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2013 IL App (3d) 120035-U

Order filed June 27, 2013

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2013

CITY OF MORRIS, an Illinois	)	Appeal from the Circuit Court
municipal corporation,	)	of the 13th Judicial Circuit,
	)	Grundy County, Illinois,
Plaintiff-Appellee,	)	
	)	
v.	)	Appeal No. 3-12-0035
	)	Circuit No. 06-CH-184A
ROBERT PRUIM, ED PRUIM and	)	
COMMUNITY LANDFILL CO.,	)	
	)	Honorable Robert C. Marsaglia,
Defendants-Appellants.	)	Judge, Presiding.

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JUSTICE SCHMIDT delivered the judgment of the court.  
Justice McDade concurred in the judgment.  
Presiding Justice Wright specially concurred.

**ORDER**

- ¶ 1 *Held:* Appeal dismissed for want of jurisdiction. Trial court order granting partial summary judgment is not a final and appealable order, despite including 304(a) language, where the order indicates it will settle matters of "consulting fees, engineering fees, expert fees, attorneys' fees and reasonable and necessary costs" at "a subsequent hearing."
- ¶ 2 In the 1970s, the City of Morris (City) operated the Morris Community Landfill. The landfill consists of two parcels, A and B. In 1982, the City transferred its interest in the landfill to Community Landfill Co. (CLC), but retained ownership of the land on which the landfill was

situated. CLC began operating the landfill. CLC paid the City dumping-related royalties for its use of the landfill.

¶ 3 In 1996, CLC secured financial assurance from bonds issued by Frontier Insurance for closure/postclosure care costs for the landfill. Prior to 1999, CLC carried \$1.4 million in bonds from Frontier, the estimated closure costs at that time.

¶ 4 In 1999, the City and CLC entered into an agreement that required CLC to give leachate from the landfill to the City, which the City then treated at its publicly-owned treatment works at no cost to CLC. The leachate from the landfill made up less than 1% of what was treated at the City's publicly-owned treatment works.

¶ 5 In 1999, CLC submitted an application to the Illinois Environmental Protection Agency (EPA) for a significant modification permit requesting the closure of parcel B and the continued operation of parcel A. The permit estimated that closure costs for CLC would be \$7 million and the costs for the City would be \$10 million for leachate treatment. CLC sought to post a \$7 million bond, while the City would commit to leachate treatment costing \$10 million. EPA rejected CLC's application and required CLC to post a bond for the entire \$17 million. CLC and the City appealed that decision to the Board and then to this court, both of which upheld the \$17 million financial assurance amount. See *Community Landfill Co.*, Ill. Pollution Control Bd. Op. 01-48, 01-49 (cons.) (April 5, 2001); *Community Landfill Co. v. Pollution Control Board (City of Morris I)*, No. 3-01-0552 (2001) (unpublished order under Supreme Court Rule 23).

¶ 6 In 2000, EPA issued a modification permit supported by financial assurance of \$17,427,366, which was guaranteed by three bonds issued by Frontier. One of the bonds, with a value of \$10,081,630, listed the City as principal. The remaining bonds listed CLC as the

principal. CLC was responsible for the premiums on all of the bonds.

¶ 7 A few months later, EPA notified CLC and the City that they were in violation of the Act because Frontier Insurance Company had been taken off the list of approved government sureties. Two weeks later, CLC filed its supplemental permit application for parcel A. EPA denied the application because Board regulations required acceptable sureties to be listed in the United States Department of Treasury's Circular 570, and Frontier was stricken from the list. CLC and the City appealed EPA's decision. The Board affirmed EPA's denial of CLC's permit. *Community Landfill Co.*, Ill. Pollution Control Bd. Op. 01-170, at 22 (Dec. 6, 2001). CLC and the City then appealed to this court. We confirmed, holding:

"[T]he supplemental permit application in this case was appropriately denied because the company failed to satisfy \*\*\* requirements of the Act and Code when seeking the permit. Although the parties do not dispute that the bonds were valid and enforceable or that the Agency accepted the company's bonds for a different permit after Frontier was removed from the Circular 570 list, Frontier did not meet the statutory financial assurance requirements for the supplemental permit here as it was not on the list of approved sureties when this application was submitted and ruled on."

*Community Landfill Co. v. Pollution Control Board (City of Morris II)*,  
331 Ill. App. 3d 1056, 1061 (2002).

¶ 8 In 2003, the State filed a complaint against CLC and the City, alleging that they were conducting disposal operations at the Morris Community Landfill without adequate financial assurance. The State filed a motion for summary judgment against CLC and the City. CLC filed

a response, arguing that there was an issue of fact as to whether it had adequate financial assurance in place. The City filed a cross-motion for summary judgment, arguing that it had no responsibility to post financial assurance because it did not conduct or manage operations at the landfill. In 2006, the Board issued an opinion and order granting the State's motion for summary judgment and denying the City's motion for summary judgment.

¶ 9 In September 2007, a penalty hearing was held. Evidence at the hearing established that CLC paid the City \$399,208.98 in dumping royalties from 2001 to 2005. The evidence also showed that CLC's premium payment for the Frontier bonds was \$217,842 in 2001, which amounted to \$596.83 per day. CLC stopped making payments on the Frontier bonds in 2001. Neither CLC nor the City provided any financial assurance to EPA for the landfill after 2001.

¶ 10 Brian White, EPA Bureau of Land compliance unit manager, testified that EPA has made a claim on the Frontier bonds obtained by the City and CLC in 2000. Frontier offered to pay EPA \$400,000 on those bonds. At the time of the hearing, Frontier had paid nothing.

¶ 11 Christine Roque, EPA Bureau of Land engineer, testified that financial assurance amounts may be reduced by seeking and obtaining a permit modification from EPA. CLC and the City did not seek a permit modification for the Morris Community Landfill until July 2007. That permit modification was under review by EPA at the time of the hearing.

¶ 12 Devin Moose, a licensed professional engineer, was hired by the City in 2005 to evaluate the landfill. Moose prepared revised cost estimates for closure/postclosure care and found them to be \$10 million. The revised figures were submitted to EPA in July 2007, but EPA had not yet responded to them.

¶ 13 Edward Pruiim, secretary/treasurer of CLC, testified that the cost of the Frontier bonds in

2000 was \$200,000 in collateral and premium payments of slightly over \$200,000 per year. CLC paid the premium on the Frontier bonds for two years. CLC then began looking for another bonding company and found that it did not have enough money to purchase other bonds.

¶ 14 Following the hearing, each party filed posthearing briefs. In its brief, the State argued that the Board should impose a penalty against CLC in the amount of \$1,059,534.70, reflecting the amount it saved on bond premiums by not paying for any bonds after 2001. The State argued that the penalty against the City should be \$399,308.98, the amount of dumping royalties it received from CLC from 2001 to 2005, when no financial assurance was in place for the landfill.

¶ 15 In 2009, the Board issued an order in which it found CLC and the City jointly and severally obligated to post financial assurance in the amount of \$17,427,366, to be reduced by any amount EPA has or will receive from Frontier. *Community Landfill Co.*, Ill. Pollution Control Bd. Op. 03-191, at 3, 35 (June 18, 2009). The Board also ordered both CLC and the City to (1) submit revised cost estimates and update financial assurance in accordance with the revised estimates; and (2) cease and desist from accepting any additional waste at the landfill. *Id.* at 3. The Board imposed penalties of \$399,308.98 against the City and \$1,059,534.70 against CLC. *Id.* The Board further found that CLC and the City were jointly and severally liable for obtaining \$17.4 million in financial assurances for the Morris Community Landfill. *Id.*

¶ 16 Both the City and CLC appealed the Board's imposition of penalties to this court in *City of Morris v. Community Landfill Company (City of Morris III)*, 2011 IL App (3d) 090847. In *City of Morris III*, this court found the Board properly granted summary judgment against CLC. *Id.* at ¶ 21. While we, again, acknowledged that the Frontier Bonds "were valid," we found that CLC must give financial assurances as outlined in the Environmental Protection Act (415 ILCS

5/21 (West 2008)) and the Illinois Administrative Code (35 Ill. Adm. Code 811.700(b) (2011); 35 Ill. Adm. Code 811.712(b) (2011)), which required purchasing the bonds through a surety listed on the federal government's Circular 570. As there was no doubt the Frontier Bonds do not meet this qualification, we affirmed the Board's grant of summary judgment in favor of the State, as well as the imposition of the \$1,059,534.70 fine against CLC. *Id.* at ¶ 54. We further confirmed the Board's order requiring CLC to obtain \$17.4 million in financial assurances from a company properly listed on Circular 570. *Id.* Finally, we confirmed the Board's cease and desist order. *Id.* at ¶ 52.

¶ 17 We reversed, however, the penalties issued against the City, as well as the Board's finding that the City was jointly and severally liable for obtaining financial assurances. *Id.* We noted that the Illinois Administrative Code states that the entity responsible for obtaining such assurances is the one "conduct[ing] any disposal operation at an MSWLF unit." 35 Ill. Adm. Code 811.700(f) (2011). The record contained no evidence indicating the City was conducting the disposal operation. *Id.*

¶ 18 The dispute currently before us, *City of Morris IV*, stems from the trial court's award of summary judgment to the City and against CLC. The litigation began between the City, CLC, and the State in December of 2006 when the State filed its complaint against both entities. The City filed a cross-claim/third party complaint against CLC and its shareholders, Robert and Edward Pruim.

¶ 19 The cross-claim/third party complaint alleged common law fraud, breach of contract, indemnity, and sought to pierce the corporate veil and impose a constructive trust over the Pruiims' property. On January 18, 2011, the City filed a motion for partial summary judgment as

to the breach of contract count (count III) and indemnity count (count IV) against CLC only. The trial court granted the motion on June 7, 2011. The order entered judgment "in the amount of \$17,427,366.00 plus expenses, consultant fees, engineering fees, expert fees, attorneys fees and reasonable and necessary costs, if any, to be proven up at a subsequent hearing."

¶ 20 CLC filed a motion to reconsider on September 23, 2011, which the trial court denied on November 28, 2011. The trial court's order denying the motion to reconsider included Rule 304(a) language, pursuant to an agreement of the parties, finding there is no reason to delay the appeal of the order. CLC filed its notice of appeal on December 28, 2011. This appeal followed.

¶ 21 ANALYSIS

¶ 22 The City argues that we have no jurisdiction to entertain part of this appeal. The City claims "several elements of damage, including [] attorney fees, engineering, consulting and other fees, and reasonable costs" have not yet been determined. Therefore, the City argues that even though the trial court's order denying reconsideration contains Rule 304(a) language, it is simply not a final and appealable order as to the indemnification count. The City claims we do have jurisdiction to review the appeal from the breach of contract claim. However, the City argues that "claim was completely resolved."

¶ 23 We find the City's argument curious as it specifically agreed to the Rule 304(a) language in the June 7, 2011, order yet now claims we have no jurisdiction to review the claim on appeal. Nevertheless, parties cannot confer jurisdiction on this court as " 'appellate jurisdiction cannot be conferred by agreement.' " *Adoption of S.G. v. S.G.*, 401 Ill. App. 3d 775, 780 (2010) (quoting *Physicians Insurance Exchange v. Jennings*, 316 Ill. App. 3d 443, 453 (2000)).

¶ 24 An order is final and appealable if it terminates the litigation between the parties on the

merits or disposes of the rights of the parties either on the entire controversy or on a separate part thereof. *Revolution Portfolio, LLC v. Beale*, 332 Ill. App. 3d 595, 598 (2002). A Rule 304(a) finding does not make a nonfinal order appealable; rather, such a finding makes a final order appealable where there are multiple parties or claims in the same action. *Id.* at 599. A judgment is final if it determines the litigation on the merits or some definite part thereof so that, if affirmed, the only thing remaining is to proceed with execution of the judgment. *In re Marriage of Verdung*, 126 Ill. 2d 542, 553 (1989).

¶ 25 In *Revolution Portfolio*, the court found that an order reviving a judgment, but which failed to settle "issues of the postjudgment interest and credit for payment," was not a final and appealable order despite the fact that it contained Rule 304(a) language. *Revolution Portfolio*, 332 Ill. App. 3d at 599. In *Ortiz v. General Motors Acceptance Corp., Inc.*, 285 Ill. App. 3d 242 (1996), the plaintiff brought a multiple count class action suit. The trial court granted summary judgment for the plaintiff on count I but "did not award damages." *Id.* at 244. Therefore, the *Ortiz* court found it had no jurisdiction to review the order awarding summary judgment, as it was not a final and appealable order despite the fact that it contained Rule 304(a) language. *Id.* at 245.

¶ 26 In *Department of Public Aid on Behalf of K.W. v. Lekberg*, 295 Ill. App. 3d 1067 (1998), the Department of Public Aid brought a petition seeking to declare paternity, obtain retroactive child support, set "current support" and address reimbursement for expenses such as blood tests, health insurance and delivery of the child. *Id.* at 1068. The trial court ruled on paternity and entered a judgment for retroactive support, but reserved the other issues for a later date. *Id.* The Department of Public Aid filed a motion to reconsider seeking a greater amount of retroactive

support, which was denied, and the court included Rule 304(a) language in the order denying the motion to reconsider. *Id.* at 1069.

¶ 27 The *Department of Public Aid* court found that despite the Rule 304(a) language, and despite the fact that the Department of Public Aid possessed a valid judgment settling the matter of retroactive support, the order was not final as "the order left pending other financial issues of potential importance." *Id.* at 1070. Therefore, the *Department of Public Aid* court found the appeal to be "premature." *Id.* In doing so, the court cautioned against allowing "piecemeal appeals when matters of child support or expenses, as in the present case, have been only partially determined by the trial court." *Id.* at 1071.

¶ 28 The judgment order from which CLC appeals is simply not a final order as it does not dispose of the litigation on the merits nor does it conclude a separate part thereof. As such, we have no jurisdiction to entertain this appeal.

¶ 29 Count III of the City's "Crossclaim/Third Party Complaint" alleges CLC is liable to the City for "all reasonable costs, attorneys' fees and expenses that may be incurred by the City of Morris in enforcing the covenants and agreements" of the lease attached to the cross-claim/third party complaint. Similar language is found in paragraphs four and five of count IV of the cross-claim/third party complaint. The City's pleadings claim it is entitled to costs, attorney fees, and expenses as contractual damages, effectively making those damages elements of counts III and IV. That is, the unresolved fees, costs, and expenses are elements of damage under the contract claim, not a separate claim.

¶ 30 The trial court's judgment order, entered June 7, 2011, specifically states that "expenses, consultant fees, engineering fees, expert fees, attorneys' fees and reasonable and necessary costs"

will be "proven up at a subsequent hearing \*\*\*." We cannot say this judgment disposes of the entire controversy, or some definite part thereof, so that if affirmed the only thing remaining is to proceed with execution of the judgment. The order is not final and appealable notwithstanding the inclusion of the Rule 304(a) language.

¶ 31 CONCLUSION

¶ 32 For the foregoing reasons, this appeal from the circuit court of Grundy County is dismissed.

¶ 33 Appeal dismissed

¶ 34 PRESIDING JUSTICE WRIGHT, specially concurring.

¶ 35 Even where the parties agree to Rule 304(a) language, as in the case at bar, the reviewing court has an obligation to consider its own jurisdiction. I agree with the majority that we lack jurisdiction to consider all issues raised in this appeal, even though the City claims we have jurisdiction to review the appeal from the breach of contract claim, which the City contends was completely resolved in the trial court.

¶ 36 I write separately to clarify that the breach of contract claim raised in count III is not limited to contractual attorney fees and costs as potential damages. In addition, count III also alleges CLC did not fulfill the promise to pay expenses pursuant to Section X, including those expenses associated with regulatory compliance and additional costs for proper closure and landfill cover pursuant Section XXII.

¶ 37 The June 7, 2011 order recognizes contractual damages may include fees for professional services concerning regulatory issues, in addition to the services of legal counsel. The precise amount of professional fees incurred by the City, which were the contractual responsibility of CLC, are yet undetermined but may not be limited to attorney fees and costs.

¶ 38 It remains unclear from the court order how the court intends to measure damages for breach of contract during this hearing. Consequently, all professional fees claimed as damages are still very much disputed with respect to the breach of contract claim and require an additional evidentiary hearing pursuant to the court's order. As the majority notes, this order has not resolved all issues related specifically to either count III or count IV.

¶ 39 For the foregoing reasons, I specially concur.