2016 IL App (2d) 150190-U
No. 2-15-0190
Order filed March 30, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

CHRISTOPHER MOORE, ELIZABETH MOORE, and BILLIE MacARTHUR,	)	Appeal from the Circuit Court of Lake County.
Plaintiffs-Appellants,	)	
v.	)	No. 06-CH-358
SUSAN FERRIS, ANDREW FERRIS, RICHARD FERRIS, and CITY OF LAKE FOREST,	)	Honorable Mitchell L. Hoffman,
Defendants-Appellants.	)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Presiding Justice Schostok and Justice Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: Appeal dismissed for lack of jurisdiction where order appealed from was nonfinal because it stated that a petition for attorney fees was denied without prejudice.

¶ 2 Plaintiffs, Christopher Moore, Elizabeth Moore, and Billie MacArthur, appeal the circuit court of Lake County's judgment on their fifth amended complaint in favor of defendants, Susan Ferris, Andrew Ferris, Richard Ferris (collectively, the Ferrises), and the City of Lake Forest (the City). For the reasons discussed below, we lack jurisdiction and dismiss this appeal.

¶ 3 This matter comes before us for a second time. The first time, in *Moore v. Ferris*, No. 2-08-0434 (2009) (unpublished order under Supreme Court Rule 23) (*Moore I)*, the same set of plaintiffs sought injunctive relief against only defendant Susan Ferris's alleged violations of certain of the City's ordinances when she proposed and constructed modifications to her residence. The trial court entered a directed finding in favor of the defendant, holding that plaintiffs' suit constituted an improper collateral attack on the City's decision and, even if the suit was proper, the defendant had not violated the City's ordinances. We reversed the trial court's judgment, holding that the defendant had not received the necessary approvals from the City.

¶ 4 Plaintiffs added the remaining defendants to various iterations of their complaint, eventually filing the fifth amended complaint at issue in this appeal. Plaintiffs' fifth amended complaint consisted of three counts: count I, to permanently enjoin the Ferrises to restore the subject property to its original condition; count II, for a declaratory judgment declaring that a 2009 amendment to Lake Forest's Historic Preservation Ordinance was unconstitutional as applied to the subject property, and count III, for a common-law writ of certiorari challenging the City's issuance of certification permitting the Ferrises to proceed with their plans to modify the subject property. On September 20, 2012, the trial court dismissed with prejudice count II of the fifth amended complaint, and plaintiffs acknowledge that this count and its issues are not raised in this appeal. On July 24, 2014, the trial court quashed the petition for a writ of certiorari in count III of the fifth amended complaint, thus finding in defendants' favor. On January 22, 2015, the trial court granted summary judgment in favor of defendants and against plaintiffs on count I of the fifth amended complaint.

¶ 5 On February 18, 2015, plaintiffs filed a petition for attorney fees under the auspices of the Municipal Code (65 ILCS 5/11-13-15 (West 2014)), adding a new postjudgment claim to the action. On February 20, 2015, plaintiffs filed a notice of appeal which was premature in light of the pending fee petition. *John G. Phillips & Associates v. Brown*, 197 Ill. 2d 337, 339-40 (2001) (the timely filing of a postjudgment claim renders a notice of appeal premature absent a Supreme Court Rule 304(a) (eff. Feb. 26, 2010) finding). Plaintiffs did not request and the trial court did not enter a Rule 304(a) finding at that time. On June 18, 2015, the trial court entered an order on the fee petition, which stated, pertinently: "plaintiff's [*sic*] petition for Attorneys' Fees is premature and is therefore denied without prejudice." On July 6, 2015, plaintiffs filed an amended notice of appeal incorporating the June 18, 2015, order into the orders from which plaintiffs sought to appeal.

¶ 6 After the parties filed their appellate briefs, this court, on its own motion, ordered the parties to prepare supplemental briefs on the issue of our appellate jurisdiction as follows: "Determine the effect of the June 18, 2015, order, denying without prejudice plaintiffs' petition for attorneys fees, on appellate jurisdiction." The parties complied and have submitted the requested supplemental briefs.

¶ 7 Following the submission of plaintiffs' initial supplemental brief, the Ferrises promptly moved to strike plaintiffs' supplemental brief as nonresponsive to our order requesting supplemental briefing. Having considered the Ferrises' motion to strike, we deny it, noting that we will disregard as is necessary the material in plaintiffs' briefs that is nonresponsive to our supplemental-briefing order.

¶ 8 Turning now to the question of jurisdiction over this appeal, we make two preliminary observations. First, even though the parties did not initially consider the question of jurisdiction

in their briefs on appeal, we have in independent duty to consider whether we have jurisdiction over an appeal and to dismiss the appeal where that jurisdiction is lacking. *Palmolive Tower Condominiums, LLC v. Simon*, 409 Ill. App. 3d 539, 542 (2011). Upon our direction to consider the issue of jurisdiction, the parties all argue that we do have jurisdiction to consider this appeal. Our second observation, then, is that the parties cannot confer appellate jurisdiction by agreement. *In re Adoption of S.G. v. S.G.*, 401 Ill. App. 3d 775, 780 (2010).

¶ 9 As our supreme court has repeatedly observed, this court only has jurisdiction over final orders, unless specifically authorized by supreme court rules. *Hawes v. Luhr Brothers, Inc.*, 212 Ill. 2d 93, 106 (2004). An order that dismisses a motion without prejudice is nonfinal. *Flores v. Dugan*, 91 Ill. 2d 108, 114 (1982); see also *DeLuna v. St. Elizabeth's Hospital*, 147 Ill. 2d 57, 76 (1992) (an order dismissing an action without prejudice is nonfinal). The trial court dismissed plaintiffs' petition for attorney fees without prejudice, and this is a nonfinal order, leaving a pending claim in the action. Accordingly, because the June 18, 2015, order was nonfinal, we are without jurisdiction to consider this appeal.

¶ 10 The parties assert that we have jurisdiction because the trial court intended to indicate, through its use of the terms, "without prejudice" its desire to allow the case to be resolved on appeal and its openness to revisiting the issue of attorney fees depending on the outcome of the appeal. If this rationale is true, it still does not change our analysis. If the trial court had entered a final order, then we could have resolved the attorney-fees issue on appeal. Depending on the result of the appeal, (for example, a reversal), plaintiffs could have once again raised the issue in the remand; similarly, an affirmance would have ended the matter definitively. The purported rationale of the trial court simply makes no sense.

¶ 11 Our analysis is bolstered by *D'Attomo v. Baumbeck*, 2015 IL App (2d) 140865. In that case, this court noted that, when the trial court includes the phrase, "without prejudice," it is clearly manifesting the intent that the order is not to be considered final and appealable. *Id.* ¶ 23.

¶ 12 Defendants urge that we should look to the effect and substance of the order, and not simply look for particular "magic words," citing to *Schal Bovis, Inc. v. Casualty Insurance Co.*, 314 Ill. App. 3d 562, 568 (1999). While this is true, our supreme court has instructed that this sort of form-over-substance analysis applies to a general order of dismissal; a reviewing court should not engage in an interpretation of a trial court's order which affirmatively indicates on its face that it is not a final order. *Pfaff v. Chrysler Corp.*, 155 Ill. 2d 35, 62-63 (1992) (overruled on other grounds, *ABN AMRO Mortgage Corp. v. McGahan*, 237 Ill. 2d 526 (2010)); see also *D'Attomo*, 2015 IL App (2d) 140865, ¶ 24 (quoting the analysis from *Pfaff*). When the trial court's order contains the phrase, "without prejudice," we are not presented with a situation where it is necessary to look at the substance of the order to determine its finality or lack of finality. *Pfaff*, 155 Ill. 2d at 63; *D'Attomo*, 2015 IL App (2d) 140865, ¶ 24. In light of this court's decision in *D'Attomo* and our supreme court's clear command in *Pfaff*, we determine that defendants' reliance on *Schal Bovis* is misplaced.

¶ 13 We therefore hold that, because the June 18, 2015, was nonfinal, we do not have jurisdiction to consider this appeal. Accordingly, we dismiss plaintiffs' appeal.

¶ 14 Appeal dismissed.