2015 IL App (1st) 142805-U

FIRST DIVISION
August 31, 2015

No. 1-14-2805

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

TODD GRYCZEWSKI, Plaintiff-Appellant, v. DELORES FRANKLIN, deceased, by and through BOB PHILLIP, as Special Administrator of the Estate of Delores Franklin, Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County. No. 12 L 6185 Honorable Janet Adams Brosnahan, Judge Presiding.

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justice Cunningham concurred in the judgment.
Justice Harris dissented.

ORDER

¶1 ***Held:*** The circuit court properly dismissed this case against a deceased tortfeasor on the basis of lack of subject matter jurisdiction.

¶2 Plaintiff Todd Gryczewski seeks reversal of an order entered by the Circuit Court of Cook County dismissing his complaint pursuant to sections 2-619(a)(1) and (a)(5) of the Code of Civil Procedure. 735 ILCS 5/2-619(1)(1), (a)(5) (West 2014) (Code). Because plaintiff's complaint did not invoke the circuit court's jurisdiction and plaintiff did not take the requisite

steps to preserve his otherwise invalid cause of action, the circuit court properly dismissed his case with prejudice.

¶3 BACKGROUND

¶4 On June 20, 2010, plaintiff was involved in an automobile accident with Delores Franklin. Franklin died on November 24, 2011. Unaware of that fact, plaintiff sued Franklin on June 12, 2012. On June 26, 2012, a law firm appeared on Franklin's behalf and filed a "Motion to Spread Defendant's Death of Record and to Appoint a Special Administrator." Notice of the motion was sent to plaintiff's counsel. On July 5, 2012, the court granted the motion and ordered that the defense name a special administrator by August 13, 2012. On July 17, 2012, the law firm filed an answer, appearance, and jury demand on behalf of Franklin "by and through Bob Philipp, as Special Administrator of the Estate of Delores C. Franklin."

¶5 From that point until June 23, 2014, the case proceeded in typical fashion. The parties propounded discovery, filed motions, and took depositions. On February 21, 2014, the case was set for trial on July 8, 2014.

¶6 On June 23, 2014, defendant filed a motion to dismiss pursuant to sections 2-619(a)(1) and (a)(5) of the Code. Defendant's argument was twofold: first, he argued that the circuit court lacked subject matter jurisdiction because plaintiff sued a dead person. Second, defendant argued that plaintiff's claim was barred by the statute of limitations because he did not satisfy the requirements of section 13-209(c) of the Code relating to suits against deceased persons. 735 ILCS 5/13-209(c) (West 2014). The court granted defendant's motion, and this appeal followed.

¶7 ANALYSIS

¶8 The circuit court dismissed this case on a motion brought pursuant to section 2-619 of the Code. "A motion to dismiss under section 2–619 admits the legal sufficiency of the plaintiff's

complaint, but asserts an affirmative defense or other matter that avoids or defeats the plaintiff's claim." *Relf v. Shatayeva*, 2013 IL 114925, ¶ 20. In this case, the circuit court dismissed plaintiff's complaint because: (1) the court lacked subject matter jurisdiction; and (2) plaintiff's complaint was time-barred. Thus, our review is *de novo*. *Id.*; *McCormick v. Robertson*, 2015 IL 118230, ¶ 18.

¶9 Plaintiff presents two arguments on appeal. First, he argues that defendant waived his right to object to defects in the complaint by (1) failing to file a timely objection and (2) failing to withdraw his answer before he filed his motion to dismiss. Second, plaintiff contends that the circuit court had subject matter jurisdiction pursuant to section 13-209(c) of the Code.

¶10 The first argument is without merit. Defendant's motion to dismiss was in substance a challenge to the circuit court's subject matter jurisdiction, and over a century of Illinois case law teaches that "[l]ack of subject matter jurisdiction cannot be waived." *People ex rel. Compagnie Air France v. Giliberto*, 74 Ill. 2d 90, 105 (1978); see also *Swope v. Northern Illinois Gas. Co.*, 221 Ill. App. 3d 241, 243 (1991) ("The lack of subject-matter jurisdiction cannot be waived since the parties cannot create subject-matter jurisdiction by consent, acquiescence, waiver or estoppel."); *Mid City Wholesale Grocers v. Bischoff*, 327 Ill. App. 268, 270 (1945); *Routt v. Newman*, 157 Ill. App. 242, 243 (1910). As the Illinois Supreme Court explained long ago, "[a] judgment, order or decree entered by a court which lacks jurisdiction of *** the subject matter ******* is void, and may be attacked at any time or in any court, either directly or collaterally." *Barnard v. Michael*, 392 Ill. 130, 135 (1945); accord *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 103 (2002); *Catom Trucking, Inc. v. City of Chicago*, 2011 IL App (1st) 101146, ¶ 26 (quoting *Ruff v. Splice, Inc.*, 398 Ill. App. 3d 431, 435 (2010) ("[S]ubject matter jurisdiction may be challenged 'at any time and may even be raised *sua sponte* by a reviewing court.' ")); see

also *In re Marriage of Chrobak*, 349 Ill. App. 3d 894, 895 (2004) ("A judgment entered by a court that lacked subject matter jurisdiction is void and may be attacked at any time and in any proceeding."). Accordingly, we find that defendant did not waive the right to file a motion to dismiss.

¶11 Plaintiff nevertheless insists that *Burks Drywall, Inc. v. Washington Bank and Trust Co.*, 110 Ill. App. 3d 569 (1982), commands a different result. We disagree. Although the appellate court in *Burks* restated the rule that "where a complaint substantially although imperfectly alleges a cause of action, the defendant waives any defect by answering it without objection," (*Id.* at 572), it is clear that the "defects" the court was referring to related to the sufficiency of the plaintiff's allegations and not the court's jurisdiction. (*Id.* at 570-71.).

¶12 Illinois courts have long held that challenges to the sufficiency of a pleading's allegations may be waived by the passage of time. See, *e.g.*, *Pathman Construction Co. v. Hi-way Electric Co.*, 65 Ill. App. 3d 480, 486 (1978) ("Failure to plead the performance of all preconditions in an action for damages for delay in the performance of a construction contract falls within the general concept of waiver and is not a fatal defect which can be raised for the first time on appeal."); see also *Champaign National Bank v. Illinois Power Co.*, 125 Ill. App. 3d 424, 429 (1984) ("By not attacking the pleadings filed by defendant and instead proceeding to trial, plaintiff has waived any objection to the *sufficiency of the allegations* by which defendant hoped to claim an express easement in gross.") (Emphasis added.); *Third Swansea Properties, Inc. v. Ockerlund Construction Co.*, 41 Ill. App. 3d 894, 899 (1976). But the fact that a defendant may, by delaying or filing an answer, waive the right to object to the complaint on the basis that it does not state a valid claim for relief, does not mean that a defendant, by answering or by malingering, waives the right to challenge the court's subject matter jurisdiction. As we

discussed above, the law in Illinois is precisely opposite—subject matter jurisdiction is always subject to attack.[1]

¶13 The circuit court was correct on the merits as well. Illinois has long adhered to the rule that "the court lacks subject matter jurisdiction where a party files a lawsuit against a deceased person." *Keller v. Walker*, 319 Ill. App. 3d 67, 70 (2001); *Volkmar v. State Farm Mutual Insurance Co.*, 104 Ill. App. 3d 149, 151 (1982) ("[P]roceedings instituted against an individual who is deceased at the time of the filing of suit are a nullity. Such proceedings are void *ab initio* and do not invoke the jurisdiction of the trial court."); see also *ABN AMRO Mortgage Group, Inc. v. McGahan*, 237 Ill. 2d 526, 528 (2010) (holding that mortgagee must name personal representative for deceased mortgagor in mortgage foreclosure case for circuit court to acquire subject matter jurisdiction). Thus, because plaintiff's complaint was brought against a deceased person, it did not invoke the court's jurisdiction.

¶14 Even so, we must still consider section 13-209(c). That section of the Code deals with this exact situation and provides:

> "If a party commences an action against a deceased person whose death is unknown to the party before the expiration of the time limited for the commencement thereof, and the cause of action survives, and is not otherwise barred, the action may be

[1] Plaintiff also cites *Citibank South Dakota, N.A. v. Galarza*, 2012 IL App (1st) 112397-U. We are not sure why. True, the court in that case stated that the defendant waived the right to file a motion to dismiss by failing to withdraw her answer. But the motion to dismiss which the defendant sought to file did not challenge the court's subject matter jurisdiction, and so the iron-clad rule against waiver, present in this case, was not present there. And in any event, the "U" in *Galarza's* citation indicates that the order is *unpublished*, and pursuant to Supreme Court Rule 23, unpublished orders can only be cited for limited purposes under limited circumstances which are not present here. See Ill. S. Ct. R. 23(e)(1) (eff. July 1, 2011). We again caution counsel not to cite non-precedential orders. See *Wells Fargo Bank, N.A. v. Simpson*, 2015 IL App (1st) 142925, ¶ 60.

> commenced against the deceased person's personal representative if all of the following terms and conditions are met:
>
> (1) After learning of the death, the party proceeds with reasonable diligence to move the court for leave to file an amended complaint, substituting the personal representative as defendant.
>
> (2) The party proceeds with reasonable diligence to serve process upon the personal representative.
>
> (3) If process is served more than 6 months after the issuance of letters of office, liability of the estate is limited as to recovery to the extent the estate is protected by liability insurance.
>
> (4) In no event can a party commence an action under this subsection (c) unless a personal representative is appointed and an amended complaint is filed within 2 years of the time limited for the commencement of the original action." 735 ILCS 5/13-209(c) (West 2014).

¶15 Citing *Keller*, plaintiff argues that the circuit court had subject matter jurisdiction pursuant to section 13-209(c). We disagree.

¶16 In *Keller*, the plaintiffs unknowingly filed suit against a deceased person. The circuit court dismissed the case for lack for subject matter jurisdiction, but the appellate court reversed, stating:

> "Although we determine that the Kellers' suit was a nullity and void *ab initio* because Walker was deceased prior to the day it was filed, we find that the court acquired subject matter jurisdiction pursuant to section 13–209(c) ***. The legislature added 13–209(c) to specifically address situations where plaintiffs are unaware that a deceased person was named as a defendant. [Citation.]. As such, the trial court had subject matter jurisdiction over the Kellers' claim. [Citation.]. As the trial court had jurisdiction pursuant to section 13–209(c), the court should have proceeded to 'substitute the personal representative as defendant' as required by section 13–209(c)(1)." *Keller*, 319 Ill. App. 3d at 71.

¶17 The *Keller* court's holding that section 13-209(c) conferred subject matter jurisdiction on the circuit court is in tension with a later Illinois Supreme Court decision. In *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill.2d 325, 334 (2002), the Court explained that "[w]ith the exception of the circuit court's power to review administrative action, which is conferred by statute, a circuit court's subject matter jurisdiction is conferred entirely by our state constitution." *Id.* at 334. The Illinois Constitution, in turn, grants subject matter jurisdiction to the circuit courts over "all justiciable matters except when the Supreme Court has original and exclusive jurisdiction relating to redistricting of the General Assembly and to the ability of the Governor to serve or resume office." Ill. Const. 1970, art. VI, § 9.

¶18 Thus, under *Belleville Toyota*, we cannot interpret section 13-209(c) as a jurisdiction-conferring statute. Instead, section 13-209(c) is best read as an extended statute of

limitations. We reach this conclusion for two reasons. First, as a structural matter, section 13-209(c) is located in article XIII of the Code, titled "Limitations," and all of its neighboring provisions are, or relate to, statutes of limitations. See, *e.g.*, 735 ILCS 5/13-201 (West 2014) (establishing limitations period for defamation and related claims); 735 ILCS 5/13-202 (establishing limitations period for certain personal injury actions). Second, the statute does not contain language conferring subject matter jurisdiction. Compare 735 ILCS 5/13-209(c) (West 2014) with 735 ILCS 5/3-104 (West 2014) ("Jurisdiction to review final administrative decisions is vested in the Circuit Courts."). Rather, section 13-209(c) refers to existing justiciable subject matter, *i.e.*, a cause of action which survives the deceased tortfeasor, and provides respite to those unwary plaintiffs who, by no fault of their of own, inadvertently sue a deceased person and do not realize their mistake until the ordinarily applicable limitations period has expired. See *Relf*, 2013 IL 114925, ¶ 28.

¶19 Regardless of how we characterize section 13-209(c), the circuit court's decision to dismiss plaintiff's complaint was correct because plaintiff failed to comply with the statute's requirement that he file an amended complaint naming Franklin's special representative as the defendant. In the face of this failure, plaintiff asks that we excuse him from complying with the statute's requirements because, in his view, section 13-209(c)'s "statutory purpose" has been satisfied.

¶20 This argument is fatally flawed. Plaintiff does not contend that section 13-209(c) is vague (nor could he; the statute is hardly ambiguous). When interpreting statutes with unambiguous terms, our role is to apply the statute as drafted by the legislature. *Solon v. Midwest Medical Records Ass'n, Inc.*, 236 Ill. 2d 433, 440 (2010). As drafted and enacted by the

General Assembly, section 13-209(c) does not contain a "statutory purpose" exception. So plaintiff's "statutory purpose" argument fails.

¶21 Our dissenting colleague argues that we should apply the canon of liberal construction contained in section 2-603(c) of the Code to construe plaintiff's original complaint, defendant's motion to appoint a special administrator, and the circuit court's order granting that motion, as an amended complaint compliant with section 13-209(c)(4). See 735 ILCS 5/2-603(c) (West 2014). But by its own terms, section 2-603(c) only applies to "pleadings," a term which is understood to encompass only complaints and answers. See 735 ILCS 5/2-602 (West 2014).

¶22 A motion is not a pleading; Illinois law readily distinguishes between the two. See., *e.g.*, 735 ILCS 5/2-301(a) (West 2014) (party may object to personal jurisdiction "[p]rior to the filing of any other pleading *or* motion other than a motion for an extension of time to answer or otherwise appear") (Emphasis added.); Ill. Sup. Ct. R. 137 (eff. July 1, 2013) (providing for imposition of sanctions when a party improperly propounds a "pleading, motion or other document"); *Bentley v. Hefti*, 2015 IL App (4th) 140167, ¶¶ 16-17. And if a motion propounded by a party to the case is not a pleading, it follows naturally that a court order ruling on such a motion is also not a pleading.

¶23 What this all means is that the only document cited by the dissent which is actually a pleading, and thus subject to section 2-603(c)'s rule of liberal construction, is plaintiff's original complaint. That complaint, as we noted above, named only Delores Franklin as the defendant. The complaint does not mention that Franklin was dead at the time it was filed, nor does it anywhere refer to a special administrator or personal representative. Plaintiff's clear intent was to sue Franklin, a fact confirmed by the statement in plaintiff's appellate brief that plaintiff was not aware that Franklin was dead prior to filing suit. If plaintiff did not know Franklin was dead,

then why would he intend to sue her administrator or personal representative? Pursuant to Rule 2-603(c), we may afford plaintiff's complaint a liberal construction, but not an unreasonable one. The clear language of plaintiff's complaint unambiguously evinces an intent to sue Franklin *qua* Franklin, so we cannot agree with our colleague's suggested construction.

¶24 Our dissenting colleague also argues that defense counsel engaged in gamesmanship by including the special administrator in the caption of various court filings and litigating the case over a two year period. This argument ignores the fact that section 13-209(c)(4) contains a statute of limitations which allows plaintiffs to sue a deceased defendant's personal representative within two years of when the original statute of limitations would have expired. In the present case, plaintiff's limitations period pursuant to section 13-209(c)(4) did not expire until June 20, 2014. Had defendant filed the motion to dismiss earlier than that date, plaintiff would have still been able to remedy the defect by following the procedure set forth in section 13-209(c). In other words, had defense counsel not waited to file the motion to dismiss, it likely would have committed legal malpractice. Accordingly, we cannot concur that defense counsel's decision to hold back and wait was improper.

¶25 CONCLUSION

¶26 We affirm the order dismissing plaintiff's complaint with prejudice.

¶27 Affirmed.

¶28 JUSTICE HARRIS, dissenting.

¶29 I disagree with the majority's determination that plaintiff did not comply with the requirements of section 13-209(c), thereby dismissing his complaint for lack of subject matter jurisdiction. Therefore, I respectfully dissent.

¶30 Section 2-603(c) of the Code explicitly provides that pleadings be liberally construed in order to do substantial justice between the parties. 735 ILCS 5/2-603(c) (West 2014). Accordingly, plaintiff should not be barred from having the merits of his case heard due to technical rules of pleading and courts should elevate substance over form. *Avakian v. Chulengarian*, 328 Ill. App. 3d 147, 154 (2002).

¶31 As the majority notes, section 13-209(c)(4) requires that plaintiff file an amended complaint. However, I liberally construe the plaintiff's original complaint, the motion to appoint a special administrator, and the trial court's order granting the motion to name the special administrator, as an amended complaint in compliance with section 13-209(c)(4). To find otherwise, in my opinion, would elevate form over substance and unreasonably preclude plaintiff's claim from being heard on the merits. All of these actions were done well before the June 20, 2014, deadline. Defendant had notice of the complaint and in fact was the party requesting to name the special administrator. Defendant placed the name of the special administrator on all of his subsequent filings. He suffered no prejudice when plaintiff did not file a formal amended complaint. It is error to dismiss the complaint on this basis. See *Wong v. Stevens*, 216 Ill. App. 3d 299, 301 (1991) (filed motions liberally construed as amended complaints so as not to elevate form over substance); *Nagel v. Inman*, 402 Ill. App. 3d 766, 771-72 (2010).

¶32 The majority is correct in stating defendant's attorneys had no obligation to "tip off" the plaintiff of a failure to amend his complaint adding the administrator. However, the facts demonstrate that plaintiff's failure to do so was the result of defendant lulling plaintiff not to do so. Let us not confuse defendant's actions with smart lawyering where success is achieved by winning on the merits. Here, it was defendant practicing gamesmanship…pure and simple.

¶33 From the first moment defendant moved to add an administrator and obtain a court order for such, his conduct well shows that he consistently acted in a manner lulling the plaintiff into the reasonable belief that nothing further need be done and that defendant had no problems with an administrator issue. From the moment the administrator was added by defendant, all of his motions and orders included the administrator in the case caption and, notwithstanding his knowledge of the administrator not being named in plaintiff's complaint, defendant never expressed any objection to the propriety of the administrator being in the case or that any issue concerning the administrator existed. For years thereafter, without any objection to the administrator's addition, defendant participated in discovery, depositions, and trial preparation. For years the defendant lulled plaintiff's attorney by acting in a manner conceding to the validity and correctness of the administrator he had added. Most telling is that although years went by in this manner, defendant did not file his motion to dismiss until three days after the statutory time had run for plaintiff to cure the technical omission of not naming the administrator in his complaint. I do not share my colleagues' suggestion that defendant's lawyers filing the motion earlier would have been the commission of legal malpractice. Certainly they were required to act competently and zealously to pursue their client's interests within the boundaries of the law. However, as set out in the preamble of the Illinois Rules of Professional Conduct, "zealously" does not mean unfairly. "Rather, it is the duty of all lawyers to seek resolution of disputes at the least cost in time, expense and trauma to all parties and to the courts." Ill. R. Prof. Conduct (2010), Preamble. I have no doubt that defendant knew early on of the plaintiff's technical omission, yet chose to conduct all his future case activity in a manner without attention to or notice of the omission, thereby lulling the plaintiff into the belief that the administrator was not an issue and which caused substantial time, expense and trauma to all parties and the courts.

¶34 Fundamental fairness and justice require a reversal. I believe one of our duties as Justices of the appellate court is to promote the honorable practice of law as opposed to affirming orders gained through the practice of gamesmanship. As a result of the factual events I have described, the subject matter jurisdiction and statute issues which the majority has detailed are not what decide the case. Rather, what does fundamental justice and fairness require? Do we promote the honorable practice of law from the attorneys before us or do we award the practice of gamesmanship? We should reverse either with an order that defendant is estopped from proceeding with the motion to dismiss or it was error to dismiss the complaint.

¶35 For the foregoing reasons, I respectfully dissent.