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2014 IL App (3d) 130885-U

Order filed October 14, 2014

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2014

JULIE WEBBER,	)	Appeal from the Circuit Court
	)	of the 14th Judicial Circuit,
Plaintiff-Appellant,	)	Henry County, Illinois.
	)	
v.	)	
	)	Appeal No. 3-13-0885
CAMP GROVE STATE BANK, a banking	)	Circuit No. 10-L-34
corporation, HATZER AND NORDSTROM	)	
EQUIPMENT COMPANY, and LARRY'S	)	
SCRAP METAL, a/k/a LARRY'S METAL	)	
COMPANY, INC.,	)	
	)	Honorable Ted J. Hamer,
Defendants-Appellees.	)	Judge, Presiding.

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JUSTICE SCHMIDT delivered the judgment of the court.  
Justices Holdridge and O'Brien concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* A dismissal for want of prosecution was not a final order notwithstanding "with prejudice" language. Appeal dismissed for lack of jurisdiction.
- ¶ 2 Following a status hearing in the Henry County circuit court, the court dismissed plaintiff, Julie Webber's, case with prejudice when she failed to attend the hearing and failed to file an appearance within 21 days of her previous attorney's withdrawal.

¶ 3 Julie argued, in her original *pro se* brief, that the trial court abused its discretion in dismissing her case. By the time she filed her reply brief, Julie retained counsel. Counsel now argues that this court lacks jurisdiction. Counsel claims that the trial court dismissed for want of prosecution. Notwithstanding the "with prejudice" language, counsel argues that this court should construe the dismissal as without prejudice. We agree. For the reasons stated below, this appeal is dismissed for lack of jurisdiction.

¶ 4 **FACTS**

¶ 5 On October 10, 2010, Julie filed a complaint in Henry County, claiming that she was damaged when agents of Camp Grove effectuated an order of replevin in Stark County against her son, Jeffery Webber. Julie's complaint alleged trespass and conversion of property of which she is the sole owner. Defendants filed an entry of appearance on December 7, 2010. Over two years later on April 8, 2013, Julie filed a motion for default judgment. On April 11, 2013, the defendants filed a response to the motion. The court denied the motion for default judgment and granted defendants' leave to file their answer and affirmative defenses. On August 28, 2013, Julie's attorney filed a notice of motion to withdraw. Julie received a copy of the notice of motion to withdraw by first class and certified mail. The motion specifically stated that failure to file an appearance may result in a dismissal of her case. On September 20, 2013, the court granted the attorney's motion to withdraw. The September 20, 2013, order required Julie to file an appearance, whether *pro se* or by counsel, within 21 days. The order further set a status hearing for October 18, 2013. Julie never filed an appearance. Julie failed to attend an October 18, 2013, status hearing. She notified the court in advance that she had a doctor's appointment and another matter in Stark County. At that hearing, the judge dismissed Julie's complaint and all associated pleadings "with prejudice." The order stated that Julie communicated with the

court that she would not attend the hearing, and she failed to file an appearance as required in the September 20, 2013, order.

¶ 6 This appeal followed.

¶ 7 ANALYSIS

¶ 8 The order dismissed Julie's case for want of prosecution, even though the court did not use such language. A dismissal for want of prosecution prior to trial is always "without prejudice." *In re Marriage of Tiballi*, 2014 IL 116319. Here, the court dismissed the case almost three years after Julie filed the complaint. Julie failed to proceed during this time. In addition, defendants had yet to file their answer.

¶ 9 Where a case is dismissed for want of prosecution, a plaintiff has "an absolute right" to refile within the period set forth in section 13-217 of the Code of Civil Procedure. 735 ILCS 5/13-217 (West 2010); *Flores v. Dugan*, 91 Ill. 2d 108, 112 (1982). For this reason, a dismissal for want of prosecution does not have a connotation of finality. *Dick Lashbrook Corp. v. Pinebrook Foundation, Inc.*, 134 Ill. App. 3d 56, 62 (1985). A dismissal for want of prosecution is not a final order until the time to refile has expired. *S.C. Vaughan Oil Co. v. Caldwell, Troutt & Alexander*, 181 Ill. 2d 489, 502 (1998); *Flores*, 91 Ill. 2d at 112.

¶ 10 If it is clear that the court dismissed for want of prosecution, the dismissal is "without prejudice" even if the order did not specifically use the words "want of prosecution." *O'Reilly v. Gerber*, 95 Ill. App. 3d 947, 950 (1981). The *O'Reilly* court found that the trial court intended to dismiss for want of prosecution for failure or refusal to file an amended complaint, even though the order did not mention those specific words. *Id.* The court held that the trial court erred in ordering that the case be dismissed with prejudice; the trial court was instructed to enter an order dismissing the case "without prejudice." *Id.* at 952.

¶ 11 In *Lashbrook*, the trial court dismissed the case with prejudice when the plaintiff failed to proceed to trial. *Lashbrook*, 134 Ill. App. 3d at 57. The order did not specifically state that the dismissal was for want of prosecution. *Id.* However, this court found the dismissal to be based on want of prosecution. *Id.* This court held the trial court erred in granting the dismissal "with prejudice." *Id.* at 63. We construed the order as being one " 'without prejudice' " and therefore, a nonfinal order. *Id.* This court dismissed the appeal because our jurisdiction is limited to final orders. *Id.*

¶ 12 Our jurisdiction is limited to appeals from final judgments, unless the appeal is within the scope of one of the exceptions established by our supreme court. *Puleo v. McGladrey & Pullen*, 315 Ill. App. 3d 1041, 1043 (2000). A judgment is final if it terminates the litigation between the parties on the merits of the case, or if it disposes of the parties' rights to either the entire controversy or a separate part of it. *R.W. Dunteman Co. v. C/G Enterprises, Inc.*, 181 Ill. 2d 153, 159 (1998).

¶ 13 Here, the trial court dismissed the case for want of prosecution. Over three years had passed from the filing of the complaint. Julie did not proceed with her case during that time. The words "with prejudice" do not make the order a final determination; we will construe the order as being one "without prejudice." Also, the dismissal does not fit within one of the exceptions. Therefore, it is not appealable.

¶ 14 CONCLUSION

¶ 15 We construe the dismissal as one without prejudice, thus the order is a nonfinal determination. We, therefore, lack jurisdiction to entertain plaintiff's appeal. We dismiss this appeal for lack of jurisdiction.

¶ 16 Appeal dismissed.