

2015 IL App (2d) 141042-U  
No. 2-14-1042  
Order filed August 24, 2015

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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|--------------------------------|---|-------------------------------|
| BRIAN KELLY and NICOLE KELLY,  | ) | Appeal from the Circuit Court |
|                                | ) | of Du Page County.            |
| Plaintiffs-Appellees,          | ) |                               |
|                                | ) |                               |
| v.                             | ) | No. 09-L-1603                 |
|                                | ) |                               |
| LARRY ORRICO and RANAE YOCKEY, | ) | Honorable                     |
|                                | ) | Kenneth L. Popejoy,           |
| Defendants-Appellants.         | ) | Judge, Presiding.             |

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JUSTICE HUTCHINSON delivered the judgment of the court.  
Presiding Justice Schostok and Justice Burke concurred in the judgment.

**ORDER**

¶ 1    *Held:* Because a reversal without remand does not revest the trial court with jurisdiction, the trial court correctly ruled that it lacked jurisdiction over defendants' motion for attorney fees. Because the trial court only considered the issue of jurisdiction, we need not reach the issue of attorney fees for the prevailing party. We affirmed the judgment of the trial court.

¶ 2    Defendants, Larry Orrico and Ranae Yockey, appeal the trial court's order, which ruled that it lacked jurisdiction to decide their motion for attorney fees because the appellate court's mandate did not remand the matter to the circuit court when it issued a reversal of a prior appeal.

We affirm.

¶ 3

I. BACKGROUND

¶ 4 This is the second time this matter has come before this Court. *Kelly v. Orrico*, 2014 IL App (2d) 130002 (*Kelly I*). This present appeal is focused on the trial court's jurisdiction to hear a claim for attorney fees. In *Kelly I*, plaintiffs, Brian and Nicole Kelly, filed a one-count breach of contract action against defendants for failure to close on a real estate agreement. The trial court found in favor of plaintiffs, and defendants appealed. On March 31, 2014, this court reversed the trial court's judgment. Concluding that "the trial court's judgment must be reversed because plaintiffs' pleadings did not match the proofs and because the trial court's finding of anticipatory repudiation is against the manifest weight of the evidence," this court reversed but did not remand. *Kelly I*, 2014 IL App (2d) 130002, ¶ 37. On May 16, 2014, the mandate was issued to the trial court and provided as follows:

"BE IT REMEMBERED, that, to wit: On the 31st day of March, 2014, a Decision of the aforementioned Court was entered of record and in accordance with the views expressed in the attached Decision the judgment of the trial court is Reversed."

¶ 5 Defendants had previously filed motions in the appellate court for costs and the release of the appeal bond, which were allowed on December 13, 2013, and April 4, 2014, respectively. The record reflects no further action by any party in the appellate court.

¶ 6 On July 23, 2014, defendants filed a motion for attorney fees in the trial court. Defendants argued that they were entitled to fees through a prevailing-party fee-shifting provision within the parties' real estate agreement. The fee-shifting provision provided: "[i]n any action with respect to this Contract, the Parties are free to pursue any legal remedies at law or in equity and the prevailing Party in litigation shall be entitled to collect reasonable attorney fees and costs from the non-Prevailing Party as ordered by a court of competent jurisdiction."

Defendants claimed that this court's order reversing the trial court judgment was an order in their favor, and, therefore, made them the prevailing party and entitled to attorney fees and costs.

¶ 7 Plaintiffs objected to the trial court's jurisdiction to consider the petition, claiming that Illinois Supreme Court Rule 369 (eff. July 1, 1982), *Watkins v. Dunbar*, 318 Ill. 174 (1925), and *Dalan/Jupiter, Inc. ex rel. JRC Midway Marketplace, L.P. v. Draper & Kramer, Inc.*, 372 Ill. App. 3d 362 (2007), precluded the trial court from exercising jurisdiction to enter further orders following a reversal without a remand.

¶ 8 Defendants replied, arguing that *Watkins* was distinguishable because the appellate court's opinion in *Kelly I* did not resolve all pending issues by leaving open the issue relative to defendants' entitlement to reimbursement of fees and costs under the fee-shifting provision. Defendants claimed the issue of the fee-shifting provision was at issue in *Kelly I* because their answer to plaintiffs' complaint specifically prayed for reimbursement of fees and costs. Further, defendants attempted to distinguish *Dalan/Jupiter* by claiming that, unlike where the defendant *Dalan* failed to request attorney fees in any of its pleadings, defendants here raised the fee issue in their answer to the complaint, but it was never ruled on. The trial court scheduled a hearing for argument "solely on the issue of jurisdiction."

¶ 9 At the hearing on September 22, 2014, the trial court asked why defendants did not file a petition for rehearing in the appellate court to amend the mandate, and asked them to distinguish *Dalan/Jupiter*. Defendants reiterated that, where *Dalan/Jupiter* did not seek fees in any of the pleadings, their distinguishing factor was that the prayer for relief in their answer brought that issue into the pleadings at the trial level. Therefore, there were unresolved issues in regard to those fees that would give the trial court jurisdiction; an issue that was not ripe until the appellate court reversed the judgment in *Kelly I*.

¶ 10 Following argument of the parties, the trial court denied defendants' petition for attorney fees for lack of jurisdiction because the mandate reversed without remand. The trial court commented that it found *Coldwell Banker Havens, Inc. v. Renfro*, 288 Ill. App. 3d 442 (1997), to be an "anomaly" in that what happens on a reversal without remand was supported by no other cases, and was specifically denounced by *Dalan/Jupiter*. The court continued that Rule 369 did not reference anything about reversal without remand, and *Watkins* and *Dalan/Jupiter* stood for that position. The court questioned whether a valid claim for attorney fees could be raised in an answer, or whether the prayer for relief of defendants' answer put plaintiffs on notice that they would seek attorney fees. Defendants filed a timely notice of appeal.

¶ 11

## II. ANALYSIS

¶ 12 On appeal, defendants contend that the trial court erred (1) when it determined it lacked jurisdiction to consider a petition for attorney fees following this court's mandate of reversal without remand instructions; and (2) when it failed to consider defendants as the "prevailing party" for the purpose of the fee-shifting provision to award attorney fees to them. Plaintiffs respond that the trial court correctly ruled that it did not have authority to rule on a petition for attorney fees without a remand; therefore, the issue regarding the prevailing party status is irrelevant.

¶ 13 In *Fisher v. Burks*, 285 Ill. 290, 293-94 (1918), our supreme court defined "mandate" and explained its purpose:

"The mandate is the judgment of this court transmitted to the circuit court. Where the direction contained in it is precise and unambiguous, it is the duty of the trial court to carry it into execution and not look elsewhere for authority to change its meaning or direction. [Citations.] It is the mandate of the court of review, and not its opinion, that governs, when

the mandate differs from the opinion or is specific and plain in its terms. \*\*\* If the mandate was not in accordance with the judgment of this court it was up to the plaintiff in error to show by the judgment of this court that it was erroneous and to have a proper mandate issued, as the lower court could not take judicial notice of the judgment of this court.”

¶ 14 Illinois Supreme Court Rule 369 (eff. July 1, 1982) controls the filing of a mandate in the circuit court and guides the proceedings subsequent the issuance of the mandate. Rule 369 provides:

“(a) Filing of Mandate. The clerk of the circuit court shall file the mandate promptly upon receiving it.

(b) Dismissal or Affirmance. When the reviewing court dismisses the appeal or affirms the judgment and the mandate is filed in the circuit court, enforcement of the judgment may be had and other proceedings may be conducted as if no appeal had been taken.

(c) Remandment. When the reviewing court remands the case for a new trial or hearing and the mandate is filed in the circuit court, the case shall be reinstated therein upon 10 days’ notice to the adverse party.”

¶ 15 In *Watkins v. Dunbar*, 318 Ill. 174, 177 (1925), our supreme court held that, “[w]here the judgment is reversed and there is no order remanding the case, it cannot be reinstated in the court which entered the judgment from which the appeal was taken.” Following the issuance of the mandate, “the trial court is revested with jurisdiction where the appellate court affirms a judgment or dismisses an appeal.” *Glens of Hanover Condominium Ass’n v. Carbide*, 2014 IL App (2d) 130432, ¶ 4 (*Carbide II*). Where there are no other claims pending in the circuit court, the trial court is not revested with jurisdiction following a reversal without remand. *Id.* (citing *Dalan/Jupiter*, 372 Ill. App. 3d at 368).

¶ 16 The mandate of the appellate court transmits the judgment and revests the trial court with jurisdiction. *Renfro*, 288 Ill. App. 3d 442, 446 (1997) (citing *PSL Realty Co. v. Granite Investment Co.*, 86 Ill. 2d 291 (1981)). It is imprecise, however, to conclude that any and every mandate automatically revests the trial court with jurisdiction. See *Renfro*, 288 Ill. App. 3d at 446. Rather, it is the contents and instruction inherent within each mandate that revests the circuit court with jurisdiction given the specific procedural situation. See *PSL Realty Co.*, 86 Ill. 2d at 308. Whether the trial court complies with the mandate is a question of law subject to *de novo* review. *Emerald Casino, Inc. v. Illinois Gaming Board*, 366 Ill. App. 3d 113, 118 (2006).

¶ 17 In the present case, defendants argue that it is the nature of attorney fees, as a separate claim, that allows the matter to revest in the trial court. Defendants assert that the issue of attorney fees was raised in some form by both sides at trial, and was not ruled upon as part of the trial court's judgment.

¶ 18 According to defendants, therefore, "when the appellate court reversed on the sole liability issue decided by it, but did not remand, this did not automatically remove from the trial court the ability—the 'jurisdiction'—to consider entitlement to a claim that the defendants only had the ability to recover as a result of the appellate court decision and judgment." Additionally, in their reply brief, defendants argue that a new claim for attorney fees arose based upon the reversal by the appellate court. Defendants concluded that reversal did not allow for continuation of the same proceedings, but, even without remand, did not foreclose the ability to bring a new claim arising after reversal on the contract liability.

¶ 19 Plaintiffs counter that the trial court correctly ruled that it did not have jurisdiction because the Illinois Supreme Court, this court, and the rules of our supreme court all provide that the trial court has no authority to enter any further rulings in the case when the appellate court

reverses without a remand. Plaintiffs claim that this court “would have to (1) ignore the plain language of Rule 369, (2) contravene the supreme court’s holding in *Watkins*, and (3) overrule our own opinion in [*Carbide II*]” to rule in favor of defendants.

¶ 20 Defendants urge that we follow *Renfro*, 288 Ill. App. 3d 442. The issue in *Renfro* stemmed from a breach of contract action claiming that defendants, the Renfros, breached their exclusive listing agreement with Coldwell Banker, their real estate broker. *Id.* at 444. The contract contained, *inter alia*, a provision providing that Coldwell Banker would be entitled to a broker’s commission if the Renfro’s property was sold within six months after termination of the contract, if Coldwell Banker had originally shown that buyer the property. *Id.* Furthermore, the contract contained a provision awarding attorney fees to the “successful party” in any action related to the listing. *Id.* On December 1, 1992, the Renfros delivered a letter canceling their listing with Coldwell Banker as of December 31, 1992. *Id.* In December 1993, the Renfros sold their property to a corporation that Coldwell Banker had previously shown the property. *Id.*

¶ 21 Coldwell Banker, which still recognized the termination date of the contract as June 23, 1993, filed suit to collect the broker’s commission and attorney fees under the contract. *Id.* The Renfros answered and included an affirmative defense that the contract had been terminated, and filed a counterclaim for slander of title in which the prayer for relief sought attorney fees and costs. *Id.* The trial court found that the Renfros’ attempt to terminate the contract was ineffective, and that the actual termination date of the contract was June 23, 1993. *Id.* at 445. The trial court awarded Coldwell Banker the broker’s commission and attorney fees and denied the Renfro’s counterclaim. *Id.*

¶ 22 On appeal, the Fifth District reversed the judgment for Coldwell Banker, holding that the Renfros did, in fact, terminate the agreement in December 1992, one year before the sale of their

property. *Id.* The reviewing court's mandate reversed the judgment but did not remand. *Id.* at 446. Following the filing of the mandate, the Renfros filed a motion for attorney fees pursuant to the provision of the contract awarding fees to the "successful party" in any action related to the listing; Coldwell Banker objected, and the trial court denied the motion. *Id.* The Renfros appealed.

¶ 23 In the second appeal, Coldwell Banker argued that the trial court lacked jurisdiction to rule on the Renfros' motion following the appellate court's mandate, which only reversed without remanding. *Id.* at 446. Basing their reasoning, in part, on *PSL Realty Co.*, 86 Ill. 2d 291, the *Renfro* court held the trial court had jurisdiction to consider the motion because the "mandate filed in the circuit court \*\*\* reconstituted the trial court with jurisdiction in the case." *Renfro*, 288 Ill. App. 3d at 446. The reviewing court began a discussion of Rule 369, focusing on section (b), reading "enforcement of the judgment may be had and other proceedings may be concluded as if no appeal had been taken." *Id.* "It is this language," the court continued, "that allows other proceedings to transpire after a mandate has been filed in the trial court. We must determine, therefore, if the Renfro's motion for attorney fees was another proceeding in this case." *Id.* at 447. The *Renfro* court concluded that the Renfros' motion for attorney fees was an "other proceeding" under Rule 369(b) based on *White v. New Hampshire Department of Employment Security*, 455 U.S. 445 (1982). The reviewing court also considered *Russell v. Klein*, 46 Ill. App. 3d 660 (1977), which similarly held that the court could proceed on a new request after the appellate court reversed but did not remand a portion of the case. *Renfro*, 288 Ill. App. 3d at 447.

¶ 24 Finally, the *Renfro* court held that equity required the Renfros to be allowed to seek attorney fees after the filing of the mandate because their counterclaim for slander of title was

“sufficient to place Coldwell Banker on notice of the Renfros’ intent to seek attorney fees under the contract, should they prevail.” *Id.* at 448.

¶ 25 In the present case, plaintiffs argue that the *Renfro* court’s analysis of the “other proceedings” clause found in Rule 369(b) misconstrued the language of that rule by ignoring that section (b) was drafted for judgments of “dismissal or affirmance.” They argue that Rule 369(b) applies only when an appeal is dismissed or affirmed and does not control situations of reversal without remand. Therefore, the trial court should not have considered whether a fee petition was an “other proceeding” under Rule 369(b) because that section is inapplicable to an appellate court’s reversal without a remand. Furthermore, plaintiffs point out that *Renfro* ignored the controlling decisions in *Watkins*, and based its ruling on *White*, 455 U.S. 445, in which the United States Supreme Court interpreted the attorney fees provision of a federal civil rights statute.

¶ 26 Plaintiffs further argue that *Carbide II*, 2014 IL App (2d) 130432, is controlling and directly on point. In that case, the plaintiff, Glens of Hanover Condominium Association, filed a forcible entry and detainer action for possession against a tenant, and sought to recover unpaid assessments, common charges, and attorney fees and costs. The condo association obtained a default judgment, and the defendant filed a motion to quash service and vacate the judgment. The trial court denied the motion. The defendant appealed, and this court reversed the order denying the motion to quash service and vacated the default judgment. *Glens of Hanover Condominium Ass’n v. Carbide*, 2012 IL App (2d) 120008-U (*Carbide I*). The judgment line did not indicate that the case would be remanded to the trial court.

¶ 27 Following issuance of this court’s mandate in *Carbide I*, the defendant filed a motion “for turnover of possession, rents and for attorney’s fees and costs” in the trial court. The trial court

determined that it was without jurisdiction to hear any motions because the appellate court had not remanded the matter to the trial court. The defendant appealed.

¶ 28 On appeal for the second time, this court affirmed the trial court's judgment, holding that a reversal without remand did not vest the trial court with jurisdiction. Basing its judgment on Rule 369, and the rationale and holdings of *Watkins*, 318 Ill. 174, and *Dalan/Jupiter*, 372 Ill. App. 3d 362, we reasoned:

“[T]he trial court is vested with jurisdiction where the appellate court affirms a judgment or dismisses the appeal. However, the rule is otherwise where the reviewing court reverses the trial court's judgment without remanding. ‘Following a reversal without remand, the trial court is not vested with jurisdiction over the case.’”

*Carbide II*, 2014 IL App (2d) 130432, ¶ 4 (quoting *Dalan/Jupiter*, 372 Ill. App. 3d at 368). We concluded that Rule 369(b) was the codification of the holding in *Watkins*, in which our supreme court held that “where the judgment is reversed and there is no order remanding the case, it cannot be reinstated in the court which entered the judgment from which the appeal was taken.”

*Id.* ¶ 5; *Watkins*, 318 Ill. at 177. The Illinois Supreme Court explained that the circuit court loses jurisdiction and all proceedings are stayed when the trial court judgment is appealed. *Carbide II*, 2014 IL App (2d) 130432, ¶ 5. Since there is no longer a case pending at that level, that court has “no authority to enter any order in the cause until it was properly reinstated.” *Id.*

¶ 29 *Dalan/Jupiter*, relied on by the Court in *Carbide II* and the plaintiff in the instant case, also cited *Watkins* to hold that the trial court is not vested with jurisdiction following a reversal without an accompanying remand. *Dalan/Jupiter*, 372 Ill. App. 3d at 368. Moreover, the reviewing court in *Dalan/Jupiter* went as far to say that the court in *Renfro* misread Rule 369(b).

*Id.*

¶ 30 The *Dalan/Jupiter* court outlined steps which a party could have taken to return the matter to the trial court for attorney fees. First, it could have requested the appellate court to remand the case to the trial court to consider a claim for attorney fees. *Id.* *Dalan* only asked to reverse and remand with directions to enter judgment in its favor, and never indicated it might be entitled to fees. *Id.* Next, following the appellate court's reversal, *Dalan* had 21 days to file a petition for rehearing requesting to amend the mandate to remand the case for consideration of attorney fees. *Id.*

¶ 31 Taking all of this into consideration, the *Carbide II* court concluded that “[t]he *Watkins* rule is clear—a reversal without remand does not revest the trial court with jurisdiction. There was no case pending in the trial court following our reversal without remand.” *Carbide II*, 2014 IL App (2d) 130432, ¶ 9.

¶ 32 We decline to follow the holding in *Renfro*, and we reject defendants' argument that there is a separate claim pending in the trial court. Defendants' statement of jurisdiction in *Kelly I* reflected appellate jurisdiction arising from a final order pursuant to Rules 301 and 303. Had there been an outstanding claim in the trial court, defendants would have been obligated to request a Rule 304(a) finding to appeal a judgment as to fewer than all of the claims. See Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010). Next, defendants' briefs in *Kelly I* make no request for attorney fees. Defendants point to no other separate claim pending in the trial court. Unlike *Renfro*, where the appellate court allowed jurisdiction as a matter of equity, our supreme court dictates that we follow its decisions and rules regarding the procedures following a reversal without a remand.

¶ 33 Based on our review of the record and the relevant law, we resolve this matter in the same manner as we did in *Carbide II*. The trial court was not re vested with jurisdiction

following our reversal without remand. The trial court had no jurisdiction to entertain defendants' claim for attorney fees. Until our supreme court decides to modify Rule 369 to address claims that become ripe after an appellate court reverses a judgment, we decline to find otherwise.

¶ 34 Because the trial court considered only the issue of jurisdiction, and because of our resolution of the matter, we need not reach the issue of attorney fees for the prevailing party.

¶ 35

### III. CONCLUSION

¶ 36 For the reasons stated, we affirm the judgment of the circuit court of Du Page County.

¶ 37 Affirmed.