

2011 IL App (2d) 100927-U
No. 2-10-0927
Order filed September 29, 2011

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

GERTRUD DULNIG,)	Appeal from the Circuit Court
)	of Lake County.
Plaintiff-Appellant,)	
)	
v.)	No. 06-CH-2343
)	
SYLVIA SAMIS, MICHAEL SAMIS, and)	
AMERICAN NATIONAL BANK AND)	
TRUST COMPANY OF CHICAGO,)	
as Trustee Under Trust Number 61623,)	Honorable
)	Mitchell L. Hoffman,
Defendants-Appellees.)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Bowman and Zenoff concurred in the judgment.

ORDER

Held: Plaintiff could not appeal the dismissal, as to all defendants, that she asked the trial court to enter; although plaintiff thought that the dismissal would allow her to appeal an earlier dismissal as to one defendant, that defendant subsequently intervened, such that the earlier dismissal was a dead letter and the only extant dismissal, as to all defendants, was the one that she requested. We affirmed the judgment of the trial court.

¶ 1 At issue in this appeal is whether plaintiff, Gertrud Dulnig, may appeal a dismissal in favor of defendants, Sylvia Samis, Michael Samis, and American National Bank and Trust Company of

Chicago (ANB), when she requested that dismissal. For the reasons that follow, we determine that she may not. Thus, we affirm the trial court's dismissal of this case.

¶ 2 The facts relevant to resolving this appeal are as follows. In December 2007, the marriage of Michael and Sylvia was dissolved. During the dissolution proceeding, Sylvia, on behalf of plaintiff, her mother, presented evidence that plaintiff loaned Michael and Sylvia money to cover various expenses they incurred during their marriage. The trial court found that some, but not all, of the money plaintiff gave them were loans and ordered them to pay plaintiff \$83,600 from the marital estate. This amount represented the loan amount plus interest.

¶ 3 In November 2006, while the dissolution proceeding was pending, plaintiff sued Michael and Sylvia, as well as ANB, seeking repayment of the money she gave Michael and Sylvia during their marriage plus interest. Sylvia answered the complaint, ANB never filed anything with regard to the complaint, and Michael moved to dismiss the complaint with prejudice. Michael argued, among other things, that the judgment for plaintiff entered in the dissolution proceeding barred plaintiff's action here (see 735 ILCS 5/2-619(a)(4) (West 2008)). Sylvia and ANB never moved to join in this motion. The trial court granted the motion to dismiss on May 27, 2008, without making a finding pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010). Plaintiff appealed from that order, and this court dismissed the appeal for lack of jurisdiction. *Dulnig v. Samis*, No. 2-08-0567 (2010) (unpublished order under Supreme Court Rule 23).

¶ 4 On remand, plaintiff moved for summary judgment against Sylvia, seeking \$456,055.78 in unpaid loan monies and interest on those loans. In her answer, Sylvia admitted all of the allegations that plaintiff advanced in her complaint and did not dispute that she was responsible for paying interest on the loans that plaintiff made to her and Michael. On or about July 15, 2010, counsel for plaintiff and counsel for Sylvia executed a proposed "Agreed Judgment Order," which requested the

trial court enter a judgment of \$854,476.22 in favor of plaintiff and against Sylvia. On July 23, 2010, Michael filed a petition to intervene in the proceedings between plaintiff and Sylvia to pose objections to the proposed Agreed Judgment Order. Michael alleged that, in Sylvia's answers to plaintiff's complaint for repayment of the loans, she stated that "Michael had an obligation to contribute to the repayment of the alleged 'loans.'" As a result of Sylvia's answers and other procedural points, including the Agreed Judgment Order that plaintiff and Sylvia were considering, Michael alleged that he needed to protect himself and needed to intervene. Michael further argued that he needed to participate because Ticor Title held escrow funds that also belonged to him, and that any agreed judgment between plaintiff and Sylvia would elevate plaintiff to a creditor against the marital estate escrowed funds. Michael's third argument related to this escrow fund as well, because he claimed that a trial court order was needed to release these funds, and if he was not "present" with respect to this matter, his interest in those funds could be compromised, which would lead to additional frivolous and unnecessary litigation. Finally, Michael argued that, as a beneficiary of the land trust that held the Samis residence, his interest was sufficient to be permitted to intervene in any action that pertained to the trust corpus (the proceeds of the sale of the house). Michael concluded that allowing him to intervene at this time would avoid relitigation of a separate collusion objection he raised regarding the proposed Agreed Judgment Order. Michael argued that, technically, he could not present such objection without being a party to the case. Michael's objections were based on collusion, fraud, and as before, *res judicata*.

¶ 5 While those motions were pending before the court, plaintiff's attorney suggested that the case be dismissed. Specifically, counsel stated:

"When this came back from the appellate court the first time, I came in here; and I said the motion should—the order should be changed.

[Michael's attorney] said in his motion to dismiss that he wanted the entire case dismissed. That's what he said in his motion. The order said the motion's granted. We fully briefed it, reply, response. The appellate court sent it back and says, oh, no.

Obviously, everybody here thought the case was done. So it comes back. I've got a client in her nineties. [Michael] comes back in. I said, well, we could enter the order now dismissing the whole case; and [Michael's attorney] didn't want to do it.

I've never been able to get an agreement in the dealings that I've had with [Michael's attorney]. Other than extending time to reply to something, we've never agreed to anything; and I trust that we're not going to agree on anything now, and we're going to end up with another year of pleadings on this.

And, if we could get an order entered where you say the whole case is dismissed, then we can appeal; but I don't know what procedural posture we're in to do that. I certainly can't bring a motion to dismiss [plaintiff's] case because [she would] lose rights that [she has] against Sylvia if I do that.”

¶ 6 In response, Michael's attorney indicated that he had no objection to the entire case being dismissed and that, in contrast to plaintiff's counsel's statements, he did not think that he ever objected.

¶ 7 The trial court granted Michael's motion to intervene; the order did not reflect any limits on his position. The trial court thereafter dismissed the case. The written order, which was prepared by plaintiff's attorney and contained a Rule 304(a) finding, provided that “[b]ased on this court's ruling on May 27, 2008 this cause be and is dismissed in its entirety and as to all defendants with prejudice[.]” This timely appeal followed.

¶ 8 The dispositive issue before this court, which Michael raised in his brief, is whether plaintiff invited the error of which she now complains. That is, we must decide whether plaintiff may take issue with the dismissal that she asked the trial court to enter. We hold that plaintiff invited this dismissal, and, thus, she cannot now complain about the dismissal.

¶ 9 Instructive on this point is *Morris v. Banterra Bank of Hamilton County*, 159 Ill. 2d 551 (1994). There, the plaintiffs filed a motion for judgment on the pleadings. *Id.* at 552. The trial court denied the motion, and the plaintiffs, who were apparently frustrated by the trial court's ruling and wished to appeal rather than go forward with their case, moved that judgment be entered in favor of the defendants. *Id.* The trial court entered judgment in favor of the defendants, and the plaintiffs appealed. *Id.*

¶ 10 Our supreme court affirmed. *Id.* at 553. In doing so, the court stated that “a party who requests the trial court enter a judgment in favor of the opposing party cannot later claim error and appeal that judgment.” *Id.* Moreover, the court noted that the plaintiffs' motivation for the trial court to enter judgment in the defendants' favor only because they wished to appeal was immaterial. *Id.* “The plaintiffs' motivation, hope, or expectation for this procedural maneuver is beside the point.” *Id.*

¶ 11 Here, the first dismissal, *i.e.*, the one that plaintiff tried to appeal initially, was not invited. If Michael had not intervened, plaintiff could have invited the dismissal of the remaining parties and then appealed the dismissal of Michael. However, Michael successfully petitioned to intervene, thereby restoring his status as a defendant. Once Michael was restored as a defendant, there were extant claims against all parties, including Michael. With Michael being restored as a defendant, the first dismissal became a dead letter.

¶ 12 After Michael was restored as a defendant, plaintiff had to press her claims, including the one against Michael. Instead of doing so, she asked for a dismissal of the entire case, including the now-restored claim against Michael. Although plaintiff said that she “can’t bring a motion to dismiss,” that was the effect of what she did. That is, she said she wanted “an order entered where [the court would] say the whole case is dismissed, then we can appeal.” It seems apparent that plaintiff asked for the case to be dismissed to appeal the original dismissal against Michael.

¶ 13 The problem with plaintiff proceeding this way is that Michael was already back in the case. There was no extant dismissal against him for her to appeal. The only dismissal left, as to *all* of the parties, was the one for which plaintiff asked. Given that, plaintiff cannot escape invited error.

¶ 14 Plaintiff advances two reasons why this court should not address Michael’s claim that plaintiff invited the error of which she now complains. First, plaintiff contends that Michael’s argument, which is contained in his brief and is entitled “Motion to Dismiss Appeal,” should have been brought as a separate motion. Although that may be true, we fail to see how, and plaintiff has given us no authority that suggests, that this prevents this court from addressing Michael’s claim. Second, plaintiff contends that she never asked the trial court to dismiss her case on the ground that the judgment entered in the dissolution proceeding barred her cause of action here. However, plaintiff’s particular motivation is irrelevant. See *Morris*, 159 Ill. 2d at 553. In any event, the written order, which plaintiff’s attorney prepared, specifically refers to the May 27, 2008, order, wherein the trial court dismissed Michael based on his claim that the dissolution judgment barred plaintiff’s claims here.

¶ 15 For these reasons, we affirm the judgment of the circuit court of Lake County.

¶ 16 Affirmed.