2019 IL App (1st) 181035-U

SIXTH DIVISION
March 15, 2019

Nos. 1-18-1035 & 1-18-1049 (cons.)

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LIBRARY TOWER CONDOMINIUM ASSOCIATION,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
v.	)	No. 17 L 5988
LIBRARY TOWER, LLC and LENNAR CHICAGO, INC., successor by merger to CONCORD HOMES, INC.,	)	Honorable John C. Griffin,
Defendants-Appellants.	)	Judge Presiding.

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

ORDER

¶ 1 *Held:* We dismiss the appeal for lack of jurisdiction because defendants did not file an interlocutory notice of appeal within 30 days of the circuit court's interlocutory order denying their motion to dismiss pursuant to arbitration agreement, *i.e.* a motion to compel arbitration, as is required pursuant to Illinois Supreme Court Rule 307(a)(1) (Ill. S. Ct. 307(a)(1) (eff. Nov. 1, 2017)); we also deny defendants' application for leave to appeal pursuant to Illinois Supreme Court Rule 308(a) (Ill. S. Ct. R. 308(a) (eff. Jul. 1, 2017)).

¶ 2 Defendants, Library Tower, LLC and Lennar Chicago, Inc. (collectively defendants), appeal from the trial court's order denying their section 2-619 motion to dismiss and subsequent motion to reconsider. Defendants' motions asserted that the claims brought by plaintiff, Library Tower Condominium Association, were improperly filed in circuit court because the parties

agreed to mediate and arbitrate any claims. For the reasons that follow, we dismiss defendants' Rule 307(a)(1) appeal and deny defendants' application for leave to appeal pursuant to Rule 308(a).

¶ 3 BACKGROUND

¶ 4 Plaintiff is the condominium association of the Library Tower development, which is a 184-unit, high-rise building located at 520 South State Street in Chicago. Defendant Library Tower, LLC, was the developer of said property and defendant Lennar Chicago, Inc., successor by merger to Concord Homes, Inc., was the general contractor on the project.

¶ 5 On June 13, 2017, plaintiff filed a three-count complaint against defendants. Count I alleged breach of the implied warranty of habitability against the developer, count II alleged breach of the implied warranty of habitability against the general contractor, and count III alleged breach of the implied warranty of good workmanship against the developer. Plaintiff's complaint alleged that defendants failed to construct and deliver the building to plaintiff in a manner that was fit for its intended purpose of habitation. Specifically, plaintiff alleged that in 2015, it discovered numerous masonry construction defects in the units, common elements, and limited common elements, including the following:

> "flashing does not extend beyond the perimeter of the wall, which allows water to remain behind the façade and causes the exterior bricks to spall, deteriorate, and fall off the [b]uilding; flashing is missing in other locations on the [b]uilding, which leads to the same spalling, deterioration, and falling off of bricks; insufficient or missing drip edges, which also allows water to remain within the façade and cause the same aforementioned damage the bricks; and the [b]uilding lacks end-dams, which also contributes to water penetration behind the façade ***."

¶ 6 Plaintiff's complaint also alleged that it found numerous other construction defects in 2016, such as:

> "metal coping on the top of the parapet of the roof lacks sufficient flashing to prevent water infiltration; stone capping on top of the masonry façade lacks sufficient flashing, which allows water penetration; improper and insufficient expansion joints are causing bricks to crack; cast stone window sills lack proper flashing, which allows water infiltration; balconies do not pitch away from the building, causing water to pool and make the balconies unusable after periods of rain; and window frames were improperly sealed, which allows water penetration***."

All of the foregoing defects were allegedly caused by inferior workmanship during the construction and development of the building. Plaintiff alleged that the defects adversely affected the habitability of the building because water penetrated through the façade and into the units.

¶ 7 On June 30, 2017, plaintiff voluntarily dismissed its complaint with leave to reinstate. On August 29, 2017, plaintiff filed a motion to reinstate, which was granted on September 13, 2017.

¶ 8 On October 18, 2017, defendants filed their "Limited Section 2-619 Motion to Dismiss," arguing that plaintiff's complaint must be dismissed because plaintiff was required to mediate, and if necessary arbitrate, any and all claims it may have against defendants. Defendants pointed to the Declaration of Covenants (Declaration) governing the condo association and argued that sections of the Declaration forbid adjudication of plaintiff's claims in circuit court. On November 21, 2017, plaintiff responded to the motion to dismiss, asserting that the Declaration had been amended and the arbitration provisions removed. In defendants' reply, filed on

December 12, 2017, they contended in part that section 18.9 of the Condominium Property Act (765 ILCS 605/18.9 (West 2016)) was preempted by the Federal Arbitration Act (9 U.S.C. § 1 *et seq.* (2016)).

¶ 9 On January 17, 2018, the circuit court entered an order denying defendants' section 2-619 motion to dismiss, finding that the amendment to the Declaration was proper and that the Federal Arbitration Act did not preempt section 18.9 of the Condominium Property Act. Subsequently, on February 9, 2018, defendants filed a motion to reconsider and for other relief in the alternative. Specifically, if the court denied their motion to reconsider, defendants alternatively requested a finding pursuant to Illinois Supreme Court Rule 308(a), which provides for permissive appeals of interlocutory orders when the trial court determines that "there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Ill. S. Ct. R. 308(a) (eff. Jul. 1, 2017).

¶ 10 On April 25, 2018, the court denied defendants' motion to reconsider, finding that defendants waived certain contentions and could not rely on case law that was not asserted in their motion to dismiss. The court also denied the motion to reconsider on substantive grounds. However, the court granted defendants' request for a finding pursuant to Rule 308(a) and certified the following questions for appeal:

> "1. Does the Federal Arbitration Act preempt application of Section 18.9 of the Illinois Condominium Property Act to the present case?
>
> 2. Can a condominium association governed by a declaration which contains an arbitration requirement file a suit, voluntarily dismiss the suit, remove the provisions

in its declaration requiring arbitration, and refile its cause of action in state court, avoiding the arbitration requirements of its original declaration?"

¶ 11 On May 23, 2018, defendants filed their notice of interlocutory appeal pursuant to Rule 307(a)(1), seeking to reverse the circuit court's January 17, 2018, order denying defendant's motion to dismiss, and the circuit court's April 25, 2018, order denying defendants' motion to reconsider. That appeal was numbered as 1-18-1035.

¶ 12 Two days later, on May 25, 2018, defendants filed an application for leave to appeal pursuant to Rule 308(a), requesting that this court resolve the certified questions. That appeal was numbered as 1-18-1049.

¶ 13 On June 4, 2018, defendants filed a motion to consolidate appeals 1-18-1035 and 1-18-1049, which was granted on June 26, 2018.

¶ 14 ANALYSIS

¶ 15 Defendants appeal to this court pursuant to two separate supreme court rules. We address each in turn.

¶ 16 Rule 307 Appeal

¶ 17 "An appellate court is under a duty to consider its jurisdiction and to dismiss an appeal if jurisdiction is lacking." *Craine v. Bill Kay's Downers Grove Nissan*, 354 Ill. App. 3d 1023, 1024 (2005). Even where, as here, the parties do not raise the issue of jurisdiction, this court must determine the question nonetheless. *Id.* Upon review of the record, we find that we lack jurisdiction to consider this appeal.

¶ 18 Appeals from interlocutory orders are allowed only as specially provided in the rules. *Robert A. Besner & Co. v. Lit America, Inc.*, 214 Ill. App. 3d 619, 623 (1991). Illinois Supreme Court Rule 307 applies to interlocutory appeals as of right and states, "An appeal may be taken

to the Appellate Court from an interlocutory order of court: (1) granting, modifying, refusing, dissolving, or refusing to dissolve or modify an injunction." Ill. S. Ct. R. 307(a)(1) (eff. Nov. 1, 2017). "The law is well established that an order of the circuit court granting or denying a motion to compel arbitration or stay court proceedings or dismiss the lawsuit is an appealable order." *Besner*, 214 Ill. App. 3d at 622.

¶ 19 In this case, defendants' motion to dismiss was titled "Defendants' Limited Section 2-619 Motion to Dismiss" and argued that plaintiff's complaint must be dismissed because the parties had agreed to mediate and arbitrate any claims. Defendants' motion did not specifically request that the court compel the parties to participate in arbitration, but the entire basis of the motion was that the parties were required to mediate or arbitrate any disputes based on a prior agreement. Thus, defendants' motion to dismiss was substantively a motion to compel arbitration and we refer to it as such, even though that was not the motion's title. *In re Haley D.*, 2011 IL 110886, ¶ 67 (recognizing that "the character of the pleading should be determined from its content, not its label" and "when analyzing a party's request for relief, courts should look to what the pleading contains, not what it's called").

¶ 20 When bringing an appeal from an interlocutory order, Rule 307(a) states that "the appeal must be perfected *within 30 days from entry of the interlocutory order* by filing a notice of appeal designated 'Notice of Interlocutory Appeal' conforming substantially to the notice of appeal in other cases." (Emphasis added.) Ill. S. Ct. R. 307(a) (eff. Nov. 1, 2017).

¶ 21 Here, the interlocutory order denying defendants' motion to compel arbitration was entered on January 17, 2018. As a result, defendants had 30 days from January 17, 2018, to file their notice of interlocutory appeal pursuant to Rule 307(a)(1). Ill. S. Ct. R. 307(a)(1) (eff. Nov. 1, 2017). However, instead of filing a notice of interlocutory appeal within 30 days of January

17, 2018, defendants filed a motion to reconsider the court's denial of their motion to compel arbitration. Defendants' motion to reconsider was denied on April 25, 2018, and defendants subsequently filed their notice of interlocutory appeal pursuant to Rule 307(a)(1) on May 23, 2018, which was over four months after the entry of the interlocutory order denying defendants' motion to compel arbitration.

¶ 22 It is well settled that "[i]f an order is entered which is immediately appealable under Rule 307, then an appeal must be taken or the right to challenge the ruling will be lost." *Besner*, 214 Ill. App. 3d at 626. Although the denial of defendants' motion to reconsider is an interlocutory order, it is not an appealable interlocutory order because it does not grant, modify, refuse, dissolve, or refuse to dissolve or modify an injunction. *Craine*, 354 Ill. App. 3d at 1027; Ill. S. Ct. R. 307(a)(1) (eff. Nov. 1, 2017). Further, a motion to reconsider does not toll the deadline for filing a notice of interlocutory appeal in a civil matter. *People v. Marker*, 233 Ill. 2d 158, 174 (2009) (citing *Craine*, 354 Ill. App. 3d at 1025-29, and *Trophytime, Inc. v. Graham*, 73 Ill. App. 3d 335, 335-37 (1979)).

¶ 23 Defendants failed to file their notice of interlocutory appeal within 30 days from the entry of the order denying their motion to compel arbitration. Defendants' motion to reconsider did not toll the 30-day time limit. As a result, defendants' notice of interlocutory appeal pursuant to Rule 307(a)(1) was untimely, and we lack jurisdiction to address the merits of this appeal.

¶ 24 Rule 308(a) Application for Leave to Appeal

¶ 25 Defendants also filed an application for leave to appeal pursuant to Supreme Court Rule 308, which governs permissive interlocutory appeals and "is an exception to the general rule that only final orders from a court are subject to appellate review." *Morrissey v. City of Chicago*, 334 Ill. App. 3d 251, 257 (2002). Rule 308(a) provides:

> "When the trial court, in making an interlocutory order not otherwise appealable, finds that the order involves a question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, the court shall so state in writing, identifying the question of law involved. Such a statement may be made at the time of the entry of the order or thereafter on the court's own motion or on motion of any party. The Appellate Court may thereupon in its discretion allow an appeal from the order. Ill. S. Ct. R. 308(a) (eff. Jul. 1, 2017).

¶ 26 Our supreme court recognizes that "the appellate court serves as a gatekeeper and must carefully question whether the case before it warrants consideration outside the usual process of appeal." *Rozsavolgyi v. City of Aurora*, 2017 IL 121048, ¶ 23. Our supreme court further explained that "[a]ppeals under Illinois Supreme Court Rule 308 should be reserved for exceptional circumstances, and the rule should be sparingly used." *Id.* ¶ 21. "Rule 308 *** was not intended to open the floodgates to a vast number of appeals from interlocutory orders in ordinary litigation." *Morrissey*, 334 Ill. App. 3d at 257.

¶ 27 When certifying the instant two questions for review, the circuit court found that "the issues raised in the defendants' 2-619 motion to dismiss, and the current motion to reconsider, involve questions of law as to which there is a substantial ground for difference of opinion" and that an immediate appeal would materially advance the litigation. We disagree that an immediate appeal would advance the litigation and decline to answer either question certified by the circuit court.

¶ 28 We have already determined that we lack jurisdiction under Rule 307(a)(1) to review the circuit court's January 17, 2018, order that denied defendants' motion to compel arbitration

because defendants failed to file a timely notice of interlocutory appeal. "In general[,] a party's failure to timely appeal an order appealable under Rule 307(a) renders that order the law of the case and that part of the resulting judgment *res judicata*." *Wolfe v. Illini Federal Savings and Loan Ass'n*, 158 Ill. App. 3d 321, 324 (1987). Additionally, "[i]f an order is entered which is immediately appealable under Rule 307, then an appeal must be taken or the right to challenge the ruling will be lost." *Besner & Co.*, 214 Ill. App. 3d at 626.

¶ 29 Here, we deny defendants' application for leave to appeal pursuant to Rule 308(a) because defendants' right to challenge the circuit court's denial of their motion to compel arbitration was lost when they failed to file a timely notice of interlocutory appeal from that order. The court's denial of defendants' motion to compel arbitration is the law of the case and cannot be challenged through defendants' subsequent Rule 308(a) application for leave to appeal. See *Wolfe*, 158 Ill. App. 3d at 324. For this reason, even if we granted defendants' application for leave to appeal and resolved the questions in defendants' favor, our decision would be meaningless because defendants have lost their ability to challenge the court's order denying their motion to compel arbitration. "A meaningless opinion does not materially advance litigation." *Kincaid v. Smith*, 252 Ill. App. 3d 618, 623 (1993). Because answering defendants' questions would not materially advance this litigation, we deny their Rule 308(a) application.

¶ 30 Even if defendants had not lost their right to appeal the court's denial of their motion to compel arbitration, we would still deny defendants' Rule 308(a) application because answering either of the certified questions would require this court to apply the law to the particular facts of this case, which is improper. Our supreme court has consistently held that "[c]ertified questions must not seek an application of the law to the facts of a specific case." *Rozsavolgyi*, 2017 IL 121048, ¶ 21.

¶ 31 Question one explicitly asks whether applying an Illinois statute "to the present case" would be preempted by a federal statute. Such a question is impermissible because it asks this court to answer the question by applying the law to the specific facts of this case. That the question actually includes the language "to the present case" is a clear indication that question one is not proper under Rule 308(a). As such, we decline to answer it.

¶ 32 Similarly, question two is also improper because its answer is entirely dependent on the facts of this case and it inherently asks this court to review the propriety of the circuit court's January 17, 2018, order, denying defendants' motion to compel arbitration. Question two asks whether a condo association can avoid an arbitration clause when it files a lawsuit, voluntarily dismisses that suit, removes the arbitration provisions, and then reinstates its cause of action, which amounts to a request that we apply the law (*i.e.*, the Federal Arbitration Act (9 U.S.C. § 1 *et seq.* (2000)) and the Condominium Property Act (765 ILCS 605/18.9 (West 2016)) to the specific sequence of events that occurred in this case. "Rule 308 was not intended to be a mechanism for expedited review of an order that merely applies the law to the facts of a particular case, and it does not permit us to review the propriety of the order entered by the lower court." (Internal quotation marks omitted.) *Combs v. Schmidt* [1], 2015 IL App (2d) 131053, ¶ 6.

¶ 33 Question two merely seeks review of the trial court's application of the law to the facts of this case rather than a properly written certified question, which only states a specific question of law. The trial court's January 17, 2018, order denied defendants' motion to dismiss because the court found that the amendment to plaintiff's declaration was proper and that the Federal Arbitration Act (9 U.S.C. § 1 *et seq.* (2000)) did not preempt section 18.9 of the Condominium Property Act (765 ILCS 605/18.9 (West 2016)). Question two inherently asks this court to

[1] In *Combs*, although the court answered one of the two questions certified by the trial court, it refused to answer the other because it was "outside the scope of Rule 308." *Combs*, 2015 IL App (2d) 131053, ¶ 9.

review the propriety of that decision, which is beyond the scope of Rule 308(a) review. See *Combs*, 2015 IL App (2d) 131053, ¶ 6. Answering question two would result in this court determining whether the circuit court properly denied defendants' motion to compel arbitration, which would be improper. As such, we decline to answer question two.

¶ 34 We recognize that "[a]n exception exists under which a court may exceed the usual bounds of review set by Rule 308." *Id.* ¶ 8. Such an exception should be applied "[w]here the interests of judicial economy and the need to reach an equitable result so require." *Id.* We do not believe that this appeal merits the invocation of such an exception because defendants' Rule 308 application for leave to appeal is essentially just another attempt to appeal the circuit court's January 17, 2018, order denying defendants' motion to dismiss. Had defendants timely filed their Rule 307(a)(1) notice of appeal, then we would have had jurisdiction to review that order. We do not believe that allowing defendants' Rule 308 application for leave to appeal on the same issue that was the subject of their untimely Rule 307(a)(1) appeal would produce an equitable result. Thus, we deny defendants' application for leave to appeal pursuant to Rule 308(a).

¶ 35 CONCLUSION

¶ 36 Based on the foregoing, we find that we lack jurisdiction and dismiss defendants' Rule 307(a)(1) appeal. We also deny defendants' application for leave to appeal pursuant to Rule 308(a).

¶ 37 Appeal dismissed.