IN THE SUPREME COURT OF THE STATE OF NEVADA

TIMBER TECH ENGINEERED BUILDING PRODUCTS, Appellant, vs. THE HOME INSURANCE COMPANY, A NEW HAMPSHIRE CORPORATION, Respondent.	No. 34546
TIMBER TECH ENGINEERED BUILDING PRODUCTS, Appellant, vs. TRAVELERS CASUALTY & SURETY COMPANY, F/K/A AETNA CASUALTY & SURETY COMPANY, A CONNECTICUT CORPORATION, Respondent.	No. 34941
TIMBER TECH ENGINEERED BUILDING PRODUCTS, Appellant, vs. THE HOME INSURANCE COMPANY, A NEW HAMPSHIRE CORPORATION; TRAVELERS CASUALTY & SURETY COMPANY, F/K/A AETNA CASUALTY & SURETY COMPANY, A CONNECTICUT CORPORATION; AND PERKINS GENERAL CONTRACTORS, INC., A NEVADA CORPORATION, Respondents.	No. 35642

FILED

APR 17 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEALS IN DOCKET NOS. 34546 AND 34941

AND DIRECTING BRIEFING IN DOCKET NO. 35642

These are consolidated appeals from two orders granting motions to dismiss and one order granting a motion for summary judgment in a tort action, all certified under NRCP 54(b).

01-06536

In Docket No. 34941, respondent Travelers Casualty & Surety Company (Travelers) has moved to dismiss the appeal for lack of jurisdiction. Travelers contends that the notice of appeal was untimely filed. However, we need not decide the timeliness issue, for, as discussed below, we lack jurisdiction over the appeals in Docket Nos. 34546 and 34941 because of improper NRCP 54(b) certification. Thus, we grant Travelers' motion to dismiss the appeal in Docket No. 34941, but on different jurisdictional grounds than those alleged.

Appellant Timber Tech Engineered Building Products (Timber Tech) filed a complaint against respondents The Home Insurance Company (Home Insurance), Travelers, and Perkins General Contractors, Inc. (Perkins). Another entity, Red Line Taco Four L.V. Ltd. Partnership d/b/a Taco Cabana, was also named as a defendant in the complaint, but was never served with the complaint and is not a party to this appeal.[1] In the complaint, Timber Tech asserted claims for spoliation of evidence, indemnity, contribution, and punitive damages.

Home Insurance filed the first motion to dismiss the complaint for failure to state a claim. On June 17, 1999, the district court granted the motion to dismiss, and certified the order as final under NRCP 54(b). Timber Tech filed a timely notice of appeal on July 19, 1999 (Docket No. 34546).

Travelers also filed a motion to dismiss the complaint for failure to state a claim. On August 3, 1999, the district court granted the motion to dismiss, and certified the order as final under NRCP 54(b). Notice of entry was served by mail on August 4, 1999. Timber Tech filed a notice of appeal on October 5, 1999 (Docket No. 34941).

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[1]See Rae v. All American Life & Cas. Co., 95 Nev. 920, 605 P.2d 196 (1979) (providing that an unserved co-defendant was not a party to the action, and NRCP 54(b) certification as to that co-defendant was unnecessary for finality).

Finally, Perkins filed a motion for summary judgment. On January 19, 2000, the district court entered an order granting Perkins' motion. The district court also certified this order as final under NRCP 54(b). Timber Tech filed a timely notice of appeal on February 10, 2000 (Docket No. 35642), designating all three orders.

These three appeals have been consolidated. We conclude that NRCP 54(b) certification of finality of the June 17 and August 3, 1999 orders was improper.

First, in Docket No. 34546, the district court granted NRCP 54(b) certification of the June 17, 1999 order granting Home Insurance's motion to dismiss. Certification of finality under NRCP 54(b) based on the elimination of a party is presumed valid and will be upheld absent a gross abuse of discretion.[2] "The district court should weigh the prejudice to the various parties and should certify a judgment as final in a 'parties' case" if the prejudice to the eliminated party in having to wait to appeal would be greater than the prejudice to the parties remaining below if the judgment is certified as final.[3] Here, the district court's order does not demonstrate that it weighed the respective prejudices to the parties. Moreover, based upon the record before this court, it appears that Home Insurance, the eliminated party, was in a similar legal position to Travelers, a party that remained below, and thus, certification as to only Home Insurance was improper.[4]

Next, in Docket No. 34941, the NRCP 54(b) certification of the order was improper because the district

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[2]See Mallin v. Farmers Insurance Exchange, 106 Nev. 606, 611, 797 P.2d 978, 981-82 (1990).

[3]Id. at 611, 797 P.2d at 981.

[4]See id.

court did not make the required, express determination that there was no just reason for delay. NRCP 54(b) provides that when multiple parties are involved in an action, the district court may direct entry of a final judgment as to fewer than all the parties "only upon an express determination that there is no just reason for delay." This court has repeatedly held that where there is a judgment dismissing fewer than all parties to an action, and there is no express determination that there is no just reason for delay by the lower court, the judgment is not a final appealable judgment.[5] Here, the district court failed to make the prerequisite determination of no just reason for delay in the August 3, 1999 order.

Accordingly, we lack jurisdiction to consider the appeals in Docket Nos. 34546 and 34941, and we dismiss them.

We have jurisdiction over Timber Tech's appeal in Docket No. 35642, however. In the February 10, 2000 notice of appeal, Timber Tech stated its intent to appeal from the June 17, 1999 order as to Home Insurance, the August 3, 1999 order as to Travelers, the January 19, 2000 order as to Perkins, and all other orders made final and appealable. As discussed above, the June 17 and August 3, 1999 orders were not final, appealable orders. But the January 19, 2000 order was the final judgment in this matter, as it disposed of all remaining parties and issues. Even though the district court also certified the January 19, 2000 order as final under NRCP 54(b), that certification was unnecessary because the order constituted the final judgment in the case. Thus, on appeal from the January 19, 2000 order in Docket No. 35642, Timber

[5]See, e.g., Hill v. State ex rel. Dep't Hwys., 86 Nev. 37, 464 P.2d 468 (1970); Aldabe v. Evans, 83 Nev. 135, 425 P.2d 598 (1967).

Tech may challenge all prior interlocutory orders, including the June 17 and August 3, 1999 orders.[6]

Appellant shall have thirty (30) days from the date of this order within which to file and serve the opening brief and appendix in Docket No. 35642. Briefing shall thereafter proceed in accordance with NRAP 31(a)(1).

It is so ORDERED.

_____, J.
Young

_____, J.
Leavitt

_____, J.
Becker

cc: Hon. Stephen L. Huffaker, District Judge
Beckley Singleton Jemison Cobeaga & List
Haney, Woloson & Mullins
Morris Pickering & Sanner
Lefebvre, Barron & Vivone, Chtd.
Clark County Clerk

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[6]See Consolidated Generator v. Cummins Engine, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998) (providing that interlocutory orders may be heard by this court on appeal from the final judgment); see also Fernandez v. Infusaid Corp., 110 Nev. 187, 192, 871 P.2d 292, 295 (1994) ("In the absence of a proper certification of finality, an interlocutory order dismissing fewer than all the parties cannot be challenged on appeal until a final judgment is entered in the action fully and finally resolving all the claims against all the parties.").