

No. 17-1461

**UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

ELIOT BERNSTEIN

Counterplaintiff-Appellant,

v.

TED BERNSTEIN, et. al.

Counterdefendants-Appellee.

**Appeal from the United States District Court
For the Northern District of Illinois
Case No. 1:13-cv-03643
The Honorable Judge Robert John Blakey**

**COUNTERDEFENDANTS-APPELLEES MEMORANDUM PURSUANT
TO THE COURT'S ORDER OF MAY 14, 2017 AND IN SUPPORT OF
DISMISSAL OF THE APPEAL
FOR WANT OF JURISDICTION**

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COUNTERDEFENDANTS-APPELLEES, Ted Bernstein, Pam Simon, Adam Simon, David Simon, The Simon Law Firm, STP Enterprises, Inc. by and through their undersigned counsel, state as their response submitted pursuant to the court's order dated May 14, 2017 and for dismissal of this appeal for want of jurisdiction states as follows:

Procedural Summary

This litigation was initiated by Ted Bernstein, and three of his four siblings seeking to collect life insurance proceeds due to the Simon Bernstein Irrevocable Insurance Trust dated 6/21/95 following the death of their father, Simon Bernstein. The case was filed in the Circuit Court of Cook County, and removed to the Northern District of Illinois in 2013 by the Insurer. The Insurer filed an interpleader action and served Eliot Bernstein, the fifth and non-consenting child of Simon Bernstein, as a potential competing claimant to the life insurance proceeds. The insurer deposited the policy proceeds with the registry of the court and then the insurer was dismissed from this litigation. While this case was pending, the Estate of Simon Bernstein -pending in probate court in Florida-was granted leave to intervene in the instant litigation. Eliot Bernstein filed counterclaims and third party claims against Appellee. (“Eliot’s Claims”). On Jan. 30, 2016, Judge Blakey granted appellee’s

motion for summary judgment as to all of Eliot's Claims. [Dkt. #273]—Referred to herein as “the Order”.

Subsequently, the trial court set a pre-trial schedule and a trial date for August 7, 2017 to resolve the original issue in this litigation with regard to the distribution of the policy proceeds that remain on deposit with the registry of the court. [Dkt. #274].

On March 6, 2017, the Seventh Circuit ordered Eliot Bernstein to file a brief explaining whether it has jurisdiction over the instant appeal. [7th Cir. Dkt. #2]. Eliot failed to file a response. The Seventh Circuit then entered an order on May 15, 2017 requesting that appellees submit a jurisdictional statement. [7th Cir. Dkt. #5]. In response, appellees submit the following:

Argument

This appeal must be dismissed because the Seventh Circuit lacks jurisdiction as the Order that is being appealed is not final and appealable. The Order (i) granted appellee's motion for summary judgment *as to Eliot's claims*, (ii) denied the Estate's motion for summary judgment seeking the policy proceeds. So after Eliot's Claims were dismissed on summary judgment, the trial court must still determine the central issue in this interpleader litigation—*determining the taker of the policy proceeds*.

Since the Order did not dispose of all claims and all parties, it is not a final order. (*Cleveland Hair Clinic, Inc. v. Puig*, 104 F.3d 123 at 125, 65 USLW 2474 (7th Cir., 1997) citing *Liberty Mutual Insurance Co. v. Wetzel*, 96 S.Ct. 1202 (1976).

Further, the Order contains no language on its face indicating it is a final and appealable order. In the Order, Eliot's claims are disposed of by way of summary judgment, but the central issue in this interpleader action – *determining the taker of the policy proceeds among the remaining parties* – awaits to be resolved at trial. A bench trial is currently scheduled to begin on August 7, 2017. [Dkt. #274].

In *Cleveland Hair Clinic, Inc. v. Puig*, the court noted that a decision establishing liability cannot be appealed until all questions regarding amounts of damages have been determined. *Cleveland Hair Clinic, Inc. v. Puig*, 104 F.3d 123 at 125, 65 USLW 2474 (7th Cir., 1997) citing *Liberty Mutual Insurance Co. v. Wetzel*, 96 S.Ct. 1202 (1976). In *Liberty Mutual*, neither party nor the appellate court challenged appellate jurisdiction. After *writ of certiorari* was granted, the Supreme Court, *sua sponte*, found that the appellate court lacked jurisdiction because (i) the order was not final and appealable, and (ii) no showing had been made that the interlocutory order was of such a nature that it required immediate appellate review. The Supreme Court also noted that, although the Order made a finding of liability, the trial court had not granted or addressed plaintiff's prayers for relief.

The reasoning applied by the courts in *Cleveland Clinic* and *Liberty Mutual* applies here in that the trial court entered summary judgment in favor of appellees as to Eliot's claims only, but the central issue in the interpleader action remains to be resolved at trial.

The Order is not final and appealable so no jurisdiction exists pursuant to 28 U.S.C. §1291. Appellant ignored this court's order requiring that he file a memorandum of law as to the issue of jurisdiction, thus appellant failed to meet his burden to establish jurisdiction for the appellate review he seeks.

Conclusion

For all the foregoing reasons, this appeal should be dismissed for want of jurisdiction.

RESPECTFULLY SUBMITTED,

Dated: May 26, 2017

/s/ Adam Simon _____

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Attorney for Appellees