

2017 IL App (1st) 152898-U
Nos. 1-15-2898 & 1-15-3259 Cons.
Order filed March 31, 2017

FIFTH DIVISION

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

SAM HORN,)	Appeal from the Circuit Court
)	of Cook County.
Plaintiff-Appellant,)	
)	
v.)	
)	No. 05 CH 6130
MANIJEH BAYZAE, individually and)	
as Cotrustee of the Albofazl Bayzaee Trust, and)	
ALBOFAZL BAYZAE, individually and as)	
Cotrustee of the Albofazl Bayzaee Trust,)	
)	The Honorable
Defendant-Appellees.)	Neil H. Cohen,
)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Gordon and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held:* This court held that the notice of appeal did not divest the trial court of jurisdiction to rule on the plaintiff's timely and proper postjudgment motions. We vacated the order denying reconsideration of the postjudgment motions for lack of jurisdiction and remanded the case for the trial court to rule on the plaintiff's postjudgment motions.

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¶ 2 The plaintiff, Sam Horn, filed a complaint against the defendants, Manijeh Bayzaee and Albofazi Bayzaee, seeking reformation, specific performance, or, in the alternative, rescission of a real estate contract, and damages for breach of contract, all stemming from a real estate transaction between the parties. Following a bench trial, the trial court entered judgment for the defendants. The plaintiff raises several issues on appeal one of which is dispositive. We determine that the filing of the notice of appeal did not divest the trial court of jurisdiction to rule on the plaintiff's postjudgment motions. We vacate the trial court's order denying the motions for lack of jurisdiction and remand for further proceedings.

¶ 3 **FACTS**

¶ 4 On September 11, 2015, the trial court issued its memorandum opinion and order entering judgment for the defendants on the plaintiff's second amended complaint. On October 9, 2015, the plaintiff filed a notice of appeal from the September 11, 2015, order and two postjudgment motions: a motion to conform the pleadings to the proof by adding a claim for unjust enrichment and a motion to reconsider, seeking to vacate or, in the alternative to modify the judgment.

¶ 5 On October 13, 2015, the trial court ruled that the October 9, 2015, notice of appeal divested the court of jurisdiction to hear the plaintiff's postjudgment motions. The court's order provided that if the plaintiff withdrew his notice of appeal, it would have jurisdiction to rule on the postjudgment motions. Instead, on November 10, 2015, the plaintiff filed a notice of appeal from the October 13, 2015 order. This court granted the plaintiff's motion to consolidate the appeals for review.

¶ 6

ANALYSIS

¶ 7 The plaintiff contends that the trial court erred when it ruled that the filing of the notice of appeal on October 9, 2015, divested the court of jurisdiction to rule on the motion to reconsider and the motion to amend the pleadings to conform to the proof.

¶ 8 As a general rule, the filing of a notice of appeal divests the circuit court of jurisdiction over a cause. *Glickman v. Teglia*, 388 Ill. App. 3d 141, 151 (2009). Exceptions to the general rule are found in Illinois Supreme Court Rule 303(a)(2). Prior to 2007, Rule 303(a)(2) provided in pertinent part as follows:

“When a timely postjudgment motion has been filed by any party, whether in a jury case or a nonjury case, a notice of appeal filed before the entry of the order disposing of the last pending postjudgment motion shall have no effect and shall be withdrawn by the party who filed it, by moving for dismissal pursuant to Rule 309. This is so whether the timely postjudgment motion was filed before or after the date on which the notice of appeal was filed. A new notice of appeal must be filed within the prescribed time measured from the entry of postjudgment motion, as prescribed in subparagraph (a)(1) of this rule.” 210 Ill. 2d R. 303(a)(2).

In 2007, Rule 303(a)(2) was amended¹ and now provides in pertinent part as follows:

“When a timely postjudgment motion has been filed by any party, whether in a jury case or nonjury case, a notice of appeal filed before the entry of the order disposing of the last pending postjudgment motion, or before the final disposition of any separate claim, becomes effective when the order disposing of said motion or claim is entered. A party

¹ Official Reports Advance Sheet No. 8 (April 11, 2007), R. 303(a)(2), eff. May 1, 2007.

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intending to challenge disposing of any postjudgment motion or separate claim, or judgment amended upon such motion, must file a notice of appeal, or an amended notice of appeal within 30 days of the entry of said order or amended judgment, but where a postjudgment motion is denied, an appeal from the judgment is deemed to include an appeal from the denial of the postjudgment motion.” Ill. S. Ct. R. 303(a)(2) (eff. 2015).

It is undisputed that the plaintiff’s postjudgment motions were timely filed.

¶ 9 The defendants maintain that the trial court determined correctly that the filing of the notice of appeal divested it of jurisdiction to rule on the plaintiff’s postjudgment motions. They point out that a motion to amend to conform the pleadings to the proof is not a motion directed against the judgment and therefore not a proper postjudgment motion under Rule 303(a)(2). They argue that to be a proper postjudgment motion it must seek one of the forms of relief pursuant to section 2-1203(a) of the Code of Civil Procedure (Code) (735 ILCS 5/2-1203(a) (West 2014)). Section 1203(a) provides in pertinent part as follows: “In all cases tried without a jury, any party may, within 30 days after the entry of the judgment *** file a motion for a rehearing, or a retrial, or modification of the judgment or to vacate the judgment or for other relief.” See *Vanderplow v. Krych*, 332 Ill. App. 3d 51, 59 (2002) (a motion to amend to conform the pleadings to the proof was not a motion directed against the judgment since it did not request modification or vacation of any of the trial court’s orders and could not be construed as a valid section 2-1203 motion).

¶ 10 The defendants rely on *Kyles v. Maryville Academy*, 359 Ill. App. 3d 423 (2005). In that case, the reviewing court ruled that the trial court lost jurisdiction to rule on the plaintiff’s motion to file an amended complaint after she filed an appeal from the denial of her motion for reconsideration. The court determined that the filing of a postjudgment motion neither nullified a

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previously filed notice of appeal nor tolled the time for filing an appeal for two reasons: (1) because a motion to amend a complaint does not attack the underlying judgment and is not considered a posttrial motion for purposes of Rule 303(a)(1) (155 Ill. 2d R. 303(a)(1)) and (2) even if the motion to amend was considered a postjudgment motion, it was a successive one to the motion for reconsideration which did not extend the time for appeal. *Kyles*, 359 Ill. App. 3d at 432-33.

¶ 11 The above cases which the defendants rely on to support their argument were decided under the pre-2007 version of Rule 303(a)(2) which required that the notice of appeal be withdrawn before the trial court could rule on the postjudgment motions. In determining that it would have jurisdiction of the posttrial motions if the plaintiff withdrew his notice of appeal, the trial court was clearly relying on the pre-2007 version of Rule 303(a)(2). Nothing in the trial court's order indicates that the court's ruling suggests that it considered the plaintiff's postjudgment motions improper for the purposes of Rule 303(a)(2). Just the opposite, as the court would have considered the plaintiff's postjudgment motions if the notice of appeal was withdrawn.

¶ 12 Moreover, even if we were to determine that the motion for leave to amend was not a proper postjudgment motion, the plaintiff's motion for reconsideration of the trial court's September 11, 2015, judgment sought both modification or, in the alternative, a vacation of the judgment, alleging the court's failure to rule on his breach of contract claim and errors in granting judgment for the defendants. A motion to reconsider may be brought pursuant to section 2-1203 for the purpose of alerting the trial court to errors it has made and to afford the court the opportunity to correct them. See *Langone v. Schad, Diamond & Shelden, P.C.*, 406 Ill. App. 3d

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820, 828 (2010); *In re Marriage of King*, 336 Ill. App. 3d 83, 87 (2002). The motion for reconsideration requested the relief set forth in section 2-1203 of the Code. Therefore the plaintiff's motion for reconsideration was a proper postjudgment motion.

¶ 13 We conclude that the filing of the notice of appeal did not divest the trial court of jurisdiction to rule on the plaintiff's October 9, 2015, timely filed postjudgment motions.

¶ 14 “ ‘Where a trial court erroneously believes it has no discretion or authority to perform some act, the appellate court should not preempt the exercise of such discretion, but should remand the cause back to the trial court.’ ” *McDonald v. Health Care Service Corp.*, 2012 IL App (2d) 110779, ¶ 30 (quoting *Greer v. Yellow Cab Co.*, 221 Ill. App. 3d 908, 915 (1991)). In the present case, the trial court erroneously held that it lacked jurisdiction to rule on the plaintiff's postjudgment motions. The trial court's refusal to rule on the plaintiff's proper and timely postjudgment motions requires the vacation of the October 13, 2015, order and remand to the court to rule on the merits of the postjudgment motions. *McDonald*, 2012 IL App (2d) 110779, ¶ 30 (order vacated and case remanded where the trial court erroneously determined that the postjudgment motion was untimely, and therefore the court had no jurisdiction).

¶ 15 No. 1-15-2898, Vacated and remanded with directions.

¶ 16 No. 1-15-3259, Dismissed as moot.