2015 IL App (1st) 141644-U

FIFTH DIVISION
December 18, 2015

Nos. 1-14-1644, 1-14-2519 (Consolidated)

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 JUDICIAL DISTRICT

	)	Appeal from the
BARBARA OTTO,	)	Circuit Court of
	)	Cook County
Plaintiff-Appellant,	)	
	)	
v.	)	No. 09 L 15655
	)	
DANIEL ROZENSTAUCH and DANIEL	)	
ROZENSTAUCH & ASSOCIATES, P.C.,	)	Honorable
	)	William Gomolinski,
Defendants-Appellees.	)	Judge Presiding.

PRESIDING JUSTICE REYES delivered the judgment of the court.
Justices Gordon and Palmer concurred in the judgment.

ORDER

¶ 1 *Held*: In consolidated appeals, the appellate court held it lacked jurisdiction to hear an appeal from an order voluntarily dismissing plaintiff's legal malpractice claims without prejudice. The appellate court also held it had jurisdiction to consider the circuit court's adjudication of costs related to the dismissed lawsuit. The appellate court affirmed the circuit court's judgment for costs, ruling plaintiff forfeited any argument regarding the costs by failing to raise such arguments in her appellate brief.

¶ 2 In these consolidated appeals, plaintiff Barbara Otto (plaintiff) seeks to contest orders of

the circuit court of Cook County: (1) barring her from presenting an expert witness at the trial of her legal malpractice claim against defendants Daniel Rozenstauch and Daniel Rozenstauch & Associates, P.C. (defendants); (2) granting her motion to voluntarily dismiss her claims; and (3) ordering her to pay $198 in costs associated with the voluntary dismissal to defendants. Plaintiff contends the circuit court erred in barring her expert witness from testifying at trial. In the alternative, plaintiff argues the circuit court erred in refusing to vacate the orders barring her expert witness. For the following reasons, we dismiss appeal number 1-14-1644, and we affirm the judgment of the circuit court in appeal number 1-14-2519.

¶ 3 BACKGROUND

¶ 4 On December 22, 2009, plaintiff filed a complaint against defendants alleging legal malpractice in connection with their representation of plaintiff in her divorce. Plaintiff alleged defendants failed to: (1) file a counter-petition for dissolution of marriage; (2) adequately attack her prenuptial agreement; (3) conduct adequate discovery of her former husband's assets or depose her former stepson; (4) properly consider documents provided by plaintiff; (5) seek sufficient temporary maintenance; (6) inform her and seek her consent during settlement negotiations; and (7) obtain a financially sufficient judgment of dissolution.

¶ 5 The parties engaged in pretrial discovery. On September 27, 2012, plaintiff filed answers to interrogatories propounded pursuant to Illinois Supreme Court Rule 213(f)(3) (eff. Jan. 1, 2007). In her answers, plaintiff disclosed Lawrence S. Starkopf (Starkopf) as her expert witness on the subject of defendants' representation of plaintiff in her divorce litigation. She also disclosed Starkopf's opinions regarding defendants' alleged deviations from the standard of care they owed to plaintiff.

¶ 6 On November 19, 2012, the circuit court entered an order providing that the discovery

deposition of Starkopf would be waived if it was not completed by December 17, 2012. The circuit court, however, entered an order on December 17, 2012, directing defense counsel to appear the following day and select a date for the discovery deposition of Starkopf. On December 18, 2012, counsel for both parties agreed Starkopf would be deposed on January 15, 2013.[1] The circuit court set the case for a January 16, 2013, case management conference.

¶ 7 The circuit court, on January 16, 2013, entered an order directing that if defense counsel failed to complete the deposition of Starkopf before February 6, 2013, defendants would be barred from taking the deposition. The order added Starkopf would be deposed at the convenience of plaintiff. On February 6, 2013, the circuit court extended the deadline for conducting the Starkopf deposition to March 6, 2013.

¶ 8 In an order dated March 6, 2013, the circuit court directed plaintiff to present Starkopf for his discovery deposition before an April 10, 2013, status hearing. At the status hearing, the circuit court ordered that Starkopf would be presented for his discovery deposition by May 15, 2013. The circuit court added Starkopf would be barred as a witness if plaintiff failed to produce him for deposition. The case was subsequently continued for status on three occasions. On May 30, 2013, Plaintiff's attorney filed a motion to withdraw and substitute her expert witness, stating Starkopf was "unwilling to be involved in the case." The record contains no ruling on this motion.

¶ 9 On June 7, 2013, the circuit court entered an order of default against defendants for failure to appear and set the matter for a proveup of damages.[2] Defendants filed a motion to vacate the order of default on June 13, 2013. Following two continuances, the circuit court

[1] The December 18, 2012, order entered by the circuit court states the agreed date for the deposition was January 15, 2012, which is a typographical error.

[2] The order states that plaintiff filed a motion for default, although the motion does not appear in the record on appeal.

entered an order on July 10, 2013: (1) vacating the order of default; (2) directing plaintiff to provide defendants with a choice of four dates for the deposition of Starkopf; and (3) directing defendants to inform the court of the chosen deposition date at a July 17, 2013, status hearing.

¶ 10 The case, however, was continued to July 24, 2013, at which time the circuit court ordered that Starkopf would appear for his deposition on August 14, 2013. The circuit court also set a case management hearing for August 15, 2013. Following the hearing on August 15, 2013, the circuit court entered an order barring plaintiff from producing Starkopf as an expert witness at trial for failure to comply with prior orders of the court.

¶ 11 On August 29, 2013, plaintiff filed a motion to vacate the order entered on August 15, 2013. Plaintiff asserted that barring the expert witness in a legal malpractice case was tantamount to entering a default judgment. Accordingly, she argued, barring Starkopf from testifying was too harsh as a first sanction for failing to produce the witness. Plaintiff filed an amended motion to vacate on October 7, 2013, which was substantially similar to the initial motion to vacate. On December 17, 2013, plaintiff filed an emergency motion to extend the time for deposing Starkopf, which asserted plaintiff's counsel received three suggested deposition dates from Starkopf and the parties could agree to depose Starkopf on one of these dates. On December 18, 2013, the circuit court entered an order reiterating that Starkopf was barred from testifying as an expert witness "for the reasons stated on the record."

¶ 12 On April 17, 2014, plaintiff filed a motion to voluntarily dismiss all of her pending claims against defendants without prejudice, pursuant to section 2-1009 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1009 (West 2012)). The motion also stated plaintiff offered to pay all recoverable costs incurred by defendants related to the voluntary dismissal. See *id.*; Ill. S. Ct. R. 219(e) (eff. July 1, 2002). On April 21, 2014, the circuit court entered an order granting

plaintiff's motion to voluntarily dismiss all claims pending against defendants without prejudice. Plaintiff filed a notice of appeal to this court on May 20, 2014, appealing from the circuit court order of April 21, 2014, and prior orders barring Starkopf as an expert witness at trial. This court docketed the matter as appeal number 1-14-1644.

¶ 13 On May 30, 2014, defendants filed a motion to compel plaintiff to pay costs related to the voluntary dismissal. On July 10, 2014, the circuit court entered an order directing plaintiff to pay $198 in costs to defendants. Plaintiff filed a second notice of appeal on August 11, 2014, appealing from the orders referenced in plaintiff's first notice of appeal and also the order entered on July 10, 2014. This court docketed the matter as appeal number 1-14-2519.

¶ 14 On March 2, 2015, plaintiff filed a motion in this court to consolidate the two appeals, which we granted on March 11, 2015. After finding the defendants failed to timely file a brief pursuant to Supreme Court Rule 343(a) (eff. July 1, 2008), this court entered an order on its own motion on August 12, 2015, taking these appeals for consideration on the record and plaintiff's brief only.

¶ 15 ANALYSIS

¶ 16 On appeal, plaintiff contends the circuit court erred in barring her expert witness from testifying at trial. In the alternative, plaintiff argues the circuit court erred in refusing to vacate the orders barring her expert witness. We initially consider our jurisdiction to decide plaintiff's appeals. Although neither party challenges our jurisdiction, this court has the duty to consider the issue and dismiss an appeal where our jurisdiction is lacking. *Palmolive Tower Condominiums, LLC v. Simon*, 409 Ill. App. 3d 539, 542 (2011); *In re Marriage of Mardjetko*, 369 Ill. App. 3d 934, 935 (2007).

¶ 17 The "[j]urisdiction of appellate courts is limited to reviewing appeals from final

judgments, subject to statutory or supreme court rule exceptions." *In re Marriage of Verdung*, 126 Ill. 2d 542, 553 (1989). An appeal from a final judgment also draws into issue all prior interlocutory orders which constituted a procedural step in the progression leading to the entry of the final judgment from which an appeal has been taken. *JPMorgan Chase Bank, N.A. v. East-West Logistics, L.L.C.*, 2014 IL App (1st) 121111, ¶ 25. Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994) provides for a right of appeal from a final judgment, initiated by filing a notice of appeal. Illinois Supreme Court Rule 303(a) requires a notice of appeal to be filed within 30 days after the entry of the final judgment from which the appeal is taken. Ill. S. Ct. R. 303(a)(1) (eff. Jun. 4, 2008); *Heiden v. DNA Diagnostics Ctr., Inc.*, 396 Ill. App. 3d 135, 138 (2009). Rule 303(a)(1) also provides that if a timely posttrial motion directed against the judgment is filed, the deadline for filing a notice of appeal is then 30 days from the resolution of the last timely and proper postjudgment motion. *Id.* A notice of appeal filed before that period is ineffective. Ill. S. Ct. R. 303(a)(2) (eff. Jun. 4, 2008). See, *e.g.*, *Marsh v. Evangelical Covenant Church of Hinsdale*, 138 Ill. 2d 458, 469 (1990) (appellate court properly dismissed a premature notice of appeal for lack of jurisdiction).[3] A notice of appeal filed after that period does not confer jurisdiction on this court unless the appellant files a motion for leave to file a late notice of appeal. See *Wauconda Fire Protection District v. Stonewall Orchards, LLP*, 214 Ill. 2d 417, 427-28 (2005) (citing Mitchell v. Fiat–Allis, Inc., 158 Ill.2d 143, 148-49 (1994) (appellate court had no jurisdiction over an appeal where the appellant failed to file a motion for leave to file a late notice of appeal, after the initial 30-day period for filing notice of appeal had elapsed)).

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[3] In addition, "[w]hen a timely postjudgment motion has been filed by any party, whether in a jury case or a nonjury case, a notice of appeal filed before the entry of the order disposing of the last pending postjudgment motion, or before the final disposition of any separate claim, becomes effective when the order disposing of said motion or claim is entered." Ill. S. Ct. R. 303(a)(2) (eff. Jun. 4, 2008).

¶ 18 In these consolidated cases, plaintiff seeks to appeal from orders: (1) granting her motion to voluntarily dismiss her claims without prejudice; and (2) adjudicating the costs related to the voluntary dismissal. "An order granting a plaintiff's motion to voluntarily dismiss an action without prejudice is final and appealable by the defendant, but not by the plaintiff, except to contest an order taxing costs." *Brentine v. DaimlerChrysler Corp.*, 356 Ill. App. 3d 760, 765 (2005) (citing *Smith v. P.A.C.E.*, 323 Ill. App. 3d 1067, 1073 (2001)). A voluntary dismissal cannot be appealed by a plaintiff since he or she requested the order and is protected from prejudice by the statute of limitations that grants a plaintiff the absolute right to refile the case within one year of a voluntary dismissal without prejudice. See *Kahle v. John Deere Co.*, 104 Ill. 2d 302, 306 (1984); see 735 ILCS 5/13-217 (West 1994).[4] In contrast, "[a] judgment for costs is a money judgment enforceable by execution [citation], and is clearly appealable." *Galowich v. Beech Aircraft Corp.*, 92 Ill. 2d 157, 161 (1982). Even an appeal from an order taxing costs related to a voluntary dismissal, however, "does not vest this court with jurisdiction to review the merits of other nonfinal orders entered prior to the order granting voluntary dismissal." *Smith*, 323 Ill. App. 3d at 1073 (citing *Valdovinos v. Luna-Manalac Medical Center, Ltd.*, 307 Ill. App. 3d 528, 537 (1999)).

¶ 19 In appeal number 1-14-1644, plaintiff's notice of appeal refers to the circuit court order of April 21, 2014 (granting her motion to voluntarily dismiss all of her claims against defendants without prejudice), as well as the prior orders barring Starkopf as an expert witness at trial.[5]

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[4] This version of section 13-217 preceded the amendments of Public Act 89-7, § 15, eff. March 9, 1995. Our supreme court found Public Act 89-7 unconstitutional in its entirety in *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 467 (1997). The legislature has not subsequently amended section 13-217 of the Code. See 735 ILCS 5/13-217 (West 2012). The version of section 13-217 currently in effect is, therefore, the version that preceded the amendments of Public Act 89-7. *Hudson v. City of Chicago*, 228 Ill. 2d 462, 469 n.1 (2008).

[5] Plaintiff's notice of appeal also specified a February 18, 2014, order denying defendants'

Plaintiff cannot, however, appeal from the circuit court order of April 21, 2014, since she requested the order. See *Kahle*, 104 Ill. 2d at 306. Plaintiff is protected from prejudice by the statute of limitations which gives her the absolute right to refile the case within one year of a voluntary dismissal without prejudice. *Id*. Further, Plaintiff cannot appeal from the prior orders barring Starkopf as an expert witness at trial. See *Valdovinos*, 307 Ill. App. 3d at 538 (appellate court lacked jurisdiction to review prior interlocutory orders, because such orders were not a procedural step in granting a motion for voluntary dismissal or assessing related costs).

¶ 20 We observe in *Smith*, the court considered the plaintiff's argument that the order granting his motion to voluntarily dismiss became final and appealable one year after its entry and that, accordingly, the interlocutory orders leading up to it became appealable. *Smith*, 323 Ill. App. 3d at 1073 (discussing *S.C. Vaughan Oil Co. v. Caldwell, Troutt & Alexander*, 181 Ill. 2d 489 (1998)).[6] The *Smith* court concluded the order voluntarily dismissing the plaintiff's initial lawsuit remained nonfinal because the plaintiff timely refiled the lawsuit. *Smith*, 323 Ill. App. 3d at 1073-74.

¶ 21 In this case, the record does not indicate whether plaintiff refiled her complaint against defendants within the one-year refiling period. Nevertheless, plaintiff's May 20, 2014, notice of appeal was premature and ineffective. See, *e.g.*, *Marsh*, 138 Ill. 2d at 468-69. Assuming *arguendo* that plaintiff refiled her complaint within the refiling period, the circuit court order of

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request for sanctions against plaintiff and setting the trial to commence on April 21, 2014. Plaintiff, however, raises no issue regarding the February 18, 2014, order in her appellate brief.

[6] In *S.C. Vaughan Oil Co*., the plaintiffs' action was dismissed for want of prosecution and they never refiled the action within the one-year period granted by statute. Our supreme court ruled the dismissal order became a final judgment at the expiration of the refiling period, as the order effectively terminated the litigation between the parties and fixed their rights finally and absolutely. See *S.C. Vaughan Oil Co*., 181 Ill. 2d at 502. Although the *Smith* court did not expressly state that similar logic would apply to a voluntary dismissal without prejudice, the appellate court did apply similar logic in *Johnson v. United National Industries, Inc*., 126 Ill. App. 3d 181, 187 (1984).

April 21, 2014, granting plaintiff's motion to voluntarily dismiss would not have been the last judgment. In the alternative, if plaintiff did not refile her complaint within the one-year period, the April 21, 2014, order would have become a final judgment one year later on April 21, 2015. Plaintiff, however, did not file a notice of appeal within 30 days of the later date or a motion for leave to file a late notice of appeal. See Ill. S. Ct. R. 303 (eff. Jun. 4, 2008). Accordingly, we lack jurisdiction to decide appeal number 1-14-1644. *Wauconda Fire Protection District*, 214 Ill. 2d at 427-28.

¶ 22 In appeal number 1-14-2519, the notice of appeal refers to not only the orders referenced in plaintiff's first notice of appeal, but also the July 10, 2014, order adjudicating $198 in costs related to the voluntary dismissal. This court has jurisdiction to consider the judgment for costs. *Galowich*, 92 Ill. 2d at 161. Our jurisdiction over the issue of costs, however, does not vest jurisdiction in this court to review the merits of the other nonfinal discovery orders entered prior to the order granting voluntary dismissal. See *Smith*, 323 Ill. App. 3d at 1073. Plaintiff, moreover, does not raise any issue on appeal related to the adjudication of the costs. Under Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013), an appellant's brief must include "the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." Rule 341(h)(7) also states "[p]oints not argued are waived and shall not be raised in the reply brief." Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). Therefore, pursuant to Illinois Supreme Court Rule 341(h)(7), we find that plaintiff has forfeited any claim of error based upon the adjudication of the costs. *E.g.*, *Vancura v. Katris*, 238 Ill. 2d 352, 369 (2010).

¶ 23 CONCLUSION

¶ 24 For the aforementioned reasons, we dismiss appeal number 1-14-1644 for lack of

jurisdiction. We also affirm the judgment of the circuit court in appeal number 1-14-2519.

¶ 25 Appeal No. 1-14-1644: Dismissed.

¶ 26 Appeal No. 1-14-2519: Affirmed.