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2013 IL App (3d) 120532-U

Order filed July 24, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT
A.D., 2013

ROBERT FOLLIS and TERESA)	
McDEVITT-FOLLIS,)	
)	Appeal from the Circuit Court
Plaintiffs,)	of the 12th Judicial Circuit
)	Will County, Illinois,
and)	
)	
ANNE SCHENK,)	Appeal No. 3-12-0532
)	
Plaintiff-Appellee,)	Circuit Nos. 06-LM-420 and 06-LM-154
)	
v.)	
)	The Honorable Raymond E. Rossi
THREE RIVERS TAX AND BUSINESS)	Judge, Presiding.
SERVICES, INC.)	
)	
Defendant-Appellant.)	

JUSTICE McDADE delivered the judgment of the court.
Presiding Justice Wright and Justice Carter concurred in the judgment.

ORDER

¶ 1 *Held:* Where circuit court denied corporation's motion to dismiss for lack of personal jurisdiction and corporation appealed, the appellate court lacked jurisdiction to consider the appeal because the order was not a final judgment, and corporation

did not file a petition for leave to file an interlocutory appeal.

¶ 2 In 2005, Anne Schenk¹ was sole shareholder and director of Tri-County Tax Service, Inc. She agreed to sell fifty percent of her interest in the business to Robert Follis and Theresa McDevitt-Follis, and the parties agreed to form a new corporation called Tri-County Tax and Business Development, Inc (Tri-County). In 2006, various issues arose with the business, leading to litigation between Schenk and Mr. and Mrs. Follis in the circuit court of Will County. After a trial, the court found that Mr. and Mrs. Follis engaged in various acts of wrongdoing, including: misappropriating Tri-County funds and accounts to use for their personal gain; dissolving Tri-County and forming a competing business called Tri-County Business Development and Tax Service, Inc.; and diverting Tri-County's clients to the newly formed competing business. The court concluded that Mrs. Follis intentionally engaged in fraud, breach of fiduciary duty, forgery, and intentional deception and misrepresentation. On September 2, 2011, the court entered a judgment in favor of Schenk against Mr. and Mrs. Follis for \$285,383 in compensatory damages and an additional \$150,000 in punitive damages.

¶ 3 On January 24, 2012, Schenk filed a petition for rule to show cause and a citation to discover assets against Mr. and Mrs. Follis. The petition alleged that to avoid to court's judgment, Mr. and Mrs. Follis had conducted a sham sale of Tri-County Business Development and Tax Service, Inc. to another newly formed business, Three Rivers Tax and Business Services, Inc. (Three Rivers). Three Rivers is a recently formed Illinois corporation, and is solely owned and incorporated by Mary Kate Smith (Smith), the daughter of Mr. and Mrs. Follis.

¹In the appellate briefs and in the trial court, Anne's name is alternately spelled "Schenk" and "Schenck." We will use the "Schenk" spelling throughout our order.

Smith lived in Seattle, Washington, when she incorporated Three Rivers.

¶ 4 The hearing on the petition for rule to show cause took place over three days before Judge Rossi; on February 14 and 16, the court heard evidence from the parties, including testimony from Schenk, Mr. and Mrs. Follis, an accountant, and Smith. Thereafter, citations to discover assets were issued against both Smith individually and Three Rivers as a corporation; the citation against Three Rivers was served on the corporation's registered agent on February 24, and the citation against Smith was served on February 27. Both citations had return dates of March 21 and proceedings were to be held before Judge Carney, but by agreement were rescheduled to April 13, 2012. To date, the citation proceedings against Three Rivers and Smith have not been conducted.

¶ 5 The hearing on the Petition for rule to show cause continued on March 2, and after the close of evidence, the court found that Three Rivers was operating its business in Tri-County's office, using Tri-County's computers, furniture, website, telephone and fax number, and that Three Rivers had access to Tri-County's clients. The testimony indicated that neither Smith nor Three Rivers paid any compensation to receive these assets. The court concluded that Mrs. Follis had fraudulently transferred these business assets to Three Rivers to avoid the claims of a creditor (presumably Schenk), and that Smith and Three Rivers had acted as the transferee by receiving these assets. The court found that Three Rivers was the successor corporation of Tri-County Business Development and Tax Service and the confederate of Mrs. Follis. At the conclusion of the March 2 hearing, the court appointed a receiver to take control of Three Rivers. The receiver was tasked with operating Three Rivers, and was to conduct a review of the business to determine which assets were transferred to Three Rivers by Mrs. Follis and which

were contributed by Smith herself. Neither Schenk nor any other party had filed a complaint against Three Rivers, and the corporation was never made a defendant in the underlying action or served with summons.

¶ 6 The judge ordered that Schenk prepare a written order consistent with the court's March 2 ruling, but the record does not indicate that any such order was prepared or entered.

¶ 7 Three Rivers filed a motion to vacate the order appointing a receiver pursuant to section 5/2-301 of the Code of Civil Procedure (735 ILCS 5/2-301 (West 2012)) on the basis that the trial court did not have jurisdiction over Three Rivers. On June 14, 2012, the court held a hearing on the motion of Three Rivers, and after hearing the arguments of Three Rivers and Schenk, the court concluded it had jurisdiction over Three Rivers and denied the motion to dismiss. The court reasoned that the citation served on Smith also conferred jurisdiction over the corporation because Smith was the sole shareholder of Three Rivers.² A written order denying the motion of Three Rivers was entered, stating that it was a final and appealable order.

¶ 8 On June 26, 2012, Three Rivers filed a notice of appeal as to the trial court's June 14 order finding it had jurisdiction over Three Rivers.

¶ 9 ANALYSIS

¶ 10 Although Three Rivers was not a party to the contempt proceeding below or to the underlying action, it has standing to appeal to this court because it has a direct, immediate, and substantial interest in the subject matter of the litigation which would be prejudiced by the

²At the hearing, both the trial court and counsel mistakenly believed that only Smith had been served with a third party citation to discover assets, when in fact Three Rivers had been served with one as well.

judgment or benefit by its reversal. *St. Mary of Nazareth Hosp. v. Kuczaj*, 174 Ill. App. 3d 268, 271 (1988). The sole issue Three Rivers has raised on appeal is whether the trial court had jurisdiction to appoint a receiver to take control of the corporation. Three Rivers argues that because it was never named as a defendant in an action and served with summons in the underlying case, the trial court's March 2 order appointing a receiver was void for lack of jurisdiction. In addition, it argues that the Citation to Discover Assets served upon it was inadequate to confer jurisdiction over the corporation.

¶ 11 Before we may reach the issue of the trial court's jurisdiction, however, we must determine whether we have jurisdiction over the appeal. Although Schenk has not argued we lack jurisdiction, "[a] reviewing court must ascertain its jurisdiction before proceeding in a cause of action, regardless of whether either party has raised the issue." *Secura Insurance Co. v. Illinois Farmers Insurance Co.*, 232 Ill. 2d 209, 213 (2009). Whether the appellate court has jurisdiction is always an open question, and where jurisdiction is lacking we may dismiss an action on our own motion. *Bernstein & Grazian, P.C. v. Grazian & Volpe, P.C.*, 402 Ill. App. 3d 961, 971 (2010). For the reasons that follow, we conclude we do not have jurisdiction over the appeal of Three Rivers, and therefore we must dismiss the appeal.

¶ 12 In its notice of appeal, Three Rivers stated it was appealing from the trial court's order of June 14, 2012, in which the trial court denied its motion to dismiss for lack of jurisdiction. Generally, the denial of a motion to dismiss is not a final and appealable judgment. *Saddle Signs, Inc. v. Adrian*, 272 Ill. App. 3d 132, 135 (1995). However, Rule 306(a)(3) provides that a party may petition for leave to file an interlocutory appeal when the trial court denies a motion to dismiss based on the ground that the circuit court lacked personal jurisdiction over the defendant.

Ill. Sup. Ct. R. 306(a)(3) (eff. Feb. 16, 2011). In this case, Three Rivers did not file a petition for leave to appeal pursuant to Rule 306. "Where a rule expressly outlines the procedure to be taken on appeal, as does Rule 306, said procedure must be followed exactly." *Lewis v. Canty*, 115 Ill. App. 3d 306, 308 (1983). See also *Ellis v. AAR Parts Trading, Inc.*, 357 Ill. App. 3d 723, 731 (2005) (where appellant failed to file petition for leave to appeal interlocutory order pursuant to Rule 306, appellate court lacked jurisdiction). Three Rivers did not follow the procedure mandated by Rule 306 by filing a petition for leave to appeal the denial of its motion to dismiss brought under section 5/2-301 of the Code of Civil Procedure, and we therefore lack jurisdiction under Rule 306.

¶ 13 We also conclude that the appeal of Three Rivers cannot be construed as a interlocutory appeal as of right pursuant to Rule 307. A party may appeal an order "appointing or refusing to appoint a receiver or sequestrator" as of right. See Ill. Sup. Ct. R. 307(a)(2) (eff. Feb. 26, 2010). To invoke this right, the party must perfect its appeal within thirty days of the entry of the interlocutory order by filing a notice of interlocutory appeal. Ill. Sup. Ct. R. 307(a) (eff. Feb. 26, 2010). In the present case, even if we were to construe the notice of appeal filed by Three Rivers as an interlocutory appeal challenging the appointment of the receiver, such an appeal would not be timely—the court entered the order appointing the receiver on March 2, and Three Rivers did not file its notice of appeal until June 26. This was well outside of the thirty day period required by Rule 307(a). In addition, the motion to dismiss filed by Three Rivers would not toll the thirty day time period required to file an interlocutory appeal under Rule 307: apart from two exceptions not applicable here, the rule requires the appeal be perfected within thirty days of the interlocutory order and does not make a provision for tolling this time period with motions

attacking the order. Ill. Sup. Ct. R. 307(a) (eff. Feb. 26, 2010). See also *Craine v. Bill Kay's Downers Grove Nissan*, 354 Ill. App. 3d 1023, 1028 (2005) (filing of a motion to reconsider does not toll the thirty day period under Rule 307); *Trophytime, Inc. v. Graham*, 73 Ill. App. 3d 335, 335 (1979) ("A motion directed against an Interlocutory order will not toll the running of the 30-day deadline for the filing of the notice of appeal."). Accordingly, we do not have jurisdiction under the rules allowing for appeals of interlocutory orders.

¶ 14 In its brief, Three Rivers invoked Rule 301 in its statement of jurisdiction before this court. Rule 301 provides that a final judgment of a circuit court is appealable as of right. Ill. Sup. Ct. R. 301 (eff. Feb. 1, 1994). Indeed, the circuit court's June 14 decision denying Three Rivers' motion to dismiss states that it is a final and appealable order. However, "[t]he mere fact that a trial court makes a finding that an order is appealable does not make that order appealable." *In re Application of County Collector*, 395 Ill. App. 3d 155, 160 (2009). For the purposes of Rule 301, a final judgment fixes the rights of the parties absolutely and finally, terminating the litigation on the merits so that if the judgment is affirmed, the only thing left to do is to proceed with the execution of the judgment. *In re Application of County Collector*, 395 Ill. App. 3d at 159. The order denying Three Rivers' motion to dismiss was not final, as it did not terminate the litigation on the merits; from the record, it is clear that the receiver was tasked with reporting back to the trial court on the assets of Three Rivers, at which point the court could order further relief. Accordingly, the June 14 order was not final and Rule 301 is not a basis for jurisdiction before this court.

¶ 15 Finally, while orders entered under section 2-1402 of the Code of Civil Procedure are appealable (Ill. Sup. Ct. R. 304(b)(4) (eff. Feb. 26, 2010)), this provision is not applicable here,

because although Three Rivers was served with a citation to discover assets, that proceeding was not conducted and no order was ever entered.

¶ 16 Because we lack jurisdiction to hear the appeal, we do not reach the issue of whether the trial court had jurisdiction to appoint a receiver over Three Rivers.

¶ 17 **CONCLUSION**

¶ 18 For the foregoing reasons, the appeal is dismissed for lack of jurisdiction.

¶ 19 Appeal dismissed.