2016 IL App (1st) 150472-U
No. 1-15-0472

THIRD DIVISION
December 14, 2016

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BAKER & DANIELS, LLP,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 10 L 5220
	)	
JAMES B. SAVAGE,	)	The Honorable
	)	Brigid Mary McGrath,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* That portion of Savage's appeal relating to the October 15, 2014 summary judgment order is dismissed for lack of jurisdiction where he did not file a notice of appeal therefrom, nor did he file a timely posttrial motion directed against that final order. Therefore, we need not consider whether the circuit court erred in accepting the conclusory opinions set forth in Baker's supporting affidavits for summary judgment. That portion of the circuit court's November 25, 2014 order substituting Faegre Baker Daniels, LLP for Baker & Daniels LLP is affirmed where, as here, "the original party held the interest at the action's commencement and a motion to substitute parties is filed to negate the opposing party's possible argument of surprise." The circuit court's use of a *nunc pro tunc* order to effectuate the substitution of parties is affirmed where the *nunc pro tunc* order properly corrects the caption of the case to reflect the proper parties.

¶ 2 Defendant James B. Savage (Savage) appeals following the circuit court's denial of his postjudgment motion to vacate pursuant to section 2-1203 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1203 (West 2014)).

¶ 3 BACKGROUND

¶ 4 On May 4, 2010, plaintiff law firm, Baker & Daniels LLP (Baker), filed a two-count complaint in the law division of the circuit court of Cook County against Savage for attorney fees. In count I, Baker alleged a breach of contract for legal services relating to Savage's interests in the probate proceedings for the estate of his mother, Ruthanne B. Savage, in case number 99 P 9408. Baker stated that on June 17, 2008, the parties entered into a written engagement agreement (estate engagement agreement) pursuant to which Savage owed Baker $88,308.12 plus interest, fees, and costs. In count II, Baker alleged a breach of contract for legal services relating to Savage's pursuit of claims for fraud against Gerald J. Mannix, Davis McGrath LLC, Julia D. Mannix, and Julia D. Mannix LLC. Baker stated that on July 31, 2009, the parties entered into another written engagement agreement (Mannix engagement agreement) pursuant to which Savage owed Baker $24,193.69 plus interest, fees, and costs. Among the exhibits attached to Baker's complaint are copies of the estate engagement agreement and the Mannix engagement agreement. The estate engagement agreement reflects the signatures of both parties, and while the Mannix engagement agreement reflects only Baker's signature, Savage later admits entering into both engagement agreements with Baker.

¶ 5 On September 20, 2010, Savage filed a motion to dismiss pursuant to section 2-619(a)(3) of the Code (735 ILCS 5/2-619(a)(3) (West 2010)). Savage alleged that Baker's complaint involved the same attorney fee issues raised by his petition in the probate division to adjudicate the attorneys lien held by Baker for work related to the removal of his sister, Elizabeth Savage,

as independent executor of their mother's estate. Savage argued that the attorney fees sought in Baker's law division case "were supposed to be obtained by [Baker] in that probate case, pursuant to an order of the probate judge," and Baker's law division case should be dismissed "due to a prior action pending." The circuit court denied Savage's motion to dismiss without prejudice on February 14, 2011.

¶ 6 On March 16, 2011, Savage filed an answer to Baker's complaint admitting that he entered into both engagement agreements with Baker and received monthly invoices from Baker for legal services, but denying that true and accurate copies of those invoices were attached to Baker's complaint.

¶ 7 On June 21, 2011, Baker filed a motion for summary judgment pursuant to section 2-1005 of the Code (735 ILCS 5/2-1005 (West 2010)), which was supported by a verified affidavit from firm partner Rachel Nguyen certifying the amounts due and owing under the engagement agreements and reflected in the invoices attached to Baker's complaint. On August 15, 2011, Savage filed a response challenging the reasonableness of the attorney fees sought by Baker and requesting leave to depose the affiants and attorneys identified in the invoices pursuant to Supreme Court Rule 191 (eff. Jan. 4, 2013). On August 29, 2011, Baker filed a reply to Savage's response asserting that it had established a *prima facie* case for breach of contract by failing to pay attorney fees, that it was not Savage's role to explore the reasonableness of the attorney fees, and that Rachel Nguyen's verified affidavit, the engagement agreements and invoices were sufficient to allow the court to determine the reasonableness of the attorney fees. On December 14, 2011, the circuit court denied Baker's motion for summary judgment without prejudice.

¶ 8 Pursuant to a case management order entered on March 14, 2012, Baker filed the supplemental affidavit of another firm partner, David M. Allen, certifying the accuracy of the amounts due and owing under the engagement agreements and reflected in the invoices attached to Baker's complaint. Allen further averred that the hourly rate and the number of hours expended were fair and reasonable, and consistent with the prevailing community rates for the type of legal services performed. As will become relevant, the supplemental affidavit filed on April 20, 2012, is the first reference in the record that plaintiff law firm Baker became known as Faegre Baker Daniels, LLP.

¶ 9 On May 7, 2012, also pursuant to the case management order, Baker filed a memorandum of law in support of its motion for summary judgment, identifying itself as "Faegre Baker Daniels LLP, an Indiana Limited Liability Partnership, formerly Baker & Daniels LLP," and renewing its motion for summary judgment as previously filed with the addition of David Allen's supplemental affidavit. In its motion, Baker maintained that it had established a *prima facie* case against Savage for breach of contract by failing to pay attorney fees.

¶ 10 On June 25, 2012, Savage filed a Supreme Court Rule 191 (eff. Jan. 4, 2013) affidavit requesting, as before, leave to depose the affiants and attorneys identified in the invoices from Baker. On August 3, 2012, the circuit court entered a briefing schedule order providing, *inter alia*, that the requested depositions were to be completed by August 21, 2012.

¶ 11 On August 24, 2012, Baker filed another supplemental affidavit from firm partner David Allen averring, as "a duly authorized representative at Faegre Baker Daniels LLP, formerly Baker & Daniels, LLP, an Indiana Limited Liability Partnership ('Baker & Daniels')," that he personally annotated the invoices to reflect task-itemized billing.

¶ 12 When the parties met for the deposition of Allen on August 27, 2012, Savage refused to waive attorney-client privilege and filed an emergency motion seeking an order "compelling deposition answers from David Allen without a waiver of the attorney-client privilege" because there were "other pending cases that would be affected by such a waiver." On October 23, 2012, the circuit court entered an order requiring Savage to execute a waiver of privilege of confidentiality before deposing Allen or any other Baker attorney, and that such deposition testimony would be subject to a protective order limiting its use to this litigation only.

¶ 13 On July 8, 2013, Savage filed a response to Baker's renewed motion for summary judgment arguing, *inter alia*, that Baker was precluded from filing a separate cause of action for attorney fees in the law division while the underlying litigation in probate court remained pending. On August 5, 2013, Baker filed a reply, arguing that the cases relied upon by Savage were inapplicable because they involved the issue of attorney fees pursuant to the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/101 *et seq.* (West 2012)) or the Illinois Parentage Act (750 ILCS 40/1 *et seq.* (West 2012)), and none of the cases support Savage's proposition that Baker was required to present mitigation evidence in a suit for the recovery of attorney fees.

¶ 14 On November 18, 2013, the circuit court entered an order granting summary judgment in favor of Baker on count II of its complaint and reserving the determination of the judgment amount pending the outcome of count I of Baker's complaint, which was transferred to the probate judge presiding over the estate of Savage's mother "to determine whether she should rule on the pending motion for summary judgment as to count I of the complaint." When the probate judge declined to rule, the matter was returned to the law division and a briefing schedule was set

on Baker's renewed motion for summary judgment. On December 18, 2013, Savage filed a motion to reconsider, which the circuit court denied on March 4, 2014.

¶ 15 Thereafter, on August 25, 2014, Savage filed an affidavit pursuant to section 1-109 of the Code (735 ILCS 5/1-109 (West 2014)), stating, *inter alia*, that "[t]he September 3, 2009, David Allen letter to me (a true and correct copy of which is attached) signifies that a motion for entry of judgment in the Probate Court for the attorney fees in question hadn't been filed by Allen precisely because the Probate Court would regard his attorney fees for the Removal as exorbitant and unreasonable." Savage further stated, "The Probate Court Order of 27 May 2009 directing that my legal fees, incurred in connection with the Removal, are owed [Baker] not by me, but by my sister, should defeat the present claim for attorney fees against myself." Savage added that he never signed the Mannix engagement agreement at issue in count II of Baker's complaint.

¶ 16 On October 15, 2014, the circuit court granted summary judgment in favor of Baker on count I of its complaint and entered judgment against Savage in the amount of $68,548.62. Noting "summary judgment as to liability on count II having previously been granted by an order entered herein on Nov. 18, 2013," the court also entered judgment against Savage in the amount of $17,802.69. In the written order to that effect, the court added that this was a final and appealable judgment with no cause for delay in enforcement.

¶ 17 Twenty-eight days later, on November 12, 2014, Baker filed a motion to substitute Faegre Baker Daniels, LLP as party plaintiff and amend the October 15, 2014 order *nunc pro tunc* to reflect the substituted party plaintiff. Attached as an exhibit was a copy of the certificate of merger of Baker into Faegre Baker Daniels, LLP, executed December 22, 2011, effective January 1, 2012.

¶ 18 On November 25, 2014, the circuit court granted Baker's motion and entered an amended judgment order substituting Faegre Baker Daniels, LLP as party plaintiff, *nunc pro tunc* to October 15, 2014. The court added that this was a final and appealable judgment with no cause for delay in enforcement.

¶ 19 Twenty-nine days later, on December 24, 2014, Savage filed a posttrial motion to vacate the original judgment order entered on October 15, 2014, and the amended judgment order entered on November 25, 2014, pursuant to section 2-1203 of the Code (735 ILCS 5/2-1203 (West 2014)). As relevant here, he complained that "[n]o explanation was offered as to how a law firm that had not existed since December of 2011, BAKER & DANIELS, LLP, could obtain a judgment and then file a motion to substitute its alleged successor as the Plaintiff who obtained the judgment." Savage argued that the amended and original judgment orders should be vacated for three reasons. First, Baker's assertion in its motion to substitute party plaintiff, that "all clients and account receivables of both Baker & Daniels LLP and Faegre & Benson LLP, including the accounts of James B. Savage that are the subject of this litigation, were assumed by the newly formed Faegre Baker Daniels LLP," was unsupported by any affidavit or other admissible evidence in contravention of Supreme Court Rule 191(a) (eff. Jan. 4, 2013), which governs affidavits in support or opposition to a motion for summary judgment. Second, Baker's failure to have joined Faegre Baker Daniels, LLP as a necessary party since December 2011, made the original judgment order a nullity that could not be amended. Third, the entry of judgment in favor of "BAKER & DANIELS, LLP" on October 15, 2014, was not a clerical error that could be corrected *nunc pro tunc*, but a legal or substantive error.

¶ 20 On January 20, 2015, the circuit court entered an order denying Savage's posttrial motion to vacate, and Savage filed a notice of appeal on February 18, 2015.

¶ 21 ANALYSIS

¶ 22 As a threshold matter, we note Savage's jurisdictional statement in his appellate brief that, pursuant to Supreme Court Rules 301 (eff. Feb. 1, 1994) and 303 (eff. Jan. 1, 2015), a notice of appeal "was timely filed on February 18, 2015," and "the Circuit Court denied [Savage's] Post-Trial Motion and Motion to Vacate" on January 20, 2015. See *Geisler v. Everest National Insurance Company*, 2012 IL App (1st) 103834, ¶ 44 (the appellate court has an independent duty to consider its jurisdiction).

¶ 23 Supreme Court Rule 301 governs the method of review and provides that every final judgment in a civil case is appealable as a matter of right, the filing of a notice of appeal being the only jurisdictional step required. Supreme Court Rule 303 governs when the notice of appeal must be filed in a civil case and requires that the notice of appeal be filed within 30 days after the entry of the final judgment, or where a timely posttrial motion directed against the final judgment has been filed, the notice of appeal must be filed "within 30 days after the entry of the order disposing of the last pending postjudgment motion directed against that judgment or order, irrespective of whether the circuit court had entered a series of final orders that were modified pursuant to postjudgment motions." Ill. S. Ct. R. 303(a)(1) (eff. Jan. 1, 2015).

¶ 24 Moreover, "any judgment, order or decree from which an appeal could have been taken may not be reviewed on appeal from a subsequent order entered in the matter." *Bank of Ravenswood v. Maiorella*, 104 Ill. App. 3d 1072, 1074 (1982). Put another way, absent a timely appeal from a final and appealable order, we are without jurisdiction to consider the propriety of that order. *Bank of Ravenswood*, 104 Ill. App. 3d at 1074. For the reasons that follow, we lack jurisdiction to consider Savage's contentions relating to the October 15, 2014 summary judgment order.

¶ 25 Here, the October 15, 2014 order granting summary judgment in favor of Baker on both counts of its complaint was a final and appealable order. *Father & Sons Home Improvement II, Inc. v. Stuart*, 2016 IL App (1st) 143666, ¶ 21; see also *Diggs v. Suburban Medical Center*, 191 Ill. App. 3d 828, 836 (1989) ("An order granting summary judgment is a final order."). For purposes of Supreme Court Rule 303(a)(1), a notice of appeal from that final judgment must be filed within 30 days thereafter, or within 30 days after the entry of an order disposing of a timely posttrial motion directed against that final judgment. Savage, however, did not file a notice of appeal from the final order entered on October 15, 2014, nor did he file a timely posttrial motion directed against that final order granting summary judgment in favor of Baker on both counts of its complaint. Having failed to file a timely notice of appeal from the October 15, 2014 order, which was final and appealable, Savage cannot challenge, and we cannot consider, its propriety under the guise of a challenge to the *nunc pro tunc* amendment to that final order. *Breslow*, 306 Ill. App. 3d at 52 (construing *Pagano v. Rand Materials Handling Equipment Company, Inc.*, 249 Ill. App. 3d 995, 1001 (1993)). Put another way, we do not have jurisdiction to consider Savage's contentions relating to the October 15, 2014 summary judgment order, *i.e.*, whether the circuit court erred in granting summary judgment in Baker's favor on both counts of its complaint, and in accepting the conclusory opinions set forth in Baker's supporting affidavits regarding the reasonableness of attorney fees and in "forcing" Savage to waive attorney-client privilege before deposing any Baker attorneys. *Shutkas Electric, Inc. v. Ford Motor Company*, 366 Ill. App. 3d 76, 82 (2006); *Bank of Ravenswood*, 104 Ill. App. 3d at 1073-74.

¶ 26 We have jurisdiction, however, to consider Savage's contentions: (1) that the circuit court abused its discretion in substituting the party plaintiff, Faegre Baker Daniels, LLP, after the entry of summary judgment; (2) that the circuit court erred in entering the resulting substitution

order *nunc pro tunc*; and (3) that Baker's motion to substitute party plaintiff and amend the summary judgment order *nunc pro tunc* failed to comply with Supreme Court Rule 191. See *In re Marriage of Breslow*, 306 Ill. App. 3d 41, 51 (1999) (a party may not challenge provisions of the underlying order that was corrected *nunc pro tunc*).

¶ 27 To that end, the crux of Savage's first argument, as set forth in his reply brief, is that the motion to substitute party plaintiff and amend the October 15, 2014 order "does not seek joinder or to Amend the Complaint so that the Court could obtain jurisdiction against [Faegre Baker Daniels, LLP], and thus entire cause of action since January 2012 was pursued by a non-existent plaintiff." We review the circuit court's decision to allow the substitution of Faegre Baker Daniels, LLP as party plaintiff for an abuse of discretion. *Bayview Loan Servicing, LLC v. Cornejo*, 2015 IL App (3d) 140412, ¶ 15.

¶ 28 We disagree with Savage's suggestion that Baker's failure to join Faegre Baker Daniels, LLP as a necessary party rendered the October 15, 2014 order a nullity. See *C.L. Maddox, Inc. v. Royal Insurance Company of America*, 208 Ill. App. 3d 1042, 1058 (1991) (rejecting contention that the failure to name bank as a plaintiff rendered the judgment void). As Baker correctly points out, Faegre Baker Daniels, LLP was a party to the underlying litigation by reason of the merger of Baker into Faegre Baker Daniels, LLP, and "[t]he timing of the motion to substitute parties or the opposing party's awareness thereof also do not abate the action when [as here] the original party held the interest at the action's commencement and a motion to substitute parties is filed to negate the opposing party's possible argument of surprise." *Aurora Bank FSB v. Perry*, 2015 IL App (3d) 130673, ¶ 33.

¶ 29 The plain language of section 2-1008(a) of the Code provides that a change of interest will not cause the action to abate. *C.L. Maddox, Inc.*, 208 Ill. App. 3d at 1059. It states in pertinent part:

> "(a) Change of interest or liability. If by reason of marriage, bankruptcy, assignment, or any other event occurring after the commencement of a cause or proceeding, *either before or after judgment*, causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after commencement of the action, it becomes necessary or desirable that any person not already a party be before the court, or that any person already a party be made party in another capacity, *the action does not abate*, but on motion an order may be entered that the proper parties be substituted or added, and that the cause or proceeding be carried on with the remaining parties and new parties, *with or without a change in the title of the cause*. (Emphasis added.) 735 ILCS 5/2-1008(a) (West 2014).

¶ 30 The plain language of section 2-1008(a) further provides that upon motion, either before or after judgment, an order may be entered substituting the proper party, *i.e.*, Faegre Baker Daniels, LLP, and that the cause maintained with or without a change in the title of the cause. *C.L. Maddox, Inc.*, 208 Ill. App. 3d at 1059. Savage's arguments to the contrary are without merit. Accordingly, we find no abuse of discretion in allowing the substitution of Faegre Baker Daniels, LLP as party plaintiff. *Cornejo*, 2015 IL App (3d) 140412, ¶ 17.

¶ 31 Next, we consider *de novo* whether the amended judgment order entered on November 25, 2014, satisfied the legal criteria for a *nunc pro tunc* order. *Gounaris v. City of Chicago*, 321 Ill. App. 3d 487, 493 (2001). The circuit court "may modify its judgment *nunc pro tunc* to correct a clerical error or matter of form so that the record conforms to the judgment actually

rendered" (*Beck v. Stepp*, 144 Ill. 2d 232, 238 (1991), abrogated on other grounds by *Kingbrook, Inc. v. Pupurs*, 202 Ill. 2d 24 (2002)), and it may do so at any time notwithstanding the general rule that it retains jurisdiction only for 30 days after entry of a final order (*Breslow*, 306 Ill. App. 3d at 51). As relevant here, clerical errors in an order such as the proper name of a party may be modified at any time *nunc pro tunc* (*Jayko v. Fraczek*, 2012 IL App (1st) 103665, ¶ 28), where the correcting order is based upon evidence such as "a note, memorandum or memorial paper remaining in the files or upon the records of the court" (*Anderson v. Alberto-Culver USA, Inc.*, 337 Ill. App. 3d 643, 662 (2003)). It is worth noting that the difference between a judicial and clerical error " 'does not depend so much upon the source of the error as upon whether it was the deliberate result of judicial reasoning and determination [citation], as opposed to inadvertence in the ministerial matter of putting in form the judgment of the court [citation].' " *Jayko*, 2012 IL App (1st) 103665, ¶ 29 (quoting *Kooyenga v. Hertz Equipment Rentals, Inc.*, 79 Ill. App. 3d 1051, 1058 (1979). Based on the court's inherent power to correct its own records, it is also worth noting that nothing precludes the court from doing so *sua sponte* at any time with notice to the parties. *In re Marriage of Hirsch*, 135 Ill. App. 3d 945, 955 (1985). Ultimately, "the end result of a successful challenge to a *nunc pro tunc* order is that the order will be found void." *Breslow*, 306 Ill. App. 3d at 51.

¶ 32 Here, the amended judgment order substituting Faegre Baker Daniels, LLP as party plaintiff and doing so *nunc pro tunc* was properly based upon the records of the court. *Pagano*, 249 Ill. App. 3d at 999. The supplemental affidavit of firm partner David Allen, which was filed on April 20, 2012, is the first reference in the record that Baker became known as Faegre Baker Daniels, LLP. On May 7, 2012, Baker filed a memorandum of law in support of its motion for summary judgment, identifying itself as "Faegre Baker Daniels LLP, an Indiana Limited

Liability Partnership, formerly Baker & Daniels LLP," and renewing its motion for summary judgment as previously filed. On August 24, 2012, Baker filed another supplemental affidavit from firm partner David Allen averring that he was "a duly authorized representative at Faegre Baker Daniels LLP, formerly Baker & Daniels, LLP, an Indiana Limited Liability Partnership ('Baker & Daniels')." These filings were a part of the official court record before the circuit court granted summary judgment in favor of "Baker" on October 15, 2014. Accordingly, the amendatory portion of the November 25, 2014 order did not substantively alter the order entered on October 15, 2014, but merely substituted Faegre Baker Daniels, LLP as party plaintiff. *Pagano*, 249 Ill. App. 3d at 999; *Anderson*, 337 Ill. App. 3d at 662; *Johnson v. First National Bank of Park Ridge U/T No. 205*, 123 Ill. App. 3d 823, 828 (1984). Accordingly, we find no error in the circuit court's *nunc pro tunc* order.

¶ 33 Third and last, we reject Savage's contention that Baker's motion to substitute party plaintiff and amend the summary judgment order *nunc pro tunc* failed to comply with Supreme Court Rule 191. The circuit court rejected this same contention, which was raised in Savage's posttrial motion to vacate the original and amended judgment orders, and we agree with the court's determination because the affidavit requirements of Supreme Court Rule 191(a) "only to affidavits in proceedings under sections 2-1005, 2-619, and 2-301(b) of the Code of Civil Procedure." *Marquette National Bank v. B.J. Dodge Fiat, Inc.*, 131 Ill. App. 3d 356, 362 (1985).

¶ 34 CONCLUSION

¶ 35 Based on the foregoing, we dismiss the portion of Savage's appeal relating to the October 15, 2014 order for lack of jurisdiction and affirm the circuit court's denial of Savage's motion to vacate the *nunc pro tunc* order substituting Faegre Baker Daniels, LLP as party plaintiff. *Shutkas Electric, Inc.*, 366 Ill. App. 3d at 83-84.

¶ 36 Appeal dismissed in part; affirmed in part.