IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

ARTHUR G. NEWMYER, individually and on behalf of his minor daughter, L.N	)	
Appellants,	)	
v.	)	
	)	No. 2012 CV 847
JAMES F. HUNTINGTON	)	
Appellee.	)	

JAMES F. HUNTINGTON'S MOTION TO DISMISS APPEAL

Counter-Plaintiff/Appellee James F. Huntington ("Huntington") respectfully submits his Motion to Dismiss Appeal filed by Counter-Defendant/Appellant Arthur G. Newmyer ("Newmyer"), as follows:

PRELIMINARY STATEMENT

Newmyer brings this appeal from an Order entered May 22, 2012 by the Superior Court of the District Of Columbia, the Honorable Michael Rankin, that denied Newmyer's Special Motion to Dismiss[1] under the District Of Columbia Anti-SLAPP Act of 2010 ("Anti-SLAPP Act"), D.C. Code, Section 16-5502. The Superior Court ruled that the Anti-SLAPP Act was inapplicable to Huntington's counterclaim, declaring:

> Here, there is no other indication that this is a claim designed to silence or punish one for speaking out on issues of public importance. Without engaging in an analysis of whether Mr. Newmyer's lawsuit extends to matters of importance to the public or whether Dr. Huntington is a public figure, it suffices to note that there is no economic bullying here by Dr. Huntington, and his claims are not likely to deter Mr. Newmyer from being heard on his contentions.

[1] A copy of Judge Rankin's Memorandum Opinion is attached as Exhibit 1.

In addition to ruling that the purposes of the Anti-SLAPP Act did not apply to Huntington's counterclaim, the Superior Court also ruled that the filing of the Special Motion to Dismiss was late. The Court also found that Newmyer's filing of the Special Motion to Dismiss was baseless and frivolous.[2]

This appeal does not fall within the statutory grounds for appeal from a final order or D.C. Code § 11-721 (d), nor does its consideration merit "extraordinary treatment" under the collateral order doctrine. To allow immediate appellate review under the circumstances herein would undermine the final-judgment rule.

For the reasons detailed herein, the Court should reject Newmyer's attempt to immediately appeal from the denial of his "special motion" to dismiss, and summarily dismiss Newmyer's appeal for lack of jurisdiction.

FACTUAL AND PROCEDURAL BACKGROUND

A. Newmyer Intentionally Interfered with Huntington's Business Relationships and Caused Substantial Emotion Distress and Financial Harm.

Huntington's counterclaim derives from Newmyer's Complaint filed May 12, 2011. In his Complaint, Newmyer alleged that his minor daughter was "injured" by an alleged "therapeutic" relationship that Newmyer asserted existed between Huntington and Newmyer's child. Newmyer earlier had learned that his estranged wife, with whom he had a valid separation agreement, was involved with Huntington. Newmyer was livid about his estranged wife's relationship with Huntington. Before the filing of his Complaint, Newmyer sought and successfully obtained Huntington's dismissal as the middle school counselor at the Sidwell

[2] Because the filing of the Special Motion to Dismiss was baseless and frivolous, Judge Rankin directed Huntington to file a Memorandum of Points and Authorities in support of attorneys fees to establish the amount of the award pursuant to D.C. Code § 16-5504. That section provides that attorneys fees may be awarded "... if the court finds that a motion brought under § 16-5502 or § 16-5503 is frivolous or is solely intended to cause unnecessary delay." The amount of the award (not Huntington's entitlement to attorneys fees) is currently pending.

Friends School. Newmyer's Complaint contained graphic, private and personal emails and communications between Huntington and Newmyer's estranged wife and was designed to humiliate and embarrass Huntington.[3] Literally within minutes of the filing of Newmyer's complaint, Newmyer gave the complaint to his public relations firm[4], hired for the sole purpose of distributing the complaint to the widest possible public audience. With no right to file a claim against Huntington for "alienation of affections[5]", Newmyer avoided this prohibition by characterizing Huntington's actions as, inter alia, professional malpractice, breach of fiduciary duty and intentional infliction of emotional distress.

B. The Proceedings in the Superior Court

On June 14, 2011, Huntington and Sidwell Friends School filed a preliminary Motion to Dismiss in Favor of Mandatory Arbitration, which was denied on December 16, 2011. As a result of the Court's Order denying Huntington's Preliminary Motion, Huntington was obligated to Answer Newmyer's Complaint and file his Counterclaim. On December 30, 2011, Huntington filed his Counterclaim.[6] In the pleading, Huntington alleged defamation, false light invasion of privacy, tortious interference with a contractual relationship and intentional infliction of emotional distress.

---

[3] Newmyer's Complaint is attached as Exhibit 2.

[4] Newmyer advised, after he was compelled to provide Answers to Interrogatories, that he retained the public relations firm of Anne Schroeder Mullins Company, LLC . This firm then sent the Complaint to numerous media companies, including Washington Post, New York Times, Huffington Post, Drudge Report, TV Channels 4, 5, 7 and 9, and ABC, CBS and MSNBC.

[5] Effective April 7, 1977, the District of Columbia enacted legislation which provided that "[c]auses of action for breach of promise, alienation of affections, and criminal conversation are hereby abolished." D.C.Law 1-107, Title I, § 111(a), 23 D.C.R. 8737.

[6] Huntington's Counterclaim is attached as Exhibit 3.

In response, on February 29, 2012 Newmyer filed a Special Motion to Dismiss Huntington's claims under 16-5502 of the D.C. Anti-SLAPP Act of 2010.[7] Newmyer's Motion was premised on the contention that Huntington's Counterclaim arose from an "act in furtherance of the right of advocacy on issues of public interest." Newmyer further asserted that Hungtinton's lawsuit had the effect of deterring individuals from "voicing their concerns" and was "contrary to the fundamental principles of freedom of speech." (Page 2 of Newmyer's Memorandum in Support of Special Motion to Dismiss). Newmyer claimed that he was entitled to immediate summary dismissal of Huntington's claims.

Huntington opposed the Special Motion procedurally and substantively. Huntington argued that procedurally the Special Motion was filed late. Furthermore, Huntington asserted that the legislative purpose sought by enactment of the law did not apply to Huntington's counter complaint, as none of the purposes underlying the Anti-SLAPP Act were present in Huntington's Counter Complaint. Huntington contended that he was seeking relief because he had been damaged; that the issues raised in Newmyer's complaint were not matters of public interest, and that the issues became known to the public (but were not "issues of public interest") because Newmyer had made it so through his retention of a public relations firm. Finally, Huntington argued that Newmyer had turned the Anti-SLAPP Act on its head because Newmyer was the wealthy individual who was bullying Huntington, and that Newmyer had filed a meritless proceeding with the hope of deterring Huntington from litigating Newmyer's abuses.

C. Judge Rankin's Order

On May 22, 2012, the Honorable Michael Rankin denied Newmyer's anti-SLAPP

[7] Newmyer's Special Motion to Dismiss is attached as Exhibit 4. Huntington's Response and Opposition filed on April 4, 2012 is attached as Exhibit 5. Newmyer also filed a Motion to Dismiss for failure to state a claim pursuant to SCRCiv R 12(b)(6). On June 6, 2012, Judge Ranking granted in part and denied in part the Motion to Dismiss, allowing Huntington to proceed on his claims of tortious interference with a contractual relationship and intentional infliction of emotional distress.

motion, finding that not only was it filed untimely (which the Court opined would have been an independent ground for denial), but that the anti-SLAPP act was inapplicable to Huntington's counterclaim. Not only did the Court determine that the anti-SLAPP act did not apply, but Judge Rankin further found that the filing of the "special motion" was baseless and frivolous, wholly lacking in substance and without even a faint hope of success on the merits. Specifically, Judge Rankin declared:

> More fundamentally, Dr. Huntington is correct when he argues that Mr. Newmyer has failed to show that the Anti-SLAPP Act applies to the counter-suit, even though the suit is grounded in the law of defamation, the typical setting for a SLAPP suit. Here, there is no other indication that this is a claim designed to silence or punish one for speaking out on issues of public importance. Without engaging in an analysis of whether Mr. Newmyer's lawsuit extends to matters of importance to the public or whether Dr. Huntington is a public figure, it suffices to note that there is no economic bullying here by Dr. Huntington, and his claims are not likely to deter Mr. Newmyer from being heard on his contentions. Therefore, the counter-claim will not be dismissed based on the Anti-SLAPP Act.
> ...
>
> As noted, the Act permits the court to award attorney's fees and costs to the "responding party" if the motion is frivolous or is solely intended to cause unnecessary delay. In deciding whether Mr. Newmyer's motion should be regarded as frivolous, the court recognizes that a motion is frivolous when it is "wholly lacking in substance" and not "based upon even a faint hope of success on the legal merits." *In re Spikes*, 881 A.2d 1118, 1125 (D.C. 2005), citing *Slater v. Biehl*, 793 A.2d 1268, 1278 (D.C. 2002). The court should consider whether the claim for relief is warranted under existing law and the plausibility of the position taken. *Id.* at 17–18. Dr. Huntington asserts that Mr. Newmyer filed the motion to delay or avoid discovery, particularly discovery of his actions in disseminating the contents of his complaint. Newmyer makes the case that his special motion meets the criteria found in D.C. Code § 16-5501(1)(B)(3), advocating issues of public interest and statements concerning matters pending consideration by public bodies. Of course, the statute is available to any litigant, rich or poor, who can assert its substantive protection to shield against harassing lawsuits; however, it is incredulous that Mr. Newmyer would view Dr. Huntington's defamation counter-claim as an offensive weapon of intimidation. It is not clear that the special motion to dismiss was filed for purposes of delay, but it is clear that the special motion is baseless and, therefore frivolous. Dr. Huntington may therefore submit a proposed order for attorney's fees along with an accompanying memorandum that explains how the fee was calculated. (emphasis added).

D. Newmyer Appeals Judge Rankin's Order

On June 12, 2012, Newmyer filed a Notice of Appeal from Judge Rankin's Order.[8]

ARGUMENT

The Court of Appeals lacks jurisdiction over this appeal because no basis for the appeal pertains in this matter. First, Judge Rankin's Order is not a final decision. Second, no leave was sought pursuant to D.C. Code § 11-721 (d). Finally, the "collateral order doctrine" does not apply.

A. The Order Is Not Appealable Because It Is Not a Final Order Pursuant to D.C.Code 1973 § 11-721(a)(1)

Ordinarily, the sole basis for appellate jurisdiction derives from D.C.Code § 11-721(a)(1). That statute provides that the appellate court has jurisdiction to review "all final orders and judgments of the Superior Court of the District of Columbia." For an order to be final, it must "dispose[] of the whole case on its merits so that the court has nothing remaining to do but to execute the judgment or decree already rendered." McBryde v. Metropolitan Life Insurance Co., D.C.App., 221 A.2d 718, 720 (1966). *See* Burtoff v. Burtoff, D.C.App., 390 A.2d 989, 991 (1978); Heller v. Edwards, D.C.Mun. App., 104 A.2d 528, 528-29 (1954). Stated another way, "[t]o be reviewable, a judgment or decree must not only be final but also complete, that is, final not only as to all parties, but as to the whole subject matter and all the causes of action involved." District of Columbia v. Davis, 386 A.2d 1195, 1198 (1978).

In Trilon Plaza Company v. Allstate Leasing Corporation, 399 A.2d 34 (1979), the Court explained:

> The principles underlying these decisions have been succinctly stated by the Supreme Court in a decision construing Title 28 U.S.C. § 1291 which provides for appeal "from all final decisions of the district courts":
>
> The effect of the statute is to disallow appeal from any decision which is tentative, informal or incomplete. Appeal gives the upper court a power of review, not one of

[8] A copy of the Notice of Appeal is attached as Exhibit 6.

> intervention. So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal.
>
> . . . . .
>
> Nor does the statute permit appeals... [from orders] ... where they are but steps towards final judgment in which they will merge. The purpose is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results. [Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546, 69 S.Ct. 1221, 1225, 93 L.Ed. 1528 (1949).] Trilon, supra, at 37.

Judge Rankin's decision is tentative and incomplete as to all issues. Furthermore, not only is Judge Rankin's decision not final as to all the parties, but it is also not final as to the whole subject matter and all the causes of action involved in the proceeding. Accordingly, no final judgment was entered by the Court that is appealable.

B. The Order Is Not Appealable Pursuant To D. C. Code §11 – 721 (d).

D.C.Code § 11-721 (d) authorizes the Court of Appeals to permit an interlocutory appeal in a civil case where the trial judge certifies in writing that the ruling in question "involves a controlling question of law as to which there is substantial ground for a difference of opinion and that an immediate appeal ... may materially advance the ultimate termination of the litigation or case." The trial judge's certification is an indispensable precondition for this court to exercise its discretion to allow an interlocutory appeal under D.C.Code §11-721(d). *See* D.C.App. R. 5(a) ("The clerk shall not accept such application [for leave to appeal an interlocutory order] for filing unless the ruling or order sought to be appealed contains the statement of the trial judge referred to in D.C.Code §11-721(d).").

Here, Newmyer did not seek certification from Judge Rankin and none was granted by the Court, on its own accord. Therefore, Newmyer has no right to appeal under D.C.Code §11-721(d).

C. The Collateral Order Doctrine Does Not Permit an Immediate Appeal of the Order.

The final avenue in which Newmyer may appeal this interlocutory order is pursuant to the "collateral order" doctrine. In addressing the application of the collateral order doctrine, the Court in McNair Builders, Inc. v. Taylor, 3 A.3d 1132 (2010), sharply limited the group of cases that the collateral order doctrine operates to accommodate which, although they do not conclude a civil action, nonetheless conclusively resolve claims of right that are separable from, and collateral to, rights asserted in the action.

In McNair Builders, the court strictly narrowed application of the collateral order doctrine as compared to earlier rulings. It explained that the threshold analysis for applying the collateral order doctrine had been "sharpened" by requiring that "some particular value of a high order" must be "marshaled in support of the interest in avoiding trial." Will v. Hallock, 546 U.S. 345, 126 S.Ct. 952, 163 L.Ed.2d 836 (2006). The McNair Builders Court indicated that the Supreme Court has "repeatedly stressed" that the collateral order doctrine applies *only* to a "small class" of decisions, which must be kept "narrow and selective in its membership," Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S.863, 868 (1994), and that it must never be allowed to swallow the general rule that "a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated." Id. at 868; Abney v. United States, 431 U.S. 651, 656 (1977).

There are three requirements for a collateral order appeal. An appellant must show that an order (1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) is "effectively unreviewable on appeal from a final judgment." McNair Builders, supra, at 1136. Because the second and third prongs of these conditions have not been met, the collateral order doctrine is not applicable.

1. **Judge Rankin's Order Does Not Resolve an "Important Issue" Completely Separate from the Merits of the Action.**

McNair Builders set forth the types of cases revolving around a "substantial public interest" that justify an immediate appeal. The court provided examples of the type of "substantial public interest" that would justify an immediate appeal, such as "honoring the separation of powers [in Nixon], preserving the efficiency of government and the initiative of its officials [in Mitchell, 472 U.S. at 530, 105 S.Ct. 2806], respecting a State's dignitary interests [in an Eleventh Amendment challenge in Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 144, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993)], and mitigating the government's advantage over the individual [with regard to the double jeopardy bar in Abney v. United States, 431 U.S. 651, 662, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977)]." See McNair Builders, supra, at 1138.

Examples of cases where the Court did not find a "substantial" interest sufficient to apply the collateral order doctrine included, e.g., the assertion of the attorney-client privilege, Mohawk Indus., Inc. v. Carpenter, ___ U.S. ___, 130 S.Ct. 599, 175 L.Ed.2d 458 (2009); advocacy immunity, see Kelly v. Great Seneca Fin. Corp., 447 F.3d 944 (6th Cir.2006), or the judicial proceedings privilege. McNair Builders, supra.

The interest for which protection is sought here does not rise to the substantial issue[9] justifying immediate appeal, such as separation of powers or double jeopardy. The "crucial

[9] Although the McNair Builders opinion refers to a Louisiana anti-SLAPP act case as raising a substantial issue under the collateral order doctrine, the application of the collateral order doctrine in that action was based upon the conclusion that, by statute, in Louisiana state courts, an unsuccessful movant can obtain immediate appellate review of the trial court's denial of the Article 971 motion through a writ of supervision under Article 2201 of the Louisiana Code of Civil Procedure. *See* LA.CODE CIV. PROC. art. 2201 ("Supervisory writs may be applied for and granted in accordance with the constitution and rules of the supreme court and other courts exercising appellate jurisdiction."). Several Louisiana courts of appeal have immediately reviewed a trial court's denial of an Article 971 motion pursuant to these supervisory writs. See, e.g., Darden v. Smith, 879 So.2d 390, 393 (La.App. 3d Cir.),writ denied, 887 So.2d 480 (La.2004); Benson v. City of Marksville, 812 So.2d 687, 690 (La.App. 3d Cir.), writ denied, 817 So.2d 1158 (La.2002).

question is not whether an interest is important in the abstract; it is whether deferring review until final judgment so imperils the interest as to justify the cost of allowing immediate appeal of the entire class of relevant orders." (Emphasis added). Mohawk Industries, 130 S.Ct. at 606. This appeal, and the legal and factual issues raised, fails to confront issues sufficiently important to invoke the protection of the collateral order doctrine. It does not raise an issue regarding the fundamental principles of free speech, nor does it include issues of public interest. Rather, Newmyer's effort to invoke the protections of the anti-SLAPP Act arises from his desire to insulate himself from the consequences of his malicious and intentional conduct. No "important issue" is harmed by allowing Huntington's counterclaim to proceed.

a. The Absence of a Legislatively Mandated Right to Immediate Appeal Reflects That No Appeal Should Lie from the Denial of the Special Motion to Dismiss

The unavailability of immediate appeal within the Anti-SLAPP Act itself is significant evidence of the legislature's view that an Anti-SLAPP statute does not vindicate a sufficiently "substantial public interest" to justify application of the collateral order doctrine. The Ninth Circuit recently held in Metabolic Research, Inc. v. Ferrell, 2012 WL 400436, at *5-6, that the unavailability of immediate appeal in state court is significant evidence of the state legislature's view that an anti-SLAPP statute does not vindicate a sufficiently "substantial public interest" to justify application of the collateral order doctrine.

That rationale applies equally in this Court, which should similarly conclude that the D.C. Anti-SLAPP Act does not vindicate a "substantial public interest" sufficient to merit the extraordinary creation of a right to interlocutory review. Because the District of Columbia City Council has not itself deemed the matters at issue in an Anti-SLAPP motion sufficiently important to warrant immediate interlocutory appeal in the courts of the District, the Court

should not expand the stringent limitations of the collateral order doctrine to create such a right in the absence of legislation indicating its importance.

2. An Immediate Appeal Is Not Proper Because The Order Can Be Effectively Reviewed After Final Judgment In This Matter.

The Supreme Court has held that the collateral order doctrine's "effectively unreviewable" requirement is satisfied only where delaying review until entry of final judgment "would imperil a substantial public interest" or "some particular value of a high order." Mohawk, supra, at 606. As argued above, there is no "substantial public interest" being imperiled here. However, even if the Court finds that a "substantial public interest" may be harmed, Judge Rankin's Order is still effectively reviewable.

In this case, the underlying purposes of the D.C. Anti-SLAPP Act can be fully vindicated without creating a new class of interlocutory appeals. The "right" granted by the D.C. Anti-SLAPP Act is merely the creation of a procedural motion to effect early dismissal of certain types of claims. D.C. Code § 16-5502. As the Supreme Court has made clear, the denial of a potentially dispositive pre-trial motion does not satisfy the "effectively unreviewable" requirement because that rule would undermine the purpose of the final order rule. Will v. Hallock, 546 U.S. 345, 351 (2006), at 352-53 ("In each case, some particular value of high order was marshaled in support of the interest in avoiding trial ... it is not the mere avoidance of trial, but avoidance of a trial that would imperil a substantial public interest, that counts when asking whether an order is 'effectively' unreviewable if review is to be left until later"); also see Mohawk Industries, supra.

Furthermore, because the facts giving rise to the claims of both Newmyer and Huntington are intertwined, Newmyer bears no greater burden in trying to prove his case than in defending his actions. Because the purpose of the statute is to limit a party's litigation expenses, and as these costs and expenses are largely the same whether prosecuting or defending these claims, no benefit exists (other than immunizing Newmyer) in allowing this appeal. And because any appeal of any decision entered herein will be subject to review by the Court of Appeals, Judge Rankin's Order denying the Special Motion to Dismiss is not "unreviewable" as that term is defined under case law.

a. The Heightened Availability For Attorneys Fees Protects Newmyer.

In this jurisdiction, the statute authorizes an award of costs and attorneys' fees to a prevailing party, upon appeal after final judgment, as substantial protection sufficient to vindicate any erroneous decision. *See* D.C. Code § 16-5504 (the "court may award a moving party who prevails, in whole or in part, on a motion brought under § 16-5502 or § 16-5503 the costs of litigation, including reasonable attorney fees"). Other jurisdictions have determined that this heightened availability for an award of attorney's fees lessens any potential harm of an mistakenly allowing a case to proceed under the Anti-SLAPP Act. In Metabolic Research, 2012 WL 400436, at *4, the Court there found that Nevada's anti-SLAPP law "provided award of costs and attorneys' fees to make the litigant whole after she prevails on the appeal from a final judgment and has, in addition, given her the option to pursue the unscrupulous litigator with an action for damages." The Court went on to declare that this potential for an award of attorneys fees further satisfied the court that "the class of claims taken as a whole, can be adequately vindicated by other means"); also see Mohawk Industries, 130 S. Ct. at 605 ("That a ruling may

burden litigants in ways that are only imperfectly reparable by appellate reversal of a final district court judgment ... has never sufficed").

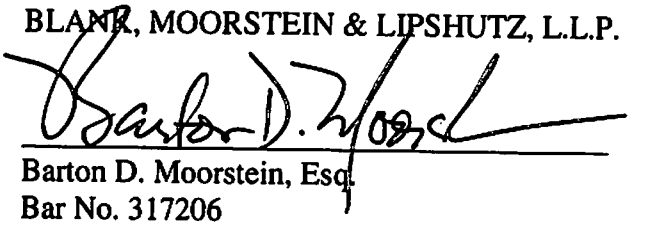
As one of the purposes of the Anti-SLAPP Act is to enable a party to avoid unnecessary fees in litigating a strategic lawsuit, the heightened availability of an attorney fee award acts to protect Newmyer. Because Newmyer can obtain attorneys fees in the event that Huntington's claim is found to be subject to the Anti-SLAPP Act, combined with the similar facts giving rise to both parties' claims, Judge Rankin's decision is reviewable on appeal, and the collateral order doctrine does not apply.

CONCLUSION

For all the foregoing reasons, Huntington respectfully requests this court to dismiss this appeal, and grant such other and further relief to which the Appellee may be entitled, and as the court may deem just and proper.

Respectfully submitted,

BLANK, MOORSTEIN & LIPSHUTZ, L.L.P.



Barton D. Moorstein, Esq.
Bar No. 317206
111 Rockville Pike, Suite 400
Rockville, Maryland 20850
301-279-2200
Attorney for Counter-Plaintiff