2015 IL App (5th) 130190-U

NO. 5-13-0190

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THOMAS W. BURKART, d/b/a Burkart Law Offices,	)	Appeal from the Circuit Court of Madison County.
Plaintiff-Appellant,	)	
v.	)	No. 12-L-1693
ILLINOIS STATE BAR ASSOCIATION MUTUAL INSURANCE COMPANY, ROBERT WILSON, and ELIZABETH WILSON,	)	Honorable Dennis R. Ruth, Judge, presiding.
Defendants-Appellees.	)	

JUSTICE SCHWARM delivered the judgment of the court.
Justices Welch and Stewart concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's order dismissing the plaintiff's case is affirmed, as it was not an abuse of discretion.

¶ 2 Plaintiff Thomas Burkart, an attorney, brought an action in Madison County seeking to force his malpractice insurer, Illinois State Bar Association Mutual Insurance Company (ISBA Mutual), to defend him in actions brought by Robert and Elizabeth Wilson. ISBA Mutual moved to dismiss the case because a similar action had been filed previously by ISBA Mutual in Sangamon County. Following a hearing, the circuit court

granted the motion to dismiss. Burkart now appeals this dismissal, as well as the denial of his motion for injunctive relief as moot. For the reasons that follow, we affirm the decision of the circuit court.

¶ 3 BACKGROUND

¶ 4 Burkart represented the Wilsons in a real estate transaction and litigation arising from that transaction. Ultimately, the litigation resulted in a $30,000 jury verdict for the Wilsons and in malpractice allegations by the Wilsons regarding Burkart's representation. The details of this litigation are largely irrelevant to the case now before the court, but this court has summarized them in a previous appeal. See *Wilson v. Lauschke*, 2012 IL App (5th) 110059-U. ISBA Mutual initially refused to defend Burkart against the malpractice claims, and Burkart sought a declaratory judgment against ISBA Mutual declaring that ISBA Mutual had a duty to defend him in the suit. ISBA Mutual and Burkart settled via a memorandum of understanding and settlement agreement. Paragraph 4 of the memorandum of understanding states that "[i]f future litigation in the nature of a declaratory judgment action arises between Burkart and ISBA regarding the [Wilson litigation], by agreement of the parties said litigation must be filed in Madison County, Illinois." This paragraph differed from the venue provision in the insurance contract between ISBA Mutual and Burkart, which stated that all disputes regarding the policy would be litigated in either Cook County or Sangamon County.

¶ 5 On July 26, 2012, the Wilsons filed two pleadings in Madison County naming Burkart as defendant, one seeking return of previously distributed escrow funds and one seeking to enjoin Burkart from referencing elements of his litigation against the Wilsons

in his then-ongoing campaign for a judicial seat in the Third Judicial Circuit of Illinois. Burkart tendered defense of both causes to ISBA Mutual. ISBA Mutual accepted defense of the escrow funds case with reservation and refused to defend the litigation-referencing case. On October 2, 2012, ISBA Mutual filed a complaint for declaratory judgment in Sangamon County stating that it had no duty to defend either of the Wilsons' suits against Burkart. Burkart then filed the instant action in Madison County, claiming that ISBA Mutual breached its settlement agreement with him. Burkart sought a declaratory judgment that ISBA Mutual had a duty to defend him in both of the Wilsons' suits. Burkart also brought a count claiming bad faith by ISBA Mutual and another count seeking a mandatory injunction preventing ISBA Mutual from refusing to defend Burkart and also requiring it to pay for Burkart's chosen counsel.

¶ 6 On December 14, 2012, ISBA Mutual filed a motion to dismiss this case pursuant to sections 2-615 and 2-619(a)(3) of the Code of Civil Procedure (735 ILCS 5/2-615, 2-619(a)(3) (West 2012)), alleging that the court should dismiss the case because a prior action was pending in Sangamon County and because Burkart's complaint was insufficient in fact and at law. On February 13, 2013, Burkart filed a response in opposition and a motion for injunctive relief. Burkart sought an order that would mandate that ISBA Mutual dismiss the Sangamon County action, prevent ISBA Mutual from filing any claim determining coverage until the Madison County action was resolved, and restrain ISBA Mutual from refusing to pay for Burkart's selected counsel in the Wilsons' suits. On April 17, 2013, after argument on these motions, the circuit court

granted ISBA Mutual's motion to dismiss pursuant to section 2-619(a)(3) and denied as moot all other motions. On April 22, 2013, Burkart filed a notice of interlocutory appeal.

¶ 7 ANALYSIS

¶ 8 According to Burkart's appellate brief, jurisdiction to this court is conferred pursuant to Illinois Supreme Court Rule 307(a)(1) (eff. Feb. 26, 2010). ISBA Mutual challenges this jurisdictional basis because the April 17 order by the circuit court was not an interlocutory order granting, modifying, refusing, dissolving, or refusing to dissolve or modify an injunction. Because an improper jurisdictional basis could prevent this court from considering any other issue, we address this issue first.

¶ 9 Rule 307(a)(1) "provides that an appeal may be taken to the appellate court from an interlocutory order 'granting, modifying, refusing, dissolving, or refusing to dissolve or modify an injunction.' " *Puleo v. McGladrey & Pullen*, 315 Ill. App. 3d 1041, 1044 (2000) (quoting Ill. S. Ct. R. 307(a)(1) (eff. July 6, 2000)). "This rule, however, is applicable only to either preliminary injunctions or temporary restraining orders which are granted to preserve the status quo pending a decision on the merits and conclude no rights." *Id.* "To determine what constitutes an appealable injunctive order under Rule 307(a)(1) we look to the substance of the action, not its form. *** Actions of the circuit court having the force and effect of injunctions are still appealable even if called something else." *In re A Minor*, 127 Ill. 2d 247, 260 (1989).

¶ 10 "Rule 307(a)(1), however, does not apply to permanent orders, which are orders that are not limited in duration and alter the status quo. [Citations.] Such orders constitute final orders and are only appealable under Rule 301 or 304(a), if those rules are

otherwise applicable." *Santella v. Kolton*, 393 Ill. App. 3d 889, 903 (2009). "Where this court lacks jurisdiction, we must dismiss the appeal; as noted in other contexts, our courts do not sit to render advisory opinions on abstract questions of law to guide potential future litigation." *Steel City Bank v. Village of Orland Hills*, 224 Ill. App. 3d 412, 416 (1991).

¶ 11 As noted by ISBA Mutual at oral argument, Burkart did not file a reply brief and thus has not written a response to its contention that this court lacks jurisdiction over this appeal because the circuit court's order was a final judgment dismissing the case and, therefore, Rule 307(a)(1) does not provide a jurisdictional basis for appeal. However, in his brief, Burkart argues that before dismissing his request for injunctive relief, the circuit court had an obligation to consider the settlement agreement between him and ISBA Mutual. Burkart bases this argument on *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill. 2d 52 (2006). The *Mohanty* court reviewed an interlocutory appeal preserving the status quo of the case. *Mohanty*, 225 Ill. 2d at 79-80 (Karmeier, J., specially concurring). In this case, however, the circuit court dismissed the case entirely under section 2-619(a)(3) without specifying that the order was without prejudice to file an amended complaint. "Where a dismissal order does not specify that it is 'without prejudice' and does not grant the plaintiff leave to file an amended complaint, the judgment is a final adjudication on the merits under Supreme Court Rule 273." *Kostecki v. Dominick's Finer Foods, Inc., of Illinois*, 361 Ill. App. 3d 362, 373 (2005). Thus, unlike the *Mohanty* plaintiffs, Burkart is appealing a final judgment. While the circuit court did dismiss Burkart's motion for injunctive relief, it did so because the motion was moot given the circuit court's section 2-

619(a)(3) ruling. Therefore, Rule 307(a)(1) does not provide a jurisdictional basis for this court to hear Burkart's appeal.

¶ 12 Nonetheless, this court can choose to hear this appeal because Burkart could have appealed it under Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994) as a final judgment. See *Gardner v. Mullins*, 234 Ill. 2d 503, 510 (2009). Burkart's error is "not sufficient to divest the appellate court of jurisdiction where the court otherwise had jurisdiction." *Id*. However, this court is "well within its authority to dismiss [the] appeal for failing to cite the appropriate rule." *Id.* Because Burkart has called attention to the facts relevant to the issues in this case, this court chooses to hear his appeal.

¶ 13 The decision to grant a section 2-619(a)(3) motion is discretionary with the trial court. *Performance Network Solutions, Inc. v. Cyberklix US, Inc.*, 2012 IL App (1st) 110137, ¶ 27. Because a section 2-619(a)(3) motion seeks dismissal due to the existence of another pending action between the parties for the same cause, it is inherently procedural and requires the circuit court to weigh several factors in making a determination. *Overnite Transportation Co. v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America*, 332 Ill. App. 3d 69, 73 (2002). The circuit court's decision to grant a section 2-619(a)(3) motion will not be overturned absent an abuse of discretion. *Continental Casualty Co. v. Radio Materials Corp.*, 366 Ill. App. 3d 345, 347 (2006).

¶ 14 Under section 2-619(a)(3), a defendant may seek dismissal of an action if "there is another action pending between the same parties for the same cause." 735 ILCS 5/2-619(a)(3) (West 2012). "Actions present the same cause when the relief requested is

based on substantially the same set of facts." *Whittmanhart, Inc. v. CA, Inc.*, 402 Ill. App. 3d 848, 853 (2010). "Nevertheless, even when the 'same cause' and 'same parties' requirements are met, section 2-619(a)(3) does not mandate automatic dismissal." *Combined Insurance Co. of America v. Certain Underwriters at Lloyd's London*, 356 Ill. App. 3d 749, 754 (2005). The court must also "weigh the prejudice that would result to the nonmovant if the motion is granted against the policy of avoiding duplicative litigation." *Rodgers v. Cook County*, 2013 IL App (1st) 123460, ¶ 36. The court should consider four discretionary factors: " '(1) comity; (2) the prevention of multiplicity, vexation, and harassment; (3) the likelihood of obtaining complete relief in a foreign jurisdiction; and (4) the *res judicata* effect of a foreign judgment in the local forum.' " *Id.* (quoting *Hapag-Lloyd (America), Inc. v. Home Insurance Co.*, 312 Ill. App. 3d 1087, 1091 (2000)). These factors are commonly known as the "*Kellerman* factors," as they originally derive from *Kellerman v. MCI Telecommunications Corp.*, 112 Ill. 2d 428, 447-48 (1986). "However, courts are not required to apply all four *Kellerman* factors." *Rodgers*, 2013 IL App (1st) 123460, ¶ 36; see also *Kapoor v. Fujisawa Pharmaceutical Co.*, 298 Ill. App. 3d 780, 789-90 (1998) (courts "should," not "must," consider them, and not all factors apply in every case); *Kellerman*, 112 Ill. 2d at 447-48 (four "factors that a court should consider").

¶ 15 In this case, it is clear that the Sangamon action and this action involved the same parties. Further, given that both cases seek to determine whether ISBA Mutual is bound to defend Burkart in the Wilsons' suits, it is clear that both involve the same cause. Burkart argues that, because he has also brought a breach of contract count, this case is

totally separate from the Sangamon County case. However, "[w]ith respect to whether the two actions are for the same cause, the crucial inquiry is whether both arise out of the same transaction or occurrence, not whether the legal theory, issues, burden of proof, or relief sought materially differs between the two actions." *Jackson v. Callan Publishing, Inc.*, 356 Ill. App. 3d 326, 337 (2005). The breach of contract count, like all other issues in the Madison and Sangamon cases, arises out of the venue clause in ISBA Mutual's contract with Burkart and the memorandum of understanding between ISBA Mutual and Burkart. Even though Burkart has pled a different legal theory in Madison County, his case is still for the same cause as the Sangamon County case.

¶ 16 In granting ISBA Mutual's section 2-619(a)(3) motion, the circuit court never explicitly referenced the *Kellerman* factors. However, the circuit court did seem to base its decision on some of the same concerns expressed in the *Kellerman* factors. It appears the circuit court was chiefly concerned with the second and third *Kellerman* factors: the prevention of multiplicity, vexation, and harassment; and the likelihood of obtaining complete relief in a foreign jurisdiction. The court told Burkart repeatedly that the jurisdictional issues could be litigated in Sangamon County. The court told Burkart that "[i]f [his case is] dismissed up there, then come back down here." Based on the circuit court's language in the April 17, 2013, hearing on the motions, it is clear that the court believed that Sangamon County could provide complete relief with regard to the jurisdictional issues and that continuing the Madison County litigation would be unnecessary and duplicative. Thus, the court granted ISBA Mutual's motion to dismiss.

¶ 17 Burkart argues that the circuit court needed to analyze the memorandum of understanding between him and ISBA Mutual before dismissing the case. By failing to do so, he claims, the circuit court denied him his rights as bargained for in his settlement with ISBA Mutual. Burkart claims that arguing any of these issues in Sangamon County would cause him to suffer irreparable harm.

¶ 18 As noted above, Burkart's argument cites *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill. 2d 52 (2006), for support. In *Mohanty*, two physicians appealed the judgment of the First District Appellate Court reversing the circuit court's denial of a preliminary injunction to their former employer "to enforce the restrictive covenants contained in their medical practice employment contracts." *Mohanty*, 225 Ill. 2d at 56. The trial court denied the preliminary injunction "because the activity restriction in the restrictive covenant was greater than necessary to protect the defendants' interests." *Id.* at 61. The appellate court, in reversing this decision, "refused to review plaintiffs' claim that defendants materially breached the employment contract." *Id.* at 62. The supreme court held that it had to first determine the enforceability of the contracts before deciding the covenant issue "[b]ecause a prior breach of contract by defendants could render the restrictive covenants in the employment contracts unenforceable." *Id.* at 71-72. Justice Karmeier, in concurring with this determination, noted that this decision to hear the merits of the breach of contract claim only was proper because "both plaintiffs and defendants elected to make an extensive evidentiary record on the question." *Id.* at 82 (Karmeier, J., specially concurring).

¶ 19 Unlike in *Mohanty*, the circuit court here granted ISBA Mutual's section 2-619(a)(3) motion to dismiss and thereby rendered Burkart's interlocutory motion moot. The *Mohanty* decision has no bearing on a court ruling regarding a section 2-619(a)(3) motion. Even so, unlike *Mohanty*, the parties did not make an extensive evidentiary record. To determine whether or not the Wilsons' current litigation fell within the terms of the memorandum of understanding, the court would have had to hear more evidence regarding the nature of the current litigation with the Wilsons, the nature of the litigation that gave rise to the memorandum of understanding, and to what degree, if at all, the suits were similar. To make such a determination, then, the circuit court would have had little choice but to hear the entire case on the merits based on little more than the claims in Burkart's pleading. In short, Burkart claims that the current cases brought by the Wilsons were sufficiently related to the litigation that gave rise to the memorandum of understanding so as to trigger its protections and that the circuit court was thus bound to hear the case on the merits in order to determine if it had jurisdiction.

¶ 20 However, "[o]ur task under section 2-619(a)(3) is not to go behind the face of the complaint and consider the merits, or lack thereof, of a party's allegations. Instead, we will take all well-pled allegations as true." *Midas International Corp. v. Mesa, S.p.A.*, 2013 IL App (1st) 122048, ¶ 16. Burkart may very well be able to show on the merits that the memorandum of understanding requires that this litigation proceed in Madison County. However, in a motion to dismiss, the circuit court could not draw such a conclusion based solely on Burkart's complaint. The circuit court further informed Burkart of his rights in the case quite clearly. Burkart can still seek to have the

Sangamon County case dismissed based upon a motion filed in that court. If the case is dismissed, he likely can still file his case in Madison County. However, because the Sangamon County and Madison County cases were between the same parties for the same cause, the circuit court did not abuse its discretion in granting ISBA Mutual's motion to dismiss.

¶ 21 CONCLUSION

¶ 22 For the reasons stated, we affirm the judgment of the circuit court of Madison County.

¶ 23 Affirmed.