2015 IL App (5th) 150047-U

NO. 5-15-0047

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

WESTPORT AUTO SALES, INC.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Lawrence County.
	)	
v.	)	No. 09-L-12
	)	
THE COUNTY OF LAWRENCE,	)	Honorable
	)	Robert M. Hopkins,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE SCHWARM delivered the judgment of the court.
Justices Welch and Stewart concurred in the judgment.

ORDER

¶ 1 *Held*: The plaintiff's appeal is dismissed for lack of appellate court jurisdiction.

¶ 2 The plaintiff, Westport Auto Sales, Inc., filed a complaint in the circuit court of Lawrence County against the defendant, the County of Lawrence, for failing to continue its participation in the National Flood Insurance Program (NFIP). The circuit court dismissed, "without prejudice," the plaintiff's contract allegations and entered summary judgment in the defendant's favor on the plaintiff's allegations of promissory estoppel. We find that jurisdiction is lacking in this case because the orders from which the appeal is taken are not final.

¶ 3 I. BACKGROUND

¶ 4 On May 28, 2014, the plaintiff filed a second amended complaint, seeking judgment and damages in count I for promissory estoppel and in count II for breach of implied contract. On June 16, 2014, the defendant filed a motion to dismiss count II of the plaintiff's second amended complaint pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2014)). The defendant argued that there were no facts alleged in count II to support a cause of action against it for either an implied contract or a written contract. On September 19, 2014, the circuit court dismissed count II of the plaintiff's second amended complaint "without prejudice."

¶ 5 On October 30, 2014, the defendant filed a motion for summary judgment as to count I of the plaintiff's second amended complaint. On December 29, 2014, the circuit court granted summary judgment in favor of the defendant. On January 29, 2015, the plaintiff filed a notice of appeal from the September 19, 2014, order and the December 29, 2014, order.

¶ 6 II. ANALYSIS

¶ 7 As an initial matter, we must determine whether this court has jurisdiction to review the issues presented. See *Cangemi v. Advocate South Suburban Hospital*, 364 Ill. App. 3d 446, 453 (2006) (this court has a duty to *sua sponte* determine whether we have jurisdiction to decide the issues presented). In the circuit court's September 19, 2014, order, it dismissed count II of the plaintiff's second amended complaint "without prejudice." In its December 29, 2014, order, the circuit court granted summary judgment on count I, without referencing the dismissal of count II or appeal of the order.

¶ 8 This court's jurisdiction to decide appeals comes from the Illinois Constitution and the rules of our supreme court. Section 6 of article VI of the Illinois Constitution states in pertinent part as follows: "Appeals from final judgments of a Circuit Court are a matter of right to the Appellate Court in the Judicial District in which the Circuit Court is located ***. The Supreme Court may provide by rule for appeals to the Appellate Court from other than final judgments of Circuit Courts." Ill. Const. 1970, art. VI, § 6. In other words, this court's jurisdiction encompasses judgments, orders, or decrees that qualify as final, but this court "is without jurisdiction to review judgments, orders or decrees which are not final," except as provided by supreme court rule. *Almgren v. Rush-Presbyterian-St. Luke's Medical Center*, 162 Ill. 2d 205, 210 (1994).

¶ 9 A judgment or order is final and appealable if it terminates the litigation between the parties on the merits, and sets, fixes, or disposes of the rights of the parties, whether upon the entire controversy or upon some definite and separate part thereof, so that if the judgment or order is affirmed, the trial court need only execute it. *In re A.H.*, 207 Ill. 2d 590, 594 (2003); *Kellerman v. Crowe*, 119 Ill. 2d 111, 115 (1987). " 'The ultimate question to be decided in each case is whether the judgment fully and finally disposes of the rights of the parties to the cause so that no material controverted issue remains to be determined.' " *Wilkey v. Illinois Racing Board*, 96 Ill. 2d 245, 249 (1983) (quoting *Cory Corp. v. Fitzgerald*, 403 Ill. 409, 415 (1949)).

¶ 10 "Our supreme court has determined that the language 'without prejudice' in a dismissal order 'clearly manifests the intent of the court that the order not be considered final and appealable' (*Flores v. Dugan* (1982), 91 Ill. 2d 108, 114 ***), and it has been

held that an order is 'on its face a nonappealable order because of the recitation of "without prejudice." ' *Arnold Schaffner, Inc. v. Goodman* (1979), 73 Ill. App. 3d 729, 731." *Renzulli v. Zoning Board of Appeals of the City of Wood Dale*, 176 Ill. App. 3d 661, 663 (1988).

¶ 11 Because the circuit court's order of September 19, 2014, dismissed the plaintiff's action in count II "without prejudice," it is not deemed final for purposes of appeal. *DeLuna v. St. Elizabeth's Hospital*, 147 Ill. 2d 57, 76 (1992); *Paul H. Schwendener, Inc. v. Jupiter Electric Co.*, 358 Ill. App. 3d 65, 73 (2005). By its very terms, our jurisdiction under Supreme Court Rule 301 is limited to review of appeals from final orders. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994) (final judgment of a circuit court in a civil case is appealable). Therefore, we lack jurisdiction to review the circuit court's dismissal of count II on September 19, 2014.

¶ 12 Accordingly, the circuit court's December 29, 2014, order entering summary judgment on count I disposed of fewer than all of the claims and was not instantly appealable. *Dubina v. Mesirow Realty Development, Inc.*, 178 Ill. 2d 496, 502-03 (1997) ("a final order disposing of fewer than all of the claims in an action is not instantly appealable"). Supreme Court Rule 304(a) provides that in an action involving multiple claims for relief, "an appeal may be taken from a final judgment as to one or more but fewer than all of the *** 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." Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010). "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); see also *AAA Disposal Systems, Inc. v. Aetna Casualty & Surety Co.*, 355 Ill. App. 3d 275, 281 (2005).

¶ 13 Because the circuit court's order entering summary judgment on count I adjudicated fewer than all the claims involved in the action, without any further findings regarding appeal of the order, it was also not appealable. "Such an order does not become appealable until all of the claims in the multiclaim litigation have been resolved." *Dubina*, 178 Ill. 2d at 503. "Once the entire action is terminated, all final orders become appealable ***." *Id.*; see also Ill. S. Ct. R. 301 (eff. Feb. 1, 1994). Because the circuit court's orders in question were not final, we lack appellate court jurisdiction to review the issues presented.

¶ 14 III. CONCLUSION

¶ 15 For the reasons stated, we dismiss the plaintiff's appeal for lack of appellate court jurisdiction.

¶ 16 Appeal dismissed.