NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5412-06T1

FRANKLIN MUTUAL INSURANCE COMPANY
a/s/o DAWN SOBCHOCK,

Plaintiff-Appellant,

v.

THOMAS RILEY,

Defendant/Third-Party
Plaintiff-Appellant,

v.

GE CAPITAL MORTGAGE SERVICES, INC.
and WELLS FARGO HOME MORTGAGE, INC.,

Third-Party Defendants-
Respondents.

Argued April 28, 2008 - Decided May 14, 2008

Before Judges Lintner and Sabatino.

On appeal from the Superior Court of
New Jersey, Law Division, Passaic County,
L-3680-05.

Marisa Y. Paradiso argued the cause for
appellant Thomas Riley (Law Offices of
Marisa Y. Paradiso, attorneys; Ms. Paradiso,
on the joint briefs).

Keith J. Murphy argued the cause for
appellant Franklin Mutual Insurance Company
(Law Offices of Methfessel & Werbel,
attorneys; Joel N. Werbel, on the joint
briefs).

Charles Shimberg argued the cause for respondents (Shimberg & Friel, P.C., attorneys; Kathleen D. Friel, on the brief).

PER CURIAM

This appeal arises from a Law Division order dismissing defendant Thomas Riley's third-party complaint against third-party defendants GE Capital Mortgage Services, Inc. (GE Capital) and Wells Fargo Home Mortgage, Inc. (Wells Fargo). A single answer was filed on behalf of GE Capital/Wells Fargo.[1] In August 2005, Franklin Mutual Insurance Company filed a subrogation suit in the name of Dawn Sobchock against Riley for costs it incurred for the investigation and remediation of a leaky oil tank discovered in March 2003 located on property formerly owned by Riley. Riley owned the property from 1962 or 1963 through 1992 when he sold it to Sobchock. Between 1988 and 1992, GE Capital held a mortgage on Riley's property and paid his homeowner's insurance premiums and taxes, which were held in an escrow account funded by Riley's monthly payments. Riley paid off his mortgage to GE Capital in 1992 when he sold the property.

In October 2000, Wells Fargo began servicing all "open" mortgage loans for GE Capital. Riley attempted to ascertain from Wells Fargo the identity of his homeowner's insurance carrier. When Wells Fargo was unable to identify Riley's homeowner's carrier during the period of the GE Capital

[1] According to counsel, GE Capital is no longer in existence.

mortgage, Riley filed his third-party complaint seeking to require GE Capital/Wells Fargo to search their files and locate the records regarding his insurance. Riley alleged alternatively that each third-party defendant was liable by way of indemnification or contribution for damages assessed against him on the Franklin Mutual complaint, based upon breach of contract or fiduciary relationship. Wells Fargo was able to locate, on microfiche, some documents showing requisite payments to hazard insurers, however, was unable to decipher the codes used by its predecessor to identify the insurer.

The motion judge granted GE Capital/Wells Fargo's motion for summary judgment dismissing Riley's third-party complaint, finding that GE Capital and Wells Fargo did not have a contractual or fiduciary obligation to keep the records sought by plaintiff. Riley thereafter, on June 20, 2007, filed his Notice of Appeal.

Where an order does not qualify as a final judgment, a party is required to seek leave to appeal. R. 2:2-4; R. 2:5-6(a). Granting leave is within our exclusive authority as an exercise of our discretion "in the interest of justice." R. 2:2-4. Such interlocutory adjudications are appealable only on leave granted pursuant to Rule 2:5-6. It is within our exclusive prerogative to determine whether extraordinary circumstances are present warranting a piecemeal appeal. See, e.g., Fu v. Fu, 309 N.J. Super. 435, 439-40 (App. Div. 1998),

rev'd on other grounds, 160 N.J. 108 (1999); Hallowell v. Am. Honda Motor Co., 297 N.J. Super. 314, 318 (App. Div. 1997); DeFelice v. Beall, 274 N.J. Super. 592, 595 n.1 (App. Div.), certif. denied, 138 N.J. 268 (1994); Kurzman v. Appicie, 273 N.J. Super. 189, 191-92 (App. Div. 1994); Procanik v. Cillo, 226 N.J. Super. 132, 143 n.4 (App. Div.), certif. denied, 113 N.J. 357 (1988); DiMarino v. Wishkin, 195 N.J. Super. 390, 395-96 (App. Div. 1984).

Under Rule 4:42-2, an order may be treated as a final order where it is "subject to process to enforce a judgment pursuant to Rule 4:59" and "the trial court certifies that there is no just reason for delay of such enforcement" under three types of circumstances. Those circumstances include "a complete adjudication of a separate claim," R. 4:42-2(1); "a complete adjudication of all the rights and liabilities asserted . . . as to any party," R. 4:42-2(2); or "a partial summary judgment or other order for payment," R. 4:42-2(3) (emphasis added).

Thus,

> although a trial court has the power to enter a partial summary judgment, adjudicating fewer than all the issues in a case, such judgment cannot be made appealable unless the disposition of that issue or issues completely disposes of the claim with reference to which that issue or issues is tendered.
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> [Haelig v. Bound Brook, 105 N.J. Super. 7, 11 (App. Div. 1969) (citations omitted).]

In other words, if "the claim may yet prevail (or be defeated) upon the basis of grounds or theories or counts advanced in the pleadings other than the adjudicated issues," the issue is not appealable as a matter of right. Ibid. Because Riley's claim against GE Capital and Wells Fargo is necessarily dependent on the success of Franklin Mutual's claim against him, the order dismissing Riley's third-party complaint may only be appealable on leave granted.

We recently pointed out that there is a "recurrent problem of a litigant securing a certification of finality from a trial court under circumstances that do not qualify for such certification in order to circumvent this court's exclusive authority to determine whether leave should be granted to appeal an interlocutory order." Janicky v. Point Bay Fuel Inc., 396 N.J. Super. 545, 547 (App. Div. 2007). Here, the parties did not obtain a certification of finality from the judge, nor could one have been given. Indeed, at oral argument, counsel for both Franklin Mutual and Riley appeared and confirmed that neither a judgment against Riley nor a stipulation of dismissal with prejudice of the underlying action has been filed.[2]

[2] At oral argument, counsel for both Riley and Franklin Mutual advised that the underlying action had been settled prior to the filing of Riley's Notice of Appeal. They, however, declined to provide the details of the settlement, advising that it is "confidential."

"'[I]f we treat every interlocutory appeal on the merits just because it is fully briefed, there will be no adherence to the Rules, and parties will not feel there is a need to seek leave to appeal . . . .'" Vitanza v. James, 397 N.J. Super. 516, 519 (App. Div. 2008) (quoting Parker v. City o Trenton, 382 N.J. Super. 454, 458 (App. Div. 2006). For that same reason, we decline to consider the substantive contention raised by the parties in this appeal regarding the order, insofar as it dismisses Riley's allegations that GE Capital/Wells Fargo is liable for failing to maintain records.

That said, however, we see no reason at this stage of the litigation to dismiss Riley's third-party complaint insofar as it seeks discovery from Wells Fargo. We can envision the possibility that there may be some current employees of Wells Fargo who might have worked for GE Capital and who can shed light on the codes identifying insurers. The judge's ruling focused only on whether GE Capital/Wells Fargo can be liable to Riley for damages for failing to maintain records. It did not mention the continued viability of maintaining a discovery action, or the possibility that further discovery, through the use of subpoena and deposition, might be productive.

Although we dismiss this appeal as improvidently filed, we nevertheless remand the matter for further inquiry to determine whether Riley's third-party complaint remains viable as a discovery action. See, e.g., Davila v. Cont'l Can Co., 205 N.J.

Super. 205 (App. Div. 1985) (permitting the maintenance of a discovery action against a defendant-employer because of its unique knowledge about the manufacture and distribution of a machine in issue). We do not retain jurisdiction.

The appeal is dismissed and the matter remanded for further proceedings in accordance with this opinion.