2017 IL App (1st) 161871-U
Order filed: June 30, 2017

SIXTH DIVISION

No. 1-16-1871

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

TIMOTHY D. ROBERTS, SR., Plaintiff-Appellee, v. WALSH CONSTRUCTION COMPANY, a/k/a Walsh Construction Group LLC, a/k/a Walsh Construction Company II, LLC, Defendant and Counterdefendant-Appellee, and JADE CARPENTRY CONTRACTORS, INC., Defendant and Counterplaintiff-Appellant. _____ JADE CARPENTRY CONTRACTORS, INC., Third-Party Plaintiff-Appellant, v. HUEN ELECTRIC, INC., Third-Party Defendant. _____ WALSH CONTRUCTION COMPANY, Third-Party Plaintiff-Appellee, v. HUEN ELECTRIC, INC., Third-Party Defendant.	)	Appeal from the Circuit Court of Cook County. No. 13 L 847 Honorable Kathy M. Flanagan, Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held*: Circuit court did not abuse its discretion by finding partial settlement of this matter to have been made in good faith and, therefore, dismissing the claims against two parties, or in making that decision immediately appealable under Illinois Supreme Court Rule 304(a).

¶ 2 Defendant, counterplantiff, and third-party plaintiff-appellant, Jade Carpentry Contractors, Inc. (Jade), appeals from an order entered by the circuit court that: (1) approved a settlement agreement by and among plaintiff-appellee, Timothy D. Roberts, Sr. (plaintiff), defendant, counterdefendant, and third-party plaintiff-appellee, Walsh Construction Company, a/k/a Walsh Construction Group LLC, a/k/a Walsh Construction Company II, LLC (Walsh) and third-party defendant, Huen Electric, Inc. (Huen); and (2) dismissed all claims against Walsh and Huen. For the following reasons, we conclude that the circuit court did not abuse its discretion in approving the settlement agreement and dismissing the claims against Walsh and Huen, or in making that order immediately appealable under Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010).

¶ 3 I. BACKGROUND

¶ 4 On May 18, 2012, plaintiff was injured in a work-related accident. At the time, plaintiff was working on a construction site for his employer, Huen, an electrical subcontractor for the general contractor for the project, Walsh. Plaintiff was injured when he slipped on a stack of trim boards left in a hallway by employees of Jade, a carpentry subcontractor. Plaintiff suffered extensive physical injuries, requiring multiple surgeries.

¶ 5 Plaintiff thereafter filed a workers' compensation claim against Huen, as well as the present personal injury lawsuit against Walsh and Jade. Jade filed a counterclaim for contribution against Walsh, and both Jade and Walsh filed contribution actions against Huen. After the

litigation among the parties had been pending for over two years, the parties participated in unsuccessful mediation.

¶ 6 In October of 2015, plaintiff, Walsh, and Huen reached a partial settlement of claims among them in this matter, as well as plaintiff's workers' compensation claim against Huen. Motions were filed in the circuit court seeking both a finding that this partial settlement was made in good faith and the dismissal of all the claims against Walsh and Huen, including Jade's counterclaim against Walsh and contribution claim against Huen, pursuant to the Joint Tortfeasor Contribution Act. (Contribution Act) 740 ILCS 100/0.01, *et seq.* (West 2014). After these initial motions were revised, they were denied because "a signed and executed copy of the agreement has not been properly tendered to the Court."

¶ 7 In February 2016, Walsh and plaintiff each filed their final motions for a good faith finding and dismissal, and it is those motions that are at issue in this appeal. While it was not attached to the motions themselves, the record reflects that a signed and executed copy of the settlement agreement was provided to both Jade and the circuit court.

¶ 8 Pursuant to the executed settlement agreement, plaintiff, Walsh and Huen agreed to release all claims by and among themselves, subject to the dismissal of all claims against Walsh and Huen both in this litigation and in the workers' compensation proceeding. In exchange, plaintiff would receive: (1) $278,334 from Walsh to settle the claims against it in this matter; (2) $221,666 from Huen, which included $200,000 paid to settle the workers' compensation claim and $21,666 to settle the claims against it in this matter; (3) a "Medicare Set-Aside Account" for plaintiff's future medical care, paid by Huen and funded by an initial payment of $15,220.34 additional annual payments of $7,102.82, paid for 15 years or until plaintiff's death; and (4) weekly payments to plaintiff for temporary total disability, payable by Huen until such time as

the settlement was approved. Finally, the settlement agreement recognized that, pursuant to section 5(b) of the Illinois Workers' Compensation Act (Compensation Act) (820 ILCS 305/5(b) (West 2014)), Huen was entitled to a statutory workers' compensation lien on any judgment settlement plaintiff might obtain against Walsh or Jade. Pursuant to the settlement agreement, Huen agreed to partially waive that lien as follows:

> "[Huen] agrees to waive its lien rights regarding the settlement entered between the Plaintiff and Walsh in 13 L 847. [Huen] retains the 5(b) lien rights as to Jade but agrees to waive the lien rights if the amount collected by the Plaintiff via settlement with Jade is for less than $4,000,000.00. [Huen] retains the 5(b) lien rights as to Jade but agrees to assign the lien rights at the direction of the [Plaintiff] if the verdict against Jade is for less than $4,000,000.00."

¶ 9 In addition, in his motion for a good-faith finding, plaintiff stated that he offered to settle with Jade under the same terms offered to Walsh. Jade counter-offered a lesser amount, which was rejected.

¶ 10 In March 2016, Jade filed a response in opposition to those motions. Therein, Jade contended that Huen's partial retention of its full workers' compensation lien (depending on the amount of plaintiff's recovery from Jade), combined with Huen's nominal payment of $21,666 to settle the claims filed against it in this matter, would leave Huen in a position to claim a lien much larger than its contribution to settling this case in the event of a judgment against or settlement with Jade of $4,000,000 or more.[1] Jade contended that the settlement was, therefore, not made in good faith because it was designed to prevent Jade from receiving the appropriate

[1] According to Jade, Huen's total workers' compensation lien—including the $200,000 in workers' compensation paid pursuant to the settlement—was at least $567,643.97 at the time of the settlement.

set-off for the full settlement with Huen and could potentially result in Jade being liable for more than its *pro rata* share.

¶ 11 In a written order entered on April 25, 2016, the circuit court granted the motions filed by Walsh and plaintiff, found the settlement agreement to have been made in good faith, and dismissed with prejudice all claims against Walsh and Huen. The circuit court specifically noted that the "agreement indicates that a fair and reasonable settlement supported by consideration was reached after lengthy negotiations" and specifically rejected Jade's contentions that the agreement was reached via improper collusion or would result in it paying more than its *pro rata* share. The court's order also indicated that it was "made pursuant to Supreme Court rule 304(a) thus there is no just reason to the delay the enforcement of appeal of this order."

¶ 12 Jade's motion to reconsider both the good faith and Rule 304(a) findings was denied on June 6, 2016, and it filed a notice of appeal on July 1, 2016.

¶ 13 II. ANALYSIS

¶ 14 On appeal, Jade first contends that we lack jurisdiction over this appeal, before asserting that the circuit court improperly found the partial settlement to have been made in good faith and, therefore, also improperly dismissed all the claims against Walsh and Huen. For the following reasons, we find that we have jurisdiction and we affirm the judgment of the circuit court.

¶ 15 A. Jurisdiction

¶ 16 We first address Jade's contention that we lack jurisdiction over this appeal because the trial court abused its discretion in making its April 25, 2016 order immediately appealable under Rule 304(a).

¶ 17 Illinois Supreme Court Rule 304(a) allows for the immediate appeal from a final judgment which disposes of fewer than all of the parties or claims, but only if the circuit court makes an express written finding that there is no just reason for delaying enforcement and/or appeal. Ill. S. Ct. Rule 304(a) (eff. Feb. 26, 2010). " '[T]he decision to grant or deny Rule 304(a) relief is best left to the sound discretion of the trial court who must determine whether, in its view, allowing an immediate appeal would have the effect of expediting the resolution of the controversy, be fair to the parties and conserve judicial resources.' " *Krause v. USA DocuFinish*, 2015 IL App (3d) 130585, ¶ 19 (quoting *Schal Bovis, Inc. v. Casualty Insurance Co.*, 314 Ill. App. 3d 562, 570 (1999)).

¶ 18 In addressing whether the circuit court abused its discretion with respect to such a determination, this court should consider the following relevant factors: " '(1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in set-off against the judgment sought to be made final; [and] (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.' " *Geier v. Hamer Enterprises, Inc.*, 226 Ill. App. 3d 372, 383 (1992) (quoting *Allis–Chalmers Corp. v. Philadelphia Electric Co.*, 521 F. 2d 360, 362 (3rd Cir. 1975)). A circuit court abuses its discretion when its ruling is arbitrary, fanciful, or unreasonable or when no reasonable person would adopt its view. *Hachem v. Chicago Title Insurance Co.*, 2015 IL App (1st) 143188, ¶ 34.

¶ 19 Initially, we reject Jade's contention that the circuit court "must consider the factors emphasized in *Geier*" before making a finding pursuant to rule 304(a), and that in this case the circuit court erred because it "did not provide any evidence that such a consideration was made." As our supreme court has indicated that, in deciding whether to make a finding pursuant to rule 304(a), the circuit court is to consider whether "allowing an immediate appeal would have the effect of expediting the resolution of the controversy, be fair to the parties and conserve judicial resources." *Schal Bovis, Inc.*, 314 Ill. App. 3d at 570. It is only *on appeal* that *this court* considers the factors outlined in *Geier* to determine whether the circuit court's decision to make a finding pursuant to rule 304(a) "is an abuse of discretion." *Geier*, 226 Ill. App. 3d at 383. The circuit court was, therefore, under no obligation to specifically discuss the *Geier* factors.

¶ 20 Substantively, we also reject Jade's contention that the *Geier* factors "do not support the inclusion of Rule 304(a) language" in the circuit court's April 25, 2016 order. On appeal, Jade contends solely that the circuit court's decision to include Rule 304(a) language in its order was an abuse of discretion because the need for appellate review of that order might be mooted by future events.

¶ 21 Jade specifically contends that, because the good-faith nature of the settlement approved by the circuit court is "inextricably intertwined" with the amount of any verdict or settlement ultimately entered against Jade and in favor of plaintiff, "[i]t would have been much more efficient for the trial court to have waited until after the trial of this case to allow a single appeal of all potential issues." While plaintiff disagrees with Jade's reading of the settlement agreement, we conclude that even if Jade's interpretation is correct, the circuit court did not abuse its discretion. The possibility of mootness is but one factor we consider. And, as plaintiff notes, without an immediate appeal of the settlement agreement it is also possible that the whole matter

would have to be retried if the settlement agreement was ultimately overturned upon any appeal taken following a trial on the remaining claims against Jade. We agree with plaintiff that "the risk of inefficiency associated with a theoretical possibility of mootness pales in comparison to the inefficiency which would result from potentially having to try this entire case twice."

¶ 22 Untimely, "[i]n the context of Rule 304(a), a trial court's finding that no just reason exists to delay an appeal is nothing more than a discretionary determination that permitting an immediate appeal, under the circumstances, would be desirable." *Fremont Compensation Insurance Co. v. Ace-Chicago Great Dane Corp.*, 304 Ill. App. 3d 734, 740 (1999). On appeal, Jade had the obligation of establishing that the circuit court's decision to include 304(a) language in its order was arbitrary, fanciful, unreasonable, or that no reasonable person would adopt its view. *Hachem*, 2015 IL App (1st) 143188, ¶ 34. Because we conclude that Jade—through its sole focus on the issue of possible mootness—has failed to do so, we affirm the circuit court's decision to make its order immediately appealable pursuant to Rule 304(a).

¶ 23 B. Good Faith Finding

¶ 24 We next turn to the plaintiff's contention that the circuit court improperly found the partial settlement to have been made in good faith and, therefore, improperly dismissed all the claims against Walsh and Huen.

¶ 25 The Contribution Act (740 ILCS 100/0.01, *et seq*. (Contribution Act) (West 2014)), seeks to promote two important public policies: encouraging settlements and ensuring the equitable apportionment of damages among tortfeasors. *Johnson v. United Airlines*, 203 Ill.2d 121, 133; *BHI Corp. v. Litgen Concrete Cutting & Coring Co.*, 214 Ill.2d 356, 365 (2005). The Contribution Act creates a right of contribution in actions "where 2 or more persons are subject to liability in tort arising out of the same injury to person or property, or the same wrongful

death, to the extent that a tortfeasor pays more than his *pro rata* share of the common liability." (Citations omitted.) *Johnson*, 203 Ill. 2d at 12. The Contribution Act also provides that a tortfeasor who settles in good faith with the injured party is discharged from contribution liability. 740 ILCS 100/2(c), (d) (West 2014).

¶ 26 The only limitation the Contribution Act places on the settlement is that it be in "good faith." *Johnson*, 203 Ill. 2d at 128. In determining whether a settlement has been made in good faith a court must strike a balance between the two important public policies of promoting the encouragement of settlements and the equitable apportionment of damages among tortfeasors. *Id*. at 133. In making this determination, the settling parties carry the initial burden to make a preliminary showing of good faith. *Id*. at 132. The settling parties must show, at a minimum, the existence of a legally valid settlement agreement. *Id*. Then, the burden shifts to the nonsettling defendant to establish by a preponderance of the evidence that the settlement is not in good faith. *Id*. at 133.

¶ 27 We review a trial court's decision to approve a settlement for an abuse of discretion. *Id*. at 135. Again, a circuit court abuses its discretion when its ruling is arbitrary, fanciful, or unreasonable or when no reasonable person would adopt its view. *Hachem*, 2015 IL App (1st) 143188, ¶ 34.

¶ 28 On appeal, Jade does not dispute that the settling parties met their initial burden by presenting a legally valid settlement agreement to the circuit court. In addition, Jade specifically indicates that it has "no objection to the total settlement payment amounts." Rather, and for a number of reasons, Jade contends that it established by a preponderance of the evidence that the settlement was not made in good faith.

¶ 29 First, Jade contends that it was improper to apportion the $221,666 paid by Huen such that $200,000 was paid to settle the workers' compensation claim and only $21,666 paid to settle the claims against it in this matter. Jade complains that "[t]hrough this apportionment, Huen has limited Jade's set-off to $21,666, while increasing its potential worker's compensation lien to over $567,000" such that "Jade could be forced to pay more than its *pro rata* share of liability in the event of a large verdict." We reject this argument.

¶ 30 Initially, we note that, "[a]lthough the manipulation of an allocation can be evidence of bad faith in a settlement negotiation, it is not *per se* bad faith to engage in the advantageous apportioning of a settlement. [Citation.] This court has recognized the importance of allowing the settling parties to apportion their settlements to their advantage." *Lard v. AM/FM Ohio, Inc*., 387 Ill. App. 3d 915, 926 (2009) (citing *Readel v. Towne*, 302 Ill. App. 3d 714, 718 (1999) (same)); see also, *Muro v. Abel Freight Lines, Inc*., 283 Ill. App. 3d 416, 420 (1996) ("A plaintiff who enters into a settlement with a defendant gains a position of control and acquires leverage in relation to a non-settling defendant. This posture is reflected in the plaintiff's ability to apportion the settlement proceeds in the manner most advantageous to it. Settlements are not designed to benefit non-settling third parties.").

¶ 31 Moreover, other than noting the purported unfairness to its interests, Jade has presented no evidence or argument that the apportionment of Huen's payments did not actually reflect the realities of Huen's respective and potential liability in both the workers' compensation proceeding and in this matter. See *Johnson*, 203 Ill. 2d at 137 (the amount of a settlement must be evaluated in relation to the probability of recovery, the defenses raised, and the settling party's potential legal liability). Jade has, therefore, failed to meet its burden to establish by a preponderance of the evidence that the apportionment of the settlement was not made in good

faith, or that the $21,666 paid to settle the claims against Huen in this matter did not accurately reflect its *pro rata* share of liability with respect to the claims against it in this matter.

¶ 32 With respect to this argument, we finally note that the settlement agreement was specifically made contingent on the acceptance of the parties' settlement of plaintiff's workers' compensation claim by the Illinois Workers' Compensation Commission. This court has recognized that such a provision is indicative of good faith with respect to the amount actually paid to settle a workers' compensation claim. *Higginbottom v. Pillsbury Co*., 232 Ill. App. 3d 240, 254, (1992), *partially abrogated on other grounds by Johnson*, 203 Ill. 2d at 134.

¶ 33 Jade next contends that by allowing Huen to retain its section 5(b) lien under certain circumstances, which would, therefore, allow for the possibility that Huen would be able to recoup much more than it paid to resolve the claims against it in this matter, the settlement agreement here is essentially a type of "loan-receipt agreement" that has been found to improperly violate the good-faith requirements of the Contribution Act. See *In re Guardianship of Babb*, 162 Ill. 2d 153, 175 (1994). However, such analogies have been repeatedly rejected under circumstances such as those presented here, where there was simply no loan as there was no requirement that a settling plaintiff ever repay a settling defendant any funds recovered from a non-settling defendant. *Dubina v. Mesirow Realty Development., Inc*., 197 Ill. 2d 185, 197 (2001) ("Absent some type of 'loan' component to this transaction, there is no basis for finding the settlement agreements and assignments to be loan-receipt agreements."); *Cleveringa v. J.I. Case Co*., 192 Ill. App. 3d 1081, 1087 (1989) (noting that loan receipt agreements have been found to exist only where the benefit received by the plaintiff must be *repaid* to the defendant upon settlement with or judgment against a third party). We come to the same conclusion here.

¶ 34 Jade's next contention is that the settlement agreement at issue here is exactly analogous to one found to violate the good-faith requirements of the Contribution Act in *Higginbottom*, 232 Ill. App. 3d 240. We disagree. In that case, the employee and employer settled a workers' compensation claim, and the employer sought a good-faith finding with respect to that settlement when it was subject to a contribution action filed by a third-party sued by the employee. *Id*. at 242-43. It is true that in that case the employer did not waive its section 5(b) lien under the settlement, the employer could, therefore, be able to recover the entirety of its payment to the plaintiff-employee from any recovery from the third-party defendant, and that the section 5(b) lien was larger than a third-party defendant would receive as a set-off. *Id*. at 255. However, the appellate court only found a lack of good faith in that case because there was no *additional* consideration given for the settlement, noting that "for there to be good faith for such employee and employer settlements there must be some *net* consideration extended by the employer to the employee." (Emphasis in original.) *Id*. at 256. That is simply not the situation presented here, where Huen paid plaintiff $21,666 in addition to the $200,000 paid to settle the workers' compensation claim. Additional consideration was also provided by way of the complete lien waiver Huen agreed to with respect to the settlement with Walsh and the contingent lien waiver it granted with respect to Jade.

¶ 35 Ultimately, Jade's objection to the final settlement agreement comes down to its contention that the settlement agreement unfairly provides that, because Huen did not agree to waive its section 5(b) lien under certain circumstances, Jade *may* not receive a set-off for Huen's full payments and it *may*, therefore, pay more than its *pro rata* share of liability. However, an employer is not required to waive its section 5(b) lien with respect to non-settling defendants in situations such as are presented here (*Bayer v. Panduit Corp*., 2015 IL App (1st) 132252, ¶ 32,

aff'd in part, rev'd in part, 2016 IL 119553), nor does the failure of an employer to waive its workers' compensation lien "*ipso facto* render a settlement invalid as having been made in bad faith." *Banks v. R.D. Werner Co.*, 201 Ill. App. 3d 762, 771 (1990). Moreover, "[i]f the position of a non-settling defendant is worsened by the terms of a settlement, this is the consequence of a refusal to settle." *Muro*, 283 Ill. App. 3d at 420. Any possibility that Jade would be worse off due to the settlement under some circumstances is but "one factor in the totality of the circumstances which the trial court considered when deciding whether the settlement was made in good faith. Emphasis should not be placed on any single factor." *Johnson*, 203 Ill. 2d at 139.

¶ 36 Indeed, we reiterate that in determining whether a settlement has been made in good faith a court must strike a *balance* between the two important public policies of promoting the encouragement of settlements and the equitable apportionment of damages among tortfeasors. *Id.* at 133. Arguably, the very provisions that Jade complains of attempts to encourage both goals. Pursuant to the agreement, Huen specifically "agrees to waive the lien rights if the amount collected by the Plaintiff via settlement with Jade is for less than $4,000,000.00." This provision provides significant motivation to both plaintiff and Jade to *settle* plaintiff's claims for less than $4 million, which would be both advantageous to them with respect to Huen's section 5(b) lien rights and allow for such a settlement to more equitably apportion the damages among tortfeasors. See *Johnson v. Belleville Radiologists, Ltd.*, 221 Ill. App. 3d 100, 109 (1991) (noting that settling parties are allowed to structure settlement in way to pressure remaining defendants to settle).

¶ 37 And, while Jade might possibly be disadvantaged under other possible future circumstances, we reiterate that "[i]f the position of a non-settling defendant is worsened by the terms of a settlement, this is the consequence of a refusal to settle" (*Muro*, 283 Ill. App. 3d at

420), and further note that "the good faith of a settlement is not judged by the obstacles it creates for the nonsettling tortfeasor." *Cleveringa*, 192 Ill. App. 3d at 1086. In addition, this court has recognized that the relevant question is whether there is sufficient consideration and good faith for a settlement *at the time it is made*. *Bayer*, 2015 IL App (1st) 132252, ¶ 31.

¶ 38 In addition, the record reflects that Jade rebuffed plaintiff's offer to settle under the same terms offered to Walsh. "A party who refuses to settle a case on agreed terms always risks that he will be exposed to enhanced liability by that refusal. This is the essence of settlement negotiations. A party either compromises in return for the certainty of a fixed result, or gambles that he will obtain a more favorable result by submitting the case to a jury." *Cleveringa*, 192 Ill. App. 3d at 1085-86.

¶ 39 Finally, Jade contends that, aside from the language of the final settlement agreement itself, "the evolution of the settlement agreement as shown in the multiple motions seeking a good-faith finding make clear the parties' improper intent." Jade contends that the language concerning Huen's waiver of its section 5(b) lien grew increasingly unfavorable to Jade throughout this process, is evidence of bad-faith.

¶ 40 First, we fail to see how any evidence of how the parties—excluding Jade, who refused to participate or agree in the final negotiated settlement—arrived at a settlement we have already concluded was made in good faith could possibly establish bad-faith. But more importantly, we note that "[s]ettlements are not designed to benefit non-settling third parties. They are instead created by the settling parties in the interests of these parties." *Muro*, 283 Ill. App. 3d at 420. It is, therefore, not improper for the settling parties to have negotiated a settlement that grew increasingly favorable to them, at least within the bounds of the requirement for good faith.

¶ 41 In sum, Jade had the burden of showing that the circuit court's good-faith finding and dismissal of the claims against Walsh and Huen was arbitrary, fanciful, unreasonable, or that no reasonable person would adopt its view. *Hachem*, 2015 IL App (1st) 143188, ¶ 34. Because it failed to do so, we affirm.

¶ 42 III. CONCLUSION

¶ 43 For the foregoing reasons, we affirm the judgment of the circuit court. This matter is remanded for further proceedings consistent with this order.

¶ 44 Affirmed and remanded.