

COBY

FILED

No. 2--00--0457

AUG 09 2001

**This Order Is Not Precedential
And Is Not To Be Cited**

LOREN J. STROTZ, CLERK
APPELLATE COURT 2nd DISTRICT

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

| | | |
|--|---|---|
| WINDOWS AND SIDING UNLIMITED, INC., |) | Appeal from the Circuit Court of De Kalb County. |
| Plaintiff, |) | |
| v. |) | |
| RAYMOND K. BERG, a/k/a Ray Berg; TERESA L. BERG, a/k/a Terri Berg; and AMERICAN NATIONAL BANK OF DE KALB COUNTY, |) | 97--CH--53 |
| Defendants-Appellees |) | |
| (David Haskins, Assignee of Windows and Siding Unlimited, Inc., Plaintiff-Appellant; Prudential Insurance Company of America; Williams Pipeline Company; and Nonrecord Claimants and Unknown Owners, Defendants). |) | Honorable Douglas R. Engel, Judge, Presiding. |

RULE 23 ORDER

Plaintiff, Windows and Siding Unlimited, Inc. (Windows), filed a complaint to foreclose on a mechanic's lien, for breach of contract, to recover under a theory of quantum meruit, and for other relief. Plaintiff named as defendants Raymond K. Berg, a/k/a Ray Berg, Teresa L. Berg, a/k/a Terri Berg, American National Bank of De Kalb County (Bank), Prudential Insurance Company of America, Williams Pipeline Company, and Nonrecord Claimants and Unknown Owners. Plaintiff sought damages of \$6,800 for the payment of

amounts due for the replacement windows and doors that it allegedly had installed on the property of the Bergs (Bergs or defendants) and sought attorney fees and interest. The plaintiff corporation was represented by attorney Dale R. Potthoff.

Defendants filed counterclaims against plaintiff for breach of contract and consumer fraud. It appears that defendants had made a partial payment of \$1,500 against the \$6,800 claim; defendants sought damages in excess of \$5,000. In response to their counterclaims, plaintiff's president, David Haskins, maintained that he was an individual who was not joined as a party to the action.

Following a bench trial, on February 3, 2000, the trial court found in a written order that plaintiff "failed to substantially complete the contract," failed to supervise and direct the work, the work was not properly done, defects were not corrected within one year, and plaintiff failed to provide a home equity loan (as agreed) so that interest paid would be deductible. The court also found, "No evidence was presented as to increase in value of the property so that any relief could be given to the plaintiff." The trial court entered judgment for defendants and against plaintiff, and the court entered judgment against defendants on their counterclaims.

On March 23, 2000, the trial court denied plaintiff's motion to vacate the judgment and reconsider, and attorney Potthoff filed a timely notice of appeal, naming the Bergs and the Bank as defendants-appellees. For the reasons that follow, we dismiss the appeal.

On May 8, 2000, Haskins caused to be filed in this court an "Assignment of Cause of Action," dated April 21, 2000, in which, for consideration of \$1 and "other good and valuation consideration," the plaintiff corporation through its president (Haskins) assigned to Haskins all right, title, and interest in its cause of action and claim against the Bergs. On the same date, assignee Haskins also filed "pro se" a motion to be substituted as a party on appeal in the place of the plaintiff corporation. See 735 ILCS 5/2--1008(a) (West 2000). This court allowed the motion on May 26, 2000.

On June 8, 2000, defendants moved to vacate the order granting Haskins' motion to substitute himself as plaintiff-appellant. They asserted among other things that they had not been served with the docketing statement and the motion to substitute. In defendants' counsel's supporting affidavit, counsel stated that Haskins was formerly an attorney who had surrendered his license and that he should have knowledge of the rules of this court; appended as an exhibit was a copy of an October 1983 order of the Illinois Supreme Court striking Haskins' name from the roll of attorneys licensed to practice law. On July 3, 2000, this court allowed defendants' motion and vacated the order granting the motion filed by Haskins pro se to substitute himself as plaintiff-appellant in this appeal.

On August 28, 2000, this court sent an overdue warning order stating that the failure of plaintiff to file a brief within 30 days would result in the dismissal of the appeal. On October 13, 2000, this court dismissed the appeal for the failure of plaintiff to file its brief as ordered. On October 20, 2000, attorney

Potthoff filed a motion to vacate the dismissal and the motion was denied. Plaintiff and Haskins then filed a motion to reconsider, to vacate the dismissal order, to substitute Haskins as assignee in the place of plaintiff, and to file an appellant's brief. In the motion, Haskins represented that he is the sole owner and officer of Windows and Siding, Inc., and that the interest in the lawsuit is assigned to him personally. The motion was signed and served by Haskins. On December 14, 2000, this court allowed the motion over defendants' objection and reinstated the appeal. This court's records show that on December 14, 2000, attorney Potthoff was also discharged.

On December 20, 2000, Haskins, now designated as plaintiff-appellant pro se, filed a notice of filing of his appellant's brief together with copies of his brief. In his affidavit of service, Haskins stated under oath that he is a nonattorney.

In January 2001, defendants filed a motion to strike plaintiff-appellant's (Haskins') statement of facts and references to facts not supported by the record. Defendants pointed out that Haskins failed to supply a report of proceedings or a substitute therefor in accordance with Supreme Court Rule 323 (166 Ill. 2d R. 323). Defendants also moved for sanctions for the willful failure of Haskins to comply with the rules for appeal and for filing a frivolous appeal pursuant to Supreme Court Rule 375 (155 Ill. 2d R. 375). They alleged that he failed to follow the rules for appeals, such as providing a sufficient record and that, in his brief, Haskins admitted that the findings of the trial court were correct, but he argued that the trial court's ruling was against the

manifest weight of the evidence--yet he failed to supply an evidentiary record in support of his argument. In a summary affidavit, defendants stated that \$5,455 in attorney fees were expended in defending against the appeal. The motion and response were ordered taken with the case. Upon further consideration of the motion to strike and to impose sanctions and the response of Haskins, we deny the motion.

On appeal, Haskins argues that plaintiff (i.e., Haskins) should recover the difference between the contract price and the reasonable cost of completing the work under the contract or, alternatively under a quantum meruit theory, that he should recover the reasonable value of the materials and services provided to defendants, and that he should recover attorney fees under the contract. However, we do not reach the merits of these claims because we dismiss the appeal.

First, we must consider whether Haskins as assignee of Windows (the corporate plaintiff and assignor) may prosecute this appeal individually pro se. An assignment operates to transfer to the assignee all of the assignor's right, title, or interest in the thing assigned, and the assignee, by acquiring the same rights as the assignor, stands in the shoes of the assignor. In re Estate of Martinek, 140 Ill. App. 3d 621, 629-30 (1986). A chose in action, such as one involving an interest in litigation, is personal property that is assignable, and a suit to enforce a chose in action may be brought in the name of the assignee and in his own behalf. Saltzberg v. Fishman, 123 Ill. App. 3d 447, 452 (1984). Since an assignment puts the assignee in the shoes of the assignor,

the assignee takes the assignor's interest subject to all legal and equitable defenses or any setoff existing at the time of the assignment. Block v. Pepper Construction Co., 304 Ill. App. 3d 809, 816 (1999); see 735 ILCS 5/2--403(a) (West 2000).

Notwithstanding that Haskins is an assignee who stands in the shoes of the corporation, this does not allow him to prosecute an appeal as a nonattorney. The assignment does not allow him, in effect, to practice law without a license. While a natural person has the liberty of prosecuting and defending himself in his own proper person, a corporation must be represented in a legal action by an attorney licensed to practice law. See Remole Soil Service, Inc. v. Benson, 68 Ill. App. 2d 234, 238 (1966). Proceedings in a suit by a person not entitled to practice law are a nullity and, in such a case, the suit should be dismissed. People v. Dunson, 316 Ill. App. 3d 760, 764 (2000); Remole, 68 Ill. App. 2d at 239.

In Biggs v. Schwalge, 341 Ill. App. 268 (1950), Biggs, acting as plaintiff, was the owner of a construction corporation; he assigned himself the corporation's chose in action for \$1 and other good and valuable consideration. The trial court dismissed the cause of action for the failure to employ an attorney to represent the corporation. On appeal, Biggs claimed that he was the legal assignee of the corporation which he controlled and managed and in which he owned all the stock. The reviewing court held that an assignment cannot be used as a subterfuge to enable the plaintiff to indulge in his overwhelming desire to practice law without complying with the requirements for admission to the bar. The court found that it was obvious that this is what the plaintiff

was trying to do and affirmed the dismissal of his cause of action. See also Lazy 'L' Family Preservation Trust v. First State Bank of Princeton, 167 Ill. App. 3d 624, 628 (1988).

In People ex rel. Chicago Bar Ass'n v. Tinkoff, 399 Ill. 282 (1948), a rule to show cause was issued against Tinkoff, a disbarred attorney. There, an assignment for \$1 of other persons legal claims to Tinkoff's minor son was held not to authorize Tinkoff, as the son's guardian, to bring suit. Under the facts of that case, including the fact that the other persons continued to hold an interest in the litigation and would receive a percentage of the net return, the supreme court determined that the purported assignment of interest in the litigation to Tinkoff's son was a subterfuge for the purpose of deceiving the court as to the real parties in interest and to provide a devious procedure by which he thought he could nullify the order of the court disbaring him and striking his name from the roll of attorneys. The supreme court found Tinkoff guilty of contempt and fined him \$500.

After reviewing the documents, pleadings, admissions and representations made in this cause and the above-cited cases, we conclude that Haskins is not authorized to prosecute this appeal by means of the assignment where it is obvious that the real party in interest was the corporate plaintiff. Further, since the corporation gave up all right, title, and interest in the litigation, the corporation no longer has standing as a party in this appeal. We declare that the proceedings are a nullity and the appeal must be dismissed.

There is an additional basis to support this court's decision to dismiss the appeal. The appellant has failed to supply a report of proceedings or an acceptable substitute therefor. Even if this court attempted to consider the merits of this appeal, it could not do so because of the inadequate evidentiary record. In the absence of a proper record, a reviewing court may dismiss an appeal, and we choose to do so in this instance. Landau & Associates, P.C. v. Kennedy, 262 Ill. App. 3d 89, 92 (1994); Nenadic v. Grant Hospital, 75 Ill. App. 3d 614, 624 (1979).

For the reasons stated, this appeal is hereby dismissed.

Appeal dismissed.

BOWMAN, J., with GEIGER and BYRNE, JJ., concurring.