FIRST DIVISION
October 9, 2012

No. 1-12-0555

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

HATEM ALSHWAIYAT,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	
	)	
AMERICAN SERVICE INSURANCE COMPANY, an Illinois corporation,	)	No. 10 CH 30870
	)	
Defendant-Appellant	)	
	)	
(Mojo Enterprises, an Illinois Corporation,	)	Honorable
	)	Sophia H. Hall,
Defendant).	)	Judge Presiding.

O R D E R

JUSTICE ROCHFORD delivered the judgment of the court.
Justices Karnezis and Cunningham concurred in the judgment.

Held: Appeal dismissed, where order granting summary judgment in favor of one of two named defendants did not contain language sufficient to confer appellate jurisdiction pursuant to Illinois Supreme Court Rule 304(a).

¶ 1 Defendant-appellant, American Service Insurance Company, an Illinois corporation (ASI), has appealed from an order entering summary judgment in favor of plaintiff-appellee, Hatem Alshwaiyat. In this action for declaratory judgment, plaintiff sought a determination that a policy

of automobile insurance ASI issued to plaintiff's employer, defendant Mojo Enterprises (Mojo), provided $500,000 in underinsured motorist coverage for an automobile accident involving both plaintiff and his deceased wife. For the reasons that follow, we dismiss this appeal for lack of appellate jurisdiction.

¶ 2 I. BACKGROUND

¶ 3 Because we dismiss this appeal for lack of jurisdiction, we provide only those facts necessary to our resolution of that issue.

¶ 4 On July 11, 2011, plaintiff filed a complaint for declaratory judgment, naming both ASI and Mojo as defendants. In that complaint, plaintiff alleged that on July 17, 2008, he was employed by Mojo as a taxi driver when the automobile he was driving was struck by another vehicle operated by Mr. Robert Pas. As a result of this accident, plaintiff suffered significant physical injuries and his wife, a passenger in the taxi, suffered injuries that resulted in her death. Claims against Mr. Pas for plaintiff's injuries and his wife's death were ultimately settled for $100,000 each, the liability limits of the policy of insurance held by Mr. Pas.

¶ 5 Plaintiff's complaint further alleged that both plaintiff and Mojo were insured under a policy of insurance issued by ASI to Mojo, effective January 1, 2008, through January 1, 2009. That policy was alleged to include $500,000 in coverage for bodily injury and property damage and, due to the fact that "uninsured/underinsured coverage" in an amount equal to that amount was never rejected, it was further alleged that "the policy must be construed to provide for $500,000.00 [in] underinsured motorist coverage." Moreover, because ASI had indicated its belief that the insurance policy issued to Mojo did not provide any underinsured motorist coverage at all, plaintiff's complaint asked the circuit court to make a declaration of the rights of the "interested parties" with respect to

the ASI policy and/or reform that policy to "include underinsured motorist coverage in an amount equal to the bodily injury limit [of] $500,000.00."

¶ 6 The record reflects that ASI was served with summons on July 28, 2010, and filed its appearance in this matter on August 10, 2010. There is no evidence in the record that service upon Mojo was ever attempted or completed, and Mojo never filed an appearance.

¶ 7 ASI filed an answer and affirmative defenses to plaintiff's complaint. Among ASI's defenses was an assertion that in Mojo's initial application for insurance, Mojo "specifically requested limits of $20,000 / $40,000 for uninsured / underinsured motorist coverage, and rejected higher limits for that coverage." Thereafter, ASI took plaintiff's deposition and filed a motion for summary judgment. In turn, plaintiff filed a cross-motion for summary judgement. In their respective motions, the parties disputed: (1) the relevance of the initial rejection of higher uninsured or underinsured policy limits made by Mojo's president, Laurie McDonald, when Mojo originally obtained an insurance policy providing a total of $300,000 in bodily injury and property damage coverage; (2) the effect, if any, of Mojo's subsequent request to increase its policy limits to a total of $500,000 in bodily injury and property damage coverage on the amount of uninsured or underinsured insurance thereafter provided by the amended policy; and (3) the proper interpretation of section 143a-2 of the Illinois Insurance Code (215 ILCS 5/143a-2 (West 2008)), which contains certain requirements with respect to uninsured and underinsured motorist coverage.

¶ 8 On February 10, 2012, the circuit court entered both a written order and a written decision denying ASI's motion for summary judgment and granting summary judgment in favor of plaintiff on his cross-motion. In its written decision, the circuit court found that because ASI had failed to comply with the provisions of section 143a-2 of the Illinois Insurance Code, the policy it issued to

Mojo–the policy which also covered plaintiff at the time of the accident at issue here–should be "reformed to set uninsured/underinsured motorist coverage limits at $500,000 to match the bodily injury liability limit." The circuit court's written order indicated that its written decision "shall be a final and appealable order." ASI filed a notice of appeal from those orders on February 16, 2012.

¶ 9 II. ANALYSIS

¶ 10 On appeal, ASI contends that the circuit court improperly interpreted the provisions of section 143a-2 of the Illinois Insurance Code, and incorrectly denied its motion for summary judgment, and granted plaintiff's cross-motion for summary judgment. However, and despite the fact that the issue has not been raised by the parties, we find we are without jurisdiction to address ASI's appeal. *Cangemi v. Advocate South Suburban Hosp.*, 364 Ill. App. 3d 446, 453 (2006) (court has a duty to *sua sponte* determine whether it has jurisdiction to decide the issues presented).

¶ 11 Except as specifically provided by Supreme Court Rule 301, this court only has jurisdiction to review final judgments, orders, or decrees. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994), *et seq*.; *Almgren v. Rush-Presbyterian-St. Luke's Medical Center*, 162 Ill. 2d 205, 210 (1994). "A judgment or order is 'final' if it disposes of the rights of the parties, either on the entire case or on some definite and separate part of the controversy." *Dubina v. Mesirow Realty Development, Inc.*, 178 Ill. 2d 496, 502 (1997).

¶ 12 However, a final judgement or order is not necessarily immediately appealable. Supreme Court Rule 304(a) provides:

> "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. Rule 304(a) (eff. Feb. 26, 2010).

¶ 13 Here, plaintiff's complaint named *both* ASI and Mojo as defendants. It seems quite possible that Mojo was named as a defendant because it was the named insured under ASI's policy, it was Mojo and not plaintiff that dealt with ASI with respect to the request to obtain the policy issued to Mojo and the subsequent increase in the limits on that policy, and plaintiff's suit sought a declaration as to the rights of the "interested parties" thereunder, and/or reformation of Mojo's policy. It has been recognized, in some circumstances, a named insured is so necessary and indispensable to a declaratory judgment action that any judgment entered in their absence from the case is null and void. *Safeway Ins. Co. v. Harvey*, 36 Ill. App. 3d 388, 391-92 (1976); but see *Safeco Ins. Co. of Illinois v. Treinis*, 238 Ill. App. 3d 541, 546-48 (1992) (named insured found not to be necessary and indispensable party) and *State Farm Mut. Auto. Ins. Co. v. Haskins*, 215 Ill. App. 3d 242, 245-46 (1991) (same).

¶ 14 In any case, while both ASI and Mojo were named as defendants in plaintiff's complaint, the record reflects that only ASI was ever served and only ASI filed an appearance in this matter. Mojo itself was never dismissed from the suit, nor was any judgment for or against Mojo ever sought by the parties or entered by the circuit court. Despite the fact that Mojo was never served and did not file an appearance in this matter, it is still a "party" to this suit for purposes of Rule 304(a). *Kral v. Fredhill Press Co.*, 304 Ill. App. 3d 988, 993 (1999); *Zak v. Allson*, 252 Ill. App. 3d 963, 965

(1993); *Mares v. Metzler*, 87 Ill. App. 3d 881, 884-85 (1980). Moreover, the circuit court's resolution of the cross-motions for summary judgment obviously did not resolve plaintiff's claim with respect to Mojo, or finally determine Mojo's interests with respect to the policy, as the circuit court lacked "jurisdiction to enter an order or judgment which affects the rights of a party not properly before the court." *Haskins*, 215 Ill. App. 3d at 245. Indeed, plaintiff's summary judgment motion specifically sought summary judgement only against ASI, and ASI's motion only sought summary judgment against plaintiff. Neither motion made any such request with respect to Mojo.[1]

¶ 15 As such, the circuit court's written order and written decision denying ASI's motion for summary judgment and granting plaintiff's cross-motion for summary judgment resulted in a final order that adjudicated fewer than all the rights and liabilities of all the parties. Pursuant to Illinois Supreme Court Rule 304(a), the written order and written decision were therefore not appealable in the absence of an "express written finding that there is no just reason for delaying either enforcement or appeal or both." Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010).

¶ 16 Here, the only language that could possibly pass for the finding required by Rule 304(a) is that portion of the written order indicating that the written decision "shall be a final and appealable order." However, this court recently rejected a contention that just such language satisfied the requirements of Rule 304(a) in *Palmolive Tower Condominiums, LLC v. Simon*, 409 Ill. App. 3d 539 (2011). In that case, this court reasoned as follows:

> "The rationale underlying Rule 304(a) is that it allows appeals to be taken before the final disposition of a case where the circuit court considers an immediate appeal to be appropriate.

[1] While ASI's motion did also generally ask the circuit court to "find and declare the rights and obligations of the parties," we note again that ASI's motion was *denied*.

> [Citation.] Thus, Rule 304(a) allows a circuit court to limit piecemeal appeals yet still allow early appeals when, in its discretion, doing so 'would have the effect of expediting the resolution of the controversy, would be fair to the parties, and would conserve judicial resources.' [Citation.] A circuit court's declaration that an order is 'final and appealable,' without reference to the justness of delay, or even reference to immediate appealability, evinces no application of the discretion Rule 304(a) contemplates. [Citation.] Instead, absent some other indication from the record that the court intended to invoke Rule 304(a) [citation], a circuit court's declaration that an order is 'final and appealable' amounts to nothing more than a non-binding interpretation. [Citation.]
>
> For these reasons, a circuit court order accompanied by language indicating that it is 'final and appealable,' but not referencing immediate appeal, the justness of delay, or Rule 304(a), does not trigger the rule. [Citations.]" *Id*. at 544; see also *Coryell v. Village of La Grange*, 245 Ill. App. 3d 1, 4-5 (1993) (coming to a similar conclusion based upon similar language).

¶ 17 The language contained in the written order in this matter did not contain any reference to an immediate appeal, the justness of delay, or Rule 304(a). Moreover, there is no other indication in the record reflecting that the circuit court, or the parties intended to invoke Rule 304(a). Indeed, ASI's notice of appeal makes no reference to Rule 304(a), and its brief on appeal contends this court's jurisdiction is properly based upon Illinois Supreme Court Rules 301(Ill. S. Ct. R. 301 (eff. Feb 1, 1994)) and 303 (Ill. S. Ct. R. 303 (eff. June 4, 2008)). Therefore, we have no jurisdiction to review the circuit court's written order and written decision, and we must dismiss ASI's appeal.

¶ 18 III. CONCLUSION

¶ 19 For the foregoing reasons, we dismiss the instant appeal for lack of jurisdiction.

¶ 20 Appeal dismissed.