

No. 1-15-1874

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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PAMELA HARNACK, )  
 )  
 Petitioner-Appellant, )  
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Appeal from the  
Circuit Court  
Cook County.

v. )

No. 08 D 02844

STEVE FANADY, )  
 )  
 Respondent )

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JEROME ISRAELOV, )

Plaintiff-Appellee, )

v. )

No. 11 CH 7166

STEVE FANADY and ALPHA INDUSTRIES, LLC, et al., )  
 )  
 Respondents. )

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CBOE HOLDINGS, INC., and COMPUTERSHARE )  
 SHAREOWNER SERVICES, )

Plaintiffs-Appellees, )

v. )

No. 11 CH 35656

MICHELLE MARME, ALPHA INDUSTRIES, LLC, and )  
 FANMARE, )

Defendants-Appellees, )

Honorable )

(Pamela Harnack, Steve Fanady, Jerome Israelov,  
and Grund & Leavitt, Defendants). )

) David E. Haracz,  
Judge Presiding.

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PRESIDING JUSTICE McBRIDE delivered the judgment of the court.  
Justices Gordon and Cobbs concurred in the judgment.

**ORDER**

¶ 1 *Held:* Since the mandate had not issued in a prior appeal in this case when Harnack filed her motion to modify the circuit court's injunction orders, the circuit court lacked jurisdiction to consider the motion and we vacate the order denying her motion.

¶ 2 This appeal involves three consolidated actions: (1) a divorce action between petitioner Pamela Harnack and respondent Steve Fanady; (2) a breach of partnership agreement, conversion, and breach of fiduciary duty action brought by plaintiff Jerome Israelov against his former business partner Alpha Industries, LLC (Alpha), and Fanady as Alpha's manager; and (3) an interpleader action brought by plaintiff CBOE Holdings, Inc. (CBOE Holdings) and its stock transfer agent Computershare Shareowner Services LLC<sup>1</sup> against Harnack, Fanady, Israelov, Alpha, Michele Marme, Fanmare, and Grund & Leavitt P.C. The common issue across all three cases is the division and ownership of 120,000 shares of Chicago Board Options Exchange, Inc. (CBOE) stock, which has been enjoined from distribution under several injunctions entered by the trial court.

¶ 3 On appeal, Harnack argues that the trial court erred in denying her motion for entry of an order seeking to modify the injunctions and the issuance of 40,000 shares of CBOE stock, or in the alternative, 6,159 shares of CBOE stock in payment of her maintenance award.

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<sup>1</sup> The interpleader action was filed in the names of CBOE Holdings, Inc., and "Mellon Investor Services LLC d/b/a BNY Mellon Shareowner Services." When Mellon Investor Services LLC, d/b/a BNY Mellon Shareowner Services, subsequently changed its name to Computershare Shareowner Services LLC, the court granted it permission to amend the caption in the interpleader action to reflect the new name. We will refer to this entity as Computershare.

¶ 4 This case was previously before this court on appeal in *In re Marriage of Harnack*, 2014 IL App (1st) 121424. A detailed discussion of the facts is set forth in the decision of this court. Therefore, we will only detail the facts necessary to fully articulate the circumstances before us in this appeal.

¶ 5 The divorce action was initiated by Harnack in March 2008. A dissolution of marriage was entered in August 2011, after Fanady defaulted. In the judgment order, Harnack was awarded 120,000 shares of CBOE stock as marital property after hearing testimony from Harnack. The trial court also entered a maintenance order of \$6,175 per month for 48 months after the order and the prior 11 months, for a lump sum payment of \$364,325. None of the other parties in the other two actions were parties to the divorce proceedings. The court held that 40,000 shares registered to Alpha were to be held in an escrow account, pending resolution of Israelov's claim.

¶ 6 In February 2011, Israelov filed the breach of partnership action against Alpha and Fanady. Israelov claimed that he and Alpha entered into a partnership named, ISRFAN, for the purpose of purchasing a membership in the CBOE. Israelov and Alpha each contributed \$1,312,500 for the purchase of a CBOE seat. In June 2010, CBOE became a publicly traded company and it exchanged 80,000 shares of stock for each seat. The ISRFAN shares were issued to Alpha, which held the seat for the benefit of the partnership. Israelov alleged that in January 2011, Alpha, through Fanady as manager, withdrew 40,000 shares of the CBOE stock and did not deliver the shares to the ISRFAN for disbursement in accordance with the partnership agreement. Israelov maintains that he is entitled to the 40,000 remaining shares from the ISRFAN seat held by Computershare. In June 2011, Israelov entered into a settlement agreement with Alpha and Fanady. In the agreement, Alpha acknowledged receipt of its *pro*

*rata* share of the CBOE stock for ISRFAN and that Israelov's *pro rata* share of the stock for ISRFAN remained due and owing. The 40,000 remaining shares issued in Alpha's name would be placed into an account for ISRFAN for distribution to Israelov. The shares are currently enjoined in an escrow account pending litigation.

¶ 7 Fanmare is a general partnership formed in March 2005 between Fanady and Michele Marme with the purpose of acquiring a membership in the CBOE. In October 2005, Fanmare purchased one seat in the CBOE, with each partner contributing \$710,000 toward the purchase. In September 2006, Fanmare purchased a second set in the CBOE, with each partner contributing \$645,000 to the purchase. In an addendum to the partnership agreement, Fanady's interest was transferred to Alpha, and one of the seats was transferred to Alpha's name. The addendum provided that Marme and Alpha continued to have 50% ownership of each seat.

¶ 8 When the CBOE became publicly traded in June 2010, both memberships were converted to 80,000 shares each, for a total of 160,000 shares. 80,000 shares were held in the name of Alpha, and 80,000 shares were held in the name of Fanmare. In November 2010, Marme and Alpha executed an addendum designating 80,000 shares to Alpha and 80,000 to Marme. In January, Alpha withdrew 40,000 shares held in its name. In February 2011, Fanmare withdrew 40,000 shares held in its name. Marme and Fanmare assert ownership of the remaining 80,000 shares of CBOE stock remaining in connection with the two memberships purchased by the partnership.

¶ 9 In December 2010, Grund & Leavitt P.C. filed a claim for the number of shares necessary to satisfy a judgment obtained against Fanady in the amount of \$82,261.39. Grund & Leavitt have an injunction prohibiting Fanady or his agents from transferring any CBOE stock. Grund & Leavitt is not a party to this appeal, but its interest remains pending in the trial court.

¶ 10 In October 2011, CBOE Holdings filed its complaint in interpleader against all parties claiming a portion of the CBOE stock held in the name of either Alpha or Fanmare, as well as dividends. CBOE Holdings asserted that due to the conflicting claims it was in doubt as to who has the legal right to receive the 80,000 shares of CBOE stock held in the name of Alpha, and the 40,000 shares of CBOE stock held in the name of Fanmare. The action sought a determination of the rights of all defendants for the disputed stock and dividends. The interpleader action was consolidated with the divorce action and breach of partnership action in January 2012.

¶ 11 In April 2012, Fanady filed a motion to set aside the judgment for dissolution of marriage pursuant to section 2-1301 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1301 (West 2010)), or in the alternative, under section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2010)). In May 2012, the trial court denied Fanady's motion, finding that section 2-1301 did not apply, and that Fanady failed to show due diligence as required by section 2-1401. Fanady then filed a notice of appeal in this court of the trial court's denial of his motion to vacate. This court affirmed the trial court's denial of Fanady's motion to vacate, but remanded for the "sole purpose of clarifying the trial court's intent with regard to the 40,000 CBOE Holdings shares to be transferred to escrow." *Harnack*, 2014 IL App (1st) 121424, ¶ 67. The court noted conflicting interpretations of the transfer provision of the 40,000 into escrow and was remanded for the trial court to amend the judgment of dissolution of marriage to clarify the transfer. *Id.* ¶ 66.

¶ 12 In its decision, this court explained the status of the consolidated cases, in that the three cases with claims to the CBOE stock were consolidated under section 2-1006 of the Code (735 ILCS 5/2-1006 (West 2010)), " 'where several actions involve an inquiry into the same event in its general aspects, the actions may be tried together, but with separate docket entries, verdicts and judgments, the consolidation being limited to a joint trial.' " *Id.* ¶40 (quoting *Shannon v.*

*Stokey*, 59 Ill. App. 3d 573, 577 (1978)). "The consolidation did not merge the two causes into a single suit, change the rights of the parties to each suit or make the parties in one suit parties in the other suit. The two actions did not merge into a single suit and, thus, Harnack did not become a party in the contract action between Israelov and Fanady/Alpha and Israelov did not become a party in the dissolution action between Harnack and Fanady." *Id.* ¶ 42 (citing *Shannon*, 59 Ill. App. 3d at 577).

"Although Israelov's action to enforce his agreement with Fanady/Alpha and Harnack's petition for dissolution involve an inquiry into the same event in its general aspects, *i.e.*, the purchase of a CBOE seat and the disposition of the shares exchanged for that seat, it is clear that the consolidation was only done for convenience. Separate case numbers were retained and, as the judgment for dissolution of marriage shows, separate judgments would be entered in each case. The judgment for dissolution of marriage pertained solely to Harnack's dissolution petition and, although it noted that Israelov's action remained pending, made no determination regarding that action." *Id.* ¶ 41.

¶ 13 In December 2014, the court also entered an order regarding a petition for rehearing filed by Marme and Fanmare that the petition was "not considered as this court did not enter any orders in its opinion that affected the pending interpleader action that was not before this court."

¶ 14 Fanady filed a petition for leave to appeal to the supreme court in January 2015, which the supreme court denied on September 30, 2015. Following the denial, the appellate court mandate was issued on November 12, 2015.

¶ 15 In March 2015, Harnack filed a motion to modify the previously entered injunction orders of the trial court. Harnack acknowledged Fanady's pending petition for leave to appeal, but asserted that because no stay had been entered, she was entitled to enforce the judgment of dissolution. Specifically, Harnack motioned the trial court to direct CBOE Holdings to distribute 80,000 shares of CBOE stock to her as provided in the judgment, or alternatively 6,159 shares to satisfy her maintenance award. She reasoned that the appellate court remand only related to 40,000 shares held in escrow, and she was therefore entitled to the remaining 80,000 shares. Israelov, Marme, and Fanmare filed objections to Harnack's motion. In her reply to the objections, Harnack asserted that the injunctions placed on the 120,000 shares be modified, and reduced her request to 40,000 shares of CBOE stock.

¶ 16 In May 2015, the trial court denied Harnack's motion, finding that "the third party issues have to get resolved before any release of any of these shares is ordered." The court further explained, "it would be \*\*\* detrimental to these third parties if these shares were released, and they have rights and due process rights which, apparently, since I wasn't the trial court which, apparently, have not been addressed before this, I'm reluctant to release shares to Ms. Harnack."

¶ 17 Harnack filed the instant appeal pursuant to Supreme Court Rule 307(a) (eff. Feb. 26, 2010), which allows for interlocutory appeals from orders "granting, modifying, refusing, dissolving, or refusing to dissolve or modify an injunction."

¶ 18 Initially, we must consider the issue of the circuit court's jurisdiction to consider the motion for entry of an order modifying the previously entered injunctions while Fanady's petition for leave to appeal remained pending in the supreme court. We have an obligation to take notice of matters which go to the jurisdiction of the circuit court, even if the issue is not raised by the parties. *General Motors Corp. v. Pappas*, 242 Ill. 2d 163, 173 (2011). Marme and Fanmare

have asserted that the trial court lacked jurisdiction to consider the motion. Harnack contends that she was free to enforce the judgment for dissolution because Fanady never obtained a stay of judgment on appeal.

¶ 19 "The lack of jurisdiction in the circuit court, in turn, affects our own jurisdiction in that we are then limited to considering only the lack of jurisdiction below, and we may not consider the substantive merit of the circuit court's unauthorized actions." *Kyles v. Maryville Academy*, 359 Ill. App. 3d 423, 431-32 (2005) (citing *People v. Flowers*, 208 Ill. 2d 291, 307 (2003)).

¶ 20 "A notice of appeal is a procedural device filed with the trial court that, when timely filed, vests jurisdiction in the appellate court in order to permit review of the judgment such that it may be affirmed, reversed, or modified." *General Motors*, 242 Ill. 2d at 173. "Once the notice of appeal is filed, the appellate court's jurisdiction attaches *instanter*, and the cause of action is beyond the jurisdiction of the circuit court." *Id.* However, the trial court retains jurisdiction after the notice of appeal has been filed for matters that are collateral or incidental to the judgment. *Id.* A stay of judgment has been recognized as being collateral to the judgment and does not affect or alter the issues on a appeal. *Id.*

¶ 21 Further, " '[o]nce a petition for leave to appeal has been filed in the Supreme Court, the appellate court loses jurisdiction over the cause of action and may not withdraw or substantively modify its filed opinion (*People v. Collins*, 202 Ill. 2d 59 (2002)) nor may it file an additional separate opinion (*People v. Turnage*, 162 Ill. 2d 299 (1994)).' " *Cooney v. Rossiter*, 2012 IL 113227, ¶ 15 (quoting Style Manual for the Supreme and Appellate Courts of Illinois § I(F) (4th ed. rev. 2012) ("Postfiling Revisions")). Nor does the circuit court have jurisdiction, only the supreme court has jurisdiction over the matter after a petition for leave to appeal has been filed. "The mandate of a court of review, however, reverts the circuit court with jurisdiction." *Pros*



*Corporate Management Services, Inc. v. Ashley S. Rose, Ltd.*, 228 Ill. App. 3d 573, 579 (1992).

Supreme Court Rule 368(b) (eff. July 1, 2006) provides that "the mandate is stayed automatically if, before it may issue, a party who is entitled to seek review by the Supreme Court files a petition in the Supreme Court for such review. The stay is effective until the expiration of the time to seek review, and, if review is timely sought, until disposition of the case by the Supreme Court." Additionally, Supreme Court Rule 369(b) (eff. July 1, 1982) states that, "[w]hen 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."

¶ 22 Here, it is undisputed that Harnack's March 2015 motion to modify the injunction orders was filed in the circuit court while Fanady's petition for leave to appeal remained pending before the supreme court. The mandate did not issue in the prior case until briefing had already begun in the instant appeal. While Harnack attempts to characterize her motion as an enforcement of the dissolution judgment for this argument, she admits that her motion sought to modify injunctions pending in the consolidated cases relating to the CBOE stock. This motion was not collateral and directly affected matters pending in the petition for leave to appeal before the supreme court, namely the CBOE stock. Absent the issuance of the mandate, the circuit court lacked jurisdiction to consider Harnack's motion to modify the injunctions on the CBOE stock. Any order entered while the circuit court is divested of jurisdiction during the pendency of an appeal is void. *Wierzbicki v. Gleason*, 388 Ill. App. 3d 921, 926 (2009). "This court has a duty to vacate void judgments and orders based upon its inherent power 'to expunge from its records void acts of which it has knowledge' and consequently may *sua sponte* vacate a void order." *Id.* at 931 (quoting *People v. Magnus*, 262 Ill. App. 3d 362, 365 (1994)). Accordingly, since the

circuit court had been divested of jurisdiction at the time Harnack filed her motion, we vacate the court's denial of the motion and order the motion to be dismissed. See *People v. Bailey*, 2014 IL 115459, ¶ 29 (where supreme court concluded that when considering a case in which the trial court lacked jurisdiction, the appellate court should have vacated the trial court's judgment and order the motion to be dismissed).

¶ 23 Based on the foregoing reasons, the decision of the circuit court of Cook County is vacated.

¶ 24 Order vacated.