

Circuit Court for Montgomery County
Case No. 448187-V

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1994

September Term, 2019

JOHN BERMAN

v.

DAVID MODELL, ET AL.

Graeff,
Berger,
Shaw Geter,

JJ.

Opinion by Berger, J.

Filed: January 6, 2021

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This case, before us for the second time, has its genesis in a verified petition for assumption of jurisdiction over the Bella U. Berman Living Trust (“the Trust”), filed in the Circuit Court for Montgomery County on May 22, 2018, by David P. Modell, trustee of the Trust.¹ Bella U. Berman died in October 2017. Her sons, John Berman,² appellant, and Ronald Berman, appellee, were remainder beneficiaries of the Trust. Minnesota Lawyers Mutual Insurance Company (“MLM”), appellee, is an insurer that issued a policy of professional liability insurance to Modell. Prior to the filing of the petition for assumption of jurisdiction over the Trust, MLM provided notice to Modell that it was asserting a subrogation claim against the Trust to recover attorneys’ fees and expenses incurred in defending Modell, in his capacity as trustee, in a number of cases filed in various jurisdictions by John Berman.

MLM’s subrogation interest arose from Modell’s rights, as trustee, under the Trust.

Paragraph 8.7 of the Trust document provides:

8.7. *Advisors.* The trustee may retain and compensate such accountants, financial advisors, banks, attorneys, or other professionals, as he or she deems necessary to assist in the administration of the trust. The trustee may appoint an individual or corporation as agent or attorney to collect, receive, and disburse any income, and generally to perform the duties and services incident to a so-called “custodian” account. The costs and expenses of any of these services shall be charged against the principal or income of the trust for which such services are rendered in such manners the trustee determines in his or her discretion.

¹ Modell also served as the guardian of Bella Berman’s property while she was living.

² John Berman is proceeding in this appeal, as he did below, in proper person.

The Trust further grants the trustee the power to “compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle claims, in favor of or against the trust as the trustees deem best.”

On September 20, 2018, the circuit court granted Modell’s petition and assumed jurisdiction over the Trust. The Court ordered a partial distribution from the Trust in the amount of \$75,000 each to John Berman and Ronald Berman. The court also ordered “that all issues related to the subrogation claim asserted by MLM against the Trust, which is contested by [Ronald Berman] and John [Berman], and any other claim related to the Trust shall remain subject to further adjudication by the Court.”

Ronald Berman filed a motion requesting the court to divide the Trust into two separate trusts, one for himself and one for John Berman. The court granted that motion and ordered that each of the new trusts was to receive fifty percent of the Trust’s assets and each brother was obligated for fifty percent of any claims and liabilities of the Trust, including MLM’s subrogation claim, as of December 16, 2019. With respect to claims and liabilities incurred after December 16, 2019, the court ordered that they were to be incurred by “the new trust whose beneficiary’s actions have caused or created such claim and/or liability.” Subsequently, Ronald Berman entered into a settlement of MML’s claims which was approved by the court.

On November 14, 2018, John Berman filed a motion for summary judgment which, after a hearing, was denied. On December 31, 2018, John Berman filed a motion requesting the court to order Modell to refund the Trust \$8,767 that had been paid to a law firm

representing Modell in his capacity as trustee. The court denied that motion in an order dated February 7, 2019.

On February 15, 2019, John Berman filed a notice of appeal to this Court in *John Berman v. David Modell, et al.*, Case No. 3473, Sept. Term 2018. He challenged the circuit court’s decision to divide the Trust into two separate trusts and the denial of his motion for summary judgment. MLM, in its capacity as an interested party, filed a motion to dismiss the appeal on the ground that the orders appealed from were interlocutory in nature and not immediately appealable pursuant to statute or the collateral order doctrine. On August 2, 2019, we granted the motion and dismissed the appeal.

While that appeal was pending, Modell filed a petition for the approval of payments made to his attorneys, which was granted. On October 23, 2019, the court also granted Modell’s petition for fees and commissions.

On November 22, 2019, John Berman filed another notice of appeal, giving rise to the instant case.

QUESTIONS PRESENTED

John Berman presents the following eight questions for our consideration:

- I. Did Modell’s silence until March 5, 2018 on any claim against the Trust associated with the Suits, the first Suit beginning March 2013, constitute a failure of his disclosure duty and a breach of trust; and did this breach forfeit Modell’s entitlement to a lien against the Trust, for expenses for the Suits?
- II. Did Modell’s forfeiture also forfeit any right MLM might have had to a lien in subrogation?

- III. Was the denial of Berman’s summary judgment motion erroneous?
- IV. Was the secret transfer of \$44,860.31 from the Trust to Modell’s counsel an unlawful taking of property and in violation of the beneficiaries’ due process rights; and were the 7/31/19 approvals of the other transfers, including prospective transfers, in violation of Berman’s due process rights?
- V. Was the trial court’s approval *nunc pro tunc* of the \$44,860.31 transfer an improper, retroactive judicial decision and not a correction of a clerical error or omission; thus voiding the approval, independent of any other reasons?
- VI. Was Modell’s misrepresentation of the Trust balance at the September 18, 2018 hearing, by his failure to disclose the August \$8,767 transfer to his counsel from the Trust, a violation of due process through false substantive notice of the actual Trust balance; did this false notice and the beneficiaries agreeing to court jurisdiction on that false basis undermine the court’s jurisdiction over the Trust?
- VII. Did the Division of the Trust defeat the plain meaning of the Trust document and also materially impair Berman’s interest in the Trust?
- VIII. Did the claim, by the trustee and his counsel, of attorney-client privilege establish, under the fiduciary exception to attorney-client privilege, that all or part of counsel’s work was for the trustee personally?

We shall not reach the merits of this appeal because the orders appealed from are neither final orders nor appealable interlocutory orders. Therefore, this Court does not have proper jurisdiction, and the appeal must be dismissed.

MOTION TO DISMISS THE APPEAL

Appellees Ronald Berman and MLM argue that the instant appeal should be dismissed because two issues were raised in a prior appeal and all of the issues raised constitute premature challenges to a number of interlocutory orders. In John Berman’s prior appeal, *John Berman v. David Modell, et al.*, Case No. 3473, Sept. Term 2018, he challenged the circuit court’s decision to grant Ronald Berman’s motion to create two separate trusts and the denial of his motion for summary judgment as to MLM’s subrogation. We dismissed that appeal as not allowed by law pursuant to Maryland Rule 8-602(b)(1), which provides that we “shall dismiss an appeal if: (1) the appeal is not allowed by these Rules or other law[.]” In the instant appeal, in Questions III and VII, John Berman again presents those issues for our consideration.

In Questions I and II of the instant appeal, John Berman challenges MLM’s right to subrogation for fees and expenses it incurred on behalf of its insured, Modell, in his capacity as Trustee, and in Questions IV, V, VI, and VIII, he asserts challenges to various orders pertaining to the payment of counsel fees and expenses and to the redaction of certain portions of invoices from Modell’s attorneys. For the reasons set forth below, we lack jurisdiction to consider all of these issues.

A. Appellate Jurisdiction

Appellate jurisdiction is a creature of statute. *Kurstin v. Bromberg Rosenthal, LLP*, 191 Md. App. 124, 131 (2010), *aff’d*, 420 Md. 466 (2011). We have jurisdiction over an appeal when it is taken from a final judgment or is otherwise permitted by law. *See* § 12-

301 of the Courts and Judicial Proceedings Article³ (“CJP”); *Addison v. Lochearn Nursing Home, LLC*, 411 Md. 251, 273-74 (2009). “Whether a judgment is final, and thus whether this Court has jurisdiction to review that judgment, is a question of law to be reviewed *de novo*.” *Baltimore Home Alliance, LLC v. Geesing*, 218 Md. App. 375, 381 (2014) (citing *Shofer v. Stuart Hack Co.*, 107 Md. App. 585, 591 (1996)).

A final judgment is a judgment that “disposes of all claims against all parties and concludes the case.” *Matter of Donald Edwin Williams Revocable Trust*, 234 Md. App. 472 (2017) (citing *Miller & Smith at Quercus, LLC v. Casey PMN, LLC*, 412 Md. 230, 241 (2010)). Under the rules and case law, “[a]n order will constitute a final judgment if the following conditions are satisfied: (1) ‘it must be intended by the court as an unqualified, final disposition of the matter in controversy;’ (2) ‘it must adjudicate or complete the adjudication of all claims against all parties;’ and (3) ‘the clerk must make a proper record of it’ on the docket.” *Waterkeeper Alliance, Inc. v. Maryland Dept. of Agriculture*, 439 Md. 262, 278 (2014) (quoting *Rohrbeck v. Rohrbeck*, 318 Md. 28, 41 (1989)).

Maryland Rule 2-602(a) makes clear that a judgment that does not dispose of all claims by and against all parties is not a final judgment. It provides:

³ Section 12-301 of the Courts and Judicial Proceedings Article provides, in part, that

[e]xcept as provided in § 12-302 of this subtitle, a party may appeal from a final judgment entered in a civil or criminal case by a circuit court. The right of appeal exists from a final judgment entered by a court in the exercise of original, special, limited, statutory jurisdiction, unless in a particular case the right of appeal is expressly denied by law.

(a) **Generally.** Except as provided in section (b) of this Rule, an order or other form of decision, however designated, that adjudicates fewer than all of the claims in an action (whether raised by original claim, counterclaim, cross-claim, or third-party claim), or that adjudicates less than an entire claim, or that adjudicates the rights and liabilities of fewer than all of the parties to the action:

(1) is not a final judgment;

(2) does not terminate the action as to any of the claims or any of the parties; and

(3) is subject to revision at any time before the entry of a judgment that adjudicates all of the claims by and against all of the parties.

There are only three exceptions to the final judgment requirement: appeals from interlocutory orders specifically allowed by statute; immediate appeals permitted under Maryland Rule 2-602(b); and appeals from interlocutory rulings permitted under the common law collateral order doctrine. *Johnson v. Johnson*, 423 Md. 602, 607 (2011); *Salvagno v. Frew*, 388 Md. 605, 615 (2005). A premature appeal is a jurisdictional defect that is of no force or effect. *Doe v. Sovereign Grace Ministries, Inc.*, 217 Md. App. 650, 662 (2014).

CJP § 12-303 specifies a limited number of interlocutory orders from which a party may appeal in a civil case. John Berman has not argued, and we do not find, that any of those exceptions apply to the instant case.⁴

⁴ Section 12-303 of the Courts and Judicial Proceedings Article provides:

A party may appeal from any of the following interlocutory orders entered by a circuit court in a civil case:

(continued)

(1) An order entered with regard to the possession of property with which the action is concerned or with reference to the receipt or charging of the income, interest, or dividends therefore, or the refusal to modify, dissolve, or discharge such an order;

(2) An order granting or denying a motion to quash a writ of attachment; and

(3) An order:

(i) Granting or dissolving an injunction, but if the appeal is from an order granting an injunction, only if the appellant has first filed his answer in the cause;

(ii) Refusing to dissolve an injunction, but only if the appellant has first filed his answer in the cause;

(iii) Refusing to grant an injunction; and the right of appeal is not prejudiced by the filing of an answer to the bill of complaint or petition for an injunction on behalf of any opposing party, nor by the taking of depositions in reference to the allegations of the bill of complaint to be read on the hearing of an application for an injunction;

(iv) Appointing a receiver but only if the appellant has first filed his answer in the cause;

(v) For the sale, conveyance, or delivery of real or personal property or the payment of money, or the refusal to rescind or discharge such an order, unless the delivery or payment is directed to be made to a receiver appointed by the court;

(vi) Determining a question of right between the parties and directing an account to be stated on the principle of such determination;

(vii) Requiring bond from a person to whom the distribution or delivery of property is directed, or withholding distribution or delivery and ordering the

(continued)

Maryland Rule 2-602(b) provides:

(b) **When allowed.** If the court expressly determines in a written order that there is no just reason for delay, it may direct in the order the entry of a final judgment:

(1) as to one or more but fewer than all of the claims or parties; or

(2) pursuant to Rule 2-501(f)(3), for some but less than all of the amount requested in a claim seeking money relief only.

The circuit court did not make the determination required by Md. Rule 2-602(b) and, as a result, that rule is not applicable to the instant case.

The common law collateral order doctrine is a very limited exception to the principle that only final judgments are appealable and it may be invoked only in extraordinary

retention or accumulation of property by the fiduciary or its transfer to a trustee or receiver, or deferring the passage of the court's decree in an action under Title 10, Chapter 600 of the Maryland Rules;

(viii) Deciding any question in an insolvency proceeding brought under Title 15, Subtitle 1 of the Commercial Law Article;

(ix) Granting a petition to stay arbitration pursuant to § 3-208 of this article;

(x) Depriving a parent, grandparent, or natural guardian of the care and custody of his child, or changing the terms of such an order; and

(xi) Denying immunity asserted under § 5-525 or § 5-526 of this article.

circumstances when a conjunctive four-part test is met. *Addison*, 411 Md. at 284-85. To qualify as an appealable collateral order, the order must:

- (1) conclusively determine[] the disputed question, (2) resolve[] an important issue, (3) resolve[] an issue that is completely separate from the merits of the action, and (4) [] be effectively unreviewable if the appeal had to await the entry of a final judgment.

Ehrlich v. Grove, 396 Md. 550, 563 (2007) (quoting *Pittsburgh Corning v. James*, 353 Md. 657, 660-61 (1999)). These four requirements “are very strictly applied.” *Id.* at 563 (internal quotations and citations omitted).

B. Issues Raised in the Prior Appeal

We dismissed appellant’s prior appeal, in which he challenged the circuit court’s decision to grant Ronald Berman’s motion to create two separate trusts and the denial of his motion for summary judgment as to MLM’s subrogation, because neither of those decisions constituted appealable final judgments. That remains the case.

With regard to appellant’s Question III, which challenges the circuit court’s denial of his motion for summary judgment, it is well established that an order denying a motion for summary judgment is, in most instances, neither a final judgment nor one of the interlocutory orders made appealable by CJP § 12-303. Such an order does not settle or conclude the rights of any party and is reviewable only after the conclusion of proceedings ending in a final judgment. *Mathis v. Hargrove*, 166 Md. App. 286, 303 and 303n.3 (2005); *Washington Suburban Sanitary Com’n v. Bowen*, 410 Md. 287, 291-93 (2009). The order denying John Berman’s motion for summary judgment is not appealable under the collateral order doctrine because that doctrine is extremely narrow, requires a four part test

that is not met in this case, and is applicable only in extraordinary circumstances that are not present here. *Bowen*, 410 Md. at 296-97.

Appellant’s challenge to the circuit court’s decision to divide the trust is also not a final appealable judgment as it does not fully adjudicate the claims between the parties or terminate or conclude the action below. That ruling is also not appealable under CJP § 12-303 and it fails to meet the four part test for application of the collateral order doctrine. *Ehrlich*, 396 Md. at 563.

Moreover, there has been no final judgment in the circuit court and nothing has changed with respect to the two issues presented in the prior appeal. The law of the case doctrine provides that “once an appellate court rules upon a question presented on appeal, litigants and lower courts become bound by the ruling, which is considered to be the law of the case.” *Holloway v. State*, 232 Md. App. 272, 279 (2017) (internal quotations and citation omitted). *See also Stokes v. American Airlines*, 142 Md. App. 440, 446, *cert denied*, 369 Md. 179 (2002) (holding same). The purpose of the law of the case doctrine is “to prevent piecemeal litigation.” *Nace v. Miller*, 201 Md. App. 54, 68 (2011), *cert denied*, 424 Md. 56 (2011). This appeal, in which John Berman is attempting piecemeal litigation, is premature. As we previously determined, the jurisdictional defect requires dismissal. Maryland Rule 8-602(b)(1).

C. Issues Presented for the First Time in the Instant Appeal

The first two questions presented by appellant concern Modell’s disclosure of MLM’s subrogation claim and MLM’s right to assert a subrogation claim. There has been no adjudication of MLM’s subrogation claim against the new trust in which John Berman

is the sole beneficiary. Modell's administration of the Trust is ongoing and is the subject of the contested proceedings in the circuit court. The questions presented by appellant do not arise from any order or adjudication of the claims between the parties that constitutes a final judgment. Neither of these issues is appealable pursuant to CJP § 12-303 because none of the exceptions to the final judgment rule set forth in that section applies to the instant case. Nor do either of these issues meet the four part test for application of the collateral order doctrine. As there has been no final judgment on these issues, we are without jurisdiction and dismissal of the appeal is required. Maryland Rule 8-602(b)(1).

The remaining questions, IV, V, VI and VIII, pertain to John Berman's challenges to certain payments made by the Trust. Specifically, he challenges the circuit court's grant of Modell's verified motion to approve his payment of attorneys' fees *nunc pro tunc*, the denial of John Berman's motion to recover \$8,767 that was paid with Trust funds to a law firm that represented Modell in defense of actions brought by John Berman in other jurisdictions, the grant of Modell's petition for the approval of the trustee's fees and costs, and, the grant of Ronald Berman's request to pay from his separate trust an agreed upon amount to settle MLM's claim for reimbursement. In addition, John Berman challenges the trustee's refusal to provide him unredacted statements for attorneys' fees.

None of these issues arise from an order or adjudication of the claims between the parties that constitutes a final judgment. None of these issues are appealable pursuant to CJP § 12-303 because none of the exceptions to the final judgment rule set forth in that section applies to the instant case. Moreover, none of these rulings are appealable under the collateral order doctrine because they do not constitute extraordinary circumstances,

and because the orders are not completely separate from the merits of the underlying action and are not unreviewable on appeal from a final judgment. Because we are without jurisdiction, dismissal of the appeal is required. Maryland Rule 8-602(b)(1).

**APPEAL DISMISSED. CASE REMANDED
TO THE CIRCUIT COURT FOR
MONTGOMERY COUNTY. COSTS TO BE
PAID BY APPELLANT.**