

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 CA 0557

MARK H. FOSHEE

VS.

GEORGIA GULF CHEMICALS AND VINYL, L.L.C.

JUDGMENT RENDERED: NOV 14 2007

ON APPEAL FROM THE
EIGHTEENTH JUDICIAL DISTRICT COURT
DOCKET NUMBER 62,551, DIVISION C
PARISH OF IBERVILLE, STATE OF LOUISIANA

HONORABLE ALVIN J. BATISTE, JR., JUDGE

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GEORGIA GULF CHEMICALS AND VINYL
L.L.C.

BEFORE: GAIDRY, MCDONALD, AND MCCLENDON, JJ.



McDONALD, J.

Plaintiff, Mark H. Foshee, appeals a judgment granting partial summary judgment in favor of the defendant, Georgia Gulf Corporation (Georgia Gulf). We conclude that the certification of the judgment as final and appealable pursuant to LSA-C.C.P. art. 1915(B) was improper, and we dismiss the appeal.

BACKGROUND

Georgia Gulf provides a discretionary profit sharing program to its regular, full-time employees not covered by a collective bargaining agreement. Pursuant to the plan, eligible employees are awarded points in the first half of each plan year based on a percentage of their salaries as of January 1st of that year. These points are converted to dollars at the end of the plan year based on Georgia Gulf's level of earnings performance. Once awarded, points do not increase; however, the employee's payment under the plan may be reduced due to the employee's poor performance. In addition, no profit sharing payments will be made unless Georgia Gulf's profits have reached a certain level. To be eligible for participation in the plan, the employee must be employed through December 31st of the plan year. If the company's profit levels warrant payments under the plan, such payments are made on or about February 15th of the next year.

In 1997, Mr. Foshee was hired as a production engineer by Georgia Gulf, where he remained employed until March 2005. In January 2005, Mr. Foshee was informed that his employment with Georgia Gulf would be terminated due to problems with his work performance and interpersonal skills. Mr. Foshee requested that he be allowed to remain at Georgia Gulf while he sought new employment. Georgia Gulf agreed to employ Mr. Foshee until March 11, 2005; however, Mr. Foshee ultimately resigned on March 7, 2005.

On May 7, 2004, Mr. Foshee was notified that he had been awarded 10,215 profit sharing points for the 2004 year. In February 2005, Georgia Gulf advised its

employees that the company's profit levels for 2004 had resulted in a payment factor of \$1.69 per point.¹ However, when the profit sharing payments for 2004 were made, Mr. Foshee did not receive any payment. After he resigned, Mr. Foshee made demand upon Georgia Gulf pursuant to LSA-R.S. 23:361, *et seq.*, for the profit sharing payment he claimed he was due for 2004. Georgia Gulf denied that Mr. Foshee was entitled to any payment, contending that the profit sharing plan was discretionary, and that Mr. Foshee's performance during the plan year did not warrant participation in the payout.

On May 25, 2005, Mr. Foshee filed suit against Georgia Gulf seeking to recover the profit sharing payment, as well as penalty wages and attorney's fees pursuant to LSA-R.S. 23:361, *et seq.* Mr. Foshee and Georgia Gulf subsequently filed cross motions for summary judgment, which were heard by the trial court on August 1, 2006. In its oral reasons for judgment, the trial court found that the profit sharing plan was not a "wage" as contemplated by LSA-R.S. 23:361, *et seq.* Accordingly, the trial court granted Georgia Gulf's motion for summary judgment in part and dismissed Mr. Foshee's claims against Georgia Gulf pursuant to LSA-RS. 23:361, *et seq.* However, the trial court denied Georgia Gulf's motion for summary judgment in all other respects, specifically finding that there was a genuine issue of material fact as to whether Mr. Foshee was entitled to the profit sharing payment under another theory. Finally, the trial court denied Mr. Foshee's motion for summary judgment.

The trial court signed an order in accordance with these oral reasons on August 22, 2006; however, the trial court did not certify the order as final for purposes of appeal pursuant to LSA-C.C.P. art. 1915. On August 29, 2006, Mr. Foshee filed a motion for new trial, which was denied by judgment signed

¹ Because Mr. Foshee was assigned 10,215 points for 2004, this payment factor results in a profit sharing payment of \$17,263.35 allegedly due to Mr. Foshee.

December 19, 2006. This judgment further stated that the court had made an express determination that the August 22, 2006 order was a final judgment under LSA-C.C.P. art. 1915, and that there was no just reason for delay. This appeal by Mr. Foshee followed.

APPELLATE JURISDICTION

When a court renders a partial summary judgment as to one or more but less than all of the claims, demands, issues, or theories in an action, 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. LSA-C.C.P. art. 1915(B)(1). This provision attempts to strike a balance between the undesirability of piecemeal appeals and the need for making review available at a time that best serves the needs of the parties. **R.J. Messinger, Inc. v. Rosenblum**, 2004-1664, p. 13 (La. 3/2/05), 894 So.2d 1113, 1122.

To assist the appellate court in its review of designated final judgments, the trial court should give explicit reasons, either oral or written, for its determination that there is no just reason for delay. If such reasons are given, the appellate court should review the certification by applying the abuse of discretion standard. **R.J. Messinger**, 2004-1664 at p. 13, 894 So.2d at 1122. Because neither the trial court's original order nor its subsequent judgment certifying the order as final provided explicit reasons for such certification, we are required to conduct a *de novo* review to determine whether the certification was proper. **R.J. Messinger**, 2004-1664 at pp. 13-14, 894 So.2d at 1122. In conducting this review, the overriding inquiry is whether there is no just reason for delay. However, appellate courts should also consider the following non-exclusive criteria in determining whether certification is appropriate:

- 1) The relationship between the adjudicated and 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 obliged 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.

R.J. Messinger, 2004-1664 at p. 14, 894 So.2d at 1122.

The partial summary judgment at issue determined only Mr. Foshee's claim under LSA-R.S. 23:361, *et seq.*, rather than his underlying claim for entitlement to the profit sharing payment. The issues decided in the judgment on appeal are closely, if not inextricably, linked to the issues concerning whether Mr. Foshee is entitled to receive the profit sharing payment under any theory. Thus, there is clearly a close relationship between the adjudicated and unadjudicated claims.² Furthermore, there is nothing in the record to suggest that the appeal of the partial summary judgment at this stage of the proceedings best serves the needs of the parties, or that other compelling or urgent circumstances exist to support a need for immediate review. Finally, there are no circumstances suggesting that a delay in appellate review until final determination of all issues would be unjust, such that immediate appeal should take precedence over the principles of judicial economy and sound judicial administration.

Based on our *de novo* review and pretermittting the merits of the partial summary judgment, we conclude that the trial court's certification of the judgment for appeal was improper. Because the impropriety of the certification is apparent from the record and no deference is due the trial court's certification given the absence of any assigned reasons, a request for a *per curiam* from the trial court would serve no purpose at this time. **Gold Dust Graphics, Inc. v. Diez**, 2006-0323, p. 7 (La. App. 1 Cir. 12/28/06), 951 So.2d 270, 274. Because this partial

² Indeed, in discussing the appealability of the judgment in his brief to this court, Mr. Foshee argued, "the wage issue and detrimental reliance [issue] ... are really just one issue that needs to be heard by this Honorable Court."

summary judgment does not constitute a final judgment for purposes of appeal, it may be revised by the trial court at any time prior to the rendition of the judgment adjudicating all issues and claims. LSA-C.C.P. art. 1915(B)(2).

DECREE

Because the trial court improperly designated the partial summary judgment rendered herein as a final judgment pursuant to LSA-C.C.P. art. 1915(B), we dismiss the appeal for lack of appellate jurisdiction. The case is remanded to the trial court for proceedings consistent with this ruling. Assessment of appeal costs shall await final disposition of this matter.

APPEAL DISMISSED; REMANDED.