

No. 1-17-2929

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

ALYSSA MOGUL and JOEY MOGUL,)	
as Co-Executors of the Estate of HONOR B.)	Appeal from the
MOGUL, deceased, ALYSSA MOGUL,)	Circuit Court of
individually, JOEY MOGUL, individually, and)	Cook County.
STEVEN MOGUL, individually,)	
)	
Plaintiffs)	
)	
(Alyssa Mogul, individually, Joey Mogul,)	No. 15 L 5069
individually, and Steven Mogul, individually,)	
Plaintiffs-Appellants,))	
)	
v.)	
)	
SCI ILLINOIS SERVICES, INC., an Illinois)	
corporation d/b/a MEMORIAL PARK)	
CEMETERY, and SCI INTERNATIONAL)	Honorable
CORPORATION, a foreign corporation,)	James E. Snyder,
)	Judge Presiding.
Defendants-Appellees.)	

JUSTICE CONNORS delivered the judgment of the court.
Justices Cunningham and Delort concurred in the judgment.

ORDER

¶ 1 *Held:* We lack jurisdiction to determine the merits of plaintiffs’ appeal where the two orders appealed from were not final and appealable because the first order did not dispose of all claims and the subsequent order contained the words “without prejudice”; appeal dismissed.

¶ 2 Plaintiffs, Alyssa Mogul, Joey Mogul, and Steven Mogul, individually, appeal from the trial court's order granting the motion to dismiss brought by defendants, SCI Illinois Services, Inc., d/b/a Memorial Park Cemetery, and SCI International Corporation, for failure to state a claim for intentional infliction of emotional distress (IIED) and negligent infliction of emotional distress (NIED), and from an order that subsequently dismissed the matter without prejudice. Plaintiffs argue that the trial court erred because their fourth amended complaint alleged sufficient facts to state claims for IIED and NIED based on defendants' resale of burial plots originally purchased by plaintiffs' mother over 10 years prior to her passing, but that plaintiffs did not discover until the day after their mother's death. For the following reasons, we find that we lack jurisdiction to consider the merits of this appeal, and dismiss.

¶ 3 **BACKGROUND**

¶ 4 Plaintiffs filed their original complaint in circuit court on May 8, 2015. After a series of motions to dismiss, plaintiffs filed their fourth amended complaint on September 9, 2016. Plaintiffs' fourth amended complaint is the subject of this appeal, and contains counts for breach of contract¹, fraud in the inducement, IIED, NIED, injunctive relief, and a claim pursuant to the Illinois Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505/1 *et seq.* (West 2012)). On October 11, 2016, defendants filed a motion to dismiss, strike, and/or compel arbitration of plaintiffs' fourth amended complaint, alleging that plaintiffs' complaint was still deficient. Relevant to this appeal, defendants moved to dismiss plaintiffs' IIED and NIED counts pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2012)), arguing that the complaint failed to state a claim upon which relief

¹ Plaintiffs' counts for breach of contract, fraud in the inducement, and injunctive relief were "re-pled for purposes of preserving Plaintiffs' appellate rights."

could be granted because plaintiffs failed to allege facts demonstrating, *inter alia*, extreme and outrageous conduct by defendants.

¶ 5 On February 6, 2017, the trial court granted in part and denied in part defendants' motion to dismiss, strike, or compel arbitration of plaintiffs' fourth amended complaint. In relevant part, the court dismissed plaintiffs' IIED and NIED counts for failure to state a claim upon which relief could be granted, struck plaintiffs' class allegations, and denied defendants' motion to dismiss for failure to state a claim as to plaintiffs' Consumer Fraud Act claim. The court also ordered defendants to answer plaintiffs' Consumer Fraud Act count by February 27, 2017.

¶ 6 On March 8, 2017, defendants filed a motion for reconsideration and/or clarification of the order entered on February 6, 2017, requesting that the court reconsider and/or clarify whether plaintiffs' Consumer Fraud Act claim was subject to the arbitration clause because the court's February 6, 2017, order was silent on that issue. On March 23, 2017, the court granted defendants' motion to reconsider and/or clarify, and dismissed plaintiffs' Consumer Fraud Act claim to arbitration without prejudice and over plaintiffs' objection. On April 21, 2017, plaintiffs filed a motion to reconsider the March 23, 2017, order, arguing that the Consumer Fraud Act claim was distinct from the arbitrable claims that were previously dismissed by the trial court. Plaintiffs never filed a motion to reconsider the court's dismissal of the IIED and NIED counts.

¶ 7 On June 1, 2017, the court granted plaintiffs' motion to reconsider, allowing the Consumer Fraud Act claim to remain in circuit court, and extending the time for defendants to answer that count until June 29, 2017. Defendants then filed their timely notice of interlocutory appeal on June 30, 2017, stating that they sought to appeal "the June 1, 2017 Order ***, granting Plaintiffs' Motion for Reconsideration of the Circuit Court's March 23, 2017 Order compelling

arbitration of Plaintiff's Claim under the [Consumer Fraud Act]." This court issued its decision in appeal No. 1-17-1570 on September 8, 2017, which reversed the circuit court's decision that allowed plaintiffs' Consumer Fraud Act count to remain in the circuit court. See *Mogul v. SCI Illinois Services, Inc.*, 2017 IL App (1st) 171570-U, ¶ 24.

¶ 8 On September 22, 2017, the circuit court entered an order continuing the matter to October 26, 2017, for a case management conference. On October 26, 2017, the circuit court entered an order stating, "This matter, coming before the court for status, the court being fully advised, it is hereby ordered: This matter is dismissed without prejudice." Plaintiffs filed their notice of appeal in the instant matter on November 20, 2017, seeking to appeal the portion of the circuit court's February 6, 2017, order that dismissed plaintiffs IIED and NIED counts, counts III and IV, respectively, and the October 26, 2017, order dismissing the matter.

¶ 9 ANALYSIS

¶ 10 Although both parties assert that this court has jurisdiction to review this appeal, "an appellate court has an independent duty to consider whether or not it has jurisdiction to hear an appeal." *A.M. Realty Western L.L.C. v. MSMC Realty, L.L.C.*, 2016 IL App (1st) 151087, ¶ 67.

¶ 11 This court's jurisdiction, except in interlocutory scenarios that are not applicable to this case, is limited to review of final orders of a trial court. *Flores v. Dugan*, 91 Ill. 2d 108, 112 (1982). An order dismissing a complaint without prejudice is not deemed final for purposes of appeal. *In re Tiona W.*, 341 Ill. App. 3d 615, 619-20 (2003). "Our Supreme Court has indicated 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.' " *O'Hara v. State Farm Mutual Automobile Ins. Co.*, 137 Ill. App. 3d 131, 134 (1985) (quoting *Flores*, 91 Ill. 2d at 114). "[A] dismissal 'without prejudice' signals that there was no final decision on the merits and that the

plaintiff is not barred from refiling the action.” *Richter v. Prairie Farm Dairy, Inc.*, 2016 IL 119518, ¶ 24. Notwithstanding the foregoing, we must look to the substance, rather than the form of the order in question in order to decide whether it is final for purposes of appeal. *Tiona W.*, 341 Ill. App. 3d at 620.

¶ 12 Here, plaintiffs’ November 20, 2017, notice of appeal stated that plaintiffs brought this appeal pursuant to Illinois Supreme Court Rule 303 (eff. Jul. 1, 2017), “from the Orders entered on February 6, 2017, dismissing Counts III and IV of the Plaintiffs’ Fourth Amended Complaint and the Order entered on October 26, 2017, which dismissed this matter.” Rule 303 states that, “[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.” Ill. S. Ct. R. 303 (eff. Jul. 1, 2017). The circuit court’s February 6, 2017, order was entered well over 30 days prior to the filing of plaintiffs’ notice of appeal on November 20, 2017. Plaintiffs could not, therefore, timely appeal the circuit court’s February 6, 2017, order under Rule 303 through its November 20, 2017, notice of appeal. Further, the circuit court’s February 6, 2017, order was not instantly appealable because it did not dispose of all of plaintiffs’ claims², and did not contain language pursuant to Rule 304(a) (eff. Mar. 8, 2016). See *Dubina v. Mesirow Realty Development, Inc.*, 178 Ill. 2d 496, 502-03 (1997) (recognizing that, “Without a 304(a) finding, a final order disposing of fewer than all of the claims in an action is not instantly appealable. Such an order does not become appealable until all of the claims in the multicclaim litigation have been resolved.”).

¶ 13 Possibly knowing that they could not appeal the February 6, 2017, order, plaintiffs filed their notice of appeal on November 20, 2017, seeking to appeal the court’s October 26, 2017, decision, for two reasons: (1) an appeal brought on November 20, 2017, from an order entered

² The February 6, 2017, order did not dispose of all of plaintiffs’ claims because it did not dismiss plaintiffs’ Consumer Fraud Act claim, and ordered defendants to answer that count by February 27, 2017.

on October 26, 2017, would be timely under Rule 303; and (2) plaintiffs believed that the October 26, 2017, order was final and appealable because it purported to dismiss this matter, and presumably, to dispose of all claims. However, such a belief is erroneous because the order specifically included the words “without prejudice” which indicates that the circuit court did not intend for the order to be final and appealable. See *O’Hara*, 137 Ill. App. 3d at 134.

¶ 14 Here, the circuit court’s October 26, 2017, order stated “This matter is dismissed without prejudice.” The order does not explain, and the parties provide no other indication regarding, the “matter” to which the court is making reference. If the court intended the “matter” to include the entirety of the case, and further intended that the dismissal be final and appealable, then there was no reason for the October 26, 2017, order to include “without prejudice” language. The circuit court’s inclusion of the words “without prejudice” in its October 26, 2017, order “signals that there was no final decision on the merits.” *Richter*, 2016 IL 119518, ¶ 24. Further evidence of the court’s intent is contained in the February 6, 2017, order, wherein the court dismissed the IIED and NIED counts, but did not state that the dismissal of those counts was with prejudice. *Contra Fabian v. BGC Holdings, LP*, 2014 Il App (1st) 141576, ¶ 12 (Internal quotation marks omitted.) (“A dismissal with prejudice is usually considered a final judgment *** as it indicates that the plaintiff will not be allowed to amend his complaint, thereby terminating the litigation.”). The language of the February 6, 2017, and October 26, 2017, orders does not indicate that the circuit court intended to enter final and appealable orders regarding plaintiffs’ IIED and NIED counts. As such, we find that we lack jurisdiction to address the merits because the orders appealed from were not final, and thus we dismiss this appeal.

¶ 15

CONCLUSION

¶ 16 Based on the foregoing, we dismiss this appeal for lack of jurisdiction .

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¶ 17 Appeal dismissed.