

No. 1-11-2765

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

MICHAEL A. HEARD doing business as)	Appeal from the
KINGSCRAFT BUILDER COMPANY)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 09 CH 28436
)	
SLRDM 7400 SOUTH ROCKWELL L.L.C.)	
ALKO CONSTRUCTION & DEVELOPMENT, INC.)	
UNKNOWN OWNERS, UNKNOWN TENANTS,)	Honorable
And NON-RECORD CLAIMANTS)	Lewis Michael Nixon,
Defendants-Appellees.)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Justices Fitzgerald Smith and Epstein concurred in the judgment.

ORDER

- ¶ 1 *Held:* Circuit court's dismissal of Count I of plaintiff's amended complaint affirmed where plaintiff failed to provide a sufficiently complete record of the proceedings to support his claim of error; appeal from the denial of plaintiff's motion for summary judgment dismissed for lack of jurisdiction.
- ¶ 2 Plaintiff Michael Heard, d/b/a Kingscraft Builder Company, appeals *pro se* from an interlocutory order of the circuit court of Cook County dismissing Count I of his first amended complaint for foreclosure of a mechanic's lien and other relief (amended complaint). On appeal, plaintiff contends that the circuit court erred in denying his motion for summary judgment, and

subsequently dismissing Count I of his amended complaint. Although defendants have not filed a brief in response, we may consider the merits of this appeal under the principles set forth in *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 3 The common law record shows, in relevant part, that on August 14, 2009, plaintiff filed a *pro se* complaint for foreclosure of a mechanic's lien and other relief against defendants SLRDM 7400 South Rockwell L.L.C. (SLRDM), ALKO Construction and Development Inc., and all other unknown owners, tenants, and non-record claimants. Therein, plaintiff, a subcontractor, alleged that several months after beginning carpentry work for defendants on a property known as "Marquette Village," he was informed by defendants' site manager that he was required to pay his employees a "prevailing wage." Plaintiff responded that "under the cost terms agreed to (the contract) plaintiff would be unable to meet any additional wage burden." He completed the agreed-upon work in late October 2008, and defendants withheld \$421,000 allegedly due him.

¶ 4 On February 9, 2010, after defendants had filed their verified answer, plaintiff filed a verification of a "First Amended Complaint for Foreclosure of a Mechanic's Lien and Other Relief."¹ The amended complaint to which this verification refers has not been made part of the record on appeal; however, the court entered an order granting defendants time to answer or otherwise plead to the "1st Amended Complaint," and such answer was filed by defendants on March 1, 2011, indicating that the amended complaint was allowed.

¶ 5 On March 22, 2010, SLRDM filed a motion to dismiss Count I of plaintiff's complaint pursuant to section 2-619(5) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(5) (West 2010)), asserting that plaintiff's "Notice of Claim for Mechanics Lien," which was recorded more than 90 days after the work had been performed, was invalid; and, further, that plaintiff failed to

¹ The order dismissing Count I of the amended complaint indicates that the pleading was filed on October 22, 2009.

file suit within 30 days of SLRDM sending him a demand to commence suit to foreclose. On May 13, 2010, the circuit court denied SLRDM's motion, finding that there was no proof of delivery of the demand.

¶ 6 On July 8, 2010, plaintiff filed a motion for summary judgment pursuant to section 2-1005 of the Code (735 ILCS 5/2-1005 (West 2010)). On April 28, 2011, the circuit court denied the motion without prejudice, finding that there was no supporting affidavit to the motion and that defendant had filed a response.

¶ 7 On August 4, 2011, the circuit court entered an order stating that the cause had come up for status, and that "Count I of Plaintiff's Amended Complaint filed on October 22, 2009, is hereby dismissed Pursuant to Supreme Court Rule 304(a) There is no just reason to delay enforcement or appeal of This order, This order being final." On August 18, 2011, the court entered an order in connection with "Plaintiff's Motion to Clarify Order Dismissing Count I of Plaintiff's [*sic*] entered August 4, 2011," stating, in pertinent part, that it had explained its reasoning for dismissing Count I of the complaint. On September 16, 2011, plaintiff filed notice of appeal from "[t]he order of August 04, 2011, dismissing, pursuant to Supreme Court Rule 304(a), Count I of plaintiffs' [*sic*] complaint filed October 22, 2009."

¶ 8 On appeal, plaintiff first contends that the circuit court erred in denying his motion for summary judgment on the grounds that it lacked a supporting affidavit. Before addressing the merits of this claim, however, we must first consider, *sua sponte*, our jurisdiction over the appeal. *Village of Sugar Grove v. Rich*, 347 Ill. App. 3d 689, 693 (2004).

¶ 9 It is well-settled that an order denying summary judgment is not a final judgment and may ordinarily not be appealed. *City of Chicago, ex rel. Charles Equipment Co. v. United States Fidelity & Guaranty Co.*, 142 Ill. App. 3d 621, 629 (1986). The only exception to this rule is where the case is on appeal from a final judgment to which the judgment sought to be reviewed

directly relates, there has been no evidentiary hearing or trial, and the party seeking review has not prevented or avoided such hearing or trial. *Charles Equipment Co.*, 142 Ill. App. 3d at 629.

¶ 10 Here, it is clear that the order denying summary judgment to plaintiff without prejudice was neither a final judgment, nor appealable under the exception stated above where the instant appeal, itself, is interlocutory in nature. *Charles Equipment Co.*, 142 Ill. App. 3d at 629.

Moreover, the order denying plaintiff's motion for summary judgment contains no finding that there is no just reason for delaying enforcement or appeal so as to allow for an appeal pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010). *Charles Equipment Co.*, 142 Ill. App. 3d at 629. Under similar circumstances, this court has found that it lacked jurisdiction to consider the appeal (*Charles Equipment Co.*, 142 Ill. App. 3d at 628-30), and we reach the same conclusion in this case. Accordingly, we dismiss plaintiff's appeal as it relates to the circuit court's order denying his motion for summary judgment.

¶ 11 Plaintiff next contends that the circuit court erred in dismissing Count I of his amended complaint. The record shows that plaintiff filed his original complaint in this matter on August 14, 2009, and subsequently filed an amended complaint which is not in the record. The record further shows that on May 13, 2010, the circuit court denied a motion by SLRDM to dismiss Count I of plaintiff's "Complaint"; and then, on August 4, 2011, dismissed Count I of "Plaintiff's Amended Complaint" at a status hearing. We note that the circuit court, on its own motion, may dismiss any claim that fails to state a cognizable cause of action. *Mitchell v. Norman James Construction Co.*, 291 Ill. App. 3d 927, 938 (1997).

¶ 12 Under well-settled principles, plaintiff, as appellant, has the burden to provide a sufficiently complete record to support a claim of error (*Foutch v. O'Bryant*, 99 Ill. 2d 389, 391 (1984)), and has failed to do so in this case. Specifically, plaintiff has failed to include the amended complaint in the record, and the "agreed statement of facts" provided has not been

signed, and was therefore not agreed to, by defendants, as required by Illinois Supreme Court Rule 323 (eff. Dec. 13, 2005). We thus have no basis for determining whether Count I of his amended complaint stated a cognizable claim, and in the absence of a sufficient record on appeal, we presume that the order entered by the trial court was in conformity with the law and had a sufficient factual basis. *Foutch*, 99 Ill. 2d at 392.

¶ 13 We, therefore, dismiss plaintiff's appeal as it relates to the circuit court's denial of his motion for summary judgment, and affirm the dismissal of Count I of his amended complaint.

¶ 14 Affirmed in part; dismissed in part.