2013 IL App (1st) 12-3053-U

FIFTH DIVISION
August 9, 2013

No. 1-12-3053



IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE OSLER INSTITUTE, INC., | ) | |
| | ) | |
| Plaintiff-Appellant, | ) | Appeal from the Circuit Court |
| | ) | of Cook County, |
| v. | ) | |
| | ) | |
| RICHARD C. MILLER, | ) | |
| | ) | 11 CH 33466 |
| Defendant-Appellee, | ) | |
| | ) | |
| and | ) | Honorable |
| | ) | Richard J. Billik, Jr., |
| CONSTANCE STANLEY and DEBORAH McINTOSH, | ) | Judge Presiding. |
| | ) | |
| Defendants. | ) | |

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Palmer concurred in the judgment.

O R D E R

¶ 1 HELD: Where plaintiff filed two identical complaints in the same court, the circuit court did not abuse its discretion by dismissing one of the complaints as duplicative.

¶ 2 Plaintiff, the Osler Institute, Inc. (Osler), appeals from the circuit court's dismissal of its "Complaint for Additional Relief and Finding of Contempt" (2011 complaint) filed against

Richard Miller, Constance Stanley, and Deborah McIntosh (the defendants), arising out of a consent decree entered into by Osler and the defendants which settled a 2005 chancery court action initiated by Osler against these same defendants. In this appeal, Osler contends that: (1) the circuit court erred by dismissing the 2011 complaint as duplicative; (2) the circuit court erred by dismissing the complaint as substantially insufficient at law; and (3) the circuit court erred by denying Osler the opportunity to amend its complaint. We affirm.

¶ 3 According to the 2011 complaint, Osler is located in Vigo County, Indiana, and "is in the business of preparing, organizing, and presenting live medical board review courses in various specialties to physicians throughout the United States, and is in the business of selling audio, video and printed materials to prepare physicians for medical speciality examinations." In May 2005, Miller, who was an employee of Osler, incorporated Nighthawk Medical Educators, Inc. (Nighthawk) to compete with Osler in the continuing medical education business. Stanley and McIntosh, who are not parties to this appeal, were also employed by Osler and were a part of Nighthawk's management team.

¶ 4 Although the 2005 chancery court complaint is absent from the record on appeal, we glean some information about that lawsuit by taking judicial notice of certain facts presented in a subsequent decision from the Court of Appeals of Indiana, *The Osler Institute, Inc. v. Miller*, No. 84A05-1003-PL-237 (Ct. App. Ind. 2010), involving all of the same parties. See *Hermesdorf v. Wu*, 372 Ill. App. 3d 842, 850 (2007) (a reviewing court may take judicial notice of a written decision that is part of the record in another court).

¶ 5 On July 6, 2005, Osler filed suit against the defendants in case no. 05 CH 11260 (2005

action), alleging that the defendants had breached fiduciary duties and duties of loyalty to Osler, had misappropriated trade secrets, had tortiously interfered with Osler's business relationships, had engaged in a civil conspiracy, and that Miller had breached his contract with Osler. Osler requested relief in the form of an injunction and monetary damages.

¶ 6 Thereafter, on September 14, 2005, the circuit court entered a consent decree enjoining Nighthawk and the defendants from competing with Osler within the United States for a period of 36 months and from "acquiring, utilizing or disclosing, directly or indirectly, Osler's trade secrets or confidential information" acquired during the defendants' employment with Osler. The decree also included a provision stating: "This court retains jurisdiction of this action for the purpose of enforcing or modifying this Consent Decree and for the purpose of granting such additional relief as may be necessary or appropriate."

¶ 7 On September 26, 2008, Osler filed suit in the Vigo County Superior Court against the defendants and others, alleging similar allegations as those raised in the two complaints at issue in this appeal. Miller filed a motion to dismiss the Indiana action and, on November 16, 2009, the Vigo County Superior Court granted the motion to dismiss, finding that it lacked subject matter jurisdiction pursuant to the consent decree and also based on the doctrine of comity.

¶ 8 The Court of Appeals of Indiana affirmed the dismissal of the Indiana action, but disagreed with the superior court's conclusion that the action was barred by a lack of subject matter jurisdiction or comity considerations. Instead, the court of appeals affirmed the dismissal based on *res judicata*, because Osler could have brought his claims in the circuit court of Cook County in the 2005 action. *Miller*, No. 84A05-1003-PL-237.

¶ 9 On September 23, 2011, Osler filed the 2011 complaint in the present case alleging that: while still employed by Osler in 2006, the defendants continued to operate continuing medical education businesses under various names including The Canadian Institute for C.M.E. and MD Exam Prep in the state of Indiana; prior to the defendants' cessation of employment with Osler, they removed power point presentations, lecture DVDs, and lecture notes for medical board review courses from Osler and converted the property for their own use; Osler's property was taken without the knowledge or permission of Osler; Osler's property was used by Nighthawk, The Canadian Institute for C.M.E., and MD Exam Prep without Osler's permission; and Osler learned of the theft, conversion, and unauthorized use of its property on September 27, 2006. Osler requested the value of the converted property and the profits realized by the defendants in using the converted property as damages.

¶ 10 According to Osler's appellate brief, Osler also requested leave to file a supplemental complaint in the 2005 action on September 23, 2011. According to the record, Osler filed the supplemental complaint to the 2005 action (supplemental complaint) on November 17, 2011. The supplemental complaint was identical in substance to the 2011 complaint.

¶ 11 On April 5, 2012, Miller filed a motion to dismiss Osler's 2011 complaint "pursuant to Section 2-603(b), 2-606, 2-608, 2-613, and 2-615 of the Illinois Code of Civil Procedure," alleging that the complaint was duplicative and contained various other deficiencies. In its response, Osler admitted it had "double-filed" its claim against the defendants but explained it had done so "because it was unclear whether it was required to file a new action (this case) or file a supplemental complaint in case no. 05 CH 11260." To ensure it filed before the statute of

limitations period expired, Osler filed both the 2011 complaint and the supplemental complaint.

¶ 12 On September 14, 2012, after a hearing, the circuit court granted Miller's motion to dismiss the 2011 complaint, basing its ruling on the insufficient nature of the complaint and the duplicative nature of the action. The circuit court noted that the dismissal would not "prejudice [Osler's] right to proceed [ ] with any claims [in case no.] 05 CH 11260, nor shall it preclude Richard Miller from seeking sanctions against the plaintiff related to proceeding with this case." Osler filed its notice of appeal on October 12, 2012.

¶ 13 Osler first contends that the circuit court erred in dismissing its complaint as duplicative because it did not consider whether the action should have been stayed according to the factors outlined in *Kellerman v. MCI Telecommunications Corp.*, 112 Ill. 2d 428 (1986).

¶ 14 Before reaching the merits of Osler's argument, two initial matters must be addressed. First, Miller suggests that there is a question of whether this court has jurisdiction over the current appeal based upon the language of the September 14, 2012, circuit court order. Although it is only a suggestion without further argument, a reviewing court is obligated to independently consider whether it has jurisdiction over an appeal; if jurisdiction is lacking, the appeal must be dismissed. *Palmolive Tower Condominiums, LLC v. Simon*, 409 Ill. App. 3d 539, 542 (2011). Therefore, we consider our jurisdiction over this appeal.

¶ 15 Illinois Supreme Court Rule 301 provides: "Every final judgment of a circuit court in a civil case is appealable as of right. The appeal is initiated by filing a notice of appeal. No other step is jurisdictional." Ill. S. Ct. R. 301 (eff. Feb. 1, 1994). Rule 301 applies to appeals from cases in which the final order has disposed of the entire controversy between the parties. *Fidelity*

*National Title Insurance Co. of New York v. Westhaven*, 386 Ill. App. 3d 201, 210 (2007). If the order does not dispose of all claims or parties, an appeal from the case may only be taken if the court makes a finding of no just reason to delay enforcement or appeal pursuant to Supreme Court Rule 304(a). Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010).

¶ 16 In the present case, the circuit court dismissed the 2011 complaint in its entirety and Osler timely filed its notice of appeal. However, the circuit court order provided, among other things, that the dismissal would not preclude Miller from seeking sanctions against Osler. A motion for sanctions filed pursuant to Illinois Supreme Court Rule 137 is considered a claim in the cause of action with which it is connected, so the filing of a Rule 137 motion for sanctions is the equivalent of adding an additional count to a complaint or counter-claim to the action. *John G. Phillips & Associates v. Brown*, 197 Ill. 2d 337, 339-40 (2001). Therefore, a timely filed Rule 137 motion for sanctions " 'renders a notice of appeal from such an order premature and precludes appellate jurisdiction.' " *Id*. at 340 (quoting *Niccum v. Botti, Marinaccio, DeSalvo & Tameling, Ltd.*, 182 Ill. 2d 6, 7 (1998)). A Rule 137 motion for sanctions must be filed within 30 days of entry of the final judgment. Ill. S. Ct. R. 137 (eff. Feb. 1, 1994). Based on the record before us, since there was no motion for sanctions filed, and therefore no additional claim or counter-claim filed in the action, the circuit court's order became final and disposed of the entire controversy. Accordingly, we have jurisdiction over the present appeal from that order. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994).

¶ 17 Second, Osler complains that because Miller's motion was not filed under section 2-619(a)(3), Osler was prejudiced because it was not given the opportunity to argue against

dismissal pursuant to section 2-619(a)(3). Moreover, Osler states it was not alerted to the possibility of a section 2-619(a)(3) dismissal until the hearing because Miller's motion did not cite to that section. Although meticulous practice dictates the correct labeling of a motion to dismiss under section 2-615 or section 2-619, reversal is required only if prejudice is established. *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 484 (1994).

¶ 18 In his motion to dismiss, Miller stated it was brought "pursuant to Sections 2-603(b), 2-606, 2-608, 2-613, and 2-615" of the Code. Despite Miller's failure to cite section 2-619(a)(3) in his motion to dismiss, the record belies Osler's argument that it was prejudiced as a result. In the motion, Miller specifically alleged that the 2011 complaint and the supplemental complaint were identical, and that Osler's attorney had refused to dismiss the 2011 complaint which "seeks identical relief in relation to the same allegations as those set forth in Case No. 05 CH 11260." In its response to Miller's motion, Osler argued that the complaint "should not be dismissed because another complaint with identical factual allegations is pending under a separate case number" and admitted that it had "double-filed" its claims against Miller. Osler then supported its conclusion with the same arguments it has presented on appeal: that Osler was not sure whether to file its complaint as a new action or as a supplemental complaint to the 2005 action and that Osler was concerned about the expiration of the statute of limitations. Not only was Osler on notice that its complaint might be dismissed as duplicative, but Osler actually responded to that argument in its written response to the motion. Therefore, Osler was not prejudiced by Miller's failure to cite section 2-619(a)(3) in his motion to dismiss and reversal of the circuit court's dismissal is not warranted on this basis.

¶ 19 Section 2-619(a)(3) of the Code of Civil Procedure (Code) provides that a defendant may file a motion to dismiss an action based on the existence of "another action pending between the same parties for the same cause." 735 ILCS 5/2-619 (West 2004). Actions will be found to involve the same cause if the requested relief is based on substantially the same set of facts. *Midas International Corp. v. Mesa, S.p.A.,* 2013 IL App (1st) 122048, ¶ 13. " 'The crucial inquiry is whether the two actions arise out of the same transaction or occurrence, not whether the legal theory, issues, burden of proof or relief sought materially differs between the two actions.' " *Id*. ¶ 13 (quoting *Village of Mapleton v. Cathy's Tap, Inc.*, 313 Ill. App. 3d 264, 266 (2000). Even if the circuit court finds that the same cause and the same parties are involved in both actions, section 2-619 does not require automatic dismissal. *Midas International*, 2013 IL App (1st) 122048, ¶ 21. The circuit court must also weigh the policy of avoiding duplicative litigation against prejudice to the non-movant if the motion is granted, which should involve consideration of the *Kellerman* factors. *Id*. The *Kellerman* factors include: comity; the prevention of multiplicity, vexation, and harassment; the likelihood of obtaining complete relief in the foreign jurisdiction; and the *res judicata* effect of a foreign judgment in the local forum. *Kellerman*, 112 Ill. 2d at 447-48.

¶ 20 A circuit court's dismissal of a complaint as duplicative will not be reversed absent an abuse of discretion. *Midas International*, 2013 IL App (1st) 122048, ¶ 12. A circuit court has abused its discretion when its ruling is " 'arbitrary, fanciful, or unreasonable, or when no reasonable person would take the same view.' " *Performance Network Solutions, Inc. v. Cyberklix US, Inc.*, 2012 IL App (1st), ¶ 27 (quoting *Favia v. Ford Motor Co.*, 381 Ill. App. 3d

809, 815 (2008)).

¶ 21 In the present case, Osler concedes that the two actions involve both the same parties and the same facts, but maintains the circuit court should have stayed the action based on the *Kellerman* factors. We disagree.

¶ 22 Because the two complaints filed by Osler were identical in substance and filed in the same court, the considerations of comity or the *res judicata* effect of a foreign judgment in the local forum are inapplicable. Considering the other factors, we conclude the dismissal instead of a stay was proper for the following reasons. First, the circuit court's dismissal of one of the two identical suits prevents multiplicity. Second, the dismissal of the 2011 complaint will prevent further time and expense required in litigating two identical actions. Third, although a stay would essentially prevent further time and expense, there has already been unnecessary time expended and litigation expenses incurred by the duplicate filings. All of these facts weigh in favor of dismissal.

¶ 23 As to the likelihood of obtaining complete relief in the foreign jurisdiction, Osler argues that it weighs in favor of staying the complaint because it is unclear pursuant to the consent decree "whether *all* controversies among the parties arising *after* its entry fall within the sole and exclusive jurisdiction of the court entering the Consent Decree." Osler posits: "For example, if two of the parties to the Consent Decree were involved in a motor vehicle collision in another jurisdiction within 36 months after entry of the Consent Decree, are they required to bring any suit for damages in the 2005 action?" However, neither the 2011 complaint nor the supplemental complaint are based on a motor vehicle collision between the parties; they are based on an

alleged breach of the consent decree. In addition, Osler's argument is entirely speculative and is not supported by any citation to authority, and is therefore waived. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) (the argument section of appellant's brief "shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and pages of the record relied on."); see also *Vincent v. Doebert*, 183 Ill. App. 3d 1081, 1087 (1989) (noting that "a reviewing court is entitled to have issues clearly defined with pertinent authority cited and cohesive legal arguments presented [citation] and issues not sufficiently presented can be waived [citation]").

¶ 24 Waiver aside, because Osler was granted leave by the circuit court to file an identical complaint in the 2005 action and because the circuit court stated that the dismissal of the 2011 complaint did not prejudice Osler's right to proceed in the 2005 action, Osler has not established any meritorious reason why the duplicative 2011 complaint should not have been dismissed. Osler therefore cannot show that the circuit court's dismissal was arbitrary, fanciful, or unreasonable.

¶ 25 Osler nonetheless argues that if the 2011 complaint is dismissed, Osler "could possibly suffer severe prejudice." Osler explains that it "double-filed" the 2011 complaint and the supplemental complaint because the consent decree was unclear as to the proper filing procedure and Osler was concerned about filing before the statute of limitations expired on its causes of action. However, the applicable statutes of limitations have no bearing on whether a complaint is duplicative. We will not speculate about the applicable statutes or give an advisory opinion regarding the timing of the filing of Osler's two complaints. As pointed out above, the dismissal of the 2011 complaint was specifically without prejudice to Osler's ability to pursue the same

claims against the same parties in its supplemental complaint to the 2005 action.

¶ 26 Osler finally contends that its 2011 complaint was not duplicative of the supplemental complaint because it alleged some claims that were not based on a violation of the consent decree, including conversion, theft, trespass to chattels, civil conspiracy, and the unauthorized use of Osler property, and "[c]laims such as conversion are not 'duplicative' of claims for violations of the" consent decree. This argument ignores the fact that Osler filed two identical complaints in the same court. Both complaints pled the exact same allegations and therefore set forth the exact same claims, including any claims of conversion, theft, trespass to chattels, civil conspiracy, and the unauthorized use of Osler property. The duplicative nature of the complaints does not change simply because Osler did not know whether it should have filed the additional claims in a new action or in the same action as claims based on a violation of the consent decree. Osler has failed to cite any authority suggesting otherwise. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008). Under the present circumstances, because it is uncontested that Osler filed both the 2011 complaint and the very same complaint in the 2005 action, there was no sound reason to stay the 2011 action and the dismissal was proper.

¶ 27 Because we find the circuit court did not abuse its discretion when it dismissed the 2011 complaint as duplicative, we need not reach the questions of whether the complaint was substantially insufficient or whether the circuit court should have allowed Osler leave to amend to the complaint.

¶ 28 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 29 Affirmed.