2015 IL App (5th) 140554-U

NO. 5-14-0554

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE COUNTY OF SHELBY, STATE OF ILLINOIS, Acting By and Through its County Board and Zoning Administrator, Plaintiff-Appellee, SHELBYVILLE TOWNSHIP ROAD DISTRICT, Plaintiff-Appellant, and WILLIAM CURL, CARLA GOODWIN, and MARK GOODWIN, Intervening Plaintiffs-Appellants, v. DAVID GALVIN and BARBARA GALVIN, Defendants-Appellees.	)	Appeal from the Circuit Court of Shelby County. No. 05-CH-43 Honorable Kimberly G. Koester, Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Goldenhersh and Chapman concurred in the judgment.

ORDER

¶ 1 *Held*: The appeal is dismissed for lack of appellate jurisdiction where the trial court's order was not a final judgment entered in a section 2-1401 proceeding nor was it a final and appealable order under Illinois Supreme Court Rule 303.

¶ 2 The appellants, Shelbyville Township Road District (the Township), William Curl, Carla Goodwin, and Mark Goodwin, appeal from the order of the circuit court of Shelby County in which the court denied their motion to dismiss the appellees', Shelby County (the county), David Galvin, and Barbara Galvin, motion to vacate and amend final judgment entered by the court on June 11, 2008. For the reasons which follow, we dismiss the appeal for lack of jurisdiction.

¶ 3 In 1974, John Junior Willenberg platted Lithia Estates Subdivision (Lithia Estates). Two lots, 24 and 25, were sold and single-family homes were built on each lot. William Curl and Carla and Mark Goodwin are the current owners of lots 24 and 25. The Township accepted and maintained the south 390 feet of the north-south roadway in Lithia Estates, which serviced the two homes. In 1983, the Galvins purchased a campground located north and east of Lithia Estates. In May 2002, the Galvins also purchased Lithia Estates, excluding lots 24 and 25. The other roads dedicated but never accepted by the Township in Lithia Estates were never constructed, although the Shelby County Zoning Ordinance (the Zoning Ordinance) required the owners of all subdivisions to construct roads pursuant to the Zoning Ordinance.

¶ 4 The Galvins had a road constructed from their campground to the dedicated and accepted Township road serving the two homes located in Lithia Estates. The road was constructed with personal equipment and without any materials provided by the

Township. This road was not built to Township road specifications because it was constructed to be used as a "light traffic driveway" for "personal use." The Galvins used the road as a commercial entrance to their campground. The road commissioner for the Township was never asked to accept and never accepted the Galvins' new road, he did not consent to the connection of the new road to the Township road, and he did not want the Galvins' new road in the Township road district due to safety and maintenance concerns.

¶ 5 On September 8, 2005, the Township filed a complaint alleging the unauthorized extension of a Township road. Thereafter, the Township filed a first amended complaint adding count I, "Violation of Zoning Ordinance," count II, "Roads and Bridges Act Subdivision Roads," and count III, "Roads and Bridges Act-Road Outside Subdivision." The county joined the Township as plaintiffs in this matter. The Township and county filed a motion for summary judgment on count I of their complaint. Thereafter, on June 11, 2008, in a docket entry, the trial court entered a final order of partial summary judgment in favor of the Township and the county on count I and ordered the Galvins to construct the subdivision in compliance with the Zoning Ordinance. The court gave the Galvins until December 1, 2009, to construct the entire subdivision. This meant that the Galvins had to construct streets, sewers, a water main supply system, a storm water system, curbs and gutters, sidewalks, and street signs in order to comply with the Zoning Ordinance. The court further ordered that if the Galvins could not comply, the county would develop the subdivision by taking a lien on the Galvins' real estate. On appeal, this court affirmed the trial court's decision. *County of Shelby v. Galvin*, No. 5-09-0565

(2010) (unpublished order under Supreme Court Rule 23).

¶ 6 Neither the Galvins nor the county made any efforts to construct Lithia Estates subdivision from 2008 through 2014. On April 3, 3014, the county and the Galvins filed a joint motion to vacate and amend the trial court's order of June 11, 2008. The joint motion noted that the county had amended its Zoning Ordinance, which included a section on "Subdivision Regulations," and neither the county nor the Galvins could comply with the court's June 2008 order without violating the Zoning Ordinance and the Public Sewage Disposal Code's regulations on private sewers.[1] Accordingly, the motion argued that the court's order should be deemed void as "compliance with same would require performance of unlawful acts." The motion argued that vacation of the court's order was proper and would not result in any concrete prejudice to any concerned party. The motion noted that the county and the Galvins "stipulate and agree that the appropriate way of *** resolving this matter is for the Galvins *** to apply to the [c]ounty for re-platting of the subdivision." The motion sought to have the original plat vacated with the exception of the two developed lots and the dedicated roadway.

¶ 7 On April 16, 2014, the Township filed a motion to dismiss the joint motion. The motion initially argued that the joint motion was untimely as a section 2-1401 petition for relief from judgment (735 ILCS 5/2-1401(c) (West 2014)) as it was not filed within two years following the entry of the final order. Alternatively, the motion argued that the

[1]It appears from the record that the size of the subdivision lots would have to be significantly enlarged in order to comply with the regulations on private sewers.

Zoning Ordinance would not be violated if the Galvins and the county complied with the trial court's June 2008 order. The motion noted that the Zoning Ordinance currently in effect was the same Zoning Ordinance in effect when the court entered its June 2008 order. The motion noted that the Galvins and the county had failed and refused "to *even* attempt to begin building the subdivision." (Emphasis in original.) The motion noted that the Galvins and the county had instead been spending their "time and money asking [the court] to vacate/modify its nearly 6 year old [order] so that, presumably, [the Galvins] can finally attach their personal road to the [Township] road and so that [the Galvins] can create a new subdivision plat that will not require as much money to construct–asking to construct 6 lots rather than the originally platted 27." The motion argued that the issue concerning the connection of the Galvins' personal road to the Township road was already litigated in the previous case.

¶ 8 On May 12, 2014, Curl and the Goodwins filed a petition for motion to intervene in the proceedings, which was thereafter granted by the trial court. Thereafter, the county and the Galvins filed an amended joint motion to vacate and amend the court's June 2008 order and a memorandum in support of the joint motion. According to the memorandum, in a separate *mandamus* action brought by Curl and the Goodwins against the county for the completion of the subdivision, the trial court suggested that the Galvins and the county file a motion to amend the court's June 2008 order in Shelby County case No. 05-CH-43. Following the hearing, the Galvins and the county determined that the "best way of approaching this situation" would be to ask the court to vacate its June 2008 order to allow the Galvins an opportunity to process the appropriate documents to have the

subdivision replatted in compliance with the current Zoning Ordinances. The memorandum noted that the joint amended motion was a stipulation between the county and the Galvins in which the "parties are revesting" the trial court with jurisdiction over this matter.

¶ 9 Furthermore, the memorandum argued that collateral estoppel did not apply as this was not a different proceeding or another action and this was instead the same suit. The memorandum argued that the joint amended motion was not filed pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2014)) and, therefore, the two-year time limitation did not apply. The memorandum also argued that the Township did not have standing to object to the joint amended motion as it did not have a real interest in the matter or its outcome, and that vacating the 2008 order and replatting the subdivision would not cause any injury in fact to a legally recognized interest of the Township. The memorandum noted that if the county and the Galvins proceeded as proposed, the Township's road in the subdivision would not be affected and no other road would be dedicated to the Township to be maintained.

¶ 10 On June 13, 2014, the Township filed a memorandum in opposition to the amended joint motion, arguing that the amended joint motion was seeking to vacate the June 2008 order, the exact relief that section 2-1401 addressed. Alternatively, the Township argued that there was no case law that supported the revestment of jurisdiction where only two of the three interested parties have entered into a stipulation, noting that the Township was a party to this litigation through the June 2008 order being entered and the subsequent appeal affirming that order. The Township also argued that it has an

interest in continuing to secure the June 2008 order as the Galvins and the county were attempting to force the Township to accept the Galvins' private, dedicated road within the subdivision and the Township. The Township further argued that it has a direct interest in "seeing the subdivision constructed as originally platted, as [it] stands to receive additional funds through an increased levy and increased assessed values" and that developed properties had the additional benefit of increasing the taxing rolls of the Township. The Township noted that reducing the number of lots from the required 32 to the proposed 6 would negatively affect the Township's tax levy income. It also argued that the county and the Galvins can comply with the June 2008 order without violating the Zoning Ordinances.

¶ 11 On October 31, 2014, the trial court entered an order by docket entry, denying the motion to dismiss and granting in part the request to vacate and amend the June 2008 order. The court ordered the Galvins to prepare and submit a new subdivision plat proposal consistent with the county's Zoning Ordinances within 45 days of the entry of the order. However, if the Galvins failed to submit the proposed plat within the time limitation, the court ordered the county to submit a proposed plan within 30 days after the Galvins' plan was due. The court stated that the matter would be set for further hearing, at which time any objections to the newly proposed plats would be heard and any proposals offered by the intervening plaintiffs and the Township would be considered. The court then stated that it would determine "which plat [would] be implemented and when, in compliance with the spirit of its original order." The Township and the intervening plaintiffs appeal.

¶ 12 Initially, the appellants argue that this appeal is from a judgment dismissing a section 2-1401 petition for relief from judgment. The appellants acknowledge that the joint motion was not titled as a section 2-1401 petition, but argues that the substance of the joint amended motion establishes that it was filed pursuant to section 2-1401. Specifically, the appellants note that the relief requested in the joint motion, *i.e.*, the vacation of a prior judgment, and the relief that was granted by the trial court is the exact type of relief provided for under section 2-1401. As a 2-1401 petition, the appellants argue that the joint motion is untimely as it was not filed within two years following the entry of the final order and that it failed to comply with the statutory requirements set forth in section 2-1401. Therefore, they argue that the trial court erred in denying their motion to dismiss. In contrast, the appellees argue that the joint amended motion is a stipulation, which revested the trial court with jurisdiction in the matter.

¶ 13 We agree with the appellees and find that the amended joint motion was not filed pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2014)). Section 2-1401 provides a comprehensive civil procedure that allows for the vacatur of a final judgment older than 30 days, but the petition must be filed not later than two years following the entry of that final judgment. *People v. Prado*, 2012 IL App (2d) 110767 ¶ 6. The final judgment in the case at bar was entered by the trial court in 2008. Clearly, the joint motion was not filed within two years of that judgment.

¶ 14 Additionally, the purpose of a section 2-1401 petition is to bring before the trial court facts not appearing in the record which, if known to the court at the time judgment was entered, would have prevented entry of the judgment. *Klose v. Mende*, 378 Ill. App.

3d 942, 947 (2008). The petition must set forth specific factual allegations supporting the following three elements: (1) the existence of a meritorious claim or defense; (2) due diligence in presenting this claim or defense to the trial court in the original action; and (3) due diligence in filing the section 2-1401 petition. *In re Estate of Barth*, 339 Ill. App. 3d 651, 662 (2003). In addition, the petition must be supported by "affidavit or other appropriate showing as to matters not of record." 735 ILCS 5/2-1401(b) (West 2014). The amended joint motion presented no newly discovered evidence or facts which support a meritorious claim or defense, nor does it include any claims of due diligence before the trial court in the original action or in filing the joint amended motion. Additionally, the joint amended motion did not include the required affidavit. It simply does not appear to be a petition filed pursuant to section 2-1401. Furthermore, the county and the Galvins did not intend their joint amended motion to be a 2-1401 petition and the court did not treat the joint amended motion as one filed pursuant to section 2-1401.

¶ 15 As we are not interpreting the joint amended motion as a section 2-1401 petition, the next issue that we must decide is whether we have jurisdiction to consider this appeal. The county and the Galvins argue that this court lacks jurisdiction under Illinois Supreme Court Rule 304(b)(3) (eff. Feb. 26, 2010) to review the circuit court's October 31, 2014, order. In the jurisdictional statement contained in the appellants' brief, the Township and the intervening plaintiffs set forth that jurisdiction for this appeal may be found under Illinois Supreme Court Rule 304(b)(3) (eff. Feb. 26, 2010) (appeal from a judgment or order granting or denying any of the relief prayed in a petition under section 2-1401). As we have already concluded that the joint motion was not filed pursuant to section 2-1401,

Rule 304(b)(3) does not provide this court with jurisdiction. Accordingly, we must determine whether we have jurisdiction under either Illinois Supreme Court Rule 303 (eff. May 30, 2008) (final order has disposed of the entire case) or another subsection of Illinois Supreme Court Rule 304 (eff. Feb. 26, 2010) (final judgment has been entered as to a separate part of the controversy).

¶ 16 Our jurisdiction to hear an appeal is confined to reviewing appeals from final judgments unless the appeal comes within one of the exceptions for interlocutory orders specified by the supreme court rules. *Johnson v. Northwestern Memorial Hospital*, 74 Ill. App. 3d 695, 697 (1979). A final judgment is a judgment that fixes absolutely and finally the rights of the parties in the lawsuit. *In re Adoption of Ginnell*, 316 Ill. App. 3d 789, 793 (2000). To be a final and appealable order, the order appealed from must determine the litigation on the merits so that, if affirmed, the only thing remaining is to proceed with the execution of the judgment. *Id*. A final judgment either terminates the litigation between the parties on the merits or disposes of the rights of the parties with regard to the entire controversy or some definite part thereof. *Inland Commercial Property Management, Inc. v. HOB I Holding Corp.*, 2015 IL App (1st) 141051, ¶ 18. When an order of the circuit court leaves a cause still pending and undecided, it is not a final order. *Johnson*, 74 Ill. App. 3d at 697.

¶ 17 In the present case, the order of October 31, 2014, denied the motion to dismiss and granted in part the request to vacate and amend the trial court's 2008 order, which required the Galvins and the county to finish developing the subdivision in accordance with the original plat. According to the 2014 order, the Galvins were required to prepare

and submit a new subdivision plat proposal consistent with the county's Zoning Ordinances within 45 days of the entry of the order. However, if the Galvins failed to submit the proposed plat within the time limitation, the county was required to submit a proposed plat within 30 day after the Galvins' plat was due. The court indicated that the matter would be set for further hearing, at which time any objections to the newly proposed plats would be heard and any proposals by the intervening plaintiffs and the Township would be considered.

¶ 18 Based on this order, we conclude that the court's vacation of the 2008 order did not in substance finally dispose of the parties' rights regarding issues in the case as there are still matters left pending and unresolved; namely, the issues involving the replatting of the subdivision and whether such replatting could occur consistent with the Plat Act. In light of this, we cannot conclude from the record before us that the court's October 31, 2014, order was a final and appealable order that would confer jurisdiction in this court pursuant to Illinois Supreme Court Rule 303 (eff. May 30, 2008).

¶ 19 Likewise, we cannot conclude that we have jurisdiction under Illinois Supreme Court Rule 304 (eff. Feb. 26, 2010). Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010) provides that "an appeal may be taken from a final judgment as to one or more but fewer than all of the parties or claims only if the trial court has made an express written finding that there is no just reason for delaying either enforcement or appeal or both." Here, no such language was included in the trial court's order. Therefore, we do not have jurisdiction under Rule 304(a). Further, we do not have jurisdiction under Rule 304(b), which allows for appeals from final judgments that do not dispose of an entire proceeding

where the trial court has not made the special written finding required in Rule 304(a). The order at issue here is not a final judgment entered in a section 2-1401 proceeding as previously discussed and it does not fall within the remaining types of orders enumerated in the rule.

¶ 20 Furthermore, we recognize that during oral argument, the appellants cited *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95 (2002), in favor of this court having appellate jurisdiction over this appeal. *Sarkissian* involved the vacation of a default judgment where defendant, the Chicago Board of Education (the Board), had filed a motion seeking relief from the default judgment entered more than seven years later based on defective service of process. *Id.* at 101. The Board argued that the reviewing court did not have jurisdiction over the trial court's order because that order was not a final and appealable order. *Id.* Our supreme court concluded that the order was a final and appealable order as the Board's motion was, in substance, a section 2-1401 motion that does not have to meet the two-year time limitation or pleading requirements under section 2-1401 because it was brought on voidness grounds. *Id.* at 102. In this case, the amended joint motion was not, in substance, a motion filed under section 2-1401 and was not brought on voidness grounds. Therefore, we conclude that the *Sarkissian* case is inapposite from the case under review here. We, accordingly, dismiss this appeal for lack of jurisdiction.

¶ 21 For the foregoing reasons, this appeal is hereby dismissed for lack of jurisdiction.

¶ 22 Appeal dismissed.