

No. 1-13-2622

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 DISTRICT

MARIO ALIANO,)	Appeal from the Circuit Court
)	of Cook County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 09 CH 16132
)	
SEARS, ROEBUCK AND COMPANY,)	Honorable
)	Thomas More Donnelly,
Defendant-Appellant.)	Judge, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment.

ORDER

¶ 1 *Held:* Appeal dismissed for lack of jurisdiction.

¶ 2 The defendant, Sears, Roebuck and Company (Sears), appeals from the \$3.10 circuit court judgment entered in favor of the plaintiff, Mario Aliano, following a bench trial on his action under the Consumer Fraud and Deceptive Business Practices Act (Act) (815 ILCS 505/1 *et seq.* (West 2008)). The plaintiff's claim was based on Sears having assessed state sales tax on the entire amount of his digital television converter box purchase, despite the fact that part of the cost of the device was subsidized by a federal voucher distributed to consumers. On appeal,

Sears argues that (1) the plaintiff waived his right to assert an unfair practice claim under the Act at trial; (2) his claim under the Act is barred by the voluntary payment doctrine; (3) the circuit court erred by granting the plaintiff's motion to amend the pleadings and admitting evidence of Sears' sales tax practices; (4) the judgment is against the manifest weight of the evidence; and (5) the plaintiff's claim was moot at the time of trial. For the following reasons, we find that we must dismiss Sears' appeal for lack of jurisdiction.

¶ 3 On April 23, 2009, the plaintiff filed a putative class action against Sears alleging that it violated the Act by collecting sales tax on the full amount of digital converter box purchases, including the amount that was subsidized by a federal consumer voucher program. Under the federal program, consumers were provided vouchers that retailers could submit to the federal government for reimbursement of the lesser of \$40 or the price of a converter box. In October 2011, the plaintiff abandoned his class action and proceeded with his individual claim against Sears.

¶ 4 The second amended complaint alleged that, on April 19, 2009, the plaintiff purchased a converter box at a Sears store located in Oak Brook. The purchase price of the box before the use of the \$40 federal voucher was \$59.99. Sears charged the plaintiff \$4.65 tax on the gross sale amount, resulting in a tax overcharge of \$3.10. The plaintiff alleged that he relied on Sears' calculation of the sales tax that he owed and that he did not know that the \$40 coupon amount should not have been taxed. The plaintiff alleged that Sears' practice of overcharging was "an unfair and deceptive act or practice" prohibited by section 2 of the Act (815 ILCS 505/2 (West 2008)), and he sought actual damages and attorney fees and costs as required by statute.

¶ 5 On November 17, 2011, Sears tendered \$1,000 to the plaintiff for his \$3.10 claim and his reasonable attorney fees. The plaintiff rejected the tender on the basis that his attorney fees and

costs far outweighed the tender amount. Thereafter, Sears moved for summary judgment, in part on the basis that the tender mooted the plaintiff's claim. On August 30, 2012, the circuit court denied Sears' motion for summary judgment, and the case proceeded to a bench trial.

¶ 6 At the conclusion of the trial, the plaintiff filed a motion for leave to file a third amended complaint to conform to the proofs. The third amended complaint was relatively unchanged from the second amended complaint, and included a request for damages and attorney fees and costs. Additionally, the plaintiff's trial memorandum stated that he intended to seek reasonable attorney fees and costs under the Act after a judgment was entered on the merits of his claim.

¶ 7 On July 16, 2013, the circuit court issued a written judgment, finding that the plaintiff could recover under the Act because Sears' act of charging excessive sales tax constituted both deceptive and unfair conduct. The court further determined that the voluntary payment doctrine did not bar the plaintiff's claim under the Act. The court therefore entered judgment in favor of the plaintiff in the amount of his damages--\$3.10. Sears subsequently filed its notice of appeal on August 14, 2013.

¶ 8 Thereafter, the plaintiff filed a petition for an award of attorney fees and expenses pursuant to section 10a(c) of the Act (815 ILCS 505/10a (c) (West 2008)), seeking an award of \$252,402.08. In the trial court, the plaintiff filed a motion objecting to Sears' attempt to stay this appeal pending the resolution of the fee petition, claiming that a fee petition was a collateral proceeding and did not affect the appealability of a final judgment. On September 17, 2013, Sears filed a motion in this court to stay this appeal pending the resolution of the plaintiff's fee petition, and we denied that motion on September 30, 2013.

¶ 9 There is no dispute that reviewing courts have an independent duty to consider its jurisdiction before proceeding to the merits of the case, and when jurisdiction is lacking, the

court must dismiss the appeal on its own motion. *Almgren v. Rush-Presbyterian-St. Luke's Medical Center*, 162 Ill. 2d 205, 210 (1994). Therefore, we must consider our jurisdiction regardless of whether the parties have raised the issue.

¶ 10 Courts have recognized a distinction between a claim for attorney fees that is brought as part of a principle action and a claim made after the principal action has been decided. *Dewan v. Ford Motor Co.*, 343 Ill. App. 3d 1062, 1072-73 (2003) *rev'd on other grounds*, 363 Ill. App. 3d 365 (2005). In the latter situation, a finding pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010), is not required. *Id.* (citing *Servio v. Paul Roberts Auto Sales, Inc.*, 211 Ill.App.3d 751, 759 (1991)). However, when a claim for attorney fees is brought as part of the principle action, the judgment is not final and not appealable until after the resolution of the plaintiff's request for fees. *Id.* at 1073.

¶ 11 In *Dewan*, the trial court dismissed the plaintiff's complaint, which included a request for actual damages and attorney fees and costs, for failing to state a proper claim under the Act; the court subsequently denied the plaintiff's motion to file an amended complaint. *Id.* at 1067-68. During the hearing on the motion to file an amended complaint, the plaintiff informed the court that he intended to file a petition for attorney fees and he requested that the dismissal order include Rule 304(a) language. *Id.* However, the trial court denied the request for Rule 304(a) language because it did not believe such language was necessary. *Id.* at 1068. Shortly thereafter, the plaintiff filed a petition for attorney fees, and four days later, he filed a notice of appeal from the trial court's dismissal order. *Id.* The appellate court held that, because the plaintiff made a claim for fees in his complaint, the dismissal judgment, in the absence of a Rule 304(a) finding, "was nonfinal and nonappealable until after the resolution of the plaintiff's request for attorney

fees." *Id.* at 1073 (distinguishing *Servio* in that the *Servio* defendants did not make a claim for attorney fees until after the judgment had been entered (see *Servio*, 211 Ill. App. 3d at 760-61)).

¶ 12 Like in *Dewan*, the plaintiff in this case made a claim for attorney fees in his complaint and notified the court in its trial memorandum that he planned to file a petition for fees following the court's decision on the merits. The trial court's July 16, 2013, written judgment does not contain a Rule 304(a) finding, and the record does not contain an order resolving the pending attorney fee petition. Therefore, like in *Dewan*, because the plaintiff sought attorney fees and costs in his complaint, the trial court's July 16, 2013, judgment is nonfinal and nonappealable until his fee petition is resolved.

¶ 13 Based on the foregoing reasons, we dismiss this appeal for lack of jurisdiction.

¶ 14 Appeal dismissed.