

No. 1-11-2433

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IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

KAPLAN ENTERPRISES, LLC.,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	No. 09 L 12371
)	
MB FINANCIAL BANK, N.A.,)	Honorable Charles R.
)	Winkler and William D.
Defendant-Appellant.)	Maddux,
)	Judges Presiding.

JUSTICE KARNEZIS delivered the judgment of the court.
Presiding Justice Hoffman and Justice Hall concurred in the judgment.

ORDER

HELD: Following an affirmance by the appellate court, a party may pursue attorneys fees in the trial court as an "other proceeding" pursuant to Illinois Supreme Court Rule 369(b), within 30 days of the appellate court's mandate.

¶ 1 Defendant-Appellant MB Financial Bank appeals the trial court's order denying its motions to ultimately seek attorneys fees and costs from Plaintiff-Appellee Kaplan

Enterprises, LLC. MB Financial Bank contends on appeal that the trial court's July 25, 2011, order should be reversed because its motions qualified as an "other proceeding" pursuant to Illinois Supreme Court Rule 369(b) (eff. July 1, 1982). We affirm the trial court's order.

¶ 2 Background

¶ 3 This is the second time this case is before us. The parties first appeal was fairly straightforward. After the first appeal however, the case took several procedural turns. The facts giving rise to the first appeal were as follows. In 2009, Kaplan sued MB Financial Bank for breach of contract and fraud (the 2009 action). The parties had entered into an "Assignment and Acceptance Agreement (Assignment Agreement) in which MB Financial Bank assigned its interests in certain loans to Kaplan. When Kaplan subsequently learned that the collateral for the loans was essentially worthless, Kaplan filed suit. The trial court dismissed Kaplan's complaint pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2008)) and Kaplan appealed. We affirmed. *Kaplan Enterprises, LLC v. MB Financial Bank, N.A.*, No. 1-10-1801 (February 8, 2011)(unpublished under Supreme Court Rule 23)

¶ 4 On February 11, 2011, MB Financial Bank demanded in a letter to Kaplan that it was entitled to recover attorneys fees and costs in the 2009 action because it was the "prevailing party" pursuant to a fee-shifting clause in the Assignment Agreement. MB Financial Bank sought reimbursement of approximately \$95,000 in fees and costs. Kaplan refused MB Financial Bank's demand.

¶ 5 The appellate court mandate issued on April 13, 2011. The next day, on April 14, 2011, MB Financial Bank filed a verified complaint for breach of contract against Kaplan (the 2011 action). The complaint alleged that Kaplan owed MB Financial Bank attorneys fees and costs in defending the 2009 action pursuant to the "prevailing party" fee-shifting provision contained in the Assignment Agreement and that Kaplan had breached the agreement by refusing MB Financial Bank's demand.

¶ 6 Kaplan responded with a motion to dismiss the complaint pursuant to section 2-615 and 2-619 of the Code of Civil Procedure (735 ILCS 5/2-615 and 619 (West 2010)). Kaplan first alleged that MB Financial Bank's demand for fees and costs was barred by the doctrine of *res judicata* because it did not request attorneys fees and costs at any time in the 2009 action. Kaplan also alleged that MB Financial Bank could not recover fees and costs because the attorneys fees provision in the Assignment Agreement only provided for fees in prosecuting an action rather than in defending an action.

¶ 7 MB Financial Bank responded to the motion to dismiss by filing a "Motion to Transfer or, Alternatively, to Consolidate" on June 13, 2011. The motion sought to transfer or consolidate the 2011 action with the 2009 action and to have the trial court consider MB Financial Bank's request for fees and costs as an "other proceeding" in the 2009 action pursuant to Rule 369(b).

¶ 8 Kaplan responded to MB Financial Bank's motion arguing that the trial court no longer had jurisdiction of the 2009 action because more than 30 days had passed since the trial court's final judgment. Kaplan maintained that therefore the 2011 action could

not be transferred to or consolidated with the 2009 action.

¶ 9 Subsequently, on June 29, 2011, MB Financial Bank filed a motion in the 2009 action entitled "Motion to Remove and Reassign Case from the Appellate Court to the Circuit Court of Cook County." MB Financial Bank argued that the appellate court still had jurisdiction of the 2009 action but should remand the cause to the trial court to conduct "other proceedings" pursuant to Rule 369(b) so that MB Financial Bank could file its fee petition. In MB Financial Bank's own words, it sought to reinstate the 2009 action so that the 2011 action could be consolidated with the 2009 action.

¶ 10 On July 25, 2011, the trial court denied MB Financial Bank's motions filed in the 2009 action and in the 2011 action. The trial court's order was captioned with the trial court number from the 2009 action. The court held that although Rule 369(b) generally permitted the reinstatement of an action in the circuit court for a party seeking attorneys fees, the doctrine of *res judicata* prevented the court from doing so because MB Financial Bank failed to assert its claim for attorneys fees in the trial or appellate courts or to petition the appellate court to remand the issue to the trial court to determine attorneys fees. The trial court relied on this court's holding in *Dalan/Jupiter, Inc. v. Draper and Kramer, Inc.*, 372 Ill. App. 3d 362 (2007). MB Financial Bank timely appealed the trial court's order. This is the appeal currently before us.

¶ 11 Subsequently, in the 2011 action, the trial court ultimately entered and continued Kaplan's motion to dismiss the 2011 complaint and stayed the action pending the outcome of the current appeal.

¶ 12 MB Financial Bank contends on appeal that the trial court's July 25, 2011, order should be reversed because its attempts to seek attorneys fees and costs were not barred by the doctrine of *res judicata* and qualified as an "other proceeding" pursuant to Rule 369(b).

¶ 13 Analysis

¶ 14 The question presented on appeal is whether the trial court correctly held that MB Financial Bank's attempts to seek attorneys fees and costs from Kaplan were barred by *res judicata*. We agree with the trial court that MB Financial Bank's motions should have been denied, however for a different reason than relied on by the trial court. We note that we may affirm the trial court's judgment on any ground appearing in the record. *Kostal v. Pinkus Dermatopathology Laboratory P.C.*, 357 Ill. App. 3d 381, 384 (2005).

¶ 15 A timely notice of appeal 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 Corp. v. Pappas*, 242 Ill. 2d 163, 173 (2011). The appellate court's mandate, which is the transmittal of the judgment of the reviewing court to the circuit court, reverts the trial court with jurisdiction. *Longo v. Globe Auto Recycling, Inc.*, 318 Ill. App. 3d 1028, 1035 (2001). Rule 369(b) provides that:

"When 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."

A circuit court retains jurisdiction for 30 days after its entry of a final order or judgment.

Herlehy v. Marie V. Bistersky Trust Dated May 5, 1989, 407 Ill. App. 3d 878, 899

(2010). A motion for attorneys fees filed more than 30 days after entry of a final judgment is untimely and the court lacks jurisdiction to consider the motion. *Herlehy*, 407 Ill. App. 3d at 899-00.

¶ 16 Here, we agree with the trial court that MB Financial Bank's motions should have been denied, however, based on untimeliness rather than *res judicata*. The appellate court mandate was issued in the 2009 action on April 13, 2011. Instead of filing a motion for attorneys fees in the 2009 action within 30 days of the appellate court mandate, MB Financial Bank filed the 2011 action on April 14, 2011. The first motion MB Financial Bank filed in the 2009 action was its "Motion to Remove and Reassign Case from the Appellate Court to the Circuit Court of Cook County," which was filed on June 29, 2011. At that time, more than 30 days had passed since the mandate had issued. MB Financial Bank's motion was untimely and should have been denied as such.

¶ 17 MB Financial Bank contends that its motions should qualify as "other proceedings" pursuant to Rule 369(b) following this court's affirmance in the first appeal. We acknowledge that this court has previously held that a party's attempt to seek attorneys fees was proper as an "other proceeding" pursuant to Rule 369(b). In *Stein v. Spainhour*, 196 Ill. App. 3d 65 (1990), this court held that following an

affirmance by the appellate court, Rule 369(b) permitted the trial court to consider the plaintiff's request for attorneys fees as an "other proceeding" pursuant to Rule 369(b). *Stein*, 196 Ill. App. 3d at 68. The court further stated that no remand order was necessary to revest the trial court with jurisdiction following the appellate court's affirmance. *Stein*, 196 Ill. App. 3d at 68. We note that the court's opinion did not address the timeliness of the party's fee petition, which was filed more than 30 days after the appellate court's mandate.

¶ 18 We agree that following an affirmance, a trial court would have jurisdiction to rule on a petition for attorneys fees as held in *Stein*. However, we part ways with *Stein* by holding that the petition must be timely filed. Rule 369(b) allows the trial court to conduct "other proceedings," but qualifies that authority with the statement "as if no appeal had been taken." As stated above, the trial court only retains jurisdiction for 30 days after its entry of a final order or judgment. Rule 369(b) does not extend this time-frame.

¶ 19 We next comment on the trial court's reliance on *Dalan/Jupiter* and *res judicata* as bases for denying MB Financial Bank's motions. We do not believe that *Dalan/Jupiter* controls the outcome of this case. This court in *Dalan/Jupiter* held that following a reversal without a remand from the appellate court, the trial court did not have jurisdiction to conduct "other proceedings" such as a fee petition pursuant to Rule 369(b). *Dalan/Jupiter, Inc.*, 372 Ill. App. 3d at 368-69. The court relied on *Watkins v. Dunbar*, 318 Ill. 174 (1925), in which our supreme court held that where a judgment was

reversed by the appellate court with no order remanding the cause, it could not be reinstated in the trial court. *Watkins*, 318 Ill. at 177; *Dalan/Jupiter, Inc.*, 372 Ill. App. 3d at 367-68. The court then addressed whether a party's new cause of action for attorneys fees was barred by *res judicata*.

¶ 20 In *Dalan/Jupiter*, Draper and Kramer filed suit against Dalan/Jupiter and Trammel Crow Company for breach of contract. The trial court found in favor of Draper. The appellate court reversed on appeal. Within 30 days of the mandate being filed, Trammel filed a petition for fees and costs pursuant to the prevailing party clause of its contract with Draper. Several months later, Dalan/Jupiter filed its own fee petition based on the contract between Draper and Trammel to which it was not a party. The trial court dismissed Dalan/Jupiter's fee petition, finding it lacked jurisdiction to consider the petition. Dalan/Jupiter had not raised the issue that it may have been entitled to attorneys fees before the trial or appellate courts. Subsequently, Dalan/Jupiter filed a new cause of action against Draper for attorneys fees. Draper filed a motion for summary judgment based on *res judicata*, which the trial court granted. Dalan/Jupiter appealed, and this court found that the new cause of action for attorneys fees was barred by *res judicata* because Dalan/Jupiter could have raised the issue of attorneys fees in the first case but failed to do so. *Dalan/Jupiter, Inc.*, 372 Ill. App. 3d at 368-69. The court reasoned that Dalan/Jupiter was not allowed another "bite at the apple" by filing a collateral complaint directed at the same fees it sought in its untimely petition before the trial court. *Dalan/Jupiter, Inc.*, 372 Ill. App. 3d at 368.

¶ 21 Here, the trial court, relying on *Dalan/Jupiter*, determined that MB Financial Bank was barred by *res judicata* from seeking attorneys fees in the 2009 action. The court's order compared MB Financial Bank to Dalan/Jupiter, finding that because MB Financial Bank failed to either assert its claim for attorneys fees in the trial or appellate courts following a "reversal," *res judicata* applied. Despite the court's use of the word "reversal," it is clear that we affirmed the trial court in the first appeal. Additionally, the second appeal in *Dalan/Jupiter* was the appeal from the trial court's dismissal of Dalan/Jupiter's separate cause of action for attorneys fees. The second appeal here does not involve MB Financial Bank's 2011 complaint for attorneys fees, as that action was stayed by the trial court. Rather, the second appeal here is from the trial court's denial of MB Financial Bank's motions. In *Dalan/Jupiter*, this court considered whether a separate cause of action for attorneys fees was barred by *res judicata* rather than whether a party could seek attorneys fees in the same cause after an affirmance by the appellate court, which is at issue in this case. Therefore, we do not find *Dalan/Jupiter* controlling.

¶ 22 Conclusion

¶ 23 As stated above, MB Financial Banks' motion filed in the 2009 action was untimely and should have been dismissed as such. We affirm the trial court's order, albeit for a different reason.

¶ 24 Accordingly, we affirm the judgment of the trial court.

¶ 25 Affirmed.

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