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2015 IL App (3d) 140489-U

Order filed August 25, 2015

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2015

TURE PERSON and CONNI PERSON,)	Appeal from the Circuit Court
)	of the 14th Judicial Circuit,
Plaintiffs-Appellants,)	Whiteside County, Illinois,
)	
v.)	Appeal No. 3-14-0489
)	Circuit No. 12-L-29
MAJESKI MOTORS, INC. and GREGORY A. MAJESKI,)	
)	
Defendants-Appellees.)	The Honorable
)	Stanley B. Steines,
)	Judge, presiding.

PRESIDING JUSTICE McDADE delivered the judgment of the court.
Justices Lytton and O'Brien concurred in the judgment.

ORDER

- ¶ 1 *Held:* In a case in which an amended complaint was dismissed with prejudice due to counsel's failure to comply with the circuit court's orders regarding amendment of the pleadings, the appellate court reversed the circuit court's judgment, holding that counsel did not deliberately or contumaciously disregard the circuit court's authority.
- ¶ 2 The plaintiffs, Ture and Connie Person, filed a civil suit against the defendants, Majeski Motors, Inc., and Gregory A. Majeski, individually, based on a vehicle sales transaction. After

several amendments to the complaint, the circuit court dismissed the complaint with prejudice based on a holding that counsel for the plaintiffs failed to comply with the court's orders. On appeal, the plaintiffs argue that the circuit court erred when it dismissed the complaint with prejudice. We reverse and remand.

¶ 3

FACTS

¶ 4

On August 1, 2012, the plaintiffs filed a civil complaint, alleging: (1) breach of implied warranty of merchantability; (2) a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act; and (3) common law fraud. The complaint's caption listed the defendants as Majeski Motors and Gregory A. Majeski, individually. In the body of the complaint, the hereinafter form "Dealer" was used for subsequent references to Majeski Motors.

¶ 5

On August 21, 2012, Mertes & Mertes filed an appearance on behalf of the defendants and filed a motion to dismiss the complaint pursuant to section 2-619 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-619 (West 2012)). In that motion, the defendants alleged that the complaint mistakenly identified the corporate defendant in that it named "Majeski Motors" instead of "Majeski Motors, Inc." The motion also alleged that the complaint failed to allege facts that would allow the corporate veil to be pierced. In their response to the defendants' motion to dismiss, the plaintiffs alleged that the problem with the complaint was one of misnomer such that the circuit court should grant the plaintiffs leave to amend the complaint.

¶ 6

On March 18, 2013, the circuit court held a hearing on the defendants' motion to dismiss. The court found that misnomer existed with regard to the corporate defendant. Further, the court granted the motion to dismiss with prejudice with regard to counts I and III against Gregory A. Majeski individually, and granted the motion to dismiss without prejudice with regard to count II. The court also gave the plaintiffs 28 days to file an amended complaint.

¶ 7 On April 29, 2013, the plaintiffs filed their first amended complaint, which corrected the corporate defendant's name to "Majeski Motors, Inc." in the caption and in the first reference to it in the body of the complaint, which included the hereinafter form "Dealer." However, the complaint re-pled all three counts—count I as to Majeski Motors, Inc., and counts II and III against both defendants.

¶ 8 On May 30, 2013, the defendants filed a motion to dismiss the first amended complaint pursuant to section 2-619 of the Code. In that motion, the defendants alleged that the first amended complaint violated the circuit court's order of March 18, 2013, in that count III contained allegations against both defendants. In their response to the defendants' motion to dismiss, the plaintiffs stated that they believed the court erred when it dismissed the claims against Gregory A. Majeski individually, and that the inclusion of those allegations in the first amended complaint were intended to preserve the issue for appellate review.

¶ 9 The case was scheduled for a hearing on the defendants' motion to dismiss on August 1, 2013. However, on that date, new counsel for the plaintiffs filed an appearance, as well as a second amended complaint after the circuit court granted leave to do so. This complaint's caption named "Majeski Motors, Inc." as a defendant and the same in the first reference in the body of the complaint. No hereinafter form was used, although the remainder of the references were to "Majeski Motors." The complaint had been rewritten and it contained three counts, all against "Majeski Motors": (1) breach of implied warranty of merchantability; (2) a violation of the Illinois Consumer Fraud Act; and (3) common law fraud and fraudulent concealment.

¶ 10 The corporate defendant filed a motion to dismiss the second amended complaint pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2012)) in which it alleged that

the complaint contained conclusions of law and allegations related to a “CarFax” report that contradicted allegations made in the two prior complaints.

¶ 11 On December 23, 2013, the plaintiffs filed a third amended complaint one week after being given leave to do so by the circuit court. The third amended complaint contained some re-writing of the facts and counts, but did not include a hereinafter form regarding Majeski Motors, Inc.

¶ 12 The defendants filed a motion to dismiss the third amended complaint pursuant to section 2-619 of the Code in which they reasserted the misnomer issue, as the body of the complaint contained references to “Majeski Motors.” In addition, the motion objected to the continued inclusion of Gregory A. Majeski in the caption of the complaint. The motion also alleged that the complaint contained hearsay statements not formulated as factual allegations, had improperly attached an expert report, and improperly contained settlement discussions.

¶ 13 On March 3, 2014, the circuit court held a hearing on the defendants' motion to dismiss the third amended complaint. After hearing arguments, the court first noted that the misnomer issue had existed throughout the life of the case. While the court noted that the correct party had been sued, the court stated, “[t]hat doesn't mean then that when you file your subsequent pleading you get to misname the party continually again.” The court also found that the pleadings were ambiguous with regard to “whether you're talking about a *** Majeski Motors or Majeski Motors, Inc.” The court also stated that “we don't know whether [counsel for the plaintiffs is] trying to preserve something on appeal or whether or not it truly is a scrivener's error.”

¶ 14 Next, the court stated that it was granting the motion to dismiss without prejudice. The court construed the defendants' motion as a section 2-615 motion, in part because the defendants'

reply used "words like stricken or strike the appropriate language." The court struck several paragraphs from the complaint because they contained hearsay and the pleading of evidence and struck the expert's report.¹ The court then gave the plaintiffs 28 days to file an amended complaint.

¶ 15 On March 5, 2014, the plaintiffs filed a fourth amended complaint, which, *inter alia*, added the hereinafter form "Majeski Motors" after the first reference to "Majeski Motors, Inc." in the body of the complaint. One week later, the plaintiffs filed a "Motion to Vacate the Order of March 3, 2014, as Entered in Error," as well as a motion to withdraw their fourth amended complaint, which stated that they wanted to stand on the third amended complaint. The circuit court granted the latter motion, and the case proceeded to a hearing on May 19, 2014, on the motion to vacate the March 3 order.

¶ 16 At the May 19, 2014, hearing, counsel for the plaintiffs inquired about the court's reasoning for the dismissal of the third amended complaint. The court clarified that it dismissed that complaint based on the misnomer issue. In response, counsel for the plaintiffs requested that the court "convert" its March 3, 2014, to a dismissal of the third amended complaint with prejudice. The court stated that it would not do so—while it ruled that the third amended complaint would be dismissed with prejudice, it was doing so solely due to counsel's failures to comply with the court's rulings regarding amendment of the pleadings.

¹ The paragraphs struck by the court referred to the plaintiffs learning from a car dealer that their vehicle had frame damage and would not be accepted as a trade-in, that another car dealer told them that the corporate defendant had a reputation of selling damaged cars to consumers without disclosing the damage, that an expert inspected the plaintiffs' car and included his findings in a report, and that the plaintiffs were allegedly told by Majeski that he would buy the car back and sell it at a profit.

¶ 17 During pretrial matters, the parties had filed cross-motions for sanctions, the result of which was the imposition of sanctions on counsel for the plaintiffs. After the circuit court finalized the amount to be imposed on counsel for the plaintiffs as sanctions, the plaintiffs appealed.

¶ 18 ANALYSIS

¶ 19 On appeal, the plaintiffs argue that the circuit court erred when it dismissed the third amended complaint with prejudice.

¶ 20 Section 2-401(b) of the Code of Civil Procedure provides that "[m]isnomer of a party is not a ground for dismissal but the name of any party may be corrected at any time, before or after judgment, on motion, upon any terms and proof that the court requires." 735 ILCS 5/2-401(b) (West 2012). Here, it is important to recognize that the circuit court did not dismiss the third amended complaint on May 19, 2014, for misnomer. Rather, the court dismissed the complaint as an exercise of its inherent authority to control its own docket. See *Sander v. Dow Chemical Co.*, 166 Ill. 2d 48, 65-66 (1995) (noting that a circuit court has the inherent authority to dismiss an action based on the complainant's violations of court orders).

¶ 21 "Dismissal of a cause of action for failure to abide by court orders is justified only when the party dismissed has shown a deliberate and contumacious disregard for the court's authority." *Id.* at 68. We review a circuit court's dismissal in this type of situation for an abuse of discretion. See *id.* at 69.

¶ 22 There is no question in this case that the original complaint contained a misnomer in that it identified the corporate defendant as "Majeski Motors," rather than "Majeski Motors, Inc." That misnomer was fixed with the first amended complaint when both the caption and the first reference in the body of the complaint were corrected. The correction of this problem was also

evident in the defendants' motion to dismiss the first amended complaint, which did not assert misnomer. Subsequent counsel for the plaintiffs filed the second amended complaint before any ruling was issued on that motion to dismiss. The second amended complaint named "Majeski Motors, Inc." in the caption and the first reference in the body of the complaint. However, no hereinafter form was used, and the remaining references in the body were to "Majeski Motors." The corporate defendant did not allege a misnomer issue when it filed a motion to dismiss the second amended complaint. Counsel for the plaintiffs secured leave to file a third amended complaint before any ruling was issued on that motion to dismiss, and in terms of the name of the corporate defendant, the third amended complaint was identical to the second amended complaint.

¶ 23 When the defendants filed their motion to dismiss the third amended complaint, they reasserted the misnomer issue by taking exception to the use of "Majeski Motors" in the body of the complaint. The circuit court found this argument persuasive, stating, *inter alia*, that: (1) the misnomer issue had existed throughout the life of the case; (2) the plaintiffs had continually misnamed the corporate defendant; and (3) the pleadings were ambiguous as to whether the plaintiffs were "talking about a *** Majeski Motors or a Majeski Motors, Inc." Counsel for the plaintiffs was given leave to file a fourth amended complaint, which was done, but it was later withdrawn in favor of standing on the third amended complaint.

¶ 24 Our review of this procedural history reveals that counsel for the plaintiffs did not exhibit a deliberate and contumacious disregard for the court's authority. Despite the circuit court's statement to the contrary, the misnomer issue had not existed throughout the life of this case. It was corrected with the first amended complaint and was resurrected by the defendants only when subsequent counsel for the plaintiffs filed an amended complaint that did not contain a

hereinafter form after its first reference in the body of the complaint. On the facts of this case, it is unreasonable to conclude that ambiguity resurfaced in the third amended complaint with regard to its references to "Majeski Motors" simply because no hereinafter form was included after the first reference in the body to "Majeski Motors, Inc."

¶ 25 Furthermore, it cannot be said that counsel for the plaintiffs deliberately and contumaciously disregarded the circuit court's authority when it included the dismissed counts in subsequent complaints or stood on the third amended complaint after withdrawing the fourth amended complaint. As the Second District has held:

"To avoid forfeiture and preserve claims for appellate review, a party can: (1) stand on the dismissed counts, take a voluntary dismissal of any remaining counts, and argue the matter at the appellate level; (2) file an amended pleading that realleges, incorporates by reference, or refers to the dismissed counts; or (3) perfect an appeal from the dismissal order prior to filing an amended pleading that does not refer to or adopt the dismissed counts." *Jacobson v. Gimbel*, 2013 IL App (2d) 120478, ¶ 19.

¶ 26 For the foregoing reasons, under the circumstances of this case, we hold that the circuit court abused its discretion when it dismissed the plaintiffs' third amended complaint with prejudice. Accordingly, we reverse the court's judgment and remand the cause for further proceedings.

¶ 27 CONCLUSION

¶ 28 The judgment of the circuit court of Whiteside County is reversed and the cause is remanded.

¶ 29 Reversed and remanded.