2013 IL App (1st) 113738-U

THIRD DIVISION
February 13, 2013

No. 1-11-3738

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

FIA CARD SERVICES, N.A.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 M1 118815
	)	
MARCIA JOHNSON,	)	Honorable
	)	Martin P. Moltz,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE NEVILLE delivered the judgment of the court.
Justices Sterba and Pierce concurred in the judgment.

O R D E R

¶ 1 *Held*: The appellate court lacks jurisdiction to consider an appeal from an order which was final only as to one claim or party and lacks an appealablity finding, and the appeal does not fall under one of the exceptions for appeals from a final judgment as to one but fewer than all parties or claims under Supreme Court Rule 304.

¶ 2 This case concerns a breach of contract action brought by plaintiff, FIA Card Services N.A., against defendant, Marcia Johnson, to collect a debt on a credit account, and defendant's counterclaim invoking the Fair Debt Collection Practices Act (the Act), 15 U.S.C. §§ 1692 *et seq*. Defendant appeals *pro se* from an order denying reconsideration of an order striking her

counterclaim and denying her motion to dismiss the complaint, contending that the court erred when it struck her counterclaim without giving her a further opportunity to amend. Plaintiff contends that we lack jurisdiction over this appeal because defendant appealed from an order that was not final as to the entire case and her appeal does not fall under any of the exceptions for final appeals when there are remaining claims under Supreme Court Rule 304 (eff. Feb. 26, 2010). For the reasons stated below, we dismiss this case for lack of jurisdiction.

¶ 3 In its March 2011 complaint, plaintiff alleged that defendant incurred debt on a credit account issued by plaintiff, owed $18,757.32 on that debt, and failed to pay when plaintiff made its demand. The complaint was supported by an affidavit to the same effect and by copies of credit account statements issued by plaintiff to defendant. These unsigned statements identify the creditor on their face as Bank of America (BofA) but on the back or second page as plaintiff.

¶ 4 While the original complaint was signed by plaintiff's counsel, the copy of the complaint attached to the summons was not.

¶ 5 Defendant appeared, made a jury demand, and filed an answer and counterclaim in June 2011. She denied that she owed any debt to plaintiff, and she sought $36,000 from plaintiff and BofA on the basis that she sent plaintiff a certified letter to that effect, that plaintiff was "required to satisfy the requirement of the *** Act prior to starting any form of debt collection in this matter" but did not respond to her letter. She argued that, when a debtor notifies a debt collector in writing that the debt is disputed in whole or part, or seeks the name and address of the original creditor, the Act requires the debt collector to cease collection efforts for the disputed debt or disputed portion thereof until it verifies the debt and/or name and address of the original creditor and mails the same to the debtor. Defendant argued that the case was no longer a small claims case subject to mandatory arbitration because of the amount of her counterclaim, and she noted her jury demand.

¶ 6 The answer and counterclaim were supported by defendant's verifying affidavit, a copy of the letter disputing the debt, and a Postal Service tracking receipt for the letter indicating that it was delivered in March 2011, in the city and postal zone where plaintiff's counsel has its office. The letter indicates that it was sent by certified mail on March 15, 2011, to plaintiff's counsel, asserts that "the debt was satisfied with Bank of America over two years ago on January 22, 2008, copies of the bills of exchange and Certificate of Dishonor are attached" (however, they are not included in the attachments to the answer and counterclaim), and demands that plaintiff prove the debt.

¶ 7 Plaintiff filed a motion to strike and for judgment on the pleadings, pursuant to section 2-615 of the Code of Civil Procedure (Code), 735 ILCS 5/2-615 (West 2010). In the motion, plaintiff stated that it is a bank and a wholly-owned subsidiary of BofA, that it issued and administered the account at issue, and thus argued that it is not a debt collector under the Act because it is collecting its own debt rather than the debt of another. Plaintiff thus sought judgment on the pleadings. Alternatively, plaintiff sought that the counterclaim be stricken under section 2-603 of the Code (735 ILCS 5/2-603 (West 2010)) which requires that counterclaims be raised in separate counts divided in turn into numbered paragraphs each raising a distinct allegation, while defendant's counterclaim was indivisible from her answer, was not divided into paragraphs each raising a distinct allegation, and raised counterclaims against both plaintiff and BofA but was not divided into separate counts.

¶ 8 Defendant filed a document responding to the motion to strike and moved to dismiss the complaint and amend her counterclaim. She alleged that plaintiff sent her a letter referring to itself as a debt collector attempting to collect a debt and argued that, by not responding to her letter disputing the debt, plaintiff failed to deny that it was a debt collector under the Act or to explain the relationship between itself and BofA until after commencing this action. She also alleged that plaintiff "failed or refused to provide authentic agreements with signatures, factual truth, accurate information, and or clarity" to which she could properly respond. Lastly, she alleged that the copy

of the complaint that was served upon her was unsigned and thus not valid under Supreme Court Rule 137 (eff. July 1, 2013).

¶ 9 Attached to the motion was an amended counterclaim separating the counterclaim from her affirmative defense to the complaint and dividing the allegations into more discrete paragraphs. Also attached was a copy of a letter from plaintiff's counsel dated February 22, 2011, acknowledging "receipt of your dispute letter and request for verification," and in response thereto identifying plaintiff as the creditor and stating the account number and balance due. The letter ends with the paragraph: "This is a communication from a debt collector and is an attempt to collect a debt. Any information obtained will be used for that purpose."

¶ 10 In its reply, plaintiff argued that defendant's response to the motion to strike did not "effectively rebut" the arguments in the motion. Plaintiff also noted that the court had not given defendant leave to file an amended counterclaim and argued that the amended counterclaim did not improve defendant's claim under the Act.

¶ 11 On September 20, 2011, the court granted plaintiff's motion for judgment on the pleadings regarding the counterclaim, expressly finding that plaintiff is not a debt collector under the Act and dismissing both the original and amended counterclaim. The court also denied defendant's "oral motion" to dismiss the complaint. The case was continued "for the purpose of assigning for a jury trial." The order did not include a finding that it was final and appealable.

¶ 12 Defendant timely filed a motion for reconsideration. She noted that her written response to plaintiff's motion to strike included her own motion to dismiss the complaint so that her motion to dismiss was not oral but written. She argued that the court's finding that plaintiff was not a debt collector under the Act was factually and legally erroneous, and she argued that plaintiff's counsel is a debt collector under the Act. Citing section 2-606 of the Code, 735 ILCS 5/2-606 (West 2010), which requires that claims based on a written instrument be supported by a copy of the instrument

or an affidavit explaining its unavailability, she reiterated her allegation that plaintiff had not provided "genuine documents" proving that it was the creditor.

¶ 13 Plaintiff responded to the motion to reconsider, arguing that the court did not err in finding that plaintiff was not a debt collector under the act, noting that the issue of whether plaintiff's counsel was a debt collector was addressed during the September 20th hearing, and arguing that defendant's motion to dismiss the complaint, whether oral or written, was inappropriate once she answered the complaint.

¶ 14 Defendant replied in support of her motion to reconsider. She reiterated her argument that plaintiff's counsel is a debt collector under the Act. She also argued that her motion to dismiss was improperly denied because plaintiff had still not provided "authentic documentation verifying defendant's relationship and agreement between [plaintiff] and/or [BofA] with defendant's signature."

¶ 15 On November 30, 2011, the court denied defendant's motion to reconsider in an order that did not include a finding that it was final and appealable.

¶ 16 In its order of December 6, 2011, the court set a trial date of February 7, 2012, at 9 a.m.

¶ 17 In December 2011, defendant filed a motion to reconsider the order of November 8, 2011, closing discovery. While that motion was pending, defendant sent various discovery requests to plaintiff. The court denied the motion on December 20, 2011.

¶ 18 Plaintiff filed her notice of appeal from the November 30th order on December 21, 2011.

¶ 19 On February 7, 2012, the court granted an *ex parte* judgment to plaintiff for $18,757.32 plus costs, noting that defendant was not present in court by 9:55 a.m.

¶ 20 On appeal, defendant contends that the trial court erred in striking her counterclaim without giving her an opportunity to amend it. However, before considering the merits of this appeal, we must determine whether we have jurisdiction to hear it. Plaintiff contends that the appellate court does not have jurisdiction because neither the November 30th order denying defendant’s motion to

reconsider nor the September 20th order granting plaintiff's motion for judgment on the pleadings was final as to all parties and claims, so that the December 21st notice of appeal did not vest this court with jurisdiction.

¶ 21 Supreme Court Rule 304 governs appeals from judgments that are final as to a portion of the case but do not dispose of the entire case, and provides that:

> "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. Such a finding may be made at the time of the entry of the judgment or thereafter on the court's own motion or on motion of any party. *** 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. Feb. 26, 2010).

¶ 22 Rule 304(b) enumerates several exceptions to the Rule 304(a) requirement of an appealability finding. These consist of child custody judgments, judgments determining the rights or status of a party in an "estate, guardianship, or similar proceeding" or the "administration of a receivership, rehabilitation, liquidation, or other similar proceeding," an order finding a person in contempt and imposing a penalty therefor, and orders finally disposing of a post-judgment proceeding to challenge the judgment under Code section 2-1401 or to collect upon the judgment under Code section 2-1402. 735 ILCS 5/2-1401, 2-1402 (West 2010).

¶ 23 Here, the September 20th order not only denied defendant's motion to dismiss the complaint but continued the case for the setting of a trial date. Shortly after the court denied defendant's motion to reconsider on November 30th, it set the case for trial. It is clear that the November 30th order referenced in defendant's notice of appeal was final as to defendant's counterclaim but did not dispose of the entire case. Because the November 30th order did not include appealability findings, and the order does not fall under one of the exceptions to the requirement of such a finding, we find that the appellate court does not have jurisdiction over this appeal.

¶ 24 Accordingly, this appeal is dismissed for lack of jurisdiction.

¶ 25 Dismissed.