

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2014 IL App (4th) 130278-U

NO. 4-13-0278

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

January 10, 2014
Carla Bender
4th District Appellate
Court, IL

WILLIAM DENNIS HUBER,) Appeal from
Plaintiff-Appellant,) Circuit Court of
v.) Sangamon County
AMERICAN ACCOUNTING ASSOCIATION,) No. 11MR411
Defendant-Appellee)
) Honorable
) John Schmidt,
) Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Presiding Justice Appleton and Justice Pope concurred in the judgment.

ORDER

- ¶ 1 *Held:* The appellate court dismissed for lack of jurisdiction where plaintiff failed to attach a certificate or affidavit showing timely compliance of a mailed notice of appeal, which the clerk's office received after the 30-day deadline.
- ¶ 2 In August 2011, plaintiff, William Dennis Huber (Huber) filed a petition to judicially dissolve defendant corporation, the American Accounting Association (the Association). As more fully set forth later in this order, the Association encompasses both a 1935 Association and a 2002 Association. Following a March 6, 2013, telephone hearing, the trial court granted the Association's motion to dismiss for failure to state a cause of action pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2012)). The circuit clerk received and file-marked Huber's mailed notice of appeal on April 9, 2013. The notice did not contain an affidavit or certificate of service pursuant to Illinois Supreme Court

Rule 12(b)(3) (eff. Jan. 4, 2013). The envelope which contained the notice of appeal was postmarked April 3, 2013.

¶ 3 On appeal, Huber asserts the trial court erred in granting the Association's motion to dismiss because (1) the court had jurisdiction over the Association; (2) Huber had standing to sue the Association; (3) the petition stated a cause of action for which relief could be granted; (4) Huber could seek injunctive relief against the Association; and (5) the court should have recused itself due to an appearance of bias. The Association responds Huber's appeal should be dismissed for lack of jurisdiction because Huber failed to file a timely notice of appeal.

¶ 4 We agree this court lacks jurisdiction and dismiss the appeal along with all pending motions.

¶ 5 I. BACKGROUND

¶ 6 The Association originally incorporated in 1935 as a not-for-profit corporation (1935 Association). In 1996, the State of Illinois dissolved the 1935 Association when the Association failed to file an annual report, but the 1935 Association continued to operate under an incorporated status. In 2002, the Association incorporated once again (2002 Association) in name only; the Association deposited all dues paid by members into the 1935 Association's account. The 1935 Association did not merge any assets with the 2002 Association. The Association's executive director, Tracey Sutherland, filed an uncontradicted affidavit claiming Huber became a member of the Association in 2000 and had always been a member of the 1935 Association, not the 2002 Association. According to Sutherland, the Association "mistakenly attempted to cure the administrative dissolution [of the 1935 Association] by forming a new corporate entity ('the 2002 Corporation') using the same name."

¶ 7 In June 2011, the Association sought from the State of Illinois (1) voluntary dissolution of the 2002 Association and (2) reinstatement of the 1935 Association. The State of Illinois granted both requests.

¶ 8 In August 2011, Huber filed a petition to (1) dissolve the 1935 Association and vacate the dissolution of the 2002 Association and (2) judicially dissolve the 2002 Association, alleging the Association engaged in "habitual, intentional, persistent, repetitive and deliberate, illegal, oppressive and fraudulent behavior; providing untrue and misleading information concerning the legal status of the Corporation and members' rights; interfering with members' rights to vote; and Dissolving the Corporation without allowing the members' [sic] to vote." Huber also requested the court enjoin the executive committee and other officers from acting inconsistently with the Association's articles of incorporation.

¶ 9 After the filing of numerous amended and supplemental petitions and motions, the Association ultimately filed a motion to dismiss pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2012)), alleging Huber failed to state a cause of action as a matter of law because (1) the trial court lacked jurisdiction over the dissolved 2002 Association; (2) Huber had no standing to sue the 2002 Association because he was never a member; (3) Huber could not seek relief against the 1935 Association because the petition failed to direct any allegations of wrongdoing against the 1935 Association; and (4) Huber failed to make the requisite showings for a preliminary injunction.

¶ 10 On March 6, 2013, the trial court held a hearing on the Association's motion to dismiss via telephone and subsequently entered a docket entry granting the motion. Pursuant to the court's direction to mail notice to the parties, the docket entry memorializing the court's order was mailed to the parties of record the same day. On April 9, 2013, the Sangamon County

circuit clerk's office received and file-marked Huber's mailed notice of appeal. The notice of appeal did not contain a certificate or affidavit of service verifying the date upon which it was mailed. The envelope containing the notice of appeal was postmarked April 3, 2013.

¶ 11 While on appeal, both Huber and the Association filed motions to strike portions of one another's briefs. We take those motions with the appeal.

¶ 12 II. ANALYSIS

¶ 13 On appeal, Huber asserts the trial court erred in granting the Association's motion to dismiss because (1) the court had jurisdiction over the 2002 Association; (2) Huber had standing to sue the 2002 Association; (3) the petition stated a cause of action for which relief could be granted; (4) Huber could seek injunctive relief against the Association; and (5) the court should have recused itself due to an appearance of bias. The Association contends the appeal should be dismissed for lack of jurisdiction because Huber failed to file a timely notice of appeal. Before we reach the merits of the case, we must first address whether this court has jurisdiction over Huber's appeal.

¶ 14 The reviewing court has a duty to ascertain whether it has jurisdiction before addressing any issues on appeal. *Secura Insurance Co. v. Illinois Farmers Insurance Co.*, 232 Ill. 2d 209, 213, 902 N.E.2d 662, 664 (2009). A timely notice of appeal is mandatory in order to convey jurisdiction upon the appellate court. *Id.*

¶ 15 The Illinois Supreme Court Rules govern the process for filing an appeal. Rule 303(a)(1) requires an appealing party to file a notice of appeal with the clerk of the circuit court within 30 days after the entry of the final judgment. Ill. S. Ct. R. 303(a)(1) (eff. June 4, 2008). In this case, the trial court entered final judgment on March 6, 2013; therefore, the notice of appeal was due on or before April 5, 2013. It is undisputed that (1) Huber mailed his notice of

appeal and (2) the clerk received the notice on April 9, 2013, after the deadline for filing a notice of appeal. In circumstances in which the appealing party mails a notice of appeal that is received after the deadline, such as in this case, Rule 373 controls. Ill. S. Ct. R. 373 (eff. Dec. 29, 2009).

Rule 373 provides:

"Unless received after the due date, the time of filing records, briefs or other papers required to be filed within a specified time will be the date on which they are actually received by the clerk of the reviewing court. If received after the due date, the time of mailing, or the time of delivery to a third-party commercial carrier for delivery to the clerk within three business days, shall be deemed the time of filing. Proof of mailing or delivery to a third-party commercial carrier shall be as provided in Rule 12(b)(3). This rule also applies to the notice of appeal filed in the trial court." Ill S. Ct. R. 373 (eff. Dec. 29, 2009).

The proof of mailing as required by Rule 12(b)(3) states:

"[I]n case of service by mail or by delivery to a third-party commercial carrier, by certificate of the attorney, or affidavit of a person other than the attorney, who deposited the document in the mail or delivered the document to a third-party commercial carrier, stating the time and place of mailing or delivery, the complete address which appeared on the envelope or package, and the fact that proper postage or the delivery charge was prepaid[.]" Ill. S. Ct. R. 12(b)(3) (eff. Jan. 4, 2013).

¶ 16 The Association relies on these supreme court rules as well as *Secura Insurance Co.*, 232 Ill. 2d 209, 902 N.E.2d 662, in support of its argument that this court lacks jurisdiction

to hear the appeal. In *Secura*, the supreme court dismissed an appeal for lack of jurisdiction where a mailed notice of appeal received after the due date failed to include the proof of mailing as required in Rules 373 and 12(b)(3). *Id.* at 216, 902 N.E.2d at 666.

¶ 17 Huber points out that *Secura* is distinguishable from the present case because the record in the present case contains an envelope with a clear postmark date of April 3, 2013, as evidence of the date Huber placed his notice of appeal in the mail. Huber asserts the postmarked envelope is enough to prove the notice of appeal was timely mailed. In support of his argument, Huber relies on a case from the Second District, *People v. Hansen*, 2011 IL App (2d) 081226, 952 N.E.2d 82, which held a clearly legible postmark provided sufficient proof of service even though the attorney failed to include a signed certificate of service as required by Rule 12(b)(3).

¶ 18 The factual scenario in the present case highlights a split between the districts. This court, in *People v. Smith*, 2011 IL App (4th) 100430, 960 N.E.2d 595, disagreed with the Second District's holding in *Hansen*. In *Smith*, this court relied instead upon an earlier First District case, *People v. Tlatenchi*, 391 Ill. App. 3d 705, 909 N.E.2d 198 (2009), which adhered to the strict requirement of filing an affidavit or certificate of service pursuant to Rule 12(b)(3) in order to satisfy the mailing requirements of Rule 373. Another Fourth District case, *People v. Blalock*, 2012 IL App (4th) 110041, 976 N.E.2d 643, reinforced this court's disagreement with *Hansen*.

¶ 19 In *Blalock*, an inmate mailed to the circuit clerk a motion to reconsider sentence, which was due on or before August 9, 2010. *Id.* ¶ 6, 976 N.E.2d 643. The clerk received the motion on August 10, 2010. *Id.* ¶ 7. However, the envelope was stamped with a postmark date of August 6, 2010. *Id.* The defendant's proof of service failed to comply with Rule 12(b)(3). *Id.* On appeal, this court stated, "[r]egardless of whether defendant mailed all of the documents

together in the envelope bearing an August 6, 2010, postmark date, the documents are insufficient to prove defendant's motion for reduction of sentence was timely filed." *Id.* ¶ 11, 976 N.E.2d 643. This court concluded the appellate court lacked jurisdiction because it was bound by the terms of Rule 12(b)(3), which did not provide for the substitution of postmarked envelopes in lieu of an affidavit or certificate of service. *Id.*

¶ 20 *Blalock* is analogous to the present case. The postmarked envelope suggests Huber mailed the notice of appeal on April 3, 2013, two days before the April 5, 2013, deadline. Nevertheless, Huber failed to file the required affidavit or certificate with his notice of appeal, as required by Rule 12(b)(3), and proof of a postmarked envelope contained within the record does not correct this defect, nor does it serve as a substitute for the omitted affidavit.

¶ 21 Because Huber failed to follow the requirements of Rule 12(b)(3), he is unable to utilize the loosened strictures of filing by mail offered by Rule 373. Thus, Huber's notice of appeal was filed on the date it was received by the clerk, April 9, 2013, which was past the 30-day deadline of April 5, 2013. Huber filed no motion for leave to file a late notice of appeal. Therefore, as Huber's notice of appeal was untimely, we conclude this court lacks jurisdiction to address the merits of the case.

¶ 22 III. CONCLUSION

¶ 23 For the reasons stated, we dismiss this case and all pending motions for lack of jurisdiction.

¶ 24 Dismissed.