

No. 1-13-0514

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

PALATINE ASSOCIATES, LLC,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 10 L 01900
)	
CHRISTY JEPSON,)	Honorable
)	Bridget Mary McGrath,
Defendant-Appellant,)	Judge Presiding.

ORDER

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Lampkin and Reyes concurred in the judgment.

¶ 1 **Held:** Interlocutory appeal brought pursuant to Illinois Supreme Court Rule 304(a) is dismissed for a lack of jurisdiction, where order dismissing affirmative defense was not final and appealable.

¶ 2 Defendant-appellant, Christy Jepson, has appealed from an order granting a motion to dismiss one of her affirmative defenses to the instant action brought by plaintiff-appellee, Palatine Associates, LLC (Palatine), which seeks to recover under a personal guaranty executed by Ms. Jepson. For the reasons that follow, we dismiss this appeal for lack of appellate jurisdiction.

¶ 3

I. BACKGROUND

¶ 4 On February 11, 2010, Palatine initiated the instant action by filing a two-count complaint against Ms. Jepson. In count I, Palatine alleged that it had leased a parcel of property located in Palatine, IL to a third party, and that this lease was subject to a personal guaranty whereby Ms. Jepson agreed to guaranty the third party's rental payments "only for the period of time from the service of notice of default, until possession is delivered to Landlord." Count I further alleged that the third party had defaulted on the lease by failing to make its rental payments, and Palatine, therefore, sought to recover from Ms. Jepson pursuant to the guaranty provision. Count II made similar allegations, and sought a similar recovery with respect to a second lease regarding another parcel of property—a lease that contained an identical guaranty provision.

¶ 5 On June 21, 2011, Ms. Jepson filed a motion to dismiss Palatine's complaint. On April 23, 2012, the circuit court dismissed count II with prejudice, but denied Ms. Jespon's motion with respect to count I. The record indicates that sometime thereafter, Ms. Jepson filed two affirmative defenses and a counter-claim, although neither the affirmative defenses nor the counter-claim are actually contained in the record on appeal. In response, Palatine filed separate motions to dismiss both affirmative defenses and the counter-claim. From the content of the motions to dismiss and the briefs filed by the parties with respect thereto, it appears that Ms. Jepson's first affirmative defense involved a claim that she could not be held liable for any unpaid rent under the guaranty provision, because notice of the third-party's default under the lease was never served upon Ms. Jepson personally.

¶ 6 On June 25, 2013, the circuit court entered an order that: (1) dismissed Ms. Jepson's first affirmative defense, accompanied by a finding that there was no just reason to delay an appeal of

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that dismissal under Illinois Supreme Court Rule 304(a) (Ill. S. Ct. R. 305(a) (eff. Feb. 26, 2010)); (2) dismissed Ms. Jepson's second affirmative by agreement; and (3) entered and continued Palatine's motion to dismiss Ms. Jepson's counter-claim for additional briefing. On February 21, 2013, Ms. Jepson filed a notice of appeal seeking review of the circuit court's dismissal of her first affirmative defense.

¶ 7

II. ANALYSIS

¶ 8 While none of the parties have questioned this court's appellate jurisdiction, we have a duty to *sua sponte* determine whether we have jurisdiction to decide the issues presented. *Cangemi v. Advocate South Suburban Hospital*, 364 Ill. App. 3d 446, 453 (2006).

¶ 9 Except as specifically provided by the Illinois Supreme Court Rules, this court only has jurisdiction to review final judgments, orders, or decrees. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994) *et seq.*; *Almgren v. Rush-Presbyterian-St. Luke's Medical Center*, 162 Ill. 2d 205, 210 (1994). "A judgment or order is final for purposes of appeal if it disposes of the rights of the parties, either on the entire case or on some definite and separate part of the controversy, and, if affirmed, the only task remaining for the trial court is to proceed with execution of the judgment." *Brentine v. DaimlerChrysler Corp.*, 356 Ill. App. 3d 760, 765 (2005).

¶ 10 However, even a final judgment or order is not necessarily immediately appealable. Illinois Supreme Court Rule 304(a) provides:

"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 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

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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. Rule 304(a) (eff. Feb. 26, 2010).

Nevertheless, a circuit court "cannot make a nonfinal order appealable simply by including language that complies with Rule 304(a)." *In re Estate of Rosinski*, 2012 IL App (3d) 110942, ¶ 22.

¶ 11 Ms. Jepson's instant appeal seeks review of the circuit court's dismissal of her first affirmative defense. As our supreme court has only recently noted, however, the denial of a defendant's affirmative defense is not a final judgment. *Mashal v. City of Chicago*, 2012 IL 112341, ¶ 55-58. The court reasoned that, while such a decision may remove one bar to a plaintiff's recovery, it is not a finding of liability with respect to the underlying claim and does not affect a defendant's ability to defend the underlying claim on the merits. *Id.*

¶ 12 More specifically, a number of courts have recognized that an order striking or dismissing an affirmative defense is not a final order, and/or is not appealable even if that order is accompanied by language complying with Rule 304(a). Thus, in *Smith v. Interstate Fire & Casualty Co.*, 47 Ill. App. 3d 555, 558 (1977), the court concluded that it did not have jurisdiction to review an order striking an affirmative defense, despite the fact that the order included a finding of appealability pursuant to Rule 304(a). The court reasoned that the circuit court still had before it "a determination of the possible liability of [defendant] to plaintiff. The striking of the affirmative defense did not end the controversy between those parties, thus this court has no jurisdiction to review the order to strike." *Id.* Similarly, in *Shelton v. Andres*, 122 Ill. App. 3d 1089 (1984), the court concluded that an order striking a defendant's affirmative defenses "was not final because it did not determine the

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litigation on its merits so that, if affirmed, the only thing remaining would be to proceed with execution on the order. *** The fact that the trial court made a finding pursuant to Supreme Court Rule 304(a) that 'there is no just reason for delaying appeal of this order' does not confer finality upon an order that is otherwise not final." *Id.* at 1093. See also, *In re the Matter of Chapman*, 132 B.R. 132, 148 (Bkrcty. N.D. Ill., 1991) (applying Illinois law, the court concluded that an order dismissing an affirmative defense "terminate[s] only the parties to and claim of the affirmative defense, and leave[s] pending the underlying action to which the affirmative defense was raised. Thus, an order dismissing an affirmative defense is not final.").

¶ 13 Pursuant to the above cited authority, we conclude that the order dismissing Ms. Jepson's first affirmative defense was not a final order. While that order may have resolved the issue of Ms. Jepson's notice-based defense to Palatine's complaint, it did not resolve her underlying liability to Palatine under count I such that "if affirmed, the only task remaining for the trial court is to proceed with execution of the judgment." *Brentine*, 356 Ill. App. 3d 765. Because a circuit court "cannot make a nonfinal order appealable simply by including language that complies with Rule 304(a)" (*Rosinski*, 2012 IL App (3d) 110942, ¶ 22), we also conclude that we are without jurisdiction to consider Ms. Jepson's appeal from that order.

¶ 14

III. CONCLUSION

¶ 15 For the foregoing reasons, we dismiss the instant appeal for lack of jurisdiction.

¶ 16 Appeal dismissed.