Appeal or No Appeal: In Stipulations, Silence on Appellate Rights Could Mean Waiver

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On December 12, 2019, the Third Circuit issued a decision in *In re Odyssey Contracting Corp.*, finding a debtor-subcontractor had waived its right to appeal from a bankruptcy court's order directing the prime contractor and the debtor-subcontractor to resolve an adversary proceeding in accordance with a stipulation entered into by the parties and approved by the bankruptcy court prior to trial. This ruling has implications for all parties litigating in the Third Circuit, as the *Odyssey* ruling makes clear that parties who enter into stipulated agreements that depend on past or prospective decisions of a court must expressly reserve their rights to appeal those decisions, lest they be deemed to have waived any appeal.

In a panel opinion written by Judge Ambro, the circuit court affirmed the district court's finding that Odyssey Contracting ("Odyssey"), had constructively waived its right to appeal a decision of the bankruptcy court.[1] Odyssey had filed for bankruptcy and was litigating a contract dispute in an adversary proceeding against L&L Painting ("L&L"). Prior to a bench trial on the contract claims, the parties entered into a stipulation providing that, if the bankruptcy court found Odyssey was the breaching party, "all of the [p]arties' pending claims . . . [would] be withdrawn and disposed of in their entirety *with prejudice*" and the adversary proceeding "[would] . . . be deemed to be finally concluded in all respects."[2] Upon a finding that Odyssey was the breaching party, the bankruptcy court entered an order directing the parties to "resolve the . . . adversary proceeding . . . in compliance with the [s]tipulation."[3] Odyssey then moved to appeal the bankruptcy court's order. The district court ultimately dismissed Odyssey's appeal upon a motion by L&L arguing that Odyssey had released its claims and waived its right to appeal under the terms of the court-approved stipulation.[4]

A preliminary question for the Third Circuit on appeal was whether the bankruptcy court's order—directing the parties to "resolve" the adversary proceeding—was final under 28 U.S.C. § 158(a)(1) so as to confer appellate jurisdiction. Judge Ambro began the opinion by noting that, while "'considerations unique to bankruptcy appeals' require 'constru[ing] finality in a more pragmatic, functional sense,'" the court determines the finality of a specific adversary proceeding

[1] *In re Odyssey Contracting Corp.*, 944 F.3d 483, 485-86 (3d Cir. 2019).

[2] *Id.* at 485 (alteration in original) (emphasis added).

[3] *Id.* (alteration in original) (internal quotation marks omitted).

[4] *Id.* at 486.

by "apply[ing] same concepts of appealability as those used in general civil litigation."[5] The standard approach to finality, adopted by the Supreme Court in *Riley v. Kennedy*, considers as final any judgment that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[6] Drawing upon this statement of the law from *Riley*, Judge Ambro stated the corollary principle adopted by the Third Circuit: "[A]n order is not final where it 'contemplates the possibility of future proceedings.'"[7] Though the court placed the *Odyssey* order in contrast with two orders previously considered by the Third Circuit on appeal that contained explicit "self-executing language" and required no further action by a court, the Third Circuit ultimately relied upon the rule articulated in *Skretvedt v. E.I. Dupont De Nemours* that, "if only a 'ministerial' task remains for the court . . . then immediate appeal is allowed,"[8] and thus held the appeal was proper.

Having cleared the threshold question of finality, the court turned to the larger issue of constructive waiver. While the stipulation entered into by Odyssey and L&L made no explicit reference to the parties' right to appeal the bankruptcy court's determination of Odyssey's liability, the Third Circuit panel ultimately found that the language of the stipulation "indicate[d] an intent to waive that right."[9] In so finding, the *Odyssey* Court relied on both Black's Law Dictionary and the court's own plain-meaning interpretation of select terms. Specifically, the court pointed to the language in the stipulation providing that, upon the bankruptcy court's determination, Odyssey would "'*thereupon* . . . withdraw[] and dispose[] of' its claims," and the adversary proceeding would "be deemed to be finally concluded *in all respects*."[10] Such language, Judge Ambro wrote, was inconsistent with any implied appellate rights that would "necessarily prolong the litigation" and allow the proceeding "[to] continue on appeal and, should the appeal result in reversal, . . . [to] continue in the Bankruptcy Court." Moreover, the stipulation specifically provided for disposition "with prejudice," using a "legal term of art" that "undeniably established that . . . the litigation would end" upon the bankruptcy court's determination of whether Odyssey was the breaching party.[11]

The Third Circuit did not end its analysis within the four corners of the stipulation, electing instead to discuss the parties' dueling proposed rules of construction where a stipulation is silent as to appellate rights. While noting that "neither party's position finds direct support in our cases," the court considered its prior holding in *Keefe v. Prudential Property & Casualty*

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[5] *Id.* (alteration in original) (first quoting *In re Prof'l Ins. Mgmt.*, 285 F.3d 268, 279 (3d Cir. 2002); then quoting *In re White Beauty View, Inc.*, 841 F.2d 524, 526 (3d Cir. 1988)).

[6] *Id.* (internal quotation marks omitted) (quoting *Riley v. Kennedy*, 553 U.S. 406, 419 (2008)).

[7] *In re Odyssey*, 944 F.3d at 486 (quoting *Delgrosso v. Spang & Co.*, 903 F.2d 234, 236 (3d Cir. 1990)).

[8] *Id.* at 487 (internal quotation marks omitted) (quoting *Skretvedt*, 372 F.3d 193, 200 n.8 (3d Cir. 2004)).

[9] *Id.* at 488.

[10] *Id.* (alteration in original) (first emphasis added).

[11] *Id.*

Insurance,[12] specifically "the well-established principle that a party cannot appeal from a consent judgment if it did not expressly reserve its right to do so."[13] This requirement of express language, the court reasoned, was necessary "to prevent unfair surprise to the opposing party, who . . . 'should not be left guessing about the finality and hence efficacy of the settlement.'"[14] That the stipulation between Odyssey and L&L was forward-looking, unlike the consent judgment at issue in *Keefe*, made "no meaningful difference" to the court.[15] The central rationale behind the *Keefe* decision, the court reasoned, was equally applicable regardless of whether a stipulation concerns past or prospective action by the court—a party who "gives up its right to press its claims or defenses in exchange for finality" should be protected.[16]

Accordingly, to the extent a party in bankruptcy, or even outside of it, intends to preserve its appellate rights in connection with otherwise-stipulated relief, it should expressly so state in the stipulation.

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[12] 203 F.3d 218, 222-23 (3d Cir. 2000).

[13] *In re Odyssey*, 944 F.3d at 488.

[14] *Id.* at 489 (quoting *Keefe*, 203 F.3d at 223).

[15] *Id.*

[16] *Id.* Notably, the *Odyssey* Court reserved its holding as to class actions, where "[i]t may be that the interest in protecting individual class members requires an explicit waiver of the right to appeal." *Id.* at 490.