SECOND DIVISION
January 8, 2013

No. 1-11-0920

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

K4 ENTERPRISES, INC. and MS PRODUCE INC.,	)	
	)	Appeal from the
	)	Circuit Court of
Plaintiffs-Appellants,	)	Cook County.
	)	
v.	)	No. 10 CH 4561
	)	
	)	Honorable
GRATER, INC. and JAMES T. ZAVACKI,	)	William D. Maddux and
	)	Bill Taylor,
Defendants-Appellees.	)	Judges Presiding.

JUSTICE QUINN delivered the judgment of the court.
Presiding Justice Harris and Justice Simon concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court did not err in dismissing plaintiffs' complaint for breach of contract pursuant to section 2-615 of the Illinois Code of Civil Procedure (735 ILCS 5/2-615 (West 2008)), where there was no evidence that defendants failed to comply with the terms of the settlement agreement between the parties.

¶ 2 In 2007, plaintiffs, K4 Enterprises and MS Produce, Inc. and defendants, Grater, Inc. and James T. Zavacki, reached an oral settlement agreement in a breach of contract action filed in the

Law Division of the Circuit Court of Cook County. The parties subsequently disagreed over the exact terms of that agreement and the trial judge, who had been present during the settlement discussion, delineated the terms and conditions of the agreement in open court and entered an order stating that the judgment was effective immediately. Defendants appealed that judgment, and this court affirmed. *K4Enterprises, Inc. v. Grater, Inc.*, 394 Ill. App. 3d 307 (2009). Our supreme court denied defendants' petition for leave to appeal. *K4 Enterprises, Inc. v. Grater*, 234 Ill. 2d 523 (2009).

¶ 3 While defendants' appeal was pending, plaintiffs filed a second breach of contract lawsuit against defendants in the Chancery Division of the Circuit Court, which is the subject of this appeal. Plaintiffs alleged breach of contract and sought equitable relief on the grounds that defendants' failure to comply with the terms of the settlement agreement prevented plaintiffs from complying with agreements they had with their trial attorneys and a financing company to settle claims for amounts plaintiffs owed them. Plaintiffs sought $550,000 in damages from defendants, the additional amount plaintiffs had to pay to settle those claims.

¶ 4 Defendants filed a motion to transfer the Chancery Division case to the trial judge who presided over the Law Division case and a motion to dismiss the Chancery Division case. Both motions were granted, and plaintiffs now appeal. On appeal, plaintiffs contend that: (1) the trial court erred in transferring the Chancery Division case to the Law Division and subsequently dismissing the Chancery Division case because defendants' attorneys had no standing to file motions since they had not first filed an appearance in the case; (2) defendants failed to satisfy the judgment in the Law Division case according this court's instructions on remand; and (3) the

trial court erred in granting defendants' motion to dismiss their Chancery Division complaint. For the reasons set forth below, we affirm the trial court.

¶ 5 I. Background

¶ 6 This appeal arises out of a breach of contract action filed in the circuit court of Cook County in February 2004, by plaintiffs for damages arising out of defendants' failure to pay plaintiffs for consulting services. The facts underlying that case are elucidated in our prior opinion. *K4Enterprises, Inc. v. Grater, Inc.*, 394 Ill. App. 3d 307 (2009). On June 7, 2007, while the case was pending before the Honorable William Taylor and after a jury had been seated, the parties met in Judge Taylor's chambers and reached an oral settlement agreement. The parties' attorneys were not present and the terms of the settlement agreement were not made a part of the written record. Shortly thereafter, the parties disagreed as to the precise terms of their settlement agreement and met again on July 3, 2007, with Judge Taylor in his chambers. Afterwards, Judge Taylor entered an agreed order stating in part, "Plaintiffs' motion to enforce settlement is entered and continued to Thursday, September 6, 2007 at 10:30 a.m. In the event Defendants tender $2,400,000 in cash by wire transfer to Johnson & Bell before said date, Plaintiffs will be satisfied and the parties shall execute mutual releases and stipulations to dismiss all cases with prejudice." Defendants contended that this order evidenced a new settlement agreement, while plaintiffs asserted that the order simply continued the hearing on the original June 7, 2007, settlement agreement.

¶ 7 On September 19, 2007, pursuant to plaintiffs' motion to enforce the June 7 settlement agreement, the trial court announced the terms of the settlement in open court, stating that

defendants were required to pay plaintiffs $1.2 million on or before September 4, 2007, and equal payments of $100,000 on the first day of the months of October, January, April, and July continuing until July 2011, for a total amount of $2.8 million. The trial court stated that the settlement agreement provided an acceleration of all payments in the event of a breach. The trial court also stated that "the judgment was effective immediately on the terms and conditions announced in open court." However, since September 4, 2007 had passed, the court gave defendants until September 26th to make the initial payment and failure to do so would mean that the full amount of the judgment would be due.

¶ 8 Defendants filed a motion to reconsider and stay enforcement of judgment pending appeal. Defendants also sought a Supreme Court Rule 304(a) finding and asked the court to set an appeal bond. On October 1, 2007, plaintiffs filed a motion to accelerate payments pursuant to the judgment of September 19, 2007. On October 3, 2007, Judge Taylor issued an order denying defendants' motion to reconsider and their request for a Rule 304(a) finding, to set an appeal bond, and for a stay of enforcement of the judgment pending appeal. The court granted plaintiffs' motion for acceleration of payment, entering judgment against defendants in the amount of $2,800,000 plus interest. Defendants filed their notice of appeal on October 9, 2007. On October 19, 2007, this court set the amount of defendants' appeal bond at $3,640,000 and stayed enforcement of the judgment until November 9, 2007. Defendants posted the appeal bond and on November 21, 2007, this court entered an order continuing the stay of enforcement of the judgment pending appeal.

¶ 9 After oral argument, this court issued an opinion on August 19, 2009, affirming the trial

court order enforcing the settlement agreement but held that the trial court erred in finding that the parties agreed to an acceleration clause and so remanded to the trial court with instructions. *K4 Enterprises, Inc. v. Grater*, 394 Ill. App. 3d 307 (2009). Defendants filed a petition for leave to appeal, which our Illinois Supreme Court denied on November 25, 2009. *K4 Enterprises, Inc. v. Grater*, 234 Ill. 2d 523 (2009). This court's opinion was then filed with the circuit court on January 13, 2010, and the case was assigned to Judge Taylor on remand. In the meantime, in the underlying Law Division case, which was remanded by this court, Judge Taylor entered an order on February 26, 2010, stating in relevant part that: "In full satisfaction of principal and interest presently due on the judgment against Grater and Zavacki equals $2,452,500.00, without effect on the remaining quarterly payment due on the judgment." After paying plaintiffs this amount, defendants then proceeded to make timely installment payments commencing April 1, 2010.

¶ 10 The plaintiffs' settlement agreement with defendants was subject to two claims, one by Johnson & Bell, Ltd., their attorneys in the underlying lawsuit and the other by Oasis Legal Finance, LLC, a financing company that advanced money to plaintiffs in connection with the lawsuit. During the course of the settlement negotiations with defendants, plaintiffs reached settlement agreements with Johnson & Bell and Oasis, whereby Johnson & Bell agreed to accept $600,000 in full satisfaction of its lien and Oasis agreed to accept $500,000 in full satisfaction of its claim. Plaintiffs were to make pay Johnson & Bell and Oasis by the end of September 2007, but were unable to do so when the trial court's judgment was stayed pending appeal. When the case was remanded to the trial court after defendants exhausted their appeals, Johnson & Bell and Oasis refused to honor those agreements since by then payment was more than two years late.

Instead, Johnson & Bell requested the full amount billed to plaintiffs, $997,996.46, and Oasis demanded $1.2 million. Plaintiffs subsequently settled with Johnson & Bell for $800,000 and with Oasis for $850,000.

¶ 11 On February 2, 2010, plaintiffs filed a lawsuit in the Chancery Division of the Circuit Court of Cook County, against defendants to recover damages equal to the additional amount plaintiffs had to pay to Johnson & Bell and Oasis as a result of their inability to make a timely payment in September 2007. Plaintiffs' two-count complaint, which was amended on May 19, 2010, alleged breach of contract and sought equitable relief on the grounds that pursuant to the settlement agreement, defendants were required to make payments commencing on September 4, 2007, with a $1.2 million payment and continuing with ten quarterly installments of $100,000 from October 1, 2007 through January 1, 2010. Plaintiffs asserted that defendants' failure to make payments until after the case was remanded to the trial court in February 26, 2010, constituted a material breach of the settlement agreement and prevented plaintiffs from resolving the lien claims of Johnson & Bell and Oasis. Plaintiffs sought $550,000 in damages, the additional amount they paid Johnson & Bell and Oasis to settle their claims, as well as attorneys fees and costs.

¶ 12 Defendants filed a motion to reassign the case to Judge Taylor, which was granted by the Honorable William D. Maddux on April 8, 2010. On July 1, 2010, defendants filed a motion to dismiss the Chancery Division case pursuant to section 2-619.1 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2008)). Defendants argued that dismissal was warranted under section 2-615 of the Code (735 ILCS 5/2-615 (West 2008)), on the grounds that

filing an appeal does not constitute a breach of contract and because defendants were not a party to plaintiffs' agreements with Johnson & Bell and Oasis and did not owe a duty to plaintiffs regarding those agreements. Defendants also sought dismissal on *res judicata* grounds, pursuant to section 2-619(a)(4) of the Code (735 ILCS 5/2-619 (a)(4)(West 2008)).

¶ 13 On November 12, 2010, defendants filed a renewed and unopposed motion to reassign the case to Judge Taylor, because the order issued by Judge Maddux on April 8, 2010, was not entered into the Clerk of Court's computer system. On November 30, 2010, an order was entered assigning the Chancery Division case to Judge Taylor and consolidating it with the Law Division case. On December 1, 2010, Judge Taylor entered an order dismissing the Chancery Division case, with prejudice. On December 30, 2010, plaintiffs filed a motion to reconsider the order consolidating the Chancery Division and Law Division cases and the order dismissing the Chancery Division case. On February 15, 2010, the motion to reconsider was denied. Plaintiffs filed a notice of appeal on March 17, 2011 from the following orders: (1) the December 1, 2010 order dismissing plaintiffs' amended complaint, with prejudice; (2) the November 30, 2010 orders consolidating the Law Division and Chancery Division cases and transferring the matter to Judge Taylor, and (3) the February 15, 2011 order denying plaintiffs' motion to reconsider.

¶ 14 II. Analysis

¶ 15 A. Jurisdiction

¶ 16 Before addressing plaintiffs' substantive arguments, we first address defendants' assertion that this court does not have jurisdiction over this appeal because plaintiffs failed to file a timely

notice of appeal of the trial court's December 1, 2010 dismissal of the Chancery Division case. Ordinarily, jurisdiction is conferred upon this court by the filing of a notice of appeal within 30 days after the entry of the final judgment from which the appeal is taken. Ill. S.Ct. R. 303(a)(1) (eff. May 1, 2007). However, Supreme Court Rule 303(a)(1) provides that if a timely postjudgment motion is filed, then the time in which to file a notice of appeal is tolled, and the appealing party must then file a notice of appeal "within 30 days after the entry of the order disposing of the last pending postjudgment motion directed against that judgment or order." *Id*. In order for a postjudgment motion to have the effect of tolling the time in which to appeal the judgment, that motion must be "directed against the judgment." *Id*. To qualify as a postjudgment motion within the meaning of the rule governing the time for filing a notice of appeal, a motion must request at least one of the forms of relief specified in section 2-1203 of the Code (735 ILCS 5/2-1203) (West 2008)), namely, rehearing, retrial, modification, vacation, or other relief directed against the judgment. *Vanderplow v. Krych*, 332 Ill. App. 3d 51, 43 (2002). The "other relief" referred to in section 2-1203 must be similar in nature to the other forms of relief enumerated in that section. *R & G, Inc. v Midwest Region Foundation for Fair Contracting, Inc.*, 351 Ill. App. 3d 318, 321 (2004).

¶ 17 In this case, plaintiffs' notice of appeal was filed on March 17, 2011, more than 30 days after the December 1, 2010 dismissal of their complaint. Defendants argue that although plaintiffs filed a motion to reconsider on December 30, 2010, that motion was not a proper postjudgment motion because it raised no issue regarding the merits of the dismissal. Therefore, defendants contend, the motion was not directed against the judgment and did not toll the time

for filing an appeal. We disagree. Plaintiffs' motion to reconsider, filed within 30 days of the trial court's dismissal of their complaint, asserts that the Chancery Division case should not have been consolidated with the Law Division case and should not have been subsequently dismissed. The motion asks the court to vacate the November 30, 2010 transfer order and the December 1, 2010 dismissal order. This was a proper postjudgment motion that tolls the time for filing an appeal. Since plaintiffs filed that notice of appeal on March 17, 2011, less than 30 days after the trial court entered its February 15, 2011 order denying the motion to reconsider, this court has jurisdiction to decide this appeal.

¶ 18 B. Standard of Review

¶ 19 We review an order granting a motion to dismiss pursuant to section 2–615 *de novo. Green v. Rogers*, 234 Ill. 2d 478, 491 (2009). "A section 2–615 motion to dismiss tests the legal sufficiency of the complaint. On review, the question is 'whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted.' " *Id*. at 491 (quoting *Vitro v. Mihelcic*, 209 Ill. 2d 76, 81 (2004). The same *de novo* standard of review applies to a motion to dismiss pursuant to section 2-619 (735 ILCS 5/2-619 (West 2008)).

¶ 20 C. Defendants' Standing to File Motions in the Chancery Case

¶ 21 On appeal, plaintiffs first contend that the trial court erred in ruling on defendants' motion to consolidate and their motion to dismiss because defendants failed to file an appearance in the Chancery Division case and therefore, did not have standing to bring those motions. Plaintiffs

assert that their Chancery Division case was filed on February 2, 2010 and defendants were served on February 19, 2010. On March 24, 2010, defendants filed a motion to transfer the case to Judge Taylor in the Law Division, which Judge Maddux granted on April 8, 2010. Plaintiffs assert that because defendants' attorneys did not file an appearance until April 28, 2010, they were not of record and should not have been permitted to file any motions or argue on defendants' behalf in open court. Plaintiffs contend that counsel's failure to file an appearance before filing their motions violated Cook Count Circuit Court Cook Rules 1.2 and 1.3 and render those filings void *ab initio*.

¶ 22 Defendants assert that we should not address this argument, because it was not raised by plaintiffs until they filed their motion for reconsideration. In general, "arguments raised for the first time in a motion for reconsideration in the circuit court are waived on appeal [Citation]." *Bank of America, N.A. v. Ebro Foods, Inc.*, 409 Ill. App. 3d 704, 709 (2011). Waiver aside, even if the circuit court or this court were to address this argument, there is no grounds for finding that defendants' motions are void *ab initio.* Illinois Supreme Court Rule 13© (1) (eff. Feb. 26, 2011) provides that "An attorney shall file his written appearance or other pleading before he addresses the court unless he is presenting a motion for leave to appear by intervention or otherwise." However, the appellate court has previously held that a filing by a party will not be deemed a nullity if an attorney has failed to first file an appearance, where there is no substantial inconvenience to the court or prejudice to a party. *Larson v. Pedersen*, 349 Ill. App. 3d 203, 206 (2004) (citing *Ebert v. Dr. Scholl's Foot Comfort Shops, Inc.*, 137 Ill. App. 3d 550 (1985)). Here, there was no inconvenience or confusion as to who was representing defendants in the

Chancery Division case, nor was there any prejudice to the plaintiffs by defendants' attorneys failure to file an appearance in that proceeding. Therefore, we reject plaintiffs' argument that all of defense attorneys' filings prior to filing an appearance in the case are void *ab initio*.

¶ 23 E. Order Transferring Case to Law Division

¶ 24 Next, plaintiffs contend that the trial court's November 30, 2010 order reassigning the case to Judge Taylor in the Law Division was improper because at that time the order was entered there was no pending Law Division case. Plaintiffs note that Circuit Court of Cook County General Order 22.3(A), provides as follows:

> "The assignment judge of the Law Division, County Department, hears motions for assignment or reassignment of related cases pending in:
>
> (a) different departments of the Circuit Court;
>
> (b) different divisions of the County Department; and
>
> © the Law Division."

¶ 25 Plaintiffs argue that after Judge Taylor entered his February 26, 2010 order requiring defendants to pay $2,452,500.00, the Law Division case was no longer pending, and therefore, the motion to transfer the Chancery Division case to Judge Taylor in the Law Division should have been denied. We disagree. First, we note that the circuit court of Cook County is a court of general jurisdiction. Ill. Const. 1970, art. VI, § 9. The fact that the circuit court, for administrative purposes, has established divisions to hear certain types of cases does not affect its jurisdiction to hear all justiciable matters, and does not affect the power of any of its judges to

hear and dispose of any matter properly pending in the circuit court. *In re Marriage of Isaacs*, 260 Ill. App. 3d 423, 427-28 (1994). The transfer of cases to specialized divisions within a judicial circuit is a matter committed to the administrative authority of the chief judge of the circuit. (Illinois Supreme Court Rule 21© (eff. Dec. 1, 2008)) and a decision to transfer a case will not be disturbed absent an abuse of discretion. As the appellate court stated in *Kaplan v. Keith*, 60 Ill. App. 3d 804, 809 (1978), "Since jurisdiction over the cause of action was vested generally in the circuit courts, which are organized and divided for administrative convenience, the transfer of the equitable cause of action from the Chancery Division to the Law Division does not limit the remedy available to one at law." Here, the court did not abuse its discretion in transferring plaintiffs' case to Judge Taylor, who had presided over the related breach of contract action between the same parties.

¶ 26 F. Defendants' Compliance With Judgment on Remand

¶ 27 Next, plaintiffs argue that defendants failed to satisfy the judgment in the Law Division case and ask this court to instruct the trial court to enforce the original provisions as contained in our August 2009 opinion. Specifically, plaintiffs argue that this court remanded the case to Judge Taylor with instructions to enforce the terms of the settlement agreement but that even after the case was ultimately remanded to Judge Taylor on January 13, 2010 and after Judge Taylor entered his February 26, 2010 order requiring defendants to make a lump sum payment of $2,452,500.00, notwithstanding the remaining quarterly payments, plaintiffs had to wait to collect on the settlement.

¶ 28 Pursuant to Supreme Court Rule 303(b)(2) (eff. June 4, 2008), when an appeal is taken

from a specified judgment, the appellate court acquires no jurisdiction to review other judgments or parts of judgments not specified or inferred from the notice of appeal. The exception to this rule is when a nonspecified judgment can be said to have been a " 'step in the procedural progression leading' " to the judgment specified in the notice of appeal; in that instance, a nonspecified judgment may be reviewed because it can be said to relate back to the judgment specified in the notice of appeal. See *In re D.R.*, 354 Ill. App. 3d 468, 472 (2004) (quoting *In re F.S.* 347 Ill. App. 3d 55, 69 (2004) (quoting *Burtell v. First Charter Service Corp.*, 76 Ill. 2d 427, 434-35 (1979))

¶ 29 In this case, plaintiffs stated in their notice of appeal that they wished to appeal from three orders: the "Order of December 1, 2010–Dismissing, with prejudice, Plaintiff's Amended Complaint," "Order of November 30, 2010-Consolidating 10 CH 4561 into 04 L 3746 and transferring matter to Judge Bill Taylor," and "Order of February 15, 2011–Denying Plaintiffs' Motion to Reconsider." Clearly, plaintiffs were limiting their appeal to the orders entered in the Chancery Division case, consolidating and dismissing their complaint, and then the order denying their motion to reconsider. According to Rule 303(b)(2), we do not have jurisdiction to review an argument related to the order entered in the Law Division case.

¶ 30 Further, even if we were to address this argument, plaintiffs do not specify the manner in which the trial court failed to comply with our instructions on remand. Plaintiffs' primary argument appears to be that after we issued our opinion on August 19, 2009, the trial court waited until February 26, 2010 to order defendants to make a lump sum payment of $2,452,500, rather than requiring defendants to immediately being making payments. This argument is

without merit. After this court issued its opinion, defendants filed a petition for leave to appeal to our supreme court, which denied the petition on November 25, 2009. Our opinion was received by the circuit court on January 13, 2010, which then addressed claims by several intervenors, before entering its order on February 26. 2010. Aside from the delay in payment, which was necessitated by defendants' appeal of the trial court's judgment first to this court and then to our supreme court, plaintiffs fail to specify the relief they seek from this court, as they were eventually paid the money owed under the settlement agreement.

¶ 31 G. Trial Court's Dismissal of Chancery Case

¶ 32 Lastly, plaintiffs argue that their chancery case should not have been dismissed, because defendants breached their settlement agreement by making plaintiffs wait more than two years for payment, which deprived plaintiffs of their ability to resolve pending claims in a timely manner. As a result of the delay, plaintiffs assert, they were required to pay Johnson & Bell and Oasis a total of $550,000 more than they would have had to pay if defendants had timely complied with the terms of the settlement agreement.

¶ 33 The elements of a breach of contract claim are: (1) the existence of a valid and enforceable contract; (2) performance by the plaintiff; (3) breach of contract by the defendant; and (4) resultant injury to the plaintiff. *Sherman v. Ryan*, 392 Ill. App. 3d 712, 732 (2009). Plaintiffs contend that the settlement agreement clearly constituted a valid and enforceable contract, as evidenced by this court's prior opinion affirming the trial court, and that defendants breached that contract by failing to pay for more than two years after the original due date. They further contend that their injury is evidenced by the fact that they had to pay $550,000 more to

their creditors than they would have paid if defendants began making payments immediately after this court affirmed the trial court. Because we find that the allegations of the complaint, when construed in the light most favorable to plaintiffs are not sufficient to establish that defendants breached the settlement agreement, we affirm the trial court's dismissal of plaintiffs' complaint pursuant to section 2-615 of the Code, (735 ILCS 5/2-615 (West 2008)). When defendants filed their appeal with this court, defendants were required to post an appeal bond and we entered an order staying enforcement of the judgment pending appeal. As a result, defendants were not required to comply with the terms of the settlement agreement until their appeal was resolved, which they did once the case was remanded to the trial court. Therefore, the trial court did not err in dismissing plaintiffs' complaint.

¶ 34 H. Rule 375 Sanctions

¶ 35 Finally, defendants request that this court find that this appeal is frivolous and award attorneys' fees and costs incurred in defending it pursuant to Illinois Supreme Court Rule 375(b) (eff. Feb. 1, 1994). A frivolous appeal is one that is not reasonably well-grounded in fact and not warranted by existing law or a good-faith argument for the extension, modification or reversal of existing law. 155 Ill.2d R. 375(b); *Gunthorp v. Golan*, 184 Ill. 2d 432 441 (1998). In determining whether an appeal is frivolous, we apply an objective standard; the appeal is considered frivolous if it would not have been brought in good faith by a “reasonable, prudent attorney." *Dreisilker Electric Motors, Inc. v. Rainbow Electric Co.*, 203 Ill. App. 3d 304, 312-13 (1990). Rule 375(b) sanctions are penal and should be applied only to cases which fall strictly within its terms. *Beverly v. Reinhart*, 239 Ill. App. 3d 91, 101 (1992). We find that plaintiffs

made a good-faith argument and that its appeal is not frivolous. For that reason, we decline to impose sanctions.

¶ 36 III. Conclusion

¶ 37 Based upon the foregoing analysis, the judgment of the circuit court is affirmed.

¶ 38 Affirmed.