2014 IL App (3d) 130513-U

Order filed October 31, 2014

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IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2014

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| BANK OF AMERICA, N.A., | ) | Appeal from the Circuit Court |
| | ) | of the 12th Judicial Circuit, |
| Plaintiff-Appellee, | ) | Will County, Illinois, |
| | ) | |
| v. | ) | |
| | ) | Appeal No. 3-13-0513 |
| CLAYTON CHERRY, ALMA JEAN | ) | Circuit No. 12-LM-1526 |
| AND KARIMA EL BEY, | ) | |
| | ) | |
| Defendants-Appellants. | ) | The Honorable |
| | ) | Raymond E. Rossi, |
| | ) | Judge, Presiding. |
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JUSTICE McDade delivered the judgment of the court.
Presiding Justice Lytton and Justice Wright concurred in the judgment.

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**ORDER**

¶ 1 *Held*: Due to the insufficiency of the record on appeal, we find no evidence of the trial court abusing it discretion in denying Cherry's motion to reconsider.

¶ 2 The defendants, Charles Cherry, Alma Jean and Karima El Bey, through an appeal filed and signed only by Cherry, argue that the court erred in allowing the plaintiff, Bank of America N.A. (BOA), to relitigate its forcible entry and detainer action previously denied in a separate

case. Additionally, the appeal challenges the court's decision to allow the case to proceed despite the defendants' argument of insufficient notice.

¶ 3 FACTS

¶ 4 BOA, as successor by merger to LaSalle Bank National Association, and a Trustee under the pooling and servicing agreement dated August 11, 2008, foreclosed on the mortgage securing the property at 1633 Ashbury Lane, Romeoville, IL 60446. Cherry purports to be the owner of the property and identifies defendants, Alma Jean and Karima El Bey his tenants. However, BOA purchased the property at a sheriff's sale on November 18, 2009, and was awarded possession and deed by order entered April 29, 2010.

¶ 5 BOA filed an action for forcible entry and detainer in a prior action where all three defendants in this matter made an appearance to contest the action. The parties concede that the case was dismissed without prejudice on November 3, 2011. BOA's motion to vacate that dismissal and reopen the case was denied on December 6, 2011.

¶ 6 On June 7, 2012, BOA filed the current forcible entry and detainer action regarding the same property, listing "unknown occupants" as defendants in the complaint. On May 30, 2013, Cherry filed a motion to dismiss BOA's forcible entry and detainer action. It was denied for reasons stated in open court on May 17, but not included in the written order. On June 11, after holding a bench trial the court ordered BOA could take possession of the premises on July 11. The Defendants sought reconsideration, but were denied. Cherry filed a notice of appeal and sought to stay the order of possession pending appeal. The motion to stay was initially denied, but a stay was ultimately granted conditioned on Cherry posting an appeal bond.

¶ 7 ANALYSIS

¶ 8 BOA argues initially that this appeal must be limited to issues specific to Cherry because he is not a licensed attorney and cannot represent the other named defendants in this matter. Cherry cites to several Supreme Court cases that discuss the need for courts to construe *pro se* pleadings liberally. Additionally, he argues that BOA failed to object to the inclusion of the other parties in his arguments during the hearing on his emergency motion to reconsider.

¶ 9 Illinois Supreme Court Rule 303(b)(4) (effective June 4, 2008) mandates that a notice of appeal "shall contain the signature and address of each appellant or appellant's attorney." Thus although pleadings are granted liberal readings, the notice of appeal will only be effective for those persons who are named and who sign the notice in a *pro se* appeal. *People v. Krueger*, 146 Ill. App. 3d 530, 533 (1986). Alma Jean and Karima El Bey, though named as parties in the appeal, did not sign the notice of appeal. For that reason, this court will consider only the arguments and issues personal to Cherry as he is barred from representing anyone else. *Fruin v. Northwestern Medical Faculty Foundation, Inc.*, 194 Ill. App. 3d 1061, 1063 (1990).

¶ 10 WAS BOA'S SECOND ACTION BARRED BY RES JUDICATA?

¶ 11 Cherry's only argument before this court is that the trial court's order denying his motion to reconsider the decision granting BOA's motion for forcible entry and detainer was error because the matter was barred by *res judicata*. Specifically, Cherry contends that the court's order on December 6, 2011, denying BOA's motion to reopen the case was a final judgment on the merits with respect to the matter.

¶ 12 The purpose of a motion to reconsider is to bring the court's attention to a change in the law, an error in the court's previous application of existing law, or newly discovered evidence that was not available at the time of the hearing. *In re Gustavo H.,* 362 Ill.App.3d 802, 814 (2005). Cherry claims our standard of review in this case is *de novo*. When reviewing a motion

to reconsider that was based only on the trial court's application of existing law, as opposed to one asserting new facts or new law, our standard of review is *de novo*. *People v. $280,020 U.S. Currency*, 372 Ill. App. 3d 785, 791 (2007). However, when reviewing a trial court's denial of a motion to reconsider that was based on new matters or matters not presented during the course of the proceedings leading to the issuance of the challenged order, this court employs an abuse of discretion standard. *Muhammad v. Muhammad-Rahmah*, 363 Ill. App. 3d 407, 415 (2006), as modified on denial of reh'g (Mar. 16, 2006). Cherry states in his brief that the motion to reconsider was based on newly discovered evidence that purports to establish that genuine issues of material facts exist. An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court. *People v. Caffey,* 205 Ill.2d 52, 89 (2001). The trial court will have disregarded established principles of law, thereby causing a party substantial prejudice. *People v. Covington*, 395 Ill. App. 3d 996, 1002-03 (2009).

¶ 13 Use of this abuse of discretion standard raises the question of whether the record is sufficient to allow a meaningful review of the trial court proceedings in order to discern abuse. Our supreme court has held that:

> "[A]n appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis. Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Foutch v. O'Bryant,* 99 Ill.2d 389, 391–92 (1984).

¶ 14 In *Foutch,* the question that challenged the sufficiency of the record was whether the trial court abused its discretion in denying the motion to vacate an *ex parte* judgment. *Id*. Absent a transcript of the evidentiary hearing below, review for an abuse of discretion of the trial court's denial of the motion, where no specific grounds for the denial were given, was foreclosed. *Id* at 392.

¶ 15 The order of May 17 denying the motion to reconsider, in the instant case, was simply a docket entry without any discussion of the reasons for the denial. Cherry argues that there was new evidence presented at the bench trial for his motion to reconsider that the trial court erred in not considering. Additionally, the order Cherry sought to be reconsidered states that it was denied for reasons stated in open court. Yet, Cherry has not provided the transcript from that proceeding or the order or transcript from the hearing on his motion to reconsider. For these reasons we cannot review for possible abuse of discretion the reasons expressed by the trial court for denying Cherry's motions.

¶ 16 Even the uncontested affidavit provided by Cherry and Cherry's emergency motion to reconsider disclose nothing that was not raised in his previously filed pleadings, motions, and complaints and provide no indicia of new evidence the trial court may have arbitrarily or unreasonably failed to consider. Cherry discussed the issue of *res judicata* in his motion to dismiss BOA's forcible entry and detainer motion. In that document as well as in his motion for an extension of time filed prior to the original trial he set out his ownership rights. He also expounded on other issues that we do not address because it pertains to persons who were not signatories to this appeal. So, without the transcript from the bench trial that might disclose any new evidence presented for the trial court to reconsider, we must resolve our doubts and this issue against Cherry. See *Foutch*, 99 Ill.2d at 391-92. Therefore, we hold that if new evidence

was presented, the trial court considered it and the denial of defendant's motion to reconsider was not an abuse of discretion.

¶ 17 Because we are aware of Cherry's strong belief that *res judicata* or collateral estoppel bar BOA's action and his frustration with the trial court for not agreeing with him, we briefly explain for his benefit why *res judicata* and collateral estoppel are inapplicable.

¶ 18 The Illinois Supreme Court noted in *Nowak v. Rita High School*, 197 Ill. 2d 381, 391 (2001), our courts' approach to the application of *res judicata*.

> "For the doctrine of res judicata to apply, the following three requirements must be satisfied: (1) there was a final judgment on the merits rendered by a court of competent jurisdiction, (2) there is an identity of cause of action, and (3) there is an identity of parties or their privies. [citation] Under Illinois law, the dismissal of a complaint for failure to state a claim is an adjudication on the merits, while the dismissal of a complaint for lack of subject matter jurisdiction is not considered a decision on the merits of the complaint. [citation] *Res judicata* is not applied where it would be fundamentally unfair to do so. [citations]" *Nowak*, 197 Ill. 2d at 390.

In the same case, the Supreme Court clarified our courts' approach to collateral estoppel:

> "The minimum threshold requirements for the application of collateral estoppel are: (1) the issue decided in the prior adjudication is identical with the one presented in the suit in question, (2) there was a final judgment on the merits in the prior

adjudication, and (3) the party against whom estoppel is asserted was a party or in privity with a party to the prior adjudication. [citations] Application of the doctrine of collateral estoppel must be narrowly tailored to fit the precise facts and issues that were clearly determined in the prior judgment. [citation]" *Id*. at 390-91

¶ 19 The underlying element of both doctrines that is lacking in this case is a previously issued final judgment on the merits. The term "merits" has been defined as, "the real or substantial grounds of [an] action or defense as distinguished from matters of practice, procedure, jurisdiction, or form." *Johnson v. Du Page Airport Authority.*, 268 Ill. App. 3d 409, 418 (1994) (quoting *Clegg v. United States*, 112 F.2d 886, 887 (1940)). A dismissal is granted without prejudice where there is no adjudication on the merits. *Id*. "The effect of a dismissal without prejudice is to render the proceedings a nullity and leave the parties in the same position as if the case had never been filed." *Id*. As noted by both parties, the original forcible entry and detainer action filed by BOA was first dismissed without prejudice. Both this dismissal and the court's subsequent refusal to reinstate BOA's claim was based primarily on the fact that BOA failed to appear. Although BOA's lackadaisical approach to this matter in the prior case proceedings was gravely inappropriate, sanctioning its conduct is not a determination of the merits of its claim. Thus, there was no prior judgment on the merits and that absolute requirement for both *res judicata* and collateral estoppel was missing in this case.

¶ 20 For these reasons, BOA's second forcible entry and detainer action was not barred by *res judicata* or collateral estoppel.

¶ 21 CONCLUSION

¶ 22 The judgment of the circuit court of Will County is affirmed.

¶ 23 Affirmed.