

NOTICE

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).

FILED

September 22, 2016
Carla Bender
4th District Appellate
Court, IL

2016 IL App (4th) 150959-U

NO. 4-15-0959

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THEODORE CLARK,)	Appeal from
Plaintiff-Appellant,)	Circuit Court of
v.)	Champaign County
BANKCHAMPAIGN, N.A.,)	No. 14L215
Defendant-Appellee.)	
)	Honorable
)	Jeffrey B. Ford,
)	Judge Presiding.

PRESIDING JUSTICE KNECHT delivered the judgment of the court.
Justices Turner and Holder White concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court dismissed the appeal for lack of jurisdiction because the trial court's dismissal order, which granted plaintiff 28 days' leave to amend his complaint, was not a final order for purposes of appeal.

¶ 2 Plaintiff, Theodore Clark (Ted), is a beneficiary of a trust created by his grandmother, Emily C. Diffenback, and in 2012, defendant, BankChampaign, N.A. (BankChampaign), served as successive trustee. In December 2014, Ted filed a complaint alleging BankChampaign breached its fiduciary duty as successive trustee when it, without authority, transferred approximately \$150,000 of Ted's funds to his father, John M. Clark, Jr. (John), to pay Ted's outstanding debts. In February 2015, BankChampaign filed a section 2-619 motion to dismiss (735 ILCS 5/2-619(a)(6), (9) (West 2014)) arguing no breach had occurred,

which the trial court granted. In its written order, the court dismissed the case without prejudice and granted plaintiff 28 days to amend his complaint. Plaintiff filed a motion to reconsider, which the court also denied. Ted appeals, arguing the court improperly granted BankChampaign's motion to dismiss because the transfer of funds to John was a breach of the bank's fiduciary duty. For the following reasons, we dismiss the appeal for lack of jurisdiction.

¶ 3

I. BACKGROUND

¶ 4 On November 19, 1971, Emily C. Diffenback, as settlor, entered into a trust agreement with Wilmington Trust Company, as trustee. The trust agreement was amended by supplemental trust agreements in February 1974, July 1979, and June 1990.

¶ 5

A. June 1990 Supplemental Trust Agreement

¶ 6 Under the most recent supplemental trust agreement, dated June 12, 1990, the income beneficiaries are Diffenback's two sons, John and Charles Clark, and their children. The terms also state John is to serve in a fiduciary capacity as distribution advisor until the youngest grandchild of Diffenback attained the age of 21. Upon Diffenback's death, John was named investment advisor of his and his children's trust funds. The parties dispute whether BankChampaign's actions were authorized under the following clause, "Trustee may take any reasonable steps to disburse funds to or for a beneficiary, including *** direct application for the benefit of the beneficiary."

¶ 7

B. October 2011 Letter of Direction

¶ 8 In October 2011, Ted signed a letter of direction directed to BankChampaign, the successive trustee, and requested Community Trust Bank of Irvington, Illinois, serve as second successive trustee. The letter stated, "I hereby approve all of the acts of BankChampaign, N.A.,

and of Smith Barney in their roles as Trustee and brokerage firm respectively, inclusive of all fees, and do hereby indemnify, hold them harmless, and release them from their responsibilities to the trust." The trust property was transferred to Community Trust Bank in November 2011.

¶ 9 C. December 2014 Complaint for Breach of Fiduciary Duty

¶ 10 In December 2014, Ted filed a complaint against BankChampaign, alleging it breached the fiduciary duty it owed to him as trustee. More specifically, Ted argued, BankChampaign breached its fiduciary duty when it, without authority, provided approximately \$150,000 to John to pay Ted's outstanding debts.

¶ 11 On February 5, 2015, BankChampaign filed a section 2-619 motion to dismiss and argued (1) under the terms of the supplemental trust agreement, it was released from any liability or responsibility for any actions it took as trustee once it transferred all of the trust's assets to Community Trust Bank on November 7, 2011 (735 ILCS 5/2-619(a)(6) (West 2014)); (2) it was released from any liability under the letter of direction Ted signed on October 6, 2011 (735 ILCS 5/2-619(a)(6) (West 2014)); and (3) under the terms of the supplemental trust agreement, it did not breach its fiduciary duty because it took all reasonable steps to disburse funds for the benefit of Ted to pay for his medical bills, utilities, outstanding credit card balances, and attorney fees for a federal criminal matter (735 ILCS 5/2-619(a)(9) (West 2014)).

¶ 12 Attached to BankChampaign's motion to dismiss was an affidavit by L. John Clausen of BankChampaign. Clausen is the senior vice president of wealth management and stated he had personal knowledge of the administration of the trust. Clausen stated the trust property was transferred to Community Trust Bank on November 7, 2011, and at that time, Ted had been provided with all statements and activities of the trust income and distributions. There

were no periods for which BankChampaign had not reported to Ted. Clausen also stated, pursuant to the trustee's discretion via the supplemental trust agreement, BankChampaign took all reasonable steps to disburse funds in Ted's best interest to John in order to pay Ted's debts.

¶ 13 On March 23, 2015, Ted filed a memorandum of law opposing BankChampaign's motion to dismiss. In response to BankChampaign's motion, Ted argued (1) BankChampaign is not released from liability under the supplemental trust agreement because he was never provided with a full and accurate accounting; (2) BankChampaign is not released from liability under the letter of direction because Ted did not knowingly and voluntarily release it from its fiduciary duty; and (3) the trust agreement did not authorize BankChampaign to make payments to John for Ted's benefit. Attached to Ted's memorandum of law was his own affidavit. Ted stated from October 2010 through October 2012, he did not receive a true and accurate accounting from BankChampaign. Additionally, he stated the letter of direction was prepared by BankChampaign and there were material facts withheld from him that he would have found relevant when signing a document releasing BankChampaign of liability. Ted also stated at the time BankChampaign transferred his funds to John, the youngest grandchild of Diffenback had attained the age of 21.

¶ 14 On April 6, 2015, BankChampaign filed a reply memorandum in support of its motion to dismiss. Attached to the reply memorandum was a supplemental affidavit of Clausen. The supplemental affidavit stated BankChampaign sent Ted a full, complete, and accurate accounting quarterly. Additionally, Ted contacted BankChampaign on October 22, 2009, and requested his quarterly statements be sent to John because he was living in Brazil. On September 11, 2012, Ted requested BankChampaign send him "all information relating to the

Emily C. Diffenback Trust, FBO Theodore Clark." BankChampaign complied with this request on September 13, 2012.

¶ 15 On May 22, 2015, the trial court issued a written order granting BankChampaign's motion to dismiss. The court stated Ted's affidavit did not conflict with Clausen's affidavit or the terms of the supplemental trust agreement. The court held, in pertinent part, as follows:

"In the affidavit of John Clausen attached to [BankChampaign's] [m]otion to [d]ismiss, paragraph 12 provides an explanation for disbursement of funds from the trust to [Ted's] father. Basically to pay [Ted's] doctor's bills, hospital bills, prescriptions, mental health counseling, alcohol dependency treatment clinics, utilities, outstanding credit card balances[,] and attorney fees for representing [Ted] in his federal criminal charges. [Ted] does not contest this in his affidavit. Paying off necessary expenses for the beneficiary is disbursement of funds for the beneficiary. This type of payment is within any reasonable meaning of 'direct application for the benefit of the beneficiary.'

From the affidavits attached, it is clear that if the fiduciary breach, as stated in the complaint, is for allowing monies to transfer to [Ted's] father to pay necessary expenses of [Ted]. It is directly allowable by the [s]upplemental [t]rust [a]greement. The evidence attached does not show any fiduciary breach as alleged in the complaint or any general breach not alleged in the complaint

such as no accounting to [Ted]."

Since the court found BankChampaign did not breach its fiduciary duty, it did not address the release contained in the letter of direction Ted signed or the release built into the supplemental trust agreement. The court dismissed the case pursuant to section 2-619 without prejudice and granted Ted 28 days' leave to amend his complaint.

¶ 16 On June 19, 2015, Ted filed a motion to reconsider. Contained within Ted's motion was a request for the trial court to issue a finding pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010).

¶ 17 On November 18, 2015, the trial court entered an order denying Ted's motion to reconsider and request for a Rule 304(a) finding. The court stated, "[Ted's] motion to reconsider is denied. The posture of this case is not such that a Supreme Court Rule 304(a) finding is appropriate and that request is denied."

¶ 18 This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 On appeal, Ted argues the trial court erred in granting BankChampaign's section 2-619 motion to dismiss because its payment of funds to John, a third party to whom no money was owed, was not a payment "directly applied" for the benefit of Ted under the terms of the supplemental trust agreement. BankChampaign argues its disbursement of funds to Ted's father was within its discretion and, alternatively, it has been released from any liability under the letter of direction Ted signed and under the terms of the supplemental trust agreement.

¶ 21 Although neither party to this appeal has raised the issue of our jurisdiction, we have a duty to consider *sua sponte* whether we have jurisdiction and to dismiss the appeal if we

lack jurisdiction. *Secura Insurance Co. v. Illinois Farmers Insurance Co.*, 232 Ill. 2d 209, 213, 902 N.E.2d 662, 664 (2009). Ted asserts jurisdiction is conferred under Illinois Supreme Court Rules 301 (eff. Feb. 1, 1994) and 303(a) (eff. Jan. 1, 2015) (concerning appeals from final judgments). Rule 301 provides "[e]very final judgment of a circuit court in a civil case is appealable as of right." Ill. S. Ct. R. 301 (eff. Feb. 1, 1994).

¶ 22 Rule 303(a) provides, in relevant part, as follows:

"The notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the final judgment appealed from, or, if a timely posttrial motion directed against the judgment is filed, whether in a jury or a nonjury case, within 30 days after the entry of the order disposing of the last pending postjudgment motion directed against that judgment or order ***." Ill. S. Ct. R. 303(a) (eff. Jan. 1, 2015).

¶ 23 An order is final for purposes of appeal if it either terminates the litigation between the parties on the merits or disposes of the rights of the parties as to the entire controversy or a separate part thereof. *Wilson v. Edward Hospital*, 2012 IL 112898, ¶ 19, 981 N.E.2d 971. When a trial court's order dismisses a case of complaint but grants the plaintiff leave to amend the complaint, the order is not final for purposes of appeal. *Richter v. Prairie Farms Dairy, Inc.*, 2016 IL 119518, ¶ 28, 53 N.E.3d 1. A court's dismissal "without prejudice" further indicates there was no final decision on the merits. *Id.* ¶ 24.

¶ 24 In this case, the trial court's order granting BankChampaign's motion to dismiss was not final for purposes of appeal because (1) the case was dismissed without prejudice and (2)

Ted was granted 28 days' leave to amend his complaint. See *id.* Ted suggests, because he filed an appeal within 30 days from the denial of his motion to reconsider, this court has jurisdiction over the appeal. We disagree. In this case, we would only have jurisdiction if the court later entered an order dismissing Ted's case *with prejudice* ("An order dismissing a complaint but granting leave to replead is not final until the trial court enters an order dismissing the suit with prejudice." *Piagentini v. Ford Motor Co.*, 387 Ill. App. 3d 887, 895, 901 N.E.2d 986, 994 (2009)). We find no such circumstance exists in this case. When the court entered its order denying Ted's motion to reconsider, it did not modify its order which granted BankChampaign's motion to dismiss, which granted Ted 28 days' leave to amend his complaint and ultimately dismissed the case without prejudice. When Ted filed his notice of appeal on November 30, 2015, there was no final judgment from which to take an appeal. Therefore, the court's judgment in this case was not final, and we lack jurisdiction over the appeal.

¶ 25

III. CONCLUSION

¶ 26

For the foregoing reasons, we dismiss this appeal for lack of jurisdiction.

¶ 27

Dismissed.