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FOR THE RECORD

BY CRAIG SANDBERG

Lack of Jurisdiction Due to Filing Late Notice of Appeal Where Post-Trial Extension Motions Timely Filed But Trial Court Failed to Enter Order by Deadline

On May 25th, without comment, the Illinois Supreme Court denied the petition for appeal in *Manning v. City of Chicago*, 944 N.E.2d 876, 2011 Ill. App. LEXIS 154 (1st Dist. 2011). Manning (substituted for original plaintiff Wilson who died during the pendency of the appeal) argued that the appellate court's interpretation of 735 ILCS 5/2-1202(c) violated the separation of powers because it directly conflicts with Illinois Supreme Court Rules 183, 184 and 303. See Sara Zavala, *High Court Asked Whether Legislative Statutes Apply Over Its Own Rules*, *Chicago Daily Law. Bulletin*, Vol. 157, No. 97, May 17, 2011, at 3.

In a 13-page opinion, Justice James Fitzgerald Smith, dismissed plaintiff's appeal citing lack of jurisdiction due to the notice of appeal having been untimely filed.

The trial court entered judgment on the jury's verdict on September 4, 2008. Plaintiff moved for a first extension of time to file his post trial motion. On October 6, 2008, the court gave him until December 19, 2008. Before the deadline, Wilson moved for a second extension, and the trial court set the hearing date on that motion for December 29th (after the deadline). Defendants filed no objection. The trial court granted the motion on December 29, 2008, giving him until February 2, 2009, to file his post trial motion. Wilson filed, a third motion for extension of time, and allowed plaintiff until February 9, 2009. Wilson filed his post trial motion on February 9, and thereafter the trial court denied the motion on the merits.

The Appellate Court declared that the trial court lost jurisdiction over Wilson's matter as of December 19, 2008 and that everything entered by the Court and filed by the parties after December 19, 2008 were nullities.

The issue of the timeliness of plaintiff's notice of appeal was first raised by defendants in their response brief on appeal. Plaintiff argued that jurisdiction was not, nor should it be, lost in the appellate court for two reasons. First, the notion that trial courts "must rely solely on" section 2-1202(c) to determine jurisdiction was wrong and in direct contradiction to their authority to control their own dockets. Alternatively, that "defendants' conduct" revested the trial court with jurisdiction to rule on Wilson's post trial motion and, thus, the notice of appeal was timely filed.

While the appellate court agreed that trial courts are empowered to control their dockets (citing *Sander v. Dow Chemical Co.*, 166 Ill. 2d 48, 65 (1995)), the panel found that the state's rules and procedures regarding legal proceedings are not mere suggestions but, instead, are required to be followed by all parties to a cause of action in our courts (citing *Trentman v. Kappel*, 333 Ill. App. 3d 440, 441 (5th Dist. 2002)).

Illinois Supreme Court Rule 303(a)(1) mandates that, for the appellate court to be vested with jurisdiction, a notice of appeal must be filed within 30 days of the entry of the final judgment in the trial court, or, if a timely post trial motion directed against the judgment has been filed, within 30 days after the entry of the order disposing of that motion. See also ILL. SUP. CT. R. 301. Relatedly, section 2-1202(c) of the Illinois Code of Civil Procedure governs the time requirements applicable to the filing of post trial motions. Section 2-1202(c) states: "Post [] trial motions must be filed within 30 days after the entry of judgment or the discharge of the jury, if no verdict is reached, or within any further time the court may allow within the 30 days or any extensions thereof."

Citing and quoting the Fifth District in *Trentman*, the court stated the language of section 2-1202(c) was plain and unambiguous—"if the trial court extends

the time in which to file a post trial motion beyond the initial 30-day period, that order of time extension must be entered within the 30-day period or within any period of extension already given. In other words, after the 30-day period has expired, or the extended period of time has expired, without the entry of a new order setting a new deadline, the trial court loses jurisdiction over the case.” *Trentman*, 333 Ill. App. 3d at 442. And, once the trial court loses jurisdiction, any subsequent orders entered, including a notice of appeal, which would vest jurisdiction with the appellate court, are not viable. See *Trentman*, 333 Ill. App. 3d at 444.

Implicit in the Court’s opinion, that interpreted section 2-1202 as requiring the trial court to hold a hearing on a motion for an extension of time before the deadline for filing a post-trial motion (even if the motion for extension is filed before the statutory deadline expires), is the directive to practitioners that if the deadline for filing for extension to file the post trial motion is on him or her, then the same shall constitute an “emergency” and the practitioner must “hunt down a judge to have an extension order entered before the deadline runs.” See Steven P. Garmisa, “Extension for Post-Trial Motion Granted Too Late For Appeal,” (Sept. 29, 2003), <http://www.hoeyfarina.com/node/504> (discussing *In re Estate of Kunsch*).

On the issue of revestment, the court noted that plaintiff insisted that “defendants’ conduct” of not objecting to any untimely motions for extension, not objecting to jurisdiction during post trial motion practice, their filing of a response to plaintiff’s post trial motion, and their participation and advocacy at oral argu-

ment on the post trial motion demonstrated active participation on their part which, in turn, kept this cause alive. The Court, citing and quoting *Bernstein & Grazian, P.C. v. Grazian & Volpe, P.C.*, 402 Ill. App. 3d 961, 971 (1st Dist. 2010), stated that “even were we to assume these allegations are true, ‘appellate jurisdiction cannot be conferred by laches, agreement, waiver or estoppel,’ and ‘[t]his includes the failure of one party *** to call the appellate court’s attention to a jurisdictional defect.’” As such, “defendants’ failure to object here is irrelevant—regardless of their action or inaction in bringing attention to the jurisdictional issue, the rules at play, which we have thoroughly discussed above, mandate that we dismiss the instant appeal.”

(Ed.: The author of this column represented the plaintiff-appellant in this case.)

Board of Regents of University of Wisconsin System Did Not Waive Its Sovereign Immunity by Appealing Agency Decision to District Court

On June 21st, Circuit Judge John D. Tinder, writing on behalf of a unanimous panel of the U.S. Court of Appeals for the Seventh Circuit (*United States of America v. Anas Salem*; Docket No. 10-2204), affirmed the district court’s denial of the defendant’s motion for new trial on claim that prosecutor violated *Brady* by failing to disclose evidence contained in third-party’s plea agreement indicating that key witness for the government in instant case was involved in an uncharged murder. While defendant argued the murder evidence was material to the outcome of his trial because he could have used that evidence to establish witness’ bias in giving testimony favorable to government, the court of appeals concluded that the district court could properly have found that murder evidence was not material and would not have changed outcome of defendant’s trial since defense counsel fully impeached witness in the instant trial with the fact that the witness had incentive to testify in favor of government because he was already facing serious drug, weapons and RICO charges that carried potential life sentence.

On appeal, Salem contended that the district court abused its discretion in deny-

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ing his motion. He maintained that the evidence regarding another murder is unlike the other impeachment evidence he had at his disposal during trial and would therefore add much toward his efforts to undermine Carlos Lopez’s (a member of the Milwaukee Latin Kings street gang) indispensable and uncorroborated testimony. He also argued that the district court incorrectly emphasized the lack of an express agreement between Lopez and the government, concluded that the Sotelo charging decision had been made before Lopez reported the intimidation incident, and relied on the government’s assertion that Lopez was charged (or not charged) in accordance with its general policies.

The court of appeals determined that Salem had not demonstrated a reasonable possibility that the outcome of his trial would have been different if he had been able to impeach Lopez with the Sotelo evidence in addition to the other evidence of bias. To be sure, Lopez’s credibility was crucial to the government’s case. See *Salem*, 578 F.3d at 688. But Salem had not shown that the Sotelo evidence would be more effective at impugning Lopez’s credibility than the previously available impeachment evidence. Salem raised the inference that Lopez had a strong motive to curry favor with the government and took great pains to paint him as an unreliable, biased witness. The district court did not abuse its discretion in concluding that evidence of additional possible sources of pro-government bias would have been largely cumulative of Salem’s impeachment efforts and therefore was immaterial for the purposes of *Brady*. ■

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