2018 IL App (1st) 172879

No. 1-17-2879

Fourth Division
August 30, 2018

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 DISTRICT

ESAD LIVNJAK, Plaintiff-Appellant, v. RIGHT RESIDENTIAL II FUND 2 LLC, CHRISTOPHER SHAXTED, and UNKNOWN AGENTS OF RIGHT RESIDENTIAL II FUND 2, LLC, Defendants (Right Residential II Fund 2 LLC and Christopher Shaxted, Defendants-Appelles).	)	Appeal from the Circuit Court of Cook County. No. 2016 L 009555 The Honorable John C. Grifin, Judge Presiding.

JUSTICE GORDON delivered the judgment of the court.
Justices McBride and Ellis concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court lacks jurisdiction to consider the instant appeal, where the grant of a postjudgment motion renders the order appealed from a nonfinal order and the order does not contain the findings that are required for an interlocutory appeal.

¶ 2 The instant appeal arises from plaintiff Esad Livnjak's contention that defendants Right Residential II Fund 2 LLC and Christopher Shaxted[1] impermissibly disposed of plaintiff's personal property after a foreclosure action. Plaintiff filed a lawsuit alleging negligence, trespass to chattels, and intentional infliction of emotional distress. Defendant filed a counterclaim, as well as a combined motion to dismiss the complaint pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2016)). The trial court granted the motion to dismiss, including a finding that "[t]his is a final order disposing of this case in its entirety." Plaintiff timely filed a notice of appeal. However, within 30 days of the trial court's order, defendant filed a motion pursuant to section 2-1203 of the Code (735 ILCS 5/2-1203 (West 2016)), requesting modification of the trial court's judgment to remove the above finding because defendant's counterclaim remained pending and therefore, the court's order did not "dispos[e] of this case in its entirety." The trial court granted defendant's motion and removed the final sentence of its order, finding that "this case remains pending and active due to [defendant's] pending counterclaim." Consequently, plaintiff's appeal must be dismissed for lack of jurisdiction.

¶ 3 BACKGROUND

¶ 4 On September 27, 2016, plaintiff filed a five-count complaint against defendant in the circuit court of Cook County after a federal district court declined to exercise supplemental jurisdiction over state-law claims in a federal lawsuit plaintiff had previously filed against defendant. Plaintiff alleged that, on July 28, 2015, the trial court had entered an order of possession in favor of defendant with respect to plaintiff's residence and that, on October 27,

[1] Plaintiff's complaint alleges that defendant Christopher Shaxted is the manager of defendant Right Residential II Fund 2 LLC, and all allegations against defendant Shaxted are in that capacity. Accordingly, we refer to the singular "defendant" and do not differentiate between the two.

2015, defendant arrived at the residence with the Cook County sheriff to evict anyone residing within the property. Plaintiff alleged that no one was present at the residence and that defendant removed all personal property belonging to plaintiff from the residence, which "were then scattered and strewn about in public view." The complaint set forth five causes of action: (1) negligence, (2) trespass to chattels, (3) conversion, (4) bailment, and (5) intentional infliction of emotional distress.

¶ 5 On November 14, 2016, defendant filed a combined motion to dismiss pursuant to section 2-619.1 of the Code, arguing that the negligence count should be dismissed under section 2-619 of the Code (735 ILCS 5/2-619 (West 2014)) because plaintiff could not establish that defendant owed him a duty of care for his personal property following the eviction and that the other counts should be dismissed under section 2-615 of the Code (735 ILCS 5/2-615 (West 2014)) because plaintiff merely recited conclusory allegations with no factual basis.

¶ 6 On November 15, 2016, defendant also filed a counterclaim against plaintiff, alleging that plaintiff initially owned the property, which was the subject of a foreclosure suit by Citimortgage, Inc., that resulted in a judgment of foreclosure and sale. At the auction, defendant was the successful bidder and, on January 5, 2015, an order confirming sale was entered in the foreclosure suit. This order granted defendant possession of the property 30 days after the entry of the order; on January 21, 2015, defendant tendered a 90-day written demand for possession of the property, requiring all occupants to turn over possession of the property by April 21, 2015. However, plaintiff continued to reside at the property despite this written demand and, on October 27, 2015, defendant enforced its order for possession and the sheriff ejected plaintiff from the property. Defendant's counterclaim alleged that plaintiff

wrongfully possessed the property from April 21, 2015, through October 27, 2015, and failed to tender rent or otherwise compensate defendant for the period of time during which he wrongfully possessed the property. Defendant alleged that it was entitled to recover from plaintiff a fair and reasonable sum for the use and occupancy of the property and requested $2800 per month, for a total of $17,398.36.

¶ 7 On January 3, 2017, plaintiff filed a motion to dismiss the counterclaim on the basis of *res judicata*, claiming that defendant could have sought compensation for use and occupancy of the property in a forcible entry and detainer action that defendant had previously filed against plaintiff's son, who had been residing at the property. In response, defendant claimed there was no identity of causes of action or parties, so *res judicata* did not apply.

¶ 8 On February 28, 2017, the trial court granted defendant's motion to dismiss plaintiff's complaint and denied plaintiff's motion to dismiss defendant's counterclaim, both without prejudice, and gave plaintiff leave to file an amended complaint. On March 20, 2017, plaintiff filed an answer and affirmative defenses to the counterclaim.

¶ 9 On March 20, 2017, plaintiff filed an amended complaint and, on April 17, 2017, defendant filed a combined motion to dismiss the amended complaint pursuant to section 2-619.1 of the Code, arguing that plaintiff had failed to remedy the defects of his original complaint. On June 13, 2017, the trial court granted defendant's motion to dismiss the complaint without prejudice and gave plaintiff leave to file a second amended complaint.

¶ 10 On July 11, 2017, plaintiff filed a second amended complaint, which removed the count concerning conversion but otherwise set forth the same causes of action as the prior complaints: (1) negligence, (2) trespass to chattels, (3) bailment, and (4) intentional infliction of emotional distress. On August 3, 2017, defendant filed a combined motion to dismiss the

second amended complaint pursuant to section 2-619.1 of the Code, again arguing that plaintiff had failed to remedy the defects of the prior two complaints. With respect to dismissal under section 2-619, defendant argued that plaintiff had failed to establish that a duty applied with respect to the negligence count; had failed to establish that he had an absolute and unconditional right to his personal property after the completion of a lawful eviction as required for a trespass to chattels; had failed to establish a relationship giving rise to a bailment; and had failed to establish that the disposition of plaintiff's personal property was extreme and outrageous conduct as required for intentional infliction of emotional distress, since the eviction was conducted in accordance with Illinois law. With respect to dismissal under section 2-615, defendant argued that plaintiff had failed to allege extreme and outrageous conduct because he failed to allege that defendant lacked the right to dispose of plaintiff's personal property. In response, plaintiff voluntarily dismissed his count for bailment.

¶ 11 On October 10, 2017, the trial court entered an order granting defendant's motion to dismiss the second amended complaint. In dismissing each count of the complaint, the court found that plaintiff had been given multiple chances to amend his complaint to state a cause of action, but had continually failed to do so. The trial court accordingly ordered:

> "(1) Defendants', Right Residential II – Fund 2 LLC, Christopher Shaxted, and Unknown Agents of Right Residential II – Fund 2 LLC, 2-615 Motion to Dismiss Plaintiff Esad Livnjak's Count IV of Second Amended Complaint is *GRANTED with prejudice*;
>
> (2) Defendants', Right Residential II – Fund 2 LLC, Christopher Shaxted, and Unknown Agents of Right Residential II – Fund 2 LLC, 2-619 Motion to Dismiss

Counts I and II of Plaintiff Esad Livnjak's Second Amended Complaint is *GRANTED with prejudice*;

(3) This is a final order disposing of this case in its entirety." (Emphases in original.)

¶ 12 On November 6, 2017, plaintiff filed a notice of appeal.

¶ 13 On November 9, 2017, defendant filed a motion to modify the October 10, 2017, judgment order pursuant to section 2-1203(a) of the Code. Defendant argued:

"The Order dismisses, with prejudice, all of the claims asserted in this action by Plaintiff, Esad Livnjak ('Livnjak'). [Citation.] Based on said dismissal, the Order then provides that 'This is a final order disposing of this case in its entirety.' [Citation.] However, this final finding in the Order is not entirely accurate because Right Residential has a pending counterclaim (the 'Counterclaim') against Livnjak, which Livnjak has answered. Consequently, the dismissal of Livnjak's claims did not dispose of this case in its entirety because this Court must still adjudicate the Counterclaim. This Motion is thus brought to modify the Order to state that this case remains ongoing based on the Counterclaim."

The record does not indicate that plaintiff filed a response to defendant's motion.

¶ 14 On November 22, 2017, the trial court entered an order on defendant's motion to modify the October 10 order, which provided:

"(1) The motion is granted;

(2) The court's order of Oct. 10, 2017 is amended to delete the final sentence in the order because this case remains pending and active due to Right Residential's pending counterclaim; and

(3) This matter shall be heard on status and presentment of Right Residential's anticipated motion for summary judgment on Dec. 19, 2017 @ 9:00 am in courtroom 1904."

¶ 15 ANALYSIS

¶ 16 On appeal, plaintiff challenges the dismissal of his complaint, arguing that he sufficiently alleged a cause of action for each count in his complaint. However, as an initial matter, we must discuss the question of our jurisdiction to consider plaintiff's claims on appeal. As an appellate court, we are required to consider our jurisdiction, even if the parties do not raise the issue. *A.M. Realty Western L.L.C. v. MSMC Realty, L.L.C.*, 2016 IL App (1st) 151087, ¶ 67. The question of whether we have jurisdiction over the instant appeal presents a question of law, which we review *de novo*. *In re Marriage of Demaret*, 2012 IL App (1st) 111916, ¶ 25; *In re Marriage of Gutman*, 232 Ill. 2d 145, 150 (2008). *De novo* consideration means we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011).

¶ 17 In the case at bar, we find that we lack jurisdiction over plaintiff's appeal. As noted, the trial court's October 10, 2017, order which granted defendants' motion to dismiss plaintiff's complaint in its entirety contained a finding that stated: "[t]his is a final order disposing of this case in its entirety." Plaintiff subsequently filed his notice of appeal on November 6, 2017, within 30 days of the entry of the order. If the order was a final judgment, the filing of plaintiff's notice of appeal would normally vest us with jurisdiction pursuant to Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994) ("Every final judgment of a circuit court in a civil case is appealable as of right.").

¶ 18 However, this order, although labeled a "final order" by the trial court, was not, in fact, a final order. Although the trial court did not mention it in its order, there remained pending defendant's counterclaim, which had been challenged by plaintiff through an earlier motion to dismiss that had been denied, and which was then subsequently answered by plaintiff. The only motion before the trial court at the time of the entry of the October 10 order was defendant's motion to dismiss the second amended complaint—the order was silent as to the counterclaim, which was not at issue. Accordingly, the October 10 order was not a final judgment as it did not dispose of all claims by all parties and, as a result, Rule 301 would not vest us with jurisdiction.

¶ 19 Defendant additionally made this oversight clear to the trial court on November 9, 2017, when defendant filed a motion pursuant to section 2-1203(a) of the Code to modify the October 10, 2017, order to remove the line quoted above that it was a final order. That motion was filed within 30 days of the entry of the October 10 order, as required under the statute. See 735 ILCS 5/2-1203(a) (West 2016) ("In all cases tried without a jury, any party may, within 30 days after the entry of the judgment *** file a motion for a rehearing, or a retrial, or modification of the judgment or to vacate the judgment or for other relief."). Thus, the trial court retained jurisdiction to consider the motion despite the filing of plaintiff's notice of appeal. See *John G. Phillips & Associates v. Brown*, 197 Ill. 2d 337, 343 (2001) ("[T]he circuit court does not completely lose jurisdiction upon the filing of a notice of appeal. It is beyond dispute that the circuit court has jurisdiction to act on a timely post-judgment motion. [Citation.] This is true even if that motion is filed after a notice of appeal ***.").

¶ 20 Under Illinois Supreme Court Rule 303, the filing of this timely postjudgment motion rendered the notice of appeal filed by plaintiff premature and unenforceable:

> "When a timely postjudgment motion has been filed by any party, whether in a jury case or a nonjury case, a notice of appeal filed before the entry of the order disposing of the last pending postjudgment motion, or before the final disposition of any separate claim, becomes effective when the order disposing of said motion or claim is entered." Ill. S. Ct. R. 303(a)(2) (eff. July 1, 2017).

Accordingly, pursuant to Rule 303, plaintiff's notice of appeal, although filed before the postjudgment motion, became effective only upon the trial court's disposition of that motion.[2]

¶ 21 In its order on the postjudgment motion, however, the trial court granted defendant's request and modified the order "to delete the final sentence in the order because this case remains pending and active due to [defendant's] pending counterclaim." Thus, the trial court's modification made it clear that there remained a pending counterclaim and that the order dismissing plaintiff's complaint did not, in fact, dispose of all issues. As plaintiff recognizes in his brief, appeals from final judgments that do not dispose of an entire proceeding are governed by Rule 304, not Rule 301.

¶ 22 Rule 304 provides, in relevant part:

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[2] We note that, under a prior version of Rule 303, the filing of a subsequent postjudgment motion after a notice of appeal "render[ed] the prior notice of appeal of no effect." *John G. Phillips & Associates v. Brown*, 197 Ill. 2d 337, 343 (2001). However, Rule 303(a)(2) was amended "to address cases such as *John G. Phillips & Associates* ***, which dismissed appeals for lack of jurisdiction because the prior version of Rule 303(a)(2) contained no saving provision for premature notices of appeal." *Hollywood Boulevard Cinema, LLC v. FPC Funding II, LLC*, 2014 IL App (2d) 131165, ¶ 21 (citing Ill. S. Ct. R. 303, Committee Comments (adopted Mar. 16, 2007)). The comments to Rule 303 explain that "[s]ubparagraph (a)(2) protects the rights of an appellant who has filed a 'premature' notice of appeal by making the notice of appeal effective when the order denying a postjudgment motion or resolving a still-pending separate claim is entered." Ill. S. Ct. R. 303, Committee Comments (adopted Mar. 16, 2007).

> "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. *** 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. Mar. 3, 2016).

In the case at bar, the trial court ultimately made no such finding that the order was final and appealable. See Ill. S. Ct. R. 304(a) (eff. Mar. 3, 2016). Indeed, it effectively made the *opposite* of such a finding, by expressly finding that "this case remains pending and active due to [defendant's] pending counterclaim." Accordingly, pursuant to the express terms of Rule 304, the October 10 order is not appealable and we lack jurisdiction to consider plaintiff's appeal. See *Stasko v. City of Chicago*, 2013 IL App (1st) 120265, ¶ 28 (finding no jurisdiction where counterclaim remained pending and trial court did not make any findings pursuant to Rule 304(a)); *City of Champaign v. Madigan*, 2013 IL App (4th) 120662, ¶ 21 (finding no jurisdiction where trial court order left unresolved issues of attorney fees and a counterclaim and there was no formal finding under Rule 304(a)); *Willis v. United Equitable Insurance Co.*, 2017 IL App (1st) 162308, ¶ 3 (noting that the appellate court had previously found that it lacked jurisdiction where the trial court had not entered an order disposing of a counterclaim and the order appealed from lacked a Rule 304(a) finding).

¶ 23 We note that Rule 304(b) provides several types of orders that are appealable in the absence of a Rule 304(a) finding. See Ill. S. Ct. R. 304(b) (eff. Mar. 8, 2016). These orders consist of:

> "(1) A judgment or order entered in the administration of an estate, guardianship, or similar proceeding which finally determines a right or status of a party.
>
> (2) A judgment or order entered in the administration of a receivership, rehabilitation, liquidation, or other similar proceeding which finally determines a right or status of a party and which is not appealable under Rule 307(a).
>
> (3) A judgment or order granting or denying any of the relief prayed in a petition under section 2-1401 of the Code of Civil Procedure.
>
> (4) A final judgment or order entered in a proceeding under section 2-1402 of the Code of Civil Procedure.
>
> (5) An order finding a person or entity in contempt of court which imposes a monetary or other penalty.
>
> (6) A custody or allocation of parental responsibilities judgment or modification of such judgment entered pursuant to the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/101 *et seq.*) or Illinois Parentage Act of 2015 (750 ILCS 46/101 *et seq.*)." Ill. S. Ct. R. 304(b) (eff. Mar. 8, 2016).

The order in the case at bar does not fall under any of these exceptions. Accordingly, at a minimum, a valid Rule 304(a) finding was required in order to vest this court with jurisdiction and that finding would have to be based on the fact that the order was a final and

appealable order. In the absence of such a finding and determination, we must dismiss plaintiff's appeal for lack of jurisdiction.[3]

¶ 24 Additionally, as we have explained, a Rule 304(a) finding, alone, does not render an order appealable. As our supreme court has noted, "[b]y its terms, Rule 304(a) applies only to final judgments or orders. The special finding contemplated by the rule will make a final order appealable" only if the order is actually a final order. *Blumenthal v. Brewer*, 2016 IL 118781, ¶ 24. "If the order is in fact not final, inclusion of the special finding in the trial court's order cannot confer appellate jurisdiction. [Citation.]" *Blumenthal*, 2016 IL 118781, ¶ 24; *EMC Mortgage Corp. v. Kemp*, 2012 IL 113419, ¶ 14; *Kellerman v. Crowe*, 119 Ill. 2d 111, 115 (1987). To be considered final and appealable for purposes of Rule 304(a), "a judgment or order must terminate the litigation between the parties on the merits of the cause, so that, if affirmed, the trial court only has to proceed with execution of the judgment." *Blumenthal*, 2016 IL 118781, ¶ 25 (citing *Kellerman*, 119 Ill. 2d at 115).

¶ 25 Where causes of action merely advance different analytical approaches for reaching the same result or are simply different iterations of the same claim, they are not considered "distinct and separate" such that dismissal of one cause of action becomes appealable under Rule 304(a). *Blumenthal*, 2016 IL 118781, ¶ 26. "[W]here one claim based on the same operative facts is stated differently in multiple counts, the dismissal of fewer than all counts is not a final judgment as to any of the party's claims as required by Rule 304(a)." *Blumenthal*, 2016 IL 118781, ¶ 27. Similarly, "where an order disposes only of certain issues relating to the same basic claim, such a ruling is not subject to review under Rule 304(a)."

[3] We note that plaintiff's appeal is also not an interlocutory appeal that is appealable as of right pursuant to Illinois Supreme Court Rule 307 (eff. Nov. 1, 2017), and plaintiff does not make the argument that it is.

Blumenthal, 2016 IL 118781, ¶ 27. Thus, in addition to containing the required Rule 304(a) language, the order appealed from must also be a final order that terminates the litigation with respect to a distinct claim in order to vest the appellate court with jurisdiction. Compare, *e.g.*, *Blumenthal*, 2016 IL 118781, ¶¶ 25-26 (finding circuit court's dismissal of certain counts of counterclaim was not a final judgment because they arose from same set of operative facts and sought same relief as the underlying cause of action), with *Toushin v. Ruggiero*, 2015 IL App (1st) 143151, ¶ 5 (finding jurisdiction where trial court reserved ruling on counterclaim and made Rule 304(a) finding), and *Royalty Farms, LLC v. Forest Preserve District of Cook County*, 2017 IL App (1st) 161409, ¶¶ 21-22 (finding that order dismissing one count of counterclaim that contained Rule 304(a) finding was a final judgment that finally disposed of a separate claim).

¶ 26 CONCLUSION

¶ 27 Since defendant's counterclaim remains pending in the instant litigation and the trial court did not make any valid findings pursuant to Rule 304(a) concerning the appealability of the dismissal order, we lack jurisdiction to consider the merits of plaintiff's claims on appeal and must dismiss plaintiff's appeal for lack of jurisdiction.

¶ 28 Dismissed for lack of jurisdiction.