2016 IL App (1st) 151472-U

FIFTH DIVISION
September 9, 2016

No. 1-15-1472

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

ARLENE ATLAS, MARSHALL ATLAS, HBZ, INC., TAFH, LLC, Plaintiffs-Appellants, v. MAYER HOFFMAN MCCANN, P.C., CBIZ, INC., CBIZ MHM, LLC, ROBERT WILNEFF, MARIA CRAWFORD, JUSTIN BIAGI, and JUDITH BERGER, Defendants, (Mayer Hoffman McCann, P.C., CBIZ, Inc., CBIZ MHM, LLC, Robert Wilneff, Maria Crawford, and Justin Biagi, Defendants-Appellees).	)	Appeal from the Circuit Court of Cook County No. 13 L 7057 Honorable Patrick J. Sherlock, Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Justices Lampkin and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Appeal dismissed where the circuit court dismissed only four of six counts of plaintiffs' third amended complaint and the order did not contain language

sufficient to confer appellate jurisdiction pursuant to Illinois Supreme Court Rule 304(a).

¶ 2 Plaintiffs Marshall Atlas (Marshall), Arlene Atlas (Arlene), HBZ, Inc. (HBZ), and TAFH, LLC (TAFH) (collectively plaintiffs) appeal the circuit court of Cook County's dismissal of their accounting malpractice complaint against defendants Mayer Hoffman McCann, P.C. (Mayer), CBIZ, Inc. (CBIZ), CBIZ MHM, LLC (CBIZ MHM), Robert Wilneff (Wilneff), Maria Crawford (Crawford), and Justin Biagi (Biagi) (collectively the Mayer defendants)[1] pursuant to section 2-619(a)(9) of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2014)). In their third amended complaint, plaintiffs alleged that Judith Berger (Berger), an employee, embezzled funds which the Mayer defendants should have discovered through their accounting work for plaintiffs and a related company, Salta Group, Inc. (Salta).[2] On appeal, plaintiffs contend that the circuit court committed reversible error when it dismissed their accounting malpractice complaint because: (1) they have standing to bring the lawsuit; (2) the statute of limitations does not bar them from bringing their claims; and (3) they cannot be imputed in *pari delicto*. For the reasons that follow, we dismiss this appeal for lack of appellate jurisdiction.

¶ 3 BACKGROUND

¶ 4 Because we dismiss this appeal for lack of jurisdiction, we provide only those facts necessary to our resolution of that issue.

¶ 5 On June 18, 2013, Marshall filed a three-count complaint for accounting malpractice

[1] The Mayer defendants fall into two categories: (1) Mayer, the firm that contracted to perform accounting services for plaintiffs; and (2) the remaining accountants and entities who plaintiffs allege are liable for Mayer's acts and omissions under the theories of respondent superior or joint enterprise liability. As the distinction between these defendants is not relevant to this appeal, we will refer to them collectively as the Mayer defendants.

[2] Salta is not a party to this appeal and has never been named as a defendant in any of the complaints due to a pending bankruptcy petition.

against Mayer. Shortly after filing the initial complaint, Marshall was permitted to file a first amended complaint naming HBZ and TAFH as plaintiffs and naming CBIZ, CBIZ MHM, Wilneff, Crawford, and Biagi as defendants. Berger was named as a nominal defendant. The record reflects an affidavit of service was filed for Berger; however, she never filed an appearance. Subsequently the Mayer defendants appeared in the matter and, on March 10, 2014, the circuit court dismissed the first amended complaint without prejudice on the Mayer defendants' motion. The second amended complaint was subsequently dismissed with prejudice; however, upon consideration of plaintiff's postjudgment motion, the circuit court allowed plaintiffs to file a third amended complaint.

¶ 6 The operative pleading in this matter, the third amended complaint (complaint), was filed on October 14, 2014. The complaint set forth four counts against the Mayer defendants for: (I) violation of the Illinois Public Accounting Act; (II) negligence; (III) willful and wanton negligence; and (IV) breach of fiduciary duty. The complaint further set forth two counts against Berger for negligence and conversion (counts V and VI). The counts of the complaint were premised on the following allegations.

¶ 7 According to the complaint, plaintiffs were in the business of purchasing delinquent real estate tax certificates from local governments. Marshall operated this business through three companies: (1) Salta; (2) HBZ; and (3) TAFH (the companies). Posting the tax certificates as collateral, plaintiffs would finance the purchases of other tax certificates with bank loans. When the homeowners finally paid their past-due taxes, plaintiffs would redeem the tax certificates. The local governments would then repay plaintiffs their purchase price, plus interest and fees, which were in excess of the amount of interest owed to the bank. Plaintiffs would use the money to repay the banks and keep the balance as profit. Berger was employed in an administrative

capacity for the companies and owned 25% of HBZ and 20% of TAFH.

¶ 8 Since 1998, Mayer or its predecessor, prepared quarterly audits for Salta and did the bookkeeping, accounting, financial statements, and compilation reports for the companies. In these audits, the Mayer defendants consistently concluded that the companies' financial statements fairly represented their financial position and that the audits were in conformity with generally accepted accounting principles. As a result, Marshall and Arlene relied on the financial statements, compilation reports, and audits prepared by the Mayer defendants and continued to personally guarantee the banks' loans. However, unbeknownst to plaintiffs, for numerous years Berger had been providing the banks with duplicate tax certificates that had already been redeemed or had been used as collateral for other loans. Berger then converted the companies' funds for her own use.

¶ 9 Plaintiffs alleged that through the audits, the Mayer defendants should have identified the numerous misrepresentations contained in the companies' financial statements. According to plaintiffs, the Mayer defendants breached the following duties which were "standard auditing procedure": (1) to check the tax certificates and compare them to the lender banks' records; (2) to identify discrepancies between the tax certificates, bank records, and the companies' records; (3) to obtain evidence from the various government entities specifically related to the tax certificates and compare that evidence to the companies' records; (4) to determine whether the tax certificates were redeemed; (5) to determine whether the tax certificates had expired; (6) to determine whether the companies repaid the bank loans once the companies obtained the funds; and (7) to uncover potential mistakes in the companies' books regarding the susceptibility of the companies' financial statements to fraud. Plaintiffs alleged these duties extended to Marshall and Arlene because the Mayer defendants knew they relied upon the financial reports,

compilation reports, and audits in order to determine whether to guarantee the loans. The complaint further alleged that the Mayer defendant's breach of these duties proximately caused plaintiffs damages.

¶ 10 Regarding Berger, plaintiffs alleged that, without their knowledge or consent, she "was lining her own pockets at Plaintiff's expense" and was "secretly acting adversely to Plaintiffs and entirely for her own purposes." As a result of her willful and malicious conversion of plaintiffs' funds, they suffered damages. Plaintiffs further alleged that Berger had a duty to act reasonably in maintaining accurate records from the companies and that her failure to do so proximately caused them damages. No exhibits were attached to the complaint.

¶ 11 On November 12, 2014, the Mayer defendants filed a motion to dismiss pursuant to section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2014)). In addition to arguing that plaintiffs' allegations were insufficient, the Mayer defendants further asserted that pursuant to section 2-619: (1) plaintiffs lacked standing to present their claims; (2) the allegations of the complaint were barred by the doctrines of *in pari delicto* and imputation; and (3) the claims were barred by the statute of limitations set forth in the contracts. In support of its motion, the Mayer defendants attached numerous exhibits, including the contracts between the parties, and an affidavit of Wilneff attesting to the veracity of certain invoices.

¶ 12 After the matter was fully briefed and argued, on January 13, 2015, the circuit court entered a 12-page written order addressing the merits of each of the Mayer defendant's section 2-619 arguments. According to the written order, the circuit court found that each of the Mayer defendants' "Section 2-619 grounds are well-taken and mandate dismissal of Counts I-IV of the third amended complaint with prejudice." However, the circuit court further found that the Mayer defendants "did not cross their T's and dot their I's in connection with providing extrinsic

evidence in support of their Section 2-619 motion" and accordingly entered and continued the motion to dismiss for the Mayer defendants to file a revised affidavit. The circuit court also permitted plaintiffs to file any objections to the new material provided by the Mayer defendants.

¶ 13 The Mayer defendants subsequently filed a new affidavit from Wilneff. In response, plaintiffs filed a motion to strike the affidavit on the basis that it failed to comply with Illinois Supreme Court Rules 191(a) and 236. On April 16, 2015, the circuit court found the new affidavit complied with the relevant rules, denied plaintiff's motion to strike, and, with the support of the new affidavit, dismissed the third amended complaint with prejudice. This appeal timely followed.

¶ 14 ANALYSIS

¶ 15 Although neither party challenges jurisdiction, we have an independent obligation to consider our jurisdiction and to dismiss when jurisdiction is lacking. *Fabian v. BGC Holdings, LP*, 2014 IL App (1st) 141576, ¶ 12. Resolution of this appeal requires consideration of Illinois Supreme Court Rules 301 and 304. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); Ill. S. Ct. R. 304 (eff. Feb. 26, 2010). Rule 301 provides, "Every final judgment of a circuit court in a civil case is appealable as of right. The appeal is initiated by filing a notice of appeal. No other step is jurisdictional. An appeal is a continuation of the proceeding." Ill. S. Ct. R. 301 (eff. Feb. 1, 1994). Our supreme court defines a final judgment as "a determination by the court on the issues presented by the pleadings which ascertains and fixes absolutely and finally the rights of the parties in the lawsuit." *Flores v. Dugan*, 91 Ill. 2d 108, 112 (1982). In other words, a final order is one that "resolve[s] every right, liability or matter raised." *Marsh v. Evangelical Covenant Church of Hinsdale*, 138 Ill. 2d 458, 465 (1990). "A dismissal with prejudice is usually considered a final judgment" (*Dubina v. Mesirow Realty Development, Inc.*, 178 Ill. 2d 496, 502

(1997)) as it indicates that the plaintiff will not be allowed to amend his complaint, thereby terminating the litigation (*J. Eck & Son, Inc. v. Reuben H. Donnelley Corp.*, 188 Ill. App. 3d 1090, 1093 (1989)).

¶ 16 In this case, plaintiff maintains we have jurisdiction pursuant to Rule 301 and Rule 303, as the circuit court's dismissal of the third amended complaint was a final order. See Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); Ill. S. Ct. R. 303 (eff. Jan. 1, 2015). The dismissal of a claim with prejudice, however, is not always immediately appealable. *Dubina*, 178 Ill. 2d at 502. Illinois 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. Such a finding may be made at the time of the entry of the judgment or thereafter on the court's own motion or on motion of any party. *** 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).

A written finding pursuant to Rule 304(a) is required; however, "where appeal is sought pursuant to Rule 304(a) from a judgment which defeats a claim or is in the nature of a dismissal, the written finding is sufficient only if it refers to appealability." *In re Application of Du Page County Collector*, 152 Ill. 2d 545, 551 (1992). Without a Rule 304(a) finding, a final order disposing of fewer than all of the claims in an action is not instantly appealable. *Dubina*, 178 Ill.

2d at 502-03. Such an order does not become appealable until all of the claims in the multiclaim litigation have been resolved. *Id.* at 503. Once the entire action is terminated, all final orders become appealable under Rule 301. *Id.* (citing *Marsh*, 138 Ill. 2d at 464).

¶ 17 Here, the trial court's order of April 16, 2015, is not a final judgment as it did not dispose of all of the counts of the third amended complaint. While the April 16, 2015, order stated that, "The third amended complaint is dismissed with prejudice," it also incorporated by reference the circuit court's order of January 13, 2015, which expressly addressed the merits of defendant's motion to dismiss. In the January 13, 2015, order, the circuit court found defendants' arguments pursuant to section 2-619 of the Code to be "well-taken and mandate dismissal of Counts I-IV of the third amended complaint with prejudice." Considering the circuit court's orders along with the arguments presented in support of the motion to dismiss, it is apparent that the circuit court did not dismiss the third amended complaint in its entirety, as counts V and VI against Berger remained.

¶ 18 Moreover, plaintiffs sought relief based on the same operative facts as those forming the basis for the surviving counts. In fact, counts V and VI were premised on general allegations, applicable to all of the counts, in which plaintiffs asserted that the Mayer defendants' negligence contributed to their inability to discover Berger's negligence. Plaintiffs further alleged that they were unable to discover Berger's conduct due to their reliance on the Mayer defendants to ensure that "misconduct of this sort was not taking place." In addition, plaintiffs alleged the same cause of action against the Mayer defendants as they did Brewer, negligence. See *Prado v. Evanston Hospital*, 72 Ill. App. 3d 622, 625 (1979). Accordingly, the dismissal of the counts against the Mayer defendants only disposed of certain issues relating to the same basic claim. See *Blumenthal v. Brewer*, 2016 IL 118781, ¶ 27.

¶ 19 As previously stated, Rule 304(a) provides that, "[i]f 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." Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010). In this case, plaintiffs named Berger as a defendant and asserted two counts against her in the third amended complaint. The record demonstrates an affidavit of service regarding Berger was filed with the circuit court, but Berger had not filed an appearance in the matter. Berger was never dismissed from the suit, nor was any judgment for or against Berger ever sought by plaintiffs or entered by the circuit court. Despite the fact that Berger did not appear in the matter, she is still a party to this suit for purposes of Rule 304(a). See *Kral v. Fredhill Press Co., Inc.*, 304 Ill. App. 3d 988, 993 (1999); *Zak v. Allson*, 252 Ill. App. 3d 963, 965 (1993). Indeed, the Mayer defendants' motion to dismiss specifically sought dismissal of the claims relating to them, regardless of their bare assertion in the prayer for relief that the complaint be dismissed in its entirety. Thus, the circuit court decision granting the Mayer defendants' motion to dismiss resulted in an order that adjudicated fewer than all the rights and liabilities of the parties and, therefore, was nonfinal. See *Coryell v. Village of La Grange*, 245 Ill. App. 3d 1, 6 (1993); *Arachnid, Inc. v. Beall*, 210 Ill. App. 3d 1096, 1103-04 (1991).

¶ 20 Furthermore, there is no language whatsoever in the circuit court's April 16, 2015, order that indicates the order was final and appealable nor does the record reflect that plaintiffs requested such language be added to the order. Pursuant to Rule 304(a), the order is not appealable in the absence of 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); see *Du Page County Collector*, 152 Ill. 2d at 551 (where an appeal is sought pursuant to Rule 304(a) from a

judgment that is in the nature of a dismissal, the written finding is sufficient only if it refers to appealability). The relevant order here merely stated the third amended complaint was dismissed with prejudice. This language fails to satisfy the requirements of Rule 304(a). See *Palmolive Tower Condominiums, LLC v. Simon*, 409 Ill. App. 3d 539, 544 (2011); *Coryell*, 245 Ill. App. at 5.

¶ 21 We find a passage from this court's decision *Davis v. Loftus*, 334 Ill. App. 3d 761, 767 (2002), to be particularly relevant to the case at bar:

> "An appeal from the dismissal of one count of a multicount complaint wastes judicial resources if the plaintiff, in the dismissed count, seeks relief based on the same operative facts as those forming the basis for a surviving count. Permitting a separate appeal in such a case would require the appellate court to relearn, inefficiently, the same set of facts when the case returns for a second appeal following final judgment on all of the claims. [Citations.] Moreover, the appellate court would address facts still at issue in the claims remaining before the trial court, compromising the trial court's position as the primary fact finder. [Citation.]"

¶ 22 In sum, there is no indication in the record reflecting that the circuit court, or the parties, intended to invoke Rule 304(a). See *Du Page County Collector*, 152 Ill. 2d at 550 (it must be "clear from the record that review is sought from a judgment pursuant to Rule 304(a)"). Indeed, plaintiffs' notice of appeal makes no reference to Rule 304(a), and its brief on appeal contends this court's jurisdiction is properly based upon Rule 301 and Rule 303. Therefore, we have no jurisdiction to review the circuit court's orders granting defendants' motion to dismiss, and we must dismiss plaintiffs' appeal.

¶ 23 CONCLUSION

¶ 24 For the foregoing reasons, we dismiss the instant appeal for lack of jurisdiction.

¶ 25 Appeal dismissed.