2011 IL App (4th) 100549-U

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NOS. 4-10-0549, 4-10-0993 cons.

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

W.E. EXCAVATING, INC., an Illinois Corporation, Plaintiff-Appellee, v. STEVEN GILBERT, a/k/a STEPHEN GILBERT, d/b/a GILBERT LAND DEVELOPMENT, INC.; STEVE GILBERT, d/b/a STEVE GILBERT REAL ESTATE, LLC; and UNKNOWN OWNERS AND NONRECORD CLAIMANTS, Defendants-Appellants.	)	Appeal from Circuit Court of Piatt County No. 07CH58 Honorable John P. Shonkwiler, Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Knecht and Justice Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Where the trial court made a Rule 304(a) finding in its judgment that finally determined all of the issues between the parties except for the amount of attorney fees, this court had jurisdiction over that judgment.

¶ 2 (2) Where the corporation was not properly served, the misnomer rule did not apply to make the corporation a party to the suit, and thus the mechanics lien judgment must be vacated for failing to include a necessary party.

¶ 3 In December 2007, plaintiff, W.E. Excavating, Inc., filed complaint for the foreclosure of a mechanics lien against defendants, Steven Gilbert (also known as Stephen Gilbert) doing business as Gilbert Land Development, Inc.; Gilbert doing business as Steve Gilbert Real Estate LLC; and unknown owners and nonrecord claimants. Hereinafter, we use the term "named defendants" to refer to all defendants, except for unknown owners and nonrecord

claimants. Plaintiff later filed first- and second-amended complaints. In September 2009, the Piatt County circuit court held a trial on plaintiff's second-amended complaint. In June 2010, the court entered a written judgment of mechanics lien foreclosure and sale, which addressed all of the issues except the amount of plaintiff's attorney fees. In November 2010, the court granted plaintiff's request to withdraw its petition for attorney fees.

¶ 4 On appeal, named defendants assert (1) the trial court's judgment is void because it was rendered in the absence of necessary parties, (2) the court erred by denying named defendants' motions to dismiss, (3) the court's finding in favor of plaintiff on its mechanics-lien-foreclosure claim is erroneous, and (4) the court's judgment erroneously extinguishes the statutory right of redemption. We vacate the court's judgment.

¶ 5 I. BACKGROUND

¶ 6 Plaintiff's December 2007 complaint referred to the named defendants collectively as "Gilbert." The complaint alleged plaintiff and named defendants entered into an oral contract on August 7, 2006, under which plaintiff agreed to construct roads and perform dirt work on Shady Ridge Subdivision, which was owned by named defendants, for $311,999.54. Between August 7, 2006, and October 18, 2007, plaintiff performed work on Shady Ridge Subdivision under the contract. Plaintiff alleged named defendants still owed plaintiff around $105,000 for its work, which named defendants refused to pay. The complaint noted plaintiff filed a mechanics lien on Shady Ridge subdivision on November 2, 2007, and attached a copy of the mechanics lien. The mechanics lien listed Gilbert Land Development, Inc., as the owner of Shady Ridge subdivision.

¶ 7 On December 27, 2007, Gilbert was personally served with two summonses for

this case. One listed the defendant as "Steven Gilbert, a/k/a Stephen Gilbert" and the other one listed "Steve Gilbert Real Estate, LLC. Reg. Agent Stephen L. Gilbert." A third summons for this case listed the defendant as follows: "Gilbert Land Development, Inc. Reg. Agent: Matt C. Deering." The attached sheet to the third summons stated Rebecca Fowler, Deering's secretary, was served with the summons on January 4, 2008. On January 28, 2008, Robert Kirchner filed a written entry of appearance on behalf of the named defendants.

¶ 8 In February 2008, named defendants filed a motion to dismiss the complaint under section 2-619(a)(9) of the Code of Civil Procedure (Procedure Code) (735 ILCS 5/2-619(a)(9) (West 2008)), asserting the November 2007 mechanics lien did not comply with the requirements of sections 1 and 7 of the Mechanics Lien Act (770 ILCS 60/1, 7 (West 2006)). In April 2008, plaintiff sought leave to file a first-amended complaint. Attached to the proposed amended complaint was an amended mechanics lien that was filed on April 3, 2008. In August 2008, the trial court held a hearing on named defendants' motion to dismiss the original complaint. At the beginning of the hearing, Kirchner declared he "represent[ed] all defendants with the exception of unknown owners and non-record claimants." After hearing the parties' arguments, the court granted the motion because the November 2007 mechanics lien was not verified as required by section 7 of the Mechanics Lien Act. The court also granted plaintiff leave to file its first-amended complaint.

¶ 9 In September 2008, named defendants filed a motion to dismiss plaintiff's first-amended complaint under both sections 2-615 and 2-619(a)(9) of the Procedure Code (735 ILCS 5/2-615, 2-619(a)(9) (West 2008)), which is provided for by section 2-619.1 of the Procedure Code (735 ILCS 5/2-619.1 (West 2008)). After a November 2008 hearing, the trial court granted

the motion to dismiss under section 2-615 because plaintiff failed to indicate if it had completed the work, and if it had not completed the work, then why it had not. The court gave plaintiff 14 days to file a new complaint.

¶ 10 In December 2008, plaintiff filed its second-amended complaint, which again referred to named defendants collectively as "Gilbert." The second-amended complaint noted plaintiff could not complete its performance under the contract because named defendants had failed to make payments as agreed. In February 2009, named defendants filed a combined motion to dismiss the second-amended complaint under section 2-619.1 of the Procedure Code. The trial court held a hearing on the motion to dismiss in March 2009. At this hearing, Kirchner raised for the first time deficiencies with respect to the parties in this case. Kirchner asserted the complaint appeared to be only against Gilbert. In response, plaintiff noted Gilbert had confused ownership of Shady Ridge subdivision in the recorded documents related to the subdivision. On April 28, 2009, the court entered a written order, denying the dismissal motion. The court did not address who the actual defendants were in this case.

¶ 11 On September 1, 2009, the trial court commenced the trial on plaintiff's second-amended complaint. The court admitted several documents for Shady Ridge subdivision that were recorded in November 2006. One was the final plat, which listed the owner and subdivider as Stephen L. Gilbert, president of Sand Lake Development. Another document was the owner's certificate and declaration of protective and restrictive covenants and easements, which listed the owner as Stephen L. Gilbert, president of Steve Gilbert Real Estate, LLC. The November 2006 exhibits also included a quitclaim deed from Steve Gilbert Real Estate, LLC, to Stephen L. Gilbert and a quitclaim deed from Stephen L. Gilbert to Gilbert Land Development, Inc., which

was the last quitclaim deed recorded. Moreover, a $350,000 mortgage listed Steve Gilbert as the mortgagor and First Mid-Illinois Bank & Trust (Bank) as the lender, and a second $350,000 mortgage listed Gilbert Land Development, Inc., as the mortgagor and the Bank as the lender. The second mortgage was signed by Steve Gilbert, president of Gilbert Land Development, Inc. Additionally, in January 2007, an amendment to the owner's certificate was recorded that was signed by "Steve Gilbert." In July 2007, another amendment was recorded that was also signed by "Steve Gilbert."

¶ 12 After hearing the parties' evidence, the trial court gave the parties time to file written closing arguments. Both parties did so. On December 1, 2009, the trial court filed a memorandum order, finding in favor of plaintiff, allowing the parties to brief the issues of attorney fees and prejudgment interest, and requiring a written order. The parties submitted additional briefs, and plaintiff submitted a petition for attorney fees, seeking $18,423.53 in fees and costs. In February 2010, the court entered a supplement to the memorandum order, finding (1) plaintiff was entitled to 10% interest from the date of the last draw request, which was in December 2006, and (2) plaintiff was entitled to attorney fees. The court did not address an amount of attorney fees.

¶ 13 On June 22, 2010, the trial court entered a written judgment of mechanics lien foreclosure, granting plaintiff a lien in the amount of $105,001.07 plus court costs, the 10% interest from December 2006, and reasonable attorney fees in an amount to be ordered by the court. The order further provided for the sale of the property if named defendants did not satisfy the lien within 120 days of the judgment. The order contained a finding that no just reason existed for delaying either the enforcement or appeal or both of the judgment.

¶ 14 On July 22, 2010, named defendants filed a notice of appeal from the June 22, 2010, judgment and all previous orders and judgments. This court docketed the case as No. 4-10-0549.

¶ 15 In the trial court, plaintiff filed another petition for attorney fees, requesting $22,429.78 on August 12, 2010. On September 28, 2010, Douglas and Elizabeth Williams, owners of lot 115 in Shady Ridge subdivision, filed a petition to intervene. The petition noted they had purchased their lot on or about September 28, 2009, from Gilbert Land Development, Inc. Douglas and Elizabeth sought to file a motion to stay the sale of their lot, a motion for relief from judgment under section 2-1401 of the Procedure Code (735 ILCS 5/2-1401 (West 2008)), and an answer and affirmative defenses to plaintiff's second-amended complaint. On September 30, 2010, the court commenced a hearing on the amount of plaintiff's attorney fees. That same day, a notice of a public auction was filed, stating a public auction of real estate would take place on October 29, 2010. On October 26, 2010, the Bank filed (1) a petition to intervene, noting it held a November 2006 mortgage on Shady Ridge subdivision, and (2) an answer to plaintiff's second-amended complaint.

¶ 16 On November 30, 2010, plaintiff filed a motion to withdraw the pending petition for attorney fees. That same day, the trial court dismissed the petition with prejudice. The court's order noted that, with the dismissal of the petition, no further issues remained pending. On December 8, 2010, the named defendants filed another notice of appeal from the court's November 30, 2010, and June 22, 2010, judgments and all previous orders and judgments. This court docketed that notice of appeal as case No. 4-10-0993.

¶ 17 In March 2011, this court granted named defendants' motion to consolidate the

two cases and their requests to have the briefs in case No. 4-10-0549 stand as the briefs in case No. 4-10-0993. Named defendants do not challenge any of the trial court's actions after its June 22, 2010, judgment.

¶ 18 II. ANALYSIS

¶ 19 A. Jurisdiction

¶ 20 Named defendants initially questioned our jurisdiction of this matter. Our supreme court has emphasized a reviewing court's duty to ascertain its jurisdiction before considering the appeal's merits. See *People v. Lewis*, 234 Ill. 2d 32, 36-37, 912 N.E.2d 1220, 1223 (2009); *Secura Insurance Co. v. Illinois Farmers Insurance Co.*, 232 Ill. 2d 209, 213, 902 N.E.2d 662, 664 (2009); *People v. Smith*, 228 Ill. 2d 95, 106, 885 N.E.2d 1053, 1059 (2008). Thus, while the parties state jurisdiction is no longer an issue, we first address our jurisdiction of this matter. See *Lewis*, 234 Ill. 2d at 37, 912 N.E.2d at 1223.

¶ 21 "The timely filing of a notice of appeal is both jurisdictional and mandatory." *Secura Insurance Co.*, 232 Ill. 2d at 213, 902 N.E.2d at 664. Unless the appealing party has properly filed a notice of appeal, a reviewing court lacks jurisdiction over the appeal and must dismiss it. *Smith*, 228 Ill. 2d at 104, 885 N.E.2d at 1058.

¶ 22 In this appeal, named defendants are challenging the trial court's June 22, 2010, judgment and previous orders leading to that judgment. As named defendants note, the only matter not resolved by June 22, 2010, judgment was the amount of attorney fees. A request for attorney fees is a claim within the meaning of Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010), regardless of whether the fees are sought pursuant to a statute or a contract provision. *Brown & Kerr, Inc. v. American Stores Properties, Inc.*, 306 Ill. App. 3d 1023, 1028, 715 N.E.2d

804, 808-09 (1999). Moreover, the fact the attorney fees were sought in the complaint does not affect their treatment as a claim for purposes of Rule 304(a). See *Brown & Kerr,* 306 Ill. App. 3d at 1026, 1029, 715 N.E.2d at 807, 809 (finding a summary judgment was not appealable because requests for attorney fees that were raised in the original pleadings were still pending and the order did not contain a Rule 304(a) finding). We note that, in *Lamar Whiteco Outdoor Corp. v. City of West Chicago,* 395 Ill. App. 3d 501, 506, 916 N.E.2d 886, 890 (2009), the Rule 304(a) finding was superfluous because the appellant wished only to appeal the pending attorney-fees claim, which was clearly not final. Since a pending request for attorney fees is regarded as a claim for purposes of Rule 304(a), the pending request precludes an appeal of otherwise final judgments in the matter unless the court makes a Rule 304(a) finding. *In re Marriage of Ehgartner-Shachter,* 366 Ill. App. 3d 278, 285, 851 N.E.2d 237, 244 (2006).

¶ 23 In this case, the trial court made a Rule 304(a) finding in its June 22, 2010, judgment. That judgment is final as to all issues, except attorney fees. On appeal, named defendants do not raise any issues as to attorney fees or anything else that took place after the June 22, 2010, judgment. Additionally, we note named defendants' July 22, 2010, notice of appeal complied with the requirements of Illinois Supreme Court Rule 303 (eff. May 30, 2008). Accordingly, we have jurisdiction of this appeal under Rule 304(a) and need not address the second notice of appeal.

¶ 24 B. Necessary Parties

¶ 25 Named defendants argue the trial court's judgment is void because Gilbert Land Development, Inc., the owner of Shady Ridge subdivision, and the Bank, the recorded mortgage holder, were necessary parties to the suit but were not joined therein. Plaintiff asserts Gilbert

Land Development, Inc., was a party to the suit under the misnomer rule and questions named defendants' ability to now raise the Bank as a necessary party.

¶ 26 At any time, the parties or the court may raise the failure to join a necessary and indispensable party. *Lakeview Trust & Savings Bank v. Estrada*, 134 Ill. App. 3d 792, 811, 480 N.E.2d 1312, 1326 (1985). "This is so because due process requires the joinder of all indispensable parties to an action; as a result an order entered without jurisdiction over a necessary party is void." *Lakeview*, 134 Ill. App. 3d at 811, 480 N.E.2d at 1326. Specifically, the failure to include a necessary party defeats a mechanics lien. *National Wrecking Co. v. Midwest Terminal Corp.*, 234 Ill. App. 3d 750, 767, 601 N.E.2d 999, 1009 (1992). This issue presents a question of law, and thus our review is *de novo*. See *Woods v. Cole*, 181 Ill. 2d 512, 516, 693 N.E.2d 333, 335 (1998) (a reviewing court reviews questions of law *de novo*).

¶ 27 Section 11(b) of the Mechanics Lien Act (770 ILCS 60/11 (West 2006)) addresses necessary parties and provides the following:

> "Each claimant shall make as parties to its pleading (hereinafter called 'necessary parties') the owner of the premises, the contractor, all persons in the chain of contracts between the claimant and the owner, all persons who have asserted or may assert liens against the premises under this Act, and any other person against whose interest in the premises the claimant asserts a claim."

¶ 28 Named defendants assert that Gilbert Land Development, Inc., was a necessary party to this suit as the owner of Shady Ridge subdivision, the subject property. Plaintiff does

not dispute that Gilbert Land Development, Inc., was a necessary party but, rather, argues Gilbert Land Development, Inc., was a party to the suit. While plaintiff admits Gilbert Land Development, Inc., was misnamed in the complaint as "Steve Gilbert d/b/a Gilbert Land Development, Inc.," it asserts the error was a misnomer and not mistaken identity because the registered agent for Gilbert Land Development, Inc., was served. In reply, Gilbert asserts Gilbert Land Development, Inc., was not properly served, and thus was not a party to the proceedings.

¶ 29 Both parties discuss *Capital One Bank, N.A. v. Czekala*, 379 Ill. App. 3d 737, 884 N.E.2d 1205 (2008). There, the reviewing court found both misnomer and mistaken identity as well as improper service on a corporation. *Capital One*, 379 Ill. App. 3d at 745-46, 884 N.E.2d at 1213-14. The *Capitol One* court began its analysis by explaining the difference between misnomer and mistaken identity. With misnomer, "the party called by the wrong name is still subject to the court's jurisdiction after receiving notice of the lawsuit." *Capital One*, 379 Ill. App. 3d at 742, 884 N.E.2d at 1211. Even after judgment, a complaint may be amended to correct a misnomer. *Capital One*, 379 Ill. App. 3d at 743, 884 N.E.2d at 1211. Conversely, with mistaken identity, "the court does not acquire personal jurisdiction over the person named by mistake but served." *Capital One*, 379 Ill. App. 3d at 743, 884 N.E.2d at 1211. Thus, any judgment is void *ab initio*. *Capital One*, 379 Ill. App. 3d at 743, 884 N.E.2d at 1211. Additionally, the *Capital One* court found the following discussion helpful:

> " 'Courts of this State have consistently distinguished the misnomer rule from rules applicable to a mistake in identity. The misnomer statute applies only to correctly joined and served, but mis-

named, parties. Mistaken identity occurs when the wrong person was joined and served. The intent of the plaintiff is a pivotal inquiry in the determination of whether a particular case involves misnomer or mistaken identity. However, the plaintiff's subjective intent as to whom he intended to sue is not controlling where the record contains objective manifestations indicating an intent to sue another.' " *Capital One*, 379 Ill. App. 3d at 743, 884 N.E.2d at 1212 (quoting *Barbour v. Fred Berglund & Sons, Inc.*, 208 Ill. App. 3d 644, 648, 567 N.E.2d 509, 512 (1990)).

¶ 30 Other cases addressing misnomer have emphasized " '[t]he misnomer rule is a narrow one and applies only where a plaintiff brings an action and a summons is served upon a party intended to be made a defendant. [Citation.] Thus, actual notice of the lawsuit is given to the real party in interest, but the process and complaint are styled in other than the party's correct name.' " *Rapier v. First Bank & Trust Co. of Illinois*, 309 Ill. App. 3d 71, 80, 721 N.E.2d 686, 692 (1999) (quoting *Zito v. Gonzalez*, 291 Ill. App. 3d 389, 392-93, 683 N.E.2d 1280, 1283 (1997)). Moreover, "in determining whether a misnomer exists, the critical determination is whether the plaintiff actually served the real party in interest with a copy of the complaint and summons." *Estate of Henry v. Folk*, 285 Ill. App. 3d 262, 266, 674 N.E.2d 102, 105 (1996) (citing *Borg v. Chicago Zoological Society*, 256 Ill. App. 3d 931, 934, 628 N.E.2d 306, 308 (1993)). Accordingly, service of process is a key component of the misnomer rule.

¶ 31 As to service of process, the *Capitol One* court stated the following:

"When serving a private corporation, the law provides that

> a copy of the summons may be left with the corporation's registered agent or any of its officers or agents within the state. [Citations.] However, a corporation cannot be served by substitute service on a corporate agent. Similarly, a corporation may not be properly served with summons on an agent in his individual capacity, such as occurred in this case. [Citation.] Substitute service on a corporation can only be obtained by serving the Secretary of State.
>
> A judgment rendered without service of process *** where there has been neither a waiver of process nor a general appearance by the defendant, is void regardless of whether the defendant had actual knowledge of the proceedings. [Citation.] Consequently, if a corporation is not served with process, all subsequent judgments against the corporation are void because the court lacked jurisdiction to enter orders against the corporate entity." (Internal quotation marks omitted.) *Capital One*, 379 Ill. App. 3d at 746, 884 N.E.2d at 1214.

¶ 32 In this case, one of the summonses listed Gilbert Land Development, Inc., as the defendant; and Deering, as its registered agent. However, that summons indicated Fowler, Deering's secretary, was the person actually served. In *Knapp v. Bulun*, 392 Ill. App. 3d 1018, 1030, 911 N.E.2d 541, 552-53 (2009), the First District found the delivery of the summons to the registered agent's paralegal and secretary was insufficient to effectuate service on the corpora-

tion. Under Illinois law, service on an employee of the corporation's registered agent is inadequate if the employee has not been designated as an agent to receive process. *Slates v. International House of Pancakes, Inc.*, 90 Ill. App. 3d 716, 725, 413 N.E.2d 457, 464 (1980). Accordingly, the delivery of the summons to Deering's secretary did not effectuate service on Gilbert Land Development, Inc.

¶ 33 Another summons listed Gilbert individually and was served upon him personally. As stated, service of summons on an agent of the corporation in his individual capacity is not proper service on the corporation. *Capital One*, 379 Ill. App. 3d at 746, 884 N.E.2d at 1214. Thus, the service of summons on the president of Gilbert Land Development, Inc., in his individual capacity did not constitute service of the corporation.

¶ 34 Accordingly, we find Gilbert Land Development, Inc., was not properly served in this suit, and the narrow misnomer rule does not apply. Moreover, Gilbert Land Development, Inc., does not fall under the unknown owners listed as defendants in this case because Gilbert Land Development, Inc., was named as the grantee in the last quitclaim deed, which was recorded on November 6, 2006. See 770 ILCS 60/11(c) (West 2006).

¶ 35 Additionally, plaintiff did not argue Gilbert Land Development, Inc., waived process or made a general appearance until oral arguments and has not provided any legal authority for the assertion Kirchner's statement he was representing all defendants constituted waiver when the complaint stated "Steven Gilbert, doing business as Gilbert Land Development, Inc." A party's failure to cite legal authority results in the argument's forfeiture. See *Helping Others Maintain Environmental Standards v. Bos*, 406 Ill. App. 3d 669, 680, 941 N.E.2d 347, 359 (2010). Thus, plaintiff has forfeited this argument. Further, plaintiff did not argue Gilbert

Land Development, Inc., waived all objections to the trial court's jurisdiction over it under section 2-301(a-5) of the Code of Civil Procedure (735 ILCS 5/2-301(a-5) (West 2006)). Last, plaintiff did not seek to supplement the record with or ask us to take judicial notice of a federal court proceeding. Accordingly, we do not address these three issues.

¶ 36 Here, the trial court did not have personal jurisdiction over Gilbert Land Development, Inc. Without a necessary party, the trial court's July 22, 2010, judgment is void. Since we have found the judgment void, we do not address whether the Bank was a necessary party and the other arguments of named defendants.

¶ 37 III. CONCLUSION

¶ 38 For the reasons stated, we vacate the Piatt County circuit court's judgment.

¶ 39 Vacated.