

CIVIL DISTRICT COURT FOR PARISH OF ORLEANS

STATE OF LOUISIANA

NO: 07-1746

DIV: "K"

SEC: 5

BROTHERS ROOFING & SHEET METAL

VERSUS

WOLFE WORLD, L.L.C. d/b/a WOLFMAN CONSTRUCTION

FILED

DEPUTY CLERK

**REQUESTED MEMORANDUM REGARDING
NATURE OF FEBRUARY 23, 2009'S PARTIAL SUMMARY JUDGMENT**

NOW INTO COURT, through undersigned counsel, comes Defendant, WOLFE WORLD, LLC d/b/a WOLFMAN CONSTRUCTION, (hereinafter "Wolfman" or "Defendant"), who submits this Memorandum regarding the order of this Court signed February 23, 2009, whereby it: (a) designated its partial summary judgment as an interlocutory judgment; and (b) denied Defendant's Motion for a Suspensive Appeal.

Defendant argues that the judgment should be designated as a final judgment as per La. C.C.P. Art. 1915(A).

The Judgment Issued by the Court is a Final Judgment because it sets forth a decision on the merits (albeit partially), and is not a decision over only "preliminary matters" to render it interlocutory under C.C.P. Art. 1841

La. C.C.P. Art. 1841, distinguishes between two types of judgments under Louisiana procedure, final judgments and interlocutory judgments. It separates them as follows:

A judgment that does not determine the merits but only preliminary matters in the course of the action is an interlocutory judgment.

A judgment that determines the merits in whole *or in part* is a final judgment.

In the Court's February 23, 2009, written reasons, Your Honor sets forth that it granted the partial summary judgment in controversy because of a "finding" that defendant owed plaintiff \$5000.00. It was thereafter classified as interlocutory because the judgment left other issues for trial, and specifically did not address plaintiff's entitlement to penalties, attorneys' fees, costs, or the full amount sued.

The Defendant argues that the judgment should not be classified interlocutory simply because it is only a partial decision. Clearly, by the terms of Art. 1841, a decision on the merits of an action "in part" may be (and are) classified as final judgments.

The judgment presently at issue did not determine a "preliminary matter" before the Court, but instead ruled on the partial merits of the case, finding that the Defendant is indebted to the Plaintiff in the amount of \$5,000.00. "A judgment that determines the merits in whole or in part is a final judgment." *Jackson Nat'l Life Ins. Co. v. Kennedy-Fagan*, 873 So. 2d 44, 47 (La.App. 1 Cir. Feb. 6, 2004); *see also Motorola, Inc. v. Associated Indem. Corp.*, 867 So.2d 723, 725-26 (La. App. 1 Cir. 2003) ("A judgment that determines the merits in whole or in part is a final judgment).

Therefore, since the judgment determines the merits of this action in part, the Defendant argues that the judgment's designation as interlocutory is incorrect.

The classification of the judgment does not end the Court's analysis, however.

As expressed in *Kennedy-Fagan*, "whether a partial final judgment is immediately appealable, however; must be determined by examining the requirements of La. C.C.P. art. 1915." *Kennedy-Fagan* at 47.

The Partial Final Judgment Is an Appealable Judgment Under La. C.C.P. 1915(A), or alternatively, should be expressly designated as appealable by this Court under 1915(B)

Determining whether a final judgment or partial final judgment is appealable requires an examination of Louisiana C.C.P. Art. 1915. *Id.* That statute is divided into two general sections. Section A sets forth those types of judgments that are immediately appealable.

Section B sets forth those judgments that are not immediately appealable, and provides the circumstances that must exist for these “B” judgments to reach an appeals court.

With regard to the judgment at controversy, the Defendant argues that it is a final and appealable judgment under the requirements of 1915(A)(3). However, in the alternative, the Defendant requests that this Court classify the judgment as appealable under 1913(B)(1).

The Judgment is Appealable Under 1915(A)(3)

In *Motorola*, the 1st Circuit made clear that art 1915 “authorizes the immediate appeal of partial final judgments, including partial summary judgments.” *Motorola* at 726.

Art. 1915(A)(3) provides that:

A final judgment may be rendered and signed by the court, even though it may not grant the successful party or parties all of the relief prayed for, or may not adjudicate all of the issues in the case, when the court:

(3) Grants a motion for summary judgment, as provided by Articles 966 through 969, but not including a summary judgment granted pursuant to Article 966(E).

As argued by Defendant herein, the judgment at controversy is a final judgment because it partially decides the merits of the action. Furthermore, it was granted upon summary judgment as provided for in Article 966. According to Article 1915, therefore, it should be designated as a final appealable judgment unless the summary judgment was granted pursuant to Article 966(E).

La. C.C.P. Art. 966(E) provides that “A summary judgment may be rendered dispositive of a particular issue, theory of recovery, cause of action, or defense, in favor of one or more parties, even though the granting of the summary judgment does not dispose of the entire case.”

This type of summary judgment has been classified by the courts as “issue summary judgments.” *Kennedy-Fagan*, at 48, *Motorola*, fn 5.

While 966(E) regards circumstances when a “partial” judgment is rendered, it is important to note that it does not encompass every type of “partial” judgment. Indeed, 966(A)(1) very clearly states that summary judgment may be requested “for all or part of the relief” prayed.

Instead, 966(E) separates from ordinary partial summary judgments those partial determinations that are “dispositive of a particular issue,” as distinguished from one that is dispositive of particular merits. The court in *Kennedy-Fagan* discusses the distinction as follows:

The judgment does not determine all claims between all parties...Nevertheless, the judgment at issue clearly meets the requirements of La. C.C.P. Art. 1915(A)(3). Thus, the trial court was not required to “certify” its judgment as appealable under La. C.C.P. art. 1915(B), and we clearly have jurisdiction to determine this appeal. *Id.* at 48, citing *Motorola*.

The *Kennedy-Fagan* court clarifies its determination in its footnote no. 4:

The judgment at issue does not actually dismiss any party from the principal demand, so it technically does not meet the criterion of dismissal required under La. C.C.P. art. 1915(A)(1). Nevertheless, for practical purposes, it resolves all issues as to the sum in dispute as between the debtor and the two competing groups of claimants...Thus it is not an “issue” summary judgment under La. C.C.P. art. 966(E), and meets the criterion of La. C.C.P. art. 1915(A)(3). *Id.*

The judgment currently in controversy is analogous to those partial summary judgments in *Kennedy-Fagan*, *Motorola* and similar jurisprudence, because it grants the Plaintiff’s motion and awards concrete damages to the Plaintiff. Accordingly, this Court has partially decided the merits of the action, and not simply an “issue” or “theory” of the case.

For these reasons, the judgment should be classified as a final judgment as per La. C.C.P. art. 1841, and immediately appealable as per La. C.C.P. 1915(A)(3). The suspensive appeal of the partial summary judgment, therefore, should be GRANTED.

Alternatively the Judgment should be designated as immediately appealable under art. 1915(B)(1)

In some instances, a partial summary judgment is not appealable under art. 1915(A)(3). After consideration of the above, if this Honorable Court determines that the instant partial summary judgment is not immediately appealable, the Defendant argues that it should be designated as appealable under the provisions of Art. 1915(B)(1).

La. Art. 1915(B)(1) provides:

When a court renders a partial judgment or partial summary judgment or sustains an exception in part, as to one or more but less than all of the claims, demands, issues, or theories, whether in an original demand, reconventional demand, cross-claim, third party claim, or intervention, the judgment shall not constitute a final judgment unless it is designated as a final judgment by the court after an express determination that there is no just reason for delay.

In the event that this Court considers the summary judgment as one granted by authority of Art. 966(E), this provision would apply. According to Louisiana case law, this particular provision “attempts to strike a balance between the undesirability of piecemeal appeals and the need for making review available at time that serves the needs of the parties.” *R.J. Messinger, Inc. v. Rosenblum*, 894 So.2d 1113, 1122 (La. 2005).

In determining whether an “express determination” of appealability should be made, “it is of paramount importance that a trial court judge fully understand and carefully perform the role of ‘dispatcher,’ rather than routinely certifying partial judgments.” *Motorola* at 731, citing *Mark Tatum & William Norris, III*, Comment, Summary Judgment and Partial Judgment in Louisiana: The State We’re In, 59 La.L.Rev. 131, 169 (1998).

Louisiana courts have set forth factors that should be considered by trial judges in determining whether to mark a 1915(B) judgment subject to immediate appeal:

...we consider the ‘overriding inquiry’ of ‘whether there is no just reason for delay,’ as well as the other non-exclusive criteria trial courts should use in making the determination of whether certification is appropriate:

- (1) The relationship between the adjudicated and the unadjudicated claims;
- (2) The possibility that the need for review might or might not be

mooted by future developments in the trial court;
(3) The possibility that the reviewing court might be obligated to consider the same issue a second time; and
(4) Miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense and the like.

Bridges v. Nat'l Fin. Sys., 960 So.2d 202, 204 (La. App. 1 Cir. 2007), citing *R.J. Messinger* at 1122.

In the instant case, the Defendants argue that the factors weigh in favor of making the matter as immediately appealable. The judgment at controversy awards \$5,000.00 to the Plaintiffs, ruling that the Defendant has made a judicial confession for that amount.

The relationship between this particular issue and the other issues in this case, is not such that the issues would be re-reviewed on appeal in the event the decision was upheld. Furthermore, the miscellaneous factors also weigh in favor of the Defendants, as the non-reviewability of the judgment has economical implications, as the Plaintiffs will be able to withdraw money held in the registry of this Honorable Court.

If this particular judgment is reversed on appeal, it would be unfair to the Defendants that the Plaintiffs were able to withdraw money from this Court's registry and maintain control of it during the interim period.

Conclusion

On February 23, 2009, this Court signed a judgment that awarded \$5,000.00 to the Plaintiffs. This judgment is immediately enforceable against the Defendants, and the Plaintiffs will be immediately compensated \$5,000.00 from money held in this Court's registry.

The judgment issued by this Court is clearly not interlocutory and considering "preliminary matters" as it actually awards monetary damages to the Plaintiff.

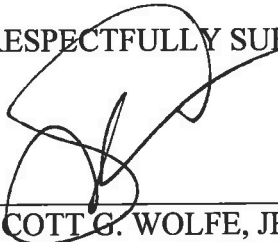
The nature of the judgment as a final judgment is underlined by its consequences: that Plaintiff will remove money from the registry of the Court. The Defendants contend that it would be damaged by this event, and specifically contends that the judgment awarding the

\$5,000.00 in damages is of the type that allows an immediate appeal, as it is immediately enforceable against the Defendants.

To refuse an appeal of the instant judgment would refuse Defendant a remedy to challenge a judgment of damages against it.

The judgment at controversy is a final judgment as per C.C.P. art 1841. Furthermore, since it was not an “issue” summary judgment under art 966(E), it is immediately appealable under art. 1915(A)(3). Alternatively, it should be designated as immediately appealable under art. 1915(B)(1) because there is “no just reason for delay.”

RESPECTFULLY SUBMITTED,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleadings have been served on all counsel of record to this proceeding by telephonic facsimile transmission or by placing a copy in the United States Mail, first class postage prepaid and properly addressed this 27TH day of February 2009.



Scott G. Wolfe Jr.