2016 IL App (1st) 160013-U
No. 1-16-0013

THIRD DIVISION
December 28, 2016

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

IRA ZOOT, Plaintiff-Appellee, v. ALANIZ GROUP, INC., LANDMARK CONTRACTORS, INC., LAND-MARK CONTRACTING DE, LANDMARK SERVICES CORP. FUND, LANDMARK CORP., JT, INC., MARKETING SPECIALISTS, ORANGE CRUSH, LLC, TRAFFIC CONTROL PROTECTION, UTILITY DYNAMICS CORP., COMMONWEALTH EDISON CO., TRANSYSTEMS CORP., TRANSYSTEMS CORP. III, TRANSYSTEMS ESYNC CORP., Defendants-Appellees, TRANSYSTEMS CORP., Defendant/Third-Party Plaintiff-Appellee, v. HENKELS & MCCOY, INC., Third-Party Defendant-Appellant.	Appeal from the Circuit Court of Cook County. No. 11 L 11065 The Honorable Kathy M. Flanagan, Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Justices Lavin and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's decision to stay and effectively sever the third-party contribution action in favor of the direct action for negligence was neither an abuse its discretion, nor an improper exercise of its inherent authority to stay proceedings *sua sponte* within the bounds of the law. The trial court's orders staying the third-party contribution claim and denying the joint motion to reconsider the stay by Henkels and TranSystems are affirmed.

¶ 2 In this interlocutory appeal, third-party defendant Henkels & McCoy, Inc. (Henkels) contends that the trial court abused its discretion in staying the third-party contribution claim brought by defendant/third-party plaintiff TranSystems Corporation (TranSystems) *sua sponte* and without notice. Henkels further contends that the trial court abused its discretion by effectively severing the third-party action from the direct action. For the reasons that follow, we disagree and affirm the trial court's orders staying the third-party contribution claim and denying the joint motion to reconsider the stay by Henkels and TranSystems.

¶ 3 BACKGROUND

¶ 4 In 2011, plaintiff Ira Zoot commenced the original cause of action for negligence against defendant Landmark Contractors, Inc., individually and/or as agent of Landmark Contracting and Development Company, Landmark Corporation, and Landmark Corporation Fund, for personal injuries and property damage that he allegedly sustained from hitting a manhole frame and lid with his vehicle while driving over a portion of Douglas Avenue in Elgin where a construction project was underway. Over the next few years, Zoot amended his complaint five times, adding additional defendants, including TranSystems.

¶ 5 On July 20, 2015, with leave of court, TranSystems filed a third-party negligence-based contribution claim against Henkels, the construction contractor for defendant Commonwealth

Edison Company (ComEd). TranSystems alleged that Henkels "had a duty to control, operate, manage, supervise, supervise [*sic*] safety on, coordinate, and/or maintain the construction project and construction site in a safe manner so as not to cause injury to drivers on the roadway," and "a duty to take all reasonable precautions to protect the public from hazardous conditions." TranSystems alleged that notwithstanding such duties and in direct violation thereof, Henkels was guilty of the following negligent acts and/or omissions:

> "(a) Caused a manhole frame and lid to be left above grade that posed an alleged danger to automobiles driving on the roadway at issue in Plaintiff's Fifth Amended Complaint at Law;
>
> (b) Failed to display any time or warning that would notify drivers of an above grade manhole frame and lid that posed an alleged danger to automobiles driving on the roadway at issue in Plaintiff's Fifth Amended Complaint at Law;
>
> (c) Failed to construct a barricade to surround the above grade manhole frame and lid large [*sic*] that posed an alleged danger to automobiles driving on the roadway at issue in Plaintiff's Fifth Amended Complaint at Law;
>
> (d) Failed to take adequate safety precaution that would protect drivers on the roadway at issue in Plaintiff's Fifth Amended Complaint at Law from an above grade manhole frame and lid[;]
>
> (e) Carelessly and negligently failed to adequately supervise the work being done on the roadway at issue in Plaintiff's Fifth Amended Complaint at Law;
>
> (f) Carelessly and negligently failed to adequately coordinate the work being done on the roadway at issue in Plaintiff's Fifth Amended Complaint at Law, including, but not limited to placing warning and safety signs and materials;

(g) Carelessly and negligently failed to establish, follow, or enforce reasonable safety procedures, safety and training programs, and work rules including the placement of warning signs at the job site at issue in Plaintiff's Fifth Amended Complaint at Law;

(h) Left the area of the construction project in a condition which it knew, or should have known, was dangerous to drivers on the roadway at issue in Plaintiff's Fifth Amended Complaint at Law;

(i) Failed to notify the appropriate entity or person that there was inadequate safety and warning materials placed when it left the job when it knew, or should have known, that the same was necessary for the protection of drivers on the roadway at issue in Plaintiff's Fifth Complaint at Law."

TranSystems added that if it were found liable to Zoot for any damages in connection with the original cause of action, then TranSystems would be entitled to contribution from Henkels for a *pro rata* share of fault. As relief, TranSystems requested "in the event the trier of fact renders a judgment against [TranSystems] [in the direct action], that this Court enter an Order granting [TranSystems] the right of contribution as against [Henkels] in an amount commensurate with the *pro rata* share of liability attributable against [Henkels]."

¶ 6 On September 8, 2015, Henkels answered the third-party complaint for contribution, admitting that the scope of its work for defendant ComEd included working around its manholes, but otherwise denying the substantive allegations of negligence and liability.

¶ 7 Henkels filed a motion to depose Zoot on December 3, 2015, and presented the motion to the trial court on December 7, 2015. No report of proceedings for December 7, 2015, is included in the record on appeal. However, the record reflects that on December 7, 2015, the trial court

entered a "case management order" providing, *inter alia*, that TranSystems's third-party action was stayed by court order; the trial court did not rule on the motion to depose Zoot.

¶ 8 Also on December 7, 2015, Henkels filed its responses to defendant Landmark Contractors Inc.'s interrogatories and production requests and its first request to admit facts directed to Zoot.

¶ 9 On December 11, 2015, TranSystems and Henkels filed a joint motion to reconsider the trial court's December 7, 2015 order staying the third-party action. Relying on *Laue v. Leifheit*, 105 Ill. 2d 191, 196-97 (1984), in which our supreme court stated that a third-party contribution claim should be filed in the pending action, TranSystems and Henkels contended that the trial court "erred in its application of existing case law when it stayed TranSystems' third-party complaint for contribution against [Henkels]."

¶ 10 On December 14, 2015, during the hearing on the joint motion to reconsider, the following colloquy occurred:

"MR. JONES [COUNSEL FOR HENKELS]: Your Honor, we weren't clear on the scope of the stay.

THE COURT: Clear? I thought it was completely clear, the entire third-party action was stayed.

MR. JONES: Okay.

THE COURT: You do not do anything in furtherance of the third-party action by way of issuing discovery, answering discovery. If he served it on you, you wouldn't have to answer.

MR. JONES: Your Honor, we're concerned about this stay because we don't know, obviously at a certain point if they're allowed to come back –

THE COURT: Counsel, you know what happens all the time in this division, a direct action is tried and/or the direct action is settled and then we try the contribution action, it happens all the time. Now the fact is that I am not going to modify my stay, the stay order stays in place, this case is already four years old easing into the fifth year, and this case is too far gone to now be completely taken back to square one.

MR. JONES: And I understand that it's an old case, I pointed that out in our motion.

THE COURT: Good.

MR. JONES: But at the same time from our perspective, there was no trial date set in this matter so –

THE COURT: Counsel, that's just a vagary of the system. This case should have had a trial date a long time ago. I don't know what happened, but it hasn't, and I don't know where it is on the trial call, I don't know when it's going to come up next in 2006 [*sic*], but when it does it is for sure going to get a trial date.

MR. JONES: Is your reasoning for imposing this stay is [*sic*] because this case is old and you want to move it along?

THE COURT: My basis for staying the third-party action is that in order for it to be conducted with all appropriate discovery, it would be tantamount to starting all over four years worth of discovery now having to be reexamined, people having to be re-deposed, I can't have that, okay? And here's what's so lucky, if this case settles, the direct action, most of them do, 95 percent of cases settle, you don't have to worry about anything unless and until he is found guilty.

MR. JONES: I understand that.

THE COURT: And then you try the contribution action. It happens all the time. We did it on the Metra cases, we do it on a lot of cases.

MR. JONES: With respect to our previous motion to re-depose the plaintiff, you're denying that motion?

THE COURT: I'm denying it, you don't need to re-depose, you'll get to re-depose the plaintiff if in fact you need to try the third-party action for contribution.

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MR. CURRAN [COUNSEL FOR ZOOT]: I'm at a little bit of a loss about the discovery that was filed. They named a new witness, if that witness is allowed to be called, if he's allowed to be named in the (f) (1) to be –

THE COURT: His discovery is quashed and there's a protective order entered under 201(c) stating that that discovery will be quashed and denied without prejudice."

After the hearing, the trial court entered a case management order denying the joint motion to reconsider. The order provided in pertinent part that "the case remains stayed as against [Henkels]" and "the discovery responses mailed and filed on 12/7/15 subsequent to the court's previous order to stay is QUASHED." The order *only* referenced Henkels's answers to the interrogatories and production requests of Landmark Contractors, Inc., and *not* Henkels's first request to admit facts directed to Zoot.

¶ 11 On January 4, 2016, Zoot filed an emergency motion to quash Henkels's discovery requests. Zoot stated that Henkels's first request to admit facts directed to Zoot "should also be quashed as it was filed subsequent to, and in violation of, the December 7, 2015 order which stayed TRANSYSTEMS' third-party action against [Henkels]." On the same date, the trial court

granted Zoot's emergency motion and quashed Henkels's first request to admit facts directed to Zoot.

¶ 12 On January 5, 2016, Henkels filed a notice of interlocutory appeal from the trial court's December 7, 2015 order staying TranSystems's third-party action against Henkels, the December 14, 2015 order denying the joint motion to reconsider the stay, and the January 4, 2016 order granting Zoot's emergency motion to quash Henkels's discovery requests.

¶ 13 Based on the appellee's failure to file a brief within the time prescribed by Supreme Court Rule 343(a) (eff. July 1, 2008), we take the instant appeal for consideration on the record and Henkels's brief only. See, *e.g.*, *Davies ex rel. Harris v. Pasamba*, 2014 IL App (1st) 133551, ¶ 34.

¶ 14 ANALYSIS

¶ 15 As a threshold matter, we have an independent duty to consider our jurisdiction regardless of whether either party has raised the question. *Secura Insurance Company v. Illinois Farmers Insurance Company*, 232 Ill. 2d 209, 213 (2009). Henkels asserts that jurisdiction is proper pursuant to Supreme Court Rule 307(a)(1) (eff. Nov. 1, 2016), which provides for appeals from an interlocutory order "granting, modifying, refusing, dissolving, or refusing to dissolve or modify an injunction."

¶ 16 We observe that "for the [limited] purpose of determining appellate jurisdiction, a stay is analogous to the granting of a preliminary injunction and is therefore appealable" (*Vasa North Atlantic Insurance Co. v. Selcke*, 261 Ill. App. 3d 626, 628 (1994)), and in determining what constitutes an appealable injunctive order pursuant to Rule 307(a)(1), we turn to the substance of the action and not its form (*In re M.S.*, 2015 IL App (4th) 140857, ¶ 28). In other words, orders

that have "the force and effect of injunctions" are appealable even if called something else. *Rathje v. Horlbeck Capital Management, LLC*, 2014 IL App (2d) 140682, ¶ 25.

¶ 17 Here, we have jurisdiction to review the trial court's orders staying TranSystems's third-party action against Henkels and denying the joint motion to reconsider the stay despite their labels as case management orders. See *Marzouki v. Najar-Marzouki*, 2014 IL App (1st) 132841, ¶ 8 (we have consistently held that a stay is injunctive "in nature" and immediately appealable pursuant to Rule 307(a)(1)); *M.S.*, 2015 IL App (4th) 140857, ¶ 32 (the trial court's order can substantively be viewed as injunctive despite the label given to the order). On the other hand, we lack jurisdiction to review the trial court's order granting Zoot's emergency motion to quash Henkels's discovery requests because such interlocutory ministerial or administrative orders regulate only procedural details of the litigation before the court and do not "affect the parties' relationship in their everyday activity apart from the litigation," which would otherwise be appealable. *Rathje*, 2014 IL App (2d) 140682, ¶ 26; *Doe v. Doe*, 282 Ill. App. 3d 1078, 1082 (1996). Indeed, Illinois courts have rejected the idea that pure discovery issues are appealable as injunctions. *Rathje*, 2014 IL App (2d) 140682, ¶ 26.

¶ 18 Turning to the merits, Henkels contends that "the trial judge's entry of a *preliminary injunction* staying the third-party action *sua sponte* without notice to the parties constitutes an abuse of discretion." As grounds, Henkels submits: (1) that the trial court was never presented with any pleading either seeking a stay of proceedings or a severance of the third-party action, (2) that the trial court's entry of the stay was made without meaningful consideration of judicial economy, the orderly administration of justice, or any other relevant factors, and (3) that the trial

court should have at least provided proper notice to the parties pursuant to section 11-102[1] of the Code of Civil Procedure (Code) (735 ILCS 5/11-102 (West 2010)) "because a stay order is a preliminary injunction."

¶ 19 Generally, a trial court's decision to issue or deny a stay will not be disturbed on appeal absent an abuse of discretion. *Cholipski v. Bovis Lend Lease, Inc.*, 2014 IL App (1st) 132842, ¶ 39. "With respect to a stay, a trial court does not act 'outside its discretion' by staying a proceeding in favor of another proceeding 'that could dispose of significant issues.'" *Id.* at 40 (quoting *Khan v. BDO Seidman, LLP*, 2012 IL App (4th) 120359, ¶ 62). "A stay is generally considered 'a sound exercise of discretion' if the other proceeding 'has the potential of being completely dispositive.'" *Id.* (quoting *Khan*, 2012 IL App (4th) 120359, ¶ 60). However, we apply *de novo* review when the question involved is whether the trial court exercised its discretion "within the bounds of law." *People v. Smith*, 233 Ill. 2d 1, 15 (2009). As a matter of law, a trial court has "the inherent authority to act *sua sponte*" (*Circle Management, LLC v. Olivier*, 378 Ill. App. 3d 601, 614 (2007)) and "may stay proceedings as part of its inherent authority to control the disposition of cases before it" (*Estate of Bass ex rel. Bass v. Katten*, 375 Ill. App. 3d 62, 68 (2007)). See also *Estate of Lanterman v. Lanterman*, 122 Ill. App. 3d 982, 990 (1984) (same).

¶ 20 Here, the trial court did not abuse its discretion in staying TranSystems's third-party contribution action because the direct action commenced by Zoot has the potential of being completely dispositive. Despite Henkels's arguments to the contrary, the record shows that the trial court considered, *inter alia*, the orderly administration of justice and judicial economy in determining to stay the third-party proceedings. See *Vasa North Atlantic Insurance Co.*, 261 Ill.

[1] Section 11-102 provides that "[n]o court or judge shall grant a preliminary injunction without previous notice of the time and place of the application having been given the adverse party."

App. 3d at 629. Although there is no report of proceedings for December 7, 2015, when the trial court issued the stay, the report of proceedings for the hearing date on the joint motion to reconsider the stay shows that the trial court was concerned with Henkels's ability to conduct all appropriate discovery when the direct action was already four years' old and noted that "if this case settles, the direct action, most of them do, 95 percent of cases settle, you don't have to worry about anything unless and until [TranSystems] is found guilty." The same report of proceedings also shows that TranSystems and Henkels were both afforded a meaningful opportunity to respond to the trial court's decision to stay the third-party action. Additionally, the relief sought in TranSystems's third-party contribution action likewise supports the trial court's decision to stay the proceeding in favor of the direct action, *i.e.*, "in the event the trier of fact renders a judgment against [TranSystems] [in the direct action], that this Court enter an Order granting [TranSystems] the right of contribution as against [Henkels] in an amount commensurate with the *pro rata* share of liability attributable against [Henkels]." It is nonetheless worth noting that Henkels has the burden to present a sufficiently complete record (*Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984)), and in the absence of an adequate record, namely a report of proceedings for December 7, 2015, when the trial court issued the stay, we must presume the court "had a sufficient factual basis for its holding and that its order conforms with the law" (*Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 157 (2005)). Ultimately, the resolution of Zoot's negligence claims in the direct action has the potential of being completely dispositive because, if defendants including TranSystems are not found to have been negligent, then there is no need to address the third-party contribution claim. See *Cholipski*, 2014 IL App (1st) 132842, ¶ 41. We therefore conclude that the trial court did not act arbitrarily by issuing a stay of the contribution claim. See *id.*

¶ 21 As for Henkels's challenge to the trial court's *sua sponte* issuance of the stay, we conclude, as a matter of law, that the trial court exercised its discretion "within the bounds of law" when it stayed TranSystems's third-party contribution action *sua sponte*, or on its own motion. *Lanterman*, 122 Ill. App. 3d at 990. Moreover, we reject Henkels's challenge to the alleged lack of any pleading either seeking a stay of proceedings or a severance of the third-party action because it ignores the inherent authority of the trial court to stay proceedings *sua sponte*, and we reject Henkels's challenge to the lack of proper notice to the parties pursuant to section 11-102 of the Code because it is premised upon the faulty assertion that "a stay order is a preliminary injunction" such that the notice requirement of section 11-102 applied. As discussed, a stay is analogous to the granting of a preliminary injunction only "for the [limited] purpose of determining appellate jurisdiction." *Vasa North Atlantic Insurance Co.*, 261 Ill. App. 3d at 628.

¶ 22 Finally, we are unpersuaded by Henkels's contention that the trial court abused its discretion in effectively severing the third-party action from the direct action commenced by Zoot. In *Cook v. General Electric Co.*, 146 Ill. 2d 548, 556 (1992), the supreme court construed its opinion in *Laue* stating: "While a strong policy preference for a joint trial is implicit in [*Laue*], and we now reiterate that policy, [*Laue*] requires only that claims for contribution be asserted in the pending action, not that there must inevitably be a joint trial in every case." Put another way, "[t]here is no hard and fast rule about joint trials but rather a policy preference for a joint trial which is still left up to the trial court's discretion to weigh among other factors." *Cook*, 146 Ill. 2d at 560, *quoted in Cholipski*, 2014 IL App (1st) 132842, ¶ 52. We find no abuse of discretion resulting from the lack of a joint trial under the circumstances.

¶ 23 CONCLUSION

¶ 24 For the reasons stated, the trial court did not abuse its discretion in issuing the stay and effectively severing the third-party action, nor did the trial court improperly exercise its inherent authority to stay proceedings *sua sponte* within the bounds of the law. Therefore, we affirm the trial court's decision to issue the stay.

¶ 25 Affirmed.