2019 IL App (1st) 173060-U

No. 1-17-3060

Order filed February 26, 2019.

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

MACEO RAINEY,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 2011 CH 9884
	)	
INDIANA INSURANCE CO.,	)	The Honorable
	)	Franklin Ulysses Valderrama,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Mason and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly entered summary judgment in favor of the defendant based on the reviewing court's prior mandate and the law of the case.

¶ 2 This cause comes before us for the second time. In this appeal, plaintiff Maceo Rainey asserts that the trial court improperly entered summary judgment in favor of defendant Indiana Insurance Co. (Indiana) on Rainey's claim that Indiana was required to provide him independent counsel in another action that had been filed against Rainey and his prior employer. Rainey

argues, among other things, that the trial court entered summary judgment in Indiana's favor based on a misunderstanding of our prior decision entered in this case. For the following reasons, we affirm the trial court's judgment.

¶ 3 I. Background

¶ 4 We recite only those facts necessary to resolve this appeal. In the underlying federal action, Fred Jacobeit sued Rich Township High School District 227 Board of Education (Rich) for terminating his employment due to his race, age and disability. Jacobeit also sued Rainey, the principal of the high school where Jacobeit had worked. Rainey himself later lost his position as principal.

¶ 5 To represent Rich and Rainey, Indiana hired Rich's general counsel, Scariano, Himes & Petrarca. Rainey sought the appointment of independent counsel at Indiana's expense but Indiana refused. Subsequently, Indiana hired attorney Jeff Taylor from Spesia & Ayers to defend both Rainey and Rich. Nonetheless, Rainey insisted that Indiana pay for his counsel of choice, Jerome Davis.

¶ 6 Rainey filed this action against Rich and Indiana on March 16, 2011. Eventually, he filed a third-amended complaint against Indiana alone, alleging that (1) Indiana breached its duty to defend him through independent counsel (count 1); (2) Indiana was equitably estopped from denying its obligation to provide an independent defense (count 2); and (3) Indiana breached its duty to defend by failing to advise Rainey that a conflict of interest existed between him and Rich (count 3). In November 2012, the underlying federal action was dismissed, over Rainey's objection, pursuant to a settlement agreement between Jacobeit and Rich.

¶ 7 In the present case, Rainey moved for summary judgment on counts 1 and 3. The trial court initially denied that motion but subsequently reconsidered and entered summary judgment

in Rainey's favor. The court found a conflict of interest existed because there were certain defenses Rich could not raise without harming Rainey. Additionally, the court found a status report filed in the underlying case showed that Jacobeit would be seeking punitive damages, which Indiana would not pay on Rainey's behalf. The court further granted Rainey leave to file a fourth-amended complaint seeking damages under section 155 of the Illinois Insurance Code (215 ILCS 5/155 (West 2012)), damages that the court then granted. Rainey voluntarily dismissed count 2 and Indiana appealed.

¶ 8 On appeal, we reversed the trial court's judgment. First, we found Rainey forfeited his argument that Rich could avoid liability by showing that Rainey acted outside of Rich's policy or directives while Rainey could avoid liability by showing he acted as a result of Rich's policy or directives. *Rainey v. Indiana Insurance Co.*, 2016 IL App (1st) 150862-U, ¶ 36. Next, we found that Rich had taken a position that favored both Rich and Rainey. Specifically, Rich had argued that neither it nor Rainey made discriminatory decisions. *Id.* ¶ 37. We also stated, "Here, Indiana could and did choose a defense strategy for one insured without harming the other." *Id.* ¶ 38. We further rejected Rainey's contention that the prospect of punitive damages created a conflict, as Jacobeit's amended complaint showed he had not formally requested such damages. *Id.* ¶ 39. Moreover, we found that Indiana could not have declined to pay any judgment against Rainey because Indiana agreed to defend him without a reservation of rights and without seeking a declaratory judgment that Rainey was not covered. *Id.* ¶ 40.

¶ 9 Under the circumstances, we agreed with Indiana's assertion that "the circuit court erroneously found a conflict of interest prevented it from controlling Rainey's defense." *Id.* ¶ 41. Likewise, the trial court had erred by entering summary judgment in favor of Rainey and awarding damages under section 155. *Id.* ¶¶ 42, 45. We further stated the following, however:

> "Finally, we reiterate that Indiana did not file a cross-motion for summary judgment in the circuit court. Accordingly, we cannot enter judgment on the merits in Indiana's favor at this juncture, notwithstanding our determination that the record shows no conflict of interest or breach of duty. *** We can only reverse and remand for further proceedings consistent with this opinion." *Id*. ¶ 43.

Finally, we reversed the trial court's award of damages under section 155. *Id*. ¶ 45.

¶ 10 On remand, Indiana moved for summary judgment in light of our determination that the record showed no conflict of interest or obligation for Indiana to pay for independent counsel. Yet, Rainey argued that "[a]dditional evidence is needed to resolve the factual issues identified by the appellate court" and that the law-of-the-case doctrine did not apply. Rainey further argued that he should be permitted to add claims not addressed in our decision. In reply, Indiana argued that we affirmatively held the record reflected no conflict or breach of duty, and that our determination was now the law of the case. Allowing Rainey to reopen discovery and amend his complaint would prejudice Indiana.

¶ 11 At the hearing on Indiana's motion, Rainey argued that we had found a factual dispute existed. He also argued that he could have presented other evidence to eliminate that factual dispute but did not do so earlier because Indiana offered no evidence in response to his summary judgment motion. In contrast, Indiana asserted that Rainey was foreclosed from seeking further discovery or filing an amended complaint because he never filed a motion indicating that more discovery was necessary to respond to the summary judgment motion (see Ill. S. Ct. R. 191(b) (eff. Jan. 4, 2013)).[1] Indiana further argued that there had been five versions of the complaint,

[1]See *Crichton v. Golden Rule Insurance Co.*, 358 Ill. App. 3d 1137, 1151 (2005) (stating that a plaintiff's failure to comply with Rule 191(b) defeats an objection that the trial court did not permit sufficient time for discovery).

more than two years of discovery and "[Rainey] had every opportunity to go out and gather this evidence to the extent that he didn't have it." According to Indiana, "a party can't go to summary judgment, or an appeal, and lose, and then come back and say, now I'd like to go out and get some more evidence."

¶ 12 The trial court agreed with Indiana:

> "Having read the Appellate Court opinion, I cannot agree with counsel for the plaintiff that there is anything left in this case.
>
> I think the arguments raised by the defendant, Indiana Insurance, are persuasive regarding what the Appellate Court exactly was finding.
>
> And the Appellate Court was finding that there really was no factual issue. They do not identify any factual dispute, contrary to what counsel for Mr. Rainey has argued here before the Court.
>
> Having read the opinion very carefully, there's nothing in this opinion that talks about a question of fact, and therefore, the matter being remanded, on the contrary, the Appellate Court is very clear that it did not and could not enter judgment on the merits because Indiana had failed to file a cross motion for summary judgment. It had not done so."

The court then entered summary judgment in favor of Indiana. Subsequently, the court denied Rainey's motion to reconsider, finding "that the Appellate Court decision establishes the law of the case and leaves no question to be resolved by the trial court." The court added that the evidence proffered with Rainey's motion to reconsider was not new and that, in any event, new evidence was not permissible at this juncture.

¶ 13 II. Analysis

¶ 14 On appeal, Rainey asserts that the trial court erred by entering summary judgment in favor of Indiana. According to Rainey, the court failed to comply with our previous mandate, erroneously applied the law of the case doctrine and improperly barred him from adding new claims not previously addressed.

¶ 15 Summary judgment is intended to determine whether a genuine issue of material fact exists, rather than to try a question of fact. *Illinois State Bar Ass'n v. Law Office of Tuzzolino and Terpinas*, 2015 IL 117096, ¶ 14. A defendant who moves for summary judgment may satisfy its initial burden by either (1) affirmatively showing that an element of the cause of action must be resolved in its favor; or (2) showing that the plaintiff cannot produce evidence necessary to support his claim. *Hall v. Flowers*, 343 Ill. App. 3d 462, 469 (2003). In addition, summary judgment is warranted where, when viewed in the light most favorable to the nonmovant, the pleadings, admissions, depositions and affidavits on file reveal no genuine issue of material fact so that the movant is entitled to judgment as a matter of law. *Brettman v. M&G Truck Brokerage, Inc.*, 2019 IL App (2d) 180236, ¶ 28. We review a grant of summary judgment *de novo*. *Illinois State Bar Ass'n*, 2015 IL 117096, ¶ 14. Moreover, central to the parties' dispute is the effect of our prior mandate: we similarly review the scope of that mandate *de novo*. *Clemons v. Mechanical Devices Co.*, 202 Ill. 2d 344, 352 (2002).

¶ 16 When a reviewing court reverses the judgment of the trial court, the reviewing court's judgment is final as to all decided questions. *PSL Realty Co. v. Granite Investment Co.*, 86 Ill. 2d 291, 305 (1981). The mandate can also be said to embrace matters that are implied therein. *Id*. at 308. Additionally, the trial court can only hold further proceedings that conform to the reviewing court's judgment. *Roggenbuck v. Breuhaus*, 330 Ill. 294, 297 (1928). Whether the trial court acted correctly on remand depends on the appellate court's mandate, as opposed to the appellate

court's opinion. *PSL Realty Co.*, 86 Ill. 2d at 308. If the reviewing court directs the trial court to proceed in conformity with the reviewing court's opinion, however, as we previously did here, that opinion's content is significant. *Id.*

¶ 17 In *Roggenbuck*, upon which Rainey relies, our supreme court stated that "where a court of appellate jurisdiction, in considering a cause, determines the issues and *decides the questions involved upon their merits*, and the judgment is reversed and the cause remanded, with directions to proceed in conformity with the views expressed in the opinion, there is no power in the court below except to enter a final order or judgment without a retrial." (Emphasis added.) *Roggenbuck*, 330 Ill. at 298. "It is only when the merits of the controversy and the ultimate rights of the parties are decided in a court of review that a reversal and remandment will deprive the court below of the right to allow amendments to the pleadings and hear other evidence." *Id.* at 298. In contrast, "if the issues are *not determined on their merits* and the judgment is reversed and the cause remanded with the directions mentioned, a retrial may be had, when the court below will be governed by the legal principles which have been announced by the appellate tribunal, and evidence offered by either party which falls within the principles so announced must be received." (Emphasis added.) *Id.*

¶ 18 Contrary to Rainey's assertion, this court's prior order decided the merits of this case, notwithstanding that we did not enter judgment thereon. The gist of our decision was that regardless of how one looked at the discovery materials and pleadings, they unequivocally showed that there was no conflict of interest between the defenses of Rainey and Rich and that Indiana did not even arguably breach a duty to Rainey in that regard. Stated differently, we found there was no genuine issue of material fact in that the record supported Indiana, not Rainey. We found no factual dispute. *Cf. Crane Paper Stock Co. v. Chicago & Northwestern Railway Co.*, 63

Ill. 2d 61, 69-70 (1967) (where the appellate court had expressly reversed summary judgment and remanded for the presentation of evidence to resolve disputed facts, the trial court erroneously believed the appellate court's directions precluded amendments to the pleadings); *Roggenbuck*, 330 Ill. at 296, 300-01 (where the appellate court "held that it was impossible to determine the amount of the damages from the evidence in the record" and consequently, reversed and remanded for further proceedings, the trial court improperly refused the defendant's demand for a jury trial on damages and denied his attempt to present further evidence). Once Indiana moved for summary judgment on remand, the trial court, to conform to our determination, could only grant Indiana's motion.

¶ 19 Rainey nonetheless argues that the trial court should have reopened discovery and permitted him to amend the pleadings because, as our supreme court stated in *Roggenbuck,* "if it appears from the opinion that the ground of reversal are of a character to be *obviated by subsequent amendment of the pleadings or the introduction of additional evidence*, it is the duty of the trial court to permit the cause to be redocketed and then to permit amendments to be made and evidence to be introduced on the hearing just as if the cause was then being heard for the first time." (Emphasis added.) *Roggenbuck*, 330 Ill. at 298. Rainey contends that he could yet have obviated our determination that no genuine issue of material fact exists. First, we note that *Roggenbuck* said nothing of reopening discovery. Even if it had, Rainey overlooks that the law-of-the-case doctrine applied and, consequently, he was procedurally precluded from obviating the ground for reversal.[2] *Cf. Clemons*, 202 Ill. 2d at 346-47, 354 (where the reviewing court

[2]The trial court generally has broad discretion over pretrial discovery (*Wynne v. Loyola University of Chicago*, 318 Ill. App. 3d 443, 455 (2000)) and over whether to grant leave to amend a complaint (*Geisler v. Everest National Insurance Co.*, 2012 IL App (1st) 103834, ¶ 94). In light of the factors to be considered, we would be hard pressed to find an abuse of discretion here. See *Id.* ¶ 94; see also *Wynne*, 318 Ill. App. 3d at 455 (stating that since the plaintiff had more than three years to conduct

reversed and remanded for a new trial due to the erroneous admission of evidence pertaining to a claim not raised the in the complaint, the plaintiff should have been permitted on remand to amend the complaint to add that claim, which would have rendered the admission of such evidence appropriate).

¶ 20 Pursuant to the law of the case doctrine, questions decided in a prior appeal are binding on subsequent proceedings in the trial court and reviewing court. *Kreutzer v. Illinois Commerce Comm'n*, 2012 IL App (2d) 110619, ¶ 23. The doctrine reflects the courts' general practice of refusing to reopen what has already been decided. *Norris v. National Fire Insurance Co. of Pittsburgh, Pa.*, 368 Ill. App. 3d 576, 580 (2006). In addition, the doctrine is intended to protect the parties' settled expectations, ensure the issuance of uniform decisions, maintain consistency, properly administer justice and bring litigation to a close. *Id.* at 581. When an issue has been decided by a reviewing court, dissatisfied parties can only file a petition for rehearing or a petition for leave to appeal to our supreme court. *Kreutzer*, 2012 IL App (2d) 110619, ¶ 30.[3] Moreover, a judgment can dispose of all controversies between the parties and adjudicate the merits of those controversies while also remanding for additional substantive proceedings, notwithstanding Rainey's suggestion to the contrary. *Id.* ¶ 28.

¶ 21 In *Cory Corp. v. Fitzgerald*, 403 Ill. 409, 414 (1949), our supreme court stated that while a reviewing court's judgment must terminate the litigation on the merits and determine the parties' rights in order to be final, the reviewing court's decision to remand for further proceedings does not necessarily mean the appellate court's judgment was not final. If, on remand, the trial court need only enter a judgment or decree according to the reviewing court's

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discovery regarding three of the four witnesses at issue, the trial court did not abuse its discretion by denying further discovery).

[3]Rainey's petition for rehearing and petition for leave to appeal were denied.

directions, or conduct further proceedings on uncontroverted incidental matters, the reviewing court's judgment is final, notwithstanding that it remanded the case to the trial court. *Id*. at 414. Conversely, where the reviewing court remands a case "for a new trial or other further proceedings *involving disputed questions of law or fact*, the judgment of the Appellate Court is not of a final character." (Emphasis added.) *Id*. at 414-15. "The ultimate question to be decided in each case is whether the judgment fully and finally disposes of the rights of the parties to the cause so that no material controverted issue remains to be determined." *Id*. at 415.

¶ 22 As stated, our prior decision determined that regardless of how one looked at the record, it unequivocally showed that there were no genuine issues of material fact. We remanded this case to the trial court only because Indiana had tendered no summary judgment motion for us to act on. As the trial court recognized below, once Indiana filed its motion, nothing remained to be done. We did not remand this case for the trial court to resolve disputed questions of law or fact. *Cf. Norton v. City of Chicago*, 293 Ill. App. 3d 620, 622-24 (1997) (where the reviewing court's prior decision had reversed judgment on the pleadings and remanded for further proceedings because it could not be determined whether a final judgment had been entered in traffic court, the trial court was not subsequently precluded by the law of the case doctrine from making that determination at the summary judgment stage). Our determination became the law of the case.

¶ 23 Rainey nonetheless asserts that an exception to the law of the case doctrine applies because our prior decision was palpably erroneous. See *Norris*, 368 Ill. App. 3d at 581. As Rainey acknowledges, the palpably erroneous exception rarely applies. *Radwill v. Manor Care of Westmont, LLC*, 2013 IL App (2d) 120957, ¶ 12. A decision is palpably erroneous only where it was clearly erroneous and would effectuate a manifest injustice. *Id*. Conversely, a decision is not palpably erroneous merely because a different court may have reached a different conclusion if it

considered the issue anew. *Id*. Furthermore, this exception requires that the prior reviewing court's decision remanded the case for a new trial on all issues. *Stallman by Stallman v. Youngquist*, 152 Ill. App. 3d 683, 689 (1987) (reversed on other grounds by *Stallman by Stallman v. Youngquist*, 125 Ill. 2d 267 (1988)).

¶ 24 Our prior decision did not remand for a new trial on all issues. It did not remand the case for any trial. Although we need go no further, we briefly find that our prior decision was sound. Jacobeit's complaint in the underlying action did not seek punitive damages against Rainey. See *National Casualty Co. v. Forge Industrial Staffing, Inc*., 567 F.3d 871, 876 (7th Cir. 2009) (finding "the specter of punitive damages was merely speculative and [did] not create an 'actual' conflict" where there was no evidence that the underlying plaintiffs would file suit and seek punitive damages or that any punitive damages requested would be so disproportionate to the compensatory damages sought as to create a genuine conflict). Moreover, the cases cited by Rainey do not show that we erroneously disregarded matters outside of the complaint in this instance. *Cf. Stoneridge Development Co. v. Essex Insurance Co*., 382 Ill. App. 3d 731, 745 (2008) (finding that the trial court could properly consider the reservation of rights letter in determining a conflict existed between the insurer and the insured); *Royal Insurance Co. v. Process Design Associates, Inc.*, 221 Ill. App. 3d 966, 977-78 (1991) (finding that while the complaint did not allege professional negligence, which would have placed the claim outside of coverage, a conflict existed because the insurer actively attempted to find a way that the insured could be found professionally negligent).

¶ 25 Finally, we find it would be manifestly unfair to allow Rainey to take a second bite at the apple following lengthy discovery and the filing of five complaints. See *Geisler*, 2012 IL App (1st) 103834, ¶ 102. A plaintiff cannot pursue claims in a piecemeal fashion. *Martin v. Federal*

Life Insurance Co. (Mutual), 164 Ill. App. 3d 820, 824 (1987). If Rainey had more claims or discovery materials to present, he should have done so before filing a motion for summary judgment, in which he himself asserted there was no genuine issue of material fact. See *Direct Auto Insurance Co. v. Beltran*, 2013 IL App (1st) 121128, ¶ 72 (observing that the plaintiff did not explain why a document was not previously attached to its motion for summary judgment and stating that trial courts ought not allow litigants to remain mute, lose on a motion and then frantically collect evidence to show the court's ruling was erroneous). Our supreme court has stated that "[t]here must be an end to litigation." *PSL Realty Co.*, 86 Ill. 2d at 313. For Rainey and Indiana, the litigation ends now.

¶ 26 III. Conclusion

¶ 27 In our prior decision, we found that the discovery materials, when viewed from any perspective, unequivocally supported Indiana's assertion that there was no conflict and refuted Rainey's assertion that there was. Rainey is bound by the law of the case.

¶ 28 For the foregoing reasons, we affirm the trial court's judgment.

¶ 29 Affirmed.