

NOTICE
Decision filed 10/22/14. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2014 IL App (5th) 130215-U

NO. 5-13-0215

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

ELMER HEMMINGHAUS, as Trustee of the)	Appeal from the
Declaration of Trust of Elmer Hemminghaus dated)	Circuit Court of
August 24, 1994, JANET K. EYMAN, as Trustee of)	Bond County.
the Declaration of Trust of Betty Hemminghaus dated)	
August 24, 1994, ELMER HEMMINGHAUS, and)	
BETTY HEMMINGHAUS,)	
)	
Plaintiffs-Appellants,)	
)	
v.)	No. 12-L-02
)	
GARY HEMMINGHAUS and)	
SHEILA HEMMINGHAUS,)	Honorable
)	Keith Jensen,
Defendants-Appellees.)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Justices Goldenhersh and Cates concurred in the judgment.

ORDER

¶ 1 *Held:* Where Elmer Hemminghaus made a general appearance in this case, he waived personal jurisdiction. Where there is no evidence to support Betty Hemminghaus' ownership of the equipment at issue, she is not an indispensable party to this case. Where the September 19, 2012, order of the court is not void, we affirm the judgment.

¶ 2 Plaintiffs appeal from the trial court's order denying their motion to vacate an earlier order dated September 19, 2012. Plaintiffs ask us to declare the judgment void on

the basis that the trial court did not have personal jurisdiction over the parties. Defendants argue that the court had jurisdiction. We affirm.

¶ 3

FACTS

¶ 4 Elmer and Betty Hemminghaus were married. At oral argument, Elmer's attorney advised the court that Betty died after he filed the appeal of the section 2-1401 order on her behalf. Three children were born during the marriage: Gary Hemminghaus, Bobby Hemminghaus, and Janet Eyman. Elmer has been a farmer since 1961. In 1968, he purchased 127 acres for Gary so that Gary could also farm. Elmer funded the costs for Gary's farm and provided the farm equipment necessary to manage the farm. Gary received 100% of the proceeds of the sale of the farm crops.

¶ 5 Elmer opened a checking account in the name of Hemminghaus Farms. He deposited income from his own farm. The purpose of the account was to pay the expense of both farms. Gary had check-writing privileges on this bank account.

¶ 6 In 1991, Gary contends that Elmer made a verbal agreement that all farm implements belonged to Gary. Elmer disputes the existence of this verbal agreement and contends that because title to the equipment is not in Gary's name, the equipment belongs to him. Gary also claims that the Hemminghaus Farms bank account belongs to him.

¶ 7 In 2012, Elmer decided to audit the Hemminghaus Farms checking account. This audit took place because Elmer learned that there was no money left in the account. He asked his daughter Janet to look at the expenses. The audit went back to 2005. Janet discovered non-farm-related bills paid out of the account totaling \$39,347. In light of this discovery, Elmer closed the bank account and sent his son Bobby to retrieve certain

pieces of farm equipment from Gary's property.

¶ 8 The trusts of Elmer Hemminghaus and Betty Hemminghaus filed a replevin complaint against Gary and his wife, Sheila. In the replevin suit, the trusts claimed that Gary was wrongfully withholding farm equipment worth \$167,300.

¶ 9 Gary and Sheila filed a counterclaim alleging that farm equipment and cash totaling \$1,351,975 rightfully belonged to them.

¶ 10 The trusts filed a motion for leave to file an amended complaint on June 14, 2012. The proposed amended complaint contained the original count filed on behalf of the trusts, and an additional monetary conversion count filed by Elmer Hemminghaus, individually. Elmer sought an order awarding him \$39,347 that he claimed Gary wrongly removed from the joint farm bank account. The court set the hearing on this motion for July 23, 2012. Following that hearing, the court entered an order, but that order contained no ruling on the motion for leave to amend. At oral argument, Elmer's attorney advised this court that the trial court never ruled on this motion. Nevertheless, Elmer presented his evidence on count II at trial, and the trial court ruled on this count in its judgment.

¶ 11 At the conclusion of the trial, the court denied the replevin complaint filed by the Hemminghaus trusts (count I), but partially granted the monetary conversion claim for \$7,000 from the Hemminghaus Farms bank account (count II filed by Elmer individually). The trial court also granted the counterclaim and awarded \$1,349,975 in equipment to Gary. The trial court rejected Gary's claim that he was entitled to the \$2,000 balance in the Hemminghaus Farms checking account.

¶ 12 In December 2012, Elmer and Betty Hemminghaus, as individuals, filed an untimely petition pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)), asking the trial court to void the September 19, 2012, judgment. The foundation for the motion was that Gary and Sheila did not seek to add Elmer and Betty Hemminghaus as individual counterdefendants, and that they were indispensable parties to the matters addressed in the counterclaim. Elmer and Betty argue that because they had personal ownership interest in the farm equipment and bank account that they were indispensable parties. They contend that because Gary and Sheila did not add them as parties to the counterclaim, the judgment against the trusts is void. Consequently, Elmer and Betty argue that the trial court lacked personal jurisdiction, and that the judgment entered is void. Gary and Sheila argue that they did not need to serve Elmer and Betty individually because they only sought relief from the trusts. Gary and Sheila point to Elmer's affidavit filed earlier in the case in which he attested that he and his wife revised their estate plan in 1994 with the creation of two trusts, and that farm equipment and machinery were "properly funded into said Trusts." They argued that since Elmer and Betty took the position that the trusts owned the farm equipment, they could not now contend that the trusts did not own the farm equipment.

¶ 13 Contemporaneous with their section 2-1401 petition, Elmer and Betty also filed a special and limited appearance.

¶ 14 The court denied the 2-1401 petition in late January 2013, explaining that when the case was tried, the theory advanced by Elmer and Betty was that the trusts owned all of the property at issue. In fact, Elmer testified at trial that when they created the trusts,

he believed that all property was transferred into the trusts. Subsequent to the trial, Gary and Sheila filed a motion to enforce the judgment. In response, Elmer and Janet Eyman, as Betty's attorney-in-fact, persisted in the claim that the trusts owned the property. The court noted that initially Elmer and Janet filed a notice of appeal, but later dismissed the appeal. After the time to appeal had passed, Elmer and Betty, via the special and limited appearance, filed the section 2-1401 petition alleging that they owned the property personally. The court denied the motion to vacate stating:

"The position of the 1401 Motion was filed after all evidence and proofs.

The claim that Elmer Hemminghaus is now the proper owner is contradictory to the admissions by [Elmer's attorney] and the Plaintiffs. To allow the 1401 Motion will allow a second bite at the apple and a totally inconsistent theory of the case."

¶ 15 Elmer and Betty filed a motion to reconsider that order. In that motion, they claimed that they were indispensable parties to that litigation because they each had a material interest in the subject matter of the litigation. This "material interest" stemmed from Gary's claim that he and Elmer had an oral contract or understanding regarding the farm equipment in 1991. They argued that the trial court's order denying their section 2-1401 petition was wrong because the court focused on the ownership of the property rather than their status as indispensable parties. They explained that the determinative issue in their motion to vacate was whether the court had jurisdiction to enter the original order. The trial court denied the motion to reconsider on April 18, 2013. Elmer and Betty Hemminghaus appeal.

¶ 16

LAW AND ANALYSIS

¶ 17 A court can declare that a judgment is void at any time during court proceedings. *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 105, 776 N.E.2d 195, 202 (2002). If the court lacks jurisdiction over the parties, any subsequent order or judgment is void and the parties can collaterally attack the judgment. *In re Marriage of Mitchell*, 181 Ill. 2d 169, 174, 692 N.E.2d 281, 284 (1998).

¶ 18 Indispensable parties to an action must be joined, and if not joined and a judgment is entered against the indispensable parties, the judgment is null and void. *Lakeview Trust & Savings Bank v. Estrada*, 134 Ill. App. 3d 792, 811, 480 N.E.2d 1312, 1326 (1985). The legal question of whether a party is "necessary" stems from whether the party is legally or beneficially interested in the subject matter and whether the party would be affected by the court's ruling. *Holzer v. Motorola Lighting, Inc.*, 295 Ill. App. 3d 963, 970, 693 N.E.2d 446, 452 (1998). A party is indispensable if the party needs to protect an interest and the judgment would materially affect that interest, if the party must protect those persons who are before the court, or if the court requires the presence of these parties in order to completely resolve the controversy. *Id.*

¶ 19 Elmer and Betty claim that Gary made them indispensable parties by alleging that Elmer orally agreed to give Gary the property in 1991.

¶ 20 Gary and Sheila contend that Elmer and Betty filed pleadings in the case that went beyond contesting jurisdiction. Elmer filed a sworn affidavit in the case in which he claimed that the trusts owned the farm equipment. He also appeared in court on nine

occasions. Additionally, Elmer filed his own count in the amended complaint for monetary conversion and presented this argument at trial.

¶ 21 Once a party appears in court and submits to the court's jurisdiction, whether or not there is any service of process becomes moot. *In re Marriage of Gorman*, 284 Ill. App. 3d 171, 178, 671 N.E.2d 819, 824 (1996). After the litigant takes action, unless that action is for the sole purpose of objecting to personal jurisdiction, courts construe his or her appearance as a general appearance. *Id.* at 179, 671 N.E.2d at 825.

¶ 22 Elmer's attorney argues that because the trial court failed to grant the motion for leave to amend the complaint adding his individual count, Elmer did not submit to the court's jurisdiction. We disagree with this argument. While there is no written order granting Elmer's motion to amend, Elmer and the court proceeded as if the amended complaint was filed. Furthermore, Elmer filed an affidavit in this case to accompany the trusts' response to a summary judgment motion filed by Gary. The affidavit was filed by Elmer individually, and not in his capacity as the trustee. Elmer made several personal declarations regarding the facts of this case, including his intent that beginning in 1994, he moved all farm equipment into the trusts. Elmer presented evidence at trial on his personal monetary conversion claim and the court acted upon the claim, ruling in Elmer's favor. We conclude that Elmer waived his argument that the trial court lacked jurisdiction over him because of his participation in the underlying case.

¶ 23 There is nothing in the record supporting Betty's personal ownership of any farm equipment. Most documents list Hemminghaus Farms or Gary Hemminghaus as the purchaser of the equipment. No titles are included in the record. Gary and Sheila took

all depreciation income tax deductions. The record does not contain a copy of the 1994 trust. Without this document, the courts are not able to verify that the farm equipment was ever in Betty's trust. We find no support for the claim that it was necessary for Gary and Sheila to have joined Betty as a party to this case.

¶ 24

CONCLUSION

¶ 25 Elmer waived jurisdiction and cannot now claim that the judgment is void. The record does not support the claim that Betty is an indispensable party. Accordingly, we find that the underlying judgment is not void.

¶ 26 For the foregoing reasons, we affirm the judgment of the Bond County circuit court.

¶ 27 Affirmed.