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2018 IL App (3d) 170264-U

Order filed June 6, 2018

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2018

PEKIN INSURANCE COMPANY,)	Appeal from the Circuit Court
)	of the 10th Judicial Circuit,
Plaintiff-Appellant,)	Peoria County, Illinois.
)	
v.)	
)	
SURE SHOT COMMUNICATIONS)	
LLC, an Illinois Limited Liability)	
Company, and BRETT J. CAHILL,)	
)	
Defendants,)	
)	Appeal No. 3-17-0264
and)	Circuit No. 17-CH-8
)	
MID CENTURY TELEPHONE)	
COOPERATIVE; AMEREN ILLINOIS)	
COMPANY; DANIEL SILVA, Special)	
Administrator of the ESTATE OF)	
ARTURO SILVA, JR., Deceased; IOWA)	
MUTUAL INSURANCE COMPANY as)	
Subrogee of KERMIT HUBER d/b/a)	
KERT HUBER DEVELOPMENT; and)	
JORDEN STANLEY,)	The Honorable
)	James A. Mack,
Intervenors-Appellees.)	Judge, presiding.

PRESIDING JUSTICE CARTER delivered the judgment of the court.
Justices Holdridge and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held:* In an appeal in a insurance policy contract rescission case where the trial court had granted the petitions of certain tort claimants to intervene in the case and to vacate a consent judgment that had been entered into between the insurance company and its insured rescinding the policy, the appellate court lacked jurisdiction to review the trial court’s ruling granting the petitions to intervene and the motions to vacate. The appellate court, therefore, dismissed the appeal for lack of appellate jurisdiction.

¶ 2 Plaintiff, Pekin Insurance Company, filed an action in the trial court against defendants, Sure Shot Communications LLC, and its manager, Brett Cahill, to rescind certain insurance policy contracts that had been entered into between plaintiff and Sure Shot. Plaintiff alleged that Sure Shot and Cahill had made material misrepresentations in the application process. Acting *pro se*, Cahill agreed to the rescission on his own behalf and on behalf of Sure Shot. The trial court entered a consent order to that effect. Less than 30 days later, the intervenors—Mid Century Telephone Cooperative (Century); Ameren Illinois Company (Ameren); Daniel Silva, as special administrator of the estate of Arturo Silva, Jr. (Silva); Iowa Mutual Insurance Company, as subrogee of Kermit Huber d/b/a as Kert Huber Development (Iowa Mutual); and Jordan Stanley (Stanley)—filed petitions to vacate the consent judgment and to intervene in the case, claiming that they were necessary parties. After a hearing on the matter, the trial court granted the petitions, allowed the intervenors to intervene, vacated the consent judgment, and scheduled the case for further proceedings. Plaintiff appeals, challenging the trial court’s grant of the intervenors’ petitions to vacate the consent judgment and to intervene in the case. We dismiss the appeal for lack of appellate jurisdiction.

¶ 3 **FACTS**

¶ 4 Sure Shot was an Illinois limited liability company that was solely owned and managed by Brett Cahill. In January 2016, Sure Shot applied for four insurance policies with plaintiff: a

commercial general liability policy, a business auto policy, a workers' compensation policy, and a commercial umbrella liability policy. As part of the application process, Sure Shot completed a commercial insurance application in January 2016 and submitted the application to plaintiff. Sure Shot also completed a contractor's supplemental questionnaire in February 2016 and submitted that document to plaintiff as well.

¶ 5 Of relevance to this appeal, the contractor's supplemental questionnaire asked the following questions of the applicant:

- “4. Is or has the owner, any partner, or any corporate officer of the applicant's business been involved in any other business venture as an owner, partner or corporate officer?.....YES* NO

- 5. Is or has the owner, any partner, or any corporate officer of the applicant's business been involved as an owner, partner, or corporate officer in any other business venture which the insurance covering the business was cancelled or nonrenewal?.....YES* NO

¶ 6 Cahill, on behalf of Sure Shot, answered “no” to question four and did not answer question five on the questionnaire. In addition, Cahill allegedly signed the questionnaire directly beneath the following certification:

“I certify that the foregoing statements and answers to this supplemental questionnaire are true and accurate to the best of my knowledge. I understand that these statements will be used in determining the acceptability and premium of insurance coverages applied for.”

¶ 7 Based upon the commercial insurance application and the completed and certified contractor's supplemental questionnaire that Sure Shot submitted, plaintiff issued the four

insurance policies to Sure Shot. The policies were effective for the period from January 20, 2016, to January 20, 2017. Two of the policies are relevant to this appeal: the commercial general liability insurance policy and the commercial umbrella liability policy. Together, those two policies provided Sure Shot with \$2 million of liability coverage.

¶ 8 Prior to or during November 2016, Sure Shot was hired by Century to install conduit for fiber optic cable in Canton, Illinois. On November 16, 2016, while Sure Shot was doing directional boring work for the project, it struck a natural gas service pipeline owned by Ameren. A four person Ameren crew, which included Arturo Silva, Jr., and Jorden Stanley, responded to the gas leak. While the crew was working to make repairs, an explosion occurred, killing Silva and seriously injuring Stanley. A nearby building owned by Kert Huber Development and insured by Iowa Mutual was also destroyed. Ameren’s two other crewmen and several other people were injured, and numerous businesses and property owners suffered varying amounts of damage.

¶ 9 Multiple parties, including all of the intervenors, notified plaintiff and defendants of their potential claims against Sure Shot’s insurance policy and demanded that Sure Shot preserve all relevant evidence. In investigating the claims, plaintiff determined that some of the information that Sure Shot and Cahill had provided in the contractor’s supplemental questionnaire was allegedly false.

¶ 10 In January 2017, plaintiff filed the instant action against Sure Shot and Cahill for rescission of the four insurance policies. In the complaint, plaintiff alleged that Cahill, acting as Sure Shot’s principal, had falsely represented to plaintiff on the contractor’s supplemental application questionnaire that he had not “been involved in any other business venture as an owner, partner or corporate officer.” In truth, Cahill had owned a similar or identical business

named Cahill Contracting, LLC, which had been insured by plaintiff from 2011 to 2014, until plaintiff elected to not renew the coverage due to adverse claim history. Plaintiff did not name any additional parties in its rescission action even though it had actual notice of the claims that had been made by the intervenors as to the insurance policies.

¶ 11 Acting *pro se* for both himself and Sure Shot, Cahill agreed to rescind the four insurance policies. In accordance with that agreement, on February 14, 2017, the trial court entered a consent judgment rescinding the four insurance policies, ordering plaintiff to return Sure Shot's premium payments, finding that there was no coverage under the policies, and dismissing the case.

¶ 12 Within 30 days after the consent judgment was entered, the five intervenors—Century, Ameren, Silva, Iowa Mutual, and Stanley—filed petitions to vacate the consent judgment pursuant to section 2-1301(e) of the Code of Civil Procedure (Code) (735 ILCS 5/2-1301(e) (West 2016)) and to intervene in the case pursuant to section 2-408(a) of the Code (735 ILCS 5/2-408(a) (West 2016)). One of the intervenors, Century, also sought, in the alternative, to vacate the consent judgment pursuant to section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2016)). The intervenors asserted that they were necessary parties by virtue of their status as tort claimants and that the judgment entered in their absence, therefore, was void. A few of the intervenors later filed amended petitions and made various nonsubstantive changes. The amended petitions were filed more than 30 days after the consent judgment had been entered.

¶ 13 In April 2017, a hearing was held on the intervenors' petitions to vacate the consent judgment and to intervene in the case. By the time of the hearing, the matters had been fully briefed before the trial court. After listening to the arguments of the attorneys, the trial court granted the intervenors' petitions, allowed the intervenors to intervene in this case as defendants,

vacated the consent judgment, and scheduled the case for further proceedings. Plaintiff filed a notice of appeal and sought, pursuant to Illinois Supreme Court Rule 304(b) (eff. Mar. 8, 2016), to challenge the trial court's ruling. In addition, on the motion of plaintiff, the trial court stayed its ruling pending appeal.

¶ 14

ANALYSIS

¶ 15

On appeal, plaintiff argues that the trial court erred in granting the intervenors' petitions to vacate the consent judgment and to intervene in the instant case. First, as to the request to intervene, plaintiff asserts that the request should have been denied because the intervenors were not necessary parties in the instant case since the intervenors were not parties to the insurance contract or intended third party beneficiaries of the contract. Second, as to the intervenors' request to vacate the consent judgment, plaintiff asserts that because the intervenors were not necessary parties, the consent judgment was valid and enforceable and should not have been vacated. Plaintiff asks, therefore, that we reverse the trial court's ruling and that we reinstate the consent judgment that was entered into between plaintiff, Sure Shot, and Cahill.

¶ 16

The intervenors argue that the trial court's ruling was proper and should be upheld. The intervenors assert that they were necessary parties in the instant action—because they were tort claimants from the underlying accident who had notified plaintiff and defendants of their potential claims against the insurance policies at issue—and that the consent judgment, which was entered into in their absence, was void and unenforceable and was properly vacated. The intervenors ask, therefore, that we affirm the trial court's judgment.

¶ 17

Before we reach the merits of the parties' arguments on appeal, however, we must first resolve the parties' dispute over whether appellate jurisdiction exists in this case. Plaintiff argues that appellate jurisdiction is provided for under Supreme Court Rule 304(b)(3), which

allows for an appeal from a trial court's ruling granting or denying a section 2-1401 petition (see Ill. S. Ct. R. 304(b)(3) (eff. Mar. 8, 2016)). In making that argument, plaintiff contends that regardless of the statutory sections cited by the intervenors in their petitions, the trial court had to have granted the intervenors' request to vacate pursuant to section 2-1401 of the Code because section 2-1301(e) of the Code only applies to default judgments, which were not involved in the present case, and because a section 2-1203 motion (a postjudgment motion in a non-jury case) (735 ILCS 5/2-1203 (West 2016)) may only be filed by a party to the case, which the intervenors were not at the time the motions were filed.

¶ 18 The intervenors argue that there is no appellate jurisdiction in this case because the trial court's ruling granting the petition to vacate and intervene was not a final and appealable judgment and because there is no basis for interlocutory review of the trial court's decision. More specifically as to plaintiff's contentions, intervenors assert that: (1) the request to vacate the consent judgment in the instant case was made and granted pursuant to section 2-1301(e) of the Code, which, contrary to plaintiff's contention, applies to more than just default judgments; and (2) because the trial court vacated the consent judgment pursuant to section 2-1301(e), rather than section 2-1401, no jurisdictional basis exists for hearing this appeal under Supreme Court Rule 304(b)(3) or any other supreme court rule. Intervenors contend, therefore, that this appeal must be dismissed for lack of appellate jurisdiction.

¶ 19 It is well settled that an appellate court has a duty to consider its jurisdiction and must dismiss an appeal if jurisdiction is lacking. *Archer Daniels Midland Co. v. Barth*, 103 Ill. 2d 536, 539 (1984). The appellate court's jurisdiction is limited and is confined to reviewing basically two different categories of appeals: (1) appeals from final orders and judgments; and (2) those interlocutory appeals that are provided for by supreme court rule. *In re Marriage of*

Agustsson, 223 Ill. App. 3d 510, 514 (1992). A final judgment is one that terminates the litigation on the merits of the case and determines the ultimate rights of the parties such that if the judgment is affirmed, the only remaining action to take is to proceed to execution of the judgment. *Id.*

¶ 20 A trial court's order vacating a judgment is generally not a final and appealable order because the merits of the underlying case are still pending. *Id.* Similarly, a trial court's grant of a party's request to intervene is also not a final and appealable judgment. *In re A.A.*, 2014 IL App (5th) 140252, ¶ 32. However, a trial court's grant or denial of a section 2-1401 petition is a final judgment and is appealable, with or without a Rule 304(a) finding, pursuant to Supreme Court Rule 304(b)(3). Ill. S. Ct. R. 304(b)(3) (eff. Mar. 8, 2016); *S.C. Vaughan Oil Co. v. Caldwell, Troutt & Alexander*, 181 Ill. 2d 489, 496 (1998).

¶ 21 In the present case, although plaintiff contends that the intervenors' petitions to vacate the consent judgment were made and granted pursuant to section 2-1401 of the Code, the record and the law on this issue does not support that contention. Contrary to plaintiff's assertion on appeal, a section 2-1401 petition may not be filed until more than 30 days has passed since the judgment in question was entered. See 735 ILCS 5/2-1401(a) (West 2016); *In re Haley D.*, 2011 IL 110886, ¶ 66; *Babcock v. Wallace*, 2012 IL App (1st) 111090, ¶ 22. In this particular case, the record clearly shows that all of the intervenors' original petitions to vacate the consent judgment were filed within the initial 30 day period after the consent judgment had been entered. Thus, the petitions to vacate the consent judgment could not have been filed or granted pursuant to section 2-1401 of the Code, despite plaintiff's claim to the contrary. See 735 ILCS 5/2-1401(a) (West 2016); *Haley D.*, 2011 IL 110886, ¶ 66; *Babcock*, 2012 IL App (1st) 111090, ¶ 22. Although some of the intervenors filed amended petitions after the initial 30 day date, the

amendments were nonsubstantive in nature, and we do not believe that the filing dates of those amended petitions would take precedence over the filing dates of the original petitions so as to convert those petitions to section 2-1401 petitions.

¶ 22 Since the trial court's ruling on the petitions to vacate was not made pursuant to section 2-1401, there is no jurisdiction provided for this appeal under Supreme Court Rule 304(b)(3). See Ill. S. Ct. R. 304(b)(3) (eff. Mar. 8, 2016). Plaintiff has not suggested, and we have not found, any other basis for appellate jurisdiction to exist in this case to allow review of the trial court's grant of the intervenors' petitions to vacate the consent judgment. See *Agustsson*, 223 Ill. App. 3d at 514. Nor have we found, and plaintiff has not suggested, any legal basis for appellate jurisdiction to exist in this case to allow review of the trial court's grant of the intervenors' requests to intervene. See *A.A.*, 2014 IL App (5th) 140252, ¶ 32. We must, therefore, dismiss this appeal for lack of jurisdiction. See *Archer Daniels Midland Co.*, 103 Ill. 2d at 539.

¶ 23 Because we have found that there is no appellate jurisdiction in this case, we need not determine and, indeed, may not determine whether the petitions to vacate the consent judgment would be more properly classified as section 2-1301(e) motions (735 ILCS 5/2-1301(e) (West 2016)) or as section 2-1203 motions (735 ILCS 5/2-1203 (West 2016)).

¶ 24 CONCLUSION

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

¶ 26 Appeal dismissed.