

This Order Is Not Precedential
And Is Not To Be Cited

FILED

No. 2--01--0314

APR 19 2002

ROBERT J. MANGAN, CLERK
APPELLATE COURT 2nd DISTRICT

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

ALFRED WILSON and JOSEPH VOILAND, as Trustee of the Bankruptcy Estate of Alfred Wilson,)	Appeal from the Circuit Court of Kane County.
)	
Plaintiffs-Appellees,)	
)	No. 98--L--352
v.)	
)	
JOSEPH DUSTIN BROZENEC;)	
HINCKLEY AND SCHMITT, INC.;)	
WALTER MARTIN GRAFF; and LIQUI-)	
GREEN OF FOX VALLEY, INC.,)	
)	
Derendants)	
)	Honorable
(Country Mutual Insurance Co.,)	Timothy Q. Sheldon,
Appellant).)	Judge, Presiding.

RULE 23 ORDER

Appellant, Country Mutual Insurance Company. (Country Mutual), appeals from a circuit court order that denied its motion to intervene in a personal injury lawsuit (the lawsuit). Country Mutual filed the motion pursuant to section 2--1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2--1401 (West 2000)). In addition to intervening in the lawsuit, Country Mutual sought in the motion to vacate a settlement agreement in the lawsuit and to vacate the dismissal of the lawsuit. Country Mutual contends that the trial court erred in denying the motion because both the judgment of dismissal and the settlement agreement were void. Country Mutual maintains that it had a workers' compensation lien

that rendered the settlement agreement void. For the reasons that follow, we affirm.

On July 6, 1998, Alfred Wilson initiated case No. 98--L--352 by filing a four-count complaint in the circuit court of Kane County. Wilson's complaint sought damages for injuries that Wilson allegedly suffered when a motor vehicle in which he was a passenger collided with another motor vehicle on August 26, 1996 (the accident). Each count of Wilson's complaint was based on a theory of negligence and was directed at a different defendant. Count I was directed at defendant Joseph Dustin Brozenec (Brozenec), the alleged driver of the other vehicle. Count II was directed at defendant Hinckley & Schmitt, Inc. (Hinckley & Schmitt), the alleged employer of Brozenec. Count III was directed at defendant Walter Martin Graff (Graff), the alleged driver of the vehicle in which Wilson was a passenger. Count IV was directed at defendant Liqui-Green of Fox Valley, Inc. (Liqui-Green), the alleged employer of both Graff and Wilson.

On April 8, 1998, Joseph Voiland, the trustee in a bankruptcy case (In re the Bankruptcy of Alfred D. Wilson and Patricia A. Wilson, Bankruptcy No. 97--B--14170) initiated case No. 98--LM--54 by filing a two-count complaint in the circuit court of Kendall County. Voiland's complaint sought to recover damages on behalf of the bankruptcy estate for the injuries that Wilson suffered in the accident. The complaint named Hinckley & Schmitt and Brozenec as defendants.

On December 17, 1998, the circuit court of Kane County entered an order consolidating Kendall County case No. 98--LM--54 with Kane

County case No. 98--L--352. For the sake of clarity, we refer to the consolidated cases as "the lawsuit," to Alfred Wilson as plaintiff, and to Joseph Voiland as the bankruptcy trustee.

Defendants Liqui-Green and Graff each subsequently filed a motion to dismiss the lawsuit. The motions asserted that because Liqui-Green was plaintiff's employer and Graff was plaintiff's co-employee the Workers' Compensation Act (820 ILCS 305/1 et seq. (West 2000)) provided the sole remedy for plaintiff against Liqui-Green and Graff. In June and July 1999, the trial court granted the motions to dismiss with prejudice. The lawsuit then proceeded against only defendants Hinckley & Schmitt and Brozence.

On December 12, 2000, Country Mutual filed a document in the circuit court entitled "Motion to Intervene, Vacate Settlement and Dismissal." In the motion, Country Mutual sought to intervene pursuant to section 2--408 of the Code (735 ILCS 5/2--408 (West 2000)), to vacate a settlement agreement that the motion stated had been reached in the lawsuit, and to vacate the dismissal of the lawsuit that the motion stated had been entered pursuant to the settlement agreement. The motion asserted that Country Mutual held a statutory workers' compensation lien on the lawsuit pursuant to section 5 of the Workers' Compensation Act (820 ILCS 305/5 (West 2000)) and that the settlement agreement was not valid because Country Mutual had not received notice of a motion to dismiss the lawsuit pursuant to the settlement agreement and had not consented to the settlement agreement.

The trial court apparently denied this motion. However, the record does not contain an order to that effect.

On January 16, 2001, Country Mutual filed a motion entitled "Country Mutual Insurance Company's 5/2-1401 Petition To Intervene, Vacate Settlement and Agreement" (section 2--1401 petition). The substance of the section 2--1401 petition was virtually identical to the substance of the motion that Country Mutual had filed on December 12, 2000.

Defendants Brozenec and Hinckley & Schmitt (hereinafter defendants) responded by filing a motion to dismiss the section 2--1401 petition. In their motion to dismiss, defendants asserted that in June 2000 plaintiff accepted their offer to settle the lawsuit for \$15,000; that in July 2000 the bankruptcy trustee petitioned the bankruptcy court for approval of the proposed settlement; that on July 27, 2000, the bankruptcy court approved the proposed settlement and the distribution of the proceeds of the settlement; that a copy of the July 27 bankruptcy court order which was attached to the motion to dismiss indicated that due notice was sent to all creditors and parties in interest; that on October 17, 2000, the circuit court entered an order dismissing the lawsuit; that on October 17, 2000, defendants' attorney faxed a letter to Country Mutual notifying Country Mutual of the payment made by defendants to the bankruptcy trustee pursuant to the bankruptcy court's July 27 order; and that on December 18, 2000, the circuit court denied Country Mutual's first motion to intervene on the ground that it was filed more than 30 days after the entry of the order dismissing the lawsuit.

In their motion to dismiss Country Mutual's section 2--1401 petition, defendants maintained that the petition should be

dismissed because it (1) failed to allege a meritorious claim; (2) failed to allege facts that demonstrated due diligence in presenting Country Mutual's workers' compensation claim to the circuit court; and (3) failed to allege facts demonstrating Country Mutual's due diligence in filing the section 2--1401 petition.

The bankruptcy trustee also filed a motion to dismiss the section 2--1401 petition. The motion incorporated by reference defendants' motion to dismiss the petition and added that the exclusive jurisdiction for determining the rights and liabilities of any creditor of a bankruptcy estate, including plaintiff's bankruptcy estate, rested with the bankruptcy court. The motion asserted that Country Mutual had filed a claim in plaintiff's bankruptcy case on November 9, 2000.

On February 27, 2001, the circuit court entered an order dismissing the section 2--1401 petition. On March 21, 2001, Country Mutual filed a notice of appeal.

Before addressing the merits of Country Mutual's appeal we must resolve a motion and a response that were taken with the case. After Country Mutual filed its notice of appeal, it filed a motion in this court to supplement the record on appeal with two orders that the bankruptcy court issued in plaintiff's bankruptcy case after Country Mutual filed its notice of appeal in this case.

Country Mutual attached copies of the bankruptcy court's orders to its motion to supplement the record. The first order was entered by the bankruptcy court on March 29, 2001. The March 29 order vacated the order that the bankruptcy court had entered on July 27, 2000, allowing the disbursement of the proceeds of the

settlement agreement that was reached in this case. The second order was entered by the bankruptcy court on March 30, 2001. The March 30 order stayed the March 29 order pending the resolution of Country Mutual's appeal from the denial of its section 2--1401 petition.

Plaintiff and the bankruptcy trustee responded by filing in this court an objection to Country Mutual's motion to supplement the record. Plaintiff and the bankruptcy trustee argued that Country Mutual's motion should be denied because allowing the proposed supplementation of the record would violate Supreme Court Rule 329 (134 Ill. 2d R. 329) and because the orders that Country Mutual sought to add to the record were irrelevant to Country Mutual's appeal. This court ordered Country Mutual's motion to supplement the record and the response thereto taken with the case.

In their appellate brief, plaintiff and the bankruptcy trustee repeat the arguments they previously made in objecting to the motion. In its reply brief, Country Mutual argues that Rule 329 does not preclude the supplementation of the record with the bankruptcy court's March 29 and March 30 orders because the orders are not additional facts or evidence. Country Mutual maintains that it should be allowed to supplement the record with the orders because the orders are judicial decisions that are in the nature of the law of the case or in the nature of additional precedential case law. Country Mutual also asserts that the March 29 order was jurisdictional because by entering it the bankruptcy court was "divesting the state court of jurisdiction to enter a dismissal order."

Rule 329 permits the supplementation of a record "to present fully and fairly the questions involved." 134 Ill. 2d R. 329. However, Rule 329 generally does not permit a party to supplement the record with evidence that was not before the trial court. People v. Patterson, 192 Ill. 2d 93, 127 (2000). Similarly, evidence that was not in existence at the time of the lower court proceedings is outside the record on appeal. County of Lake v. Fox Waterway Agency, 326 Ill. App. 3d 100, 103-04 (2001). Such limitations on supplementing the record are necessary because a reviewing court normally must determine only whether the trial court erred in its resolution of questions on the basis of the evidence before it. City of Chicago v. Yellen, 325 Ill. App. 3d 311, 313 (2001).

In this case, the bankruptcy court's orders with which Country Mutual seeks to supplement the record were not before the trial court and were not even in existence when the trial court made the rulings that Country Mutual contests. Therefore, defendants are correct that supplementation of the record with the orders would violate the general constraints of Rule 329.

We recognize that there are cases where a party has been allowed to supplement a record with material that was not before the trial court when the material aided in resolving a question of jurisdiction. See Yellen, 325 Ill. App. 3d at 314 (discussing cases). However, in this case it seems clear that the trial court had jurisdiction at the time it made the rulings that Country Mutual challenges. Moreover, Country Mutual cites no authority for its position that the March 29 order with which it seeks to

supplement the record somehow retroactively divested the trial court of jurisdiction. For these reasons, we are not persuaded by Country Mutual's argument that it should be allowed to supplement the record with the bankruptcy court orders because they affect the trial court's jurisdiction.

Furthermore, we cannot agree with Country Mutual that it should be allowed to supplement the record with the orders because they are in the nature of precedential decisions or in the nature of the law of the case. Country Mutual again cites no authority in support of its position. Even assuming arguendo that such orders could be in the nature of precedent or in the nature of the law of the case, Country Mutual does not convince us that the particular orders in question here are in the nature of either precedent or of the law of the case. Country Mutual posits that the bankruptcy court issued the March 29 order because it "understood that the July 27, 2000, order was entered in error, based on the lack of notice to County Mutual, a judgment creditor." However, the order itself does not indicate why the bankruptcy court entered the order and Country Mutual has not provided anything else that corroborates its bald assertion.

Finally, we are aware that this court has the authority to take judicial notice of public documents that are included in the records of other courts and administrative tribunals. NBD Highland Park Bank, N.A. v. Wien, 251 Ill. App 3d 512, 520 (1993). However, we decline to take judicial notice of the March 29 and March 30 bankruptcy court's orders because Country Mutual has failed to demonstrate that the orders are relevant to resolving the merits of

the appeal. For all these reasons, Country Mutual's motion to supplement the record is denied.

We now turn to the merits of Country Mutual's appeal. Country Mutual contends that the trial court erred in denying its section 2--1401 petition. Although the record does not show the basis of the trial court's denial of the motion, Country Mutual posits that the trial court denied the petition on due diligence grounds. Country Mutual argues that this was error because the petition sought, inter alia, to vacate the judgment of dismissal which was void and therefore could be attacked at any time. In Country Mutual's view, the judgment of dismissal was void because the settlement agreement on which the judgment was based was also void.

In support of its position that the settlement agreement was void, Country Mutual first points to section 5(b) of the Workers' Compensation Act (Act) (820 ILCS 305/5(b) (West 2000)). Section 5(b) provides, in relevant part:

"If the injured employee or his personal representative agrees to receive compensation from the employer or accept from the employer any payment on account of such compensation, or to institute proceedings to recover the same, the employer may have or claim a lien upon any award, judgment or fund out of which such employee might be compensated from such third party.

In such action brought by the employee or his personal representative, he shall forthwith notify his employer by personal service or registered mail, of such fact and of the name of the court in which the suit is brought, filing proof

thereof in the action. The employer may, at any time thereafter join in the action upon his motion so that all orders of court after hearing and judgment shall be made for his protection. No release or settlement of claim for damages by reason of such injury or death, and no satisfaction of judgment in such proceedings shall be valid without the written consent of both employer and employee or his personal representative, except in the case of the employers, such consent is not required where the employer has been fully indemnified or protected by Court order." 820 ILCS 305/5(b) (West 2000).

Country Mutual asserts that section 5(b) applies to this case because plaintiff received workers' compensation benefits for the injuries that he suffered in the accident and then brought an action against third parties seeking damages for the injuries. Country Mutual also asserts that it is uncontested that it never received prior notice of the settlement agreement, that it did not provide written consent to the settlement agreement, and that it has not been fully indemnified or protected by court order with respect to the settlement agreement. Country Mutual argues that the settlement agreement and the judgment of dismissal that stemmed from it were void because the settlement agreement violated section 5(b).

Section 2--1401 of the Code provides a comprehensive statutory procedure by which a petitioner may seek to vacate a final order or judgment more than 30 days after it has been entered. Smith v. Airoom, 114 Ill. 2d 209, 220 (1986). To be entitled to relief

under section 2--1401, the petitioner must set forth specific factual allegations demonstrating (1) the existence of a meritorious claim or defense; (2) due diligence in presenting that claim or defense; and (3) due diligence in filing the section 2--1401 petition. Smith, 114 Ill. 2d at 220-21. Because a void judgment may be attacked at any time, a section 2--1401 petitioner need not show due diligence to obtain relief from a void judgment. Borcherding v. Anderson Remodeling Co., 253 Ill. App. 3d 655, 660 (1993).

Whether to grant a section 2--1401 petition lies within the trial court's discretion and depends on the facts and equities presented. Therefore, a reviewing court will not disturb a trial court's ruling on a section 2--1401 petition unless the trial court abused its discretion in making the ruling. Smith, 114 Ill. 2d at 221.

In this case, the apparent basis of the trial court's denial of Country Mutual's section 2--1401 petition was a lack of due diligence. It is not clear whether the court found a lack of due diligence related to Country Mutual's diligence in presenting its claim or related to Country Mutual's diligence in filing the section 2--1401 petition. Country Mutual merely makes the general assertion that it was not required to show due diligence because the settlement agreement was void and therefore the judgment of dismissal that stemmed from the settlement agreement should also be deemed void.

We disagree. Country Mutual ignores the distinction between a "void" and a "voidable" judgment. The question whether a

judgment is void or voidable depends on whether the court that entered the challenged order possessed jurisdiction over the parties and the subject matter. In re Marriage of Mitchell, 181 Ill. 2d 169, 174 (1998). A lack of jurisdiction renders any subsequent judgment void. Steinbrecher v. Steinbrecher, 197 Ill. 2d 514, 531 (2001). The entry of an erroneous judgment by a court that has jurisdiction renders the judgment voidable. Mitchell, 181 Ill. 2d at 174. Once a court has acquired jurisdiction, a judgment is not rendered void merely because of an error or impropriety in the issuing court's determination of the law. Mitchell, 181 Ill. 2d at 174. Moreover, a court does not lose jurisdiction because it makes a mistake in determining either the facts or the law. Mitchell, 181 Ill. 2d at 175.

In this case, Country Mutual does not contend that the trial court lacked jurisdiction when it entered the judgment of dismissal based on the settlement agreement. We realize that Country Mutual argued with respect to its motion to supplement the record that one of the orders with which it sought to supplement the record showed that the trial court had somehow retroactively lost jurisdiction. However, we have already considered and rejected that argument. Accordingly, we conclude that the trial court had jurisdiction to enter the judgment of dismissal. Therefore, even if we assume for the sake of argument without deciding that the trial court erred in allowing the parties to reach the settlement agreement under section 5(b) of the Workers' Compensation Act (820 ILCS 305/5(b) (West 2000)) as Country Mutual asserts, the error would not have rendered the judgment void but merely voidable. Therefore, Country

Mutual cannot prevail on its argument that it was not required to show due diligence with respect to its section 2--1401 petition because the judgment was void.

Alternatively, Country Mutual argues that even if diligence was required it was diligent in seeking to have the settlement agreement and the dismissal vacated. Country Mutual acknowledges that on October 17, 2000, it received notice of the settlement agreement. Country Mutual then recounts the steps it allegedly took in reacting to the notice. However, Country Mutual's explanation of why it did not file a response to the notice until December 6, 2000, or later, does not persuade us that the trial court abused its discretion in finding a lack of due diligence.

We also note that Country Mutual does not explain why it failed to seek to intervene in the lawsuit prior to December 2000. Documents in the record show that Country Mutual had notice of the lawsuit no later than August 1999. The record contains a subpoena for deposition records that was dated August 2, 1999 and was addressed to Country Mutual. The record also contains a notice filed by the attorneys for Hinckley & Schmitt and Brozenec that was filed on August 12, 1999, and shows that Country Mutual would be deposed on August 16, 1999.

After carefully reviewing the record, we cannot say that the trial court abused its discretion when it denied Country Mutual's section 2--1401 petition.

Accordingly, the judgment of the circuit court of Kane County is affirmed.

Affirmed.

O'MALLEY, J., with GROMETER and KAPALA, JJ., concurring.