BROWN AND BROWN, INC. *v.* RICHARD BLUMENTHAL, ATTORNEY GENERAL

RICHARD BLUMENTHAL, ATTORNEY GENERAL *v.* BROWN AND BROWN, INC.
(SC 17920)

Rogers, C. J., and Palmer, Vertefeuille, Zarella and Schaller, Js.

Argued February 15—officially released September 9, 2008

Michelle H. Seagull, with whom were *William M. Rubenstein* and *Kelly A. Burns*, for the appellant (plaintiff in the first case, defendant in the second case).

Matthew J. Budzik, assistant attorney general, with whom were *Arnold B. Feigin*, assistant attorney general, and, on the brief, *Michael E. Cole*, chief of the antitrust department, for the appellee (defendant in the first case, plaintiff in the second case).

James Sicilian, *Jason S. Weathers*, *Ben Robbins*, *Martin J. Newhouse* and *Jo Ann Shotwell Kaplan* filed a brief for the New England Legal Foundation as amicus curiae.

Dennis F. Kerrigan, Jr., *Michael Menapace* and *Emily A. Gianquinto* filed a brief for the Connecticut Business and Industry Association, Inc., et al., as amici curiae.

Opinion

VERTEFEUILLE, J. This appeal arises from an action seeking injunctive, declaratory and equitable relief brought by the plaintiff, Brown and Brown, Inc., against the defendant, Attorney General Richard Blumenthal, in connection with a subpoena duces tecum and interrogatories issued by the defendant pursuant to General Statutes § 35-42[1] as part of an investigation of potential antitrust violations in the insurance industry.[2] The plaintiff, an independent insurance intermediary that provides insurance and reinsurance products and services to various types of professional, corporate and individual clientele, appeals[3] from the trial court's decision denying its motion for summary judgment. On appeal, the plaintiff asserts that the trial court improperly denied its motion for summary judgment, which had sought a declaration that the defendant may not disclose any documents or information provided by the plaintiff in response to the subpoena and interrogatories issued pursuant to § 35-42, except in two limited circumstances. Because we conclude that the trial court's denial of the plaintiff's motion for summary judgment was not a final judgment, we dismiss the plaintiff's appeal.

The following undisputed facts and procedural history are relevant to this appeal. The defendant is conducting an ongoing investigation into certain practices in the insurance industry that may be in violation of the Connecticut Antitrust Act, General Statutes § 35-24 et seq. In furtherance of this investigation, the defendant issued interrogatories and a subpoena duces tecum to the plaintiff pursuant to § 35-42. The plaintiff partially responded to the defendant's requests, producing more than 12,000 pages of documents.

During the course of the plaintiff's production of documents, it became evident that the plaintiff and the defendant disagreed about the ability of the defendant to disclose information produced pursuant to § 35-42 to individuals outside of the defendant's office. As a result, the plaintiff did not complete its response to the defendant, and instead filed the present action in the Superior Court. The plaintiff's claims are set forth in a five count complaint, which seeks: a declaration of the scope of the confidentiality protection provided by § 35-42; temporary and permanent injunctive relief enjoining the defendant from disclosing the responsive material and information in violation of the provisions of § 35-42; a writ of mandamus requiring the defendant to protect the confidentiality of the responsive material and information by not disclosing it in violation of § 35-42; an order quashing or modifying the subpoena so as to ensure appropriate safeguards to protect the disclosure of trade secrets and other confidential commercial and financial information; and a protective order preventing the disclosure by the defendant of the plaintiff's trade

secrets and other confidential commercial and financial information. The defendant subsequently filed a separate action for a declaratory judgment seeking an order requiring the plaintiff to comply with the subpoena duces tecum and the interrogatories. See footnote 2 of this opinion.

Thereafter, the plaintiff filed a motion for summary judgment, seeking a "declaration from the court that pursuant to [§] 35-42, the [defendant] may not disclose any of [the plaintiff's] documents or information provided pursuant to a subpoena or interrogatories issued pursuant to § 35-42 to any person outside the [defendant's office] except to the extent (1) a court permits—after notice to the [plaintiff] and an opportunity to be heard—during the course of a litigation that arises from the [defendant's] antitrust investigation; or (2) provided to an official of another state or the federal government pursuant to § 35-42 (g) where such official will maintain the same degree of confidentiality provided by [§] 35-42 (c) and (e)."[4] The trial court denied the plaintiff's motion for summary judgment, rejecting the plaintiff's claims, including its interpretation of § 35-42. This appeal followed.

We begin by setting forth the standard of review. "The lack of a final judgment implicates the subject matter jurisdiction of an appellate court to hear an appeal. A determination regarding . . . subject matter jurisdiction is a question of law [over which we exercise plenary review]. . . . *Pritchard* v. *Pritchard*, 281 Conn. 262, 270, 914 A.2d 1025 (2007).

"We commence the discussion of our appellate jurisdiction by recognizing that there is no constitutional right to an appeal. E.g., *Chanosky* v. *City Building Supply Co.*, 152 Conn. 449, 451, 208 A.2d 337 (1965); *State* v. *Figueroa*, 22 Conn. App. 73, 75, 576 A.2d 553 (1990), cert. denied, 215 Conn. 814, 576 A.2d 544 (1991). Article fifth, § 1, of the Connecticut constitution provides for a Supreme Court, a Superior Court and such lower courts as the [G]eneral [A]ssembly shall . . . ordain and establish, and that [t]he powers and jurisdiction of these courts *shall be defined by law*. . . . To consider the [plaintiff's] claims, we must apply the law governing our appellate jurisdiction, which is statutory. *State* v. *Curcio*, 191 Conn. 27, 30, 463 A.2d 566 (1983). The legislature has enacted General Statutes § 52-263,[5] which limits the right of appeal to those appeals filed by aggrieved parties on issues of law from final judgments. Unless a specific right to appeal otherwise has been provided by statute, we must always determine the threshold question of whether the appeal is taken from a final judgment before considering the merits of the claim. . . . *Rivera* v. *Veterans Memorial Medical Center*, 262 Conn. 730, 733–34, 818 A.2d 731 (2003); see also *State* v. *Curcio*, supra, 30 (right of appeal is accorded only if the conditions fixed by statute and the

rules of court for taking and prosecuting the appeal are met). Further, we have recognized that limiting appeals to final judgments serves the important public policy of minimizing interference with and delay in the resolution of trial court proceedings. . . . *Hartford Accident & Indemnity Co.* v. *Ace American Reinsurance Co.*, 279 Conn. 220, 225, 901 A.2d 1164 (2006)." (Emphasis in original; internal quotation marks omitted.) *Palmer* v. *Friendly Ice Cream Corp.*, 285 Conn. 462, 466–67, 942 A.2d 742 (2008).

In the present case, the plaintiff appeals from the trial court's denial of its motion for summary judgment. The denial of a motion for summary judgment does not result in a judgment, however, and no judgment therefore was rendered. "As a general rule, an interlocutory ruling may not be appealed pending the final disposition of a case. See, e.g., *Doublewal Corp.* v. *Toffolon*, 195 Conn. 384, 388, 488 A.2d 444 (1985); see also *State* v. *Curcio*, [supra, 191 Conn. 30] (right of appeal is purely statutory and is limited to appeals by aggrieved parties from final judgments). The denial of a motion for summary judgment ordinarily is an interlocutory ruling and, accordingly, not a final judgment for purposes of appeal. See, e.g., *Connecticut National Bank* v. *Rytman*, 241 Conn. 24, 34, 694 A.2d 1246 (1997). We previously have determined [however] that certain interlocutory orders have the attributes of a final judgment and consequently are appealable under . . . § 52-263. . . . In *State* v. *Curcio*, [supra, 31], we explicated two situations in which a party can appeal an otherwise interlocutory order: (1) where the order or action terminates a separate and distinct proceeding, or (2) where the order or action so concludes the rights of the parties that further proceedings cannot affect them. . . . *Esposito* v. *Specyalski*, 268 Conn. 336, 345–46 n.13, 844 A.2d 211 (2004)." (Internal quotation marks omitted.) *Chadha* v. *Charlotte Hungerford Hospital*, 272 Conn. 776, 784–85, 865 A.2d 1163 (2005).

At oral argument in this court, the parties asserted that the present case is reviewable under the second prong of *State* v. *Curcio*, supra, 191 Conn. 31. Specifically, the parties claimed that the trial court's denial of the plaintiff's motion for summary judgment constituted a rejection of the plaintiff's interpretation of the confidentiality requirements of § 35-42, and because each of the plaintiff's claims sought confidentiality of documents disclosed pursuant to § 35-42, the court's denial of summary judgment so concluded the rights of the parties that further proceedings cannot affect them. We disagree.

We begin by noting that the parties' agreement on the existence of a final judgment does not confer jurisdiction on this court. "The lack of a final judgment implicates the subject matter jurisdiction of an appellate court to hear an appeal. . . . The appellate courts

have a duty to dismiss, even on [their] own initiative, any appeal that [they lack] jurisdiction to hear. . . . Neither the parties nor the trial court, however, can confer jurisdiction upon [an appellate] court. . . . The right of appeal is accorded only if the conditions fixed by statute and the rules of court for taking and prosecuting the appeal are met." (Citations omitted; internal quotation marks omitted.) *Mazurek* v. *Great American Ins. Co.*, 284 Conn. 16, 33–34, 930 A.2d 682 (2007).

We now must determine whether the trial court's order so concluded the rights of the parties that further proceedings cannot affect them. In denying the plaintiff's motion for summary judgment, *Hon. Robert J. Hale*, judge trial referee, rejected the plaintiff's interpretation of the confidentiality provisions of § 35-42. Because the defendant did not file a cross motion for summary judgment, however, the trial court's interpretation of § 35-42 has not been incorporated into any judgment. The present action remains an open matter on the trial court docket, and further proceedings will occur in this case. Specifically, it is likely that the case will be placed on a docket management calendar, at which time the parties will be required to take the necessary steps to obtain a judgment or the case will be dismissed for failure to prosecute the action with reasonable diligence. See Practice Book § 14-3.[6]

Moreover, the judge who presides at those future proceedings will not be bound by the legal determinations made by Judge Hale in his denial of the motion for summary judgment. The law of the case doctrine "expresses the practice of judges generally to refuse to reopen what [already] has been decided . . . . New pleadings intended to raise again a question of law which has been already presented on the record and determined adversely to the pleader are not to be favored. . . . Where a matter has previously been ruled upon interlocutorily, the court in a subsequent proceeding in the case may treat that decision as the law of the case, if it is of the opinion that the issue was correctly decided, in the absence of some new or overriding circumstance. . . .

"A judge is not bound to follow the decisions of another judge made at an earlier stage of the proceedings, and if the same point is again raised he [or she] has the same right to reconsider the question as if he [or she] had himself [or herself] made the original decision. . . . This principle has been frequently applied to an earlier ruling during the pleading stage of a case . . . . According to the generally accepted view, one judge may, in a proper case, vacate, modify, or depart from an interlocutory order or ruling of another judge in the same case, upon a question of law. . . .

"This court has determined that although a judge should be hesitant to rule contrary to another judge's ruling, he or she may do so [n]evertheless, if the case

comes before him [or her] regularly and [the judge] becomes convinced that the view of the law previously applied by [a] coordinate predecessor was clearly erroneous and would work a manifest injustice if followed . . . . By way of example, this court has noted that [t]he adoption of a different view of the law by a judge in acting upon a motion for summary judgment than that of his [or her] predecessor . . . is a common illustration of this principle. . . . From the vantage point of an appellate court it would hardly be sensible to reverse a correct ruling by a second judge on the simplistic ground that it departed from the law of the case established by an earlier ruling." (Citations omitted; internal quotation marks omitted.) *Johnson* v. *Atkinson*, 283 Conn. 243, 249–50, 926 A.2d 656 (2007).

In the present case, therefore, any other judge to whom this action is assigned in the future will not be bound by Judge Hale's ruling on the plaintiff's motion for summary judgment. In addition, we do not know whether the matter will be assigned again to Judge Hale, who is a judge trial referee. Pursuant to General Statutes § 52-434,[7] a judge trial referee, to whom civil cases of an adversary nature can be referred, must be reappointed annually.

Because no judgment has been rendered in this case and further proceedings may occur in which the trial court will not be bound by Judge Hale's interpretation of § 35-42, we cannot conclude that the rights of the parties have been so determined by Judge Hale's denial of summary judgment that further proceedings cannot affect them. We conclude that the court's denial of the plaintiff's motion for summary judgment is not an appealable final judgment. As a result, we lack subject matter jurisdiction to entertain the present appeal.

The appeal is dismissed.

In this opinion ROGERS, C. J., and ZARELLA and SCHALLER, Js., concurred.

[1] General Statutes § 35-42 provides in relevant part: "(a) Whenever the Attorney General, his deputy, or any assistant attorney general designated by the Attorney General, has reason to believe that any person has violated any of the provisions of this chapter, he may, prior to instituting any action or proceeding against such person, issue in writing and cause to be served upon any person, by subpoena duces tecum, a demand requiring such person to submit to him documentary material relevant to the scope of the alleged violation.

"(b) Such demand shall (1) state the nature of the alleged violation, and (2) describe the class or classes of documentary material to be reproduced thereunder with such definiteness and certainty as to be accurately identified, and (3) prescribe a date which would allow a reasonable time to assemble such documents for compliance.

"(c) All documents furnished to the Attorney General, his deputy, or any assistant attorney general designated by the Attorney General, shall be held in the custody of the Attorney General, or his designee, shall not be available to the public, and shall be returned to the person at the termination of the attorney general's investigation or final determination of any action or proceeding commenced thereunder.

"(d) No such demand shall require the submission of any documentary material, the contents of which would be privileged, or precluded from disclosure if demanded in a grand jury investigation.

"(e) The Attorney General, his deputy, or any assistant attorney general

designated by the Attorney General, may during the course of an investigation of any violations of the provisions of this chapter by any person (1) issue in writing and cause to be served upon any person, by subpoena, a demand that such person appear before him and give testimony as to any matters relevant to the scope of the alleged violations. Such appearance shall be under oath and a written transcript made of the same, a copy of which shall be furnished to said person appearing, and shall not be available for public disclosure; and (2) issue written interrogatories prescribing a return date which would allow a reasonable time to respond, which responses shall be under oath and shall not be available for public disclosure.

"(f) In the event any person shall fail to comply with the provisions of this section, (1) the Attorney General, his deputy, or any assistant attorney general designated by the Attorney General, may apply to the superior court for the judicial district of Hartford for compliance, which court may, upon notice to such person, issue an order requiring such compliance, which shall be served upon such person; (2) the Attorney General, his deputy, or any assistant attorney general designated by the Attorney General, may also apply to the superior court for the judicial district of Hartford for an order, which court may, after notice to such person and hearing thereon, issue an order requiring the payment of civil penalties to the state in an amount not to exceed five hundred dollars. . . . "

[2] The defendant filed a separate action, in which the party designations were reversed, seeking a declaratory judgment requiring the plaintiff to comply with the subpoena and respond to the interrogatories. Thereafter, pursuant to the parties' joint motion, that action was consolidated with the plaintiff's action. For purposes of convenience, references herein to the plaintiff are to Brown and Brown, Inc., and references to the defendant are to Attorney General Richard Blumenthal.

[3] The plaintiff appealed to the Appellate Court from the decision of the trial court. We subsequently granted the defendant's motion to transfer the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-2.

[4] We note that the defendant did not file a cross motion for summary judgment.

[5] General Statutes § 52-263 provides: "Upon the trial of all matters of fact in any cause or action in the Superior Court, whether to the court or jury, or before any judge thereof when the jurisdiction of any action or proceeding is vested in him, if either party is aggrieved by the decision of the court or judge upon any question or questions of law arising in the trial, including the denial of a motion to set aside a verdict, he may appeal to the court having jurisdiction from the final judgment of the court or of such judge, or from the decision of the court granting a motion to set aside a verdict, except in small claims cases, which shall not be appealable, and appeals as provided in sections 8-8 and 8-9."

[6] Although the dissent acknowledges that "ordinarily, the denial of a motion for summary judgment is an interlocutory ruling that does not constitute a final judgment for purposes of appeal," it asserts that "the denial of [the plaintiff's] motion was a final judgment because the court's ruling on that motion definitively and conclusively resolved the rights of the parties under § 35-42 for all purposes." As we have explained previously herein, however, this court has adopted and consistently applied the two-pronged test under *State* v. *Curcio*, supra, 191 Conn. 31, to determine whether an interlocutory order is appealable. See, e.g., *Palmer* v. *Friendly Ice Cream Corp.*, supra, 285 Conn. 467–68 ("This court has determined that certain interlocutory orders are to be treated as final judgments for purposes of appeal. To determine whether an order should be treated as such, we apply [the two-pronged *Curcio*] test . . . . Unless an order can satisfy one of these two prongs, the lack of a final judgment 'is a jurisdictional defect' that necessitates dismissal of the appeal." [Citation omitted.]). The dissent fails, however, to engage in any analysis under *Curcio*, asserting, instead, that the decision at issue is not an interlocutory ruling. It is well established, however, that the denial of a motion for summary judgment is an interlocutory ruling and is appealable only if it satisfies one of the two prongs of *Curcio*. The dissent seeks to avoid the requirements of *Curcio* by stating that this is not an interlocutory order, despite our consistent case law to the contrary.

Furthermore, were we to adopt the dissent's position, we would open the floodgates to appeals brought from interlocutory orders. In each of these appeals, this court would abandon the well established *Curcio* test and, instead, engage in an analysis of the parties' claims. Such a result would not further the principle of judicial economy that the dissent seeks to promote.

The dissent also asserts that the denial of summary judgment in this case

is appealable because one of the counts of the plaintiff's complaint sought declaratory relief pursuant to General Statutes § 52-29 (a). Although we acknowledge that a declaratory *judgment* pursuant to § 52-29 (a) has "the force of a final judgment," we disagree that there is a declaratory judgment in the present case. To the contrary, the trial court *denied* the plaintiff's request for summary judgment on its claim for declaratory relief. If we were to treat the denial of a motion for summary judgment on the count of the complaint seeking declaratory relief, we would be creating a separate test for the finality of a judgment for claims brought under § 52-29 (a), different from all other civil claims. Such an approach would be ill-advised.

Finally, we note that it is axiomatic that, "[i]t is the responsibility of the appellant to provide an adequate record for review. The appellant shall determine whether the entire trial court record is complete, correct and otherwise perfected for presentation on appeal." Practice Book § 61-10. In the present case, therefore, to the extent that the memorandum of decision lacked clarity, the plaintiff, as the appellant, had the burden of perfecting the record prior to taking this appeal, including establishing that the appeal was taken from a final judgment. The plaintiff failed, however, to seek an articulation from the trial court or to take any other action necessary to ensure that it was appealing from a final judgment.

[7] General Statutes § 52-434 (b) provides: "The Chief Justice may designate, from among the state referees, judge trial referees to whom criminal and civil cases and juvenile matters may be referred. Criminal cases and civil cases of an adversary nature shall be referred only to state referees who are designated as judge trial referees, and proceedings resulting from a demand for a trial de novo pursuant to subsection (e) of section 52-549z shall be referred only to judge trial referees who are specifically designated to hear such proceedings. On or before October first of each year, the Chief Court Administrator shall publish the list of the judge trial referees specifically designated to hear such proceedings. Juvenile matters shall be referred only to judge trial referees who are specifically designated to hear juvenile cases. No designation pursuant to this subsection may be for a term of more than one year."