

**THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

ROBERT PARSKY and ANN ROANTREE,	:	February Term, 2000
Plaintiffs	:	
	:	No. 771
v.	:	
	:	Commerce Case Program
FIRST UNION CORPORATION,	:	
Defendant	:	Control No. 071884

OPINION

Defendant First Union Corporation (“First Union”) filed preliminary objections (“Objections”) to the class action Complaint of Robert Parsky and Ann Roantree (“Plaintiffs”). The Court overruled the Objections in an order (“Order”) dated June 29, 1999. First Union filed an appeal of the Order on July 28 and has filed a Motion to Amend the Order (“Motion”) in order to allow for an interlocutory appeal pursuant to Pennsylvania Rule of Appellate Procedure 1311 (“Rule 1311”). For the reasons set forth in this Opinion, the Court has issued a contemporaneous order denying the Motion.

DISCUSSION

Pennsylvania law permits appeals from four types of orders: an interlocutory order as of right, Pa. R.A.P. 311, a final order, Pa. R.A.P. 341, a collateral order, Pa. R.A.P. 313, and an interlocutory order by permission in accordance with Rule 1311. Rush v. Philadelphia Newspapers, Inc., 732 A.2d 648, 651 (Pa. Super. Ct. 1999). However, an order dismissing preliminary objections is interlocutory and appealable only by permission. Pa. App. Prac. 2d § 312.38. See also In Re Phillips, 471 Pa. 289, 370 A.2d 307 (1977); Davis Supermarkets, Inc. v. United Food & Commercial Workers, Local 23, 368 Pa. Super. 290, 294, 533 A.2d 1068, 1070 (1987) (holding that an order overruling

preliminary objections challenging subject matter jurisdiction is not final and may not be appealed as of right). As a result, First Union may appeal the Order only as allowed by Rule 1311.

Under Rule 1311, a party may seek permission from the appropriate appellate court to appeal if the relevant interlocutory order includes the language prescribed by 42 Pa. C.S. § 702(b) (“Section 702(b)”), which states that

When a court or other government unit, in making an interlocutory order in a matter in which its final order would be within the jurisdiction of an appellate court, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter, it shall so state in such order.

The appellate court has the discretion to permit an appeal from an order that contains the Section 702(b) language.

In the event that an interlocutory order does not, as originally issued, include the required language, the party wishing to appeal may file an application for amendment to request that the order be amended to include the 702(b) language. Any application is to be filed within thirty days after the entry of the interlocutory order, and permission to appeal to the appellate court may be sought within thirty days after entry of the amended order.¹

Here, First Union has asked the Court to amend the Order to state that the Order involves “[1] a controlling question of law as to which [2] there is substantial ground for difference of opinion and that

¹ In the event that a lower court denies an application for amendment, “a petition for review under Chapter 15 of the unappealable order of denial is the proper mode of determining whether the case is so egregious as to justify prerogative appellate correction of the exercise of discretion by the lower tribunal.” Note to Rule 1311. If the appellate court grants the petition for review, the issue will be treated as if the lower court had granted the petition to amend the order. Id.

[3] an immediate appeal from the [O]rder may materially advance the ultimate termination of the matter.” Section 702(b). Because none of these three characteristics accurately describes the Order, the Court has denied the Motion.

I. Controlling Question of Law

The Court first notes that the overruling of preliminary objections raises questions of law. See Heiple v. C.R. Motors, Inc., 446 Pa. Super. 310, 314, 666 A.2d 1066, 1068 (1995), overruled on other grounds by Celucci v. General Motors Corp., 450 Pa. Super. 438, 676 A.2d 253 (1996).

However, because First Union does not separately address the three elements set forth in Section 702(b), it is difficult to conclude why any specific question of law here is “controlling”: the issue of whether a division of the Court of Common Pleas has exclusive or concurrent jurisdiction relates only tangentially to the matter as a whole and could, at best, require a transfer of the case to a related division of the same court in the same district. Given Pennsylvania’s “strong policies underlying the unappealability of interlocutory orders and decrees,” In re Smith’s Estate, 442 Pa. 249, 255, 275 A.2d 323, 326 (1971), the Court cannot conclude that the Order involves a controlling question of law.

II. Substantial Ground for Difference of Opinion

If the Trial Division of the Court of Common Pleas has jurisdiction over a case, the administrative judge of the Trial Division may not transfer the matter to Orphans’ Court. See Baskin & Sears v. Edward J. Boyle Co., 506 Pa. 62, 67, 483 A.2d, 1365, 1367-68.² As a result, a transfer is

² First Union itself acknowledges that “where two divisions of the Court of Common Pleas share concurrent jurisdiction over a matter, an administrative judge of one division lacks authority to transfer the case to another division.” First Union Preliminary Objection Reply Brief at 1.

proper only if Orphans' Court has exclusive jurisdiction and the Trial Division has no jurisdiction over the matter.

First Union made two alternative assertions in the Objections:³ (1) the Trial Division does not have jurisdiction over a breach of contract claim against an inter vivos trust; and (2) even if the Trial Division has jurisdiction over such breach of contract claims, the Plaintiffs' claims are not breach of contract claims but rather trust administration claims over which Orphans' Court has exclusive jurisdiction.

A. No Jurisdiction over Breach of Contract Claims

Pennsylvania law grants Orphans' Court exclusive jurisdiction over "the administration and distribution of the real and personal property of inter vivos trusts, and the reformation or setting aside of any such trusts"⁴ 20 Pa. C.S. § 711 ("Section 711"). However, if a case includes matters not set forth in Section 711, Orphans' Court has only concurrent jurisdiction. 20 Pa. C.S. § 712. Consequently, if the Complaint includes a claim not covered by Section 711, Orphans' Court has concurrent, not exclusive, jurisdiction, and the Trial Division may not transfer the matter.

Set forth in the Complaint is a prayer for relief, which includes a request ("Request") for the Entry of a judgment on the claim of breach of contract in favor of plaintiffs and other members of the class and against First Union, and an award of compensatory damages

³ As required by Pennsylvania law, the Court considered all material facts in the pleading and all reasonably deducible inferences to be true, Sevin v. Kelshaw, 417 Pa. Super. 1, 7, 611 A.2d 1232, 1235 (1992), and was permitted to sustain the Objections only if First Union's claims were "clear and free from doubt." School Dist. of Phila. v. Livingston-Rosenwinkel, P.C., 690 A.2d 1321, 1323 (Pa. Commw. Ct. 1997).

⁴ Both parties agree that the trust in question is an inter vivos trust.

in favor of plaintiffs and the other members of the class and against First Union in the amount of the federal income tax liability caused by First Union's breaches of contract.

Complaint at 26.

The Request does not address the reformation or setting aside of an inter vivos trust.

Furthermore, it does not ask for relief regarding the administration or distribution of the inter vivos trust property. Rather, the Plaintiffs request damages arising from First Union's alleged breach of contract.⁵

Consequently, the Complaint raises issues outside the scope of Section 711, giving Orphans' Court only concurrent jurisdiction and requiring that the matter remain in the Trial Division.

B. Actual Breach of Contract Claim

Among the allegations made in the Complaint are the following:

- Ⓒ a.Ⓒ The form letters sent to the Plaintiffs were unilateral contracts to convert the relevant trusts without incurring federal income tax liability (¶ 51);
- Ⓒ a.Ⓒ The Plaintiffs could, and did, fulfill their obligations under the contracts either by filling out and returning the authorization form or by remaining silent (¶ 52);

⁵ Indeed, Pennsylvania courts have held that a breach of contract action is not within the exclusive jurisdiction of the Orphans' Court. See Petrocon Corp. v. Batdorf, 24 Fiduc. Rep. 362, 364, 66 Berks 140, 141 (1974) (citing Ake & Feay's App., 74 Pa. 116, 120 (1873), in holding that "the Orphans' Court has no jurisdiction to try actions for breach of contract"); Orban v. Rothrock, 19 D. & C.2d 336, 338, 28 Lehigh 350, 352 (1959) (citing Pringle v. Pringle, 130 Pa. 565, 18 A. 1024 (1890), in holding that an action for breach of contract is not within the Orphans' Court's exclusive jurisdiction). See also Lafayette Trust Co. v. Easton Trust Co., 347 Pa. 162, 163, 32 A.2d 215, 216 (1943) (stating that "Orphans' Court does not possess exclusive jurisdiction in the proof of decedent's creditors"); In re Locher's Est., 219 Pa. 42, 67 A.2d 953 (1907) (holding that Orphans' Court has no jurisdiction over claims against an estate based on the decedent's negligence).

6 a.6 First Union structured the Conversion in such a way that the Plaintiffs incurred federal tax liability (§ 56-57);

These allegations alone indicate that the claim is, in fact, a breach of contract claim, as the Plaintiffs claim. As such, First Union's argument that the Complaint presents only a "trust administration claim in disguise" must fail, as must the claim that the issue involves substantial ground for difference of opinion.

III. Materially Advance Ultimate Termination

Last, the Court is unconvinced that an appeal would advance the ultimate termination of this matter. An appellate decision on this matter may save time, but, as the Superior Court stated in Kaiser v. Meinzer, 272 Pa. Super. 207, 414 A.2d 1080 (1979), "that may be said of any interlocutory ruling that may potentially be reversed on direct appeal." 272 Pa. Super. at 220, 414 A.2d at 1087 (quoting Miller v. Krug, 225 Pa. Super. 39, 45, 386 A.2d 124, 127 (1978)). As a result, the Court cannot conclude that First Union has shown that allowing an appeal of the Order would advance this case's ultimate termination.

CONCLUSION

Because the requirements for allowing an appeal by permission do not exist here, the Court has refused to amend the Order to insert the language set forth in Section 702(b).

BY THE COURT:

JOHN W. HERRON, J.

Dated: August 23, 2000

**THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

ROBERT PARSKY and ANN ROANTREE,;	:	February Term, 2000
Plaintiffs	:	
	:	No. 771
v.	:	
	:	Commerce Case Program
FIRST UNION CORPORATION,	:	
Defendant	:	Control No. 071884

ORDER

AND NOW, to wit, this 23rd day of August, 2000, upon consideration of Defendant First Union Corporation's Motion to Amend the Order Overruling Defendant's Preliminary Objections to Plaintiffs' Complaint, and any responses and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it is hereby ORDERED and DECREED that the Motion is DENIED.

BY THE COURT:

JOHN W. HERRON, J.