

2018 IL App (2d) 180269
No. 2-18-0269
Order filed September 12, 2018

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

F. GARY KOVAC,)	Appeal from the Circuit Court
)	of Kane County.
Plaintiff-Judgment Creditor/Appellee,)	
)	
v.)	
)	
ESTATE OF KENNETH L. BARRON, JR.,)	
DECEASED,)	
)	
Judgment Debtor,)	No. 07-CH-1886
)	
and)	
)	
SANDRA L. BARRON,)	
)	
Citation-Respondent/Appellant,)	
)	
(F. Gary Kovac, Plaintiff- Appellee, v.)	Honorable
Sandra L. Barron, Respondent-Appellant).)	David R. Akemann,
)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Hutchinson and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court improperly granted the judgment-creditor's motion to turn over the citation-respondent's personal assets to satisfy a portion of the constructive trust imposed solely against the judgment-debtor Estate. Judgment reversed.

¶ 2 This case comes before the court pursuant to an interlocutory appeal in which plaintiff-judgment creditor, F. Gary Kovac, sought to achieve partial satisfaction of an outstanding judgment entered by the trial court on June 6, 2012, and affirmed by this court in *Kovac v. Barron*, 2014 IL App (2d) 121100 (*Kovac I*), in relation to wage overpayments to citation-respondent, Sandra L. Barron. Kovac filed the underlying motion to compel participation in citation proceedings and require turnover of funds alleged to be in Sandra's possession. The trial court granted the motion for turnover of Sandra's personal assets in the amount of \$821,565, plus \$328,185 in prejudgment interest and \$533,240 in postjudgment interest for a total of \$1,682,990, and enjoined Sandra from making or allowing any transfer or other disposition of her property not exempt from the alleged wage overpayment. Sandra appeals, arguing that the trial court improperly granted Kovac's motion to turn over her personal assets to satisfy a portion of the constructive trust imposed against the estate of her deceased husband, Kenneth L. Barron, Jr. (Barron). We reverse. Based on our decision, we need not address Sandra's other arguments regarding law of the case, *res judicata*, or whether the trial court abused its discretion in granting pre and postjudgment interest.

¶ 3

I. FACTS

¶ 4

A. Underlying Action

¶ 5 The underlying suit arose from a dispute between Kovac, a 50% shareholder of several operating companies, and Barron, the other 50% shareholder. In relevant part, we affirmed the trial court's finding that Barron, as an officer and director, had breached his fiduciary duty to both Kovac as a shareholder and to the operating companies because he acted in his own interest and not in the interests of both the operating companies, and Kovac by committing constructive fraud when he caused the operating companies to pay him and Sandra millions in excessive

compensation over the years and then concealed his fraudulent actions by disguising the payments to himself and Sandra as “contract labor” on the operating companies’ tax returns. *Kovac I*, 2014 IL App (2d) 121100, ¶ 65. The trial court imposed a constructive trust on the Estate to the extent of Barron’s \$3.2 fraudulent overpayment of wages to himself and Sandra. We affirmed the trial court’s ruling as an appropriate remedy to prevent his unjust enrichment. *Id.* ¶ 69. We also affirmed the dismissal of counts VIII for conversion, and counts IX and X for conspiracy, the only claims alleged against Sandra in her individual capacity. *Id.* ¶¶ 101, 106.

¶ 6

B. Ancillary Actions

¶ 7 In 2009, the operating companies brought a separate claim against Sandra, individually, in the Circuit Court of Kane County, *Pinnacle Systems, Inc. v. Barron*, No. 09 L 266, which sought a judgment based on the excessive compensation she received while employed by one of the operating companies for the years 1998 through 2007 (the 2009 OC Action). The court dismissed it with prejudice.

¶ 8 In *Kovac v. Barron*, No. 12 CH 2699, Kovac filed a separate action against Sandra, individually, for the alleged fraudulent conveyance in which he sought, in part, to impose a constructive trust on the basis of unjust enrichment. He alleged that Sandra was the direct recipient of \$814,000 as the result of Barron’s breach of fiduciary duty and that these sums were the rightful property of Kovac. Kovac also sought an additional \$303,518 as the allocated portion of prejudgment interest on the judgment award against the Estate, plus postjudgment interest. The court dismissed the action on the grounds that the claim was the subject of a prior pending action (the underlying case) and was barred under the doctrine of *res judicata*, collateral estoppel, and claim splitting. On reconsideration, the court dismissed it without prejudice and vacated the order to the extent it was based on section 2-619(a)(4) of the Code of Civil Procedure

(Code) (735 ILCS 5/2-619(a)(4) (West 2010)) because Kovac's claims against Sandra individually were still before this court on his cross-appeal in the underlying appeal.

¶ 9 In a probate action involving the Estate in the Circuit Court of Kane County, Kovac filed a citation to recover assets, pursuant to section 16-2 of the Probate Code (755 ILCS 5/16-2 (West 2012)), directed against Sandra. *Estate of Kenneth L. Barron, Jr., deceased*, No. 12 P 182. Sandra states in her appellate brief that the court dismissed the case on the grounds that this case was a prior pending action.

¶ 10 C. Supplementary Proceedings Regarding the Present Appeal

¶ 11 The supplementary proceedings in the present appeal stem from the trial court's imposition of the constructive trust on the Estate to the extent of Barron's \$3.2 fraudulent overpayment of wages to himself and Sandra, and in particular, the wage overpayment to Sandra. The fraudulent overpayment of wages included an estimate of \$821,565 to Sandra, as calculated and attested to by the expert hired by Kovac.

¶ 12 Kovac brought citations to discover assets against Sandra, as independent administrator of the Estate and certain financial institutions on January 29, 2014. A separate citation was issued against Sandra, individually. She moved to quash the citations on the grounds of *res judicata*, statute of limitations, and as seeking the assets of a third party rather than the judgment debtor. The trial court denied the motions but limited the scope insofar as they attempted to reach Sandra's exclusive and personal accounts and other assets. The court also granted Kovac leave to amend the citations to properly identify the judgment debtor and seek financial documents relating solely to the accounts owned by the Estate.

¶ 13 The trial court subsequently ordered the citations to be amended to properly identify the judgment debtor as "the Estate of Kenneth Barron" rather than Sandra. The court found the

citations were overly broad and represented a substantial risk of further intrusions of Sandra's privacy and ordered that the citations not be directed at property that was, and always had been, exclusively Sandra's without providing evidence tracing Estate property to her accounts.

¶ 14 On March 29, 2014, Kovac filed his first motion for turnover against Sandra pursuant to section 2-1402 of the Code (735 ILCS 5/2-1402 (West 2016)) as to monies held in certain accounts maintained by certain third-party citation respondents holding assets of Sandra and Barron. The trial court granted the order on September 19, 2016. The court initially found that Sandra was not a judgment debtor. The court also found that the salary overpayments were not part of the Estate. The court further found that the judgment against the Estate and subsequent constructive trust included a wage overpayment to Sandra in the amount of \$874,742. The court further held that it was proper to "identify Sandra's assets and have them turned over to Kovac."

¶ 15 Sandra filed a motion to reconsider on the grounds that the amount was incorrect, that Kovac was improperly circumventing *res judicata* and/or the law of the case doctrine, and that Kovac had failed to prove that Sandra was in possession of the Estate's assets subject to the constructive trust. The court vacated the September 19 order finding, *inter alia*, the amount was incorrect.

¶ 16 On January 8, 2018, Kovac filed a combined motion for turnover and to compel Sandra's participation in the citation proceedings. Kovac stated in his motion that its purpose was to achieve partial satisfaction of the June 6, 2012, judgment "specifically in relation to the direct wage overpayments to Sandra." Kovac had discovered Sandra's real estate assets through public records and he requested that they be delivered up to the sheriff for public sale and that Sandra be prohibited from making or allowing any transfer, or otherwise disposing of, "property not exempt from the wage overpayment judgment," among other relief.

¶ 17 On March 29, 2018, the trial court granted Kovac’s motion. While the court recognized that Sandra was not the judgment debtor, it stated that “a portion of the judgment concerns overpayments Barron made to her, which would not be part of the estate, but would reasonably be in Sandra’s possession.” The court found that the amount of the wage overpayment was \$821,565, and that the amount owed to Kovac directly from Sandra was \$1,682,990, which included \$328,185 in prejudgment interest and \$533,240 in postjudgment interest. It ordered Sandra to apprise Kovac of the nature, extent, value, and whereabouts of her personal assets, and if such assets included real estate, to deliver them to the sheriff for public sale or other method to liquidate the property. The court further prohibited Sandra from making or allowing any transfer of any property not exempt from the wage overpayment judgment.

¶ 18 Sandra brought this timely interlocutory appeal from the order granting injunctive relief and granting Kovac’s motion for turnover and freezing certain assets.

¶ 19 We note that on November 12, 2014, Kovac filed a complaint against Sandra, individually, and in her roles as plenary guardian and administrator of the Estate, alleging, in part, a fraud claim under the Illinois Uniform Fraudulent Transfer Act (IUFTA) (740 ILCS 160/5(a)(1) (West 2014)) (2014 Complaint). Sandra brought a motion to dismiss, claiming in part that the 2014 Complaint failed to allege that she was holding the Estate’s assets and therefore failed to qualify as a “supplementary proceeding” pursuant to section 2-1402. The trial court denied the motion, noting that Kovac’s claim of unjust enrichment was based upon the allegation that Sandra was holding the Estate’s assets. The 2014 Complaint is still pending.

¶ 20

II. ANALYSIS

¶ 21 Sandra contends that the trial court improperly granted Kovac’s motion to turn over her personal assets to satisfy a portion of the constructive trust imposed solely against the judgment-

debtor Estate. Kovac asserts that the scope of the underlying motion and the focus of this appeal are properly directed only to the existing judgment and the resulting constructive trust relating to the wrongful payment to Sandra and her corresponding obligations under section 2-1402 of the Code. Kovac maintains that the resulting constructive trust includes the wrongful payment Sandra received from Barron.

¶ 22 We agree that the scope of the underlying motion and the focus of this appeal are properly directed to the existing judgment and the resulting trust. However, contrary to Kovac's assertion, the trial court's judgment in *Kovac I* was directed solely against Barron, who had breached his fiduciary duty when he caused the operating companies to overpay him and Sandra excessive compensation and then concealed his fraudulent actions. *Id.* ¶ 69. The trial court specifically imposed a constructive trust on Barron's assets, not Sandra's. In fact, it clarified in its June 12, 2012, order that the constructive trust "refers to the estate of Ken Barron." No judgment was ever entered against Sandra, and we affirmed the trial court's dismissal of the counts against her. *Id.* ¶¶ 95-108.

¶ 23 Kovac instituted the supplemental proceedings in the present appeal pursuant to section 2-1402(a) of the Code. The purpose of Kovac's motion was to achieve partial satisfaction of the June 6, 2012, judgment "specifically in relation to the direct wage overpayments to Sandra." Section 2-1402(a) provides a mechanism by which a judgment creditor may initiate supplementary proceedings to discover the assets of a judgment debtor, or a third party, and apply those assets to satisfy the judgment. 735 ILCS 5/2-1401(a) (West 2016); *Schak v. Blom*, 334 Ill. App. 3d 129, 133 (2002). These proceedings may be initiated only after the circuit court enters a judgment. *Ericksen v. Rush Presbyterian St. Luke's Medical Center*, 289 Ill. App. 3d 159, 166 (1997) (rehearing denied, appeal denied, 174 Ill. 2d 559 (1997)). Before a judgment

creditor may proceed against a third party who is not the judgment debtor, the record must contain some evidence that the third party possesses assets of the judgment debtor. Only then does the citation court have the jurisdiction to order that party to produce those assets to satisfy the judgment. *Ericksen*, 289 Ill. App. 3d at 166. If the third party possesses no assets of the judgment debtor, then the court has no authority to enter any judgment against the third party in a supplemental proceeding. *Id.* at 167.

¶ 24 Thus, the only relevant inquiries in the supplementary proceedings are: (1) whether the judgment debtor is in possession of assets that should be applied to satisfy the judgment, or (2) whether a third party is holding assets of the judgment debtor that should be applied to satisfy the judgment. *Schak*, 334 Ill. App. 3d at 133; *Pyshos v. Heart-Land Development Company*, 258 Ill. App. 3d 618, 623 (1994). The provisions of section 2-1402 are to be liberally construed, and the burden lies with the judgment creditor to show that the citation respondent possesses assets belonging to the judgment creditor. *Kauffman v. Wrenn*, 2015 IL App (2d) 150285, ¶ 23; *Schak*, 334 Ill. App. 3d at 133; *Mid-American Elevator Company v. Norcon, Inc.*, 287 Ill. App. 3d 582, 587 (1996). Whether there was an enforceable judgment on which to proceed under section 2-1402 is a purely legal question, subject to *de novo* review. See *Eclipse Manufacturing Co. v. United States Compliance Co.*, 381 Ill. App. 3d 127, 134 (2007) (reviewing *de novo* the trial court's turnover order in section 2-1402 proceedings where the trial court had not been called upon to make any factual findings).

¶ 25 Here, in the March 29, 2018, order, the trial court correctly found that Sandra was not the judgment debtor and that Sandra's salary overpayments at issue were not part of Barron's Estate. The salary overpayments were made to Sandra and were possessed by her individually and they were never held by the Estate. No judgment has ever entered against Sandra individually

regarding the salary overpayments. Despite this fact, the trial court then inexplicably held that it was “proper for Kovac to be permitted to identify Sandra’s assets and have them turned over to him.” The trial court appeared to confuse the issue by adopting Kovac’s argument that the constructive trust imposed by the trial court in *Kovac I* covered Sandra’s salary overpayments wherever those funds could be found. The constructive trust imposed by the trial court on June 6, 2012, and clarified on June 12, 2012, was solely against the Estate, not against Sandra, and not against any “direct wage overpayments” that Sandra had received. Based on the limited nature of citation proceedings, the trial court had no authority to order Sandra to turn over her assets that clearly were not that of the judgment-debtor Estate. Accordingly, the trial court erred in ordering Sandra to freeze her assets and to turn them over to Kovac in partial satisfaction of a judgment against the Estate.¹

¶ 26 Based on our decision, we need not address Sandra’s alternative arguments regarding the law of the case, *res judicata*, or the imposition of pre and postjudgment interest.

¶ 27 III. CONCLUSION

¶ 28 Based on the preceding, we reverse the judgment of the circuit court of Kane County.

¶ 29 Reversed.

¹ If, in fact, Sandra is still holding the assets of the Estate, they are subject to possible turnover pursuant to the 2014 Complaint or supplemental proceedings.