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2012 IL App (3d) 110769-U

Order filed December 11, 2012

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2012

V. BOMMIASAMY, M.D. and V.	)	Appeal from the Circuit Court
BOMMIASAMY, M.D., S.C.,	)	of the 10th Judicial Circuit,
	)	Peoria County, Illinois
Plaintiffs-Appellants,	)	
	)	Appeal No. 3-11-0769
v.	)	Circuit Nos. 04-L-301, 05-L-0468
	)	07-L-162, 10-L-81
RAKESH PARIKH, M.D.,	)	
	)	Honorable Scott A. Shore,
Defendant-Appellee.	)	Judge, Presiding.

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PRESIDING JUSTICE SCHMIDT delivered the judgment of the court.  
Justice Holdridge concurred in the judgment.  
Justice Wright specially concurred.

**ORDER**

- ¶ 1 *Held:* The plaintiffs' voluntary dismissal of their cause of action was not a final and appealable order, as they retained the absolute right to refile the action for one year. As such, we lack the jurisdiction to hear plaintiffs' appeal. Appeal dismissed.
- ¶ 2 This breach of contract action between the plaintiffs, Dr. V. Bommiyasamy and V.

Bommiasamy, M.D., S.C. (hereinafter the Bommiasamys), and the defendant, Dr. Rakesh Parikh, began on September 22, 2004, following a sale of stock transaction in April 2004. It involves multiple parties and a tortured procedural history that will be detailed below as needed. The circuit court of Peoria County granted the plaintiffs' motion for voluntary dismissal (filed by counsel) pursuant to section 2-1009 of the Illinois Code of Civil Procedure (the Code) (735 ILCS 5/2-1009 (West 2011)) over the plaintiffs' *pro se* objection. On August 12, 2011, the Bommiasamys filed a motion to vacate the voluntary dismissals of their claims, which the trial court denied.

¶ 3 The Bommiasamys appeal, claiming, *inter alia*, that the trial court erred in allowing their counsel of record to voluntarily dismiss their claims over their objection, and that the voluntary dismissals were prejudicial to their case. We find that we lack the jurisdiction to entertain the Bommiasamys' appeal, as their voluntary dismissal was not a final and appealable order.

¶ 4 **BACKGROUND**

¶ 5 Wilmer Andrada, Bradley Gates, the Bommiasamys, and Parikh entered into a sale of stock agreement on April 1, 2004. The transaction related to an entity known as Health Care Labs, Inc., which is no longer in business. Parikh was to purchase Health Care Labs, Inc., from Andrada, Gates, and the Bommiasamys for the sum of \$550,000, less any outstanding obligations and debts. Andrada filed a complaint on September 22, 2004, in Peoria County, alleging that Parikh had not fulfilled his obligations under the sale of stock agreement and had breached the contract. Parikh filed a response and counterclaim against Andrada, and a third-party complaint against the Bommiasamys, alleging, among other things, fraudulent concealment and fraudulent

misrepresentation.

¶ 6 On May 24, 2005, the Bommmasamys filed two complaints against Parikh, also related to the sale of stock transaction, in the circuit court of La Salle County, and a third complaint against Andrada and Gates, also related to the sale of stock transaction in La Salle County. Eventually, these cases were transferred to the circuit court of Peoria County and consolidated into case No. 04-L-301 (the original case filed by Andrada against Parikh for breach of contract). On August 17, 2010, the trial court entered an order granting summary judgment in favor of Andrada and against the Bommmasamys in the consolidated case No. 07-L-162, and denying Parikh's motion for summary judgment against the Bommmasamys in the current case (No. 04-L-301).

¶ 7 Turning now to the more recent events leading to this appeal, after denying Parikh's motion for summary judgment against the Bommmasamys in case No. 04-L-301, the trial court set the remaining claims on the consolidated cases for trial on July 25, 2011. On June 6, 2011, the Bommmasamys' counsel of record, Raymond Fabricius, filed a motion to withdraw, citing an "irretrievable breakdown...in the attorney client relationship." The motion also alleged that his clients had retained another attorney, William B. Kohn (the Bommmasamys' current appellate counsel). The hearing on Fabricius's motion to withdraw was noticed for June 21, 2011, prior to which both the Bommmasamys, through Kohn, and Parikh objected. The Bommmasamys' appellate counsel, Kohn, signed the response in opposition to the motion to withdraw as their "non-record" counsel, and did not enter an appearance at that point. The response alleged that the Bommmasamys sought Kohn's assistance because the Bommmasamys were having difficulty communicating with Fabricius, that Fabricius was uncooperative and refused to communicate

with Kohn about the case and that, given the pending trial date, it would be prejudicial to the Bommiasamys to allow Fabricius to withdraw. On June 21, 2011, the trial court denied Fabricius's motion to withdraw.

¶ 8 On July 11, 2011, Fabricius filed motions to voluntarily dismiss the Bommiasamys' remaining claims in case Nos. 07-L-162, 10-L-81, and 5-L-468 pursuant to section 2-1009 of the Code. The Bommiasamys filed a verified emergency motion to strike the motion to voluntarily dismiss on July 14, 2011, which was, again, filed by Kohn on the Bommiasamys' behalf as their "non-record counsel." This motion stated that Kohn was recently made aware that the Bommiasamys were having difficulty communicating with their counsel, Fabricius, and that Kohn had been contacted by the Bommiasamys in an attempt to facilitate communication. The motion further stated that the Bommiasamys had expressly advised Fabricius that he was not authorized to withdraw the Bommiasamys' claims and that, while the Bommiasamys would like to allow Fabricius to withdraw, he could only do so if the July 25, 2011, trial date in the consolidated cases was stricken and they were allowed time to retain new counsel. Kohn did not personally appear to argue the motion to strike, instead calling upon local counsel to object to the motion to dismiss. When the trial court inquired as to whether or not local counsel had the authority to unconditionally authorize the withdrawal of Fabricius and enter an appearance on behalf of Mr. Kohn, local counsel explained that he had no such authority. On July 15, 2011, the trial court issued a written order denying the Bommiasamys' motion to strike and granting their motion for voluntary dismissal. The order also granted the oral motion of Parikh to voluntarily dismiss his counterclaim. All claims and counterclaims were dismissed without prejudice and all

future dates were stricken.

¶ 9 On August 12, 2011, the Bommmasamys, again through Kohn, filed a motion to vacate the voluntary dismissals. Parikh filed an opposition to the motion to vacate. At the September 13 hearing on the motion, Kohn, again, argued that Fabricius did not have the Bommmasamys' authorization to voluntarily dismiss their claims, and that the Bommmasamys would be prejudiced by the dismissals because they had the effect of making all other orders in the case final and appealable. As a result, the Bommmasamys would then be in the "unenviable" spot of having to retain new counsel to comb through seven years' worth of litigation to determine what claims, if any, would need to be appealed, as that would be the only avenue available to them. After hearing argument by all counsel involved, the trial court stated that Fabricius did the only possible thing to protect the Bommmasamys' rights under the circumstances, and it could not see any prejudice that would result from the voluntary nonsuit of the case. The trial court issued a written order denying the Bommmasamys' motion to vacate, and this timely appeal followed.

¶ 10 ANALYSIS

¶ 11 As an initial matter, Parikh argues that this court lacks jurisdiction to entertain the appeal. Specifically, he argues that we have no jurisdiction to hear the Bommmasamys' appeal of the trial court's July 15, 2011, order granting the Bommmasamys' own motion to voluntarily dismiss because "[a]n order of voluntary dismissal cannot be appealed by the plaintiff since he or she requested the order and thus is protected from prejudice by the statute of limitations which gives the plaintiff the absolute right to refile the action within one year of a voluntary dismissal without prejudice." *Edward E. Gillen Co. v. City of Lake Forest*, 221 Ill. App. 3d 5, 9 (1991); *Kahle v.*

*John Deere Co.*, 104 Ill. 2d 302 (1984).

¶ 12 On the other hand, the Bommiasamys argue that the proposition stated above is *dicta* and an isolated, out-of-context reference that cannot be considered binding authority. It appears, however, that the Bommiasamys agree with the general rule that a plaintiff cannot appeal his or her own voluntary dismissal, but insist that an exception exists in their case. Specifically, that because the Bommiasamys' counsel did not have their authority to file a motion for voluntary dismissal, the dismissal should not be allowed to stand. This argument is without merit, and we lack the jurisdiction to hear the Bommiasamys' appeal.

¶ 13 There is an abundance of case law that is directly on point with the issue before us now, *i.e.*, "that when a plaintiff retains an absolute right to refile his lawsuit, a dismissal does not represent a final and appealable order to support his appeal." *Howard v. Druckemiller*, 238 Ill. App. 3d 937, 940 (1992); see also *Flores v. Dugan*, 91 Ill. 2d 108, 111-12 (1982); *Kahle v. John Deere Co.*, 104 Ill. 2d 302, 305-06 (1984); *Wold v. Bull Valley Management Co.*, 96 Ill. 2d 110, 112 (1983); *Dillie v. Bisby*, 106 Ill. 2d 487 (1985). We therefore lack jurisdiction to consider the Bommiasamys' appeal.

¶ 14 However, we will take the time to address the Bommiasamys' argument that their case is an exception to the rule, insofar as their counsel of record did not have their authority to file the motions for voluntary dismissal. We would like to point out that under the United States and Illinois Constitutions, an individual in a civil action has no right to counsel. *Lassiter v. Department of Social Services of Durham County*, 452 U.S. 18 (1981) (holding that the constitutional right to counsel exists only when the loss of liberty is threatened); *Johnson v.*

*Doughty*, 433 F. 3d 1001, 1019-20 (7th Cir. 2006); *Ratcliffe v. Apantaku*, 318 Ill. App. 3d 621, 627 (2000). While the right to effective assistance of counsel is firmly grounded in criminal jurisprudence, no such right exists on the civil side. *Kalabogias v. Georgou*, 254 Ill. App. 3d 740, 750 (1993).

¶ 15 In a situation such as this, where the Bomviasamys essentially argue that they should be allowed to circumvent the rule that plaintiffs cannot appeal a voluntary dismissal because their counsel took actions that were not authorized, the established principle that there is no right to counsel in a civil case is certainly relevant. The Bomviasamys cannot have it both ways. If they wanted to take a course contrary to that of their retained counsel, they should have fired him or allowed him to withdraw. The Bomviasamys hired Fabricius at the outset of this litigation and kept him on board right up until it was time for trial. If they disagreed or were unsatisfied with the representation, the burden was on the Bomviasamys to make necessary changes or retain new counsel. Instead, the Bomviasamys enlisted the help of their now appellate counsel, William Kohn, to draft objections to their actual counsel's motion to withdraw and motions to voluntarily dismiss all remaining claims, all the while signing the documents as the Bomviasamys' "non-record counsel." Frankly, we do not know what the phrase "non-record counsel" means in this sense. Furthermore, we do not believe that it has any legal significance, nor does it give rise to an exception to the general rule that a plaintiff cannot appeal his or her own voluntary dismissal when plaintiff retained the absolute right to refile within a year.

¶ 16 We do not understand why the trial court considered pleadings or argument from attorneys who alleged they were "non-record counsel." We know of no authority for such a

designation. We do not believe that Illinois Supreme Court Rule 13 (eff. Feb. 16, 2011) contemplates this maneuver. It does not really matter to our resolution of the case, but either by filing the pleadings, Kohn appeared or, alternatively, his designation of "non-record counsel" rendered the pleadings a nullity.

¶ 17 Accordingly, we find that no exception exists and we, therefore, lack jurisdiction to hear the Bommiassamys' appeal from their own motion to voluntarily dismiss pursuant to section 2-1009 of the Code.

¶ 18 Finally, if the Bommiassamys feel that their attorney's actions prejudiced them, that is another case. The Bommiassamys cannot insist that their lawyer remain in the case and then file *pro se* pleadings in opposition to those filed by their attorney. The trial court judge found the Bommiassamys' actions were a transparent attempt to avoid the looming trial date while keeping their case alive. We agree. We also note that the Bommiassamys have exercised their right to refile; case No. 12-CV-7314 is currently pending in the United States District court for the Northern District of Illinois.

¶ 19 CONCLUSION

¶ 20 For the foregoing reasons, we find that we lack jurisdiction to hear the plaintiffs' appeal.

¶ 21 Appeal dismissed.

¶ 22 JUSTICE WRIGHT, specially concurring.

¶ 23 I concur in the portion of the majority's analysis concluding that this court lacks jurisdiction to consider the Bommiassamy's appeal. However, the tone of the discussion beginning at paragraph 15 of the order questioning the terminology employed by appellate

counsel adds nothing to the author's analysis (*People v. Hackett*, 2012 IL 111781, ¶ 30) and for this reason, I concur in the judgment only.