2015 IL App (1st) 141159-U

No. 1-14-1159

Fourth Division
June 30, 2015

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

VIRGINIA HALL,	)	
	)	
Plaintiff,	)	Appeal from the Circuit Court of
	)	Cook County.
v.	)	
	)	
MILAN KANGRGA and BISTRA KANGRGA,	)	
	)	
	)	
Defendants,	)	Trial No. 11 L 65036
----------	)	
MILAN KANGRGA and BISTRA KANGRGA,	)	
	)	
	)	
Third-Party Plaintiffs-Appellants,	)	
	)	Honorable Rita M. Novak,
v.	)	Judge, presiding.
	)	
BLAZO GJOREV, ELISABETA KRAPEVSKA, ROBERT A. HALL, and BISHOP & LAFORTE, LTD.,	)	
	)	
	)	
Third-Party Defendants-Appellees.	)	

JUSTICE COBBS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Ellis concurred in the judgment.

¶ 1 **O R D E R**

¶ 2 *Held*: The circuit court did not err in granting summary judgment on an equitable contribution claim in favor of third-party defendants where third-party plaintiffs did not allege that they had paid an amount in excess of their *pro rata* share.

¶ 3 This appeal stems from an action to recover on three promissory notes payable to Virginia M. Hall, which were executed by Milan Kangrgra and Bistra Kangrga (Third-Party Plaintiffs) and Blazo Gjorev and Elisabeta Krapevska (Third-Party Defendants)[1], as co-obligors. Following the co-obligors' failure to make payments on the notes, Hall filed a complaint against the third-party plaintiffs who filed a third-party complaint for equitable contribution against third-party defendants. Thereafter, the circuit court granted summary judgment in favor of Hall and entered a judgment against third-party plaintiffs for $135,500, with an additional $27,800 against Bistra Kangrga, plus interest and costs. Subsequently, the court entered summary judgment against third-party plaintiffs on their third-party contribution claim. Third-party plaintiffs seek reversal of the judgment, asserting that the trial court erred when it determined that they could not establish all the elements of a contribution claim because they alleged no facts demonstrating they actually paid an amount in excess of their *pro rata* share to Hall. In the alternative, third-party plaintiffs request that this court vacate the judgment and dismiss the case without prejudice. For the reasons that follow, we affirm the trial court and deny the request to vacate the judgment.

¶ 4 BACKGROUND

¶ 5 The three promissory notes at issue were executed to guarantee financing of a joint venture. Each promissory note stated that "the undersigned promise to pay to the order of Virginia M. Hall the principal sum *** and interest from the date hereof" and then dictated the amount owed, the interest rate, and the repayment schedule. The first note for $50,000 was

[1] Although Robert A. Hall and Bishop & Laforte, LTD were named as third-party defendants, they are not parties to this appeal. Accordingly, our reference to "third-party defendants" in this order refers only to Blazo Gjorev and Elisabeta Krapevska.

executed on November 27, 2009. The second note for $20,000 was executed on December 4, 2009.[2] On February 23, 2010, the co-obligors executed a third and final promissory note for $50,000. After they defaulted on their repayment, Hall filed a complaint against third-party plaintiffs, but did not name third-party defendants in the action.

¶ 6 On September 26, 2012, third-party plaintiffs filed a third-party complaint for equitable contribution against third-party defendants. In response, third-party defendants filed a motion to dismiss arguing that third-party plaintiffs must allege payment of the joint debt before a contribution claim can be made. The trial court denied the motion to dismiss stating that "a defendant does not have to wait until his liability had been determined, or until he has paid the plaintiff in whole or in part for the plaintiff's damages" to bring a third-party complaint.

¶ 7 Thereafter, on January 2, 2013, Hall filed a motion for summary judgment on the underlying complaint. Finding that there were no genuine issues of material fact, the court granted the motion and entered a judgment against third-party plaintiffs for the amount of $134,500 plus interest and costs. An additional judgment of $27,800 was entered against Milan Kangrga. Subsequently, the order was amended to award Hall attorney fees and interest on the promissory notes and to amend the order to reflect that the $27,800 judgment was against Bistra, and not Milan Kangrga.

¶ 8 Subsequent to the resolution of the underlying case, the third-party action for equitable contribution was transferred to the Chancery Division and third-party defendants filed a motion for summary judgment. On October 10, 2013, the court granted that motion in favor of third-party defendants, finding that, although there was a judgment against third-party plaintiffs, their complaint did not allege that they had actually paid more than their *pro rata* share of the debt owed to Hall, an essential element of a contribution claim.

[2] Milan Kangrga did not sign the December 4, 2009 promissory note for $20,000.

¶ 9 Third-party plaintiffs filed a motion to reconsider on November 12, 2013, arguing that Illinois law does not require that a judgment be paid before a party can bring a third-party action and, thus, payment was not necessary for an equitable contribution claim. They requested, in the alternative, that the order be amended so that the case is dismissed without prejudice. The court later denied that motion on March 17, 2014, and third-party plaintiffs filed this appeal on April 16, 2014.

¶ 10 ANALYSIS

¶ 11 As an initial matter, we address third-party defendants' argument that this court does not have jurisdiction to hear this appeal because it is untimely. Specifically, third-party defendants assert that because third-party plaintiffs' post-trial motion included argument that did not attack the final judgment, it did not toll the time for appeal. Thus, they argue, the appeal must have been filed within 30 days of the final judgment that was entered on October 10, 2014.

¶ 12 An appeal from the circuit court must be filed within 30 days of a final judgment, or, if a post-trial motion is timely filed, within 30 days of the disposition of the post-trial motion. Ill. S. Ct. R. 303(a)(1) (eff. June 4, 2008). Similarly, a post-trial motion must be filed within 30 days of the final judgment. 735 ILCS 5/2-1203. Here, the final judgment was entered on October 10, 2013, and the motion for reconsideration was filed within 30 days, on November 12, 2013. That motion was denied on March 17, 2014, from which third-party plaintiffs appealed on April 16, 2014.

¶ 13 A motion to reconsider must attack the final judgment. IL. S. Ct. Rule 303(a)(1); See also *Atlas Galleries, Inc. v. Heller*, 2013 IL App (1st) 113405, ¶ ¶ 15-16. " 'The purpose of a motion to reconsider is to bring to the trial court's attention (1) newly discovered evidence not available at the time of the hearing, (2) changes in the law, or (3) errors in the court's previous application

of existing law.' " *Simmons v. Reichardt*, 406 Ill. App. 3d 317, 324 (2010) (quoting *Stringer v. Packaging Corp. of America*, 351 Ill. App. 3d 1135, 1140 (2004)).

¶ 14 Here, in their motion to reconsider, third-party plaintiffs argued that Illinois law does not require payment to make a contribution claim and, in the alternative, requested that the court amend the order granting summary judgment to dismiss the complaint without prejudice. We agree with third-party defendants that the request for the court to amend the final order to be without prejudice does not introduce new facts, assert an error in the application of existing law, cite to new law, or attack the final judgment. Consequently, that argument is improper in a motion to reconsider. However, third-party plaintiffs also sought vacation of the judgment, arguing that the court erred when it determined that actual payment in excess of its *pro rata* share was necessary to bring a contribution claim. Therefore, the motion contained proper argument, which tolled the time for appeal, and we have jurisdiction to review this case. However, as discussed below, we find that the third-party plaintiffs' request to modify the order granting summary judgment to be without prejudice was an improper argument in a motion to reconsider and is also an improper argument on appeal.

¶ 15 Summary Judgment

¶ 16 A trial court's grant of summary judgment is reviewed *de novo*. *JPMorgan Chase Bank, N.A. v. Earth Foods, Inc.*, 238 Ill. 2d 455, 461 (2010). Summary judgment is appropriate only when the "pleadings, affidavits, depositions and admissions of record, viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008); 735 ILCS 5/2–1005(c) (West 2012). Summary judgment is a "drastic measure," and should only be granted when the right of the moving party is free from doubt.

King v. NLSB, 313 Ill. App. 3d 963, 965 (2000). However, it is also an appropriate tool to facilitate the expeditious disposition of a lawsuit. *Adams v. N. Illinois Gas Co.*, 211 Ill. 2d 32, 43 (2004). "To survive a motion for summary judgment, the nonmoving party must present a factual basis that would arguably entitle her to a judgment in her favor." *Hussung v. Patel*, 369 Ill. App. 3d 924, 931 (2007) (citing *Sunderman v. Agarwal*, 322 Ill. App. 3d 900, 902 (2001)). If facts are not alleged regarding each element of the cause of action, summary judgment is proper. *Id.*

¶ 17 Third-party plaintiffs contend that the court erred in granting summary judgment in favor of third-party defendants. Specifically, they argue that the court erred by denying that third-party plaintiffs were entitled to seek equitable contribution from third-party defendants, who were co-obligors of the notes. Third-party plaintiffs assert that a judgment does not need to be paid or satisfied before a party can bring a third-party action against a co-obligor for contribution. Third-party defendants respond that Illinois law requires that a judgment first be paid before a co-obligor can bring an action for contribution against another co-obligor.

¶ 18 The right of contribution "rests upon the principle that, where all are equally liable for the payment of a debt, all are bound equally to contribute to that purpose." *Sledge v. Dobbs*, 254 Ill. 130, 133-34 (1912). Courts have long recognized that a right of contribution is based in equity and that where "one has discharged a debt or obligation which others were equally bound with him to discharge and has thus removed the common burden, the others who have received an equal benefit ought in conscience to refund to him a ratable proportion." *Siegel v. Fish*, 129 Ill. App. 319, 323 (1906) (quoting A. & E. Encyc. of L., 2nd ed., vol. 7, p. 326). A common law contribution claim "arises due to the compulsory payment by a joint obligor of more than his share of a common obligation." *Ruggio v. Ditkowsky*, 147 Ill. App. 3d 638, 642 (1986). See also *Virginia Surety Co. v. Northern Insurance Co.*, 224 Ill. 2d 550, 565-66 (2007) ("Contribution is

defined as 'the right that gives one of several persons who are liable on a common debt the ability to recover ratably from each of the others when that one person discharges the debt for the benefit of all' "(citing Black's Law Dictionary, 352-53 (8th ed. 2004)).

¶ 19 Third-party plaintiffs rely on *Parmelee v. Lawrence*, 44 Ill. 405 (1867), to assert that a party does not need to make actual payment to bring a contribution claim because it is sufficient for a party to be compelled to pay more than their *pro rata* share. In *Parmelee*, our supreme court stated that a party "will be left liable to contribution at the suit of his co-obligors if they are compelled to pay more than their *pro rata* share of the claim." *Id.* at 411. However, third-party plaintiffs misunderstand the import of *Parmelee* and take the quoted statement out of context. The main issue in *Parmelee* was whether the release of one obligor from a debt operated to release the co-obligors as well. *Id.* The court was not analyzing whether actual payment was necessary for contribution but, rather, was hypothesizing that if a party is released from a debt by the holder of a note, that party could still be liable to pay the debt in a contribution claim brought by a co-obligor if that obligor was compelled to pay more than its *pro rata* share. *Id.* Consequently, *Parmelee* does not support the third-party plaintiffs' argument.

¶ 20 It is well settled that a party must have actually paid an amount in excess of their *pro rata* share in order to request contribution from co-obligors. *Hoyt v. Lock*, 41 Ill. 119-120-21 (1866); see also *Gottschalk v. Gottschalk*, 222 Ill. Ap. 56, 59 (1921) ("Each one who pays has the right to recover from the others the amount which he has paid in excess of his own proportionate part."). *Ruggio*, 147 Ill. App. 3d at 642 (" 'Before one is entitled to contribution from his co-obligor, the evidence must disclose that he has paid more than his just proportion of the joint indebtedness and it must also disclose what that excess is.' " (quoting *Schaefer v. Dippel* 250 Ill. App. 184, 188 (1920))).

¶ 21 In the instant appeal, when third-party plaintiffs signed the promissory notes, they promised to pay Hall the principal sum borrowed as well as interest according to the delineated repayment schedule. All of the undersigned parties on the note were jointly and severally liable for the entire debt owed to Hall. 810 ILCS 5/3-116(a) ("Except as otherwise provided in the instrument, 2 or more persons who have the same liability on an instrument as makers, drawers, acceptors, indorsers who are indorsing joint payees, or anomalous indorsers are jointly and severally liable in the capacity in which they sign." *Id.*). Thus, third-party plaintiffs accepted responsibility for the entire amount of the debt, regardless of the fact that there were other co-signers of the notes. Third-party defendants accepted the same responsibility. However, Hall did not sue all of the co-signers of the notes but, instead, chose to sue just third-party plaintiffs. Although this may not comport with a general sense of fairness, it was within Hall's legal right to seek recovery from only two of the four co-obligors. In that case, a judgment was entered against third-party plaintiffs. Had third-party plaintiffs paid the judgment, they would have been in a position to pursue their claim for contribution from third-party defendants. However, it is undisputed that third-party plaintiffs had not paid any amount of the judgment, let alone more than their *pro rata* share. Therefore, they cannot demonstrate a necessary element of an equitable contribution claim. Accordingly, we affirm the trial court's grant of summary judgment in favor of third-party defendants.

¶ 22 We are mindful that the trial court denied third-party defendant's motion to dismiss on the basis that liability did not need to be established, or payment made, before third-party plaintiffs could join third-party defendants in the action. We agree that it is not necessary to have a judgment, and thus to have satisfied a judgment, before a third-party can be joined. See *Anixter Bros. Inc. v. Central Steel and Wire Co.*, 123 Ill. App. 3d 947, 953 (1984) (explaining that

Illinois law allows a third-party indemnity claim to be filed before it accrues); *Guzman v. C.R. Epperson Const. Inc.,* 196 Ill. 2d 391, 399-400 (2001). However, once a party has been joined as a third-party defendant, the third-party plaintiff must then be able to prove its claim in order to recover for contribution. Here, although third-party defendants were properly joined, third-party plaintiffs were unable to prove their claim. As a consequence, summary judgment against them was proper.

¶ 23 Modification of the Dismissal Order

¶ 24 As a final matter, third-party plaintiffs request that we vacate the order granting summary judgment and dismiss their complaint without prejudice with leave to re-file their case against third-party defendants if they paid the judgment against them. In their motion to reconsider, third-party plaintiffs made a similar request, asking the court to amend the final order so that the case would be dismissed without prejudice. Even if we were inclined to consider this request, we are constrained from granting it because we find no error in the trial court's grant of summary judgment. We know of no authority, and third-party plaintiffs point to none, which vests in this court authority to alter a judgment of the trial court in the absence of a finding of error. We note additionally that the concept of summary judgment without prejudice is not supported by the law. *Poulos v. Reda,* 165 Ill. App. 3d 793, 801-02 (1987). " 'Without prejudice' indicates that the suit is dismissed without a decision on the merits and is not conclusive of the rights of the parties. Summary judgment, on the other hand, is the procedural equivalent of a trial and is an adjudication of the claim on the merits. [Citations.]." *Id.* A trial court's grant of summary judgment that disposes of all issues between the parties is a final judgment. See *Arangold Corp. v. Zehnder,* 187 Ill. 2d 341, 358 (1999). "Under the doctrine of res judicata, a final judgment on the merits is conclusive as to the rights of the parties and their privies and constitutes an absolute

bar to a subsequent action involving the same claim, demand or cause of action as to those parties." *Poulos,* 165 Ill. App. 3d at 802 (citing *Reynolds Metals Co. v. V.J. Mattson Co.,* 125 Ill. App. 3d 554, 556 (1984)). Thus, third-party plaintiffs ask for a legal remedy that does not exist. The trial court correctly denied the request, and we are without authority to grant the relief here requested.

¶ 25 CONCLUSION

¶ 26 For the foregoing reasons, we affirm the judgment of the trial court.