ruled on by the trial court's Order denying Jupiter Inlet's Motion for New Trial.

Jupiter Inlet filed its Appellate brief Oct. 18, 1985 with eight points on appeal. The points raised in the Motion for New Trial were the same points raised against Burg in Jupiter Inlet's initial brief. Burg was completely aware of the points on appeal as they were already raised in the Motion for New Trial. Burg moved to dismiss the appeal, but also filed an Appellate brief answering Jupiter Inlet's initial brief. A Motion to Dismiss was granted, but on Motion for Rehearing, the District Court of Appeal, Fourth District, granted the Rehearing, denied the Motion to Dismiss, and certified the following question to the Florida Supreme Court:

"DOES A NOTICE OF APPEAL FILED AFTER JURY VERDICT, AND BEFORE AN APPROPRIATE FINAL JUDGMENT REMAIN IN LIMBO AS TO ANY ASPECT OF THE JURY VERDICT WHICH WAS NOT REFLECTED IN SUCH FINAL JUDGMENT FILED THEREAFTER, BUT IS EVENTUALLY IN A SUBSEQUENTLY RENDERED FINAL JUDGMENT?" (A-26)

The Fourth District Court of Appeal found that Burg was clearly on notice of the matter which Jupiter Inlet was seeking to appeal. The Court held that:

"There is a delicate balance which must be struck between the letter and the spirit of the rule, when to insist upon blind adherence to the former does violence to the very cause for which the rules were adopted in the first place; that is, equal justice under the law."

The Court quoted from Bowen v. Bowen, as follows:

"As Judge Mills stated in Hill v. Leon County School Board, 351 So.2d. 732 (FLA. 1 DCA 1977), opinion filed Oct. 28, 1977, "***we should never become so technical that we obscure the justice of the case. To do so, merely brings justice and those who administer it, into disrepute. Although we must have rules to guide us in the performance of our duties, we should never ignore common sense in reaching a just result. If we desire respect for the law, and we do, we must first make the law respectable. To do this, we must not permit technicalities from preventing justice being done."(A-29)

POINT INVOLVED IN APPEAL

WHETHER THE FILING OF A NOTICE OF APPEAL AFTER JURY VERDICT, BUT BEFORE AN APPROPRIATE FINAL JUDGMENT HAS BEEN RENDERED REMAINS IN LIMBO AS TO ANY ASPECT OF THE JURY VERDICT WHICH IS NOT REFLECTED IN SUCH FINAL JUDGMENT FILED THEREAFTER, BUT IS EVENTUALLY REFLECTED IN A SUBSEQUENTLY RENDERED FINAL JUDGMENT.

SUMMARY OF ARGUMENT

Although Burg has attempted to restate the certified question, the Statement of Case and Facts as outlined by Jupiter Inlet clearly indicates that the District Court of Appeal, Fourth District, stated the certified question appropriately under the facts. Burg has attempted to restate the certified question, ignoring the facts and issues in this case, and the reasoning of the District Court of Appeals, Fourth District.

Jupiter Inlet's Notice of Appeal satisfied the two primary functions of a Notice of Appeal by vesting jurisdiction in the Appellate Court and giving adequate notice to the adverse parties that an appeal has been taken. After the jury verdict, there was a Motion for New Trial, which contained allegations of error involving the common law indemnity issue. The Notice of Appeal itself referred to the Final Judgment and an Order denying summary judgment on the common law indemnity issue. Jupiter Inlet's filing of the Orders being appealed included the Final Judgment, the Order denying the new trial, which contained argument on the common law indemnity issue, the Order denying summary judgment on common law indemnity, and it contained Burg's name in the style of

the case. Accordingly, the notice requirement has been abundantly satisfied. Any defect in the Notice of Appeal was merely technical and did not divest the District Court of jurisdiction as to Burg. The Notice of Appeal should be considered to be in limbo until Final Judgment was entered.

ARGUMENT

THE FILING OF A NOTICE OF APPEAL FILED AFTER JURY VERDICT, BUT BEFORE AN APPROPRIATE FINAL JUDGMENT HAS BEEN RENDERED REMAINS IN LIMBO AS TO ANY ASPECT OF THE JURY VERDICT, WHICH IS NOT REFLECTED IN SUCH FINAL JUDGMENT FILED THEREAFTER, BUT IS EVENTUALLY REFLECTED IN A SUBSEQUENTLY RENDERED FINAL JUDGMENT.

A Notice of Appeal has two primary functions: (1) to vest jurisdiction in the Appellate Court; and (2) to give notice to the adverse party that an appeal is being taken. Jupiter Inlet has satisfied both functions. Accordingly, the Notice of Appeal should be considered to have been in limbo until final judgment was ultimately entered.

The District Court of Appeal, Fourth District found, without doubt, that Burg was on notice of the matter Jupiter Inlet was seeking to appeal. Its finding was based, in part, on the fact that the Motion for New Trial contained allegations of error involving the common law indemnity issue against Burg in Paragraphs 5, 6 and 7. Burg attended the hearing on the Motion for New Trial, and argued that no error had occurred with respect to the common law indemnity claim. The Notice of Appeal also referenced an Order denying summary judgment in favor of Jupiter Inlet on common law indemnity. Additionally, the notice of filing referenced the Order denying Jupiter Inlet's Motion for New Trial on the common law indemnity issue, and contained Burg's name in the style of the case. It is abundantly clear that the District Court of Appeal, Fourth District, correctly held that the notice requirement was satisfied.

The District Court of Appeal, Fourth District found that Jupiter Inlet also satisfied the second function of the Notice of Appeal, that of vesting jurisdiction in the Appellate Court. The Fourth District cited the case of Williams v. State, 324 So.2d. 74 (FLA. 1975) and its "limbo" theory, as being the appropriate theory to apply. In Williams, the Court found that a Defendant may file his Notice of Appeal at any time after oral judgment is pronounced, and before it is rendered, i.e., filed with Recording. When a judgment is subsequently rendered, the Notice of Appeal shall become effective to vest jurisdiction in the Appellate Court. The Court ruled that a Notice of Appeal filed after the oral pronouncement of judgment, but before the rendition thereof, shall not be dismissed. The Court held that the rules shall apply where the Defendant filed his Notice of Appeal after oral pronouncement of judgment, but before the judgment was reduced to writing and signed.

In this case, the jury's verdict was determinative of the issue of common law indemnity. All parties recognized that question no. 4 on the interrogatory verdict form was determinative and admitted that before and acknowledged that after the jury verdict was rendered. The Appellee, Jupiter Inlet, moved for new trial on common law indemnity and Burg argued against it. Jupiter Inlet appealed the Order denying new trial on the claim for common law indemnity, the final judgment based on the jury verdict, as well as the denial of summary judgment on the issue of common law indemnity. The final judgment was rendered or made "final" by the

Court's Order denying Jupiter Inlet's Motion for New Trial, which addressed the common law indemnification issue. Clearly, the District Court of Appeal, Fourth District, had jurisdiction over the third party Defendant, Burg.

There is substantial case law in Florida providing that defects in a Notice of Appeal are not considered jurisdiction or grounds for dismissal unless the complaining party has been substantially prejudiced. Rattner v. Miami Beach 1st. National Bank, 352 So.2d. 273 (FLA. 1978); Milar Galleries, Inc. v. Miller, 349 So.2d. 170 (FLA. 1977); Brown v. Winn Dixie Stores, 267 So.2d. 78 (FLA. 1972). In this case, there has been no prejudice to Burg, who received the Notice of Appeal, the Notice of Filing, showing that the denial of the Motion for New Trial was one of the Orders being appealed, and received the Notice of Appeal on the denial of the summary judgment for common law indemnity. Further, it saw its name in the style of the case. Further, there has been no prejudice to Burg, because it has already filed its Appellate brief.

Some cases simply hold that a defective Notice of Appeal is sufficient to review an Order not specified in a Notice of Appeal where the complaining party has not been misled. Bay Area News, Inc. v. Poe, 364 So.2d. 839 (3 DCA 1978); Casino, Inc. v. Kugeares, 354 So.2d. 936 (2 DCA 1978); Brown v. Winn Dixie Stores, Inc., 267 So.2d. 78 (FLA. 1972); Eggers v. Narron, 238 So.2d. 72 (FLA. 1970); State of FL., ex. rel., Poe v. Allen, 196 So.2d. 745 (FLA. 1967). Other case law allows a party to amend a defective Notice of Appeal in the interests of justice. Certainly, these

case are applicable in this situation. Bowen v. Bowen, 352 So.2d. 166 (1 DCA 1977); Burlington v. Allen, 295 So.2d. 684 (1 DCA 1974).

There is no case law exactly on point with the factual situation presented to this Court in this case. Burg was unable to cite any similar case. The few cases cited by Burg, including Webb General Contracting, Inc. v. P.D.M. Hydro Storage, Inc., 397 So.2d. 1058 (3 DCA 1981); Kenilworth Insurance Co. v. Drake, 396 So.2d. 836 (2 DCA 1981) are clearly distinguishable on the facts. The District Court of Appeal, Fourth District found that the "limbo" theory enunciated in the case of Williams v. State, 324 So.2d. 74 (FLA. 1975) should be applied under the present factual circumstances. Burg's objection is a technical one that should be overruled in the interests of justice.

Although Burg argues vehemently that the claims by the Plaintiff are separate and apart and require a separate judgment from the claims by the third party Plaintiff on indemnification, this is clearly not the case. The jury in this case made the final determination on the claim by the Plaintiff and the claim by the third party Plaintiff as to common law indemnification. The trial court wished to enter one judgment as to the whole matter, and attempted to do so, but wished to hear additional argument on the claim for contractual indemnification. Brocard's attorney was anxious to get the verdict on the Plaintiff's claim reduced to final judgment immediately. All parties agreed that the jury verdict on the issue of common law indemnity resolved that issue in its entirety and no further argument could be had. That claim

should have been reduced to final judgment at that time. The Defendant's Motion for New Trial directed itself to all matters that had been determined by the jury. In the post-trial argument on the issue of contractual indemnification, the argument was isolated to that issue only, with Jupiter Inlet acknowledged that there was nothing to discuss on the issue of common law indemnity as that had been determined by the jury and argued on Motion for New Trial.

The matters of the Plaintiff's case and the third party Plaintiff's case were not separate, in that they were tried together and decided together by the jury. There is no requirement that there be separate judgments on the main case vs. the third party case. The fact of the matter is that the issues on the Plaintiff's claim and the third-party Plaintiff's claim were tried together and determined by a jury at the same time, and should have been ruled on in a single judgment.

The "limbo" theory of Williams v. State should be held applicable to the factual situation presented in this case in the interests of justice since the Notice of Appeal fulfilled the two functions required of a Notice of Appeal. Any defects in a notice of appeal are not to be considered jurisdictional unless the complaining party is prejudiced. Burg has failed to show any prejudice in this case whatsoever. Burg had clear notice of the issues to be raised through the Motion for New Trial, and clear notice that Jupiter Inlet intended to appeal by filing for Appeal the Order denying summary judgment on common law indemnity, the

Order denying new trial, and the Order appealing the final judgment of Feb. 15, 1985. Jupiter Inlet would argue that this Notice of Appeal was sufficient since Burg has not been misled. Alternatively, Jupiter Inlet should be allowed to proceed on its appeal to raise the common law indemnification issue by amending its Notice of Appeal in the interests of justice.

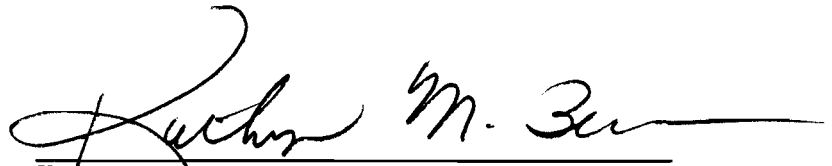
CONCLUSION

The question certified by the District Court of Appeal, Fourth District, should, in the interests of justice, be answered in the affirmative. A Notice of Appeal filed after jury verdict, and before final judgment should remain in limbo as to any aspect to the jury verdict, which is not reflected in such final judgment filed thereafter, but is eventually in a subsequently rendered final judgment. In essence, such a Notice of Appeal is, in effect, premature, and certainly could cause no prejudice, whatsoever, to the Appellee. The Appellee here was fully aware of the claims of error because they were reflected in the Motion for New Trial. The Appellee was further advised that the Order granting New Trial was being appealed.

If this Court does not answer the question in the affirmative, then the Appellee, Jupiter Inlet, should be granted leave to Amend the Notice of Appeal to add the later final judgment, since there has been a showing of both notice and jurisdiction, and no showing that the Appellant, Burg, has been prejudiced or misled.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was furnished on this 16th. day of June, 1986, to: R. Fred Lewis, Esq. of Magill & Lewis, P.A., Suite 730, Ingraham Bldg., 25 S.E. Second Avenue, Miami, FL 33131; Edna L. Caruso, Esq., 1615 Forum Place, Suite 4-B, West Palm Beach, FL 33401; Jose G. Rodriguez, Esq., Suite F, 328 First St., West Palm Beach, FL 33401; Kenneth P. Carman, Esq., P.O. Box 350276, Ft. Lauderdale, FL 33335; W. Chester Brewer, Jr., Suite 800, Forum III, 1655 Palm Beach Lakes Blvd., West Palm Beach, FL 33401.

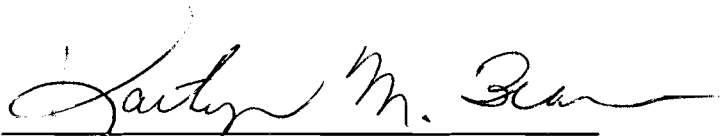


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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was furnished on this 16th. day of June, 1986, to: R. Fred Lewis, Esq. of Magill & Lewis, P.A., Suite 730, Ingraham Bldg., 25 S.E. Second Avenue, Miami, FL 33131; Edna L. Caruso, Esq., 1615 Forum Place, Suite 4-B, West Palm Beach, FL 33401; Jose G. Rodriguez, Esq., Suite F, 328 First St., West Palm Beach, FL 33401; Kenneth P. Carman, Esq., P.O. Box 350276, Ft. Lauderdale, FL 33335; W. Chester Brewer, Jr., Suite 800, Forum III, 1655 Palm Beach Lakes Blvd., West Palm Beach, FL 33401.



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