2013 IL App (1st) 122239-U

SECOND DIVISION
October 22, 2013

No. 1-12-2239

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CMA HOLDINGS, INC.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 04 CH 16328
	)	
SEIDLER & MCEARLEAN; MARC SEIDLER and PETER G. HALLAM,	)	
	)	Honorable
	)	Kathleen M. Pantle,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Quinn and Justice Pierce concurred in the judgment.

O R D E R

¶ 1 *Held*: Because the record was incomplete, plaintiff's claim that the trial court improperly dismissed its section 2-1401 petition as untimely could not be reviewed; plaintiff failed to show that the trial court's dismissal of the case was void; dismissal of section 2-1401 petition affirmed.

¶ 2 Plaintiff CMA Holdings, Inc. appeals from a June 27, 2012 order of the circuit court dismissing its petition for relief pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2012)). Plaintiff argues the trial court erred by dismissing plaintiff's petition as untimely. In the alternative, plaintiff contends that the underlying order was void. We affirm.

¶ 3 The genesis of this dispute was plaintiff's purchase of substantially all the stock in AAI Holdings, Ltd. (AAI Holdings) effective as of the close of business on December 31, 1995. Subsequently, plaintiff apparently discovered that the stock of AAI Holdings was worthless, it allegedly had relied upon misstatements made by certain people and entities in its purchase decision, and it suffered damages as a result of this purchase. This transaction generated a 1997 federal lawsuit against Charterhouse International, Inc. (Charterhouse), Gary Kingery, and Kevin Ottley that plaintiff voluntarily dismissed in 1999, and a 2002 arbitration with the following parties: Auto & Home Insurance Agency, Inc., the Galney Group, Estate of A.A. Freemen, Peter Wolff, C.W. Olson Company, Dr. Robert Herzberg, Marcia Herzberg, Steven Vile, Patricia Vile, James Lewis, Thomas Silberman (as Trustee of the Thomas A. Silberman Trust), Nancy Silberman (as Trustee of the Nancy W. Silberman Trust), Arthur B. Friedman, and Reuben P. Ballis. The arbitration's result was adverse to plaintiff.

¶ 4 In October 2004, after the arbitration was complete, plaintiff filed a complaint in Cook County. Ultimately, on August 5, 2005, plaintiff filed a third amended two-count complaint. Count I sought a declaratory judgment as to whether an enforceable tolling agreement existed that would permit plaintiff to reinstate its initial lawsuit, regardless of the running of the statute of limitations, so that it could proceed with its claim for damages against Charterhouse, Kingery, and Ottley. The trial court denied Ottley's motion for summary judgment and certified a question of law for an immediate appeal—whether parties could indefinitely toll or waive by oral agreement the applicable statutes of repose. On appeal, we found that plaintiff was asking the trial court to decide whether he had a cause of action against defendants, noted that courts will not render advisory opinions or give legal advice, concluded that an actual controversy did not exist, and dismissed the appeal as moot. *CMA Holdings, Inc. v. Kevin Ottley, Marc Seidler, Peter G. Hallam, and Seidler & McEarlean*, No. 1-08-1075 (2009) (unpublished order under Supreme Court Rule 23).

¶ 5 Count II, which arose out of the same facts and circumstances as Count I, alleged professional negligence against defendants Seidler & McEarlean, Marc Seidler, and Peter G. Hallam (Seidler defendants), who represented plaintiff from 1997 until 2003 in both the federal lawsuit and arbitration. Plaintiff alleged that their negligence proximately caused plaintiff the loss of the recovery of large sums in damage awards because now plaintiff had "no one to recover from since the statutes of limitation have long since expired absent a tolling agreement."

¶ 6 After the 2009 decision by this court on Count I, on February 18, 2010, plaintiff filed a motion to compel, asserting there were outstanding discovery issues relating to the Seidler defendants, the subjects of Count II. On April 20, 2010, a case management order was entered that granted plaintiff leave to file an amended complaint within 21 days. On May 24, 2010, the trial court entered an order stating that "[t]his matter having come before the Court on a scheduled status hearing, notice having been given to all parties and the Court being duly advised on the premises," and recounting that on March 2, 2010, plaintiff was granted leave to file an amended complaint until March 30, 2010, and failed to do so, and on April 20, 2010, plaintiff was again granted leave to file an amended complaint until May 11, 2010, and again failed to do so. As a result, the court ordered "this case and all claims and all counts against all defendants are hereby dismissed with prejudice." (Emphasis in original.)

¶ 7 On August 12, 2010, plaintiff filed a verified motion for rule to show cause relating to a subpoena that had been issued. On August 24, 2010, the trial court entered an order striking this motion with prejudice because the case was dismissed with prejudice on May 24, 2010. On May 23, 2011, plaintiff filed a motion to vacate the May 24, 2010 order of dismissal as to Count II of the complaint. As part of the filing, on a document entitled "Spindled Motion Form," plaintiff checked the box for "Vacate Order." One entry above "Vacate Order" was "Cavate [*sic*] DWP," which was not checked. On June 10, 2011, the trial court entered an order striking plaintiff's motion to vacate the order of dismissal.

¶ 8 On June 8, 2012[1], plaintiff filed a petition for relief from judgment pursuant to section 2-1401, requesting that the court vacate its order of dismissal of May 24, 2010 as to defendants. The petition alleged that none of the parties had been present on May 24, 2010, plaintiff's counsel never received a post card or other notice of the order dismissing the case or any of the parties, and plaintiff had been unaware of the dismissal until plaintiff scheduled a motion to enforce a subpoena on August 24, 2010. Plaintiff asserted that the trial court had wrongfully dismissed the entire case with prejudice because there was no order that Count II be amended, defendants had never requested that Count II be dismissed, and there had been no reason for plaintiff to file an amended complaint "since the parties were at issue and there was on-going discovery outstanding." Additionally, while plaintiff's key witness had been severely incapacitated due to illness and disability from time to time, the witness was currently able to proceed. No response from defendants is included in the record.

¶ 9 On June 27, 2012, the trial court entered an order dismissing plaintiff's petition. The order stated:

> "This matter coming on for hearing on plaintiff's motion pursuant to 735 ILCS 5/2-1401, counsel for defendants***being present, the Court having heard arguments of counsel and for the reasons stated on the record [plaintiff's] motion is denied and [plaintiff's] petition pursuant to [section] 1401 is dismissed."

Plaintiff filed a timely notice of appeal of the June 27, 2012 order.

¶ 10 On appeal, plaintiff argues the trial court dismissed his section 2-1401 petition on timeliness grounds, and that dismissal for this reason was improper. Plaintiff contends that because the trial court's May 24, 2010 dismissal was a dismissal for want of prosecution, it did

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[1] The record indicates that the petition was filed on June 8, 2013. However, it is clear this was a clerical error and that the actual date of filing was June 8, 2012.

not become a final order until June 10, 2011. Therefore, according to plaintiff, the section 2-1401 petition was timely filed on June 8, 2012.

¶ 11 When a court enters either a judgment on the pleadings or a dismissal in a section 2-1401 proceeding, our review of the order is *de novo*. *People v. Vincent*, 226 Ill. 2d 1, 18 (2007). *De novo* consideration means that the reviewing court performs the same analysis that a trial judge would perform. *Nationwide Advantage Mortgage Co. v. Ortiz*, 2012 IL App (1st) 112755, ¶ 20. However, where the trial court conducts an evidentiary hearing pursuant to a section 2-1401 petition, we review the trial court's judgment under the manifest weight of the evidence standard. *In re Marriage of Roepenack*, 2012 IL App (3d) 110198, ¶ 35. Here, the applicable standard of review is unclear because plaintiff has failed to provide a complete record. The record contains no transcript, no report of the proceedings, no bystander's report, and no agreed statement of facts for the June 27, 2012 proceeding. Ill. S. Ct. R. 323(a), (c), (d) (eff. Dec. 13, 2005). The trial court's order notes that counsel was present for the proceedings and that the petition was denied "for the reasons stated on the record," but we do not know what those reasons were or what arguments defendants advanced. We also do not have written pleadings from defendants. Additionally, we do not know if additional evidence was presented at the June 27, 2012 proceeding, in which case we would review the trial court's judgment under the manifest weight of the evidence standard. However, even applying *de novo* review, plaintiff's claim fails.

¶ 12 One requirement for a valid section 2-1401 petition is that it must be brought within two years of the final order or judgment from which relief is sought. 735 ILCS 5/2-1401(a), (c) (West 2012). Even assuming that plaintiff is correct that the trial court dismissed his section 2-1401 petition as untimely, he cannot prevail. Whether as plaintiff urges, plaintiff's petition was timely depends on whether the May 24, 2010 order was actually a dismissal for want of prosecution. A dismissal for want of prosecution is subject to a one-year re-filing period (735 ILCS 5/13-217 (West 2010)) and, as such a dismissal for want of prosecution becomes a final

order only when this re-filing period expires (*S.C. Vaughn Oil Co. v. Caldwell, Troutt & Alexander*, 181 Ill. 2d 489, 508 (1998); *Jackson v. Hooker*, 397 Ill. App. 3d 614, 618 (2010)). Thus, if the May 24, 2010 dismissal order was a dismissal for want of prosecution, then the one-year period for re-filing expired, and the dismissal became final, on May 24, 2011. In that case, the two-year limitation under section 2-1401 would have ended on May 24, 2013, and plaintiff's petition would be timely filed. However, if the May 24, 2010 order was not a dismissal for want of prosecution, as urged by defendant, then the two-year limitation ended on May 24, 2012, and plaintiff's petition was not timely filed.

¶ 13 It is ambiguous whether the trial court's May 24, 2010 order was a dismissal for want of prosecution. The order stated that because plaintiff failed to file an amended complaint on two occasions, "all claims and all counts against all defendants are hereby dismissed with prejudice." (Emphasis in original.) A suit may be dismissed for want of prosecution for the failure or refusal to file an amended complaint (*O'Reilly v. Gerber*, 95 Ill. App. 3d 947, 950 (1981)), and that may be what occurred here. However, the order's language suggests this was not a dismissal for want of prosecution because a dismissal for want of prosecution would trigger the one-year re-filing provision, contradicting the trial court's explicit use of the phrase "with prejudice." See *National Underground Construction Co. v. E.A. Cox Co.*, 273 Ill. App. 3d 830, 835 (1995). Additionally, on plaintiff's "Spindled Motion Form," plaintiff checked the box for "Vacate Order," rather than "Cavate [*sic*] DWP,"[2] suggesting that plaintiff did not construe the May 24 order as a dismissal for want of prosecution.

¶ 14 Ordinarily, where an order is ambiguous, the order appealed from should be interpreted in the context of the record and the situation that existed at the time of its rendition. *Twardowski v. Holiday Hospitality Franchising, Inc.*, 321 Ill. App. 3d 509, 512 (2001). Here, however, we are unable to determine the character of the trial court's May 24, 2010 order because we do not

[2] We presume that "Cavate" is a typo, and the actual phrase should be "Vacate DWP."

have a complete record. It is generally the appellant's burden to properly complete the record on appeal, and any doubts arising from the incompleteness of the record will be construed against the appellant and in favor of the judgment rendered in the lower court. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984); *People v. Henderson*, 2011 IL App (1st) 090923, ¶ 45. Here, as stated above, the record contains no transcripts of the various hearings at issue, no report of the proceedings, no bystander's report, and no agreed statements of facts. Ill. S. Ct. R. 323(a), (c), (d) (eff. Dec. 13, 2005). Nor is it apparent that defendant failed to file responses to plaintiff's motion to vacate the May 24, 2010 dismissal or plaintiff's subsequent motions. While, under some circumstances, transcripts of proceedings are unnecessary on *de novo* review (*Gonella Baking Co. v. Clara's Pasta di Casa, Ltd.*, 337 Ill. App. 3d 385, 388 (2003)), here a more complete record is needed. Without a complete record, we cannot determine the nature of the May 24, 2010 dismissal and whether plaintiff's section 2-1401 petition was timely. Under these circumstances, we presume that the trial court heard adequate evidence to support its decision and that its orders were in conformity with the law. See *Webster v. Hartman*, 195 Ill. 2d 426, 433-34 (2001).

¶ 15 Next, plaintiff contends the trial court's May 24, 2010 dismissal was void because it constituted a denial of plaintiff's due process rights. Plaintiff asserts the dismissal violated plaintiff's due process rights because there was no order to amend Count II, no motion to dismiss Count II was pending, and discovery was ongoing as to Count II.

¶ 16 A section 2-1401 petition may be exempt from the two-year limitations period when the judgment being challenged is void. *People v. Harvey*, 196 Ill. 2d 444, 447 (2001). A judgment, order, or decree entered by a court is void if the court lacks jurisdiction of the parties or subject matter, or if the court lacks the inherent power to make the particular order involved. *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 103 (2002). In Illinois, due process violations do not render a judgment void. See *People v. Hubbard*, 2012 IL App (2d) 101158, ¶ 1, 16 (in

section 2-1401 petition, alleged due process violation could not be grounds for contending conviction was void because in Illinois, a judgment is void only when the court entering the judgment lacked jurisdiction). As such, plaintiff has failed to show that the trial court's May 24, 2010 order was void.

¶ 17 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 18 Affirmed.