2015 IL App (3d) 140385-U

Order filed March 30, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

JOSEPH F. FACKEL, Individually, and as Executor of the Estate of Samuel L. Salerno, Deceased,	)	Appeal from the Circuit Court of the 14th Judicial Circuit, Rock Island County, Illinois.
Plaintiff-Appellant,	)	
v.	)	Appeal No. 3-14-0385
	)	Circuit No. 13-L-85
KAY ANN ZWICKER, Individually, and as Trustee of the Samuel L. Salerno Revocable Trust Dated September 20, 2012,	)	
	)	Honorable Frank R. Fuhr,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Presiding Justice McDade and Justice Holdridge concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in granting defendant's motion to vacate pursuant to section 2-1401 (735 ILCS 5/2-1401 (West 2012)), where plaintiff filed an inappropriate lawsuit in an attempt to circumvent the probate proceedings.

¶ 2 While involved in litigation with defendant over the estate of Samuel Salerno, plaintiff, Joseph F. Fackel, filed a two-count complaint in the Rock Island County circuit court against defendant, KayAnn Zwicker. Plaintiff contested the 2012 version of decedent Samuel L.

Salerno's will and trust, alleging undue influence on the part of defendant. The second count alleged that defendant tortiously interfered with plaintiff's testamentary expectancy that he would inherit from decedent Salerno.

¶ 3 Plaintiff served defendant on August 13, 2013, by personal service of summons, along with an order for a civil case management conference, scheduling the same for November 21, 2013. Defendant filed no answer, nor did she or any of her representatives appear. Plaintiff sought, and subsequently obtained, a default judgment on September 19, 2013.

¶ 4 On December 31, 2013, defendant, by counsel, filed a motion to vacate default judgment. The motion alleged, *inter alia*, that plaintiff contacted defendant *ex parte* when he served her directly and that plaintiff's complaint was an inappropriate attempt to circumvent the probate proceedings. Following a hearing, the trial court granted defendant's motion.

¶ 5 Plaintiff appeals, alleging defendant's motion to vacate default judgment failed to meet the legal standards for relief pursuant to section 2-1401 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-1401 (West 2012)).

¶ 6 We affirm.

¶ 7 BACKGROUND

¶ 8 The instant appeal arises from a two-count complaint filed by plaintiff, Joseph Fackel, on July 10, 2013, against defendant, Kay Ann Zwicker. Count I sought to contest a will and trust executed by decedent, Samuel L. Salerno, and set aside certain transfers made by him to Zwicker as the result of undue influence. Count II sought damages for defendant's alleged tortious interference with plaintiff's testamentary expectancy that he would inherit from decedent.

¶ 9 Plaintiff's version of the facts lacks any substantive reference to other pending matters regarding decedent's will and trust. It is, therefore, necessary to give a brief historical

accounting of the events leading up to this appeal and the other cases still currently pending in the circuit court.

¶ 10 The decedent, Samuel Salerno, died on November 6, 2012, leaving a will dated September 20, 2012. The will named Zwicker as executor and primary beneficiary. Zwicker is the daughter of decedent's close friend, Zeke Zwicker. Plaintiff is the cousin of decedent's late wife, Betty Salerno.

¶ 11 On January 15, 2013, plaintiff opened a probate estate in the name of decedent and introduced an earlier will dated July 15, 2009. The 2009 will apparently called for the equal distribution of decedent's estate between plaintiff and defendant. The trial court admitted the 2009 will to probate and issued plaintiff letters testamentary based on the 2009 will.

¶ 12 On February 20, 2013, defendant petitioned the court for admission of the 2012 will, thereby initiating a will contest. The 2012 will apparently left the majority of decedent's estate to defendant. Plaintiff answered defendant's petition alleging that the 2012 will was the product of her undue influence. We note that neither party included in the record a copy of either the 2009 or 2012 will, or any pleadings from the probate proceedings.

¶ 13 The decedent also owned an annuity invested with Modern Woodmen of America. After the death of his wife in 2008, decedent executed a change of beneficiary form naming defendant as beneficiary. Shortly after decedent's death, plaintiff's counsel contacted Modern Woodmen, claiming an interest in the annuity. Modern Woodmen responded on February 8, 2013, by filing an interpleader complaint naming Zwicker, Fackel, and William Powers, the decedent's nephew, as defendants.

¶ 14 Ultimately, plaintiff voluntarily dismissed his claim as a potential beneficiary of the annuity. Powers, however, filed an answer claiming the annuity proceeds, as well as a

counterclaim against defendant, alleging undue influence and interference with his expectation to inherit from decedent.

¶ 15 In addition, Powers also filed a complaint in the probate proceeding, seeking to set aside both the 2009 will and the 2012 will, which would allow Powers to inherit the entire estate as the decedent's sole heir at law. Powers' complaint further asserted claims of undue influence and interference with testamentary expectation against defendant. While neither the interpleader nor will contest are currently before this court, they are relevant to the outcome of this appeal.

¶ 16 Plaintiff filed his complaint in the instant matter on July 10, 2013, again alleging that defendant unduly influenced the decedent. Plaintiff further claimed that defendant tortiously interfered with his expected inheritance. Defendant's counsel had previously informed plaintiff's counsel that he would accept service of the complaint on defendant's behalf. Upon receiving the complaint, however, defendant's counsel observed that it named her as a defendant in her individual capacity, and also as a trustee of the decedent's revocable trust, which decedent established on September 20, 2012. Defendant is not a trustee of the trust.

¶ 17 On August 6, 2013, defendant's counsel, attorney Mather, notified plaintiff's counsel by letter, advising that the complaint inaccurately identified defendant as the trustee of the trust, and requested that plaintiff file an amended complaint naming the correct trustee, NPL Financial, LLC. Attorney Mather also indicated that he would accept service on behalf of the trustee.

¶ 18 There has been some miscommunication between the parties' attorneys in this case, and they disagree as to who responded to what and when. Plaintiff asserts that he responded to attorney Mather's August 6 letter in a handwritten note inquiring as to whether or not attorney Mather represented defendant. Attorney Mather, on the other hand, asserts that he did not receive the handwritten note, and only first saw it months later in plaintiff's motion papers,

hence his failure to respond. Plaintiff's counsel alleges that when he did not receive a response, he concluded that attorney Mather only represented NPL Financial, LLC, and proceeded to directly serve defendant on August 13, 2013. Along with the summons and complaint, plaintiff served defendant with an order scheduling a civil case management conference for November 21, 2013.

¶ 19 Defendant points out that at the time plaintiff served her with the aforementioned complaint, she was already a party to the will contest concerning decedent's estate and the 2009 and 2012 wills. The will contest, as well as the interpleader action concerning the decedent's annuity, both involved plaintiff and Powers and multiple allegations of undue influence and interference with testamentary expectancy against defendant. Attorney Mather represents defendant in connection with all of those disputes and states that he had no indication that defendant had been personally served *ex parte* with the new complaint.

¶ 20 When neither defendant nor her counsel responded to the complaint after 30 days, plaintiff sought, and subsequently obtained, an order for default judgment on September 19, 2013. Shortly thereafter, plaintiff mailed defendant (not her attorney) a copy of the default order.

¶ 21 In mid-December 2013, defendant inquired of attorney Mather if she needed to be present for an upcoming hearing in her case. Unaware of any hearing, counsel searched online court records and learned of the default judgment. Defendant then filed a motion to vacate default judgment on December 31, 2013. The motion alleged that plaintiff deliberately circumvented attorney Mather's representation of the defendant and engaged in improper *ex parte* communication with her, that plaintiff failed to join a necessary party to the suit, namely NPL Financial, LLC, as trustee of the Samuel L. Salerno revocable trust, and that the court should

forego granting plaintiff relief in this case where the will contest to determine the proper executor of decedent's estate was still pending.

¶ 22 Following a hearing on March 10, 2014, the trial court granted defendant's motion to vacate the default judgment, finding that she had satisfied the requirements of section 2-1401 (735 ILCS 5/2-1401 West 2012)) and that the various proceedings involving decedent's estate should have been consolidated.

¶ 23 Plaintiff filed a motion to reconsider, which the trial court denied. The court also ordered the three proceedings—the decedent's probate estate, the interpleader action concerning decedent's annuity, and the instant lawsuit—consolidated.

¶ 24 Plaintiff appeals.

¶ 25 ANALYSIS

¶ 26 At the outset, plaintiff asserts that defendant's motion to vacate default judgment must be construed as a petition for relief from judgment pursuant to section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2012)). Defendant agrees, and indeed, never argued anything to the contrary. The trial court's September 19, 2013, order granting plaintiff a default judgment was unquestionably a final order that terminated the litigation on the merits. See *In re Detention of Lieberman*, 356 Ill. App. 3d 373, 375 (2005). Defendant did not move to vacate the order until well after 30 days from the entry thereof, necessarily making a section 2-1401petition her only avenue for relief.

¶ 27 Plaintiff then contends that defendant failed to establish the necessary elements for relief under section 2-1401. Specifically, that defendant failed to make any kind of statement establishing a meritorious defense to plaintiff's underlying allegations, that she failed to allege or

show due diligence in presenting anything to the court, and that her motion is not supported by affidavit or sworn testimony as required by statute.

¶ 28 Section 2-1401 of the Code provides a comprehensive statutory procedure for which judgments can be challenged more than 30 days after their rendition. "To be entitled to relief under this section, the petitioner must affirmatively set forth specific factual allegations supporting each of the following elements: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim to the court in the original action; and (3) due diligence in filing the section 2-1401 petition for relief. [Citations.] The quantum of proof necessary to sustain a section 2-1401 petition is a preponderance of the evidence. [Citation.]" *Cunningham v. Miller's General Insurance Co.*, 188 Ill. App. 3d 689, 692 (1989). "One of the guiding principles, however, in the administration of section 2–1401 relief is that the petition invokes the equitable powers of the circuit court, which should prevent enforcement of a default judgment when it would be unfair, unjust, or unconscionable." *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 225 (1986).

¶ 29 Under normal circumstances, our analysis of "a section 2-1401 petition is two-tiered: (1) the issue of a meritorious defense is a question of law subject to *de novo* review and (2) if a meritorious defense exists, the issue of due diligence is subject to abuse of discretion review." *Charles Austin, Ltd. v. A-1 Food Services Inc.*, 2014 IL App (1st) 132384, ¶ 26. "A meritorious defense is one which, if believed by the trier of fact, would defeat plaintiff's underlying claim." *Halle v. Robertson*, 219 Ill. App. 3d 564, 568 (1991). The situation confronting us in this case differs slightly, insofar as defendant's defense is not related to the underlying claim but, rather, is directed at plaintiff's initiation of the litigation itself.

¶ 30 Here, in lieu of addressing plaintiff's underlying claims of undue influence and tortious interference, defendant contends that plaintiff improperly filed the instant suit and seeks relief identical to that requested in the pending will contest. We agree, and are of the view that defendant need not articulate a defense to a claim that should not have been initiated in the first place.

¶ 31 While normally employed within the context of voluntary dismissals and *res judicata*, a brief analysis of the rule against claim-splitting is warranted where plaintiff clearly engaged in the same. "Illinois courts generally follow a rule against claim-splitting. [Citation.] Under this rule, where a cause of action is in its nature entire and indivisible, a plaintiff cannot divide it in order to maintain separate lawsuits. [Citation.] A plaintiff is not permitted to sue for part of a claim in one action and then sue for the remainder in another action. [Citation.] Instead, a plaintiff must assert all the grounds of recovery he or she may have against the defendant arising from a single cause of action in one lawsuit. [Citations.]" *Green v. Northwest Community Hospital*, 401 Ill. App. 3d 152, 154 (2010).

¶ 32 Plaintiff was undoubtedly aware of the following critical facts well before he filed this complaint in July 2013: (1) that there existed at least two wills executed by decedent, the validity of which were at issue; and (2) that attorney Mather represented defendant in the will contest, as counsel petitioned the trial court to admit the 2012 will in the probate proceeding. Yet, despite being armed with that knowledge, plaintiff still brought identical claims of undue influence arising from the same set of operative facts against defendant in two separate causes of action.

¶ 33 Moreover, and of particular import, plaintiff seeks the same relief. Specifically, that the court declare the 2012 will and trust invalid and revoke the same, name plaintiff as the duly-appointed executor, and direct defendant to transfer or reassign to plaintiff those assets she

induced decedent to add her name to. The trial court cannot properly grant the relief requested by plaintiff when doing so would invalidate the will and trust currently at issue in the earlier initiated probate proceeding. This is exactly the type of piecemeal litigation that the rule against claim-splitting seeks to prevent.

¶ 34 Plaintiff posits that the pending will contest is of little consequence given that he had an independent right to file a separate tort action, the judgment of which stands on its own. Citing to *DeHart v. DeHart*, 2013 IL 114137, and *In re Estate of Ellis*, 236 Ill. 2d 45 (2009), he argues that while a will contest and a tort action for intentional interference are distinct from one another, Illinois courts have allowed multiple count complaints involving both tort and undue influence claims to go forward.

¶ 35 Plaintiff's reliance on *DeHart* and *Ellis* is misplaced, as those cases are procedurally distinguishable. In both cases, our supreme court confirmed that "[a] will contest is distinct from a tort action for intentional interference with testamentary expectancy." As such, "[t]he remedy is not the setting aside of the will, but a judgment against the individual defendant, which would include money damages for the amount of the benefit tortiously acquired." *DeHart*, 2013 IL 114137, ¶ 39 (citing *Ellis*, 236 Ill. 2d at 52). However, in *DeHart*, the trial court dismissed the plaintiff's torts claims with prejudice pursuant to section 2-615. *DeHart*, 2013 IL 114137, ¶ 13; 735 ILCS 5/2-615 (West 2008). In reversing that order, the supreme court simply found that "plaintiff has properly alleged sufficient facts to meet a *prima facie* case for both torts, with the exception of the damages element, which can only be known if it exists after resolution of the first two claims contesting the will." *DeHart*, 2013 IL 114137, ¶ 40.

¶ 36 In *Ellis*, the sole issue was whether the six-month limitation period pursuant to section 8-1 of the Probate Act of 1975 (755 ILCS 5/8-1 (West 2006)) applied to a charitable hospital's

claim for tortious interference. *Ellis*, 236 Ill. 2d at 50. In finding section 8-1 inapplicable, the court held that the hospital's claim could go forward where it had been unaware of its bequest until more than two years after the later will had been admitted to probate. *Id*. at 56. After the six-month jurisdictional period had passed, the validity of the will was thereby established, thus the hospital's tort claim could not, in practical effect, serve to retroactively invalidate the will. See *id*. at 54-55.

¶ 37 The default judgment obtained by plaintiff in this case is a far cry from the dismissal pursuant to section 2-615 in *DeHart* or the applicability of section 8-1 of the Probate Act in *Ellis*. Those cases actually serve to highlight the fact that, while the tort claim may go forward with a will contest, the damages associated therewith can truly only be determined after the validity of one of the wills is established. We find the clear implication here is that since the validity of neither the 2009 nor 2012 will had yet to be established in the probate proceedings, plaintiff's default judgment amounts to a procedural end-around.

¶ 38 In light of the aforementioned case law and, most importantly, plaintiff's request for relief identical to that in the probate proceeding, we find that the trial court did not err in granting defendant's motion to vacate default judgment pursuant to section 2-1401. To allow the default judgment to stand, given the circumstances under which plaintiff filed and served the complaint, would be unfair and unjust. We also find plaintiff's argument that he did not know Zwicker had counsel for purposes of the issues raised here to be totally disingenuous. Then, even though he knew Zwicker was represented with respect to the issues raised in his newly-filed suit, plaintiff obtained a default judgment just 36 days after service of process. We see no reason to reward this conduct. Again, the new suit raised the same issues as those in the pending litigation. We find it unnecessary to address in any depth plaintiff's arguments regarding due diligence or the

lack of a sworn affidavit given that we have determined that plaintiff's complaint should not have been filed and justice commands the default judgment be set aside. See *Rockford Financial Systems, Inc. v. Borgetti*, 403 Ill. App. 3d 321, 330 (2010).

¶ 39 Notwithstanding the fact that plaintiff's procedural sleight of hand cannot stand here, we would be remiss not to mention that defendant asserts plaintiff failed join a necessary party to the action, namely, NPL Financial, LLC, as trustee of the Samuel L. Salerno revocable trust.

¶ 40 Our review of the record reveals that NPL Financial, LLC, is, in fact, the trustee of decedent's revocable trust and, as such, is an indispensable party to the litigation. See *In re Estate of Bork*, 145 Ill. App. 3d 920, 929 (1986) (citing *People's Bank & Trust Co. of Rockford v. Gregory*, 347 Ill. 397, 399 (1932)). Illinois courts have long held that the failure to join an indispensable party does not deprive the court of jurisdiction over the parties properly before it (*Just Pants v. Bank of Ravenswood*, 136 Ill. App. 3d 543, 546 (1985)), however, a court should not proceed to a decision on the merits when an indispensable party is absent. *Feen v. Ray*, 109 Ill. 2d 339, 347 (1985). "[W]here a failure to join an indispensable party is brought to the attention of a reviewing court, the appropriate course is to vacate the judgment, not because the trial court lacked jurisdiction over the joined parties, but because fairness to the non-joined party dictates such a result." *Just Pants*, 136 Ill. App. 3d at 546.

¶ 41 The trial court's vacatur of the default judgment was therefore also warranted on the basis that plaintiff failed to join a necessary party. We accordingly affirm the trial court's order granting defendant's motion to vacate default judgment pursuant to section 2-1401.

¶ 42 CONCLUSION

¶ 43 For the foregoing reasons, the judgment of the circuit court of Rock Island County is affirmed.

¶ 44 Affirmed.