2015 IL App (1st) 14-0113-U

THIRD DIVISION
August 19, 2015

No. 1-14-0113

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

JAMES MAHONEY, Plaintiff-Appellee, v. KARI BLUNDA, as Trustee of the Mahoney & Associates Trust, under Trust Agreement dated May 6, 1996, and THE MAHONEY & ASSOCIATES TRUST, Defendants-Appellants.	)	Appeal from the Circuit Court of Cook County. No. 11 CH 41789 The Honorable Rodolfo Garcia, Judge presiding.
JUNE MAHONEY, Third-Party Plaintiff-Appellee, v. KARI BLUNDA, in her individual capacity and in her capacity as Trustee of the Mahoney & Associates Trust, under Trust Agreement dated May 6, 1996, and THE MAHONEY & ASSOCIATES TRUST, CLINTON MAHONEY, and JAMES MAHONEY, Third-Party Defendants-Appellants.	)	Appeal from the Circuit Court of Cook County. No. 11 CH 41789 The Honorable Rodolfo Garcia, Judge presiding.

KARI BLUNDA, as Trustee of the Mahoney & Associates Trust, under Trust Agreement dated May 6, 1996, and THE MAHONEY & ASSOCIATES TRUST,	)	Appeal from the Circuit Court Cook County.
Counterplaintiffs-Appellants,	)	
237 EAST ONTARIO LLC,	)	
Third-Party Plaintiff-Appellant,	)	
v.	)	No. 11 CH 41789
JAMES MAHONEY, JUNE MAHONEY,	)	
Counterdefendants-Appellees,	)	
JOHN MAHONEY,	)	The Honorable Rodolfo Garcia,
Third-Party Defendant-Appellee.	)	Judge presiding.

JUSTICE LAVIN delivered the judgment of the court.
Justices Pucinski and Mason concurred in the judgment.

ORDER

¶ 1 *Held*: The doctrine of *res judicata* precluded appellants' claims for tortious interference of contract and business expectancy based on an earlier bankruptcy court order. Appellants' claims were also insufficiently pled. This court affirmed the decision of the trial court.

¶ 2 Appellants Kari Blunda, the former trustee of Mahoney & Associates Trust (Trust), the Trust, and 237 East Ontario LLC (Appellants), have filed this interlocutory appeal challenging the dismissal of their countersuit and third-party complaint against James, June, and John Mahoney (Appellees). Appellants argue the trial court erred in finding their complaint was barred by *res judicata* based on a prior bankruptcy ruling and that Kari/the Trust did not have standing to bring the claims. Appellants also contend their third-party complaint and counterclaim sufficiently stated claims of tortious interference with a contract and business expectancy. Finally, they assert the court erred in dismissing their claims without granting them leave to amend.

¶ 3 BACKGROUND

¶ 4 This appeal stems from a rather involved history of family litigation over money. As stated in our prior order (See *Mahoney v. Blunda*, 2015 IL App (1st) 141649-U (unpublished order under Supreme Court Rule 23)), it has led to a former husband (James) suing his former wife (Kari); a child (Clinton) suing his parents (James and Kari); a grandmother (June) suing her son, former daughter-in-law (Kari), and grandchild (Clinton); and bankruptcy proceedings, among other lawsuits. Currently, there are three other appeals pending in this court involving the present case or relating to the parties in litigation (Nos. 1-15-0308, 1-15-0181, and 1-14-3198). We dismissed the last interlocutory appeal, filed by the Trust and the now acting trustee (Clinton), for lack of jurisdiction.[1] See *Mahoney*, 2015 IL App (1st) 14-1649-U (unpublished order under Supreme Court Rule 23). This case comes to us on interlocutory appeal after the trial court found, pursuant to Supreme Court Rule 304(a) (eff. Feb. 26, 2010), that there was no just reason to delay the appeal. For the reasons stated, we affirm the trial court.

¶ 5 The facts reveal in relevant part that when married, James and Kari established Mahoney & Associates Trust (Trust). A Trust-owned LLC borrowed Trust money to buy 237 East Ontario (Real Property). The business entity 237 East Ontario LLC (237 LLC) eventually succeeded the aforementioned LLC, thus acquiring the Real Property. Kari is the current manager of 237 LLC. Litigation over the Real Property ensued in 2009, but the parties (James, Kari, 237 LLC, the Trust, and the tenant production company) eventually signed a five-page handwritten, court-approved document (Mediation Agreement). Under the Mediation Agreement, 237 LLC had

[1] In a footnote, Appellants assert that the Trust was extinguished in February 2014 when Kari resigned as trustee, appointing Clinton instead. Appellants argue a trust cannot survive when the sole trustee is also the beneficiary. Appellants did not raise this issue before the trial court and have not developed an argument as to how this affects the current appeal. See *Jones v. Chicago HMO Ltd. of Illinois*, 191 Ill. 2d 278, 306 (2000) (issues raised for the first time on appeal are waived); *Law Offices of Nye and Associates, Ltd. v. Boado*, 2012 IL App (2d) 110804, ¶ 24 (an appellant who fails to present cogent arguments supported by authority forfeits those contentions on appeal). Regardless, it seems contrary to their position since Clinton as trustee filed the last appeal and the Trust is currently an appellant. See *Mahoney*, 2015 IL App (1st) 14-1649-U (unpublished order under Supreme Court Rule 23).

"sole discretion" to lease or sell the Real Property. James and Kari agreed to each pay James' mother, June, $300,000 for June's previous loan. This would occur when the Trust, in turn, repaid James and Kari for their loan (a $1.6-million loan from 1996) and "upon the sale of the property at 237 East Ontario." James resigned as cotrustee of the Trust, leaving Kari as sole trustee.

¶ 6 Thereafter, John (James' brother) asked Kari to record a lien against the Real Property in June's favor. Kari refused, and on January 6, 2011, apparently at John's behest and in concert with James, June recorded the Mediation Agreement with the Cook County recorder of deeds, along with a legal description of the Real Property, so as to "give notice of her interest in the proceeds of any sale" of the Real Property.

¶ 7 237 LLC subsequently filed for Chapter 11 bankruptcy. During bankruptcy, 237 LLC filed a complaint in an adversary proceeding for slander of title, to quiet title, and for aiding and abetting tortious conduct against James, June, and John, among others. 237 LLC asserted that recording the Mediation Agreement was an encumbrance to the Real Property, which interfered with 237 LLC's ability to obtain a $2-million loan to redevelop the property and, in turn, to secure tenants for the Real Property. The recording allegedly also led to the bankruptcy, as 237 LLC apparently had no alternative funding or buying options. The bankruptcy court granted the motions to dismiss of June and John, holding "the complaint fails to state a claim for slander of title because the plaintiff has not alleged facts plausibly suggesting a falsity," since the "debtor [237 LLC] essentially concedes there is nothing false about the mediation agreement itself."[2] The court further noted the Mediation Agreement did not purport to create any ownership or lien

[2] At the hearing on the adversary proceeding, there was some discussion about whether the causes of action were core or non-core; regardless, the record suggests the parties consented to the judgment. See 28 U.S.C.A. § 157(c)(2) (West 2012). The Appellants do not now argue the bankruptcy court, itself, was not a court of competent jurisdiction with the authority to enter a final judgment.

rights in the Real Property or call into question 237 LLC's title. Based on the facts alleged, the Mediation Agreement similarly could not constitute a cloud on title (for a quiet title action). In 2012, the Real Property was sold for $7 million, which garnered the Trust between $3.4 and $4.3 million.

¶ 8 Presently, litigation continues in the circuit court over previous loans and the Mediation Agreement. Relevant to this appeal, in December 2012, Kari and the Trust filed a countercomplaint, and 237 LLC filed a third-party complaint in the circuit court against James, June, and John, raising the same allegations as in the adversary proceeding before the bankruptcy court, only under the guise new causes of action, including tortious interference with a contract and with a business expectancy.[3] In response, James filed a motion to dismiss under section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2012)). June and John did the same. Collectively, the Appellees argued the claims were barred by *res judicata* and insufficiently pled. In addition, they argued Kari and the Trust lacked standing to bring claims on behalf of 237 LLC.

¶ 9 Following a hearing with argument, the circuit court granted the motions to dismiss for the aforementioned reasons. This interlocutory appeal followed.

¶ 10 ANALYSIS

¶ 11 A section 2-615 motion poses the question of whether the complaint states a cause of action upon which relief can be granted. *Prime Leasing, Inc. v. Kendig*, 332 Ill. App. 3d 300, 307 (2002). A section 2-619 motion, on the other hand, raises certain defects or defenses defeating the claim and questions whether defendant is entitled to judgment as a matter of law. *Id*.; see also *Ball v. County of Cook*, 385 Ill. App. 3d 103, 107 (2008). Because the resolution of

[3] Appellants also complained that appellees breached their implied duty of good faith and fair dealing, but Appellants do not now advance any argument regarding those counts. *Marzouki v. Nagar-Marzouki*, 2014 IL App 1st 132841, ¶ 12 (arguments not properly raised on appeal are waived).

either motion involves a question of law, the standard of review is *de novo*. *Prime Leasing, Inc*, 332 Ill. App. 3d at 307.

¶ 12 Appellants first argue the court erred in holding the counterclaim and 237 LLC's complaint were barred by *res judicata*. See 735 ILCS 5/2-619(a)(4) (West 2012). *Res judicata* bars a subsequent action if (1) a final judgment on the merits was rendered by a court of competent jurisdiction, (2) there is an identity of parties or their privies, and (3) there is an identity of cause of action. *Cooney v. Rossiter*, 2012 IL 113227, ¶ 18; *Matejczyk v. City of Chicago*, 397 Ill. App. 3d 1, 3 (2009); see also *Cabrera v. First National Bank of Wheaton*, 324 Ill. App. 3d 85, 92 (2001) (noting federal and state *res judicata* principles are substantially similar and federal law is relevant where the integrity of a bankruptcy judgment is at issue). The doctrine applies to all matters that were actually decided in the original action, and to matters that could have been decided. *Cooney*, 2012 IL 113227, ¶ 18. Appellants challenge only the first requirement of *res judicata* and argue there was no final judgment by the bankruptcy court. *Id*.

¶ 13 The facts show that when the bankruptcy court dismissed 237 LLC's adversary complaint, the court stated it intended to dismiss the claims with prejudice since it was "hard to imagine any other facts that could have been alleged in this unpleasant family dispute." The court stated that it would nonetheless entertain "some sort of motion to amend or change" its ruling by 237 LLC. The court subsequently entered a written order on July 19, 2012, stating 237 LLC had 14 days to file a motion to amend the complaint, but if one was not filed within that time, or if the court denied the motion, the dismissal of the claims would be with prejudice. Exactly 14 days later, on August 2, 2012, at 6:02pm 237 LLC filed a notice of appeal from the order, even though there was no apparent basis for appellate jurisdiction since the order had not

yet become final due to the 14-day period not having expired and there was no leave of court for appealing an interlocutory order (the counts relating to James were not resolved). See 28 U.S.C. § 158 (West 2012) (allowing appeals from final orders or when leave of court granted on interlocutory orders). Curiously, on August 2, 2012, at 6:15pm, 237 LLC also filed a motion for leave to file an amended complaint with the same allegations as initially alleged. However, with the notice of appeal on file, the bankruptcy court was stripped of jurisdiction to consider the motion for leave to amend. See *In re Statistical Tabulating Corp., Inc.*, 60 F.3d 1286, 1289 (7th Cir.1995). On October 15, 2012, 237 LLC voluntarily dismissed its appeal without prejudice. About a month later, 237 LLC voluntarily dismissed its entire adversary action, claiming it was also doing so "without prejudice."

¶ 14 The above facts reveal that 237 LLC (and Kari as its manager) already brought an adversary action challenging the recordation of the Mediation Agreement. See *In re S.N.A. Nut Co.*, 215 B.R. 1004, 1009 (1997) (*res judicata* generally applied where a prior contested matter or adversary proceeding, arising under Chapter 11, provided an opportunity to litigate a claim). Thus, all the current claims now raised were brought or could have been brought in that action. The adversary action was dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim, and such a dismissal order is considered a "judgment on the merits." See *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n. 3 (1981); *Stewart v. U.S. Bancorp*, 297 F. 3d 953, 957 (9th Cir. 2002) (same); *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 303 (1998) (same); see also Fed. R. Civ. P. 41(b), stating, "Unless the dismissal order states otherwise, a dismissal *** except one for lack of jurisdiction, improper venue, or failure to join a party *** operates as an adjudication on the merits."); Ill. S. Ct. R. 273 (same).

Indeed, the effect of a dismissal order is determined by its substance and not by the incantation of any particular magic words. *Matejczyk*, 397 Ill. App. 3d at 5.

¶ 15 Appellants nonetheless hang their hat on the fact that the July 19 written dismissal order permitted them leave to amend their action. They claim they filed their proposed amended complaint, but it was never ruled upon. We find this contention disingenuous for several reasons. First, their amended complaint was not meaningfully different from the initial complaint. The bankruptcy court had emphasized it was hard to imagine any other facts that could have been alleged to support the asserted counts, and 237 LLC lent credence to this thought by filing a proposed amended complaint that was effectively the same as the initial complaint. This was for all intents and purposes a "ghost" filing or empty vehicle. Second, 237 LLC filed its notice of appeal *before* the proposed amended complaint, thus divesting the bankruptcy court of authority to consider any proposed amendment. When 237 LLC later voluntarily dismissed its appeal, it did not refile its motion to amend the complaint. Even if it did refile that motion, 237 voluntarily dismissed its adversary action before the court could render a final ruling on the motion most assuredly to avoid an unfavorable ruling. 237 LLC therefore abandoned its right to proceed with the action. See *Doe v. Gleicher*, 393 Ill. App. 3d 31, 36 (2009) (dismissed claims that are not repled are abandoned). For the reasons stated, there was not a proper amended complaint filed within 14 days, and the bankruptcy court's judgment therefore became final on the merits. *Briehler v. City of Miami*, 926 F. 2d 1001, 1002 (11th Cir. 1991) (where an order dismisses a complaint with leave to amend within a specified period, the order becomes final when the time period allowed for amendment expires); see also *Little Caesar Enterprises, Inc. v. Smith*, 916 F.Supp. 662, 664 (E.D. Mich. 1996) (a "final judgment" is a decision on a cognizable claim for relief which ultimately disposes of that individual claim); *cf.*

Hernandez v. Pritikin, 2012 IL 113054, ¶¶ 46-47 (where judge granted leave to file amended complaint but there was no language suggesting a final ruling was rendered or a dismissal with prejudice). This conclusion is consistent with the entire context in which the court's July order was entered, including the court's oral pronouncements. See *Kiefer v. Rust-Oleum Corp.*, 394 Ill. App. 3d 485, 494 (2009) (court orders must be interpreted in context, with reference to record, pleadings, motions, and arguments, and also construed in a reasonable manner to give effect to trial court's intent). To rule otherwise would encourage parties to circumvent court rulings or undermine the court's authority.

¶ 16 In addition, underlying Appellants' adversary action and their current claims is the representation that the Mediation Agreement somehow created a lien or encumbrance on the Real Property. However, the bankruptcy court, months before the adversary action, agreed with 237 LLC that the Mediation Agreement did not "give June a right to be paid by the debtor [237 LLC]" and disallowed her creditor claim. On October 2, 2012, the bankruptcy court similarly held "There is nothing in the mediation agreement that even remotely suggests that the debtor [237 LLC] intended to grant a security interest in the property to James or anyone else." The court added, "on the merits, it is clear under Illinois law that the mediation agreement creates no security interest or lien of any kind in the property." That holding itself can serve as a bar to the present suit.

¶ 17 Appellants counter that the confirmation plan specifically reserved 237 LLC's right to maintain slander of title litigation and this justifies the present suit, but their cited authority, *D & K Properties Crystal Lake v. Mutual Life Insurance Co. of New York*, 112 F.3d 257 (7th Cir. 1997), does not support their contention. There, the court held that even if the bankruptcy confirmation plan had properly reserved the debtor's breach of contract action (which the plan

did not), that action was still barred by *res judicata* based on an earlier bankruptcy order and where the debtor had a right at that earlier time to pursue the claim. *Id*. at 262, n. 4. If anything, *D & K Properties Crystal Lake* indicates that an earlier bankruptcy order may trump any contradictory reservation in a confirmation plan. In short, the case that Appellants principally rely on does not support their contention that *res judicata* does not apply here due to the confirmation plan. See Ill. S. Ct. Rule 341(h)(7) (eff. Feb. 6, 2013) (appellants must set forth contentions on appeal and the reasons therefor, with citation to authority); *Cimino v. Sublette*, 2015 IL App (1st) 133373, ¶ 3 (this court is not a repository for an appellant to foist burden of argument and research).

¶ 18 The doctrine of *res judicata* should be only applied as fairness and justice require. It also prevents a party from being unjustly burdened from having to relitigate the same case. *Cooney*, 2012 IL 113227, ¶ 35; see also *Matrix IV, Inc. v. American National Bank & Trust Co. of Chicago*, 649 F.3d 539, 547 (7th Cir. 2011). For those policy reasons and the reasons already stated, we conclude *res judicata* bars the present action. As the Illinois supreme court aptly stated, "We will not circumvent the purpose of the doctrine of *res judicata* by permitting plaintiffs to pursue their state claims after bringing a claim arising out of the same operative facts against defendant in federal court." *Cooney*, 2012 IL 113227, ¶ 35.

¶ 19 Even if we were to find *res judicata* inapplicable in this case, we agree with the trial court that appellants' complaint failed to sufficiently plead causes of action sufficient to withstand a motion to dismiss. See See *Ranjha v. BJBP Properties, Inc.*, 2013 IL App (1st) 122155, ¶ 9. The elements of the alleged tortious interference with a contract include (1) the existence of a valid and enforceable contract; (2) defendant's knowledge of the existing contract between plaintiff and a third person; (3) defendant's intentional and malicious inducement of the breach;

(4) a subsequent breach by a third person; and (5) damages. *Kraft Chemical Company v. Illinois Bell Telephone Co.,* 240 Ill. App. 3d 192, 198 (1992). The elements of tortious interference with business expectancy are similar, but less stringent; it requires that the plaintiff reasonably expect to enter into a valid business relationship, that the defendant know about this expectancy and purposefully interfere with it, and that the plaintiff suffer damages as a result. *Soderlund Bros., Inc. v. Carrier Corp.*, 278 Ill. App. 3d 606, 615 (1995).

¶ 20 Regarding the first element, as the trial court noted, the Mediation Agreement was recorded before appellants entered into any proposed loan agreement to redevelop the Real Property or tenant contract and thus the recording could not qualify as intentional tortious interference with a contract or business expectancy that did not yet exist. See *Kraft Chemical Company,* 240 Ill. App. 3d at 198 (to establish the existence of a contract, the pleader must allege facts indicating offer, acceptance, and consideration). In addition, something more than merely rendering a contract more burdensome is needed. *George A. Fuller Co. v. Chicago College of George A. Fuller Co.,* 719 F.2d 1326, 1331 (1983); *cf. Scholwin v. Johnson*, 147 Ill. App. 3d 598, 608 (1986) (cause of action encompasses the situation in which the defendant prevents the plaintiff from performing the contract). Regarding the element requiring inducement to breach and interference, Appellants failed to sufficiently plead that June, John or James actually interfered with any third-party contract or business expectancy, as their conduct was not specifically directed at the prospective lender. See *DuPage Aviation Corporation v. DuPage Airport Authority*, 229 Ill. App. 3d 793, 803 (1992) (Illinois courts require that a tortious interference claim be supported by allegations that the defendant acted toward a third party); see also *Kraft Chemical Company*, 240 Ill. App. 3d at 198 (same); *Mitchell v. Weiger*, 87 Ill. App 3d 302, 305 (1980) (complaint insufficient where no allegation that defendants made any false or

malicious statement to third party to induce a breach of contract); *cf. Scholwin*, 147 Ill. App. 3d at 608 (*supra*). Moreover, as the trial court noted, appellants cite no law "that imposes an affirmative duty on a person to take action to release such a recordation." We again observe that the bankruptcy court previously held the Mediation Agreement did not create a lien or encumbrance on the property, and this conclusion was clear from the plain language of the Mediation Agreement. See *Soderlund Bros., Inc. v. Carrier Corp.*, 278 Ill. App. 3d at 620 (1995) (there is no liability for interference with a prospective contractual relation on the part of one who merely gives truthful information to another). Thus, the notion that it was the recording of the Mediation Agreement that ruined 237 LLC's development or sales opportunity is tenuous at best and not persuasive. See *Mitchell*, 87 Ill. App. 3d at 305 (noting the acts aimed at third parties must actually *cause* those parties to breach the contract held by the plaintiff). Even taking the facts of the complaint in a light most favorable to Appellants, they were insufficient to support the stated causes of action. See *Kraft Chemical Company*, 240 Ill. App. 3d at 196.

¶ 21 Having held that the issue raised is *res judicata* and cannot withstand a motion to dismiss, we need not address whether Kari had standing to raise the claim on behalf of the Trust. We also need not address Appellants' contention that they should have been granted leave to amend their pleadings, especially when they did not ask for leave to amend below. See *Harlin v. Sears Roebuck and Co.*, 369 Ill. App. 3d 27, 37 (2006) (applying waiver).

¶ 22 CONCLUSION

¶ 23 For the reasons stated, we affirm the dismissal of Kari's counterclaim and 237 LLC's third-party complaint.

¶ 24 Affirmed.