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2014 IL App (3d) 130231-U

Order filed October 29, 2014

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2014

FIRSTMERIT BANK, N.A., as successor-in-	)	Appeal from the Circuit Court
interest to GEORGE WASHINGTON	)	of the 12th Judicial Circuit,
SAVINGS BANK,	)	Will County, Illinois.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	
	)	
WILLIAM J. McENERY,	)	Appeal No. 3-13-0231
	)	Circuit Nos. 10-L-477
Defendant,	)	11-D-447
	)	
and	)	
	)	
MARGARET M. McENERY,	)	
	)	
Third Party Citation	)	Honorable Brian E. Barrett,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE SCHMIDT delivered the judgment of the court.  
Justices Carter and McDade concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court had jurisdiction to grant plaintiff's motion for turnover, and did not err in so ordering. Any marital interest appellant had in the distributional interests of the LLCs was subordinate to plaintiff's lien rights.

¶ 2 This appeal arises from the consolidation of two cases in the Will County circuit court. First, on June 10, 2010, plaintiff, FirstMerit Bank, obtained a judgment by confession against defendant, William J. McEnery, based on defendant's default upon a promissory note. FirstMerit subsequently commenced supplementary proceedings by serving William with a citation to discover assets, and by serving a third party citation to discover assets upon appellant, Margaret McEnery. On August 10, 2010, by way of a stipulation and agreed order, the trial court entered an order under which the distributional and transferable interests of William McEnery in a number of restaurant business limited liability companies (LLCs) were charged to satisfy FirstMerit's judgment.

¶ 3 The second case commenced on March 4, 2012, when Margaret filed a petition for dissolution of marriage. Pursuant to Margaret's amended motion to consolidate filed on November 28, 2011, the trial court consolidated the two cases for the purposes of determining what interest, if any, Margaret had in William's various LLCs.

¶ 4 On September 12, 2012, the trial court entered an order finding that Margaret held a marital interest in certain property, including William's distributional interest in the various LLCs, and that said interest is at least 50%. Both the dissolution and supplementary proceedings were set for status.

¶ 5 FirstMerit then filed a motion for turnover seeking entry of an order compelling turnover to FirstMerit of all present and future LLC distributions owed to William. Following a hearing, the trial court granted FirstMerit's motion and held that Margaret's marital interest in William's distributional interest in the LLCs was subordinate to the liens and charging order that were entered in favor of FirstMerit on August 20, 2010.

¶ 6 Margaret appeals, arguing, *inter alia*, that the trial court's order granting FirstMerit's motion for turnover should be declared null and void, as it divested her of a vested property interest that the trial court had previously found she had.

¶ 7 We affirm.

¶ 8 BACKGROUND

¶ 9 Plaintiff, FirstMerit Bank, N.A., as successor-in-interest to George Washington Savings Bank (FirstMerit), initiated case No. 10-L-477 in the Will County circuit court on June 10, 2010. Plaintiff's complaint alleged that defendant, William J. McEnery, owed plaintiff a total of \$1,843,129.14 based on his default upon two promissory notes.

¶ 10 On that same day, by agreement, the trial court ordered that FirstMerit recover from William the sum of \$1,843,129.14, plus costs of suit and that execution may issue.

¶ 11 FirstMerit thereafter commenced supplementary proceedings on July 1, 2010, serving William with a citation to discover assets and serving Margaret with a third-party citation to discover assets.

¶ 12 On August 10, 2010, the trial court entered a stipulation and agreed order (the charging order), under which the distributional and transferable interests of William in the following LLCs were charged to satisfy FirstMerit's judgment: 175 Bar & Grill, LLC; U.S.G. Italian Marketcaffe, LLC; Randolph/Stetson Sopraffina Marketcaffe LLC; and 175 Sopraffina Marketcaffe, LLC (collectively the LLCs). The order specifically stated that: "[t]he transferable interests of Judgment Debtor McEnery [William] in the limited liability companies identified on Exhibit "B" are hereby charged to satisfy the unpaid judgment entered herein in favor of Plaintiff [FirstMerit] and Plaintiff [FirstMerit] shall have a lien on both the distributional interests and transferable interests therein, in the same of McEnery [William]."

¶ 13 From the date of the charging order until June 21, 2011, FirstMerit received William's share of distributions from the LLC.

¶ 14 On March 4, 2011, Margaret filed a petition for dissolution of marriage in the Will County circuit court, case No. 11-D-447. On May 25, 2011, Margaret filed a motion to consolidate the dissolution action with FirstMerit's supplementary proceeding. The court allowed FirstMerit 28 days to file its reply brief.

¶ 15 Shortly thereafter on June 21, 2011, certain creditors of William filed an involuntary petition for relief under Chapter 7 of the Bankruptcy Code, thereby staying the proceedings in the circuit court.

¶ 16 Margaret filed a motion for relief from the automatic stay in bankruptcy court. The court granted the motion and modified the stay for the limited purposes of allowing the state court to determine what constituted marital property and Margaret's interests in such property. Margaret then filed an amended motion to consolidate the dissolution action and the supplementary proceeding.

¶ 17 On May 21, 2012, the circuit court, over FirstMerit's objection, granted Margaret's motion and consolidated the actions.

¶ 18 In the bankruptcy proceedings, the bankruptcy court modified the automatic stay on July 17, 2012, allowing FirstMerit to enforce its charging order against the LLCs. The order expressly allowed FirstMerit "to enforce its judgment liens and charging orders with regards to Debtor's [William's] property identified in the motion \* \* \*."

¶ 19 Following the consolidation of the actions in the circuit court, Margaret filed a series of motions seeking a determination as to whether Margaret held a marital interest in certain property. Margaret's third petition for summary determination (hereinafter third petition),

requested a determination that William's distributional interest in the LLCs was marital property, that Margaret had a vested interest in the same, and that Margaret's interest in that property was at least one half of the approximate \$199,718.75 in annual distributions from the LLCs.

¶ 20 Specifically, Margaret argued in the third petition that the August 20, 2010, charging order was entered without her knowledge and consent, and that she had a vested interest in the LLCs as marital property pursuant section 503 of the Illinois Marriage and Dissolution of Marriage Act. 750 ILCS 5/503 (West 2012). In its objection to Margaret's motion, FirstMerit argued, *inter alia*, that the characterization of the distributional interest in the LLCs as marital or nonmarital did not affect the rights of third-party creditors or serve to strip preexisting creditor liens.

¶ 21 The trial court entered an order on September 12, 2012, providing that Margaret held a marital interest in certain property, including William's distributional interest in the LLCs. It further stated that that interest was at least 50%. The order set both the marital dissolution action and the supplementary proceedings for status on October 25, 2012.

¶ 22 Also on September 12, 2012, pursuant to FirstMerit's request, the court ordered the LLCs to "deposit all payments of distributions or transfers, due to, or based upon the distribution interests of William J. McEnery in the LLCs, directly into an escrow account with Chicago Title." The order further provided that "[t]he lien of FirstMerit on such funds withheld pursuant to the charging order shall remain a lien thereon even though such funds are deposited into such escrow account."

¶ 23 On or about October 15, 2012, the LLCs deposited the distributions owed to McEnery into the Chicago Title escrow account. FirstMerit subsequently filed a motion for turnover,

seeking an order compelling all present and future LLC distributions owed to William, including those already in escrow.

¶ 24 The trial court heard argument on the motion for turnover on March 27, 2013, thereafter entering an order granting FirstMerit's motion, and finding that Margaret's marital interest in William's distributional interest in the LLCs was subordinate to the liens and charging orders that were entered in favor of FirstMerit on August 20, 2010. The order also stated that the funds held in the Chicago Title escrow account were to be disbursed to FirstMerit, with all future deposits and payments to remain subject to FirstMerit's liens and the charging order. The trial court included Rule 304(a) language in the order, stating there was no reason to delay its enforcement or appeal. Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010).

¶ 25 On April 10, 2013, Margaret filed a timely notice of appeal.

¶ 26 ANALYSIS

¶ 27 Margaret contends that the trial court's order of March 27, 2013, granting FirstMerit's motion for turnover conflicts with the trial court's previous order of September 12, 2012, wherein the court found Margaret had at least a 50% marital interest in William's distributional interests in the LLCs. Thus, according to Margaret, the March 27 order is null and void. Margaret's rationale appears to be that the trial court lacked both authority and subject matter jurisdiction over the property on March 27, as it had already made a final and appealable determination of her marital interest. In that same vein, Margaret also contends that *res judicata* and/or the law-of-the-case doctrine barred the trial court's March 27 order.

¶ 28 Margaret also argues that the trial court's order subverts the purpose of the Illinois Marriage and Dissolution Act (750 ILCS 5/503(b) (West 2010)) for the equitable division of

property. Finally, Margaret argues that the March 13, 2013, order goes beyond the scope of the pleadings. We find all of Margaret's claims to be without merit.

¶ 29 Margaret's various arguments have two fatal flaws. First, the September 12, 2012, order was not final and appealable. Second, Margaret completely ignores the fact that FirstMerit is a secured judgment creditor that perfected its lien rights against the distributional interests of the LLCs.

¶ 30 I. Subject Matter Jurisdiction

¶ 31 Illinois Supreme Court Rule 301 provides that "[e]very final judgment of a circuit court in a civil case is appealable as of right." Ill. S. Ct. R. 301 (eff. Feb. 1, 1994). "An order is final if it either terminates the litigation between the parties on the merits or disposes of the rights of the parties, either on the entire controversy of a separate branch thereof." *Wilson v. Edward Hospital*, 2012 IL 112898, ¶ 19 (citing *Hull v. City of Chicago*, 165 Ill. App. 3d 732, 733 (1987)). A notice of appeal must be filed within 30 days after the entry of the final judgment appealed from or within 30 days after entry of the order disposing of the last pending postjudgment motion. Ill. S. Ct. R. 303 (eff. June 4, 2008). However, as is the case here, "[i]f 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." Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010).

¶ 32 The trial court's September 12, 2012, order did not include Rule 304(a) language. Even if it had, it would not be a final and appealable order—amongst the three parties, it did not terminate any pending litigation or dispose of any of their rights. The order continued the marital dissolution proceedings for status and did not grant dissolution of the parties' marriage.

Nor did the trial court's finding that Margaret had a 50% marital interest in the LLCs transform the interlocutory order into a final order. It denoted only that the distributional interest in the LLCs was a part of the marital estate. The trial court did not attempt to place an actual dollar amount on, or distribute equitably between the parties, any marital assets or debts in the dissolution proceeding.

¶ 33 As for the supplementary proceedings, an order entered in a section 2-1402 proceeding is final “when the citation petitioner is in a position to collect against the judgment debtor or a third party, or the citation petitioner has been ultimately foreclosed from doing so.” *D’Agostino v. Lynch*, 382 Ill. App. 3d 639, 642 (2008). The order only directed that William’s distributional interests in the LLCs be deposited into an escrow account, then continued all pending citations. While the trial court's September 12 order may have moved FirstMerit one step closer, it clearly did not put it in a position to actually collect. " 'A judgment is final if it determines the litigation on the merits so that, if affirmed, the only thing remaining is to proceed with the execution of the judgment.' " *Dolan v. O’Callaghan*, 2012 IL App (1st) 111505, ¶ 34 (quoting *People ex rel. Scott v. Silverstein*, 87 Ill. 2d 167, 171 (1981)). The September 12 order falls short of that requirement by a long shot. As the order was not final and appealable as to any aspect of the litigation, the trial court retained subject matter jurisdiction and authority to grant FirstMerit's motion for turnover.

¶ 34 II. *Res Judicata* and Law-of-the-Case Doctrine

¶ 35 Finding the September 12, 2012, order to be interlocutory in nature also effectively obviates Margaret’s arguments that: (1) *res judicata* barred the trial court’s March 27, 2013, order; and (2) the law-of-the-case doctrine barred relitigation.



¶ 36 A critical component of the *res judicata* doctrine is proving that there has been a final adjudication. *Hernandez v. Pritikin*, 2012 IL 113054, ¶ 41. As Margaret failed to meet the essential first element of the doctrine, it therefore does not apply. The same can be said for the law-of-the-case doctrine. That doctrine generally provides that once an issue has been litigated and decided, that should be the end of the matter, and the unreversed decision of a question of law or fact made during the course of litigation settles the question for all subsequent stages of the suit. See *Irizarry v. Industrial Comm'n*, 337 Ill. App. 3d 598, 606 (2003). However, the "law-of-the-case doctrine only binds a court when its order was final." *Professional Transportation, Inc. v. Illinois Workers' Compensation Comm'n*, 2012 IL App (3d) 100783WC, ¶ 41 (quoting *Commonwealth Edison Co. v. Illinois Commerce Comm'n*, 368 Ill. App. 3d 734, 742 (2006)). The law-of-the-case doctrine, too, is inapplicable to the case at bar.

¶ 37 III. Margaret's Marital Interests are Subordinate to FirstMerit's Liens

¶ 38 Margaret argues that the March 27 order should be found null and void "because [the order] took from [her] a valuable asset to which she had a vested interest." Specifically, that the order violated section 503(e) of the Illinois Marriage and Dissolution of Marriage Act. 750 ILCS 5/503(e) (West 2010).

¶ 39 Margaret cites to no authority, nor has this court uncovered any, to suggest that a spouse's marital interest in certain property can become superior to the prior recorded lien of a judgment creditor. To the contrary, our supreme court has stated that " 'marital property' is a nomenclature devised to realize an equitable distribution of property upon termination of the marriage." *Kujawinski v. Kujawinski*, 71 Ill. 2d 563, 573 (1978). The *Kujawinski* court stated that "[w]e must presume that the 'marital property' will be distributed pursuant to section 503(b) so as to avoid the impairment of any contractual obligations owed to third parties who are not

parties to the dissolution proceeding.” *Id.* at 574. Margaret argues that this statement demonstrates that the supreme court left these distributions for the trial court to resolve. We find that it unequivocally provides that the contractual and/or lien rights of third parties are protected, and will not be diminished by the distribution of marital property. The trial court correctly found that Margaret's marital interest in the LLCs is subordinate to FirstMerit's lien.

¶ 40 IV. The March 27 Order Did Not Go Beyond the Scope of FirstMerit's Pleadings

¶ 41 In the interest of thoroughness, we will briefly address Margaret's last quasi-jurisdictional claim. She posits that the trial court's March 27 order went beyond the scope of the pleadings, thus there was no justiciable issue presented to the court rendering its order void. Specifically, Margaret argues that the order contained findings that were not requested or set forth in FirstMerit's motion for turnover. Those findings include: (1) that Margaret's interest in the LLCs is deemed subordinate to the liens and charging order entered in favor of FirstMerit; and (2) that Chicago Title distribute those funds held in escrow to FirstMerit pursuant to FirstMerit's citations and charging order.

¶ 42 Margaret cites to *Ligon v. Williams*, 264 Ill. App. 3d 701, 707 (1994), for the proposition that a party cannot be granted relief in the absence of corresponding pleadings and that such an order would be void. In *Ligon*, a mother filed a petition to establish the father's parent-child relationship and to order the father to pay child support. *Id.* at 702. At the hearing on that petition, only the father appeared, and the court granted him custody of the minor. *Id.* at 703. The First District found the trial court's order void, as neither mother nor father had petitioned for custody and the issue of custody was therefore not before the court. *Id.* at 711.

¶ 43 *Ligon* is easily distinguishable. First and foremost, our review of the motion for turnover clearly establishes that FirstMerit did discuss and request the relief granted by the trial.

Margaret's argument to the contrary is disingenuous. Margaret also complains that some of the findings in the trial court's order for turnover were entered by Judge Carney prior to the time the cases were consolidated. She asserts that "Judge Barrett did not have the jurisdiction or the authority to reiterate that which is set forth in another judge's order." There is no support in the law for such a proposition. In fact, quite the opposite is true, as it has clearly been recognized that a successor judge may make a ruling based upon a prior judge's finding of fact. See *In re Marriage of Ayers*, 82 Ill. App. 3d 164, 167 (1980) (finding it was not improper for a successor judge to enter an order dissolving the marriage based upon the factual findings of the prior judge). The trial court's order for turnover did not go beyond the pleadings and properly granted FirstMerit's motion for turnover.

¶ 44 We accordingly find that the trial court retained subject matter jurisdiction following the September 12 order as it was not final and appealable, that neither doctrines of *res judicata* nor law-of-the-case apply, that the trial court's order for turnover did not violate the principles of the Illinois Marriage and Dissolution of Marriage Act, that the trial court properly found Margaret's marital interest in the distributions of the LLCs subordinate to the prior lien of FirstMerit, and that the turnover order did not grant relief beyond the scope of the pleadings.

¶ 45 CONCLUSION

¶ 46 For the foregoing reasons, the judgment of the Will County circuit court is affirmed.

¶ 47 Affirmed.