2015 IL App (1st) 142453-U

No. 1-14-2453

Fourth Division
June 30, 2015

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

NIKITA HAMPTON,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 13 L 132929
	)	
WALTER FIELDS and PP NT 1, LLC d/b/a	)	Honorable
PANEGA REAL ESTATE HOLDINGS,	)	Moira Johnson,
	)	Judge, presiding.
Defendants-Appellees.	)	

JUSTICE COBBS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Ellis concurred in the judgment.

O R D E R

¶ 1 *Held*: The trial court did not abuse its discretion in declining to issue a body attachment as a discovery sanction to compel the defendant's appearance. The trial court's entry of a default judgment against the defendant for his failure to appear and answer the complaint was proper.

¶ 2 Plaintiff, Nikita Hampton, filed suit against the defendants, Walter Fields (Fields) and PP NT 1, LLC d/b/a Pangea Real Estate Holdings, (defendants) for negligence. After Fields failed to respond to discovery, the trial court entered a default judgment against him. Plaintiff

filed a motion to reconsider which the trial court denied. The court subsequently certified three questions of law for this appeal pursuant to Supreme Court Rule 308 (eff. Feb. 26, 2010).

¶ 3 BACKGROUND

¶ 4 The record reveals that plaintiff filed a complaint against defendants on November 20, 2013. In his complaint, plaintiff alleged that on August 31, 2013, while lawfully walking in the alley directly behind Fields' premises, he suffered injuries as a result of the defendants' negligence. Specifically, plaintiff alleged that he was attacked by six pit bull dogs owned by Fields and sheltered on the premises owned and operated by Pangea. Plaintiff alleges that the yard was negligently maintained and constructed by Pangea and not secure to hold the animals. Plaintiff requested relief in excess of $30,000 for the injuries he sustained in the alleged attack.

¶ 5 On March 11, 2014, Fields was served with a summons and complaint via personal service. Also on March 11, 2014, Fields was served with a subpoena for his deposition via personal service. The subpoena deposition of Fields was scheduled for April 28, 2014, at 1:00 p.m. at the law office of plaintiff's counsel, located at 9701 W. Higgins Road, Rosemont, Illinois. Fields never filed an appearance or answer, nor did he appear for the deposition.

¶ 6 On May 2, 2014, plaintiff filed a petition for rule to show cause against Fields. The petition requested that Fields be required to appear for his deposition. On May 7, 2014, a copy of the petition was personally served on Fields.

¶ 7 On May 8, 2014, the trial court granted plaintiff's motion for default against Fields.[1] On May 9, 2014, the trial court granted plaintiff's petition for rule to show cause, ordered Fields to appear in court on May 29, 2014, to explain why he failed to appear for his subpoena deposition and also instituted a fine of $100 per day commencing on May 9, 2014, against Fields. Counsel for plaintiff mailed a copy of the May 9, 2014, order to Fields via certified mail. Fields signed for the certified mail on May 16, 2014.

¶ 8 Fields failed to appear in court for the hearing on May 29, 2014. The trial court then entered the following order: "This cause coming before the Court for Plaintiff's Petition for Rule to Show Cause against Walter Fields, parties having notice and the Court being fully advised in the premises: The Court imposes a $2000.00 judgment plus $200.00 per attorney for attorneys fees against Walter Fields." The record contains no transcript of these proceedings.

¶ 9 Plaintiff subsequently filed a motion for reconsideration, seeking to vacate the May 29, 2014, order. On August 1, 2014, the court denied plaintiff's motion. On that same date and in that same order, the court certified the following three questions pursuant to Supreme Court Rule 308. (Ill. S. Ct. R. 308) (eff. Feb. 26, 2010).

1. "Did the court abuse its discretion in entering a judgment against Walter Fields for his failure to appear for his subpoena deposition rather than issuing a body attachment?
2. Should Walter Fields be treated as an non-party and be subject to Supreme Court Rule 204(d) because he is a named party that is in default?

[1] The record does not indicate whether the motion for entry of a default was made orally or in writing. No written motion in contained in the record on appeal.

3. May the court enter judgment against a deponent for failure to appear at a subpoena deposition before attempting to gain compliance with the subpoena through use of a body attachment?"

The record contains no transcript of the August 1 proceedings.

For the following reasons, we vacate the order granting leave to file this interlocutory appeal, affirm the default judgment in part, vacate in part and remand for further proceedings consistent with this order.

¶ 10 ANALYSIS

¶ 11 Jurisdiction

¶ 12 Prior to considering an appeal on its merits, the Appellate Court must determine if the appeal has been properly taken so as to invoke its jurisdiction. *Camp v. Chicago Transit*, 82 Ill. App. 3d 1107, 1109 (1980). A question of whether the appellate court has jurisdiction is always open, (*id*. at 1109) and we may reconsider the question of our jurisdiction if our earlier ruling seems erroneous. *Voss v. Lincoln Mall Management Co.*, 166 Ill. App. 3d 442, 451 (1988). Generally, jurisdiction of the appellate court is limited to appeals from final judgments (*AT & T v. Lyons and Pinner Elec. Co., Inc.*, 2014 IL App (2d) 130577, ¶19), except in those cases where appeals from interlocutory orders are permitted by Supreme Court Rule. See, *e.g.*, Ill. S. Ct. Rule 308 (eff. Feb. 26, 2010). 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 a separate part thereof. *In re Marriage of Gutman*, 232 Ill.2d 145, 151 (2008); *Davis v. Loftus*, 334 Ill. App. 3d 761, 766 (2002). An interlocutory judgment is a judgment given in the middle of a cause on some

plea, or proceeding, or default which is only immediate and does not finally determine or complete the suit. 2 Ill. Law & Prac. *Appeal and Error* §87 (2002).

¶ 13 Rule 308 provides a remedy of permissive appeal for interlocutory orders where the trial court has deemed that they involve a question of law as to which there is a substantial ground for difference of opinion and where an immediate appeal from the order may materially advance the ultimate termination of the litigation. *AT & T v. Lyons and Pinner Elec. Co., Inc.*, 2014 IL App (2nd) 130577, ¶29; Ill. S. Ct. R. 308. The rule was intended to be used sparingly and is strictly construed. *Camp*, 82 Ill. App 2d. at 1111. The appellate court is vested with the responsibility to "insure that this authority to allow interlocutory appeals is not abused." *Id.* (quoting Ill. Ann. Stat., ch. 110A, par. 308, Committee Comments, at 667 (Smith-Hurd 1973)).

¶ 14 The Rule expressly provides in pertinent part:

> "(a) Requests. When the trial court, in making an interlocutory order not otherwise appealable, finds that the order involves a question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, the court shall so state in writing, identifying the question of law involved. Such a statement may be made at the time of the entry of the order or thereafter on the court's own motion or on motion of any party. The Appellate court may thereupon in its discretion allow an appeal from the order." Ill. S. Ct. 308(a).

¶ 15 Appeal in this case is here purportedly pursuant to Supreme Court Rule 308. *Id.* The order entered by the trial court on May 29, 2014, was for a judgment for $2,000, plus attorneys' fees, in favor of plaintiff. Plaintiff timely filed a motion for reconsideration in

which he sought to have the May 29th judgment vacated. On August 1, 2014, the court denied plaintiff's motion. In that same order, the court certified three questions, pursuant to Supreme Court Rule 308. Prior to doing so, the court did not vacate either the May 29th judgment order, or the August 1, 2014, order denying reconsideration of that order.

¶ 16 The trial court's May 29th order, which entered judgement and assessed attorney fees and its subsequent order which certified questions to this court, is somewhat confusing. We are mindful that to ascertain the nature of the trial court's order appealed from, so that the standard of review can be determined, the order must be construed in a reasonable manner, with references to other parts of the record, including the pleadings, so as to give effect to the apparent intention of the trial court. *Heinrich v. Mitchell*, 357 Ill. App. 3d 1017, 1021 (2005) (citing *American Bank & Trust Co. v. Department of Revenue*, 242 Ill. App. 3d 716, 720 (1993)). Thus, we have reviewed the record and the substance of the trial court's orders.

¶ 17 The court's May and August orders clearly indicate that a judgment is entered in favor of the plaintiff and assesses attorneys' fees against the defendant. Additionally, there is no statement in the record from the trial court indicating that the "order involves a question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." See Ill. S. Ct. Rule 308(a). Further, although there is no transcript of proceedings, in his brief, plaintiff indicates that the trial court, in ruling on his motion for reconsideration, suggested that the judgment would lead to a petition for rule to show cause on a citation to discover assets and then ultimately to a body attachment when Mr. Fields does not appear or respond to the citation to discover assets. We perceive the comments attributed to the court to reference those procedures which generally attend post judgment enforcement proceedings.

Based upon our review of the entire record, we believe that the court's May 29th judgment was a final judgment.

¶ 18 Entry of a final judgment, pursuant to an earlier default order disposed of the controversy and ended the litigation between the parties. Plaintiff's subsequent motion for reconsideration of that judgment was denied. The rights of the parties had, at that point, been finally determined. Thus, this appeal can hardly be characterized as interlocutory and any answers to "certified questions" could not, at this juncture, advance termination of the already terminated litigation. In light of the trial court's entry of a final judgment, we do not have jurisdiction to proceed pursuant to Rule 308. Accordingly, we vacate the order of September 8, 2014, as having been improvidently granted.

¶ 19 Generally, when this court has determined that an appeal pursuant to 308 must be dismissed, given the interlocutory nature of a Rule 308 appeal, the case simply proceeds to final disposition in the trial court. See, *e.g., McMichael v. M. Reese Health Plan Found*, 259 Ill. App. 3d 113 (1994); *Kincaid v. Smith*, 252 Ill. App. 3d 618 (1993). Here, final disposition has been already entered. Thus, our dismissal in this case would effectively end the litigation. However, we are sensitive to the fact that the trial court, having denied plaintiff's motion for reconsideration, in that same order, purported to certify questions pursuant to Rule 308. In reliance on the trial court's orders, and this court's grant of the interlocutory appeal, plaintiff timely filed his brief and a supplemental record. In the interest of justice, and in the exercise of this court's discretion, we elect to review the issues presented in plaintiff's appeal pursuant to Supreme Court Rule 303. See Il. S. Ct. Rule 303 (eff. May 30, 2008).

¶ 20 In so doing, we recognize that the right to appeal exists only in favor of a party whose rights have been prejudiced by the judgment or decree from which the appeal is taken. *Riley v. Physicians Weight Loss Centers, Inc.*, 192 Ill. App. 3d 23, 31 (1989). However, if a party has not obtained all that he deems himself entitled to, he may appeal. *Bullman v. Cooper*, 362 Ill. 469, 471-72. Here, plaintiff received a judgment in his favor. Thus, he cannot be heard to complain on that issue. However, plaintiff's prayer for relief sought $30,000 in damages. As a part of the judgment, the trial court awarded $2,000, an issue raised by plaintiff in his argument regarding the court's refusal to issue a body attachment. Thus, we may properly proceed to consider the merits of this appeal.

¶ 21 Defendant has filed no appearance or answer in this case and no appellee's brief has been filed. Defendant's lack of response, however, is not an impediment to our review. See *First Capitol Mortgage Corp. v. Talandis Consturction Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 22 Motion to Dismiss Appeal

¶ 23 During the pendency of this appeal, plaintiff filed a motion seeking to "dismiss this appeal without prejudice, with leave to refile within one year and without any award of costs." In support of his motion, plaintiff asserts that on April, 6, 2015, the circuit court granted his motion for voluntary nonsuit. We have taken the motion with the case. As we have determined that the May 29, 2014, order was a final judgment, the trial court was without jurisdiction to grant plaintiff's subsequent motion for voluntary dismissal, entered on April 6, 2015. See *Brewer v. National R.R. Passenger Corp.*, 165 Ill. 2d 100, 105 (1995); *Herlehy v. Marie v. Bistersky Trust Dated May 5, 1989*, 407 Ill. App. 3d 878, 898 (2010). Accordingly, plaintiff's motion to dismiss this appeal on the basis of a voluntary dismissal is denied and we turn to the merits of this appeal.

¶ 24 Discovery Sanction

¶ 25 Plaintiff argues that by the court's entry of a judgment, as opposed to proceeding to issue a body attachment to compel defendant's appearance, he was deprived an opportunity to depose the defendant. He asserts that had he been able to take defendant's deposition he would have been able to ascertain facts which would have enabled him to properly pursue his case in the underlying action. Apparently, in anticipation of post-judgment enforcement proceedings, plaintiff argues that to have to bear the costs associated with serving defendant with a citation to discover assets are additional costs which he seeks to avoid by having the court, in the underlying action, issue a body attachment.

¶ 26 In response to defendant's failure to appear for his deposition, plaintiff filed a Petition for Rule to Show Cause (Petition) against Fields. The Petition requested that Fields be required to appear for his deposition. The record reflects that defendant was personally served with notice of the Petition. On May 9, 2014, the trial court granted plaintiff's Petition, ordered Fields to appear on May 29th, and then, also imposed a $100 per day fine, commencing on May 9th. Counsel for plaintiff mailed a copy of the May 9th order to Fields via certified mail, for which Fields signed on May 16th. On May 29th, Fields failed to appear in court for the hearing on the Petition. The court took no other action regarding the Petition, but instead, entered a default judgment against Fields and awarded plaintiff attorney fees.

¶ 27 Trial judges are afforded authority to enter a wide range of orders when a party unreasonably fails to comply with discovery rules and orders. *Besco v. Henslee, Monek & Henslee*, 297 Ill. App. 3d 778 (1998). The decision whether to impose sanctions for failure to comply with a discovery order and, if so, what type of sanction to impose, are decisions largely within the sound discretion of the trial court. *Besco,* 297 Ill. App. 3d at 782; *Peterson*

v. Ress Enterprises, Inc., 292 Ill. App. 3d 566, 579 (1997). A trial court's decision will not be overturned on appeal absent an abuse of that discretion. *Besco*, 297 Ill. App. 3d at 782.

¶ 28 When appropriate, the trial court may, by contempt proceedings, compel obedience by any party or person to any subpoena issued or order entered under the rules. Il. S. Ct. R. 219(c) (eff. July 1, 2002). A petition for a rule to show cause is the method of notifying the court that a court order may have been violated, and the petitioner requests a hearing on the issue. *In re Marriage of LaTour*, 241 Ill. App.3d 500, 508 (1993). The petition for a rule to show cause and the rule to show cause operate together to inform the alleged contemnor of the allegations against him or her. *Id*. Thus, the petition for a rule to show cause initiates the contempt proceedings, but it does not establish that a violation of a court order has in fact occurred. *Id*. The rule to show cause, issued by the court, is not a finding of a violation of a court order, but part of the process of notifying the alleged contemnor of the charges, and the time and place of the hearing. *Id*. Like a rule to show cause, a writ of attachment is merely a means by which to bring an alleged contemnor before the court when the failure to comply with an order of the court is the alleged. *Revolution Portfolio, LLC v. Beale*, 341 Ill. App. 3d 1021, 1026 (2003); *In re Marriage of Rizza*, 237 Ill. App. 3d 83, 87.

¶ 29 Defendant did not appear in court on May 29th for hearing on the Petition. The trial court, nonetheless, assessed a $100 daily fine against him on that date. We note that although no rule to show cause was ever entered, because defendant has voiced no objection, and further, because it does not appear that the trial court has retained jurisdiction to enforce the sanction then imposed, we express no opinion regarding whether imposition of a fine at that stage in the contempt proceedings was appropriate.

¶ 30 In any case, the purpose of Supreme Court Rule 219(c) is to advance the discovery process and encourage a trial on the merits. *Besco*, 297 Ill. App. 3d at 782. We know of no rule or of any case law, and plaintiff points to none, that would require the trial court to issue a body attachment for a party's non-compliance. Here, the court apparently elected to not proceed further with contempt proceedings, and, instead, entered a default judgment against Fields. Once a final judgment has been entered, there is no longer a case to be pursued in the trial court and the need for discovery is extinguished.

¶ 31 Plaintiff, even in the face of a judgment in his favor, urges the court to continue with discovery sanctions. We can perceive of no more favorable outcome for a plaintiff than to have a judgment entered in his favor, without the expenditure of time and money which trial would require. The trial court's decision not to proceed with additional discovery sanctions was within its discretion and, on this record, we find no abuse.

¶ 32 Plaintiff additionally argues that the trial court should enforce the subpoena against Fields as a non-party pursuant to Illinois Supreme Court Rule 204(d) (eff. Dec. 16, 2010). He posits that because defendant has filed neither an appearance nor an answer, he must be treated as a non-party with respect to his deposition. He maintains, without citation to authority, that because Fields is in default and has not participated in the case, that he cannot be served with a notice for deposition. Thus the only means by which to secure his deposition is through a subpoena.

¶ 33 Supreme Court Rule 204 provides the means by which to compel the appearance of a deponent. Section (d) of the rule, upon which plaintiff relies, sets forth the notice requirements for a body attachment order, a rule to show cause, or an order of contempt for non-parties who fail to comply with discovery orders. Il. S. Ct. R. 204 (d). The rule does not

compel the court to issue a writ for a body attachment. Moreover, Fields is a named party in this action. His failure to participate has no transformative effect with respect to his relationship to this litigation. Plaintiff's argument is wholly without merit.

¶ 34 Entry of a Default Judgment

¶ 35 In its May 8, 2014 order, the court entered a default against defendant. Subsequently, on May 29, 2014, the court entered a default judgment against defendant in the amount of $2,000 and assessed attorney fees in the amount of $200.

¶ 36 In cases in which a party fails to comply with discovery or fails to comply with any order entered under the court's discovery rule, the court may enter a judgment by default against the offending party. *King v. American Food Equipment Co.*, 160 Ill. App. 3d 898, 910 (1987); see also Il. S. Ct. R. 219(c). Where a sanction is imposed under paragraph (c) of the Rule, the judge is required to set forth the reasons and basis of any sanction imposed either in the judgment order itself or in a separate written order. *Cirrincione v. Westminster Gardens Ltd. Partnership*, 352 Ill. App. 3d 755, 762 (2004); Il. S. Ct. R. 219(c). Judgment by default may also be entered by the court for want of an appearance, or for failure to plead. 735 ILCS 5/2-1301(d). Although plaintiff refers to the judgment entered in this case as a discovery sanction, we note that no findings consistent with Rule 219(c) are included in the judgment order, and no separate writing has been provided as a part of the record. Thus, we presume that the judgment was entered pursuant to section 1301(d) of the Code, and not as a discovery sanction.

¶ 37 In the context of his argument in support of additional discovery sanctions, plaintiff comments that the judgement amount entered by the court ($2,000) was far less than the damages amount sought ($30,000) in his prayer for relief. A default judgment comprises two

components: (1) a finding of the issues for the plaintiff; and (2) an assessment of damages. *Wilson v. TelOptic Cable Construction Co.*, 314 Ill. App. 3d 107, 112 (2000). Where, as in this case, an action is in tort or for an unliquidated claim or amount, a default does not admit the amount of damages to which the plaintiff is entitled. *Stickler v. McCarthy*, 64 Ill. App. 2d 1 (1965), *aff'd as modified*, 37 Ill. 2d 48 (1967). It is established that a judgment for unliquidated damages cannot be entered without establishing the fair amount of those damages. *Bickel v. Subway Development*, 354 Ill. App. 3d 1090, 1100 (2004) (citing *Nye v. Parkway Bank & Trust Co.*, 114 Ill. App. 3d 272, 276 (1983)).

¶ 38 The version of complaint in the record before us is unverified and the record does not include any affidavits in support of the plaintiff's $30,000 claim. Further, the record is devoid of any indication that either an evidentiary hearing or a "prove up" of damages was conducted. Thus, we remand this matter to the trial court for an evidentiary hearing or "prove-up" as to the amount of damages. In so doing, we express no opinion with respect to the correctness of the judgment amount previously entered.

¶ 39 CONCLUSION

¶ 40 For the reasons stated, we vacate the order of September 8, 2014, certifying questions pursuant to S. Ct. Rule 308. We affirm the liability portion of the judgment. However, for the reasons stated, we vacate the judgment award and remand this cause for a hearing or "prove-up" of damages.

¶ 41 Order vacated; judgment affirmed in part and vacated in part; cause remanded with directions.