2014 IL App (2d) 130698-U
No. 2-13-0698
Order filed May 27, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

UESCO INDUSTRIES, INC.,	)	Appeal from the Circuit Court
	)	of Lake County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 11-MR-2036
	)	
CONTINENTAL CASUALTY COMPANY and TRANSPORTATION INSURANCE COMPANY,	)	
	)	
Defendants-Appellees	)	Honorable
	)	Jorge L. Ortiz,
(Poolman of Wisconsin, Inc.-Defendant).	)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices McLaren and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: In a 2013 appeal from the underlying case, the appellate court held that Uesco could not state a valid claim against Poolman for a violation of the Telephone Consumer Protection Act. That decision rendered the instant case against Poolman's insurers moot, so we dismissed the appeal.

¶ 2 Plaintiff, Uesco Industries, Inc. (Uesco), appeals from the trial court's order granting the motion to dismiss filed by defendants, Continental Casualty Company and Transportation Insurance Company (collectively Insurers), pursuant to section 2-619(a)(9) of the Code of Civil

Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2010)). The trial court ruled that Uesco lacked standing based on a lack of a justiciable or ripe case or controversy. Shortly afterwards, the First District appellate court issued its decision in *Uesco Industries Inc. v. Poolman of Wisconsin, Inc.*, 2013 IL App (1st) 112566 (*Uesco II*), which was an appeal from the underlying case. We conclude that the decision renders the instant appeal moot, and we therefore dismiss the appeal.

¶ 3 I. BACKGROUND

¶ 4 This is the second time this case is on appeal before this court, and we restate the pertinent facts as described in our prior order. See *Uesco Industries Inc. v. Continental Casualty Co.*, 2012 IL App (2d) 120433-U (*Uesco I*).

¶ 5 In 2009, Uesco filed a class action against Poolman of Wisconsin Inc. (Poolman) in the circuit court of Cook County. Uesco alleged that Poolman violated the Telephone Consumer Protection Act (47 U.S.C. § 227 (2006)) by sending it an unsolicited junk fax advertisement on March 16, 2006, and also sending the advertisement to over 39 others. Uesco additionally asserted a cause of action for common law conversion, similarly based on unsolicited faxes.

¶ 6 Insurers had issued Poolman three commercial general liability insurance policies covering various policy periods. Insurers agreed to defend Poolman in the Cook County suit subject to a reservation of rights. On November 14, 2011, Insurers filed a declaratory judgment action against Poolman in Wisconsin federal court. They sought a declaration that they did not have a duty to defend or indemnify Poolman in the underlying suit.

¶ 7 Three days later, on November 17, 2011, Uesco filed the instant action in Lake County against Insurers and Poolman. It sought a declaration that pursuant to the insurance policies,

Insurers had a duty to defend and indemnify Poolman in the underlying suit. Poolman did not file an appearance or answer in the Lake County action.

¶ 8 On December 16, 2011, Insurers filed a motion to dismiss or stay the Lake County suit. They argued that the case should be dismissed pursuant to section 2-619(a)(3) because they had previously filed another action in federal court involving the "same parties" and seeking a determination of the "same cause." Insurers argued that dismissal was also warranted under section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2010)) on the grounds that Uesco did not have standing to seek a declaration of coverage under the policies because its claim against them was not ripe. Insurers claimed that there was no justiciable case or controversy between them and Uesco because Insurers had not denied Poolman coverage but rather had agreed to defend it under a reservation of rights, and because no judgment or settlement had been entered against Poolman in the underlying suit. As an alternative to dismissal, Insurers sought a stay of the case pending resolution of the federal suit.

¶ 9 Uesco filed a response to Insurers' motion to dismiss on February 2, 2012. It argued that a section 2-619(a)(3) dismissal was not warranted because there was no other action pending against the same parties for the same cause, as Uesco was not a party to the federal suit. Uesco argued that dismissal was also not warranted under section 2-619(a)(9) because it had a ripe, justiciable claim for declaratory relief. Uesco argued that although Insurers were defending Poolman pursuant to two of its policies, they had also disclaimed coverage entirely and refused to defend Poolman under a third policy. According to Uesco, the federal district court action showed that there was an actual controversy between Insurers and Poolman, and Uesco asserted that it had a substantial interest in the determination of available insurance coverage.

¶ 10 The trial court issued its ruling on April 11, 2012. The trial court granted in part and denied in part Insurers' motion to dismiss under section 2-619(a)(9). It found that Uesco had standing to pursue a declaratory judgment action against Insurers on matters pertaining to the duty to defend Poolman in the underlying action, and that such action was ripe for judicial determination. In contrast, it found that the issue of Insurers' duty to indemnify Poolman in the underlying action was not ripe because there had been no adjudication of liability against Poolman in that action. The trial court further granted Insurers' motion to dismiss under section 2-619(a)(3) on the basis that there was another action pending between the same parties for the same cause.

¶ 11 On appeal, this court reversed and remanded. We concluded that the trial court abused its discretion in granting Insurers' motion to dismiss the suit pursuant to section 2-619(a)(3), because although another action was pending in federal court, Uesco did not have substantially similar interests to Poolman such that they could be considered the "same parties" under the statute. *Uesco I*, 2012 IL App (2d) 120433-U, ¶ 34. We did not address Uesco's arguments that the trial court correctly determined that it had standing to pursue a declaratory judgment action against Insurers on the issue of their duty to defend Poolman in the underlying action, and that such action was ripe for judicial determination. *Id.* ¶ 36.[1]

[1] Although the trial court had granted in part Insurers' motion to dismiss under section 2-619(a)(9) on the issue of Insurers' duty to indemnify, it denied the motion in part on the issue of Insurers' duty to defend. Therefore, the ruling under section 2-619(a)(9) was not appealable as of right. See *Mund v. Brown*, 393 Ill. App. 3d 994, 996 (2009) (the denial of a motion to dismiss is an interlocutory order, not a final and appealable order, and does not give the appellate court jurisdiction on appeal); see also *In re Marriage of Jensen*, 2013 IL App (4th) 120355, ¶ 34

¶ 12 Once the case was remanded, Insurers filed a motion asking the trial court to reconsider its decision to deny in part their 2-619(a)(9) motion to dismiss. Insurers argued that the appellate court had since issued *Byer Clinic & Chiropractic, Ltd. v. State Farm Fire & Casualty Co.*, 2013 IL App (1st) 113038, which showed that the trial court did not correctly apply Illinois law on this issue. Uesco responded that Insurers' arguments were barred by the law of the case doctrine; that the trial court's prior decision denying in part the 2-619(a)(9) motion was consistent with precedent; and that *Byer Clinic & Chiropractic, Ltd.* was neither controlling nor on point.

¶ 13 On June 5, 2013, the trial court granted Insurers' motion to reconsider and dismissed the case under 2-619(a)(9), finding there was currently no justiciable or ripe case or controversy between the parties. Uesco timely appealed.

¶ 14 II. ANALYSIS

¶ 15 On appeal, Uesco largely restates the arguments that it presented below. Insurers argue that the trial court correctly granted their motion to reconsider and dismissed the action under section 2-619(a)(9). They alternatively argue that this appeal is moot in light of the appellate court's decision in *Uesco II*, which was issued a couple of weeks after the trial court entered the order appealed from here. We agree that this appeal is moot.

¶ 16 In *Uesco II*, Poolman appealed from an order of the Cook County circuit court granting Uesco class certification. *Uesco II*, 2013 IL App (1st) 112566, ¶ 2. The appellate court stated as follows. The evidence showed that Poolman hired a company called B2B to engage in two fax advertising campaigns, one in March 2006 and the second in December 2006. *Id.* ¶¶ 23, 66-69. Uesco received a single fax advertisment from the first advertising campaign, but there was no

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(without a finding under Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010), an order disposing of fewer than all claims is not appealable).

evidence it received a fax during the second advertising campaign. *Id.* ¶ 69. For the March 2006 advertising campaign, Poolman specifically instructed B2B to market only to small electric motor repair and service companies, and B2B agreed, but B2B's information technology specialists failed to input that request into the customer database. *Id.* ¶ 66. Therefore, as a matter of law, B2B exceeded the scope of its authority during the first fax advertising campaign when it sent fax advertisements to persons or companies other than those that service and repair small electric motors, and liability could not be imputed to Poolman for any fax advertisements received by parties outside of the authorized scope. *Id.* ¶¶ 67, 69.

¶ 17 The appellate court continued:

> "[Uesco] is not a company that services and repairs small electric motors and, therefore, is outside the scope of fax recipients authorized by [Poolman] for the March 2006 advertising campaign. Simply put, [Uesco] is not a member of [Poolman's] class. [Citation.] Consequently, [Uesco] cannot state a valid claim against [Poolman] for a violation of section 227(b)(1)(C) of the Act for the first advertising campaign. [Citation.] Accordingly, we find [that Uesco] cannot adequately represent the other potential plaintiffs for the class of recipients of the March 2006 fax." *Id.* ¶ 69.

The appellate court stated that because there was no evidence that Uesco received a fax in December 2006 as part of Poolman's second advertising campaign, Uesco was also not an appropriate class representative for those who received Poolman's unsolicited faxes in December 2006. *Id.* ¶ 70. The appellate court concluded that, therefore, Uesco could not adequately represent the class, and the circuit court abused its discretion by granting Uesco's motion for class certification. *Id.* ¶ 70. The appellate court reversed and remanded the cause for further proceedings. *Id.* ¶ 78.

¶ 18 Uesco's request for leave to appeal *Uesco II* was denied in the Illinois supreme court (966 N.E. 2d 24 (Table) (September 25, 2013)), and the United States Supreme Court denied its petition for writ of *certiorari* (134 S. Ct. 1323 (February 24, 2014)).

¶ 19 As previously mentioned, Uesco's complaint against Poolman alleged a violation of the Telephone Consumer Protection Act and cause of action for common law conversion based on the unsolicited junk fax advertisement it and others received on March 16, 2006. See *supra* ¶ 5. In *Uesco II*, the appellate court held that Poolman could not be liable to Uesco for the fax B2B sent to Uesco on Poolman's behalf, because B2B exceeded the scope of its authority in sending the fax to Uesco. *Uesco II*, 2013 IL App (1st) 112566, ¶¶ 67, 69. Uesco's requests to appeal the decision to the Illinois supreme court and the United States Supreme Court were denied. As such, Poolman cannot be liable to Uesco for violations of the Telephone Consumer Protection Act or common law conversion. It follows that because Poolman is not liable to Uesco, Uesco cannot obtain the proceeds from Poolman's insurance coverage as damages.

¶ 20 An appeal is moot where it presents no actual controversy or where the issues in the trial court do not exist anymore because intervening events have made it impossible for the reviewing court to grant the complaining party effectual relief. *Fleming v. Moswin*, 2012 IL App (1st) 103475-B, ¶ 27. Reviewing courts do not generally decide moot questions, write advisory opinions, or consider issues where the ultimate result will not be affected. *Id.* Here, regardless of whether the trial court erred in granting Insurers' motion to dismiss under section 2-619(a)(9), it is impossible to grant Uesco the relief that it ultimately seeks, which is recovery under the insurance policies for the alleged damages it suffered from receiving the fax. Therefore, this appeal is moot.

¶ 21 Uesco argues that this appeal is not moot because no judgment has been entered in the underlying action, and briefing is on-going with regard to Poolman's most recent motion for entry of judgment. We take judicial notice that the underlying suit against Poolman has not terminated in the trial court. See Ill. R. Evid. 201(f) (eff. Jan. 1, 2011) ("Judicial notice may be taken at any stage of the proceeding."); *Walsh v. Union Oil Co. of California*, 53 Ill. 2d 295, 299 (1973) (Illinois court may take judicial notice of other proceedings where a holding in one cause involving substantially the same parties is determinative of the pending cause); see also *People v. Wright*, 2013 IL App (1st) 103232, ¶ 38 (Illinois courts may take judicial notice of federal court proceedings). However, Uesco brought the underlying action both individually and as a representative of a class, so it follows that the action could possibly continue without Uesco, *i.e.* another class member could be named lead plaintiff.[2] In contrast, here Uesco brought the action against Insurers individually. As the appellate court's ruling in *Uesco II* means that Uesco will not ultimately be able to obtain damages from Poolman, Uesco's appeal in this case is moot.

¶ 22 III. CONCLUSION

¶ 23 For the reasons stated, we dismiss the appeal as moot.

¶ 24 Appeal dismissed.

[2] We express no opinion on the ultimate merits of such an argument.