2016 IL App (1st) 151233-U

FOURTH DIVISION
August 4, 2016

No. 1-15-1233

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re ESTATE OF MERCEDES CHAIN, a Disabled Person,	)	Appeal from the Circuit Court of Cook County.
(Vance Ketchens Petitioner-Appellant,	)	No. 98 P 8831
v.	)	
Virgie J. Smith, Guardian of the Person and Estate of Mercedes Chain, a Disabled Person, Respondent-Appellee).	)	Honorable Ann Collins-Dole, Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Justices Howse and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: Where appellee had not filed brief and appellant made out *prima facie* case of reversible error, we vacate trial court's denial of petition to vacate and remand for further proceedings. Trial court did not lack jurisdiction to rule on petition even though former disabled person whose estate court had monitored had died.

¶ 2 In 1998, respondent Virgie Smith was appointed as the guardian of her aunt Mercedes Chain's estate, as Chain was suffering from dementia-like symptoms. Smith attempted to serve a citation to discover information on petitioner Vance Ketchens, in order to uncover information about a condominium that he and Chain co-owned. According to Smith, Ketchens had defrauded Chain into giving him funds for the down payment on the condo, then re-recorded the deed to

show that he and Chain were joint tenants rather than tenants in common. Eventually, the guardianship court entered a default judgment against Ketchens and entered an order changing the ownership of the condo back to a tenancy in common.

¶ 3 In 2014, Ketchens filed a petition to vacate the trial court's orders finding him in default and modifying the deed, alleging that he had never been served with notice of the citation. After Smith did not respond to the petition to vacate, the trial court awarded Ketchens judgment on the petition. But the trial court *sua sponte* reconsidered its ruling and denied the petition after finding that it lacked subject-matter jurisdiction over the petition after Chain's death. Ketchens appeals, arguing that the trial court erred in concluding that it lacked subject-matter jurisdiction.

¶ 4 Smith has not filed an appellee's brief. In the absence of an appellee brief, we may reverse a trial court's judgment where the appellant makes a *prima facie* showing of reversible error. We conclude that Ketchens has done so here, as the trial court had jurisdiction to decide the petition to vacate.

¶ 5 We decline to reach the merits of the petition to vacate. We have no briefing on the issue at all, since Ketchens did not argue the merits in his appellant's brief, and the record is not entirely clear regarding the trial court's view of the merits, or whether the merits were considered at all. The trial court should have an opportunity to review the merits of the petition where its initial ruling was impacted by a perceived lack of jurisdiction. Thus, we vacate the trial court's judgment and remand for further proceedings on the petition.

¶ 6 I. BACKGROUND

¶ 7 On September 28, 1998, Smith, Chain's niece, filed a petition seeking to be appointed as the guardian of Chain's person and estate due to Chain's disability. The trial court appointed Smith as Chain's temporary guardian to investigate Chain's assets, including her "real estate."

But the court did not authorize Smith to collect those assets. On November 13, 1998, Smith was appointed as the plenary guardian of Chain's estate and person, after the trial court found that Chain had a "greatly decreased memory, poor judgment, and [an] inability to make sound rational decisions."

¶ 8 On the same day that Smith was appointed as plenary guardian, Ketchens, acting *pro se*, filed his own petition seeking to be appointed as Chain's guardian, noting that she had a "poor memory" and "confusion." At the bottom of the petition, Ketchens listed his address as, "1169 So. Plymouth Ct. #503."

¶ 9 On December 18, 1998, Smith filed a petition seeking a citation to discover information from Ketchens. The petition alleged that Ketchens had purchased a condominium at 1169 South Plymouth Court, Unit 503, in Chicago, using $120,000 of Chain's money as a down payment. Smith alleged that the condominium was originally purchased with Ketchens and Chain as tenants in common, but, one week later, Ketchens "re-recorded the deed as joint tenants." She also alleged that Ketchens lived in the condo without paying Chain rent. Smith sought a citation requiring Ketchens "to answer to allegations of fraud and misrepresentation in the purchase of [the condo]."

¶ 10 The court issued the citation to discover information. A Cook County sheriff's deputy attempted to serve Ketchens with the citation on February 1, February 3, and February 5, 1999 but could not make contact with Ketchens at 1169 South Plymouth Court, Unit 503.

¶ 11 On April 19, 1999, Ketchens sent Judge Dowdle—the judge handling the case at the time—a letter expressing his concerns with Smith's appointment as guardian:

> "I *** am writing you on behalf of Mercedes Chain and the legal guardian ([Smith]) who was appointed in your court on November 13, 1998. Since that time

> Mercedes Chain['s] life style has changed for the wors[e]. She is now in a position where she never has any money on hand nor in the bank to take care of her daily needs. [Smith] has taken it upon herself to write to known friends of Mercedes Chain requesting they never call or visit at Mercedes Chain place of residence. Mercedes Chain has called me numerous times requesting [that] I help her obtain a lawyer to have [Smith] removed as guardian."

The trial court forwarded the letter to Smith's counsel.

¶ 12 In response to the letter, Smith filed an interim report of care, which noted that she had been appointed as plenary guardian "pursuant to a contested hearing after objection to appointment by [Ketchens]." The report detailed the ways in which Smith had been acting in Chain's best interests. Smith also noted that Ketchens had made "repeated telephone calls" to Chain "informing her that she [was] being forced to live under conditions which [did] not allow her to make her own decisions." And, Smith alleged, Ketchens had "refused to cooperate with [her]" by failing "to disclose the agreement he [had] with [Chain] in the purchase of [the condo]."

¶ 13 For nearly three years, little occurred in the case that related to Ketchens, although the accounts filed by Smith continued to list the condo as one of Chain's assets.

¶ 14 On April 30, 2002, the trial court ordered an alias citation to issue for Ketchens and appointed a special process server. On June 26, 2002, Smith filed a motion for additional time to serve the citation by publication. The court granted the motion.

¶ 15 On November 4, 2002, Smith filed a certificate of publication from the Law Bulletin Publishing Co., which asserted that it ran notice of the citation in the Chicago Daily Law Bulletin on October 18, October 25, and November 1, 2002. The notice listed Ketchens's address as

"1169 S. Plymouth Court, Chicago, IL 60605" and told Ketchens to appear in court on November 18, 2002 in order to answer the fraud allegations.

¶ 16 In an affidavit for service by publication, Smith's attorney stated that Ketchens was "concealed within the state so that process [could not] be serve upon [him]." The affidavit listed Ketchens's address as "1169 S. Plymouth Ct., Chicago, IL 60605."

¶ 17 The court, finding that Ketchens "was given notice of the citation," found Ketchens to be in default and scheduled a date for a prove-up on the citation. On February 26, 2003, the court converted the citation to discover information into a citation to recover Chain's assets from Ketchens.

¶ 18 On March 21, 2003, the court set aside the deed showing that Ketchens and Chain held the condo as joint tenants and ordered that title to the condo "shall be reestablished as tenants in common between [Ketchens] and Mercedes Chain and [this order] shall be recorded against the real property."

¶ 19 On March 13, 2008, the court entered an order stating that Chain had died and requiring Smith to file a final account of Chain's assets. On January 15, 2009, the court approved the final accounting and closed Chain's estate.

¶ 20 On August 18, 2014, Ketchens filed the section 2-1401 petition that is at issue in this appeal. Ketchens asserted that the court's orders of November 18, 2002 (finding him to be in default) and March 21, 2003 (setting aside the deed showing that Ketchens and Chain held the condo as joint tenants) were void for lack of personal jurisdiction because he was never properly served with notice of the citation. He stated that neither the sheriff nor the special process server served him with the citation in 1999 or 2002, respectively. And he argued that Smith had not

complied with section 2-206 of the Code of Civil Procedure (735 ILCS 5/2-206 (West 2002)) when she attempted to serve him by publication.

¶ 21 Ketchens attached the affidavits of the sheriff and the special process server. The sheriff's deputy's affidavit noted that he had attempted to serve Ketchens at the condo three times, but could not. The affidavit of the special process server stated that, at 9:30 a.m. on April 20, 2002, he "post[ed] a copy" of the citation "on the main door of the [condo], there being no one in the possession of the premises at [the] time of service." The affidavit also listed notes of the attempts the special process server had made to serve Ketchens:

> "19 April 02 2030 hours….Subject @ apt did not respond to bell.
>
> 20 April 02 0930 hours….Subject believed to be in apt, citation placed under door to apt. #503.
>
> 23 April 02 Employment information obtained form [*sic*] attorney/office
>
> 24 April 02 A.L.A.S. (Attorney Assurance Society) 311 S. Wacker suite 5700 ….denied subject *** is a former employee. NFI"

¶ 22 Ketchens also included an affidavit of his own, which said that he had lived at the condo "continuously from March 1994 until the present date." He said that from March 1994 through 2003, he lived at the condo with the mother of his youngest daughter and his three children. His oldest daughter left home to attend college in 1996. In 2003, the mother of his child moved out and his cousin moved in. Ketchens stated that he had to travel for his work as a computer consultant but that, when he was away from home, the condo was "occupied by one or more of [his] children," the mother of his youngest child, or his cousin. Ketchens denied ever receiving notice of the citation to discover information.

¶ 23 But Ketchens acknowledged being served with a copy of the summons and complaint in case number 11 CH 5934, a lawsuit seeking involuntary partition of the condo between him and Chain's estate. Ketchens said he accepted service of the complaint and summons in that case while he was living at the condo in 2011.

¶ 24 On October 28, 2014, Ketchens moved for a default judgment on his section 2-1401 petition, noting that Smith had not appeared or otherwise responded to his petition. The court granted the motion and vacated the November 18, 2002 and March 21, 2003 orders "for lack of personal jurisdiction" over Ketchens.

¶ 25 On January 6, 2015, the court *sua sponte* vacated its order awarding Ketchens judgment on his section 2-1401 petition. On March 9, 2015, the court denied the section 2-1401 petition and the motion for a default judgment on that petition, stating, "Upon the death of the ward and the closing of the Guardianship Estate, this Court no longer has jurisdiction." Ketchens appealed from the March 9, 2015 order after this court granted him leave to file a late notice of appeal.

¶ 26 II. ANALYSIS

¶ 27 On appeal, Ketchens contends that the trial court erred in concluding that it lacked jurisdiction to hear the merits of his section 2-1401 petition. Ketchens claims that, because he challenged the trial court's personal jurisdiction over him, the trial court could hear his challenge at any time.

¶ 28 Smith has not filed an appellee's brief. Supreme court precedent leaves us with three possible approaches to resolve this case. First, though we are not required to "serve as an advocate for the appellee or *** search the record for the purpose of sustaining the judgment of the trial court," we may, "if justice requires, do so." *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976); see also *Thomas v. Koe*, 395 Ill. App. 3d 570,

577 (2009). Second, "if the record is simple and the claimed errors are such that the court can easily decide them without the aid of an appellee's brief, the court of review should decide the merits of the appeal." *Talandis Construction Corp.*, 63 Ill. 2d at 133. Third, "if the appellant's brief demonstrates *prima facie* reversible error and the contentions of the brief find support in the record[,] the judgment of the trial court may be reversed." *Id.* "Prima facie means, at first sight, on the first appearance; on the face of it; so far as can be judged from the first disclosure; presumably; a fact presumed to be true unless disproved by some evidence to the contrary." (Internal quotation marks omitted.) *Id.* at 132.

¶ 29 We find that, in this case, Ketchens has made a *prima facie* showing that the trial court committed reversible error when it concluded that it lacked jurisdiction. The trial court initially awarded Ketchens a default judgment on his section 2-1401 petition, but *sua sponte* reconsidered that judgment and denied the petition after concluding that it lacked subject-matter jurisdiction over the case once Chain had died and the estate had been closed. Presumably, the trial court relied on the general rule that "upon the ward's [(*i.e.*, disabled person's)] death, both the guardianship and the trial court's jurisdiction to supervise the ward's estate necessarily terminate." *In re Estate of Gebis*, 186 Ill. 2d 188, 193 (1999). That is because, once the ward dies, the power to pay any claims shifts to the executor or administrator of the decedent's estate, away from the trial court supervising the guardianship estate. *Id.* at 193-94.

¶ 30 But this court has distinguished *Gebis* and held that this rule does not apply when a party seeks to vacate a judgment entered in a guardianship case by alleging jurisdictional error by the court at the time the challenged judgment was entered. See *In re Estate of Ostern*, 2014 IL App (2d) 131236, ¶ 31; *In re Estate of Barth*, 339 Ill. App. 3d 651, 659-60 (2003).

¶ 31 In *Ostern*, 2014 IL App (2d) 131236, ¶¶ 4-5, the guardianship court entered an order establishing a trust that oversaw the decedent's assets, but excluded one of the decedent's children. Nearly two years later, the children of the excluded child (*i.e.*, the decedent's grandchildren) moved to vacate the order establishing the trust pursuant to section 2-1401, alleging that they had not been properly served. *Id.* ¶¶ 6-7. This court held that the trial court had jurisdiction to rule on the 2-1401 petition, because "the claim at issue [was] not a claim against the estate, it [was] an assertion of jurisdictional error by the court." *Id.* ¶ 31. The court relied on *Barth*, 339 Ill. App. 3d at 660, where this court likewise held that the trial court had jurisdiction over a section 2-1401 petition after the estate of the disabled person had close due to her death, because the claim asserted in the section 2-1401 petition was "of jurisdictional error by the court" and not an attempt to seek payment of a claim.

¶ 32 Here, as in *Ostern* and *Barth*, Ketchens attempted to vacate two orders based on the trial court's lack of personal jurisdiction over him at the time those orders were entered in 2002 and 2003. Because he was not seeking to recover a claim from the estate and instead was challenging the guardianship court's jurisdiction over him at the time those two orders were entered, the trial court erred in concluding that, in light of Chain's death, it lacked subject-matter jurisdiction to consider the section 2-1401 petition. As in *Ostern* and *Barth*, Chain's death did not prevent the court from considering an alleged jurisdictional error regarding those previous orders. Thus, Ketchens has made a *prima facie* showing of reversible error sufficient to merit reversal of the trial court's judgment.

¶ 33 While we could, in the exercise of our discretion, review the merits of the section 2-1401 petition itself, doing so would be inappropriate in this case. The trial court entered its initial order on the section 2-1401 petition on the basis of a default judgment, and then it reversed itself,

vacated that order, and premised its ultimate denial of the section 2-1401 petition on its perceived lack of subject-matter jurisdiction. Though the trial court's order did recite its "careful re-consideration of the evidence presented," its written order unquestionably was premised on subject-matter jurisdiction, and in any event we lack a record of the proceedings below. Without knowing whether the trial court ever passed on the merits of the petition, and given strong reason to believe it did not, we decline to be the first court to do so.

¶ 34 Moreover, there has been no briefing on the sufficiency of the service of the citation. Ketchens has not raised it in his brief; he only contends that the trial court erred in concluding that it lacked jurisdiction. And Smith has filed no brief at all. With no briefing—let alone adversarial briefing—we are hesitant to decide an issue that could have a significant impact on the outcome of Chain's estate and the ownership of Ketchens's place of residence. See *People v. Guillen*, 2014 IL App (2d) 131216, ¶ 63 (Zenoff, J., concurring) ("[W]ithout [an] issue's adversarial development, the court is all the more likely to abandon its neutral role, to resolve the issue erroneously, or both.").

¶ 35 Finally, it is important that we respect the trial court's role as the initial arbiter of these issues. The trial court has several different options when ruling on a section 2-1401 petition: "the trial judge may dismiss the petition; the trial judge may grant or deny the petition on the pleadings alone (summary judgment); or the trial judge may grant or deny relief after holding a hearing at which factual disputes are resolved." *People v. Vincent*, 226 Ill. 2d 1, 9 (2007). We are loath to encroach on the trial court's discretion in deciding how to dispose of this petition, when it was under the impression that it had no authority to do so.

¶ 36 Because Ketchens has made out a *prima facie* showing of reversible error on the trial court's decision regarding its jurisdiction, we vacate the trial court's judgment on that issue and

remand for further proceedings on the section 2-1401 petition. We decline to reach the merits of the petition in the absence of any briefing on the issue or a more complete record of the trial court's decision.

¶ 37 III. CONCLUSION

¶ 38 For the reasons stated, we vacate the trial court's order denying the section 2-1401 petition and finding that the trial court lacked jurisdiction to rule on that petition. We remand for further proceedings.

¶ 39 Vacated and remanded.