2011 IL App (2d) 110399-U
No. 2—11—0399
Order filed August 9, 2011



IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| In re APPOINTMENT OF SPECIAL PROSECUTOR, | ) | Appeal from the Circuit Court of McHenry County. |
| | ) | No. 09—MR—142 |
| (The County of McHenry, Petitioner-Appellant, v. Henry C. Tonigan and Thomas K. McQueen, Respondents-Appellees). | ) | Honorable Gordon E. Graham, Judge, Presiding. |

JUSTICE BOWMAN delivered the judgment of the court.
Presiding Justice Jorgensen and Justice McLaren concurred in the judgment.

**ORDER**

*Held*: We lacked jurisdiction over the trial court's order awarding the special prosecutors their requested amount of attorney fees; therefore, we dismissed the appeal.

¶ 1 The County of McHenry (County) appeals the circuit court's order requiring it to pay special prosecutors Henry C. Tonigan and Thomas K. McQueen (Special Prosecutors) interim attorney fees. The County argues that the trial court improperly granted fees beyond what is allowed under statute. See 55 ILCS 5/3—9008 (West 2010). However, we agree with Special Prosecutors' argument that we lack jurisdiction over this appeal, and we therefore dismiss it.

¶ 2 I. BACKGROUND

¶ 3 Special Prosecutors were appointed to investigate alleged misconduct by McHenry County State's Attorney Louis A. Bianchi and others in his office. Their appointment arose at the request of Amy Dalby, Bianchi's former secretary, who was charged in 2009 with stealing documents from the State's Attorney's office. She alleged that Bianchi required her to perform extensive political activities during her working hours. On April 23, 2009, Dalby requested the appointment of a special prosecutor to investigate the State's Attorney's office, arguing that there would be a conflict of interest if a member of the State's Attorney's office had to investigate his or her own supervisors and coworkers for possible criminal wrongdoing.

¶ 4 On June 10, 2009, the County filed a petition to intervene for the limited purpose of representing its financial interest, as the appointment of a special prosecutor would come at its expense. The trial court granted the County's motion on August 14, 2009. On September 4, 2009, the trial court entered an order allowing the State's Attorneys Appellate Prosecutor's office to represent the County.

¶ 5 On September 4, 2009, the trial court entered an order approving the appointment of a special prosecutor. On September 18, 2009, the trial court appointed Tonigan as a special prosecutor and McQueen as assistant to the special prosecutor. They were appointed to investigate Dalby's allegations and prosecute if warranted. Special Prosecutors filed documents with the trial court on October 13, 2009, stating that they accepted the appointments "at the rate of $250 per billable hour." On February 1, August 1, and December 16, 2010, the trial court ordered the County to pay the Special Prosecutors their requested fees for the relevant time periods billed. According to Special Prosecutors, the County paid the fees as ordered each time.

¶ 6 On February 16, 2011, the Appellate Prosecutor's office filed a petition requesting clarification of its role in representing the County. The petition stated that it was the office's understanding that its representation of the County concluded when Special Prosecutors were appointed, but it had thereafter received notice of a motion for interim attorney fees. At a hearing on February 23, 2011, the trial court clarified that the Appellate Prosecutor's office was still representing the County's financial interests. The trial court stated the office had "dropped the ball" by not appearing at prior hearings on fee requests despite being properly noticed.

¶ 7 On March 2, 2011, Special Prosecutors filed a notice of a motion for interim fees for the time period of September 1, 2010, to November 30, 2010. A hearing was held on the motion on March 14, 2011. Tonigan sought $21,789.74 for over 87 hours worked, and McQueen sought a total of $48,120.60 for over 131 hours of work, out of pocket expenses, and $10,000 that was erroneously excluded from an order for a prior, uncontested bill. The Special Prosecutors sought payment, as with previous bills, at a rate of $250 per hour.

¶ 8 The County, as represented by the Appellate Prosecutor's office, stated that it did not want to get into detail about the actual billing, but had "a position with regard to the bills in general." The County cited the statute allowing the appointment of special prosecutors, which states in relevant part:

¶ 9 "Any attorney appointed for any reason under this Section shall possess all the powers and discharge all the duties of a regularly elected State's attorney under the laws of the State to the extent necessary to fulfill the purpose of such appointment, and *shall be paid by the county he serves not to exceed in any one period of 12 months, for the reasonable amount of time actually expended in carrying out the purpose of such appointment, the same*

> *compensation as provided by law for the State's attorney of the county, apportioned, in the case of lesser amounts of compensation, as to the time of service reasonably and actually expended*." (Emphasis added.) 55 ILCS 5/3—9008 (West 2010).

The County asked that the trial court apply the statute, which required that the fees be "apportioned" appropriately. The County stated that there was no case law analyzing the term "apportioned." When the trial court responded that the County was not providing it with "much help," the County stated that it was not giving the trial court "much help other than to indicate that there is a cap of about $166,500 that needs to be apportioned based upon the amount of time actually spent." The County agreed that the limit applied to an annual basis. The trial court stated that the special prosecutors were not near the limit for the State's Attorney's salary on an annual basis, and it entered an order requiring the County to pay the fees.

¶ 10 On April 1, 2011, the County filed a motion to reconsider the March 14, 2011, award of attorney fees. The County argued that the fees were not "apportioned" as required by statute. A hearing on the motion to reconsider took place on April 14, 2011. At the hearing, the County argued that section 3—9008 required that the compensation for the special prosecutor be apportioned based upon the State's Attorney's salary. The County argued that the use of the word "apportioned" contemplated a pro rata determination based on the time actually expended, rather than just that the total bills be under the yearly salary. The County argued that the $166,508 salary should be divided by 52 weeks, then by 35 hours per week, resulting in a figure of $91.50 per hour. The County alternatively argued that the fees should be awarded based on a percentage of time the special prosecutors billed based on a workweek of seven hours per day.

¶ 11 In response, Special Prosecutors cited *People ex rel. Barrett v. Board of Commissioners of Cook County*, 11 Ill. App. 3d 666, 669 (1973), which held that for special prosecutors appointed for reasons other than a vacancy, the award of fees was within the trial court's discretion. The County countered that the *Barrett* court properly applied to the statute in effect at the time of that decision, but the statute had since been amended and required apportionment for all special prosecutors. The trial court denied the County's motion to reconsider, stating that it was relying on *Barrett* and that the County had failed to make its current apportionment argument at the March 2011 hearing.

¶ 12 The County filed a notice of interlocutory appeal on April 25, 2011, and an amended notice on May 12, 2011.

¶ 13 II. ANALYSIS

¶ 14 On appeal, the County argues that the trial court misinterpreted section 3—9008 by refusing to limit and apportion Special Prosecutors' compensation. However, Special Prosecutors argue that we lack jurisdiction over this appeal. The County contends that we have jurisdiction pursuant to Supreme Court Rule 307(a)(1) (eff. Feb. 26, 2010), which allows for an appeal from an "interlocutory order" of the trial court "granting, modifying, refusing, dissolving, or refusing to dissolve or modify an injunction." Special Prosecutors argue that the order appealed from was not an injunction within the meaning of the rule, and even if it were, the rule applies only to temporary restraining orders or preliminary injunctions, while the fee order at issue here was neither.

¶ 15 The " 'purpose of an interlocutory injunction is to preserve the rights of some one or more of the parties and continue the property and the rights therein *in statu quo* until the cause can be disposed of on the merits.' " *In re Estate of French*, 166 Ill. 2d 95, 99 (1995), quoting *Almon v. American Carloading Corp.*, 380 Ill. 524, 529 (1942). In determining whether an order may be

appealed under Rule 307(a)(1), we look to the substance of the order rather than its form. *In re A Minor*, 127 Ill. 2d 247, 260 (1989).

¶ 16 The term "injunction" is defined as a " 'judicial process operating in personam and requiring [a] person to whom it is directed to do or refrain from doing a particular thing' " *(id.* at 261, quoting Black's Law Dictionary 705 (5th ed. 1983)) or " '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 operate as a restraint upon the party in the exercise of his real or supposed rights' " (*id.*, quoting *Wangelin v. Goe*, 50 Ill. 459, 463 (1869)). We construe the meaning of the term "injunction" in Rule 307(a)(1) broadly. *Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214, 221 (2000). Still, not all nonfinal court orders compelling a party to do or not do a particular thing are appealable, as orders that regulate the procedural details of litigation cannot be appealed as an interlocutory order. *In re A Minor*, 127 Ill. 2d at 262. Such orders are not considered injunctive because they are part of the court's inherent power to compel witnesses to give testimony rather than part of the power traditionally reserved for courts of equity. *Id.*; see also *In re Marriage of Tetzlaff*, 304 Ill. App. 3d 1030, 1038 (1999) (order requiring firm to put portion of interim attorney fees into an escrow account was not an injunction or order modifying an injunction, but rather a modification of the court's previous interim attorney fee award).

¶ 17 In addition to the requirement that an order be injunctive, Rule 307(a)(1) applies only to orders that are interlocutory, rather than permanent, in nature. *Santella v. Kolton*, 393 Ill. App. 3d 889, 903 (2009). "Rule 307(a)(1) applies only to interlocutory injunction orders that merely preserve the status quo pending a decision on the merits, conclude no rights, and are limited in duration, in no case extending beyond the conclusion of the action." *Id.* Conversely, Rule 307(a)(1) does not

apply to permanent orders, which are not limited in duration and change the status quo. *Id.*; see also *Skolnick*, 191 Ill. 2d at 222 (a permanent injunction is a final order appealable only under Supreme Court Rules 301 or 304). "Status quo" is defined as " 'the last actual, peaceable, uncontested status which [preceded] the pending controversy.' " *Steel City Bank v. Village of Orland Hills*, 224 Ill. App. 3d 412, 417 (1991), quoting *Martin v. Eggert*, 174 Ill. App. 3d 71, 77 (1988).

¶ 18 Special Prosecutors argue that the trial court's order here was not an injunction within the meaning of Rule 307(a)(1) because it does not enjoin or restrain the County from any action or provide an equitable remedy to right a wrong, but instead merely approves the Special Prosecutors' requested compensation and orders its payment. Special Prosecutors further argue that, even if the order is construed as an injunction, it is not appealable under Rule 307(a)(1) because it concludes their right to compensation for the time period covered by their fee request, and it does not purport to preserve the status quo pending a decision on the merits of the fee request for that period.

¶ 19 Special Prosecutors cite *Puleo v. McGladrey & Pullen*, 315 Ill. App. 3d 1041 (2000). There, the trial court ordered the plaintiff to deposit insurance proceeds with the court in an interest-bearing account while the issue of damages was relitigated. *Id.* at 1043. The appellate court held that it did not have jurisdiction under Rule 307(a)(1) because the trial court's order was a permanent injunction; the order affirmatively required the plaintiff to tender the funds to the court and therefore altered, rather than preserved, the status quo. *Id.* at 1045.

¶ 20 Special Prosecutors also cite *Santella*. In that case, the trial court ordered that the defendants pay back to their corporation commissions they had received. *Santella*, 393 Ill. App. 3d at 899. The reviewing court held that the defendants could not appeal the order under Rule 307(a)(1) because the order was permanent in nature, in that it altered the status quo, concluded the parties' rights, and

was not limited in duration. *Id.* at 903; see also *Steel City Bank*, 224 Ill. App. 3d at 417-18 (order requiring Village to issue building and occupancy permits was a permanent mandatory injunction which could not be appealed under Rule 307(a)(1)); *In re Marriage of Schweihs*, 272 Ill. App. 3d 653, 662 (1995) (order directing the disposition of an asset in a manner that changed the status quo was not appealable under Rule 307(a)(1)).

¶ 21 The County argues that the status quo fee arrangement here allowed Special Prosecutors to accrue $250 per billable hour. According to the County, the billed amounts of money purportedly belonged to Special Prosecutors as they accrued their billable hours, rather than to the County. Therefore, the trial court's order represented an equitable, injunctive remedy of requiring the return of property to its putative owners pending final resolution of their claim. The County further maintains that under the trial court's interpretation of section 3—9008, Special Prosecutors were limited to the McHenry County State's Attorney's annual salary of $166,500 in any rolling, 12-month period. The County argues that the trial court could not have concluded Special Prosecutors' statutory rights to compensation while compliance with the purported 12-month cap necessarily remained uncertain.

¶ 22 Assuming, *arguendo*, that the fee award was injunctive in nature, we still agree with Special Prosecutors that the order was not interlocutory, so it is not subject to review under Rule 307(a)(1). As stated, Rule 307(a)(1) applies only to orders that preserve the status quo pending a decision on the merits, conclude no rights, and are limited in duration. *Santella*, 393 Ill. App. 3d at 903. The order here did not preserve the status quo of Special Prosecutors not yet having been paid for the period of September 1, 2010, to November 30, 2010. Instead, the trial court determined on the merits that Special Prosecutors had a right to be paid for their hours billed for that time period at a

rate of $250 per hour, and it ordered that the County pay the fees. Further, compliance with the alleged 12-month cap does not mean that the trial court did not determine Special Prosecutors' right to the money on the merits, as the trial court could still decrease the amount awarded on future fee petitions within the 12-month time frame that would otherwise exceed the cap.

¶ 23 In sum, the fee award altered the status quo, concluded Special Prosecutors' rights to the fees billed for the relevant time period, and was not limited in duration, so it may not be appealed under Rule 307(a)(1). The County does not argue any alternative basis for jurisdiction, nor is one apparent.[1] Accordingly, we must dismiss the appeal for lack of jurisdiction.

¶ 24 III. CONCLUSION

¶ 25 For the reasons stated, we dismiss the County's appeal for lack of jurisdiction.

¶ 26 Appeal dismissed.

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[1]Supreme Court Rule 301 (eff. Feb. 1, 1994) allows appeal from a final judgment that absolutely and finally fixes the parties' rights so that, if affirmed, the trial court only has to proceed with executing the judgment. *In re M.M.*, 337 Ill. App. 3d 764, 771 (2003). Here, Rule 301 does not apply because the Special Prosecutors' work on this case was ongoing at the time of the fee award appealed from. Supreme Court Rule 304(a) (eff. Feb. 26, 2010) allows for the appeal of a final judgment that disposes of one or more but fewer than all of the parties or claims, but it requires an express written finding by the trial court that there is no just reason for delaying enforcement or appeal of the order, which was not present here.