2013 IL App (2d) 120976-U
No. 2-12-0976
Order filed May 14, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

BLUE RIDER FINANCE, INC.,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 11-CH-3524
	)	
CITYSCOPE PRODUCTIONS, LLC,	)	
DAVID ODOM, and KIMBERLY ODOM,	)	Honorable
	)	Bonnie M. Wheaton,
Defendants-Appellants.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Jorgensen and Spence concurred in the judgment.

ORDER

¶ 1 *Held:* Because the trial court's written order conflicted with the explicit account the trial court presented in the report of proceedings, the oral pronouncement controlled. Therefore, the trial court's oral pronouncement that it would not consider defendants' section 2-615 motion to dismiss did not constitute a denial of defendants' motion. Without a final or appealable order, we dismissed the appeal for lack of appellate jurisdiction.

¶ 2 On August 25, 2011, plaintiff, Blue Rider Finance Inc., and defendants, Cityscope Productions, LLC, David Odom, and Kimberly Odom, entered into a settlement agreement concerning a loan transaction between the parties; the parties also presented a "Stipulation to

Dismiss" to the trial court, on which the trial court entered its dismissal order. Thereafter, in March 2012, plaintiff filed a petition to enforce the settlement and vacate the trial court's August 2011 dismissal order pursuant to section 2-1401 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-1401 (West 2010)). Defendants moved to dismiss pursuant to section 2-615 of the Code (735 ILCS 2-615 (West 2010)). On August 13, 2012, the trial court conducted a hearing on the pending petition and characterized the dismissal motion as a "response." Following arguments of the parties, the trial court indicated that defendants' motion to dismiss was premature and granted plaintiff's petition to enforce the settlement agreement and to vacate the dismissal order. Defendants appeal, challenging the trial court's jurisdiction to consider plaintiff's petition and the sufficiency of plaintiff's section 2-1401 petition. For the reasons that follow, we dismiss this appeal for lack of appellate jurisdiction.

¶ 3 The record reflects that on May 9, 2011, plaintiff and defendant Cityscope entered into a bridge loan agreement, whereby plaintiff advanced $2.5 million to Cityscope for the production of a motion picture, and defendant would repay the loan plus fees ($3 million) in 45 days. Cityscope did not repay the loan as agreed. On July 27, 2011, plaintiff filed a verified complaint against defendants and requested the imposition of a constructive trust. Among the allegations, plaintiff alleged that defendants David Odom and Kimberly Odom may have wrongfully and illegally used $820,000 of proceeds from the bridge loan to repurchase their real estate, which had been foreclosed upon and sold at a sheriff's sale.

¶ 4 On August 25, 2011, the parties entered into a settlement agreement and presented a "Stipulation to Dismiss" to the trial court. The dismissal stipulation provided that "dismissal shall be a bar to the bringing of any action based on or including the claim for which this action has been brought, except as set forth in the settlement agreement and the terms of the August 25, 2011 email

agreement." The dismissal order provided that plaintiff's complaint would be "dismissed with prejudice, subject to settlement agreement" and that the "court retains jurisdiction to enforce settlement agreement."

¶ 5 On March 29, 2012, plaintiff petitioned the court pursuant to section 2-1401 of the Code to enforce the parties' settlement agreement and to vacate the dismissal order. Plaintiff alleged that the stipulated dismissal was "expressly qualified" upon negotiated terms between the parties in a three-page email document and that the trial court retained jurisdiction to enforce the terms. One of the dismissal terms from the email document provided:

> "8. If David Odom, Kimberly Odom, or Cityscope Productions engage, or have engaged, in any fraudulent conduct or forgery related to the bridge loan transaction or this agreement then the claim for the remaining balance owed Blue Rider may be reinstated against David Odom, Kimberly Odom, and/or Cityscope Productions, LLC."

¶ 6 Plaintiff alleged that, since the August 2011 dismissal, it had discovered new evidence implicating defendants in perpetrating a fraud surrounding the bridge loan, including stealing the identity of "Nimesh Shah," one of the alleged parties securing the bridge loan. Shah had met with Darryl Clements, a business associate of defendant David Odom. Clements disclosed in an email to Shah that he, defendant David Odom, and another individual stole Shah's identity after Clements had supplied them with some of Shah's documents related to another transaction and forged Shah's name to the financing transaction document. Plaintiff further alleged that it discovered a prior attempt by defendant David Odom to procure a bridge loan using a forged proof of funds letter. Plaintiff alleged that Sara Giles, the principal of Quick Draw, turned over correspondence and documents in the failed loan transaction, which reflected documents that were "highly suspicious,

were produced on fictitious letterhead containing false email addresses, and contained [a] *** forged signature." Plaintiff alleged that the discovery of the new evidence established that defendants "actively engaged in fraud or forgery when negotiating and entering into the bridge loan transaction." Plaintiff concluded that, pursuant to paragraph 8 of the dismissal terms, it should be allowed to reinstate its lawsuit against defendants to recover the remaining balance of the bridge loan, and requested the trial court to vacate the August 2011 dismissal order and grant it leave to file an amended verified complaint. Plaintiff attached three sworn declarations and an amended verified complaint to its petition.

¶ 7 On April 30, 2012, defendants filed a motion pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2010)) seeking to dismiss plaintiff's section 2-1401 petition. In this motion, defendants alleged that they had made the $2 million settlement payment to plaintiff and that defendant David Odom "cooperated with [plaintiff] and its counsel by answering every question presented to him and sharing all of the information he has/had during more than four hours of interviews." Defendants argued that plaintiff's motion failed to identify any document that defendant David Odom supposedly forged; the motion failed to include any reliable evidence that defendant David Odom participated in identity theft. Defendants further argued that plaintiff's section 2-1401 petition failed to allege or otherwise satisfy the minimum requirements to survive dismissal.

¶ 8 The parties fully briefed the issues, and on August 13, 2012, the trial court conducted a hearing "on the motion to dismiss the 2-1401 petition." The trial court added, "[b]ut I am going to take that as a response." Following arguments of the parties, the trial court stated, "I am going to grant the motion to reinstate the case. And I will grant [plaintiff] leave to file an Amended

Complaint." With respect to defendants' section 2-615 motion to dismiss, the trial court stated, "all of the arguments you make may be absolutely legally correct. But I think we have to have a complaint on file before I can make any determination as to that. Your motion reeks with prematurity. So, I am going to grant the motion to reinstate the case." Following a request by plaintiff, the trial court rephrased its ruling:

> "As an evidentiary matter, you may be correct legally with arguments at the close of any discovery. But I believe that it is incumbent on the Court to grant the motion to vacate the settlement order and reinstate the case."

¶ 9 The parties later returned to court and informed it that they disagreed as to what the written court order should reflect. Defendants asserted that plaintiff was "of the opinion that this ruling was a ruling on our 2-615 argument," to which the trial court replied "No." The trial court continued, "I don't believe that I can rule on the merits of the things that [defendants] raised until there is actually a Complaint on file." Plaintiff's counsel stated, "they raised meritorious claims in their objection to the 1401 petition. And we have denied that. But we are going to reargue those issues." The trial court replied, "If [defendants] want[] to file a motion to dismiss" and added, "[b]ut I will tell you that I think there are so many questions of fact raised by your arguments and your submissions ***." The transcript further reflected the following:

> "MR. ODOM [Defendant]: I just want to just be clear that I can file a 2-615 motion.
>
> ***
>
> THE COURT: Yeah. All right. The order should say that the motion to dismiss the *** petition is denied. The petition to *** vacate the dismissal order and reinstate is granted."

¶ 10 In granting plaintiff's motion to enforce the settlement agreement to vacate the dismissal order, the trial court's written order also provided that "Defendants' Motions to Dismiss Plaintiff's Motion to Enforce Settlement Agreement and Vacate Dismissal order are hereby denied; as the 2-615 motion is premature." Defendants filed a notice of appeal from this order.

¶ 11 Before we consider our standard of review or the merits, we address our jurisdiction to consider the appeal (*Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 251-52 (2010)). An order is said to be final if it disposes of the rights of the parties, either upon the entire controversy or upon some definite separate part thereof such as a claim in a civil case. *State Farm Fire & Casualty Co. v. John J. Rickhoff Sheet Metal Co.*, 394 Ill. App. 3d 548, 556 (2009).

¶ 12 As stated above, the trial court's written order reflected that defendants' section 2-615 motion to dismiss was denied. However, a court order is not interpreted in a vacuum. "The orders of the trial court must be interpreted from the entire context in which they were entered, with reference to other parts of the record including the pleadings, motions and issues before the court and the arguments of counsel." *Kiefer v. Rust–Oleum Corp.*, 394 Ill. App. 3d 485, 494 (2009) (citing *Dewan v. Ford Motor Co.*, 343 Ill. App. 3d 1062, 1069 (2003)). Orders must be construed in a reasonable manner so as to give effect to the apparent intention of the trial court. *Dewan*, 343 Ill. App. 3d at 1069.

¶ 13 In the current matter, defendants presented a section 2-615 motion to dismiss plaintiff's section 2-1401 petition. Our supreme court has stated that proceedings under section 2-1401 of the Code are subject to the usual rules of civil practice. *People v. Vincent*, 226 Ill. 2d 1, 8 (2007) (citing *Ostendorf v. International Harvester Co.*, 89 Ill. 2d 273, 279 (1982)). Section 2-1401 petitions are subject to dismissal for want of legal or factual sufficiency; more specifically, a section 2-1401

petition may dismissed where the allegations, taken as true, do not state a meritorious defense or diligence under section 2-1401 case law. *Vincent*, 226 Ill. 2d at 8. " 'Like a complaint, the petition may be challenged by a motion to dismiss for its failure to state a cause of action or if, on its face, it shows that the petitioner is not entitled to relief.' " *Vincent*, 226 Ill. 2d at 8 (quoting *Klein v. La Salle National Bank*, 155 Ill.2d 201, 205 (1993)).

¶ 14 In their section 2-615 motion to dismiss, defendants asserted that plaintiff's petition failed to state a claim for relief under section 2-1401 of the Code. Defendants asserted that plaintiff's petition did not demonstrate due diligence in presenting the claims; the petition was not supported by affidavit; the petition failed to demonstrate the existence of a meritorious claim in the underlying action or in the petition itself. At the August 13, 2012, hearing on defendants' section 2-615 motion to dismiss plaintiff's section 2-1401 petition, the trial court heard arguments of the parties. With respect to defendant's specific factual objections, the trial court noted that defendants were asking it "to make evidentiary rulings" and explained, "[w]e are not at that point yet." It further stated that defendants "may be correct legally with arguments at the close of any discovery" but that the section 2-615 motion "reek[ed] with prematurity" and it was incumbent to grant the petition and reinstate the case.

¶ 15 Based on our review of the record, the trial court's written ruling on defendants' section 2-615 motion to dismiss was not supported by the report of proceedings. In the report of proceedings, the trial court stated that it would not rule on the merits of defendants' motion to dismiss until there was "actually a Complaint on file." Subsequently, when the parties requested guidance or clarification regarding the contents of the written order, defendants asserted that plaintiff was "of the opinion that this ruling was a ruling on our 2-615 argument," to which the trial court replied "No."

The court did not deny defendants' section 2-615 dismissal motion because it considered the arguments and found them without merit, but because it determined the motion was brought prematurely. The denial of the motion was based on a perceived procedural misstep, rather than a substantive review of the alleged defects. Thus, the report of proceedings clearly reflects that the trial court did not consider the merits or rule on defendants' section 2-615 motion to dismiss.

¶ 16 "When there is a conflict between the trial court's oral pronouncement and its written order, the oral pronouncement controls." *Danada Square LLC v. KFC National Management Co.*, 392 Ill. App. 3d 598, 608 (2009); *In re Tr. O.*, 362 Ill. App. 3d 860, 867-68 (2005). Here, the written order conflicts with the explicit account the trial court presented in the report of proceedings, and therefore, we conclude that the trial court's oral pronouncement that it would not consider defendants' section 2-615 motion to dismiss did not constitute a denial of defendants' motion.

¶ 17 The finality of an order is determined by an examination of the substance as opposed to the form of that order. *Gutenkauf v. Gutenkauf*, 69 Ill. App. 3d 871, 873 (1979). Appellate jurisdiction is limited to review of final judgments unless an order falls within a statutory or supreme court exception. *Pekin Insurance Co. v. Benson*, 306 Ill. App. 3d 367, 375 (1999). The report of proceedings reflects that the trial court did not fix, determine, or otherwise dispose of defendants' section 2-615 motion. Because the trial court did not consider defendants' section 2-615 motion to dismiss, the trial court's written order was not final or appealable.

¶ 18 Accordingly, without reaching the issues concerning plaintiff's section 2-1401 petition or defendants' section 2-615 dismissal motion, we dismiss the appeal for lack of jurisdiction.

¶ 19 Appeal dismissed.