

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Janet M. Sullivan

Court of Appeals No. L-15-1169

Appellee

Trial Court No. DR1996-0989

v.

Daniel J. Sullivan

DECISION AND JUDGMENT

Appellant

Decided: September 30, 2016

* * * * *

John J. Schlageter, Jr., for appellant.

Thomas A. Matuszak, for appellee.

* * * * *

SINGER, J.

{¶ 1} Appellant, Daniel J. Sullivan, appeals the May 20, 2015 judgment of the Lucas County Court of Common Pleas, Domestic Relations Division, and also challenges the trial court's subject-matter jurisdiction. For the reasons which follow, we affirm the May 20, 2015 judgment, but vacate the trial court's April 25, 2008 judgment entry.

{¶ 2} Appellant sets forth one assignment of error:

{¶ 3} Plaintiff-Appellee fraudulently procured subject-matter jurisdiction in the state trial court; therefore, the subsequent judgment entries issued by the state trial court - including the May 20, 2015 Judgment Entry - should be deemed void *ab initio*.

{¶ 4} The background of this case is fully set forth in our previous decision, *Sullivan v. Sullivan*, 6th Dist. Lucas No. L-09-1022, 2010-Ohio-3064. Briefly, the parties were granted a divorce in 1997, and appellee, Janet Sullivan, was awarded a portion of appellant's retirement plan with the Civil Service Retirement System ("CSRS"). A "Pension Distribution Decree" was filed by the parties to effectuate that award. Thereafter, appellant withdrew the deposits in the CSRS and redeposited them in the District of Columbia Police Officers' and Firefighters' Retirement Plan ("D.C. Plan").

{¶ 5} Appellant retired in 2003 and began receiving retirement benefits, with no notice or allocation of benefits to appellee. In 2006, appellee discovered appellant had changed retirement plans and was collecting benefits. Appellee sought a new qualified domestic relations order ("QDRO") directed to the D.C. Plan and an award of retroactive benefits and attorney fees from the trial court.

{¶ 6} On February 7, 2008, the trial court determined appellee was entitled to a QDRO perfecting her rights in appellant's retirement plan.

{¶ 7} On February 29, 2008, appellee filed a motion to join the D.C. Plan and the Plan Administrator as third-party defendants. On March 4, 2008, the trial court granted

the motion and added the Plan Administrator of the United States Office of Personnel Management (“OPM”) and the Plan Administrator of the D.C. Plan as third-party defendants.

{¶ 8} On April 22, 2008, the United States, on behalf of OPM, filed a notice of removal of the case from state court to federal court in the U.S. District Court for the Northern District of Ohio. On April 23, 2008, the notice of removal was filed in the trial court. On April 25, 2008, appellee’s counsel provided the trial court with a proposed judgment entry to dismiss OPM and the D.C. Plan. That same day the trial court signed the judgment entry, ordering the dismissal of OPM and the D.C. Plan.

{¶ 9} On April 28, 2008, the United States, on behalf of OPM, filed a motion to vacate its notice of removal and remand the action to state court. On April 30, 2008, the federal court issued an order granting the remand of the case to the trial court. The order was filed with the trial court on May 8, 2008.

{¶ 10} On January 9, 2009, the trial court filed its judgment which established the amount to which appellee was entitled from the D.C. Plan. The trial court awarded appellee retroactive benefits, attorney’s fees and costs. Appellant appealed. We affirmed the trial court’s judgment. *Sullivan* at ¶ 69.

{¶ 11} On March 14, 2013, appellee filed with the trial court a motion to show cause seeking a lump sum judgment of the pension monies to which she was entitled, as well as other fees and costs. On May 20, 2015, the trial court awarded appellee

\$33,126.75, plus interest. Appellant appealed yet assigned no error specifically regarding the May 20, 2015 order. Rather, appellant contends appellee fraudulently procured the trial court's jurisdiction, in April 2008, when she had ex parte communication with the trial court to dismiss the third-party defendants at a time when the trial court did not have jurisdiction, and all orders entered by the trial court thereafter are nullities.

{¶ 12} The lack of subject-matter jurisdiction may be raised at any stage of the proceeding and cannot be waived. *Gates Mills Investment Co. v. Parks*, 25 Ohio St.2d 16, 19-20, 266 N.E.2d 552 (1971). ("The failure of a litigant to object to subject-matter jurisdiction at the first opportunity is undesirable and procedurally awkward. But it does not give rise to a theory of waiver, which would have the force of investing subject-matter jurisdiction in a court which has no such jurisdiction.") Thus, the issue of a trial court's lack of subject-matter jurisdiction may be raised for the first time on appeal. *Jenkins v. Keller*, 6 Ohio St.2d 122, 216 N.E.2d 379 (1966), paragraph five of the syllabus. Accordingly, we will address appellant's assignment of error and arguments.

{¶ 13} As to the alleged fraudulent procurement of jurisdiction, in order to prove fraud, the following elements must be established:

(a) a representation or, where there is a duty to disclose, concealment of a fact, (b) which is material to the transaction at hand, (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (d) with the

intent of misleading another into relying upon it, (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance. (Citations omitted.) *State ex rel. The Illuminating Co. v. Cuyahoga Cty. Court of Comm. Pl.*, 97 Ohio St.3d 69, 2002-Ohio-5312, 776 N.E.2d 92, ¶ 24.

{¶ 14} Here, appellant claims appellee committed fraud when appellee's former counsel presented an ex parte order to the trial court to have the third-party defendants dismissed when the trial court lacked jurisdiction to issue any orders. Appellant claims appellee's counsel then sent a copy of that order to the U.S. Attorney's Office who "apparently relying on the validity of that state trial court order - petitioned the U.S. District Court to remand the case to the state trial court." The federal court returned the case to the state trial court. Appellant further claims appellee presented the ex parte order from the trial court "to the federal prosecutors and, ultimately, to the U.S. District Court. In doing so, Janet mislead [sic] both; she presented an order that purported to be genuine when * * * it was jurisdictionally void *ab initio*."

{¶ 15} A review of the record shows appellee's former counsel presented a proposed judgment entry to the trial court to dismiss OPM and the D.C. Plan as parties on April 25, 2008, three days after the notice of removal of the case to federal court was given. The trial court judge signed the judgment entry that day, ordering the dismissal of these parties. The record contains no evidence that appellee's counsel concealed or

withheld any facts from the trial court or made false claims or allegations to the trial court in seeking the dismissal of the parties.

{¶ 16} On April 29, 2008, the United States, on behalf of OPM, filed a motion to vacate its notice of removal and remand the action to state court. The next day, the federal court issued an order granting the remand of the case to the trial court. Nothing in the record, other than appellant's claims, indicates appellee's former counsel acted in a deceitful or dishonest manner or misled counsel for the United States or the federal court with regards to the trial court's entry ordering the dismissal of OPM and the D.C. Plan as parties.

{¶ 17} As appellant has not established fraud on the part of appellee, we find appellant's claim that appellee fraudulently procured the trial court's jurisdiction is without merit.

{¶ 18} We must next determine whether the trial court properly exercised subject-matter jurisdiction. In so doing, we must examine the jurisdiction of both the trial court and the federal court.

{¶ 19} As an initial matter, we note some procedural irregularities occurred in the trial court. The trial court permitted appellee to add OPM and the D.C. Plan as third-party defendants, but they are not third-party defendants within the meaning of Civ.R. 14. Rather, OPM and the D.C. Plan would be considered defendants. *See* Civ.R. 15. In order to add a defendant to a suit, an amended complaint must be filed. *Id.* However, since

nothing in the record indicates an amended complaint naming OPM and the D.C. Plan as additional defendants was ever filed or served, or that service was waived, OPM and the D.C. Plan were not added as party defendants. *See* Civ.R. 4; Civ.R. 15.

{¶ 20} As to the trial court's jurisdiction, the record shows the trial court had subject-matter jurisdiction beginning in 1996, when the divorce case was filed, until April 22, 2008, when the case was removed to federal court. On April 30, 2008, the trial court's jurisdiction was restored, as on that day, the federal court ordered the case be returned to state court. *See Int'l Lottery v. Kerouac*, 102 Ohio App.3d 660, 665, 657 N.E.2d 820 (1st Dist.1995) (once federal court ordered action remanded to state court, federal court was divested of jurisdiction).

{¶ 21} Therefore, the trial court temporarily lost jurisdiction over the case in the interval between the filing of the notice of removal on April 22, 2008, and the order of return by the federal court on April 30, 2008. Since the trial court issued a judgment entry on April 25, 2008, when it did not have jurisdiction, that judgment entry is void and must be vacated. We recognize, as a practical matter, the April 25, 2008 judgment entry, which ordered the dismissal of OPM and the D.C. Plan as third-party defendants, was already of no effect since OPM and the D.C. Plan were never properly added as parties.

{¶ 22} With respect to the federal court's jurisdiction, the record shows the case was removed to federal court on April 22, 2008, by the United States, on behalf of OPM. *See Borkowski v. Abood*, 117 Ohio St.3d 347, 2008-Ohio-857, 884 N.E.2d 7, ¶ 8-12. On

April 29, 2008, the United States filed a motion to vacate its notice of removal and remand the action to state court. The federal court issued an order granting the remand of the case to the trial court on April 30, 2008. Thus, the trial court's jurisdiction was revived on April 30, 2008. *See Borkowski* at ¶ 12. All orders and judgments rendered by the trial court after remand are presumed valid. *See Haag v. Meffley*, 89 Ohio App. 471, 476, 103 N.E.2d 37 (6th Dist.1951).

{¶ 23} We find appellant's assignment of error that appellee fraudulently procured subject-matter jurisdiction in the trial court not well-taken, but find the trial court was without jurisdiction to issue the April 25, 2008 judgment entry which ordered the dismissal of OPM and the D.C. Plan as third-party defendants. Accordingly, the April 25, 2008 judgment entry of the Lucas County Court of Common Pleas, Domestic Relations Division, is vacated. However, as previously noted, the April 25, 2008 judgment entry was of no effect since OPM and the D.C. Plan were never properly added as parties. We further find all orders and judgments of the Lucas County Court of Common Pleas, Domestic Relations Division issued in this case after April 30, 2008, including the May 20, 2015 judgment, are valid and enforceable.

{¶ 24} Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment Affirmed.

Janet M. Sullivan
v. Daniel J. Sullivan
L-15-1169

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See also 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

James D. Jensen, P.J.
CONCUR.

JUDGE

JUDGE