2011 IL App (1st) 103829-U

THIRD DIVISION
October 26, 2011

No. 1-10-3829

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JOHN WHITE, Plaintiff-Appellant, v. MANNY'S BLUE ROOM, INC., Judgment Debtor, and THE BURLINGTON INSURANCE COMPANY, Garnishee Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County. No. 06 L 2656
THE BURLINGTON INSURANCE COMPANY, Counter-Plaintiff-Appellee, v. JOHN WHITE, Counter-Defendant-Appellant, and	)	

MANNY'S BLUE ROOM, INC.,	)	
	)	
	)	Honorable
Counter-Defendant.	)	Alexander P. White,
	)	Judge Presiding.

ORDER

JUSTICE SALONE delivered the judgment of the court.
Presiding Justice Steele and Justice Murphy concurred in the judgment.

HELD: Rule 304(b)(4) provides jurisdiction from final orders as to less than all parties in proceedings filed under section 2-1402; summary judgment properly entered where insurance policy specifically excluded liability for assault or battery and liquor related liability; motion to reconsider properly denied.

¶ 1 This appeal arises from the circuit court's entry of summary judgment in favor of Counter-Plaintiff/Garnishee Defendant/Appellee The Burlington Insurance Company (Burlington) and against its insured, Manny's Blue Room, Inc. (Manny's) and John White (White) in a declaratory judgment counter-claim. White appeals the trial court's entry of summary judgment and the denial of his motion to reconsider. For the following reasons, we affirm.

¶ 2 BACKGROUND

¶ 3 White filed the underlying action against Manny's, which alleged that he was injured on March 16, 2005, while patronizing Manny's. The complaint contained three counts: Count I alleged liability under the Dram Shop Act (235 ILCS 5/6-21 (West 2008)) against Manny's; and Count II alleged negligence in that Manny's failed to supervise its patrons, failed to control or supervise its employees, failed to provide proper security and otherwise negligently

allowed Donnie Burton and Troy Pickett to become intoxicated and use a firearm against White.[1]

¶ 4 Following a jury trial against Manny's, the jury returned a verdict in favor of White on the dram shop and negligence counts and awarded White $217,590.80 in damages. Judgment was entered on this amount on May 26, 2009. Manny's liquor liability insurer, Illinois Casualty Company, paid $53,092.05 of the judgment, which was the maximum amount recoverable under the Dram Shop Act for causes of action arising in 2005. The remaining unsatisfied portion of the judgment was $164,495.75.

¶ 5 White subsequently commenced supplementary enforcement proceedings against Burlington on June 25, 2009, to satisfy the balance of the judgment. Burlington responded by filing a counter-claim for declaratory judgment against Manny's and White on August 3, 2009. Burlington sought a declaration as a matter of law that it had no duty to defend or indemnify the remaining amount of the judgment based on the assault or battery exclusion contained in its policy, contested the presence of an "occurrence," and further alleged that the liquor liability exclusion also applied to exclude coverage.

¶ 6 The relevant portions of Burlington's policy provide as follows:

> "**SECTION I - COVERAGES**
>
> **COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY**
>
> 1. Insuring Agreement
>
> a. We will pay those sums that the insured becomes

[1]Count III was directed against Burton and is not relevant to this appeal.

legally obligated to pay as damages because of bodily injury or property damage to which the insurance applies. We will have the right and duty to defend the insured against any suit seeking those damages. However, we will have no duty to defend the insured against any suit seeking damages for bodily injury or property damage to which this insurance does not apply. * * *

* * *

b. This insurance applies to bodily injury and property damage only if

(1) The bodily injury or property damage is caused by an occurrence that takes place in the coverage territory and

(2) The bodily injury or property damage occurs during the policy period."

* * *

EXCLUSION - ASSAULT OR BATTERY

1. Exclusion a. of Coverage A (Section I) is replaced by:

This insurance does not apply to:

a. Bodily injury or property damage:

(1) Expected or intended from the standpoint of any insured; or

(2) arising out of an assault or battery, or out of any act or omission in connection with the prevention or suppression of an assault or battery."

* * *

AMENDMENT OF LIQUOR LIABILITY EXCLUSION:

Exclusion c. of Coverage A (Section I) is replaced by the following:

c. Bodily injury or property damage for which any insured or his indemnitee may be held liable by reason of:

(1) Causing or contributing to the intoxication of any person;

(2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or

(3) Any, statute ordinance, or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

This exclusion applies only if you:

(1) Manufacture, sell or distribute alcoholic beverages;

(2) Serve or furnish alcoholic beverages for a charge whether or not such activity;

(a) requires a license;

(b) is for the purpose of financial gain or livelihood; or;

(3) Serve or furnish alcoholic beverages without a charge, if a license is required for such activity;

(4) Are an owner or lessor of premises used for such purposes."

¶ 7 Subsequently, on September 30, 2009, Burlington filed a motion for summary judgment in its declaratory judgment action. Meanwhile, White filed a separate citation on Manny's on March 24, 2010. The trial court granted Burlington's motion for summary judgment on July 21, 2010, and White filed a motion to reconsider. The pending citation against Manny's was entered and continued pending resolution of the motion to reconsider, which was subsequently denied on November 29, 2010. The trial court's order denying White's motion to reconsider did not contain any special finding of appealability and the record contains no order resolving the supplementary enforcement proceedings against Manny's.

¶ 8 White then filed a notice of appeal in this court on December 27, 2010, appealing the trial court's order entering summary judgment in favor of Burlington on July 21, 2010, and the denial of his motion to reconsider on November 29, 2010.

¶ 9 DISCUSSION

¶ 10 On appeal, White contends that the trial court improperly entered summary judgment in favor of Burlington and additionally that the trial court erred in denying his motion to reconsider.

¶ 11 Jurisdiction

¶ 12 Preliminarily, however, Burlington challenges the jurisdiction of this court to hear the appeal because the citation against Manny's was still pending. Accordingly, Burlington contends that White's notice of appeal filed on December 27, 2010, was improperly filed as the November 29, 2010, order was a final order as to fewer than all parties because of the pending citation against Manny's, and the order did not include the requisite Rule 304(a) language. (Ill. Supreme Court Rule 304(a) eff. Jan. 1, 2006).[2]

¶ 13 White responds in his reply brief that Supreme Court Rule 303 (Ill. Supreme Court Rule 303 eff. Sept. 1, 2006) is applicable because a final judgment against judgment debtor (Manny's) had previously been entered. He further contends that his supplementary proceedings to enforce the judgment against both Burlington and Manny's should not be construed as post-trial proceedings because they only sought to enforce the existing judgment. White further contends that Burlington "mistakenly argues that Supreme Court Rule 304(a) governs," apparently abandoning his contention in his opening brief that Rule 304(a) governs.

¶ 14 A reviewing court has a duty to consider *sua sponte* its jurisdiction and to dismiss an appeal if jurisdiction is lacking. *In re Marriage of Link*, 362 Ill. App. 3d 191, 192 (2005).

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[2]In his opening brief, White asserts that this court has jurisdiction under Supreme Court Rule 304(a).

Subject to certain exceptions, our jurisdiction is limited to appeals from final judgments. *Smith v. P.A.C.E., a Suburban Bus Div. of Regional Transp.*, 323 Ill. App. 3d 1067, 1073 (2001).

¶ 15 We first note that White's argument that Rule 303 applies is glaringly without merit. While he is correct that the initial judgment entered in the underlying action was a final and appealable order, he had no right to file an appeal from it. Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994) provides that every final judgment of a circuit court in a civil case is appealable as of right. Here, a monetary judgment was entered against Manny's following a jury trial on May 26, 2009, thus a timely notice of appeal would have been due within 30 days. See Illinois Supreme Court Rule 303(a)(1) (eff. Sept. 1, 2006) (a notice of appeal must be filed within 30 days after entry of the final judgment appealed from). However, the right to appeal was vested in Manny's as the aggrieved party, not White. See *Tisoncik v. Szczepankiewicz*, 113 Ill. App. 3d 240, 244 (1983) (the right to appeal exists only in favor of a party whose rights have been prejudiced by the judgment or decree appealed from). As such, Rule 303 would not apply to an appeal filed by White.[3] Accordingly, the only way that this court would have jurisdiction would be under Rule 304.

¶ 16 In the case at bar, following entry of the monetary judgment, White filed a supplementary enforcement proceeding against Burlington pursuant to section 2-1402 of the Code of Civil Procedure (Code) (735 ILCS 2-1402 (West 2008)), to enforce his judgment. Section 2-1402(a) authorizes a judgment creditor to prosecute supplementary proceedings for

[3]We further note that even if the right to appeal was vested in White, his notice of appeal would have been untimely under Rule 303 as it was filed more than one year following entry of the underlying judgment.

the purposes of examining the judgment debtor or any other person to discover assets or income of the debtor that are not exempt from the enforcement of a judgment, deduction order or garnishment, and compelling the application of such non-exempt assets or income discovered toward the payment of the amount due under the judgment. 735 ILCS 5/2-1402(a) (West 2008).

While Burlington's summary judgment motion was pending, White subsequently joined Manny's in the supplementary enforcement proceedings by filling a citation. Burlington's summary judgment motion was granted on July 21, 2010, at which time the citation against Manny's was still pending. White then filed a motion to reconsider, and the citation against Manny's was continued pending the outcome of White's motion. When White's motion was denied on November 29, 2010, the citation against Manny's was still pending.

¶ 17 Generally speaking, if an order does not resolve every right, liability or matter raised, it must contain an express finding that there is no just reason for delaying an appeal pursuant to Rule 304(a) (Ill. Supreme Court Rule 304(a) (eff. Jan. 1, 2006). See also *Longo v. Globe Auto Recycling, Inc.*, 318 Ill. App. 3d 1028, 1033 (2001). However, Rule 304(b) makes certain types of final orders immediately appealable without a special finding. Ill. Supreme Court Rule 304(b) (eff. Jan. 1, 2006). One of the types of orders that is immediately appealable without a special finding is a final order in a section 2-1402 collection proceeding. Ill. Supreme Court Rule 304(b)(4) (eff. Jan. 1, 2006). An order in a section 2-1402 proceeding is said to be final when the citation petitioner (in this case White) is in a position to collect against the judgment debtor (Manny's) or a third party (Burlington), or the citation petitioner has been ultimately foreclosed

from doing so. *D'Agostino v. Lynch*, 382 Ill. App. 3d 639, 642 (2008). In this case, the denial of White's motion to reconsider was a final order with respect to the supplementary proceedings against Burlington, even though the proceedings against Manny's were still pending, thus we have jurisdiction to hear the appeal under Rule 304(b)(4). *Auto Owners Ins. v. Berkshire*, 225 Ill. App. 3d 695, 696 (1992); *D'Agostino*, 382 Ill. App. 3d at 642.

¶ 18 We therefore turn to the merits of this appeal.

¶ 19 Grant of Summary Judgment

¶ 20 White contends on appeal that the trial court erred in granting Burlington's motion for summary judgment based on its finding that Burlington had no duty to indemnify the remaining balance of White's judgment against Manny's.

¶ 21 Summary judgment is proper where the pleadings, depositions, admissions, and affidavits on file show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Scerba v. City of Chicago*, 284 Ill. App. 3d 435, 438 (1996). Summary judgment will be allowed only where the right of the moving party is clear and free from doubt. *Scerba*, 284 Ill. App. 3d at 438. Our review of the summary judgment is *de novo*. *Scerba*, 284 Ill. App. 3d at 438.

¶ 22 In order to determine whether the insurer's duty to defend has arisen, the court must compare the allegations of the underlying complaint to the policy language. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 125 (1992). The allegations in the underlying complaint must be liberally construed in favor of the insured. *Outboard Marine Corp.*, 154 Ill. 2d at 125. If the court determines that these allegations fall within, or potentially

within, the policy's coverage, the insurer has a duty to defend the insured against the underlying complaint. *Outboard Marine Corp.*, 154 Ill. 2d at 125.

¶ 23 Burlington's counterclaim alleged that coverage for White's judgment was excluded by the assault and battery exclusion and also because the "bodily injury" was not caused by an "occurrence." The counterclaim further alleged that coverage for White's judgment was excluded under the liquor liability exclusionary endorsement.

¶ 24 It is clear upon review of the policy that it clearly excludes from coverage any liability arising from an assault or battery, or of any act or omission related to the prevention or suppression of an assault or battery. The policy also excludes liquor-related liability arising from the sale or provision of alcohol. The allegations in White's complaint clearly arose from expressly excluded risks, namely the failure to prevent the bar shooting and dram shop liability. Even if the assault and battery exclusion did not apply, application of the liquor liability exclusion is clear, as it is clear that Manny's was in the business of selling, serving or furnishing alcoholic beverages. As such, we must conclude that Burlington's policy specifically excluded coverage for Manny's liability for failure to prevent White's injuries which were the result of an assault or battery and further specifically excluded coverage for furnishing or selling alcohol. Thus, Burlington had no duty to indemnify White's judgment as there was never a potential for coverage. We find therefore, that the trial court properly granted Burlington's motion for summary judgment.

¶ 25 Denial of Motion to Reconsider

¶ 26 White further contends that the trial court erred in denying his motion to reconsider. In

his motion to reconsider, White alleged that the trial court made an error in its interpretation of the applicable law and relevant facts. Because White is questioning the propriety of the trial court's application of substantive law to the facts presented before it, the standard of review is *de novo*. *O'Shield v. Lakeside Bank*, 335 Ill. App. 3d 834, 838 (2002).

¶ 27 As we have just determined that summary judgment was properly entered because White's claims were based on liabilities that were specifically excluded from the policy, and as such, Burlington had no duty to indemnify the judgment, it follows then that the motion to reconsider was properly denied.

¶ 28 CONCLUSION

¶ 29 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 30 Affirmed.