

NOTICE

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2015 IL App (5th) 140302-U

NO. 5-14-0302

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE VANDALIA LEVEE AND DRAINAGE DISTRICT,)	Appeal from the
)	Circuit Court of
)	Fayette County.
Plaintiff-Appellee,)	
)	
v.)	No. 08-CH-19
)	
FRED P. KECK; GUARANTEED AIR FREIGHT)	
AND FORWARDING, INC., an Illinois Corporation;)	
PARISH HOLDINGS, LP, a Minnesota Limited)	
Partnership; and KASKASKIA LAND COMPANY,)	
LLC, f/k/a Keck Land Company, LLC, an)	
Illinois Limited Liability Company,)	Honorable
)	Dennis E. Middendorff,
Defendants-Appellants.)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Justices Welch and Moore concurred in the judgment.

ORDER

- ¶ 1 *Held:* Failure to join landowner as a defendant prior to original judgment and appeal did not render judgments void where property was transferred during the proceedings, the plaintiff had no reason to know the property was transferred, and the new owner's interests were adequately represented by the other defendants at trial.
- ¶ 2 The issue involved in this appeal is whether judgment is proper against a necessary party added as a defendant on remand after judgment and appeal under an

unusual set of circumstances. The added defendant—Kaskaskia Land Company, LLC (KLC)—is owned and controlled by the son and a business associate of one of the original defendants—Fred Keck. Most of the land at issue in this dispute was transferred from a corporation owned by Keck to KLC after the plaintiff filed its complaint but prior to trial. The plaintiff, however, did not learn of the transfer until Keck testified at trial that the land had been transferred. The plaintiff successfully appealed a judgment in favor of the defendants. On remand, the plaintiff filed a motion to add KLC as a necessary party, which the court granted. The court entered an order granting an injunction, but reserved ruling on the question of damages. KLC appeals, arguing that (1) all orders against it are null and void because they were entered before KLC was joined as a necessary party; and (2) the finding of a prescriptive easement in favor of the levee district, a quasi-public entity, constitutes a taking which requires just compensation. We affirm.

¶ 3 This case has a long and complex procedural history. The issue in the underlying litigation was the impact of levees on flooding in the Kaskaskia River flood plain. The plaintiff, the Vandalia Levee and Drainage District, operates a system of levees and drains that protect 12,000 acres of farmland. The defendants in this matter include Parish Holdings, Fred Keck, and various entities owned and controlled by Keck, his son Jon Keck, and his friend and business associate Tim Emerick. Parish Holdings is a partnership that owns farmland on Pecan Island. Guaranteed Air Freight and Forwarding (GAFF) is a corporation wholly owned by Fred Keck. KLC is a partnership that is owned and controlled by Tim Emerick and Jon Keck. Emerick owns 55% of KLC

individually, and Jon Keck owns the remaining 45% through Waterfowler Express, Inc., a corporation which is wholly owned and controlled by Jon Keck.

¶ 4 Fred Keck began purchasing land on Pecan Island in 1988. He began farming that land in 1989. In July 2006, he transferred all of his Pecan Island property to GAFF. In January 2010, while the instant lawsuit was pending in the trial court, GAFF transferred all of its assets, including its Pecan Island property, to KLC. Both GAFF and Fred Keck also transferred additional property in Fayette County to KLC at this time. The January 2010 transfers violated a court order entered in a divorce case involving Fred Keck and his former wife, Vanessa Keck.

¶ 5 The plaintiff filed its initial complaint in this matter on April 18, 2008. The only named defendants in the original complaint were Fred Keck and Parish Holdings. The plaintiff alleged that when Fred Keck purchased property on Pecan Island, he began building new levees around its perimeter and rebuilding, repairing, and raising the height of existing but nonfunctional levees. The plaintiff further alleged that these levees increased flood heights upstream from Pecan Island, thereby weakening the plaintiff's levees and causing breaches. The plaintiff argued that the levees (1) violated a prescriptive flood easement; (2) constituted a nuisance; and (3) violated the civil law of drainage. The plaintiff sought damages and injunctive relief.

¶ 6 In July 2008, the plaintiff filed a motion for leave to add GAFF as a defendant. In the motion, the plaintiff alleged that despite exercising due diligence to discover the ownership of all Pecan Island property, it did not discover Fred Keck's 2006 transfer of his Pecan Island property to GAFF due to a clerical error at the recorder's office. The

plaintiff further alleged that the status of GAFF was unclear at that time because the Secretary of State's online records showed that it had been dissolved involuntarily in November 2007. The plaintiff filed its amended complaint adding GAFF as a defendant on September 30, 2008.

¶ 7 The matter proceeded to trial late in August 2010. Fred Keck testified that neither he nor GAFF owned any property on Pecan Island at that time. He acknowledged that when the plaintiff filed its original complaint, GAFF owned 2,000 acres in Fayette County, including property on Pecan Island. However, he stated that the land owned by GAFF had been transferred into the Keck Trust, which was set up and controlled by his son, Jon Keck. Asked if he made the transfer on behalf of GAFF, Keck responded, "No. The bank was foreclosing on me. So actually, the bank made the transfer." He admitted that he was responsible for the levee construction at issue and that he was the owner of the equipment used to build the levees at issue, which he also used in farming.

¶ 8 On September 13, 2010, the plaintiff filed a motion requesting a hearing to determine (1) ownership of the Pecan Island property previously owned by Fred Keck and GAFF and (2) control of the levees on that property. In it, the plaintiff alleged that the transfer of GAFF's property while the proceedings were pending was not disclosed to the plaintiff through seasonal supplements to discovery (see Ill. S. Ct. R. 213(i) (eff. Jan. 1, 2007)) and "apparently not known by [Fred] Keck's counsel." The plaintiff alleged that the transfers violated a court order in Fred and Vanessa Keck's dissolution proceedings, which were pending simultaneously with the proceedings in this matter.

The plaintiff further alleged that both Tim Emerick and Jon Keck admitted in depositions in related litigation that they had an oral agreement to transfer the property back to Fred.

¶ 9 The plaintiff further alleged in the motion that Fred Keck exercised sufficient control over the Pecan Island levees to be ordered to remove all of them. This was because he either leased or managed most of the property on which the levees were situated, including the land owned by Parish Holdings. The plaintiff asserted, however, that Jon Keck was managing some of the property leased by Parish Holdings to Fred. Apparently, Fred subsequently became incapacitated.

¶ 10 The transfers of property at issue in this matter also resulted in a lawsuit by Vanessa Keck against KLC, Fred Keck, Jon Keck, Tim Emerick, GAFF, and Waterfowler Express. We will discuss that litigation to the extent it relates to this litigation. Vanessa filed her complaint on September 9, 2010. She requested an order setting aside the transfers pursuant to the Uniform Fraudulent Transfers Act. She also requested a preliminary injunction prohibiting KLC and its owners from transferring or encumbering any of the property at issue. (We note that Vanessa's suit involved a substantial amount of property in addition to the property at issue here.) She alleged that on September 14, 2009, the dissolution court entered an order prohibiting Fred from transferring or encumbering any property. She alleged that in spite of this order, Fred executed a deed on behalf of GAFF transferring 26 tracts to KLC. She further alleged that KLC paid inadequate consideration for the transfers, and that the owners of KLC (Tim Emerick and Jon Keck) orally agreed to convey the property back to Fred in the future.

¶ 11 Eventually the parties entered into a settlement in Vanessa Keck's suit. The settlement called for the property at issue to be sold at an auction. KLC was to pay Vanessa \$925,000 from the proceeds of those sales. The settlement also provided that if the auction did not take place or the purchasers failed to close on the sales, the defendants would not be obliged to pay Vanessa. Jon successfully bid on some of the property. His bids totaled over \$4 million, but he was unable to obtain financing to close on the sales. In addition, Jon was not required by KLC to pay earnest money when he bid at auction.

¶ 12 Vanessa filed a motion to enforce the settlement, arguing that the defendants failed to act in good faith and prevented willing and able purchasers from bidding on the properties. The trial court found that (1) Jon could not have reasonably believed that he would be able to secure financing for his obligations; and (2) by impeding the ability of other buyers to bid on the properties, Tim Emerick and Jon improperly prevented a condition precedent from occurring. The court ordered them to hold another auction or pay Vanessa the \$925,000 she was owed under the settlement agreement. That ruling was eventually upheld on appeal.

¶ 13 Meanwhile, on October, 28, 2010, the court in this case entered judgment for the original defendants (Parish Holdings, Fred Keck, and GAFF). The court found that the plaintiff did not prove that its damages were caused by the defendants' levees and that none of the legal theories put forth by the plaintiff supported its position. The court also specifically held that injunctive relief would not be proper, reasoning that the ability to seek damages provided the plaintiff with an adequate legal remedy. In the same order, the court denied the plaintiff's motion for a hearing to determine ownership of the Pecan

Island property and control of the levees, finding that its ruling in favor of the defendants rendered the motion moot. The court noted, however, that in the event the plaintiff successfully appealed that ruling, such a determination would be necessary on remand.

¶ 14 The plaintiff appealed that ruling, and in December 2012, this court reversed. The defendants—Fred Keck and GAFF—argued before this court, among other things, that judgment against Fred Keck individually was improper because he did not own any property on Pecan Island. We rejected this argument, explaining that judgment against Fred Keck was proper regardless of which entities owned the property because the evidence established that he personally built and maintained the levees and had the ability and authority to remove them. As noted earlier, the equipment used to maintain the levees was owned by Fred Keck, and he farmed, leased, or managed much of the land. We remanded the matter to the trial court for the entry of an injunction and determination of damages.

¶ 15 On March 5, 2013, the plaintiff filed a motion for leave to add additional parties. The plaintiff requested to add Jon Keck, Vanessa Keck, Tim Emerick, Waterfowler Express, and KLC as defendants. It alleged that (1) the plaintiff believed that all five parties had acquired an interest, "ownership or otherwise," in the Pecan Island property at issue; (2) their presence was necessary to fully resolve the issues between the plaintiff and the other defendants; and (3) the other defendants would not be prejudiced by the addition of these parties and did not object. The court granted the motion on March 11. On April 29, 2013, the plaintiff filed an amended complaint adding these parties and alleging that it sustained additional damages as a result of an April 20 flood event.

¶ 16 On June 13, 2013, KLC filed a motion to dismiss, arguing that (1) the October 2010 trial court judgment and the decision of this court were null and void because KLC was a necessary party that was not before the court when these decisions were rendered; (2) the finding of a prescriptive easement constituted a taking of property for which just compensation was required under the eminent domain clauses of the state and federal constitutions; and (3) the plaintiff lacked standing to represent the property owners in the levee district. Vanessa Keck also filed a motion to dismiss. The court held a hearing on the motions on August 6. On August 21, the court granted Vanessa's motion to dismiss. On the same day, the court ordered that a hearing be conducted on the plaintiff's previously-filed motion to determine ownership of Pecan Island property and control of the levees. The court reserved ruling on KLC's motion to dismiss until after that hearing. The court reasoned that if the transfer from GAFF to KLC was legitimate, KLC would be entitled to conduct discovery and mount a defense, but if the transfer was fraudulent, no additional proceedings would be necessary for this purpose.

¶ 17 On September 16, 2013, this court rendered its decision upholding the trial court's decision in Vanessa Keck's suit. On December 16, KLC filed a motion to reconsider the order of August 21 in which the court found it necessary to determine whether the transfer from GAFF to KLC constituted fraud. In its motion, KLC pointed out that this court upheld the validity of the settlement agreement in Vanessa's suit. It argued that because none of the parties to this suit had standing to challenge that ruling, it was not proper for the trial court in this matter to decide whether the transfer was fraudulent. (We note that neither the trial court nor this court resolved Vanessa's allegations of fraudulent

transfer due to the settlement entered into in that case. The question before the courts was whether the terms of the settlement agreement were enforceable against KLC in spite of the failure of a condition precedent. See *Keck v. Keck Land Co.*, 2013 IL App (5th) 120503-U, ¶ 44.)

¶ 18 In March 2014, the court granted KLC's motion to reconsider its August 2013 ruling and denied KLC's motion to dismiss. In its order granting the motion to reconsider, the court explained that the intent of the transfers did not matter; ownership was all that was at issue.

¶ 19 In April 2014, the court held a hearing on the scope of injunctive relief. On May 21, 2014, the court entered an injunction ordering KLC and Parish Holdings each to remove two sections of levees on their own property. The court reserved ruling on the question of damages.

¶ 20 On June 23, 2014, KLC filed the instant appeal. The plaintiff filed with this court a motion to dismiss the appeal, arguing that it was premature because the trial court had not yet entered a final judgment on the question of damages. This court denied the plaintiff's motion, finding that the appeal was a proper appeal of an order granting an injunction pursuant to Supreme Court Rule 307(a)(1) (eff. Feb. 26, 2010). The plaintiff argues that the injunctive relief ordered by the trial court was "woefully inadequate" and not consistent with this court's decision in the prior appeal. However, the plaintiff did not file a notice of cross-appeal. Thus, we are without jurisdiction to consider this argument. See Ill. S. Ct. R. 303(a)(3) (eff. May 30, 2008).

¶ 21 We turn our attention to KLC's contentions. KLC argues that (1) all judgments against it are void because it was a necessary party to this litigation and was not joined until after judgment; and (2) the finding of a prescriptive easement in favor of the levee district constitutes a taking which requires just compensation under the eminent domain clauses of the federal and state constitutions. We reject both of these arguments.

¶ 22 A necessary party is a party with an interest in the dispute that will be materially affected by the judgment. *Moore v. McDaniel*, 48 Ill. App. 3d 152, 156 (1977). A party may also be necessary if its presence is required to protect the interests of other parties or to enable the court to completely resolve the dispute. *Holzer v. Motorola Lighting, Inc.*, 295 Ill. App. 3d 963, 970 (1998). Under most circumstances, judgment entered without the presence of a necessary party is null and void. *Schnuck Markets, Inc. v. Soffer*, 213 Ill. App. 3d 957, 982 (1991). This is because "[f]undamental principles of due process prevent the entry of a judgment that affects a right or interest of a party not before the court." *Caparos v. Morton*, 364 Ill. App. 3d 159, 175 (2006); see also *Moore*, 48 Ill. App. 3d at 156. However, there is one exception to this otherwise inflexible rule. Judgment against an absent necessary party is proper where (1) extraordinary circumstances are present which made joinder of the necessary party "practically impossible"; and (2) the interest of the absent party is adequately represented by the presence of parties with identical interests who are "equally certain to bring forward the entire merits of the controversy." *Oglesby v. Springfield Marine Bank*, 385 Ill. 414, 423-24 (1944). This exception is known as the doctrine of representation. See *Moore*, 48 Ill. App. 3d at 158.

¶ 23 Here, the parties agree that KLC is a necessary party to this litigation because it owns much of the property on Pecan Island and because Fred Keck is no longer able to personally remove the levees. KLC argues, however, that it was not impossible for it to be joined earlier and its interest was not adequately represented by the parties who were joined earlier. We disagree.

¶ 24 We first note that numerous cases applying the doctrine of representation subsequent to *Oglesby* have focused solely on the requirement of adequate representation by parties in the lawsuit. See, e.g., *State Farm Fire & Casualty Co. v. John J. Rickhoff Sheet Metal Co.*, 394 Ill. App. 3d 548, 563-64 (2009); *Caparos*, 364 Ill. App. 3d at 176; *Schnuck Markets*, 213 Ill. App. 3d at 982; *Moore*, 48 Ill. App. 3d at 158. Other cases have held, however, that application of the doctrine requires *both* adequate representation *and* circumstances that make it practically impossible to join the necessary party. See, e.g., *Crum & Forster Specialty Insurance Co. v. Extended Stay America, Inc.*, 375 Ill. App. 3d 654, 687 (2007); *Zurich Insurance Co. v. Baxter International, Inc.*, 275 Ill. App. 3d 30, 37 (1995). Here, we may assume that both requirements are necessary because we find that both are satisfied.

¶ 25 KLC asserts that "this is not 'a case so extraordinary and exceptional in character' that it was 'practically impossible' to make [KLC] a party to this suit." See *Oglesby*, 385 Ill. at 423-24. KLC points out in a footnote in its brief that the Pecan Island property was transferred from GAFF to KLC in January 2010, seven months prior to trial. However, it provides no other argument or explanation to support its bald assertion. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 16, 2013) (providing that an appellant's brief "*shall* contain the

contentions of the appellant *and the reasons therefor*," and that any arguments not included in the appellant's brief are forfeited (emphasis added)). In any case, we disagree with KLC's contention.

¶ 26 As discussed previously, the plaintiff did not discover the transfers from GAFF to KLC until Fred Keck testified at trial that GAFF no longer owned any property on Pecan Island. To the extent the footnote pointing out that the transfers occurred seven months prior to trial can be read as an argument that the plaintiff should have learned of the transfers earlier and sought to add KLC before trial, we are not persuaded for two reasons.

¶ 27 First, duty to seasonably supplement or amend information previously provided through discovery is intended to eliminate the requirement of further inquiries. See Ill. S. Ct. R. 213(i) (eff. Jan. 1, 2007) and committee comments. The plaintiff was not required to make ongoing inquiries throughout the pendency of these proceedings to determine whether any of the property had changed hands.

¶ 28 Second, the circumstances surrounding the transfer made it particularly difficult to uncover. As we have already discussed at length, the transfer violated a court order in another case. Tim Emerick acknowledged in a deposition in Vanessa's suit that KLC came into existence just weeks prior to the transfers. See <http://www.ilsos.gov/corporatellc/CorporateLlcController>, last visited July 31, 2015. Both Jon Keck and Tim Emerick admitted that they agreed to transfer the land back to Fred in the future, although Emerick stated that this was now unlikely to occur.

¶ 29 It is also worth noting that Fred Keck's trial testimony regarding the transfer in this case was not even truthful. He testified that the property was transferred into a trust controlled by his son; however, the record established subsequent to this revelation shows that the property was in fact conveyed directly to KLC. The trial court recognized the difficulty involved in resolving the question, noting that in the event of a remand, "additional discovery[,] pleading and extensive evidence to these issues will be required." Under these circumstances, we find that it was practically impossible for the plaintiff to join KLC earlier because the plaintiff had no reason to know that GAFF, acting through its sole shareholder, Fred Keck, transferred all of its property to KLC.

¶ 30 KLC also contends that its interests were not adequately represented in the litigation because it does not have the same interests as any other defendants. We find this argument unavailing.

¶ 31 As discussed earlier, adequate representation requires a party with interests that are identical to the interests of the absent party. See *Oglesby*, 385 Ill. at 423-24. This does not necessarily mean that the parties must have identical interests in the property, however. We find *Moore v. McDaniel* and *Borrowman v. Howland*, 119 Ill. App. 3d 493 (1983), instructive in this regard.

¶ 32 In *Moore*, the trial court entered an order enjoining property owners from maintaining a mobile home or trailer on their property due to a restrictive covenant. The bank holding their mortgage sought to intervene in the proceedings, but its motion to intervene was denied. The property owners appealed the injunction, and the bank appealed the order denying its motion to intervene. *Moore*, 48 Ill. App. 3d at 154. The

appellate court concluded that the bank was not an indispensable party to the litigation. *Moore*, 48 Ill. App. 3d at 158. This finding was partly because the underlying dispute involved the use of the property rather than title to the property. *Moore*, 48 Ill. App. 3d at 157. Nevertheless, the court went on to state in *dicta* that even if it were to find that the bank was an indispensable party, its joinder would not be required under the doctrine of representation. *Moore*, 48 Ill. App. 3d at 158.

¶ 33 In finding the doctrine of representation applicable in spite of the parties' different interests in the property, the court explained that their interests in the litigation were identical. That is, both parties "desired a ruling that the mobile or modular home was not a 'trailer house'—the McDaniels in order to preserve their home, and [the bank] in order to protect its security interest." *Moore*, 48 Ill. App. 3d at 158. Because the parties' interests in the litigation were identical, the court found that the property owners adequately represented the bank's interest. *Moore*, 48 Ill. App. 3d at 158. The court then went on to point out that they "presented a vigorous defense at trial" and there was no indication that they had done anything in conflict with the bank's interests. *Moore*, 48 Ill. App. 3d at 160.

¶ 34 In *Borrowman*, a levee district sought a mandatory injunction ordering the removal of a farm building it alleged encroached on its easement. *Borrowman*, 119 Ill. App. 3d at 498. The defendant did not hold the deed to the property at issue. *Borrowman*, 119 Ill. App. 3d at 498. However, he was purchasing the property on contract (*Borrowman*, 119 Ill. App. 3d at 498), and he was responsible for erecting the building at issue (*Borrowman*, 119 Ill. App. 3d at 496).

¶ 35 On appeal from an injunction ordering him to remove the building, the defendant argued that the order was void because the record owners were necessary parties but were not before the court. *Borrowman*, 119 Ill. App. 3d at 496. The court initially found that they were not necessary parties because it was not clear from the record whether they had any interest in the building itself. *Borrowman*, 119 Ill. App. 3d at 499. However, the court also found that, even assuming the landowners had an interest in the farm building, the doctrine of representation would be applicable. The court reasoned that "[w]hatever the precise nature of [the owners'] interest in the structure, *their purpose in the litigation would surely be the same as defendant's purpose*: to preserve the structure." (Emphasis added.) *Borrowman*, 119 Ill. App. 3d at 500.

¶ 36 Here, likewise, KLC's interest in the litigation was precisely the same as that of the other defendants—to keep the levees in place. This is so even though their interests in the property itself may be different. Although KLC contends that its interests are different from those of the Kecks and GAFF, it does not identify any difference. See *Schnuck Markets*, 213 Ill. App. 3d at 982.

¶ 37 We conclude that KLC's interest in this litigation was identical to that of Fred Keck and GAFF. In addition, those defendants put forth a vigorous defense. Because it was practically impossible for the plaintiff to join KLC as a defendant and KLC's interests were adequately represented by Fred Keck and GAFF, we find that the doctrine of representation was applicable, and judgment against it was therefore proper.

¶ 38 KLC next argues that the plaintiff has not compensated it for the prescriptive easement. We first note that none of the cases cited by KLC in support of this contention

arose in the context of a prescriptive easement found to have come into existence through 20 or more years of adverse use long before the landowner acquired title to the property at issue, and we are aware of no such cases. This is not surprising given the nature of a prescriptive easement.

¶ 39 In any case, we do not believe that the question is properly before us. KLC raised the issue as an affirmative defense in its motion to dismiss. That is not the same as a request for just compensation. Moreover, while the trial court order denying KLC's motion to dismiss may be seen as including an implicit finding that it is not entitled to dismissal on this basis, the trial court did not rule on the question of whether the requirement of just compensation applies to a prescriptive easement arising before the party acquired the property. KLC acknowledges as much in its response to the plaintiff's arguments on the issue; it asserts that because the trial court has not ruled on the question, the plaintiff may not argue in its brief that KLC is not entitled to compensation. Thus, we need not consider the issue further.

¶ 40 For the foregoing reasons, we affirm the order of the trial court.

¶ 41 Affirmed.