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Appellate Practice Corner

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Supreme Court Rule 306(a) Interlocutory Appeals Are Not Tolled By the Filing of a Motion for Reconsideration

A recent 2007 decision of the Illinois Appellate Court Second District, highlights two procedural matters affecting appellate practice. In *CE Design, LTD, v. Mortgage Exchange, Inc.*, 375 Ill. App. 3d 379, 872 N.E.2d 1056 (2nd Dist. 2007), the appellate court reiterated the rule that a motion to reconsider does not extend or toll the time for filing a Rule 306(a) petition for leave to appeal. Moreover, the court held that service by facsimile of a motion to dismiss an appeal, even without the recipient's consent, did not warrant striking the motion, because the recipient received and responded to the motion and failed to show any prejudice.

In *CE Design*, the plaintiffs filed a class action complaint alleging unsolicited advertising in violation of Illinois and federal laws, and subsequently filed for class certification. On October 13, 2006, the circuit court denied the plaintiffs' certification motion, finding that the class did not share common issues and that the class action mechanism was not the appropriate method for adjudication of the controversy. The plaintiffs moved to reconsider on November 13, 2006, which was denied on February 22, 2007. On March 26, 2007, the plaintiffs filed a Rule 306(a) petition for leave to appeal the circuit court's denial of their motion for class certification. A few weeks later, the defendant moved to dismiss the appeal for lack of jurisdiction.

Concerning the procedural issue of service, the plaintiffs contended that the motion to dismiss should be stricken because they had not been properly served. The plaintiffs cited Supreme Court Rule 11(b)(4), which states that a party may be served via facsimile machine only where that party has so consented. 145 Ill. 2d R. 11(b)(4). The plaintiffs contended that they had not consented to fax service, and therefore, the motion was improper. The appellate court rejected the plaintiffs' position, noting that it is not reversible error where the opposing attorney who actually receives the document was nevertheless permitted to respond to the motion. *See In re M.G.*, 301 Ill. App. 3d 401, 412, 703 N.E.2d 594 (1st Dist. 1998); *Curtis v. Pekin Ins. Co.*, 105 Ill. App. 3d 561, 566, 434 N.E.2d 555 (4th Dist. 1982). Moreover, the court observed that cases have condoned a lack of strict compliance with procedural Supreme Court rules where the alleged violations do not interfere with or preclude review. Here, there was no prejudice to the plaintiffs, as they indeed filed a response to the motion.

Concerning the tolling issue, the court held that the 30-day requirement of Supreme Court Rule 306(c) is jurisdictional and there is no provision that allows a motion to reconsider an interlocutory order to extend the time for filing a petition for leave to appeal. According to the court, Illinois courts have consistently held that motions to reconsider directed towards interlocutory orders identified by certain subsections of Rule 306(a) do not toll the running of the 30-day filing period. *In re Leonard R.*, 351 Ill. App. 3d 172, 174, 813 N.E.2d 1054 (1st Dist. 2004) (considering subsection (a)(5)); *Law Officers of Jeffery M. Leving, Ltd. v. Cotting*, 345 Ill. App. 3d 495, 499, 801 N.E.2d 6 (1st Dist. 2003) (considering subsection (a)(4)); *National Seal Co. v. Greenblatt*, 321 Ill. App. 3d 306, 308, 748 N.E.2d 333 (2nd Dist. 2001) (considering subsection (a)(4)); and *Odom v. Bowman*, 159 Ill. App. 3d 568, 570, 511 N.E.2d 1265 (5th Dist. 1987) (considering what is now subsection (a)(1)).

Of interest, the plaintiffs argued that no case had specifically addressed whether the denial of a motion for reconsideration of class certification is appealable under Rule 306(a)(8), which subsection is worded differently than subsections (a)(2) and (a)(4), which referred specifically to an order granting or denying a particular motion. The court observed, "the timeliness requirement in subsection (c) of Rule 306 applies in the same way to all petitions filed pursuant to all subsections of Rule 306(a) except subsection (a)(5), which is governed by subsection (b)." Thus, "if a motion to reconsider will not toll the running of the 30-day deadline for petitions filed pursuant to Rules 306(a)(2) and (a)(4), then a motion to reconsider will not toll the running of the deadline for a petition filed pursuant to Rule 306(a)(8)."

The plaintiffs further argued that the motion to reconsider was in fact a new motion for class certification, which under *Kemner v. Monsanto Co.*, 112 Ill. 2d 223, 236, 492 N.E.2d 1327 (1986), would restart the clock as far as filing a Rule 306(a) petition. In *Kemner*, the court found that the motion to reconsider was actually a new original motion to dismiss under *forum non conveniens*, and permitted the Rule 306(a) petition to proceed. Here, the court rejected any comparison to *Kemner*, noting that the motion to reconsider did not raise any new facts or change in the law, but simply attempted to point out to the circuit court why it had erred in interpreting existing authorities.

CE Designs is important because it reminds us that the best course of action following the entry of any qualifying order under rule 306(a) is to simply file the petition for leave to appeal. While this case concerns the denial of class certification, the general principles pronounced impact all Rule 306(a) interlocutory appeals, in particular those based on the doctrine of *forum non conveniens*. If a motion to reconsider is desired, one must file and obtain ruling on it prior to the expiration of the 30-day period, or face waiver of the right to file a petition. Moreover, if one wants to call the motion a "new motion", label it as such and be sure to include the new facts that were not available at the time of the original motion, or reference new law that has changed since the original order or hearing.

About the Author

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