Losing Your Right to Appeal Through Silence

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The Court of Appeals for the Third Circuit (Ambro, J.) issued an opinion that may have consequences far beyond the circumstances involved in the case. The underlying dispute was a breach of contract claim which the parties eventually agreed to resolve through a stipulation that provided that if the Bankruptcy Court determined that Odyssey was the breaching party, then "all of the [p]arties' pending claims will be withdrawn and disposed of in their entirety with prejudice" and the adversary proceeding "shall be deemed to be finally concluded in all respects." *In re Odyssey Contracting Corp*., No. 19-1150, 2019 WL 6766985, at *1 (3d Cir. Dec. 12, 2019). After trial, the Bankruptcy Court determined that Odyssey was the breaching party, but rather than withdraw the claims as provided in the stipulation, Odyssey appealed. The Court considered two issues: whether the order on appeal was final and whether Odyssey had waived the right to appeal even if the order was final.

The Court of Appeals first addressed the elusive concept of when an order of the Bankruptcy Court is final for purposes of appeal. Its analysis concluded that the order was final and the District Court had jurisdiction to hear the appeal because all the Bankruptcy Court had left to do after entering its order was the ministerial act of dismissing the claims with prejudice in accord with the stipulation. Because the District Court had appellate jurisdiction, so, too, did the Court of Appeals.

The more compelling question addressed, and the one that every lawyer should consider in entering into a stipulation, is what a stipulation has to provide to be certain a party has not waived the right to appeal. Finding nothing in the stipulation that addressed Odyssey's right to appeal, Judge Ambro parsed the text to conclude that the phrases: the claims "will be . . . disposed of in their entirety with prejudice;" and, the adversary "shall be deemed to be finally concluded in all respects," *id.*¸ barred any appeal. Recognizing that there was no precedent directly addressing the effect of silence in a stipulation, the Court analogized the situation to that of a consent judgment, which bars an appeal unless the losing party expressly preserves its right to appeal. The Court had previously decided in *Keefe v. Prudential Prop. & Cas. Ins. Co*., 203 F.3d 218, 222–23 (3d Cir. 2000), that a party to a consent judgment could appeal some contested order preceding the judgment only if the record clearly established an express understanding that the right to appeal was preserved. Utilizing that principle in this case, the Court wrote:

> We conclude that this distinction [between a consent judgment and a stipulation] makes no meaningful difference. In both instances the parties have agreed to resolve and end the litigation based on the Court's determination of a contested issue. The parties did so in *Keefe* after the District Court decided the contested issue; here the parties did so prospectively, that is, before the contested issue was decided. But the rationale for the rule in *Keefe* applies equally in both circumstances: a party that agrees to resolve and end a case—and thus gives up its right to press its claims or defenses in exchange for finality—should not be left guessing whether the opposing party can appeal. Rather, the party seeking to appeal must make its intent to do so clear at the time of the stipulation.

Id. at *4.

So as to prevent guessing about the finality and efficacy of the stipulation and to prevent unfair surprise to the other parties, the Court decided that a party who wants to appeal "must make its intent to do so clear at the time of the stipulation setting the manner for resolution." *Id.* at *5.

Practice Tip: If your client is resolving a matter by stipulation but still wants to preserve a right to appeal, be sure to specify that intent in the stipulation.

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