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SIXTH DIVISION
September 16, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

WEN XUAN,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 08 M2 1520
)	
JAMES TAI, MARIO A. SULLIVAN, <i>et al.</i> ,)	Honorable
)	James E. Snyder,
Defendant-Appellees.)	Judge Presiding.

JUSTICE GARCIA delivered the judgment of the court.
Presiding Justice R. E. Gordon and Justice Cahill concurred in the judgment.

ORDER

¶ 1 *HELD:* Where plaintiff appealed from orders dismissing his original complaint and denying his motions to reconsider the dismissal, but the plaintiff filed a timely amended complaint as expressly permitted by the court orders, the orders appealed from were not final. The appeal dismissed for lack of jurisdiction.

¶ 2 Plaintiff Wen Xuan, *pro se*, filed a replevin action against defendants James Tai, the Law Offices of Peter Anthony Johnson, P.C. ("Law Firm"), and attorney Mario Sullivan, a "member" of the Law Firm. Plaintiff contends the trial court erred in granting Sullivan's motion to quash service, in dismissing Sullivan as a defendant, and in denying sanctions against Sullivan. The plaintiff also contends the circuit court wrongly granted defendant James Tai's

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motion to dismiss the complaint. Finally, plaintiff challenges the circuit court's denial of plaintiff's request to transfer the case to the law division and certain rulings by the court not reduced to writing.

¶ 3 In his June 2008 replevin complaint, plaintiff alleged he was the lawful occupant of certain commercial premises in Chicago. In his complaint, he admitted a default judgment for possession of those premises was issued against him in a forcible detainer action in October 2007. Plaintiff alleged defendants locked him out of the premises on or about January 4, 2008, and wrongfully took possession of plaintiff's personal property that remained on the premises, despite his timely appeal of the eviction court's denial of his motion to vacate the default judgment. See *Tai v. Xuan*, No. 1-09-2504. We take judicial notice that the landlord-plaintiff in the underlying forcible detainer action referenced in the replevin complaint, from which the instant plaintiff appealed, was On Tai, not James Tai. In his replevin complaint, the instant plaintiff sought \$50,937.96 plus damages and court costs.

¶ 4 Attached to the complaint were a partial copy of the lease for the premises and a purported inventory of plaintiff's property that remained on the premises following the lockout. Documents from the forcible detainer action brought by On Tai were also attached to the replevin complaint. The court documents included the October 2007 judgment order for possession of the premises, which awarded On Tai \$4,230.50 plus costs, a November 2007 order denying the instant plaintiff's motion to vacate the judgment of default, which included a denial of his request for a stay of the order of possession, and the instant plaintiff's notice of appeal in that forcible detainer action we referenced above. The attachments also included two letters of January 16, 2008, from plaintiff's counsel to the defendant Law Firm, On Tai's counsel in the eviction action. One letter asserted that neither James Tai nor On Tai appeared at an agreed upon meeting on January 14, 2008, to permit the plaintiff to remove his personal property from

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the premises, although an unnamed person on behalf of On Tai and James Tai appeared. The other letter asserted that "your client has no right to touch my client's properties" as that would constitute illegal self-help. Both letters expressed plaintiff's willingness to meet either On Tai and James Tai at a mutually convenient time for plaintiff to remove his property from the premises

¶ 5 The underlying eviction action on behalf of On Tai against the instant plaintiff was filed in the first municipal district of the circuit court as the real property was located in Chicago. The instant plaintiff filed his replevin action in the second municipal district, apparently based on his residence.

¶ 6 Plaintiff had summonses issued against all three defendants at the address of the defendant Law Firm. Service of the summons on the Law Firm was received by Sullivan; purported services on James Tai and Sullivan were received by Peter Johnson, the name attorney of the Law Firm.

¶ 7 In September 2008, the Law Firm moved to transfer the case to the first municipal district based on where the cause of action arose. Plaintiff responded that venue was proper anywhere in Cook County, and the Law Firm's motion was not supported by affidavits. Defendants James Tai and Sullivan also jointly moved to quash service of summons because neither had been served personally or at their respective residence. Attached were affidavits by James Tai and Sullivan attesting that neither resided at the address of the Law Firm. Plaintiff responded that service upon the Law Firm was proper service upon James Tai and Sullivan because Sullivan was an employee of the Law Firm and James Tai was represented by the Law Firm. He emphasized that Sullivan personally received the summons for the Law Firm. He also argued the affidavits of James Tai and Sullivan were "in bad faith" because they were contradicted by the returns of service and were substantially identical.

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¶ 8 On October 27, 2008, the court granted the motion to quash and transferred the case to the presiding judge of the first municipal district. The case was then subject to several courtroom transfers, which the plaintiff contends supports his claim for sanctions against Sullivan, transfers which we need not detail.

¶ 9 Plaintiff filed a motion for sanctions against Sullivan based on the contention that Sullivan was acting as counsel for all defendants. In his motion for sanctions, plaintiff alleged Sullivan falsely stated he was not properly served when the return of service contradicted his statement. He alleged Sullivan made misrepresentations to various judges that caused the transfer of the case to different courtrooms. Sullivan denied the allegations. The motion for sanctions was denied on February 20, 2009.

¶ 10 Alias summonses were issued for James Tai and Sullivan, with substitute service effected on Sullivan in February 2009.

¶ 11 A motion to dismiss the replevin complaint was filed on behalf of the Law Firm and Sullivan in February 2009, pursuant to sections 2-615 and 2-619 of the Code of Civil Procedure (Code). 735 ILCS 5/2-615, 2-619 (West 2008). The motion stated that defendant James Tai is the agent of On Tai, the owner of the premises, and that Sullivan is a "member" of the Law Firm. The motion alleged plaintiff failed to pay rent on the premises beginning in June 2007 and James Tai, as On Tai's agent, employed the Law Firm to bring the eviction action against plaintiff. In October 2007, a default judgment for possession and damages was entered against the instant plaintiff and his motion to vacate was denied. The instant plaintiff's motion to stay enforcement pending appeal was denied; he did not post bond on appeal, and the sheriff enforced the eviction order on January 3, 2008. According to the motion, James Tai gave the instant plaintiff two opportunities to remove his property from the premises, as documented in two letters attached to the motion, but plaintiff did not avail himself of either opportunity. On

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Tai waited a reasonable time before removing the items of personal property from the premises. Neither the Law Firm nor Sullivan ever possessed plaintiff's property. The Law Firm and Sullivan contended they should be dismissed because they acted merely as attorneys on behalf of On Tai in the eviction action.

¶ 12 The Law Firm's Johnson attached his affidavit to the motion along with letters from the Law Firm to plaintiff's counsel, dated January 11, 14, 15, 2008. The first two letters informed plaintiff that "my client" would be at the premises, with the first letter giving a meeting date of January 14 and the second letter giving a meeting date of January 16. The Law Firm asserted On Tai was not liable for property not removed before the plaintiff was evicted from the premises. The letter of the January 15 claimed that On Tai "waited a reasonable time *** before removing any of the personal property from the subject premises." The same letter stated "my client *** is still willing to allow [plaintiff] to retrieve those items that remain in the subject premises, although he is not obligated to do so."

¶ 13 In his response, plaintiff alleged James Tai was "an owner or Landlord's agent or assignee since around 2000." Plaintiff admitted he failed to pay rent from June 2007 onward, but alleged he did so because James Tai did not fix the roof that had been leaking since 2001, did not provide hot water since November 2002, and did not repair the damage caused when a water pipe burst in February 2007. Plaintiff also alleged the first eviction action was dismissed with leave to refile because Tai had not fixed the problems mentioned by plaintiff. He alleged both eviction actions were filed without proper notice to quit the premises, and plaintiff was not served with a copy of the default judgment of possession entered in the second eviction. Plaintiff alleged that when his motion to vacate was denied along with his request for a stay, he was assured by the sheriff's office that his appeal would automatically stay the eviction order. He denied he was given an opportunity to remove his property from the premises before January

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10, 2008, when he alleged James Tai had the property removed. Plaintiff alleged James Tai failed to attend two scheduled meetings for plaintiff to remove his property. He alleged he used the premises as a medical office and it was illegal to remove patient records.

¶ 14 In their reply, the Law Firm and Sullivan argued that many of the allegations in plaintiff's response were irrelevant because On Tai was awarded possession of the premises by court order, received possession from the sheriff following plaintiff's eviction, and plaintiff failed to remove his property within a reasonable time after the eviction order was entered. The Law Firm and Sullivan pointed to numerous misstatements by plaintiff in his response: the first eviction action was dismissed without prejudice not because Tai was ordered to make certain repairs, but because of improper service; the roof leak was repaired long before the eviction was filed; and Tai gave plaintiff opportunities to remove his property. The Law Firm and Sullivan argued they never controlled or possessed plaintiff's property, which barred the replevin action against them. Attached to the reply was James Tai's affidavit in which he averred he was "the agent for the owner of the property."

¶ 15 On April 10, 2009, the court granted the motion to dismiss and dismissed the Law Firm and Sullivan from the case with prejudice.

¶ 16 Plaintiff filed a motion to reconsider the dismissal order, arguing Sullivan was not properly before the court as he had not filed an appearance following substitute service. On May 26, 2009, the court granted reconsideration of the dismissal, allowed Sullivan to file his appearance *instanter*, and reentered its order dismissing Sullivan from the case with prejudice.

¶ 17 Service of process was effected on James Tai in late June 2009. On August 4, 2009, the court granted James Tai leave to file his appearance and a motion to dismiss in lieu of an answer. The court denied plaintiff's motion for default.

¶ 18 James Tai's motion to dismiss plaintiff's complaint was filed pursuant to sections 2-615 and 2-619 of the Code. He alleged he was not the owner of the premises but rather the agent of the owner, On Tai, on whose behalf the eviction was filed, which the circuit court granted. James Tai contended he was misjoined as a defendant. James Tai alleged the removal of plaintiff's property occurred only after plaintiff was given a reasonable opportunity to take possession of his property. He asserted the owner "waited [a] reasonable time before removing the items of personal property from the" premises and plaintiff "cannot establish that Defendant is in or had possession or is in control of the items alleged in his Complaint." He argued that under these facts, plaintiff could not state a claim for replevin against defendant James Tai.

¶ 19 In his response, plaintiff argued he dealt with James Tai alone on issues that arose regarding the premises. He also pointed to the absence of any official document that showed On Tai owned the premises. Finally, he alleged James Tai personally supervised the removal of plaintiff's property from the premises.

¶ 20 In September 2009, plaintiff's motion to transfer this case to another courtroom was denied.

¶ 21 On October 20, 2009, the court granted James Tai's motion to dismiss without prejudice, granting plaintiff 28 days to amend his complaint. The court denied plaintiff's motion for substitution of judge as of right.

¶ 22 Plaintiff filed a motion to reconsider the granting of James Tai's motion to dismiss, arguing James Tai had plaintiff's property wrongfully removed from the premises. Plaintiff claimed he was engaged in a medical practice at the premises, where he also stored and sold medicines and herbs. He argued James Tai, not being a health care provider, violated federal law by taking possession of plaintiff's patient records. Plaintiff also sought

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reconsideration of the denial of his motion for substitution of judge. While he admitted the court ruled on motions to dismiss, he argued that substantial rulings made before a party's appearance do not bar his claim for substitution of judge as of right. Plaintiff pointed to Sullivan's dismissal from the case on April 10, 2009, and noted he did not file an appearance until May 26, which did not preclude his right to seek substitution of judge as of right.

¶ 23 On November 17, 2009, the court declined to reconsider the dismissal and gave plaintiff seven days to file an amended complaint.

¶ 24 On November 24, 2009, plaintiff timely filed his amended complaint, naming James Tai and Edward Tai (but not On Tai) as defendants. Plaintiff alleged that "one of the current owners of the Premises" informed him in 2000 that "James Tai had become a new landlord of the premises" and would be plaintiff's sole contact. Plaintiff also alleged that he corresponded with James Tai regarding the leaky roof, the lack of hot water, and a burst pipe. Plaintiff alleged that Edward Tai signed the receipt of possession following the eviction of January 4, 2008, as owner of the premises. He alleged James Tai personally supervised and participated in the removal of plaintiff's property from the premises on January 10, 2008, as well as directed employees to remove the remaining property on January 11, 2008. Plaintiff alleged that he could not enter the premises to recover property on January 16, 2008, as scheduled because James Tai was not present, and Tai refused to give him written permission to enter the premises on January 18, 2008. Plaintiff alleged his efforts to contact James Tai after January 2008 seeking return of his property were fruitless, which prompted him to file this case. As to the disposition of plaintiff's property, the complaint alleged he was told by neighbors that on January 11, 2008, plaintiff's furniture and equipment were removed from the premises and left on the side of the street. According to these neighbors, Tai's employees offered to sell the furniture and equipment and the employees were selling some of plaintiff's herbs and medicines

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in late January or early February 2008. In his amended complaint, plaintiff sought \$360,627.96 in damages, including \$60,000 for a draft of a book on Chinese medicine, \$150,000 for lost income, and \$60,000 for "mental/physical damages" and "reputation damage."

¶ 25 Plaintiff also filed a motion for substitution of judge for cause, arguing the presiding judge demonstrated bias by dismissing Sullivan from the case on April 10 before Sullivan had filed an appearance. He argued the judge showed prejudice by not immediately finding James Tai in default when he failed to file a timely appearance. Plaintiff argued the judge improperly denied his motion for substitution of judge as of right. Lastly, the judge's dismissal of James Tai on the basis that he was the agent of the owner of the premises, rather than the owner, was unsupported by any evidence. The dismissal was contrary to the fact that James Tai had plaintiff's property removed from the premises. Following a hearing before another judge, the motion for substitution for cause was denied.

¶ 26 On November 30, 2009, the court denied reconsideration of the October 20, 2009, dismissal, in an order stating it was final and appealable. This November 30, 2009, order in effect repeated what the order of November 17, 2009, stated as we set out above. Plaintiff filed his notice of appeal on December 30, 2009, which brings this appeal before us.

¶ 27 Discussion

¶ 28 James Tai contends we do not have jurisdiction to entertain this appeal because the October 20, 2009, dismissal order was without prejudice and granted plaintiff leave to file an amended complaint within 28 days, which makes the order not final. Even if the October 20, 2009 were final and appealable, James Tai argues plaintiff filed successive post-judgment motions challenging the October 20, 2009, dismissal so that his December 30 notice of appeal was filed more than 30 days after the order denying plaintiff's first motion to reconsider on the November 17, 2009. Supreme Court Rule 303 expressly provides that a notice of appeal

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must be filed within 30 days of a final judgment or the denial of a timely motion challenging a final judgment, and a successive post-judgment motion does not toll the time for filing a notice of appeal. Ill. S. Ct. R. 303(a)(1), (2) (eff. June 4, 2008).

¶ 29 We agree with James Tai that the order of October 20, 2009, was not final and appealable. The order dismissed the case without prejudice and granted plaintiff 28 days to amend his complaint. An order is final and appealable only when it ends the litigation. *Apollo Real Estate Investment Fund v. Gelber*, 398 Ill. App. 3d 773, 783-85 (2009). The order of November 17, 2009, which denied plaintiff's first motion to reconsider the October 20 dismissal, expressly gave plaintiff seven days to file an amended complaint, which makes the order of November 17 not final as well. Plaintiff then filed an amended complaint on November 24, 2009, as permitted by court order. With the filing of the amended complaint, the order of November 30, 2009, denying plaintiff's second motion to reconsider the October 20, 2009, dismissal cannot be an order that ends the litigation to qualify as a final and appealable order. *Gelber*, 398 Ill. App. 3d at 783-85. Nor did the express language in the order of November 30, 2009, that it was a final and appealable order, make it so. *Adoption of S.G.*, 401 Ill. App. 3d 775, 783 (2010) (it is axiomatic that a non-final order does not become appealable merely by the language declaring it appealable).

¶ 30 When defendant filed his notice of appeal on December 30, 2009, there was no final judgment from which to take an appeal.

¶ 31 This cause is dismissed for lack of jurisdiction.

¶ 32 Dismissed.