2012 IL App (1st) 111762-U

No. 1-11-1762

SIXTH DIVISION
May 17, 2012

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re AUDI LITIGATION	)	Appeal from the
	)	Circuit Court of
(PAUL PERONA, on behalf of himself	)	Cook County.
and all others similarly situated,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 99 CH 12640
	)	
VOLKSWAGEN OF AMERICA, INC.;	)	
AUDI AG; and VOLKSWAGEN AG,	)	The Honorable
	)	Kathleen M. Pantle,
Defendants-Appellees).	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Robert E. Gordon and Justice Garcia concurred in the judgment.

O R D E R

¶ 1 *HELD*: This court does not have jurisdiction to review the underlying appeal.

¶ 2 Plaintiff, Paul Perona, on behalf of himself and all others similarly situated, appeals the trial court's order instructing him to provide to defendants, Volkswagen of America, Inc., Audi AG, and Volkswagen AG, notes that he generated after reviewing a privileged document

inadvertently produced by defendants during the course of discovery. Defendants contend we do not have jurisdiction to review the challenged order pursuant to Supreme Court Rule 307(a)(1) (eff. Feb. 26, 2010) because it was ministerial and not injunctive. Based on the following, we dismiss the instant appeal for lack of jurisdiction.

¶ 3 FACTS

¶ 4 The underlying litigation began in 1987 and relates to the alleged unintended acceleration of Audi 5000 vehicles for the model years of 1984-1986. Following lengthy litigation, including two prior appeals, Illinois class certification was granted. In the course of discovery, defendants inadvertently produced a memorandum containing statistical data on complaint, accident, injury, and fatality rates of four car companies. Approximately one year later, plaintiff served defendants a "Notice to Admit Certain Facts and Genuineness of Relevant Documents," attaching the memorandum and two other inadvertently produced documents. Defendants' counsel responded by letter requesting that the three documents be withdrawn from the court file and returned to defendants. Plaintiff failed to respond to the letter. Defendants subsequently filed a motion in the circuit court for an order directing plaintiff to withdraw the three inadvertently produced documents and return them to defendants.

¶ 5 On February 17, 2011, the circuit court entered a written order finding that the three documents were privileged, either as attorney-client communications or work-product materials or both, and the privileges were not waived when defendants voluntarily produced the documents to plaintiff. The circuit court ordered that the documents remain in the court file, but placed them under seal. In addition, the circuit court ordered plaintiff to return the three documents to

defendants. In response to defendants request for sanctions against plaintiff for failing to comply with a protective order instituted at the outset of the litigation, the circuit court found that sanctions were not authorized.

¶ 6 On April 18, 2011, a hearing was held on plaintiff's motion for an in-camera inspection of certain documents. During the hearing, a discussion ensued regarding the meaning of the circuit court's February 17, 2011, order. The court clarified that plaintiff could not use the statistical data contained in the memorandum at issue in the case at bar because it was protected by both the attorney-client privilege and the work-product privilege. The court also instructed plaintiff to comply with its February 17, 2011, order to return the three privileged documents, including the memorandum containing the statistical data.

¶ 7 On May 25, 2011, a hearing was held on defendants' objections to a Supreme Court Rule 216 (eff. Jan. 1, 2011) notice to admit, defendants' request for sanctions against plaintiff's attorneys, and plaintiff's request for leave to compel depositions of named witnesses. During the course of the hearing, it became obvious that plaintiff was requesting leave to compel the depositions of individuals to substantiate the statistical data contained in the privileged memorandum. The circuit court addressed plaintiff's counsel as follows:

> "No, you have no right to the document. I said it was privileged. I allowed [defendants] the call back. The only point of allowing a call back is that it is as if it never happened, okay. If you can get the facts from outside the privileged document, then by all means you can send out these requests, to admit. But anything that – any of these requests to admit that are based on any

> information in [the three documents] are improper because those documents never should have been in your possession to begin with. And I'm not going to allow you to invade my order, saying that those documents are privileged, but then asking for facts in the documents because I said the whole thing was privileged ***.

¶ 8 In its written order, the circuit court denied plaintiff's request for leave to compel further discovery depositions and denied plaintiff's motion to compel answers to the requests to admit. The order provided that defendants' motion for sanctions was withdrawn. The order further provided:

> "Defendants should supply the Court with a list of documents filed with the Court that reference or rely upon the privileged documents subject to this Court's clawback action. With that list Defendants shall provide a proposed protective order to place those documents under seal. *Furthermore, plaintiff's counsel are directed to provide to Defendants all notes referencing the privileged documents for destruction of those notes.*" (Emphasis added.)

¶ 9 Plaintiff refused to turn over the notes related to the statistical data from the privileged memorandum and instead filed a "friendly contempt" motion. On June 23, 2011, the circuit court said:

> "Well, you know, after I got your motion, I put some–this might shortcut things. The thought occurred to me that–I mean, you're seeking the contempt just on the portion of my order that says you have to turn over your notes regarding the

> documents to–back to the defendants.
>
> And the thought occurred to me that may have–that that order may have been in error because I don't know how you–if I take away your notes, I don't know how you can properly brief that issue on appeal if you can't–you know, since you've turned the documents over. So I was–but I was going to kind of float that idea. ***. I mean, the plaintiff[] [does] have a right in the event of an adverse judgment to appeal my order and if I take away their notes which may very well be their own work product, you know. I might be compromising their ability to raise the issue on appeal."

Defendants' counsel informed the circuit court that they did not want plaintiff's notes turned over to defendants, but rather that the notes be destroyed. The circuit court responded: "I'm not going to do anything to enforce the *** last paragraph of the May 25 order at this point ***." The motion for friendly contempt was entered and continued. The parties and the court then went on to schedule briefing for defendants' pending motion for summary judgment.

¶ 10 Also on June 23, 2011, plaintiff filed an interlocutory appeal of that portion of the circuit court's May 25, 2011, order instructing plaintiff's counsel to provide defendants with all notes referencing the privileged documents for their destruction.

¶ 11 DECISION

¶ 12 We must first consider whether jurisdiction has vested with this court. *Artoe v. Illinois Bell Telephone Co.*, 26 Ill. App. 3d 483, 484, 325 N.E.2d 698 (1975). Defendants contend we do not have jurisdiction to consider this appeal because the trial court's May 25, 2011, order does

not have the force and effect of an injunction, and, therefore, cannot form the basis of an interlocutory appeal under Rule 307(a)(1). In the event we find the May 25, 2011, order was injunctive, defendants contend there was no longer any order requiring plaintiff to perform an act because, on June 23, 2011, the circuit court renounced any injunctive effect of the prior order when the court said it was "not going to do anything to enforce" the portion of the May 25, 2011, order being appealed by plaintiff "at [that] point." Plaintiff responds that the May 25, 2011, order was injunctive, in that it ordered him to turn over his notes related to the allegedly privileged memorandum, and the subsequent order of June 23, 2011, did not amend or vacate that order, thereby retaining the force and effect of the May 25, 2011, order.

¶ 13 We previously denied defendants' motion to dismiss this appeal for lack of jurisdiction; however, upon further review, we conclude that this court does not have jurisdiction to consider the appeal before us.

¶ 14 Rule 307(a)(1) provides that an appeal may be taken from an interlocutory order "granting, modifying, refusing, dissolving, or refusing to dissolve or modify an injunction" within 30 days of entry of that order. The question before us is whether the trial court's May 25, 2011, order qualifies as an injunction? The supreme court provided guidance on this question in *In re A Minor*, 127 Ill. 2d 247, 537 N.E.2d 292 (1989). In that case, the supreme court advised that the determination of an appealable injunctive order requires review of the substance of the order. *Id*. at 260. An injunction has been described as " 'a judicial process, by which a party is required to do a particular thing, or to refrain from doing a particular thing, according to the exigency of the writ, the most common sort of which operates as a restraint upon the party in the

exercise of his real or supposed rights.' " *Id*. at 261 (quoting *Wangelin v. Goe,* 50 Ill. 459, 463 (1869)). In the case before us, the trial court ordered plaintiff to "do a particular thing," namely, turn over his notes related to the inadvertently disclosed memorandum. However, the supreme court has further advised that:

> "[n]ot every nonfinal order of a court is appealable, even if it compels a party to do or not do a particular thing. Orders of the circuit court which can properly [be] characterized as 'ministerial,' or 'administrative'–-because they regulate only procedural details of litigation before the court–-cannot be the subject of an interlocutory appeal. [Citation.] Such orders may be considered noninjunctive because they did not form part of the power traditionally reserved to courts of equity, but, instead, were part of the inherent power possessed by any court to compel witnesses to appear before it and give testimony. [Citation.] They do not affect the relationship of the parties in their everyday activity apart from the litigation, and are therefore distinguishable from traditional forms of injunctive relief." *Id*. at 261-62.

¶ 15 Here, the trial court's May 25, 2011, order was noninjunctive where the purpose of the order was to regulate discovery stemming from the inadvertent production of what was deemed an undiscoverable document. The order did not affect the relationship of the parties outside of litigation. The order, therefore, was not a traditional form of an injunction and does not allow for interlocutory review pursuant to Rule 307(a)(1).

¶ 16 CONCLUSION

¶ 17 We lack jurisdiction to consider the propriety of the disputed order and, therefore, dismiss the instant appeal.

¶ 18 Appeal dismissed.