

No. 1-15-3538

**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  
FIRST JUDICIAL DISTRICT

---

TARGIN SIGN SYSTEMS, INC.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 13 CH 28449
	)	
ILLINOIS CASUALTY COMPANY,	)	Honorable
	)	Neil H. Cohen,
Defendant-Appellee.	)	Judge Presiding.

---

JUSTICE HARRIS delivered the judgment of the court.  
Presiding Justice Connors and Justice Simon concurred in the judgment.

**ORDER**

¶ 1 **Held:** We dismiss appellant's appeal as its notice of appeal was not timely filed. Targin's certificate of service fails to substantially comply with Rule 12(b)(3), thus it is unable to prove the notice was filed within 30 days as required by Rules 303 and 373.

¶ 2 This is an insurance coverage action stemming from a lawsuit brought pursuant to the federal Telephone Consumer Protection Act (hereinafter TCPA). In the underlying action, plaintiff-appellant, Targin Sign Systems, Inc. (hereinafter Targin), filed suit against CYC Golden

Palace, Inc. (hereinafter CYC) alleging CYC sent unsolicited faxes to Targin and others. Eventually, the circuit court in the underlying action certified Targin's motion for class certification. Targin then moved for summary judgment, which the circuit court granted, and a total judgment of \$8,414,374.50 was entered in its favor.

¶ 3 Targin then filed this action in an attempt to collect the judgment from defendant-appellee, Illinois Casualty Company (hereinafter ICC), as CYC's insurance carrier. The parties filed cross-motions for summary judgment. On November 9, 2015, the circuit court granted ICC's motion for summary judgment after finding pursuant to the TCPA policy exclusion in CYC's 2005-06 policy, ICC did not have an obligation to defend the underlying action.

¶ 4 Targin raises several arguments in support of reversing the decision of the circuit court, however, we do not reach the issues raised because a review of the record demonstrates we are without jurisdiction to consider the merits of this appeal. Accordingly, we dismiss the appeal.

¶ 5 **JURISDICTION**

¶ 6 As discussed more fully in the analysis section, we lack jurisdiction to hear this appeal, because Targin failed to comply with the requirements found in Illinois Supreme Court Rules 12, 303, and 373. Ill. S. Ct. R. 12 (eff. Jan. 4, 2013); R. 303 (eff. Jan. 1, 2015); R. 373 (eff. Dec. 29, 2009).

¶ 7 **BACKGROUND**

¶ 8 The underlying class action complaint was filed against CYC on April 7, 2009. The underlying complaint alleged CYC sent unsolicited faxes to fax machines when CYC knew or should have known it did not have the recipients' permission or invitation to send them faxes. The underlying complaint alleged CYC had "a practice of faxing unsolicited advertisements." It further alleged that "[o]n or about March 14, 2006, Defendants faxed an advertisement to

Plaintiff" and "Defendants faxed the same and similar advertisements to Plaintiff and more than 39 other recipients without first receiving the recipients' express permission or invitation."

¶ 9 The underlying complaint alleged three causes of action against CYC. Count I alleged a violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 (West 2014). Count II alleged a cause of action for common law conversion based on CYC's alleged wrongful use of Targin's telephone line, fax toner, fax paper, and employees' time. Finally, count III alleged a cause of action for a violation of the Illinois Consumer Fraud Act based on CYC's alleged unfair business practice of sending unsolicited faxes. 815 ILCS 505/2 (West 2014).

¶ 10 CYC tendered defense of the underlying complaint to ICC for coverage under its insurance policy, but ICC declined the tender and refused to defend CYC in the underlying action. ICC explained a claim arising directly or indirectly out of any actions involving a violation of the TCPA was excluded from coverage. On September 27, 2011, the circuit court granted Targin's motion for class certification. The circuit court certified the following class: "All persons who were sent a facsimile on March 14, 2006, promoting the commercial availability of the goods or services of 'Golden Palace' of Itasca, IL, stating 'The Best Chinese Food in Itasca!' and including the 'Special Luncheons' menu." Following the class certification, Targin moved for summary judgment on the underlying complaint. On November 27, 2012, the circuit court granted the summary judgment motion. The circuit court awarded a total judgment of \$8,414,374.50, including \$2,114,375.50 in prejudgment interest.

¶ 11 Targin then filed this declaratory judgment action against ICC as CYC's insurer. An amended complaint was filed on August 26, 2014. The amended complaint alleged many of the same facts found in the underlying complaint and sought to hold ICC liable for allegedly wrongfully denying coverage to CYC. The amended complaint alleged ICC had a duty to defend

CYC under both its 2004-05 policy and the 2005-06 policy. It further alleged ICC failed to provide adequate notice of the new TCPA exclusion found in the 2005-06 policy. Based on these facts, Targin alleged ICC wrongfully denied coverage and now must indemnify CYC for the judgment entered against it.

¶ 12 ICC filed a motion to dismiss based upon the "Laws Exclusion" section of CYC's policy, attaching an affidavit appending the 2004-05 policy and the notice provided to the insured regarding the "Laws Exclusion" section. The circuit court granted the motion after finding "[t]he underlying complaint was based solely on a facsimile sent March 14, 2006. Therefore, the 2004-05 policy is not at issue in this action." The circuit court further held the notice of the new exclusion was sufficient. This left only Targin's claim related to the 2005-06 insurance policy.

¶ 13 The parties then filed cross-motions for summary judgment. On November 9, 2015, the circuit court granted ICC's motion and denied Targin's. Relying on its previous ruling finding notice to be proper, the circuit court ruled based on the TCPA exclusion found in 2005-06 policy, ICC did not have a duty to defend the underlying action. This appeal followed.

¶ 14 ANALYSIS

¶ 15 Before turning to the merits of Targin's appeal, ICC asks us to review the timeliness of Targin's notice of appeal. ICC initially raised this matter before this court in a motion to dismiss. ICC argued the notice of appeal was filed outside the 30 day timeframe and the certificate of service attached to the notice of appeal failed to comply with the applicable supreme court rules, thus preventing Targin from demonstrating the notice of appeal was timely filed. After receiving ICC's motion to dismiss, Targin moved this court to file a corrected certificate of service *instanter* in an attempt to cure the defects in the original. We allowed Targin to file a corrected

certificate of service and accepted Targin's claim of inadvertence and ministerial error. Accordingly, we denied ICC's motion to dismiss. ICC raises the issue again in its response brief and again urges us to dismiss the appeal for lack of jurisdiction. After a reexamination of the record, we conclude Targin failed to comply with the applicable Illinois supreme court rules regarding the timely filing of a notice of appeal and we are without jurisdiction to consider the merits of this appeal.

¶ 16 This court has an independent obligation to "ascertain its jurisdiction before proceeding in a cause of action, regardless of whether either party has raised the issue." *Secura Ins. Co. v. Illinois Farmers Ins. Co.*, 232 Ill. 2d 209, 213 (2009) citing *People v. Smith*, 228 Ill. 2d 95, 106 (2008). Appellate review is initiated by the filing of a notice of appeal. *General Motors Corp. v. Pappas*, 242 Ill. 2d 163, 176 (2011). A timely filed notice of appeal, "divests the trial court of jurisdiction and confers jurisdiction upon the appellate court." *Harrisburg-Raleigh Airport Authority v. Department of Revenue*, 126 Ill. 2d 326, 341 (1989). "No other step is jurisdictional." Ill. S. Ct. R. 301 (eff. Feb. 1, 1994). Absent a properly filed notice of appeal, an appellate court lacks jurisdiction and must dismiss the appeal. *General Motors*, 242 Ill. 2d at 176.

¶ 17 The timeliness of a party's notice of appeal is governed by our supreme court's rules. *Chand v. Schlimme*, 138 Ill. 2d 469, 476 (1990). Whether or not a party timely filed a notice of appeal is a legal question this court reviews *de novo*. *Huber v. American Accounting Ass'n*, 2014 IL 117293, ¶ 9.

¶ 18 Rule 303 states in relevant part "[t]he notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the final judgment appealed from," or "within 30 days after the entry of the order disposing of the last pending post judgment motion." Ill. S. Ct.

R. 303(a)(1). Here, the circuit court entered summary judgment in favor of ICC on November 9, 2015. Targin did not file a post judgment motion. Thus, Targin would be required to file its notice of appeal within 30 days of November 9, *i.e.* no later than December 9, 2015. Targin does not dispute its notice of appeal was due December 9, nor does it dispute the circuit court of Cook County did not receive the notice of appeal until December 15. Targin argues the notice of appeal was timely under the mail box rule.

¶ 19 Rule 373 address when the notice of appeal is received after the due date, and states, "the time of mailing, \* \* \* shall be deemed the time of filing." Ill. S. Ct. R. 373 (eff. Dec. 29, 2009). However, Rule 373 also provides "[p]roof of mailing \* \* \* shall be as provided in Rule 12(b)(3)." *Id.* Rule 12(b)(3) requires that when service is by mail, service is proved:

by certificate of the attorney, or affidavit of a person other than the attorney, who deposited the document in the mail \* \* \*, stating the time and place of mailing \* \* \*, the complete address which appeared on the envelope or package, and the fact that proper postage \* \* \* was prepaid[.]

Ill. S. Ct. R. 12(b)(3) (eff. Jan. 4, 2013). "Although minor defects will be excused, proof of proper service by mail must be made in substantial compliance with the requirements of Supreme Court Rule 12." *Ingrassia v. Ingrassia*, 156 Ill. App. 3d 483, 502 (1987). Accordingly, Targin's notice of appeal can be deemed timely if it was mailed by December 9, 2015, and the accompanying certificate substantially complies with Rule 12(b)(3).<sup>1</sup>

¶ 20 In its brief before this court, ICC argues Targin's original certificate of service filed with the notice of appeal fails to conform to the requirements of Rule 12(b)(3). ICC specifically points to the failure of Targin to indicate on the certificate that it was also being mailed to the Circuit

---

<sup>1</sup> The record does not contain the mailing envelope.

Court Clerk of Cook County. Targin, in its reply brief, relies on its response to the motion to dismiss and the affidavits of Targin's attorney, David Oppenheim and his assistant Tina Natali, which accompanied Targin's response to the motion to dismiss.

¶ 21 This court's own review of the notice of appeal and certificate of service shows the certificate of service fails to substantially comply with the requirements found in Rule 12(b)(3). Moreover, the affidavits of Oppenheim and Natali do not support the statements contained in the certificate of service and cannot be relied upon.

¶ 22 Rule 12(b)(3) has five requirements and Targin's certificate of service fails to comply with three of those requirements. First, Targin's certificate of service fails to identify the "place of mailing," *i.e.* where the envelope was deposited into the postal system. Ill. S. Ct. R. 12(b)(3) (eff. Jan. 4, 2013). Next, Targin fails to identify "the complete address which appeared on the envelope or package." *Id.* Finally, the certificate of service fails to identify "who deposited the document in the mail or delivered the document to a third-party commercial carrier." *Id.* These defects are fatal to the certificate of service.

¶ 23 Normally, who deposited the envelope would be resolved by the certificate of service itself, however, the affidavits Targin submitted in response to ICC's motion to dismiss contradict the statements in the certificate of service. In the certificate of service, Targin's attorney, David Oppenheim, stated "I served a true and correct copy of this Notice of Appeal and its attachment on the party listed above, via: U.S. mail, by depositing it in the U.S. mail at or before 5:00 p.m., with proper postage prepaid to the address listed below." In contradiction of this statement, in her affidavit, Tina Natali states, "[a]t the request and direction of Mr. Oppenheim, on December 9, 2015, I deposited in the United States Mail \* \* \* the envelopes containing Targin's Notice of Appeal." Oppenheim's affidavit also conflicts with the certificate of service, "[a]t my request and

direction, on December 9, 2015, Ms. Natali deposited in the United States Mail." The contradiction between the certificate of service and the two affidavits regarding who deposited the notice of appeal render all three unreliable.

¶ 24 Based on the above failures, Targin's certificate of service fails to substantially comply with the requirements of Rule 12(b)(3). Without a proper certificate of service, Targin cannot show its notice of appeal complies with the jurisdictional requirement of Rule 303(a). *Secura Ins. Co. v. Illinois Farmers Ins. Co.*, 232 Ill. 2d 209, 217 (2009). Accordingly, this court does not have jurisdiction to consider the merits of Targin's appeal.

¶ 25

#### CONCLUSION

¶ 26 For the foregoing reasons, Targin's appeal is dismissed for lack of jurisdiction.

¶ 27 Appeal dismissed.