2015 IL App (3d) 140309-U

Order filed May 8, 2015

---

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

| | | |
|---|---|---|
| GROWMARK, INC., Individually and derivatively on behalf of SUNRISE AG SERVICE CO., | ) | Appeal from the Circuit Court of the 9th Judicial Circuit, Fulton County, Illinois. |
| Plaintiff-Appellee, | ) | |
| v. | ) | |
| SUNRISE AG SERVICE CO., CHARLES TAYLOR, DONALD FRIEND, RONALD KUHLMANN, RICHARD JOKISCH, KRAIG KRAUSE, FRANKLIN MELLERT, GEORGE MEEKER, DAVID SANDIDGE, WILLIAM DURDLE, and JAMES KLEINSCHMIDT, | ) | Appeal No. 3-14-0309 Circuit No. 12-MR-34 |
| Defendants, | ) | |
| RICH VANDERPOOL | ) | Honorable Steven R. Bordner, Judge, presiding. |
| Defendant-Appellant. | ) | |

---

JUSTICE CARTER delivered the judgment of the court.
Presiding Justice McDade and Justice Wright concurred in the judgment.

---

**ORDER**

¶ 1 *Held*: This court lacks jurisdiction over defendant's appeal from the trial court's order denying his motion for substitution of judge as of right because the order is not a final order. Without an Illinois Supreme Court Rule 304(a) finding, this court also lacks jurisdiction over defendant's appeal from the trial court's order granting plaintiff's motion to voluntarily dismiss him as a party without prejudice.

¶ 2 Defendant, Rich Vanderpool, appeals from a trial court order granting the plaintiff's motion to voluntarily dismiss him without prejudice and denying his motion for substitution of judge as being moot. On appeal, Vanderpool argues that the trial court erred in denying his motion to substitute judge as a matter of right. We dismiss this appeal for lack of jurisdiction.

¶ 3 FACTS

¶ 4 Plaintiff-Growmark (shareholder of Sunrise) brought a derivative and individual shareholder action against Sunrise (as a nominal defendant) and Sunrise's president, directors and general manager. In its complaint, Growmark alleged that Sunrise (through its general manager, Vanderpool) and Sunrise's board of directors breached their fiduciary and statutory duties when they attempted to merge Sunrise with a Growmark competitor.

¶ 5 The original complaint was filed on March 5, 2012, and was amended on August 7, 2012; neither the original or first amended complaints named Vanderpool as a defendant. On August 30, 2013, the trial court granted Growmark's motion for a partial summary judgment, finding that Sunrise's articles of incorporation indicated that the purpose for creating Sunrise was to establish and maintain in perpetuity the membership of Growmark, Inc. The bylaws provided that Class B shares would be used to maintain the relationship with Growmark. The trial court concluded that the Sunrise board of directors issued themselves 146,000 class B shares for the prohibited purpose of outvoting Growmark's shares so as to effectuate a merger with one of Growmark's competitors. On September 2, 2013, the trial court ordered that the issuance of the additional Class B shares be revoked, rescinded, and recalled.

¶ 6 On January 14, 2014, Growmark filed a second amended complaint specifically naming Vanderpool as an individual defendant "soley in his capacity as the General Manager of Sunrise." Growmark alleged seven counts of breach of fiduciary duty and statutory violations against the Sunrise board of directors and Vanderpool. Growmark's request for relief included an injunction to remove Vanderpool as the general manager of Sunrise.

¶ 7 On January 31, 2014, counsel for Vanderpool entered an appearance and filed a motion for substitution of judge as a matter of right pursuant to section 2-1001(a)(2)(i) of the Illinois Code of Civil Procedure (Code). 735 ILCS 5/2-1001(a)(2)(i) (West 2012). On February 28, 2014, Growmark filed a motion to voluntarily dismiss Vanderpool without prejudice pursuant to section 2-1009 of the Code. See 735 ILCS 5/2-1009 (West 2012). Both motions were scheduled to be heard on March 11, 2014.

¶ 8 On March 11, 2014, at the hearing on the motions, the following colloquy took place:

> "[VANDERPOOL'S COUNSEL]: Your Honor, on January 31st I had filed a motion for substitution of judge on behalf of Mr. Vanderpool and that has been noticed for today, and I think that's probably the first thing we need to do.
>
> [GROWMARK'S COUNSEL]: Actually, Judge, I respectfully disagree. We have a motion to voluntarily dismiss Mr. Vanderpool, which would moot the motion to substitute judge, and we would like our motion to be addressed first.
>
> THE COURT: In light of the fact that there's a motion to dismiss [Vanderpool] out of the matter, it would seem that that's a larger issue to be addressed, and it obviates the necessity of having your matter heard, correct?

[VANDERPOOL'S COUNSEL]: Well, I guess I disagree with that, Your Honor. *** [A]fter I filed my motion, there was a motion to voluntarily dismiss Vanderpool.

* * *

*** [T]he complaint that's presently on file asks that he be terminated from his position at the plaintiff, and he would rather stay in the case and be able to assert rights because no one else is going to particularly defend his rights in this case.

* * *

*** [E]ven if there was a dismissal with prejudice today, he is continuing a course of conduct which gives Growmark the right to bring him back in[.]

So I do think there is really no discretion on the motion for substitution, and a later-filed motion does not affect Vanderpool's absolute right to ask for a substitution."

¶ 9 Counsel for Growmark argued that its right to voluntarily dismiss Vanderpool mooted the issue of substitution of judge. Counsel for Growmark acknowledged that Growmark was requesting that Vanderpool be removed from his position "if he continue[d] to improperly act," but claimed that he was "very aptly represented by, essentially, two counsel here today."

¶ 10 Counsel for Sunrise indicated that Vanderpool's interests would not be adequately represented because the company was a nominal defendant and there was a clear conflict between Vanderpool's interests and the interests of the co-defendant directors. Counsel for Sunrise argued that Vanderpool was a necessary party.

¶ 11 The trial court granted Growmark's motion to voluntarily dismiss Vanderpool without prejudice and denied Vanderpool's motion to substitute judge. Vanderpool appealed both of the orders.

¶ 12 ANALYSIS

¶ 13 On appeal, Vanderpool argues that the trial court erred in refusing to rule on the merits of his motion to substitute judge as a matter of right. In response, Growmark argues that this court does not have jurisdiction over this appeal because Vanderpool's motion was not a final and appealable order under Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994). Additionally, Growmark argues that the trial court did not err in finding that Vanderpool's motion was moot because a non-party lacks standing to seek a substitution of judge, and Vanderpool had been dismissed.

¶ 14 I. Motion to Strike Growmark's Appearance on Appeal

¶ 15 Initially, we address Vanderpool's motion to strike Growmark's appearance on appeal. Vanderpool argues that Growmark does not have standing to appear in this appeal because Growmark did not object to his motion to substitute judge in the trial court. Growmark contends that it implicitly raised an objection to Vanderpool's motion to substitute judge as of right when it requested that its motion to voluntary dismiss Vanderpool be heard before the motion to substitute judges was heard.

¶ 16 The issue of standing is a question of law that is reviewed *de novo. Powell v. Dean Foods Company*, 2012 IL 111714, ¶ 35. The doctrine of standing ensures that issues are raised only by parties having a real interest in the outcome of the controversy. *Id.* As a general rule, a party cannot complain of an error that does not prejudicially affect that party. *Id.*, ¶ 36.

¶ 17 In *Powell,* four of six defendants were granted motions to substitute judge as a matter of right. Thereafter, another defendant, Alder Group, filed a motion for substitution of judge as a matter of right, which was denied. A jury verdict was entered against all defendants. On appeal, the First District Appellate Court reversed the trial court's denial of Alder Group's motion for substitution of judge and vacated all orders entered subsequent thereto. On appeal to the Illinois Supreme Court, plaintiffs filed a motion to dismiss Alder Group with prejudice, to which Alder Group had no objection. The Illinois Supreme Court granted the motion to dismiss and held that the remaining defendants did not have standing to challenge the trial court's denial of Alder Group's motion for substitution. *Id.* Similarly, in *Aussieker v. City of Bloomington*, 355 Ill. App. 3d 498 (2005), the Fourth District Appellate Court held that the trial court erred by denying plaintiff's motion for substitution of judge and any subsequent orders were void as to the plaintiff, but the 16 co-plaintiffs had no standing to raise the claim.

¶ 18 Here, Growmark did not raise the challenge to the trial court's denial of Vanderpool's motion to substitute judge and does not claim any subsequent orders were void as to it. Instead, as the appellee, Growmark has responded to Vanderpool's argument that the trial court erred by granting Growmark's motion to voluntarily dismiss him and finding that his motion to substitute judge was moot. We find Growmark has standing and deny Vanderpool's motion to strike Growmark's appearance in this appeal.

¶ 19 II. Jurisdiction

¶ 20 Next, we address the issue of our jurisdiction over this appeal. This court has a duty to consider its jurisdiction and dismiss the appeal if it finds jurisdiction is lacking. *Brentine v. DiamlerChrysler Corp.*, 356 Ill. App. 3d 760, 765 (2005). The Supreme Court Rules govern an

appeal to this court. We apply a *de novo* review when considering the construction of a Supreme Court Rule. *In re Edmonds*, 2014 IL 117696, ¶ 36.

¶ 21 "Every final judgment of a circuit court in a civil case is appealable as of right" and is initiated by filing a notice of appeal. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994). A judgment or order is "final" if it disposes of the rights of the parties, either on the entire case or with regard to some definite and separate part of the controversy. *Dubina v. Merisow Realty Development, Inc.*, 178 Ill. 2d 496, 502 (1997).

¶ 22 Pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 1, 2010), if multiple parties or multiple claims for relief are involved, an appeal may be taken from a final judgment as to fewer than all of the parties or claims only if the trial court makes an express written finding that there is no just reason for delaying either enforcement or appeal of those claims. In the absence of a Rule 304(a) finding, a final order disposing of fewer than all the claims or the rights and liabilities of fewer than all the parties is not instantly appealable and does not become appealable until all the claims have been resolved. Ill. S. Ct. R. 304(a); *People ex rel. Ryan v. Rude Way Enterprises, Inc.*, 326 Ill. App. 3d 959, 961 (2001).

¶ 23 Certain interlocutory orders are appealable by permission with a petition for leave to appeal to the appellate court. See Ill. S. Ct. R. 306 (eff. July 1, 2014) (allowing for petitions to appeal from certain specified trial court orders, which do not pertain to a substitution of judge or voluntary dismissals). Other interlocutory orders are appealable as a matter of right. See Ill. S. Ct. R. 307(a) (eff. Feb. 26, 2010) (providing for interlocutory appeals as a right from certain trial court specified orders, which do not pertain to a substitution of judge or voluntary dismissals).

¶ 24 In this case, Vanderpool appeals the denial of his motion for substitution of judge. The denial of his motion to substitute judge as a matter of right was not a final order because it did

not dispose of the rights of the parties, either on the entire case or with regard to some definite and separate part of the controversy. Therefore, the order denying the motion for substitution of judge was not appealable as of right under Rule 301. See Ill. S. Ct. R. 301 (eff. Feb. 1, 1994).

¶ 25 Additionally, there is no applicable provision of the Illinois Supreme Court Rules providing for an interlocutory appeal from the trial court's order denying Vanderpool's motion to substitute judge as of right. The denial of a motion for substitution of judge is not a final order but, instead, is an interlocutory order that is appealable on review from a final order. *In re Marriage of Nettleton*, 348 Ill. App. 3d 961, 969 (2004). "Our supreme court has seen fit not to provide specifically for interlocutory appeals of *any* order disposing of a motion for substitution." (Emphasis in original.) *U.S. Bank National Ass'n v. In Retail Fund Algonquin Commons, LLC*, 2013 IL App (2d) 130213, ¶ 25.

¶ 26 In support of his contention that an appellate court has jurisdiction to consider a trial court's improper denial of a motion for substitution of judge as of right, Vanderpool cites *Aussieker*, 355 Ill. App. 3d 498. In *Aussieker*, taxpayers brought a declaratory judgment action against the City of Bloomington. After granting one plaintiff a substitution of judge as of right, the trial court denied another plaintiff's motion for substitution of judge as of right and granted the city's motion to dismiss the action, with leave to refile in 21 days. *Aussieker*, 355 Ill. App. 3d at 500. *Ausskier* is of no assistance to Vanderpool in this case because we presume the order appealed from in *Ausskier* had become a final order before the appeal was taken, especially since there is no indication to the contrary.

¶ 27 Vanderpool also appealed the trial court's order allowing Growmark to voluntarily dismiss him without prejudice pursuant to section 2-1009 of the Code. Section 2-1009 provides:

"(a) The plaintiff may, at any time before trial or hearing begins, upon notice to each party who has appeared or each such party's attorney, and upon payment of costs, dismiss his or her action or any part thereof as to any defendant, without prejudice, by order filed in the cause.

(b) The court may hear and decide a motion that has been filed prior to a motion filed under subsection (a) of this Section when that prior filed motion, if favorably ruled on by the court, could result in a final disposition of the cause." 735 ILCS 5/2-1009(a), (b) (West 2012).

¶ 28 An order granting a plaintiff's motion to voluntarily dismiss an action without prejudice is final and appealable by the defendant, but not by the plaintiff, except to contest an order taxing costs. *Brentine*, 356 Ill. App. 3d at 765; *Kahle v. John Deere Co.*, 104 Ill. 2d 302, 307 (1984). Therefore, the order granting the voluntary dismissal of Vanderpool as a defendant was a final order as to Vanderpool but as to fewer than all the parties or claims. However, there was no Rule 304(a) finding that there was no just reason for delaying either enforcement or appeal of the dismissal order. Consequently, the dismissal order was not immediately appealable. See *Rude Way Enterprises*, 326 Ill. App. 3d at 961 (providing that without a Rule 304(a) finding, a final order disposing of fewer than all of the claims was not an appealable order); *Dubina*, 178 Ill. 2d at 502-03 (stating that since the order of dismissal with prejudice lacked Rule 304(a) language, it was a final but not immediately appealable order).

¶ 29 Thus, neither of the trial court's orders of March 11, 2014, granting the voluntary dismissal and denying Vanderpool's motion to substitute judge as a matter of right, were final and appealable orders as required by Rule 301. Accordingly, we dismiss this matter for lack of jurisdiction.

¶ 30 CONCLUSION

¶ 31 For the foregoing reasons, this appeal from the judgment of the circuit court of Fulton County is dismissed.

¶ 32 Appeal dismissed.