

2011 IL App (1st) 102340-U

No. 1-10-2340

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FIFTH DIVISION
September 30, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ESTATE OF MARVIN S. ULLMAN,)	Appeal from the
)	Circuit Court of
Deceased.)	Cook County.
_____)	
AMERICAN CHARTERED BANK,)	
)	
Claimant-Appellant,)	
)	
v.)	No. 09 P 8148
)	
JAN KRAFSUR, Independent Administrator)	
of the Estate of Marvin S. Ullman,)	Honorable
)	Henry Budzinski,
Defendant-Appellee.)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Epstein and Justice Joseph Gordon
concurred in the judgment.

ORDER

¶ 1 *HELD:* The trial court erred in denying claimant's
motion for substitution of judge before making any substantial

1-10-2340

rulings on the case.

¶ 2 Claimant American Chartered Bank (ACB) appeals from orders entered by the circuit court of Cook County that: (1) denied its motion for substitution of judge; (2) barred its claim against the Estate of Marvin S. Ullman (Estate) for recovery on a personal guaranty of a loan; (3) granted attorney fees to defendant Jan Krafzur, independent administrator of the Estate; and (4) denied its petition for issuance of citation to discover information. The trial court denied ACB's motion for substitution of judge as a matter of right (735 ILCS 5/2-1001 West 2008)) after making a determination that the claim ACB filed would be barred under existing case law. The court determined that since ACB's claim would be denied, that ACB is not an "interested party" to the Estate and did not have standing to file a motion for substitution of judge. For the reasons set forth below, we reverse the circuit court.

¶ 3 BACKGROUND

¶ 4 ACB loaned money to Geneva/Belden, LLC, secured by a mortgage on real estate. Marvin S. Ullman, John K. Gibson and Carl M. Darr were members of Geneva/Belden, LLC. They signed personal guaranties for the ACB loan. Geneva/Belden, LLC, defaulted on the loans in August 2008. ACB filed a complaint to foreclose on the mortgage in the circuit court of Cook County,

1-10-2340

naming as defendants Geneva/Belden, LLC, and the guarantors, including Ullman.

¶ 5 ACB filed a motion for partial summary judgment alleging the facts of the loan and default and requested a judgment against the individual guarantors for any deficiency based on their personal guarantees. On November 6, 2009, during the pendency of the foreclosure proceedings, Ullman died. On November 29, 2009, ACB "withdrew" its request for relief against Ullman in its motion for partial summary judgment. A judgment of foreclosure and an order for a sale of the property was subsequently entered. The property was sold at a judicial sale for \$2,200,000. A judgment was entered against the two other guarantors in the amount of \$4,983,683.94, reflecting the deficiency amount.

¶ 6 ACB filed a claim against the Estate of Marvin S. Ullman on June 2, 2010, in the amount of \$4,983,683.94, plus costs. On the same date ACB also filed a motion for substitution of judge. ACB alleges Ullman personally guaranteed the loan in a separate agreement and asked that a citation issue to discover assets of Ullman's estate.

¶ 7 The Estate filed an objection to the claim, arguing the debt is invalid because Ullman was dismissed from the Geneva/Belden, LLC, foreclosure action and the Estate was not

1-10-2340

substituted as required by section 5/2-1008(2) of the Illinois Code of Civil Procedure (735 ILCS 5/2-1008(2) (West 2008)).

Therefore, ACB is not an interested party and has no standing to file a motion for substitution of judge.

¶ 8 On July 27, 2010, the trial court denied ACB's motion for substitution of judge. The court made a finding that ACB is not an interested party regarding the Estate. The court found that ACB could not recover on the debt based on Ullman's guaranty because ACB had made an election of remedies when it procured a deficiency judgment against the two other guarantors in the foreclosure case without getting a judgment against the Estate. The court held that since the debt was invalid, ACB was not an interested party and had no standing to file a motion for substitution of judge.

¶ 9 The trial court ordered ACB to pay the Estate's attorney fees and also denied ACB's petition for issuance of citation to discover because ACB is not an interested party in the Estate.

¶ 10 On August 13, 2010, ACB filed a motion to stay the payment of any bequests, legacies or claims by or against the Estate and filed its appeal of the trial court's July 27th orders. On August 18, 2010, the trial court granted ACB's motion to stay pending the determination of ACB's appeal.

¶ 11 ANALYSIS

¶ 12 ACB claims the trial court erred by not granting its motion for substitution of judge and subsequently issuing substantive rulings on its claim.

¶ 13 Our determination of ACB's claims rests on interpretation of section 5/2-1001(a)(2) of the Illinois Code of Civil Procedure (735 ILCS 5/2-1001(a)(2) (West 2010)). Statutory construction presents a question of law which we review *de novo*. *In re Estate of Wilson*, 238 Ill. 2d 519 (2010).

¶ 14 Section 5/2-1001(a)(2) of the Code provides:

"(a) Substitution as of right. When a party timely exercises his or her right to a substitution without cause as provided in this paragraph (2).

(i) Each party shall be entitled to one substitution of judge without cause as a matter of right.

(ii) An application for substitution of judge as of right shall be made by motion and shall be granted if it is presented before trial or hearing begins and before the judge to whom it is presented has ruled on any

substantial issue in the case, or if it is presented by consent of the parties (emphasis added)." 735 ILCS 5/2-1001(a)(2) (West 2010).

¶ 15 When interpreting the language of a statute, the primary rule of construction for this court to follow is to ascertain and give effect to the intention of the legislature. *In re Estate of Stern*, 263 Ill. App. 3d 1002, 1005 (1994). We look to the language of the statute to determine the legislature's intent, giving this language its plain, commonly understood meaning. *Wilson*, 238 Ill. 2d at 346.

¶ 16 On its face, the statute requires the motion for substitution of judge (SOJ) to be granted if it is presented before trial or a hearing begins and before the judge has ruled on any substantive matters. Here, the motion for SOJ was presented with ACB's initial filing of the claim and before any substantive ruling was made while ACB was in the case. The plain reading of the statute requires the court to grant the motion under those circumstances.

¶ 17 The Estate argues that when a motion for SOJ is made, the court may inquire as to the standing of the party making the motion. However, the Estate has presented no persuasive caselaw

1-10-2340

or statute in support of its argument. The Estate claims *Powell v. Dean Foods Co.*, 405 Ill. App. 3d 354 (2010), supports its argument that the circuit court can still consider "procedural" matters after a motion for substitution without cause is filed. The Estate's reliance on *Powell* is misplaced because the appellate court in *Powell* merely conducted an analysis to determine whether a motion for SOJ was filed by a party prior to a substantive ruling by the trial court.

¶ 18 In *Powell*, the defendants' motion for SOJ, which was granted, listed one of defendants by two different names, i.e., Alco of Wisconsin, Inc., and Alco, Inc. *Powell*, 405 Ill. App. at 356. The plaintiffs filed a motion to reconsider arguing the motion for SOJ should be vacated because Alco of Wisconsin, Inc., and Alco, Inc., are the same party. *Id.* At a hearing on the motion to reconsider, counsel for the defendants agreed that the motion for SOJ should be vacated. At the same time, said counsel presented a motion for SOJ on behalf of defendant Alder Group, which was not listed in the defendants' earlier motion for SOJ. *Id.* The trial court denied Alder Group's motion for SOJ, finding that its granting of the plaintiffs' motion to reconsider was a substantial ruling. *Id.* at 357.

¶ 19 The appellate court found that the trial court erred in denying Alder Group's motion for SOJ because the ruling on the

1-10-2340

motion to reconsider was procedural and did not directly relate to the merits of the case, *i.e.* negligence in a wrongful death action. *Id.* at 361. *Powell* illustrates that when a motion for SOJ as a matter of right is filed, the first duty of the trial court is to determine whether there have been any substantive rulings before the motion was filed and grant the motion if there were none. *Id.* at 364.

¶ 20 In this case, ACB filed the motion for SOJ. The circuit court construed Illinois caselaw to find that the claim filed by ACB was invalid because ACB lacked standing to file a motion for SOJ. The court erred by determining standing before ruling on ACB's motion for SOJ because section 5/2-1001(a)(2) of the Code of Civil procedure expressly requires that a motion for SOJ be granted unless there was a substantive ruling that preceded the motion for SOJ (735 ILCS 5/2-1001(a)(2) (West 2010)).

¶ 21 The record reflects no substantive ruling was made prior to ACB filing the motion, therefore, the motion was improperly denied. Since the motion for SOJ was improperly denied, all subsequent orders entered in regard to ACB claims are void. *Powell*, 405 Ill. App. at 359. Because of our disposition, the remaining arguments raised by the parties need not be addressed. The judgment of the trial court is reversed, cause

1-10-2340

remanded for further proceedings.

¶ 22 CONCLUSION

¶ 23 For the foregoing reasons, we reverse the trial court's judgment.

¶ 24 Reversed and remanded.