

No. 1-11-3405

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 under Rule 23(e)(1).

---

IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

---

ATLAS GALLERIES, Inc.	)	Appeal from the Circuit
	)	Court of Cook County,
Plaintiff-Appellant,	)	
	)	
v.	)	
	)	No. 10 CH 11355
SAM HELLER,	)	
	)	
Defendant-Appellee.	)	The Honorable
	)	Kathleen M. Pantle,
	)	Judge Presiding.
	)	

---

JUSTICE TAYLOR delivered the judgment of the court.  
Justices Howse and Palmer concurred in the judgment.

**ORDER**

¶ 1 *Held:* This court lacks jurisdiction to reach the merits of an appeal where the plaintiff failed to file a timely notice of appeal following an order that dismissed his complaint with prejudice. Defendant's motion for attorney's fees did not affect the appealability of the order where the issue was raised for the first time after the order was entered.

No. 1-11-3405

¶ 2 Plaintiff, Atlas Galleries, Inc., appeals from an order of the circuit court of Cook County dismissing its second amended complaint against defendant, Sam Heller, plaintiff's former employee, for breach of a contract not to retain information about plaintiff's customers. Plaintiff contends that the court erred in dismissing its complaint because, contrary to the court's order, plaintiff sufficiently pled that its customers' information was confidential and that, in any event, it is entitled to enforce its contract with defendant even if the wrongfully retained information was not confidential as a matter of law.

### ¶ 3 BACKGROUND

¶ 4 Plaintiff, an art gallery, filed a complaint, which was amended twice, against defendant, who had worked for plaintiff as a salesperson until February 2006. Each version of that complaint alleged, and the parties do not dispute, that during his employment, defendant signed a document titled "confidential information, covenant not to compete and non-solicitation agreement," which was attached as an exhibit. The agreement contained: (1) a 1-year non-competition clause that forbade defendant from providing services to another gallery within a 5-mile radius of plaintiff, which expired in 2007; (2) a 2-year non-solicitation clause that forbade him from soliciting plaintiff's customers, which expired in 2008; and (3) a 2-year non-employee solicitation clause that forbade him from causing another employee of plaintiff to terminate his employment, which expired in 2008. In addition, the agreement included two confidentiality provisions, namely: (1) a three-year provision that forbade defendant from "us[ing] ... or otherwise disclos[ing] any confidential information," which expired in 2009; and (2) a provision with no time restriction which required defendant to return to plaintiff all materials containing

No. 1-11-3405

plaintiff's confidential information, and forbade defendant from retaining "any copies, duplicates or other documents memorializing" such confidential information.

¶ 5 In its first complaint, filed on March 18, 2010, plaintiff alleged that in February 2010, defendant contacted one or more unspecified customers of plaintiff, which he could not have been able to do if he had not retained and used plaintiff's confidential business records in violation of the agreement. Based on those allegations, plaintiff sought unspecified damages for its business losses from defendant's conduct (count I), an accounting of all profits that defendant generated from his use of plaintiff's confidential information (count II), and an injunction against future use of that information (count III).

¶ 6 Defendant filed a motion to dismiss the complaint on the grounds that the non-compete, non-solicitation and non-disclosure provisions of the agreement had all expired when defendant allegedly used any confidential information to contact plaintiff's customers. The circuit court agreed, and granted defendant's motion to dismiss on July 22, 2010.

¶ 7 On August 19, 2010, plaintiff filed its first amended complaint, which repleaded counts I, II and III of its original complaint, noting that they were previously dismissed, and added count IV, alleging that defendant wrongfully retained copies of plaintiff's confidential purchase records. Under that count, plaintiff sought the return of all of its records and copies thereof, and an order requiring defendant to cease and desist using any information from those records. Defendant filed a new motion to dismiss this complaint, arguing not only that plaintiff was attempting to prevent defendant from activities whose restrictions had already expired, but also that plaintiff failed to plead any facts to support the notion that its records were, in fact, confidential. The

No. 1-11-3405

circuit court, again, agreed with defendant and dismissed plaintiff's first amended complaint.

¶ 8 Plaintiff subsequently filed its second amended complaint, which, again, repled counts I, II and III of its two prior complaints, and a revised count IV, where plaintiff sought only the return of its confidential purchase records. In this complaint, plaintiff listed, as an example, the purchase records of an artist called Frederick Phillips, which, according to plaintiff, is unavailable to the public just like the rest of its purchase records. Again, defendant filed a motion to dismiss, this time under section 2-619 of the Illinois Code of Civil Procedure, and attached his own affidavit stating that the information allegedly retained by him was not confidential. Defendant argued that the absence of such confidentiality was an affirmative defense because it rendered the agreement unenforceable. In that affidavit, defendant averred that plaintiff does not treat its purchase records in a confidential manner, and that the Phillips' customer base is easy to ascertain. Plaintiff did not file a counter affidavit, but responded only that defendant's motion to dismiss under section 2-619 was improper because plaintiff properly pled that the records in question were confidential.

¶ 9 On August 9, 2011, the circuit court, again, agreed with defendant and dismissed plaintiff's second amended complaint, this time with prejudice. In doing so, the court found that defendant's claim of unenforceability of his agreement with plaintiff is an affirmative defense, and that he also raised an affirmative matter which refutes plaintiff's crucial conclusions of material fact. The order stated that this was "a final order disposing of all litigation in this matter."

¶ 10 In each of its complaints, plaintiff sought, in addition to other awards, its attorney fees

No. 1-11-3405

and costs associated with the lawsuit, pursuant to a fee shifting provision in its agreement with defendant. Defendant, however, did not seek an award of attorneys fees in any of his motions to dismiss or other documents filed prior to August 18, 2011. For the first time on that date, he filed his own motion for attorney's fees pursuant to the agreement with plaintiff. On October 14, 2011, the parties apparently agreed on an award of attorney's fees in the amount of \$3,740, and the circuit court entered an agreed order on that amount on the same day. On November 14, 2011, more than 90 days after the circuit court dismissed plaintiff's second amended complaint with prejudice, plaintiff filed its notice of appeal from that dismissal.

#### ¶ 11 ANALYSIS

¶ 12 On appeal, plaintiff now contends that the circuit court erred in dismissing its complaints because plaintiff was entitled to enforce its agreement by recovering its customer information and damages for its improper use, even if that information was not confidential as a matter of law. Plaintiff further contends that the court improperly dismissed its second amended complaint because plaintiff sufficiently pled that its customer information was confidential, and that once plaintiff prevails on its claims, the attorney's fees award must be reversed.

¶ 13 Defendant initially responds that plaintiff has failed to timely appeal from the circuit court's dismissal of its second amended complaint, and as a result, this court lacks jurisdiction to reach the merits of the appeal. According to defendant, the order from August 9, 2011 was final and appealable, and therefore, triggered the 30-day period in which to file a notice of appeal. He maintains that his motion for attorney's fees did not affect the finality of the prior order because the motion did not challenge the dismissal, and defendant's fee request was not pending when the

No. 1-11-3405

court dismissed plaintiff's second amended complaint. Plaintiff replies that the order from August 9, 2011 was not final because plaintiff included a request for attorney's fees in each of its complaints, and therefore, the question of whether attorney's fees would be awarded to the prevailing party was still pending when plaintiff's second amended complaint was dismissed.

¶ 14 A final judgment in a civil case is appealable under Illinois Supreme Court Rule 301 (Ill. S. Ct. R. 301); and jurisdiction is vested in the appellate court to review such judgment upon the filing of a notice of appeal. *Hartford Fire Ins. Co. v. Whitehall Convalescent & Nursing Home, Inc.*, 321 Ill. App. 3d 879, 885 (2001). The timing for filing a notice of appeal is governed by Rule 303(a)(1), which provides:

"Except as provided \*\*\* below, the notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the final judgment appealed from, or, if a timely post-trial motion directed against the judgment is filed, \*\*\* within 30 days after the entry of the order disposing of the last pending post-trial motion." Ill. S. Ct. R. 303(a)(1).

¶ 15 For purposes of Rule 303, a final judgment is one that terminates the litigation between the parties on the merits or determines the rights of the parties either upon the entire controversy or some definite part thereof. See, e.g., *Mars v. Priester*, 205 Ill. App. 3d 1060, 1063 (1990). Further, Rule 304(a) governs the timing of appeals from final orders that do not dispose of all the matters presented to the court, and states:

"If multiple parties or multiple claims for relief are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all of the parties or

No. 1-11-3405

claims only if the trial court has made an express written finding that there is no just reason for delaying either enforcement or appeal or both. \*\*\* In the absence of such a finding, any judgment that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not enforceable or appealable and is subject to revision at any time before the entry of a judgment adjudicating all the claims, rights and liabilities of all the parties." Ill. S. Ct. R. 304(a)

¶ 16 A Rule 304(a) finding is not required, however, when a claim for fees is made after the principal action has been decided. *Hartford Fire Ins., Inc.*, 321 Ill. App. 3d at 886, citing *Servio v. Paul Roberts Auto Sales, Inc.*, 211 Ill. App. 3d 751, 759 (1991). In fact, it is well established that a motion for attorney's fees is not a "posttrial motion directed against the judgment" within the meaning of Rule 303, and does not, therefore, toll the time period in which a party may appeal from a final judgment. See *Marsh v. Evangelical Covenant Church of Hinsdale*, 138 Ill. 2d 458, 462 (1990); *c.f. F.H. Prince & Co., Inc. v. Towers Financial Corp.*, 266 Ill. App. 3d 977, 992 (1994) (noting that a petition for fees filed pursuant to Rule 137 would make a notice of appeal from the judgment premature).

¶ 17 Moreover, while this court has considered motions for attorney's fees "claims" within the meaning of Rule 304(a) (see *F.H. Prince & Co., Inc.*, 266 Ill. App. 3d at 983), it has long recognized a distinction between claims that are brought as part of the principal action and claims that are brought after the principal action has been decided (*Servio*, 211 Ill. App. 3d at 759). In the latter scenario, a Rule 304(a) is not required. *Id.* For instance, if a plaintiff includes a request for an award of attorney's fees in his complaint and the court enters a judgment in his favor, but

No. 1-11-3405

does not rule on the amount of fees, the judgment is not appealable while that issue is pending. See *F.H. Prince & Co., Inc.*, 266 Ill. App. 3d at 984-85. However, when a successful party files a motion for fees only after the court has rendered a final judgment on his action, the motion is collateral and does not affect the appealability of the final judgment on the principal action. See *Hartford Fire Ins., Inc.*, 321 Ill. App. 3d at 886-87 (declaratory judgment in favor of plaintiff was still appealable once plaintiff filed motion for reimbursement of defense costs); *Servio*, 211 Ill. App. 3d at 761 (successful defendant's motion for attorney's fees, filed after the judgment on the action, but not included in his responsive pleadings, did not prevent judgment from being appealable without a Rule 304(a) finding).

¶ 18 Here, the parties do not dispute that the circuit court's order dismissing plaintiff's second amended complaint did not include a Rule 304(a) finding. However, although plaintiff included a claim for attorney's fees in each of its complaints, defendant did not make such a claim in any of his responsive pleadings. Since plaintiff based its request for attorney's fees on a contractual provision under which such fees would be awarded to the prevailing party, it no longer had a claim for such fees when its second amended complaint was dismissed with prejudice. Thus, there were no pending claims at that time, and the order was final and appealable. Defendant, on the other hand, brought his motion for attorney's fees for the first time after the dismissal of plaintiff's second amended complaint. While defendant's motion was based on the same contractual provision in which plaintiff based his request, that does not change the fact that defendant made no claim for attorney's fees on any basis prior to the circuit court's final judgment on the principal action. Since defendant's motion for attorney's fees was collateral to the final

No. 1-11-3405

judgment, and did not prevent it from being appealable without a Rule 304(a) finding, plaintiff was required to file a notice of appeal within 30 days of August 9, 2011, which it did not do. See *Servio*, 211 Ill. App. 3d at 761. Consequently, this court lacks jurisdiction over all matters that were resolved on or before August 9, 2011.

¶ 19 Accordingly, the only matter which we may review is the order from October 14, 2011, awarding defendant attorney's fees. However, since plaintiff's basis for reversal of the award is that the circuit court erred in dismissing its second amended complaint, and we cannot reach the challenge to that dismissal, we now affirm that order.

¶ 20 For the foregoing reasons, we dismiss the appeal as to all matters except for the order entered on October 14, 2011, awarding defendant attorney's fees, which we affirm.

¶ 21 Dismissed in part, affirmed in part.