FIRST DIVISION
FILED: March 26, 2012

No. 1-11-0502

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ANDREW P. TOBIAS, Plaintiff-Appellant, v. LAKE FOREST PARTNERS, LLC, a Nevada limited liability company, MARK D. WEISSMAN, ALBERT J. MONTANO, and CHRISTOPHER T. FRENCH, Defendants-Appellees.	))))))))))))	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. No. 06 CH 18664 HONORABLE ALEXANDER P. WHITE, JUDGE PRESIDING.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Karnezis and Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the circuit court is reversed and the cause is remanded for further proceedings.

¶ 2 The plaintiff, Andrew P. Tobias, brought this action against defendants, Lake Forest Partners, LLC (Lake Forest), Mark D. Weissman, Albert J. Montano, and Christopher T. French, seeking repayment of a loan and for his attorney fees pursuant to the loan agreement between the parties.

The circuit court entered a default judgment against all defendants, and Tobias initiated supplementary proceedings to collect on the judgment. Tobias subsequently filed a petition seeking postjudgment attorney fees. The trial court granted Weissman's motion to dismiss the attorney-fee petition, and Tobias has appealed.[1] For the reasons that follow, we reverse and remand the cause for further proceedings.

¶ 3 The record reflects the following relevant facts. Tobias loaned Lake Forest the sum of $500,000, which was personally guaranteed by Weissman, Montano, and French. The transaction was memorialized in a loan agreement dated December 5, 2005, that was executed by each of the defendants. In addition to providing for repayment of the loan with interest at the rate of 10% per annum, the loan agreement also provided, *inter alia*, that Lake Forest "promises to pay all costs of collection in case payment shall not be made at maturity; and further promises, in case suit is instituted to collect the Loan or the Interest, or any portion thereof, to pay such reasonable attorney's fees in such suit."

¶ 4 The defendants failed to pay the loan when due, and Tobias brought an action to recover on the debt. On February 27, 2007, the circuit court entered a default judgment against the defendants in the amount of $656,185.61, which included the outstanding principal and interest, as well as $12,610.61 in attorney fees and costs incurred by Tobias as of that date. The order further provided that judgment was entered against the defendants for "any additional attorneys' fees, costs and interest incurred after the date of this judgment." On April 5, 2007, Tobias filed a motion requesting

[1] Lake Forest, Montano, and French have not participated in the litigation since May 22, 2009, and they have not filed briefs in this appeal.

that the judgment be amended "so that it states what was intended, namely, joint and several liability and a fixed judgment amount." On that same date, the circuit court amended the judgment of February 27, 2007, by entering judgment in favor of Tobias and against the defendants, jointly and severally, in the sum of $662,172.21 plus costs, but the order did not include a provision for any postjudgment attorney fees that Tobias might incur.

¶ 5 On May 2, 2007, the defendants filed a motion to vacate the default judgment. Tobias opposed the defendants' motion, asserting that it was untimely because the April order "merely corrected" the February judgment and did not extend the time in which the default judgment could be set aside. The circuit court denied the defendants' motion, finding that that it was filed more than 30 days after the initial entry of judgment and did not satisfy the requirements for vacatur under section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2006)). The court further found that, even if the motion were considered to be timely because it was filed within 30 days of the "amended judgment," the defendants had not alleged sufficient grounds to justify vacatur.

¶ 6 In an effort to satisfy his judgment, Tobias commenced supplementary proceedings under section 2-1402 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1402 (West 2008)) by filing numerous citations to discover assets. During the course of those supplementary proceedings, which occurred over a two-year period, another judgment creditor was granted leave to intervene, and the circuit court was called upon to adjudicate the various parties' entitlement to funds that belonged to Weissman but were in the possession of a third party.

¶ 7 On April 23, 2009, Tobias filed a petition for an award of post-judgment attorney fees and costs. On that same day, the trial court conducted a hearing on Weissman's motion for the release

of his funds in the third party's possession. The parties agreed that, as of that date, a balance of $86,845.12 was still owed on Tobias' judgment, exclusive of his unresolved claim for post-judgment attorney fees. Following the April 23, 2009, hearing, the circuit court entered an order directing the third party to pay Tobias $86,845.12 "as full satisfaction of the February [*sic*] 27, 2007 judgment" and providing that the payment to Tobias "shall release the citation served by Tobias" on the third party. In addition, the order directed payment of the remainder of those funds, a portion of which was to be disbursed to the intervening judgment creditor. The order also provided that there was no just cause to delay its enforcement or appeal.

¶ 8 Tobias thereafter filed a timely notice of appeal from the order distributing Weissman's funds that were in the possession of the third party. In particular, Tobias challenged the trial court's determination that the payment of $86,845.12 would act as "full satisfaction" of the balance owed on the judgment because his unresolved claim for postjudgment attorney fees should enjoy the same priority on the funds held by the third party as did the balance due him on the underlying judgment.

¶ 9 On June 1, 2010, Weissman moved to dismiss Tobias' petition for postjudgment attorney fees under section 2-619 of the Code (735 ILCS 5/2-619 (West 2010)). In his motion, Weissman asserted that the claim for postjudgment attorney fees was barred because the judgment entered on February 27, 2007, had been paid in full and satisfied and because the circuit court lacked jurisdiction to rule on the petition as a result of the filing of Tobias' notice of appeal.

¶ 10 On June 22, 2010, this court affirmed the circuit court's decision as to the distribution of Weissman's funds, holding that, because Tobias' claim for postjudgment attorney fees had not been reduced to a specific judgment amount, it could not be enforced in a supplementary proceeding

brought pursuant to section 2-1402 of the Code and, therefore, did not become a lien upon Weissman's funds in the third party's possession. *Tobias v. Lake Forest Partners, LLC*, 402 Ill. App. 3d 484, 488-89, 931 N.E.2d 757 (2010) (*Tobias I*).

¶ 11 Tobias' petition for postjudgment attorney fees, and Weissman's motion to dismiss that petition, remained pending and unresolved in the circuit court throughout the pendency of the appeal and for more than six months after the decision in *Tobias I* was issued. On January 10, 2011, the trial court dismissed the petition for postjudgment attorney fees on the ground that "the April 5, 2007 order was not appealed." This appeal followed. After the parties filed their original briefs before this court, we ordered them to submit supplemental briefs addressing the issue of whether the circuit court had jurisdiction to enter the April 5, 2007, order disposing of Tobias' motion to amend the February 27, 2007 judgment.

¶ 12 A circuit court's ruling on a motion to dismiss pursuant to section 2-619 of the Code presents a question of law. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59, 857 N.E.2d 229, 236 (2006). Thus, we review the dismissal of Tobias' petition for postjudgment attorney fees *de novo*. *DeLuna*, 223 Ill. 2d at 59.

¶ 13 Initially, we note that Illinois follows the "American rule," which requires each party to the litigation to bear its own attorney fees and costs. *Morris B. Chapman and Associates, Ltd. v. Kitzman*, 193 Ill. 2d 560, 572, 739 N.E.2d 1263 (2000). However, express statutory or contractual provisions to the contrary are an exception to this rule. *Abdul-Karim v. First Federal Savings & Loan Association of Champaign*, 101 Ill. 2d 400, 411-12, 462 N.E.2d 488 (1984); *Losurdo Brothers v. Arkin Distributing Co.*, 125 Ill. App. 3d 267, 275, 465 N.E.2d 139 (1984). Here, Tobias' claim

for postjudgment attorney fees was predicated on the loan agreement, which expressly provided that Lake Forest promised to pay all costs of collection, including reasonable attorney fees.

¶ 14 On appeal, Tobias argues that he was entitled to pursue his claim for postjudgment attorney fees based on the judgment entered on February 27, 2007. Weissman responds by asserting that Tobias' claim for postjudgment attorney fees was extinguished because the contract on which that claim was premised merged into the final judgment entered on April 5, 2007, which did not provide for such fees. Alternatively, Weissman claims that, if the April 2007 order was void, the February order was not final because it did not determine the specific amount of attorney fees to which Tobias was entitled. We agree with Tobias.

¶ 15 As noted above, the default judgment entered on February 27, 2007, awarded Tobias the outstanding principal and interest due on the loan, as well as $12,610.61 in prejudgment attorney fees and costs. In addition that order specifically provided that judgment was entered against the defendants for "any additional attorneys' fees, costs and interest incurred after the date of this judgment." This judgment was a final order in that it determined the rights of the parties on the merits of the issues raised in Tobias' complaint and left unresolved only the incidental issue of the amount of postjudgment attorney fees to which Tobias was entitled. See *In re Curtis B.*, 203 Ill. 2d 53, 59, 784 N.E.2d 219 (2002); *City of Chicago v. Harris Trust and Savings Bank*, 346 Ill. App. 3d 609, 616, 804 N.E.2d 724 (2004); see also *In re D.D.*, 212 Ill. 2d 410, 418, 819 N.E.2d 300 (2004) (holding that an order is final when matters left for future determination are merely incidental to the ultimate rights that have been adjudicated by the judgment).

¶ 16 Section 2-1203 of the Code mandates that a motion seeking rehearing, retrial, or a

modification or vacatur of a judgment must be filed within 30 days of the judgment. 735 ILCS 5/2-1203 (West 2006). In the absence of a timely-filed postjudgment motion, the circuit court lacks the necessary jurisdiction to amend, modify, or vacate its judgment after the passage of 30 days. *Beck v. Stepp*, 144 Ill. 2d 232, 238, 579 N.E.2d 824 (1991); *Holwell ex rel. Holwell v. Zenith Electronics Corp.*, 334 Ill. App. 3d 917, 922, 779 N.E.2d 435 (2002); *In re County Treasurer*, 309 Ill. App. 3d 181, 187, 721 N.E.2d 745 (1999). Though a court may at any time modify its judgment to correct a clerical error or a matter of form so that the record conforms to the judgment actually rendered, that power may not be employed to correct judicial errors or to supply omitted judicial action. *Beck*, 144 Ill. 2d at 238; *Holwell ex rel. Holwell*, 334 Ill. App. 3d at 922. Yet, a circuit court has inherent authority to enforce its orders and judgments, and that power may extend beyond the 30-day period during which a court may modify its orders. *Director of Insurance ex rel. State v. A and A Midwest Rebuilders, Inc.*, 383 Ill. App. 3d 721, 723, 891 N.E.2d 500 (2008) (citing *Holwell ex rel. Holwell*, 334 Ill. App. 3d at 922). Where an order contemplates future conduct, it may be inferred that the court retained jurisdiction to enforce it. *Director of Insurance ex rel. State*, 383 Ill. App. 3d at 723.

¶ 17 In this case, Tobias' motion filed on April 5, 2007, requested that the previous judgment be modified by holding the defendants jointly and severally liable and by increasing the amount of the judgment by $5986.60.[2] Despite Tobias' claim that the April order "merely corrected" the February judgment, the record does not establish that the April order was entered *nunc pro tunc* to correct a clerical error or a matter of form. See *Beck*, 144 Ill. 2d at 239 (holding that *nunc pro tunc* orders

[2] Weissman concedes that this increase in the amount of the judgment presumably represents the amount of additional interest due on the balance of the loan.

must be based upon definite and precise evidence in the record); *Fox v. Department of Revenue*, 34 Ill. 2d 358, 360, 215 N.E.2d 271 (1966) (same). Because Tobias' motion was filed 37 days after entry of the February judgment, it did not extend the time within which the circuit court could modify that judgment, and the order entered on April 5, 2007, was void. See *Fox*, 34 Ill. 2d at 360. However, the circuit court retained the inherent authority to enforce the terms of the February 27, 2007, judgment, including resolution of the amount of Tobias' postjudgment attorney fees, which could not be determined until the judgment had been satisfied. Thus, the circuit court retained jurisdiction to rule on Tobias' petition for postjudgment attorney fees.

¶ 18 In reaching this conclusion, we necessarily reject Weissman's assertion that Tobias' claim for postjudgment attorney fees was barred by the April 2007 judgment under the doctrine of *res judicata*. As set forth above, the "amended judgment" entered in April was void for lack of jurisdiction. Consequently, it was a nullity and may not be used as the basis for application of the doctrine of *res judicata*. See *Township of Jubilee v. State*, 2011 IL 111447, ¶ 30 (citing *People v. Kidd*, 398 Ill. 405, 410, 75 N.E.2d 851 (1947)).

¶ 19 We similarly reject Weissman's claim that Tobias' claim for postjudgment attorney fees had been extinguished because it was based on the loan agreement, which was merged into the judgment. The doctrine of merger provides that when a judgment is rendered on a claim that is based on a contract or instrument, contract or instrument becomes entirely merged into the judgment. *Doerr v. Schmitt*, 375 Ill. 470, 472, 31 N.E.2d 971 (1941); *Poilevey v. Spivack*, 368 Ill. App. 3d 412, 414, 857 N.E.2d 834 (2006); *Stein v. Spainhour*, 196 Ill. App. 3d 65, 69, 553 N.E.2d 73 (1990). Once an instrument has merged into a judgment, no further action can be maintained on that instrument.

Doerr, 375 Ill. at 472; *Poilevey*, 368 Ill. App. 3d at 414; *Stein*, 196 Ill. App. 3d at 69. The doctrine of merger applies to causes of action and bars the parties from relitigating the same cause of action. *Poilevey*, 368 Ill. App. 3d at 415 (citing *Stein*, 196 Ill. App. 3d at 70). However, the merger doctrine does not apply to postjudgment attorney fees, which are ancillary to the primary cause of action. *Poilevey*, 368 Ill. App. 3d at 415; *Stein*, 196 Ill. App. 3d at 70. In addition, the merger rule does not preclude the plaintiff from bringing an action based on the judgment. *Poilevey*, 368 Ill. App. 3d at 415-16 (holding that, where a judgment provides for postjudgment attorney fees, the doctrine of merger does not apply because a subsequent petition for attorney fees is based on the judgment rather than the contract).

¶ 20 Here, Tobias's petition for attorney fees did not seek to relitigate the defendants' liability under the loan agreement, but only sought reimbursement of the attorney fees he incurred in collecting on the debt. His right to collect for these ancillary fees had been decided and specifically preserved in the February 27, 2007, judgment, and the subsequent petition for postjudgment attorney fees was based on that judgment, not on the underlying contract. Consequently, the doctrine of merger does not bar Tobias' claim for such fees. See *Poilevey*, 368 Ill. App. 3d at 415-16.

¶ 21 We also reject Weissman's contention that the circuit court had jurisdiction to enter the April 5, 2007, judgment by virtue of the doctrine of revestment. Under that doctrine, litigants may revest a trial court with personal and subject matter jurisdiction, after the expiration of the 30-day period following a final judgment, if they actively participate in proceedings that are inconsistent with the merits of the prior judgment. *People v. Bannister*, 236 Ill. 2d 1, 10, 923 N.E.2d 244 (2009); *People v. Kaeding*, 98 Ill. 2d 237, 240-41, 456 N.E.2d 11 (1983). The principle underlying the revestment

doctrine is that the party who benefitted from the circuit court's final judgment waives the right to question the jurisdiction of the court by ignoring the judgment and retrying the case on the merits. *Ridgely v. Central Pipe Line Co.*, 409 Ill. 46, 50, 97 N.E.2d 817 (1951); *Leavell v. Department of Natural Resources*, 397 Ill. App. 3d 937, 951-52, 923 N.E.2d 829 (2010). Conduct is inconsistent with a judgment if it reasonably can be construed to indicate that the party does not view the order as final and binding. See *Leavell*, 397 Ill. App. 3d at 952 (citing *Gentile v. Hansen*, 131 Ill. App. 3d 250, 255, 475 N.E.2d 894 (1984).

¶ 22 In this case, neither Tobias nor the defendants engaged in any conduct suggesting that they did not view the February 2007 judgment as final and binding. To the contrary, the record reveals that Tobias' April 5, 2007, motion was premised on his view that the February judgment finally determined the rights of the parties and merely required correction to state "what was intended" by its entry. In addition, he specifically relied on the finality of that order in opposing the defendants' motion to vacate the default. Based on this record, we cannot say that Tobias ignored the February 27, 2007, judgment and actively participated in proceedings that were inconsistent with the merits of that judgment. Because none of the parties implied by their conduct that the judgment should be set aside, the doctrine of revestment is inapplicable here.

¶ 23 Finally, we are unpersuaded by Weissman's argument that Tobias' claim for postjudgment attorney fees is precluded by judicial estoppel. The doctrine of judicial estoppel provides that " 'a party who assumes a particular position in a legal proceeding is estopped from assuming a contrary position in a subsequent legal proceeding.' " *People v. Caballero*, 206 Ill. 2d 65, 80, 794 N.E.2d 251 (2002) (quoting *Bidani v. Lewis*, 285 Ill. App. 3d 545, 550, 675 N.E.2d 647 (1996)); *Barack*

Ferrazzano Kirschbaum Perlman & Nagelberg v. Loffredi, 342 Ill. App. 3d 453, 460, 795 N.E.2d 779 (2003) (*Loffredi*) (same). The purpose of this doctrine is " 'to promote the truth and to protect the integrity of the court system by preventing litigants from deliberately shifting positions to suit the exigencies of the moment.' " *Loffredi*, 342 Ill. App. 3d at 460 (quoting *Bidani*, 285 Ill. App. 3d at 550). Illinois courts have identified five elements as necessary to a successful assertion of judicial estoppel: (1) the party to be estopped must have taken two positions, (2) those positions are factually inconsistent, (3) the positions were asserted in separate judicial or quasi-judicial administrative proceedings, (4) the party to be estopped intended for the trier of fact to accept the truth of the facts alleged, and (5) that party must have succeeded in the first proceeding and received some benefit from it. *People v. Caballero*, 206 Ill. 2d 65, 80, 794 N.E.2d 251 (2002).

¶ 24 Here, Weissman argues that Tobias should be estopped from pursuing his claim for postjudgment attorney fees because he claimed during the 2007 circuit court proceedings that the February 2007 judgment was final and that the court should enter a "fixed judgment amount," but he subsequently claimed in the supplementary collection proceedings and on appeal that he was entitled to collect the attorney fees incurred after the judgment was entered. Implicit in this argument is the assertion that Tobias' request for postjudgment attorney fees constitutes a new claim for relief under the loan agreement. However, as set forth above, this is not the case. The petition for postjudgment attorney fees merely sought to enforce Tobias' right to recover on a claim that was included in the complaint and was both decided and preserved in the February 27, 2007, judgment. Based on our review of the record, we find no factual inconsistency in the positions taken by Tobias, and we conclude that the doctrine of judicial estoppel does not preclude his right to collect

postjudgment attorney fees.

¶ 25 Accordingly, the circuit court erred in dismissing Tobias' petition for postjudgment attorney fees. For all of the foregoing reasons, the judgment of the circuit court is reversed, and the cause is remanded for further proceedings.

¶ 26 Reversed and remanded.