FIRST DIVISION
December 3, 2012

No. 1-12-0754

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

NEJLA K. LANE, Individually, and THE LAW OFFICES OF NEJLA K. LANE, P.C., an Illinois Corporation,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellants,	)	
v.	)	
	)	No. 11 M2 684
NATIONAL PROCESSING COMPANY,	)	
Defendant-Appellee,	)	
(National Bankcard Corporation and American Express,	)	Honorable Thaddeus Stephan Machnik,
Defendants).	)	Judge Presiding.

O R D E R

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Cunningham concurred in the judgment.

¶ 1 ***Held***: Appeal dismissed for lack of appellate jurisdiction, where complaint was dismissed "without prejudice."

¶ 2 Plaintiffs-appellants, Nejla K. Lane, individually, and The Law Offices of Nejla K. Lane, P.C., an Illinois corporation (Lane), filed the instant suit against defendant-appellant, National

Processing Company (NPC), and defendants, National Bankcard Corporation and American Express. The trial court ultimately granted a motion to dismiss filed by NPC, noting in its written order that Lane may refile this action in Jefferson County, Kentucky pursuant to language contained in the relevant agreement between Lane and NPC. Lane has now appealed from that decision. However, because the trial court's dismissal was entered "without prejudice," we dismiss Lane's appeal for lack of jurisdiction.

¶ 3 I. BACKGROUND

¶ 4 Lane filed an initial complaint in this matter on May 6, 2011. In that complaint, Lane sought to recover damages arising out of defendants' improper handling of an American Express credit card payment made by one of the law firm's clients, pursuant to a credit card processing agreement between Lane, NPC, and National Bankcard Corporation. The complaint generally alleged that a $2,000 credit card payment had not been properly credited to Lane's bank account, and that an unauthorized $2,000.15 charge had subsequently been made upon Lane's bank account. Lane's complaint sought to recover damages arising out of these transactions, asserting claims of breach of contract, conversion, unjust enrichment, and common law fraud.

¶ 5 NPC filed an answer and affirmative defenses to Lane's complaint in June of 2011, in which it objected to Lane's choice of venue for this suit. NPC's answer and affirmative defenses asserted that paragraph 22 of the agreement between it and Lane contained a forum selection clause providing: "Any lawsuit or other action arising out of this Agreement shall be litigated exclusively in a State or Federal court located in Jefferson County, Kentucky." Thereafter, defendant American Express was dismissed from the suit. Lane subsequently filed an amended complaint which named only NPC and National Bankcard Corporation as defendants, contained similar factual allegations,

and asserted claims for breach of contract, negligence, common law fraud, negligent misrepresentation, and a violation of the Illinois Consumer Fraud and Deceptive Practices Act (815 ILCS 505/1 *et seq*. (West 2008)).

¶ 6 In response to the amended complaint, NPC filed a combined motion to dismiss pursuant to section 2-619.1 of the Code of Civil Procedure (Code). 735 ILCS 5/2-619.1 (West 2010). NPC's motion sought, in part, dismissal of the amended complaint in light of the forum selection clause and pursuant to section 2-619 of the Code. 735 ILCS 5/2-619 (West 2010). On November 11, 2011, the trial court entered two orders. The first order dismissed National Bankcard Corporation from this suit with prejudice. The second order stated that NPC's "[s]ection 2-619 motion to dismiss is granted without prejudice. Plaintiff may re-file in Jefferson County, KY pursuant to the ¶ 22 [*sic*] parties' Card Processing agreement." The trial court subsequently denied Lane's motion to reconsider, and Lane timely appealed.

¶ 7 On appeal, this court allowed the parties to file additional briefs addressing NPC's request that Lane's opening brief be stricken and sanctions imposed. That request was based upon NPC's assertion that Lane's opening appellate brief was not properly signed and certified pursuant to Illinois Supreme Court Rule 137 (Ill. S. Ct. R. 137 (eff. Feb. 1, 1994)) and Rule 341 (Ill. S. Ct. Rule 341 (eff. July 1, 2008)).

¶ 8 Additionally, NPC filed a written response to the statement of jurisdiction contained in Lane's opening brief on appeal, after such a response was invited by an October 11, 2012, order entered by this court that questioned Lane's compliance with Illinois Supreme Court Rule 341(h)(4)(ii) (Ill. S. Ct. R. 341(h)(4)(ii) (eff. July 1, 2008)). As we noted in that order, Lane's statement of jurisdiction contended that appellate jurisdiction was conferred upon this court pursuant

to Illinois Supreme Court Rule 366(b)(1)(i) (Ill. S. Ct. R. 366(b)(1)(i) (eff. Feb. 1, 1994)), which is generally recognized to merely outline the scope of this court's powers in conducting appellate review and to presuppose that jurisdiction has otherwise been properly conferred upon this court. See *Bernstein and Grazian, P.C. v. Grazian and Volpe, P.C.*, 402 Ill. App. 3d 961, 970 (2010); *Eychaner v. Gross*, 321 Ill. App. 3d 759, 781-782 (2001), reversed on other grounds, 202 Ill. 2d 228 (2008). NPC's response did not contend that this court lacked jurisdiction; rather, NPC contended that Lane's insufficient statement of jurisdiction was further support for its request that Lane's brief be stricken and sanctions imposed.

¶ 9 Finally, on October 31, 2012, we allowed Lane to withdraw her opening brief and to file an amended opening brief which contained an amended statement of jurisdiction and was properly signed and certified. Lane's amended opening brief contended that jurisdiction over this appeal was properly conferred by Illinois Supreme Court Rule 301 (Ill. S. Ct. R. 301 (eff. Feb. 1, 1994)) and Rule 303 (Ill. S. Ct. R. 303 (eff. June 4, 2008)), because "the instant appeal is from a final judgment of a circuit court in a civil case, and therefore the order appealed from is appealable as of right."

¶ 10 II. ANALYSIS

¶ 11 On appeal, Lane contends that the trial court improperly dismissed the amended complaint on the basis of the forum selection clause. However, we find that we are without jurisdiction to consider the merits of Lane's appeal.

¶ 12 Here, while both parties have addressed the issue of this court's jurisdiction in the context of addressing the sufficiency of Lane's initial statement of jurisdiction, neither party has questioned whether this court does, in fact, have jurisdiction over this appeal. Nevertheless, we have a duty to *sua sponte* determine whether this court has jurisdiction to decide the issues presented. *Cangemi*

v. Advocate South Suburban Hosp., 364 Ill. App. 3d 446, 453 (2006).

¶ 13 Except as specifically provided by the Illinois Supreme Court Rules, 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). Moreover, it is well recognized that the dismissal of a complaint "without prejudice" is " 'on its face a non-appealable order.' " *Flores v. Dugan*, 91 Ill. 2d 108, 114 (1982) (quoting *Arnold Schaffner, Inc. v. Goodman*, 73 Ill. App. 3d 729, 731 (1979)); *Paul H. Schwendener, Inc. v. Jupiter Electric Co., Inc.*, 358 Ill. App. 3d 65, 73 (2005) ("An order dismissing an action 'without prejudice' is not deemed final for purposes of appeal."). Pursuant to this authority, we do not have jurisdiction to consider Lane's appeal because the trial court's dismissal was clearly and specifically entered "without prejudice."

¶ 14 We are certainly aware that "it is the substance of an order, not its form, that matters for the purpose of determining whether it is subject to review as either an interlocutory or a final order." *Sherman West Court v. Arnold*, 407 Ill. App. 3d 748, 752 (2011). Indeed, this court has previously stated that "[b]ecause the effect of a dismissal order is determined by its substance, and not by the incantation of any particular magic words, a trial court's description of a final judgment as being 'without prejudice' is of no greater logical effect than a trial court's statement that a non-final dismissal judgment is 'with prejudice.' " *Schal Bovis, Inc. v. Casualty Insurance Co.*, 314 Ill. App. 3d 562, 568 (1999).

¶ 15 However, our supreme court has quite clearly indicated that its decision in *Flores* stands for the proposition that the "inclusion in an order of the phrase 'without prejudice' clearly manifests the intent of the trial court that its order not be considered final and appealable." *Pfaff v. Chrysler*

Corp., 155 Ill. 2d 35, 63 (1992), overruled on other grounds by *ABN AMRO Mortgage Group, Inc. v. McGahan*, 237 Ill. 2d 526 (2010). Thus while "substance rather than form may determine whether a *general* order of dismissal represents a final adjudication," where an order includes the phrase "without prejudice," a court of review should "decline to engage in any interpretation of an order which so affirmatively indicates on its face that a final adjudication was not made." (Emphasis added.) *Pfaff*, 155 Ill. 2d at 62-63. As our supreme court explained, such orders do not present a case "where certain 'magic words' indicative of a final decision on the merits were not included in a dismissal order such that it becomes necessary to look to the substance of the order." *Id*. at 63.

¶ 16 Even if we were to attempt to divine the intent of the trial court's use of the phrase "without prejudice" in this case, we still could not say that the order was, nevertheless, intended to be final and appealable. As an initial matter, neither a transcript of the hearing on NPC's motion to dismiss nor a bystander's report–either of which might provide some guidance to the trial court's intent or reasons for using "without prejudice" in its order–is included in the record on appeal. Moreover, the context of this particular dismissal order precludes us from concluding with any certainty just what the trial court intended.

¶ 17 We note that, in addition to dismissing Lane's complaint "without prejudice," the trial court's order also states that Lane "*may* re-file in Jefferson County, KY pursuant to the ¶ 22 [*sic*] parties' Card Processing agreement." (Emphasis added.) The "without prejudice" language may simply have been included to allow Lane an opportunity to decide whether to refile in Kentucky while the trial court retained jurisdiction. Further, it is possible to read this language as intending to reflect that while the instant suit had been involuntarily dismissed, the dismissal was not based upon on the underlying merits of Lane's suit, and any claim of collateral estoppel or *res judicata* should,

therefore, not prevail in any refiled action. Such an order may arguably be final and appealable, but for the language indicating that it was "without prejudice."

¶ 18 However, it is possible that the trial court also intended that Lane would be allowed to refile this suit in Cook County, should Lane's efforts to file in Kentucky prove unsuccessful due to any statute of limitations, service of process, or other issues. Similar protections are provided, in the case of a suit dismissed on the grounds of *forum non conveniens*, by Illinois Supreme Court Rule 187(c)(2) (Ill. S. Ct. R. 187(c)(2) (eff. Aug. 1, 1986)). Of course, reading the order in such a way would render it interlocutory in nature, and not one of the specific interlocutory orders appealable as of right or by permission pursuant to Illinois Supreme Court Rule 306 (Ill. S. Ct. R. 306 (eff. Feb. 16, 2011)) or Rule 307 (Ill. S. Ct. R. 307 (eff. Feb. 26, 2010)). Finally, it is possible that the trial court intended all, or none of these things.

¶ 19 What is clear, on its face, is that the order dismissed Lane's complaint "without prejudice." The order is, thus, by its plain terms, not final and appealable. As such, we do not have jurisdiction to consider Lane's appeal on the merits.

¶ 20 Furthermore, the issue of whether Lane's opening appellate brief was properly signed and certified has been rendered moot due to the withdrawal of that brief, the filing of the amended brief, and our finding that this court lacks jurisdiction over this appeal. *In re Jonathan P.*, 399 Ill. App. 3d 396, 400 (2010) (courts of review will generally not consider issues where the result will not be affected regardless of how those issues are decided). Finally, while NPC has made a request for sanctions with respect to the purported insufficiencies of Lane's opening brief, we find no basis for such an award here, as we have allowed that brief to be withdrawn, and a fully compliant brief to be filed in its place.

¶ 21 III. CONCLUSION

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

¶ 23 Appeal dismissed.