2015 IL App (1st) 142560-U

SIXTH DIVISION
June 5, 2015

No. 1-14-2560

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

KOREY GIBALA KRASTEV,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 2011 L 010501
	)	
CITY OF CHICAGO, a Municipal Corporation,	)	
and 445-447 FULLERTON CONDOMINIUM ASSOCIATION,	)	Honorable
	)	Kathy M. Flanagan,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Lampkin concurred in the judgment.

O R D E R

¶ 1 *Held*: Because we lacked appellate jurisdiction, this appeal from an order granting defendants' motions for summary judgment, which did not resolve all of the parties' claims and did not include a finding under Rule 304(a), was dismissed.

¶ 2 Plaintiff, Korey Gibala Kratev, filed suit against defendants, the City of Chicago (the City), and 445-447 Fullerton Condominium Association (the Association), seeking damages for her injuries resulting from a fall on defective pavement in front of the Association's condominium building located at 445-447 West Fullerton Parkway (the building). Each defendant filed a cross-claim and the Association filed a counterclaim. The circuit court granted

defendants' motions for summary judgment against plaintiff on her first-amended complaint having found the defect which was said to have caused plaintiff's fall was open and obvious. We dismiss this appeal for lack of appellate jurisdiction where there are remaining unresolved claims and the order granting defendants' summary judgment against plaintiff did not include a Rule 304(a) finding. Ill. S. Ct. R. 304(a) (eff. Feb 26, 2010).

¶ 3 In her first-amended complaint, plaintiff, generally, alleged that on October 10, 2010, she tripped on a defective portion of pavement near 445 West Fullerton Parkway in Chicago and brought negligence actions against the City and the Association. Plaintiff alleged that the City owned and controlled the public sidewalks and had a duty to keep them safe. As to the Association, plaintiff alleged, in part, that the Association had procured a public way permit to place a driveway over property owned by the City and, therefore, the Association had a duty to keep the driveway in a safe condition under section 10-20-415(c) of the Chicago Municipal Code (Code) (Municipal Code of Chicago, Ill. § 10-20-415(c) (2014)). Discovery showed plaintiff fell at a point where the public sidewalk, brick paved parkway, and the driveway met in front of the building.

¶ 4 The Association filed a counterclaim under the Joint Tortfeasor Contribution Act (Contribution Act) (740 ILCS 100/1 *et seq*. (West 2010), seeking a set-off in the amount of any settlement plaintiff received from any person. The Association also brought a cross-claim under the Contribution Act against the City seeking contribution to the extent the City's negligence contributed to plaintiff's damages should the Association be found liable to plaintiff.

¶ 5 Additionally, the City filed a cross-claim against the Association which contained three counts. Count I sought contribution from the Association, in the event that a judgment was

entered against the City, in the amount of the percentage of fault attributable to the Association pursuant to the Contribution Act. Count II sought indemnification from the Association under section 1-4-125 of the Code (Municipal Code of Chicago, Ill. § 1-4-125 (2014)), based on the Association's failure to obtain the proper permit and insurance for its driveway. Section 1-4-125 provides that when a party has failed to obtain a license, permit, or insurance as required by the Code, that party may be required to make restitution to the City "in full amount of all liabilities, judgments, settlements, costs, damages and expenses which may in any way come against the city" as a result. *Id.* Finally, count III requested that the Association be found to have violated provisions of the Code which required that the Association obtain a driveway permit and insurance and sought a fine of $1,000 per day under section 10-20-450 of the Code. Municipal Code of Chicago, Ill. § 10-20-450 (2014).

¶ 6 The City filed a motion for summary judgment on March 14, 2014, arguing that it owed no duty of care and claiming that it neither owned, nor controlled, nor maintained the driveway/parkway, which had been constructed by the Association, where plaintiff fell, and there was no liability because plaintiff's fall was caused by an open and obvious condition. In its summary judgment motion, the City stated that if the Association had a permit for the driveway, it would be required to indemnify the City against all liability for maintaining the driveway.

¶ 7 On March 28, 2014, the Association filed a motion for summary judgment asserting: (1) the Association did not owe plaintiff a duty of care because the fall occurred on public property it did not own, possess, or control; (2) plaintiff failed to provide evidence to support her claims of negligence against the Association; and (3) the evidence established that plaintiff's fall was due to an open and obvious condition. The Association asserted that there was no evidence it

had obtained a permit, or made a permit application, prior to plaintiff's fall and any conduct of the Association which may have violated the Code was not a proximate cause of plaintiff's injuries.

¶ 8 In response to the Association's motion for summary judgment, plaintiff stated that she fell where the sidewalk met the driveway apron. Plaintiff argued that, because the Association had failed to obtain a permit for the driveway, the driveway was an encroachment on the public way and, thus, the Association had a duty to maintain it.

¶ 9 Plaintiff did not respond to the City's motion for summary judgment, but the City filed a reply in support of its motion which responded to the Association's motion for summary judgment. The City pointed out that: (1) under section 10-20-450 of the Code, the Association was required to pay a fine and either remove and restore the driveway area, or pay the costs of removal and restoration if indeed it did not have a permit; or (2) in the alternative, if there was a permit, the Association was required "to indemnify the City against all liabilities" for its failure to keep the driveway in good repair under section 10-20-415(c). The City reminded the parties and the circuit court that it had filed a cross-claim against the Association "based on contribution, indemnity, and ordinance violation."

¶ 10 In a written order entered on July 21, 2014, the circuit court granted defendants' motions for summary judgment. The circuit court found that the City controlled the public sidewalk and parkway near where plaintiff fell, but that there was a disputed issue as to whether the City or the Association had a responsibility to maintain the driveway apron. However, the circuit court found as a matter of law, that the defective condition at issue was open and obvious and, thus, neither the City nor the Association owed a duty of care to plaintiff. The circuit court, in its

written order, did not expressly address the counterclaim of the Association nor defendants' cross-claims and the order did not include a finding under Supreme Court Rule 304(a) (Ill. S. Ct. R. 304(a) (eff. Feb 26, 2010)).

¶ 11 On August 19, 2014, plaintiff filed a notice of appeal from the summary judgment order entered in favor of the City and the Association.

¶ 12 Although not raised by the parties, we have an independent duty to consider the issue of our jurisdiction over this appeal, and dismiss the appeal where our jurisdiction is lacking. *Palmolive Tower Condominiums, LLC v. Simon*, 409 Ill. App. 3d 539, 542 (2011).

¶ 13 "Appellate jurisdiction is limited to review of final judgments unless an order falls within a statutory or supreme court exception." *Cole v. Hoogendoorn, Talbot, Davids, Godfrey and Milligan*, 325 Ill. App. 3d 1152, 1153 (2001). In order to be considered final, an order must dispose of the rights of the parties, either upon the entire controversy or some definite and separate part of it. *In re Guardianship of J.D.*, 376 Ill. App. 3d 673, 676 (2007).

¶ 14 However, a final judgment or order is not necessarily immediately appealable. 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 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) (eff.Feb.26, 2010).

Thus, "[p]rior to the resolution of all claims with respect to all parties, any order entered in the case even if final as to any one party or claim remains nonappealable unless such order contains a finding in compliance with Rule 304(a), that there is no just reason to delay enforcement or appeal." *P & A Floor Company, Inc. v. Burch*, 289 Ill. App. 3d 81, 88 (1997).

¶ 15 Here, plaintiff appeals from the order granting defendants' motions for summary judgment. That order finally resolved the claims raised by plaintiff against defendants in her first-amended complaint. However, there were other claims raised by the parties pursuant to the cross-claims and counterclaim.

¶ 16 Therefore, after receiving the record on appeal and the parties' briefs, we ordered the parties to submit status reports to address whether the counterclaim and cross-claims had been resolved and whether there was a potential jurisdictional problem. Our concern was that plaintiff had appealed from an order that resolved fewer than all the claims of the parties without a Rule 304(a) finding. Plaintiff and defendants complied with the request and each submitted a report.

¶ 17 In her report, plaintiff stated the cross-claims and the counterclaim were, in fact, left unresolved in the circuit court and "will be pending should the judgment entered in the lower court be reversed and remanded." As to whether we had jurisdiction, plaintiff saw no issue.

¶ 18 The City and the Association both stated that the circuit court, in its summary judgment order, did not expressly rule on their cross-claims and the Association's counterclaim. However, the City and the Association believed the contribution claims were rendered moot as the circuit court had found that neither defendant had liability for plaintiff's injuries. The City further

maintained that the summary judgment order necessarily disposed of the issues of contribution raised in the cross-claims and counterclaim.

¶ 19 Additionally, the City in its report asserted that it had abandoned both its claim for indemnification against the Association under count II of its cross-claim as well as its action seeking fines for the Association's failure to obtain a proper permit and insurance for its driveway as set forth in count III of its cross-claim. The City and the Association concluded that all claims of the parties had been terminated, and this court had appellate jurisdiction to hear the appeal.

¶ 20 We find merit in the position of the City and the Association that the summary judgment order finding that defendants were not liable to plaintiff necessarily extinguished the counterclaim and cross-claims for contribution based on an apportionment of liability or, at the very least, the claims were mooted by the finding of defendants' nonliability. However, even if we were to find the contribution claims have been terminated for purposes of our jurisdiction, we are not convinced that the City's claim for indemnification, which included a claim for its legal fees and costs, and its claim seeking the imposition of fines against the Association for ordinance violations, have been abandoned and should be considered terminated. We do not believe the City by merely stating so in its report on jurisdiction to this court can be considered to have "abandoned" these cross-claims against the Association.

¶ 21 Defendants moved for summary judgment against plaintiff on her negligence action against them. Defendants' motions for summary judgment did not seek resolution of their cross-claims, nor of the counterclaim of the Association. The fact that the City did not seek summary judgment at that time on its cross-claims for indemnification and fines against the Association

cannot be viewed as an abandonment of those claims. In fact, the City, in its reply, asserted that it was seeking full indemnification against the Association and the imposition of fines as set forth in its cross-claim.

¶ 22 The City cites to *Cribbin v. City of Chicago*, 384 Ill. App. 3d 878 (2008), in support of its abandonment argument. In that case, the plaintiffs filed declaratory and mandamus actions against the City seeking an order directing the City to release its hold on construction permits and an award of damages, costs, and attorney fees incurred as a result of the City's refusal to issue the permits. *Id*. at 880-81. After a trial, the plaintiff's mandamus action was granted and the City appealed. *Id*. at 883-84. In addressing whether there was appellate jurisdiction, this court accepted the City's contention that the plaintiffs had abandoned their requests for damages, attorney fees, and costs when they failed to present evidence as to these requests at trial and did not ask the trial court to reserve jurisdiction with respect to these claims. *Id*. at 886. Furthermore, on appeal, the plaintiffs did not dispute the City's position that their claims had been abandoned. *Id*. at 884. In contrast, this matter was adjudicated on defendants' motions for summary judgment which were limited to questions of their liability for plaintiff's injuries. as set forth in her first-amended complaint and not at a full trial on the merits. Plaintiff's appeal here from the summary judgment order does not support a finding of abandonment by the City of its ordinance violation and indemnification actions against the Association.

¶ 23 We find that there are unresolved claims in this case and, without a Rule 304(a) finding, plaintiff's appeal from the summary judgment order must be dismissed for lack of appellate jurisdiction.

¶ 24 Appeal dismissed.