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SIXTH DIVISION
February 27, 2015

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

| | | |
|--|---|--------------------|
| GROWING LEAN FOODS, INC., an Illinois Corporation, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellant, |) | Cook County. |
| |) | |
| v. |) | No. 08 M2 2639 |
| |) | |
| RIKA ENTERPRISES, INC., an Illinois Corporation, |) | |
| KIMBERLY GARZA, and RICHARD GARZA, |) | The Honorable |
| |) | Jeffrey L. Warnick |
| |) | Roger G. Fein, |
| Defendants-Appellees. |) | Judges Presiding. |

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

¶1 **HELD:** Appeal dismissed where neither the parties nor the record demonstrate that all of the claims were disposed of on summary judgment or by directed verdict and the judgments at issue did not contain language sufficient to confer jurisdiction upon this court pursuant to Illinois Supreme Court Rule 304(a).

¶2 This case arises from a dispute between plaintiff, Growing Lean Foods, Inc. (Growing Lean Foods), and defendants, RIKA Enterprises, Inc. (RIKA), Kimberly Garza, and Richard

Garza, related to the parties' agreement for plaintiff's purchase of defendants' café and bakery known as Kim's Kitchen. Plaintiff appeals the trial court's order granting summary judgment on four of its five breach of contract claims and also appeals the trial court's order granting a directed verdict on one of its fraud claims. Plaintiff contends there were genuine issues of material fact, which precluded summary judgment of its breach of contract claims. Plaintiff further contends the trial court erred both procedurally and substantively in entering a directed verdict on the fraud claim. Although not raised by either party on appeal, we find this court is without jurisdiction to address plaintiff's contentions.

¶3 **FACTS**

¶4 In 2001, Kimberly Garza opened Kim's Kitchen in Evanston, Illinois. Kim's Kitchen was a café and bakery and also operated as a catering business. The majority of the café's walk-in customers were Northwestern University students, professors, and administrators. According to her affidavit, Kimberly continuously experimented with the café and catering menus. However, as of 2004, the menus became more stable and, by 2006, the menus were "vastly finalized."

¶5 In 2008, Benson Friedman, co-owner and legal counsel for Growing Lean Foods,¹ and Kimberly conducted a number of meetings to negotiate the sale of Kim's Kitchen to Growing Lean Foods. Kimberly and her husband, Richard Garza, formed RIKA, and transferred ownership of the assets of Kim's Kitchen to the new entity. During the summer of 2008, Friedman visited Kim's Kitchen on four occasions to discuss the terms of the purchase and to accompany various inspectors while viewing the premises. Friedman and his wife also met with a number of Kim's Kitchen employees.

¶6 On August 26, 2008, the parties entered into an asset purchase agreement. According to section 2.01 of the asset purchase agreement, the parties contracted to transfer from defendants to

¹ Growing Lean Foods was co-owned by Benson's wife, Susan Friedman.

plaintiff "[t]hose certain leasehold improvements, equipment, fixtures and furnishings located in Seller's business (the 'Fixed Assets') which are identified in the Bill of Sale which will be delivered at the Closing ***. The leasehold improvements, equipment, fixtures and furnishings being transferred are in good operating condition subject only to ordinary wear and tear unless otherwise stated in this Agreement. ***. [A]ll records and information pertaining to Seller's customers, menus, and sales and promotional materials." In addition, defendants agreed to transfer to plaintiff the rights to use the Kim's Kitchen name, email, and website for one year from the effective date of the agreement, as well as granted the "nonexclusive and perpetual use of the Café Recipes and Catering Recipes." Finally, defendants agreed to transfer to plaintiff "[t]he inventory located in Seller's Business at Closing." Plaintiff chose not to purchase the rights to Kimberly's catering contracts. The agreed purchase price was \$83,832.00.

¶7 Section 7.01 of the asset purchase agreement provided, in relevant part, that, "[f]rom the date hereof until the closing," defendants promised to "carry on the Business diligently and in the usual, regular, and ordinary manner" and to "use its best efforts to carry on the Business in a manner consistent with its prior practice and in the ordinary course and will use its best efforts to preserve the relationship of its suppliers, customers, and others having a business relationship with it." Moreover, section 11.05 of the asset purchase agreement included an integration clause.

¶8 The closing for the purchase of Kim's Kitchen also took place on August 26, 2008, the same date that the asset purchase agreement was executed. According to Kimberly's affidavit, negotiations for the agreement continued until "very shortly before the scheduled closing"; therefore, the asset purchase agreement was not executed until the closing date. In her affidavit, Kimberly further attested that, at the closing, defendants provided plaintiff with all of the items listed on the asset purchase agreement's asset list, including various pieces of equipment, the café

menu and the catering menu, the recipes for all items appearing on the menu as well as some additional recipes, and non-current menus in physical or electronic form. Plaintiff gained access to the website within three weeks of the closing.

¶9 On July 28, 2010, plaintiff was granted leave to file its four-count third amended verified complaint. In count I, plaintiff alleged defendants breached the parties' asset purchase agreement by: (a) failing to provide plaintiff with all catering and café recipes; (b) failing to honor its warranty that all café equipment was in good operating condition; (c) failing to carry on the business in a customary manner and to use its best efforts to maintain customer relationships; (d) failing to transfer all inventory to plaintiff; and (e) not providing plaintiff with all information relating to all of Kim's Kitchen menus and promotional materials. In count II, plaintiff alleged defendants fraudulently induced plaintiff to accept a purchase price based on Kimberly's false representations and financial reports. In count III, plaintiff alleged defendants fraudulently omitted equipment or inventory from the inventory list. Finally, in count IV, plaintiff alleged defendants made a series of transfers totaling thousands of dollars from RIKA's assets to Kimberly and Richard's personal checking account in violation of the Uniform Fraudulent Transfer Act. On June 28, 2011, defendants filed a motion for summary judgment.

¶10 On October 12, 2011, in a written order, the trial court granted summary judgment in part and denied summary judgment in part. More specifically, the trial court granted summary judgment in favor of defendants on plaintiff's breach of contract claim for failing to provide plaintiff all catering and café recipes (count I(a)); failing to carry on the business in a customary manner and to use its best efforts to maintain customer relationships (count I(b)); failing to transfer all inventory to plaintiff (count I(d)); and not providing plaintiff with all information relating to all of Kim's Kitchen menus and promotional materials (count I (e)), and on plaintiff's

fraud claim that related to the omission of equipment or inventory from the inventory list (count III). The trial court, however, denied summary judgment in favor of plaintiff on its breach of contract claim as to defendants' warranty that all café equipment was in good operating condition (count I(c)), on its fraud claim alleging defendants fraudulently induced plaintiff to accept a purchase price based on Kimberly's faulty representations and financial reports (count II), and on plaintiff's Uniform Fraudulent Transfer Act claim (count IV). With regard to count IV, the trial court stated that whether "defendants have transferred or depleted the assets of their corporation without adequate consideration or value to thus be unable to satisfy any claim or obligation to plaintiff" was at issue.

¶11 The case proceeded to a bench trial on the remaining counts. The record does not contain a transcript or acceptable substitute from the trial (Ill. S. Ct. R. 323, eff. Dec. 13, 2005). We, therefore, do not know what evidence was presented or what events took place. According to plaintiff, however, those witnesses appearing on both parties' witness lists were questioned by both parties during plaintiff's case-in-chief pursuant to the parties' pre-trial agreement. After the close of plaintiff's case, defendants filed a motion for a directed verdict. According to the trial court's February 14, 2013, written order, the motion for directed verdict was granted as to the fraud claim (count III), but judgment was entered in favor of plaintiff in the amount of \$1,262.59 for the "replacement of a faulty freezer." The order did not contain a finding regarding plaintiff's Uniform Fraudulent Transfer Act claim (count IV). The preprinted form constituting the written order included an "x" near the box providing "Order Final and Appealable." This appeal followed.

¶12 Plaintiff's notice of appeal indicates its desire to appeal the circuit court's October 12, 2011, order in its entirety, incorrectly listing count IV as a claim that was dismissed on summary

judgment, and the circuit court's February 14, 2013, order directing the finding in favor of defendants as to count II (fraud).

¶13 On appeal, we directed the parties to supplement their briefs to establish the disposition of count IV. Plaintiff's supplemental brief merely provided that its claim under the Uniform Fraudulent Transfer Act (count IV) became "virtually worthless" as a result of the trial court's summary judgment order dismissing the majority of plaintiff's claims where the purpose of the claim was to collect from Kimberly and Richard Garza to the extent RIKA lacked sufficient assets to pay judgments on the other claims. Plaintiff provided no insight as to the procedural disposition of count IV. In their supplemental brief, defendants stated that "[t]here is no dispute amongst the parties whether Counts II and IV were dismissed." Defendants noted that the February 14, 2013, written order, as completed by plaintiff, erroneously identified count III as the fraud claim for which the verdict was directed when count III had already been dismissed on summary judgment. The correct count was count II, which plaintiff accurately identified on appeal. Defendants additionally noted the text providing that the trial court entered judgment in favor of plaintiff in the amount of \$1,262.59 was "in an incorrect spot," *i.e.*, following the form language "it being further agreed that installment payments be made as follows." Moreover, defendants acknowledged that "[t]he [trial] court's ruling on [c]ount IV is wholly inconclusive by looking merely at the court order." However, defendants maintained that count IV was dismissed pursuant to the directed verdict.

¶14

ANALYSIS

¶15

I. Summary Judgment

¶16 Plaintiff first contends the trial court erred when it granted summary judgment on all but one of its breach of contract claims and on one of its fraud claims where genuine issues of material fact existed precluding the entry of summary judgment.

¶17 As a threshold issue, we must address whether this court has jurisdiction to consider plaintiff's contentions. We recognize that neither party challenged our jurisdiction on appeal; however, this court has an independent duty to consider our jurisdiction and dismiss the appeal where it is lacking. *Palmolive Tower Condominiums, LLC v. Simon*, 409 Ill. App. 3d 539, 542 (2011).

¶18 Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010) 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 finding that there is no just reason for delaying either enforcement or appeal or both. *** In 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).

Here, the trial court's October 12, 2011, order granted partial summary judgment leaving three claims unresolved, including the Uniform Fraudulent Transfer Act claim (count IV). Therefore, the order resolved fewer than all the claims presented. There is no dispute that the October 12,

2011, order did not contain Rule 304(a) language. Moreover, despite our request to supplement the record with clarification, the parties have failed to demonstrate, and the record does not support, that count IV was ever disposed of. In other words, there is nothing in the record revealing a final judgment as to all of plaintiff's claims. See *Knapp v. Bulun*, 392 Ill. App. 3d 1018, 1023 (2009) ("[a]n appeal from a final judgment draws into issue all previous interlocutory orders that produced the final judgment"). Without Rule 304(a) language or evidence of a final judgment as to all of plaintiff's claims, this court has no authority to presume jurisdiction of the trial court's interlocutory partial summary judgment order. "Absent a supreme court rule, the appellate court is without jurisdiction to review judgments, order or decrees which are not final." *EMC Mortgage Corp. v. Kemp*, 2012 IL 113419, ¶ 9. We, therefore, conclude this court lacks jurisdiction to consider plaintiff's contentions related to the trial court's October 12, 2011, order.

¶19

II. Directed Verdict

¶20 Plaintiff next contends the trial court erred in granting defendants' motion for a directed verdict on procedural grounds where the motion was entered improperly after defense witnesses had testified and because it "was against the manifest weight of the evidence."

¶21 Again, we first must consider our jurisdiction to review plaintiff's contention. *Simon*, 409 Ill. App. 3d at 542. The trial court's February 14, 2013, order granted defendants' motion for directed verdict as to plaintiff's remaining fraud claim and entered judgment in favor of plaintiff in the amount of \$1,262.59 for the "replacement of a faulty freezer," which related to plaintiff's remaining breach of contract claim. As stated, the order did not contain a finding regarding plaintiff's Uniform Fraudulent Transfer Act claim (count IV). Without evidence that all of plaintiff's claims were adjudicated and a final disposition had been issued, this court cannot presume jurisdiction without a supreme court rule. *Kemp*, 2012 IL 113419, ¶ 9. The preprinted

form constituting the written order did include an "x" near the box providing "Order Final and Appealable." However, this court has concluded that nearly identical language fails to satisfy the requirements of Rule 304(a). In *Simon*, this court stated:

"The rationale underlying Rule 304(a) is that it allows appeals to be taken before the final disposition of a case where the circuit considers an immediate appeal to be appropriate. [Citation.] Thus, Rule 304(a) allows a circuit court to limit piecemeal appeals yet still allow early appeals when, in its discretion, doing so 'would have the effect of expediting the resolution of the controversy, would be fair to the parties, and would conserve judicial resources.' [Citation.] A circuit court's declaration that an order is 'final and appealable,' without reference to the justness of delay, or even reference to immediate appealability, evinces no application of the discretion Rule 304(a) contemplates. [Citation.] Instead, absent some other indication from the record that the court intended to invoke Rule 304(a) [citation] a circuit court's declaration that an order is 'final and appealable' amounts to nothing more than a non-binding interpretation. [Citation.]

For these reasons, a circuit court order accompanied by language indicating that it is 'final and appealable,' but not referencing immediate appeal, the justness of delay, or Rule 304(a), does not trigger the rule. [Citations.]" *Simon*, 409 Ill. App. 3d at 544.

¶22 Even assuming we accept that the "x" marked near the box stating "Order Final and Appealable" in fact was meant to indicate the February 14, 2013, order was "final and appealable," the language contained on the preprinted form order did not reference the justness of delay, an immediate appeal, or Rule 304(a). Moreover, where the record does not contain a

transcript or acceptable substitute from the trial, we are unable to ascertain whether Rule 304(a) language was requested by either party or contemplated by the trial court. We, therefore, have no jurisdiction to review the trial court's February 14, 2013, written order.

¶23

CONCLUSION

¶24 Because we conclude that we lack jurisdiction to consider plaintiff's contentions, we must dismiss the instant appeal. *Simon*, 409 Ill. App. 3d at 542.

¶25 Appeal dismissed.