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2012 IL App (3d) 110571-U

Order filed May 8, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

<i>In re</i> MARRIAGE OF)	Appeal from the Circuit Court
WILLIAM DAUGHERTY,)	of the 12th Judicial Circuit,
)	Will County, Illinois,
Petitioner-Appellee,)	
)	
and)	
)	Appeal No. 3-11-0571
DEBORAH DAUGHERTY,)	Circuit No. 08-D-1898
)	
Respondent-Appellee)	
)	
(Susan Simonsen,)	
)	Honorable
Third-Party)	Robert J. Baron,
Defendant-Appellant).)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justices O'Brien and Lytton concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred by granting respondent's preliminary injunction, because the trial court did not have personal jurisdiction over the third-party defendant.

¶ 2 Third-party defendant, Susan Simonsen, appeals from the granting of a preliminary injunction. At the time the injunction was issued, petitioner, William Daugherty, and respondent,

Deborah Daugherty, were in the process of a divorce proceeding. William and Simonsen were 50% members and managers of four limited liability companies (LLCs), which owned and operated nursing homes. On May 5, 2011, the trial court entered an order that required Simonsen and William to make a \$400,000 distribution from the LLCs' assets to a client trust account. Simonsen filed a motion to vacate the order, which was denied. Simonsen appeals the denial of her motion to vacate, arguing that the order should be vacated because: (1) Simonsen and the LLCs were not given notice of the relief requested at the May 5, 2011, hearing, and William and Deborah did not prove the elements necessary for the preliminary injunction; (2) the LLCs' assets used for the distribution were not part of the marital estate; and (3) the court lacked subject matter jurisdiction over Simonsen because no cause of action was pending against her at the time of the order. We reverse.

¶ 3

FACTS

¶ 4 On October 23, 2008, William filed a petition for dissolution of marriage against Deborah. On November 10, 2010, the trial court entered an order allowing Deborah to petition the court to add Simonsen as a third party defendant. On November 15, 2010, over William's objection, the trial court entered an order allowing Deborah to add Simonsen as a party. On December 5, 2010, Simonsen was served with both a summons and the November 15, 2010, court order allowing her to be added as a third party defendant.

¶ 5 On November 22, 2010, William filed a petition to modify temporary maintenance because his income had been reduced. William alleged that Simonsen, as the other 50% owner of the LLCs, reduced his monthly distributions from the LLCs and refused to vote in favor of continuing to distribute \$24,000 per month because she had determined that the LLCs were in

difficult financial straits.

¶ 6 On January 26, 2011, Deborah filed a petition for temporary restraining order and preliminary injunction. In her petition for preliminary injunction, Deborah asked that William be ordered to take a minimum distribution of \$24,000 per month¹ or, in the event that Simonsen's consent was required to make the distribution, enforce the manager deadlock provision in the LLCs' operating agreement.

¶ 7 On January 28, 2011, Simonsen filed a response objecting to Deborah's motion for preliminary injunction because Deborah failed to serve her with a third-party complaint; therefore, she was not a party to the action. Simonsen admitted that she, along with William, were 50% members and managers of the LLCs. Simonsen requested that Deborah's petition also be denied because the LLCs needed those assets for capital expenditures and operating expenses. Moreover, if William was required to take a distribution of \$48,000, Simonsen would also be required to take the same amount. Simonsen also argued that Deborah could not show the elements required for the injunction.

¶ 8 On February 18, 2011, Deborah filed a third petition for interim and prospective fees and costs. Deborah asserted that she was without sufficient income or assets to pay for her necessary attorney and experts' fees and costs, then totaling approximately \$300,000. Deborah requested that William and Simonsen be ordered to disburse said amounts of money from the LLCs, so that

¹ Deborah's petition for preliminary injunction initially asked that William take a \$24,000 distribution. However, in Deborah's prayer for relief, she requested that William be required to take a \$48,000 distribution. Thus, it is unclear which amount Deborah was actually requesting.

William could make these payments.

¶ 9 On March 16, 2011, Simonsen filed an objection to Deborah's request for interim attorney fees. Simonsen objected to the request for a distribution because Simonsen was not a proper party to the case, Deborah had no legal right to distributions from the LLCs, and allowing the trial court to order a distribution would deprive the LLCs of money they needed to operate. On March 24, 2011, the court held a hearing and entered an order generally continuing Deborah's petition for injunction and for interim attorney fees.

¶ 10 On May 5, 2011, the court held a hearing at which counsel for William and Deborah were present but Simonsen's counsel was not. The following matters had been scheduled and noticed for the hearing: Deborah's motion to set matter for trial; Deborah's motion to resume residency in the marital home; Deborah's motion for leave to file a notice of withholding; Deborah's motion to compel compliance with Rule 214 document requests; Deborah's return of rules to show cause; and William's petition to modify and/or reduce maintenance. Deborah's petition for interim attorney fees and preliminary injunction – the two pending motions potentially affecting Simonsen and the LLCs – were not set for hearing that day. Upon inquiry by the court, counsel for William admitted that he had failed to file a complaint against Simonsen, but assured the court that he would do so. Counsel for Deborah advised the court that Simonsen was a proper party to the action because he had, he asserted, previously mailed in a third-party complaint. Despite this assertion, no such complaint had been filed with the court or served on Simonsen on May 5th, nor was any third party complaint filed until May 11th by William and May 13th by Deborah.

¶ 11 At the hearing, attorneys for Deborah and William requested a distribution to be made

from the LLCs, because William was behind in his mortgage payments on the marital residence and in payments to Deborah for support. Both parties claimed that Simonsen was taking money out of the LLCs to pay for her attorney fees to defend against the distributions, and also putting large amounts of money from the LLCs into her personal bank account without William's consent. After the hearing, the court entered an order requiring Simonsen and William to make a distribution, within seven days, to William in the amount of \$400,000, to be drawn from assets belonging to the LLCs. This money was to be held in a client trust account for later distribution pursuant to further order of the court.

¶ 12 On May 11, 2011, William filed a third party complaint against Simonsen. On May 12, 2011, Simonsen filed an emergency motion to vacate the order of May 5, 2011, because she was not a proper party to the case, and it was improper to require a distribution of the LLCs' assets. On May 13, 2011, the court held a hearing on Simonsen's motion to vacate, and the court stayed the portion of the order requiring the distribution. Also at this hearing, Deborah filed a third party complaint against Simonsen. On May 18, 2011, Simonsen filed a revised motion to vacate, which added that she was not given notice that the parties intended to seek an order against her. On July 28, 2011, the court addressed Simonsen's motion to vacate, which it denied. The court ordered Simonsen to comply with the May 5, 2011, order by September 8, 2011. Simonsen appeals.

¶ 13

ANALYSIS

¶ 14 On appeal, Simonsen argues that: (1) Simonsen and the LLCs were not given notice of the relief requested at the May 5, 2011, hearing, and William and Deborah did not prove the elements necessary for the preliminary injunction; (2) the LLC assets used for the distribution

were not part of the marital estate; and (3) the court lacked subject matter jurisdiction over Simonsen because no cause of action was pending against her at the time of the order. Initially, we note that no appellee's brief has been filed. However, we may reach the merits of the case because the claimed errors are such that the court can objectively decide them under the appropriate standards of review without aid of an appellee's brief. *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128 (1976).

¶ 15 We will address Simonsen's argument relating to jurisdiction first, because any order entered without proper jurisdiction is rendered void. *In re Marriage of Mitchell*, 181 Ill. 2d 169 (1998). Simonsen argues that the trial court lacked subject matter jurisdiction over her at the time of the May 5, 2011, order; therefore, the court had no power to issue the order against her. Specifically, Simonsen contends that either Deborah or William was required to file a third party complaint against her in order to vest the court with proper jurisdiction. Whether a court had proper jurisdiction is a question of law, which we review *de novo*. *Doctor's Associates, Inc. v. Duree*, 319 Ill. App. 3d 1032 (2001); *Mugavero v. Kenzler*, 317 Ill. App. 3d 162 (2000).

¶ 16 Simonsen claims that the court lacked subject matter jurisdiction over her; however, a court's lack of jurisdiction over a party is correctly characterized as personal jurisdiction. Subject matter jurisdiction refers to a court's power both to adjudicate the general question involved and to grant the particular relief requested. *In re Estate of Gebis*, 186 Ill. 2d 188 (1999). Personal jurisdiction refers to whether a court has acquired the ability to apply its subject matter jurisdiction to an individual. *In re Shawn B.*, 218 Ill. App. 3d 374 (1991).

¶ 17 The circuit court of Will County is a court of general jurisdiction vested with the authority to hear matters arising pursuant to the Illinois Marriage and Dissolution of Marriage

Act (750 ILCS 5/101 et seq. (West 2010)) and it therefore has subject matter jurisdiction over the instant matter.

¶ 18 To determine whether the court had personal jurisdiction over Simonsen, we look to section 2-406 of the Code of Civil Procedure. That section states that "[i]f a complete determination of a controversy cannot be had without the presence of other parties, the court may direct them to be brought in." 735 ILCS 5/2-406(a) (West 2010). This section further states that a defendant "may by third-party complaint bring in as a defendant any person not a party to the action who is or may be liable to him or her for all or part of the plaintiff's claim against him or her." 735 ILCS 5/2-406(b) (West 2010). Where a party has not been served with process as required by law, the trial court lacks jurisdiction to enter a judgment against that party. *People v. Grau*, 263 Ill. App. 3d 874 (1994).

¶ 19 Our review of the record shows that William and Deborah did not file or serve a third-party complaint against Simonsen until after the court entered the May 5, 2010, order. Without filing a third-party complaint, Simonsen was not a proper party to the action at the time the trial court entered the order. Therefore, without personal jurisdiction, the trial court was without authority to enter a preliminary injunction against her. See *Mitchell*, 181 Ill. 2d 169. This issue is dispositive of this case and makes it unnecessary to address Simonsen's remaining arguments. Accordingly, we reverse the trial court's denial of Simonsen's motion to vacate the May 5, 2010, order.

¶ 20 CONCLUSION

¶ 21 For the foregoing reasons, the judgment of the circuit court of Will County is reversed, and the cause is remanded for further proceedings.

¶ 22 Reversed and remanded.