2013 IL App (2d) 120601-U
No. 2-12-0601
Order filed March 4, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF ANGELA MARIA SPIEGLER, Petitioner and Respondent and Counterpetitioner-Appellee, and GLEN G. SPIEGLER, Respondent (Law Offices of Debra DiMaggio, Petitioner and Counterrespondent-Appellant).	)	Appeal from the Circuit Court of Kane County. No. 05-D-1540 Honorable John A. Noverini Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Hutchinson and Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: Because petitioner appealed while a counterclaim was pending and without a Rule 304(a) finding, the appeal was premature, and we dismissed it pursuant to *Knoerr*.

¶ 2 The Law Offices of Debra DiMaggio (DiMaggio) appeals from a judgment dismissing the fee petition that DiMaggio filed against both parties in a dissolution-of-marriage action: Glen G. Spiegler (Glen) and her former client Angela Maria Spiegler (Maria). DiMaggio asserts that the

court erred in dismissing her petition as barred by *res judicata*. We dismiss the appeal for lack of jurisdiction. However, in reaching that conclusion, we, in passing, conclude that the petition's dismissal was improper.

¶ 3 I. BACKGROUND

¶ 4 On August 12, 2005, Maria filed a dissolution action in the circuit court of Cook County. DiMaggio represented Maria. Glen moved for a change of venue to Kane County, and the court granted the motion. DiMaggio, on October 31, 2006, filed a petition seeking $50,401.43 in fees from Maria. An amended petition sought $61,269.13 in fees from both Maria and Glen. The court entered a judgment for dissolution of marriage on April 28, 2007. By then, DiMaggio was no longer counsel for Maria. Glen filed a response to DiMaggio's petition on April 30, 2007.

¶ 5 Maria filed a response on May 1, 2007; this included a counterclaim for refund of the retainer. The last filing from that period is a form order dated November 2, 2007, setting a November 9, 2007, date for status "re Settlement Recommendation."

¶ 6 On November 2, 2011, DiMaggio filed a "Motion to Close File Instanter," asserting that, because nothing had occurred in the case since November 2, 2007, "Case Number D 1540 should be immediately closed." Maria responded, noting the pendency of her counterclaim and asserting that DiMaggio had filed a breach-of-contract action against her in Cook County and further noting that the Cook County court had involuntarily dismissed that action. A memorandum of law filed by Maria included as an exhibit an order by the circuit court of Cook County dismissing that action pursuant to section 2-619(a)(3) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(3) (West 2010)). That section provides for involuntary dismissal when "there is another action pending between the same parties for the same cause." The Cook County court gave as a reason for the

dismissal the pendency of the fee petition in the Kane County case. After Maria's response, DiMaggio withdrew her motion to close the file and instead asked the Kane County court to decide the merits of the fee petition.

¶ 7 Maria then moved to dismiss the fee petition. She noted that, under Illinois Supreme Court Rule 273 (eff. Jan. 1, 1967), "[u]nless the order of dismissal or a statute of this State otherwise specifies, an involuntary dismissal of an action, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join an indispensable party, operates as an adjudication upon the merits." She asserted that the Cook County dismissal under section 2-619(a)(3) of the Code thus was an adjudication on the merits of DiMaggio's right to fees, and thus operated to create a *res judicata* bar to the Kane County fee petition. DiMaggio responded, asserting, essentially, that such an application of Rule 273 is nonsensical. On May 1, 2012, the court entered an order stating that "Petitioner's Motion to Dismiss Is Granted DiMaggio's Fee Petition is Dismissed With Prejudice." The order did not mention the counterclaim, and the court did not make a finding of immediate enforceability and appealability under Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010). On May 31, 2012, DiMaggio filed a notice of appeal.

¶ 8 II. ANALYSIS

¶ 9 On appeal, DiMaggio asserts that the *res judicata* dismissal was the result of an unreasonable interpretation of the interaction between Rule 273 and section 2-619(a)(3). She further asserts that the counterclaim is not an obstacle to this appeal because, taking Maria's reasoning to its logical conclusion, the *res judicata* dismissal necessarily applied to the counterclaim as well as the fee petition. She suggests that, because the issues in the counterclaim mandatorily had to be raised as a counterclaim or be lost, if the Cook County dismissal operated as a dismissal on the merits of the

breach-of-contract claim, it had the same effect on the counterclaim. Maria responds, arguing the merits of the case, but also asserting that the pendency of the counterclaim renders the appeal premature.

¶ 10 Several paths of reasoning are open to us in determining our jurisdiction. One path is to decide whether a section 2-619(a)(3) dismissal is indeed a dismissal on the merits. If it is *not*, then we can reject DiMaggio's argument as to the status of the counterclaim while simultaneously reducing the likely need for a second appeal. We therefore choose that path. We conclude that a section 2-619(a)(3) dismissal is *not* a dismissal on the merits. That conclusion eliminates the only imaginable means by which the counterclaim could have been disposed of, thus requiring us to conclude that the appeal was premature. See Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010) ("If multiple parties or multiple claims for relief are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all of the parties or claims only if the trial court has made an express written finding that there is no just reason for delaying either enforcement or appeal or both").

¶ 11 Section 2-619(a)(3) provides:

> "Defendant may, within the time for pleading, file a motion for dismissal of the action or for other appropriate relief upon any of the following grounds. ***
>
> * * *
>
> (3) That there is another action pending between the same parties for the same cause." 735 ILCS 5/2-619(a)(3) (West 2010).

Rule 273 provides in full:

> "Unless the order of dismissal or a statute of this State otherwise specifies, an involuntary dismissal of an action, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join an indispensable party, operates as an adjudication upon the merits." Ill. S. Ct. R. 273 (eff. Jan. 1, 1967).

Maria asserts that, because section 2-619(a)(3) does not specify that an involuntary dismissal under the section is *not* on the merits, by the plain language of Rule 273 such a dismissal *is* on the merits.

¶ 12 Maria's argument ignores the necessary implication of section 2-619(a)(3) that a dismissal for pendency of another action for the same cause is a dismissal not on the merits. The purpose of the section is patent: it is "to relieve both courts and litigants of the unnecessary burden of *duplicative* litigation." (Emphasis added.) *Ransom v. Marrese*, 122 Ill. 2d 518, 530 (1988). To conclude that a dismissal under the section is one on the merits would be inconsistent with the section's unmistakable purpose. The provision needs no clearer specification; to conclude otherwise would produce absurdity and largely[1] defeat the purpose of the section.

¶ 13 If the dismissal in Cook County had been one on the merits, fully resolving the action, it arguably also would have been a determination on the merits of any mandatory counterclaim. Because it was not a determination on the merits of the primary claim, *a fortiori* it could not be a determination on the merits of the counterclaim. Thus, DiMaggio's argument for why the counterclaim must have been dismissed in Kane County along with the fee petition fails. This was

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[1]We say "largely," rather than "completely," because a court that was aware of the issue could avoid what happened here by specifying in the order that the dismissal was without prejudice. Because the intent of section 2-619(a)(3) is so obvious, we would not expect a court to add such apparently unneeded language unless it was aware of attempts to use the section as Maria has.

the only argument as to how the counterclaim was resolved. With its failure, we must conclude that the counterclaim indeed remained pending. Therefore, the appeal is premature, and we lack jurisdiction.

¶ 14 Alternatively, we also note that *res judicata* is an affirmative defense, so that a party must raise it to defeat a claim. *Curtis v. Lofy*, 394 Ill. App. 3d 170, 188 (2009). Thus, nothing about Maria's raising of a *res judicata* defense implied any need for the court to consider DiMaggio's implicit complementary *res judicata* defense. Consequently, we also reach the alternative holding that the grant of Maria's motion to dismiss was not an implicit dismissal of the counterclaim, such that, again, its pendency makes this appeal premature.

¶ 15 Where the record shows that pendency of a claim has made an appeal premature, we generally follow the procedure set out in *In re Marriage of Knoerr*, 377 Ill. App. 3d 1042, 1050 (2007):

> "We presume that [appellant] can timely file a notice of appeal upon the resolution of *** any *** pending claims in this matter. However, if pending claims have been resolved and the time to file a new notice of appeal has expired, Rule 303(a)(2) allows [appellant] to establish the effectiveness of the present notice of appeal. In the latter event, [appellant] may file a petition for rehearing and to supplement the record, thereby establishing our jurisdiction to address the merits."

Here, in the latter event, to properly establish jurisdiction, DiMaggio must show final resolution of the counterclaim or the court's entry of a Rule 304(a) finding.

¶ 16 III. CONCLUSION

¶ 17 For the reasons we have stated, we dismiss the appeal for want of jurisdiction.

¶ 18 Appeal dismissed.