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NO. 5-12-0127

APPELLATE COURT OF ILLINOIS

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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Honorable  
Brian Babka,  
Judge, presiding.

of that court. The parties are neighbors who reside in a subdivision, and most of the litigation involves their respective rights to the real estate. The litigation has become personal and antagonistic, and it is not altogether clear that the parties really want to resolve their differences. Indeed, it appears the parties just want to fight, using the courts as their weapons. We will set forth only those facts necessary to an understanding of our disposition.

¶ 4 On August 17, 2006, the plaintiffs, William Dribben and Wendy Dribben, filed in the circuit court of St. Clair County a five-count complaint against the defendants, Geraldine Davidson, Gary Davidson, Todd Favre, Sherry Favre, Norman Arras, and Debra Arras. Counts I and II are directed against Geraldine Davidson and sound in fraudulent concealment and consumer fraud. They allege that Davidson was the realtor who represented the Favres in the sale of their home in the subdivision to the Dribbens. They allege that Davidson knew that a dam holding a lake in the subdivision had not been engineered by a professional engineer licensed in the State and that the required permit for the construction of the lake had not been obtained from the State, and that she failed to disclose this to the Dribbens and, indeed, fraudulently concealed it from them.

¶ 5 Counts III and IV of the complaint are directed against the Favres and allege fraudulent concealment and breach of contract based on their failure to disclose to the Dribbens the problems with the lake and dam.

¶ 6 Count V of the complaint seeks a declaratory judgment that certain restrictive covenants pertaining to the land are valid and enforceable and that those covenants require the three property owners of the subdivision to each pay one-third of the costs to maintain the lake and its dam.

¶ 7 On September 15, 2006, the Davidsons filed a motion to compel arbitration and dismiss counts I and II of the Dribbens' complaint against them because the claims were based on a real estate contract which required that all disputes be submitted to arbitration.

The Davidsons also filed a motion to compel alternative dispute resolution with respect to count V of the Dribbens' complaint, alleging that it also arose out of the real estate contract.

¶ 8 On November 16, 2006, the circuit court granted the Davidsons' motion to stay counts I and II of the Dribbens' complaint and ordered the Dribbens to participate in arbitration with respect thereto. The Davidsons' motion to compel arbitration on count V of the Dribbens' complaint against her was denied and count V remained pending before the circuit court. The court also granted the Favres' motion to compel arbitration on the Davidsons' claims against them.

¶ 9 On December 26, 2007, the circuit court entered judgment on count V of the Dribbens' complaint against the Davidsons, declaring that the restrictive covenants were valid and applied to the maintenance of the dam and lake and that the property owners adjacent to the lake each had a duty and obligation to pay one-third of all costs incurred in maintaining that lake and dam. The court explicitly held that the parties retained all rights to seek apportionment and contribution from each other with respect to payment of those costs.

¶ 10 All remaining issues between the parties were in arbitration and all proceedings before the circuit court were stayed. On October 20, 2011, the court granted an oral motion to lift the stay and permitted the parties to engage in discovery on their complaints. The court acknowledged the Dribbens' statement that they needed to file an amended complaint, but no leave to do so was sought or granted at that time. The cause was set for a jury trial in March 2012.

¶ 11 On November 4, 2011, the Davidsons filed a motion to reinstate the stay and vacate the trial date. The motion alleges that counts I and II of the Dribbens' complaint against the Davidsons were proceeding in arbitration and hearing thereon was scheduled for February 2012. Accordingly, the motion alleges, any court proceedings on those counts must be stayed pending the outcome of the arbitration proceeding. The motion further alleges that counts

III and IV of the Dribbens' complaint, directed against the Favres, had been settled and dismissed. Finally, the court had entered a judgment on count V of the Dribbens' complaint. Accordingly, there were no issues appropriate for disposition by the circuit court, and the court should reinstate the stay pending the completion of arbitration proceedings. The Davidsons sought reinstatement of the stay because the Dribbens had served them with discovery requests in the circuit court at the same time discovery was being conducted in the arbitration proceeding.

¶ 12 On November 10, 2011, the court entered an order reinstating the stay and vacating the trial date. The court noted that counts I and II of the Dribbens' complaint were in arbitration, counts III and IV had been settled and dismissed, and count V had been adjudicated. The court stated, "[T]he court acknowledged plaintiffs' right to amend the complaint, but no amended pleadings have been filed and no current reason exists to conduct discovery \*\*\*."

¶ 13 On December 30, 2011, the Dribbens filed their first amended complaint alleging additional new claims against the Davidsons and others. They had not requested leave to do so, nor had leave been granted. On January 6, 2012, the Dribbens filed a motion to lift the stay so that they could proceed with discovery on their amended complaint.

¶ 14 On January 10, 2012, the Davidsons filed a motion to dismiss the Dribbens' amended complaint because it had been filed without leave. They also filed their opposition to the Dribbens' motion to lift the stay since the amended complaint had not been properly filed. On January 17, 2012, the court denied the Dribbens' motion to lift the stay, finding that the amended complaint was deemed a nullity because it had been filed without leave of the court.

¶ 15 On January 24, 2012, the Dribbens filed a motion for leave to file an amended complaint, which the Davidsons opposed. No accompanying motion to lift the stay was filed.

¶ 16 In their response to the Dribbens' motion for leave to file an amended complaint, the

Davidsons reference the draft of a letter dated February 19, 2006, from Wendy Dribben to her attorney in which she reveals her knowledge of facts which would tend to defeat her claims against the Davidsons based on the statute of limitations. This document was obtained by the Davidsons through discovery in the arbitration proceedings. On motion of the Dribbens' attorney, the arbitrator had found that the document contained privileged communications and ordered all parties to return any copies of the document to the Dribbens. The Davidsons moved for an order compelling the Dribbens to produce this document to the court to prevent "any attempt by the Dribben's [*sic*] to perpetrate a fraud on this court by allowing the Dribben's [*sic*] to plead facts as 'newly discovered' when the February, 2006 letter shows that Wendy Dribben knew certain facts and lied under oath in her deposition to further the cause of her endless litigation."

¶ 17 At the hearing on the motions, held March 8, 2012, the Davidsons' counsel pointed out that the arbitration proceedings had also been amended to allege many of the new claims set forth in the Dribbens' proposed amended complaint and that allowing the Dribbens to proceed on the amended complaint in the circuit court might result in inconsistent dispositions in the two venues. The Davidsons asked the court to continue the stay already in place.

¶ 18 We note that the Davidsons did not present to the circuit court any amended pleadings from the arbitration proceeding to support their claim that the two proceedings were duplicative and might result in inconsistent dispositions, nor are any such documents included in the record on appeal. The only evidence before the circuit court or this court of the issues involved in the arbitration proceeding is counts I and II of the Dribbens' original complaint, which were referred to arbitration by the court.

¶ 19 The court stated: "I believe the best way would be \*\*\* simply to stay it until after the arbitration has run its course. So that way I don't have to make any rulings." The court

continued the stay of proceedings in the circuit court pending the result of the arbitration proceeding and declined to rule on the Dribbens' motion for leave to file an amended complaint or the Davidsons' motion to compel production of the letter of February 19, 2006.

¶ 20 The Dribbens filed their notice of interlocutory appeal on March 13, 2012. In their brief on appeal, they:

"seek to vacate the stay, and under this Court's supervisory powers, grant the motion to amend, lift the stay, and remand this matter to a Circuit Court in Washington, Perry or Randolph County for fair and expeditious disposition with instructions to expedite the case, allowing for immediate motions for summary judgment, immediate discovery and only allowing further delay for good cause shown. The Dribbens further request an order holding the Dribbens' letter is privileged, thus ending any further unnecessary collateral disputes."

For the reasons that follow, we reverse the order which continued the stay and remand this cause to the circuit court of St. Clair County with directions that it rule on the motions before it and proceed accordingly. As to the rest of the Dribbens' prayers for relief, we decline to exercise any such supervisory power where these matters have not been presented to the circuit court.

¶ 21 We first address the appropriate standard of review, on which the parties disagree. The Dribbens argue that the standard of review is *de novo*, while the Davidsons argue that the appropriate standard of review is the more deferential abuse of discretion standard. We are guided by our discussion of this question by *LAS, Inc. v. Mini-Tankers, USA, Inc.*, 342 Ill. App. 3d 997, 1000-01 (2003). There we stated that the proper standard of review is determined by the nature of the question presented to the circuit court. 342 Ill. App. 3d at 1001. Where the question presented to the circuit court involves only a question of law, as it did in *LAS, Inc.*, the proper standard of review is *de novo*. 342 Ill. App. 3d at 1001. In

such a case the answer to the question presented is dictated by the law, and no discretion is left to the circuit court. Accordingly, the review is *de novo*.

¶ 22 However, where the answer to the question presented to the circuit court is dictated neither strictly by law nor strictly by fact, but involves an exercise of the circuit court's discretion, the appropriate standard of review is abuse of discretion. See *TIG Insurance Co. v. Canel*, 389 Ill. App. 3d 366, 372 (2009). Such is the case at bar.

¶ 23 In determining whether the circuit court abused its discretion, this court should not decide whether it agrees with the circuit court's decision, but rather should determine whether the circuit court acted arbitrarily without the employment of conscientious judgment or, in view of all the circumstances, exceeded the bounds of reason and ignored recognized principles of law so that substantial prejudice resulted. *Estate of Bass v. Katten*, 375 Ill. App. 3d 62, 67 (2007). The only question before the reviewing court is whether there was a sufficient showing made to the circuit court to sustain its order granting or denying the stay. *Estate of Bass*, 375 Ill. App. 3d at 67.

¶ 24 The circuit court in the case at bar abused its discretion in continuing the stay in the face of the Dribbens' motion for leave to file an amended complaint where the court did so only to avoid making any rulings. See *Estate of Bass*, 375 Ill. App. 3d at 67.

¶ 25 The circuit court also abused its discretion in continuing the stay because the Davidsons failed to make a sufficient showing to justify the continuation of the stay in the face of the Dribbens' motion for leave to file an amended complaint. The party requesting the stay must make a sufficient showing to the circuit court that the stay is justified. *TIG Insurance Co. v. Canel*, 389 Ill. App. 3d 366, 372 (2009). In the case at bar, the Davidsons simply asserted, without any supporting documents, that the arbitration proceedings had been amended to allege many of the new claims set forth in the Dribbens' proposed amended complaint. The circuit court did not have before it the amended pleadings from the

arbitration to compare to the Dribbens' proposed amended complaint. Furthermore, it appears that the proceedings in arbitration were limited to Geraldine Davidson's actions as a realtor, and not directed at her personally. The proposed amended complaint was at least in part directed to Geraldine Davidson in her personal capacity. The Davidsons simply did not make a showing sufficient to justify the imposition of a stay which prohibits the Dribbens from pursuing their claims in the circuit court, claims which are clearly different from those made in their original counts I and II which were referred to arbitration.

¶ 26 Accordingly, we reverse the order of the circuit court which continued the stay of proceedings and remand this cause to the circuit court to proceed on the motions before it.

¶ 27 We turn now to the other relief requested by the Dribbens in their brief on appeal. They ask us to grant their motion for leave to amend their complaint and order a change of venue to Washington, Perry, or Randolph County, with instructions that the cause be expedited. While Illinois Supreme Court Rule 366(a) (eff. Feb. 1, 1994) grants us the power to "enter any judgment and make any order that ought to have been given or made, and make any other and further orders and grant any relief \*\*\* that the case may require," we decline to grant the Dribbens the relief they request here. No motion for change of venue has ever been presented to the circuit court, nor has any basis for granting such a motion been presented to this court. The Dribbens' motion for leave to file an amended complaint is pending before the circuit court and is properly addressed there. We do, however, encourage the court and all the parties to proceed as expeditiously as possible to bring this dispute to a resolution.

¶ 28 Finally, in their brief on appeal and in a motion which we have ordered taken with the case, the Dribbens ask us to find that the letter from Wendy Dribben to her attorney dated February 19, 2006, is privileged, and to strike any reference to "attorney-client privileged communications" from the record, to seal the March 8, 2012, transcript of the hearing at



which it was discussed, and to strike from that transcript any portions that, "improperly reveal any actual or alleged attorney-client privileged communications." We note that the contents of the letter have not been revealed in the record on appeal in anything but a vague and general way. No copy of the letter exists in the record on appeal, nor were any contents of the letter revealed in any substantive way in the record on appeal. It also appears that the contents played no part in the circuit court's entry of the order appealed from, nor do they play any part in our decision herein. We urge the Dribbens to file the appropriate motion in the circuit court to prevent any further use of any attorney-client privileged communications. We deny the Dribbens' prayer for relief in their brief on appeal and their motion to strike which we have taken with the case.

¶ 29 For the foregoing reasons, the order of the circuit court of St. Clair County which continued the stay of proceedings in the circuit court is hereby reversed, the stay is lifted, and this cause is remanded to the circuit court with directions that it rule on the motions before it and proceed accordingly.

¶ 30 Reversed and remanded with directions.