

2015 IL App (2d) 140901-U
No. 2-14-0901
Order filed August 24, 2015

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
SECOND DISTRICT

SHREE RADHEY SHYAM GROUP)	Appeal from the Circuit Court
SERIES, LLC.,)	of DuPage County.
)	
Plaintiff and)	
Third-Party Defendant-Appellee,)	
)	
v.)	No. 12-L-963
)	
JOHN SAKASH REVOCABLE TRUST)	
dated January 2, 1987; and JKM)	
PARTNERSHIP,)	
)	
Defendants and)	
Third-Party Plaintiffs-Appellants,)	
)	
(Sprintcom, Inc.; STC TWO, LLC;)	
Global Signal Acquisitions II, LLC;)	Honorable
Global Signal Acquisitions III, LLC,)	Bonnie M. Wheaton,
Defendants.))	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice Shostok and Justice Hutchinson concurred in the judgment.

ORDER

¶ 1 *Held:* The appeal must be dismissed pursuant to *In re Marriage of Knoerr*, 377 Ill. App. 3d 1042 (2007), because defendants' appeal from the summary judgment was premature in that codefendants' counterclaims were pending and the trial court's finding that the order was "final and appealable" was insufficient to invoke Supreme Court Rule 304(a).

¶ 2 Defendants John Sakash revocable trust dated January 2, 1987, (Sakash Trust) and JKM Partnership appeal from the trial court's order granting plaintiff, Shree Radhey Shyam Group Series, LLC, summary judgment. We dismiss the appeal for lack of jurisdiction.

¶ 3 I. BACKGROUND

¶ 4 The parties dispute which entity is entitled to rental payments from a cell phone tower located on a portion of the property commonly known as 23W110 Army Trail Road in Glendale Heights. On August 21, 2012, plaintiff filed a two-count complaint against defendants Sprintcom, STC TWO, LLC (STC), Global Signal Acquisitions II, LLC (GSA II), and Global Signal Acquisitions III, LLC (GSA III) (collectively, the Cell Tower Defendants).

¶ 5 One count for forcible entry and detainer alleged that plaintiff was the titleholder of record of the property and defendants did not have a right to occupy or use the property without compensating plaintiff. The count alleged that Sprintcom constructed an equipment base station and antenna structure on the property and that the remaining Cell Tower Defendants might have some interest in the property according to recorded lease agreements.

¶ 6 Before this dispute, the Sakash Trust owned the property, leased a portion of it to Sprintcom for the installation of the cell tower, and subsequently transferred title to Victor Soto, who is not a party to this action. A foreclosure action against Soto resulted in plaintiff purchasing the property, and the Cell Tower Defendants continued operating the cell tower pursuant to a lease. Contrary to plaintiff's demands to defendants, fewer than all rental payments were forwarded to plaintiff. The first count of the complaint sought possession of the property and unpaid rent. The second count sought a declaratory judgment to adjudicate the final rights and liabilities of the parties with respect to the property.

¶ 7 On November 2, 2012, the Sakash Trust filed an answer and raised an affirmative defense, arguing that a recorded lease and a 14-year history of receiving monthly rental payments from the Cell Tower Defendants entitled it to future payments. On November 16, 2012, the Cell Tower Defendants filed their own answer to the complaint, generally stating that they will tender rent to whichever party is so entitled.

¶ 8 On November 16, 2012, the Cell Tower Defendants filed a third-party complaint against plaintiff, the Sakash Trust, and the JKM Partnership (JKM) for declaratory and injunctive relief regarding the proper disposition of the rental payments. The third-party complaint alleged that, following the death of John Sakash, the Sakash Trust assigned the lease to JKM and GSA III began forwarding rent payments to JKM. Because the Sakash Trust and JKM have a rival claim against plaintiff for the payments, the counterclaimants were in “great doubt as to which party is entitled to the lease payments” and could not determine which claim is valid. The first counterclaim sought an injunction barring the Sakash Trust, JKM, and plaintiff from pursuing any action against the counterclaimants for future lease payments before resolving their claims, to protect against “double or triple litigation” against the counterclaimants. In the event that the Sakash Trust and JKM are entitled to the rental payments, the second counterclaim sought from plaintiff a refund of certain payments that counterclaimants had potentially made in error.

¶ 9 On January 23, 2013, plaintiff moved for summary judgment. Plaintiff filed a two-count amended complaint on February 7, 2013, and was granted leave to add JKM as a defendant and make JKM subject to the motion for summary judgment. The claim for forcible entry and detainer was the same as in the original complaint, seeking possession of the property, compensation for defendants’ use of the property, and attorney fees and costs. The amended declaratory judgment claim added that JKM is the assignee of a lease between the Sakash Trust

and Sprintcom. The claim sought an adjudication of the parties' rights regarding whether various agreements still apply to the property and whether the Sakash Trust or JKM are entitled to any rental payments.

¶ 10 On August 13, 2014, the trial court entered an order granting plaintiff's motion for summary judgment. The trial court found that the Sakash Trust and JKM had no right, title, or interest in the property and plaintiff was entitled to all rent for the cell tower lease from the date that it acquired the property. The written order stated that "[t]his is a final and appealable order." On September 9, 2014, the Sakash Trust and JKM filed a notice of appeal. The Cell Tower Defendants' two counterclaims against plaintiff, the Sakash Trust, and JKM remained pending.

¶ 11

II. ANALYSIS

¶ 12 A reviewing court must ascertain its jurisdiction before proceeding in a cause of action, and this duty exists regardless of whether either party has raised the issue. *Secura Insurance Co. v. Illinois Farmers Insurance Co.*, 232 Ill. 2d 209, 213 (2009). A judgment is final if it terminates the litigation between the parties on the merits or disposes of the parties' rights with regard to either the entire controversy or a separate part of it. *R.W. Duntelman Co. v. C/G Enterprises, Inc.*, 181 Ill. 2d 153, 159 (1998). Absent a written finding under Supreme Court Rule 304(a) (eff. Feb. 26, 2010), a final order disposing of fewer than all the claims is not an appealable order and does not become appealable until all of the claims have been resolved. *In re Marriage of Gutman*, 232 Ill. 2d 145, 151 (2008). The rule was implemented to discourage piecemeal appeals in the absence of a just reason and to remove the uncertainty, which existed when a final judgment was entered on fewer than all of the matters in controversy. *Gutman*, 232 Ill. App. 3d 2d at 151.

¶ 13 We have noted that, “[w]hile it is true that the absence of Rule 304(a)’s precise wording does not conclusively preclude appellate jurisdiction, it must be clear that Rule 304(a) is intended to be invoked.” *Matson v. Department of Human Rights*, 322 Ill. App. 3d 932, 939 (2001). An express finding of “no just reason” to delay appeal indicates that the trial court decided whether an immediate appeal was appropriate “in light of fairness to the parties, the conservation of judicial resources, and the expedition of the resolution of the controversy.” *Matson*, 322 Ill. App. 3d at 939. Therefore, “[i]f an order adjudicating fewer than all of the claims does not state that there is no just reason for delaying appeal, the appellate court has no jurisdiction over an appeal from such judgment, and it is proper for the appellate court to dismiss the appeal on its own motion.” *Matson*, 322 Ill. App. 3d at 940.

¶ 14 As noted, the record shows no disposition of the counterclaims filed by the Cell Tower Defendants. The Sakash Trust and JKM nevertheless argue that we have jurisdiction because “the [summary] judgment fully resolved the issues presented by all the claims of all the parties.” Although the judgment adjudicates the respective rights of the Sakash Trust, JKM, and plaintiff; the Cell Tower Defendants sought in their counterclaims injunctive relief barring future litigation regarding the rental payments and potentially a refund from plaintiff of any improper payments. The summary judgment and the counterclaims involve the same subject matter, but the Cell Tower Defendants’ counterclaims are distinct from the claims in plaintiff’s amended complaint. The counterclaims must be ruled upon to terminate the litigation between the parties on the merits or dispose of the parties’ rights with regard to either the entire controversy or a separate part of it.

¶ 15 Because the counterclaims remained pending at the time, the Sakash Trust and JKM could not appeal from the summary judgment without a proper written finding pursuant to Rule

304(a). Although the written order granting summary judgment states, “[t]his order is final and appealable,” it does not state that there is “no just reason to delay appeal.” 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. See *Coryell v. Village of La Grange*, 245 Ill. App. 3d 1, 5 (1993) (holding that circuit court’s finding that an order was “final and appealable,” without reference to justness of delay, did not trigger Rule 304(a)). In this case, the trial court’s finding is not sufficient to invoke Rule 304(a), and the parties have not pointed to anything else in the record to indicate that the trial court intended to vest this court with jurisdiction over an appeal that would be premature otherwise. Because the record does not establish a basis for this court to exercise jurisdiction, we must dismiss the appeal.

¶ 16 We note that *In re Marriage of Knoerr*, 377 Ill. App. 3d 1042, 1049-1050 (2007), provides for the possible reinstatement of an appeal, like this one, that is dismissed as premature. In *Knoerr*, we stated as follows:

“[W]e dismiss respondent’s appeal because on the present record, respondent’s notice of appeal is premature. We presume that respondent can timely file a notice of appeal upon the resolution of the pending petition for a rule to show cause and any other pending claims in this matter. However, if pending claims have been resolved and the time to file a new notice of appeal has expired, Supreme Court Rule 303(a)(2) allows respondent to establish the effectiveness of the present notice of appeal. In the latter event, respondent may file a petition for rehearing and to supplement the record, thereby establishing our jurisdiction to address the merits.” *Knoerr*, 377 Ill. App. 3d at 1049-1050.

¶ 17 Thus, if during the pendency of this appeal the trial court disposed of the counterclaims, the Sakash Trust and JKM may file a petition for rehearing and to supplement the record to establish our jurisdiction in this appeal.

¶ 18 For the foregoing reasons, the appeal is dismissed.

¶ 19 Appeal dismissed.