

2014 IL App (1st) 133482-U

No. 1-13-3482

November 25, 2014

SECOND DIVISION

**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  
FIRST DISTRICT

ING BANK, FSB,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 12 M1 705312
	)	
UNKNOWN OCCUPANTS,	)	
	)	The Honorable
Defendants-Appellants.	)	Aicha MacCarthy,
	)	Judge presiding.

JUSTICE NEVILLE delivered the judgment of the court.  
Justices Pierce and Liu concurred in the judgment.

**ORDER**

¶ 1 *Held:* The appellate court has jurisdiction to review that part of an order denying a petition to intervene in an eviction action because the intervention order is a final order since all issues in the eviction action have been decided. The circuit court did not abuse its discretion when it denied the defendants' petition to intervene more than four months after the court entered its order of possession. Finally, the appellate court does not have jurisdiction to review that part of an order striking a motion to vacate, which commenced a collateral proceeding independent of the eviction action, because the motion has not been granted or denied, and the vacate order is therefore, interlocutory and not a final order.

¶ 2 Plaintiff, ING Bank, filed a forcible entry and detainer (eviction) action against "unknown occupants" in Unit 1 of a multi-unit building located at 931 N. Mozart, in Chicago, Illinois. The circuit court entered an order of possession. Harvey Stinson and Patricia Hampton, the appellant-defendants, were evicted, and they filed a petition to intervene and a motion to vacate. The circuit court denied the defendants' petition to intervene and struck their motion to vacate on the grounds that the court did not have jurisdiction.

¶ 3 We hold that the appellate court has jurisdiction to review that part of an order denying a petition to intervene in an eviction action because the intervention order is a final order since all issues in the eviction action have been decided. The circuit court did not abuse its discretion when it denied the defendants' petition to intervene more than four months after the court entered its order of possession. Finally, the appellate court does not have jurisdiction to review that part of an order striking a motion to vacate a void order, which commenced a collateral proceeding independent of the eviction action, because the motion has not been granted or denied, and the vacate order is therefore, interlocutory and not a final order.

¶ 4 **BACKGROUND**

¶ 5 After purchasing a multi-unit building at a judicial sale on March 6, 2012, ING Bank filed an eviction action, naming "unknown occupants" of Unit 1 as defendants. Vicent Soto, Jr., an agent of ProVest LLC, a special process server, averred in an affidavit that on October 18, 2011, he served defendants named "unknown occupants" with a "notice of post-foreclosure eviction" by "substitute service" on Harvey Capone in Unit 1. Soto also averred in an affidavit that on February 15, 2012, he served defendants named "unknown occupants" with a "demand for possession" by "substitute service," on Brian Moebus in Unit 1. Deputy

Redd, a Cook County Sheriff, averred in an affidavit that on March 13, 2012, summons was not served on "unknown occupants" in Unit 1. Barbara Grzynkiewicz, another agent of ProVest LLC, averred in an affidavit that summons was not served on "unknown occupants" on July 29, 2012, but averred in a second affidavit that "unknown occupants" were served with "substitute service" by delivering a summons to Janet Gonzalez on October 14, 2012. However, neither affidavit included the address or unit number where substitute service took place.

¶ 6 On November 6, 2012, ING Bank filed a motion for hearing on its complaint for forcible entry and detainer, which was to be heard on November 20, 2012. On November 20, 2012, the hearing was continued to January 2, 2013, but on January 2, 2013, the matter was stricken from the call.

¶ 7 On March 1, 2013, ING Bank filed a Motion for Order of Possession naming as parties the "unknown occupants" of Unit 1 and setting the hearing for March 21, 2013. On March 21, 2013, the court entered an *ex parte* Order of Possession against the "unknown occupants."

¶ 8 On August 1, 2013, Stinson and Hampton filed a Petition to Intervene and a Motion to Vacate the Order of Possession, and attached affidavits. In their petition to intervene, Stinson and Hampton requested leave to intervene in the eviction action because their interests were not adequately represented as "unknown occupants" and because being named "unknown occupants" was not sufficient to include them in the action. In their motion to vacate, Stinson and Hampton stated that "after first securing leave of court to intervene as party-defendants" they were moving the court to vacate the order of possession because it was void for lack of personal jurisdiction. Stinson and Hampton averred in their affidavits

that they were denied access to their unit by the Cook County Sheriff on June 3, 2013. In addition, Stinson and Hampton averred in their affidavits attached to the petition and motion that: 1) they have always resided in the basement apartment; 2) only Stinson and Hampton resided in the basement apartment; 3) the apartment on the first floor was referred to as unit 1; 4) they were never served with the summons and complaint in the eviction action; and 5) while physically present in court "on or about November 22, 2012", on January 2, 2013, and on February 21, 2013, Stinson provided his name and address to ING Bank's counsel on the two court dates in which ING Bank's counsel appeared (November 20, 2012 and February 21, 2013), but Stinson and Hampton were never notified about the hearing on March 21, 2013, when the court entered the *ex parte* order of possession.

¶ 9 On August 13, 2013, Judge MacCarthy entered and continued both the petition to intervene and the motion to vacate until August 22, 2013. The judge set a briefing schedule on August 22, 2013, and set the case for a hearing on October 3, 2013. ING did not file a response to the petition or motion and counter affidavits were not filed in response to Stinson and Hampton's affidavits.

¶ 10 On October 3, 2013, the circuit court entered the following order: "the motion to intervene is denied and [the motion] to vacate is hereby stricken, as the Court is without jurisdiction because the motions were filed greater than 30 days after the Order of Possession of March 21, 2013." Stinson and Hampton filed their notice of appeal on November 1, 2013. The notice of appeal indicates, in pertinent part, the following: "Date of the judgment order being appealed: 10/03/13. \*\*\* Relief sought from the Reviewing Court: Reverse the adverse ruling of October 3, 2013, grant the request for intervention, and vacate the *ex parte* order of possession entered on March 21, 2013."

We now consider the appeal.

¶ 11 ANALYSIS

¶ 12 Jurisdiction

¶ 13 The appellate court has an independent duty to ensure that appellate jurisdiction is proper and unless specifically authorized by the rules of the Illinois Supreme Court, it has no jurisdiction to review judgments, orders or decrees that are not final. *Department of Central Management Services. v. American Federation of State, County and Municipal Employees (A.F.S.C.M.E.)*, 182 Ill. 2d 234, 238 (1998). Every final judgment of a circuit court in a civil case is appealable as of right. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994). Supreme Court Rule 303 provides that the appellate court has jurisdiction to hear an appeal from a final order of the circuit court in a civil case when the notice of appeal is filed within 30 days after entry of the order. Ill. S. Ct. R. 303 (eff. June 4, 2008). An order is final when it "terminates and disposes of the parties' rights regarding issues in the suit so that, if affirmed, the trial court has only to proceed with execution of judgment." *Findley v. Posway*, 118 Ill. App. 3d 824, 826 (1983). If an order leaves a cause still pending and undecided, it is not a final order. *Findley*, 118 Ill. App. 3d at 826.

¶ 14 We find that the March 21, 2013 order of possession was final because all parties and claims were adjudicated in the eviction action. *Findley*, 118 Ill. App. 3d at 826. We also find that Stinson and Hampton's petition to intervene, filed four months after the order of possession, was an attempt to reopen the eviction action, so that part of the October 3, 2013 order which denied the petition to intervene finally disposed of all issues in the eviction action. *Findley*, 118 Ill. App. 3d at 826; *Velde Ford Sales, Inc. v. John Bearce Ford, Inc.*, 194 Ill. App. 3d 951, 952 (1990); see *Koester v. Yellow Cab*, 18 Ill. App. 3d 56, 61 (1974). The



intervene is remedial in nature and should be liberally construed. *Citicorp Savings of Illinois v. First Chicago Trust Co. of Illinois*, 269 Ill. App. 3d 293, 298 (1995). Section 2-408 provides that a petition to intervene must be timely filed (735 ILCS 5/2-408(a) (West 2012); *Schwechter v. Schwechter*, 138 Ill. App. 3d 602, 604 (1985)), and whether a party has intervened in a timely manner is left to the sound discretion of the circuit court. *In re Application of County Collector of Du Page County*, 181 Ill. 2d 237, 247-48 (1998); *Citicorp*, 269 Ill. App. 3d at 298. The question under the abuse of discretion standard is not whether the reviewing court agrees with the circuit court, but whether the circuit court "acted arbitrarily, without employing conscious judgment, or whether, in view of all the circumstances, the court exceeded the bounds of reason and ignored recognized principles of law so that substantial prejudice resulted." *State Farm Fire & Casualty Co. v. Leverton*, 314 Ill. App. 3d 1080, 1083 (2000). If the party was unaware of the original suit until after judgment was entered, intervention after judgment may be allowed. *Schwechter*, 138 Ill. App. 3d at 604-05. However, where a party has known about an action and failed to timely intervene, intervention has not been allowed unless failure to intervene can be adequately explained. *O'Bannon v. Northern Petrochemical Co.*, 113 Ill. App. 3d. 734, 737 (1983).

¶ 18

Stinson and Hampton argue that they have a right to intervene pursuant to sections 2-408(a)(2) and 2-408(a)(3) of the Code. 735 ILCS 5/2-408(a)(2)-(3) (West 2012). Stinson and Hampton maintain that their petition was timely because it was filed less than two months after they were evicted. They also maintain that their reason for attempting to intervene was because ING Bank failed to properly name them and serve them with process when ING Bank knew they resided in the basement apartment. However, this reason does not explain Stinson and Hampton's delay in filing the petition to intervene and motion to vacate. We note

that Stinson and Hampton averred in their affidavits that they were physically present in court on three court dates ("on or about November 22, 2012," January 2, 2013, and February 21, 2013) before the circuit court entered its order of possession on March 21, 2013. But the record contains no evidence that Stinson or Hampton filed a petition to intervene or a motion to vacate challenging the court's personal jurisdiction during the three previously attended court hearings. Stinson and Hampton provide no excuse for filing the petition to intervene four months after the circuit court entered the order of possession when they were present in court three times during the pendency of the eviction action. Therefore, we find that the circuit court did not abuse its discretion when it denied Stinson and Hampton's petition to intervene.

¶ 19 Stinson and Hampton rely on *Citicorp* to support their position that even after a judgment has been entered between the original parties, a motion to intervene may be filed to protect the interests of the intervener. *Citicorp*, 269 Ill. App. 3d at 298. However, the facts in *Citicorp* are distinguishable from the facts in this case. The intervening parties in *Citicorp* were denied intervention five days before the circuit court dismissed the case with prejudice. *Citicorp*, 269 Ill. App. 3d at 299. Here, Stinson and Hampton filed their petition to intervene more than four months after the circuit court entered the order of possession and nearly two months after they were evicted. Accordingly, we hold that the circuit court did not err when it entered the order denying the petition to intervene that was filed more than four months after entry of the order of possession. *Fisher v. Capesius*, 369 Ill. 598, 604-05 (1938).

¶ 20 Motion to Vacate

¶ 21 Next, we must determine if the notice of appeal confers the appellate court with jurisdiction to review that part of the October 3, 2013 order striking the motion to vacate the

March 21, 2013 order of possession. We find that section 2-1401 of the Code gives a party a right to challenge a void judgment, herein, the order of possession. 735 ILCS 5/2-1401(f) (West 2012). We note that while a motion to vacate a void judgment must be filed in the same proceeding in which the void order of possession was entered (735 ILCS 5/2-1401(b)) (West 2012), it is a new proceeding independent of the other action. *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 102 (2002); see *Malone v. Cosentino*, 99 Ill. 2d 29, 32-33 (1983) (where the court found that a petition filed under section 2-1401 is a collateral proceeding).

¶ 22 The Supreme Court directs reviewing courts to the Supreme Court Rules to resolve jurisdictional questions:

"Supreme Court Rule 303(b)(2) provides that a notice of appeal 'shall specify the judgment or part thereof or other orders appealed from and the relief sought from the reviewing court.' [Citation]. Illinois courts have held that a notice of appeal confers jurisdiction on a court of review to consider only the judgments or parts thereof specified in the notice of appeal. [Citations]."  
*People v. Smith*, 228 Ill. 2d 95, 104 (2008); see also Ill. S. Ct. R. 303 (eff. June 4, 2008).

Stinson and Hampton explicitly state in their notice of appeal that they are only seeking review of the October 3, 2013 order, but they refer to the March 21, 2013 order of possession in the request for relief section of their notice of appeal. Because Rule 303(b)(2) only confers jurisdiction on this Court to review the orders specified in the notice of appeal, we can only review the October 3, 2013 order. *Smith*, 228 Ill. 2d at 104; Ill. S. Ct. R. 303 (eff. June 4, 2008).

¶ 23 Because we must liberally construe the notice of appeal (*Smith*, 228 Ill. 2d at 104), we must determine whether the reference to the March 21, 2013 order of possession in the relief section of the notice of appeal gives this Court jurisdiction. We note that a judgment, order or decree entered by a court which lacks jurisdiction over the parties or the subject matter is void and may be attacked at any time and in any court. *Sarkissian*, 201 Ill. 2d at 103. Therefore, the circuit court had jurisdiction to decide the motion to vacate (1) because the motion maintained that the March 21, 2013 order of possession was void for lack of personal jurisdiction over Stinson and Hampton, which we treat as a section 2-1401 proceeding (*Sarkissian*, 201 Ill. 2d at 103); 735 ILCS 5/2-1401(f) (West 2012)), and (2) because the motion to vacate was not a continuation of the eviction action, but a collateral proceeding governed by Supreme Court Rule 304(b)(3). Ill. S. Ct. R. 304(b)(3) (eff. Feb. 26, 2010).

¶ 24 However, instead of deciding the motion to vacate, the circuit court struck the motion in its October 3, 2013 order. Illinois courts have found that a court which strikes a motion without using the words "denied," "dismissed," or "stricken with prejudice" leaves the motion pending. *Belluomini*, 207 Ill. App. 3d at 586; *OneWest Bank, FSB v. Topor*, 2013 IL App (1st) 120010, ¶ 17; *see also Calkin v. Roberts Park Fire Prot. Dist.*, 402 Ill. 579, 581 (1949). Here, the court struck the motion to vacate instead of "denying" the motion or striking the motion "with prejudice." We find the circuit court's decision to use the word "stricken" instead of the words "denied," "dismissed," or "stricken with prejudice" leaves the motion to vacate undecided because there was no decision on the merits. *Belluomini*, 207 Ill. App. 3d at 586; *Topor*, 2013 IL App (1st) 120010, ¶ 17; *see also Calkin*, 402 Ill. at 581. Therefore, this Court does not have jurisdiction under Rule 304(b)(3) to hear that part of the appeal that concerns the motion to vacate, which commenced a new proceeding, because that part of the October 3,

2013 order striking the motion to vacate did not grant or deny any of the relief prayed for in the motion to vacate. *Sarkissian*, 201 Ill. 2d at 102; Ill. S. Ct. R. 304(b)(3) (eff. Feb. 26, 2010). Until the circuit court grants or denies Stinson and Hampton's motion to vacate, the issue of whether the March 21, 2013 order of possession is void will remain undecided and the appellate court will lack jurisdiction to review the vacation order. Accordingly, we remand this case to the circuit court for the court to grant or deny the motion to vacate. Finally, we need not reach the remaining issues in this appeal.

¶ 25

#### CONCLUSION

¶ 26

We hold that the appellate court has jurisdiction to review that part of the October 3, 2013 order denying the petition to intervene in the eviction action because the intervention order is a final order since the court denied the petition and all issues have been decided in the eviction action. We also hold that the circuit court did not abuse its discretion when it denied the defendants' petition to intervene in the eviction action more than four months after the court entered its order of possession. Finally, we hold that the appellate court does not have jurisdiction to review that part of the October 3, 2013 order striking the motion to vacate because the court's use of the word "stricken" instead of the words "denied" or "stricken with prejudice", and its failure to grant or deny the motion, makes the order interlocutory rather than final and leaves the motion to vacate a matter to be decided because there was no decision on the merits.

¶ 27

Accordingly, the part of the circuit court's October 3, 2013 order denying the petition to intervene is affirmed but the part of the order striking the motion to vacate is remanded for further proceedings consistent with this order.

¶ 28

Order affirmed in part and case remanded with directions.