2013 IL App (1st) 121104-U

SIXTH DIVISION
MARCH 1, 2013

No. 1-12-1104

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

HALLORAN & YAUCH, INC.,	)	Appeal from the Circuit Court of
Plaintiff-Appellant and Cross-Appellee,	)	Cook County.
v.	)	No. 10 L 7063
ROUGHNECK CONCRETE DRILLING & SAWING COMPANY,	)	Honorable Raymond W. Mitchell, Judge Presiding.
Defendant-Appellee and Cross-Appellant.	)	

JUSTICE R. GORDON delivered the judgment of the court.
Presiding Justice Lampkin and Justice Hall concurred in the judgment.

ORDER

¶ 1 *Held*: Where the trial court's order denying defendant's motion for summary judgment and limiting plaintiff's available damages was not a final order and no petition for leave to appeal was filed, the appellate court lacked jurisdiction to hear the appeals.

¶ 2 The instant appeal arises from defendant Roughneck Concrete Drilling & Sawing Company's performance as a subcontractor pursuant to a contract between defendant and plaintiff Halloran & Yauch, Inc. Plaintiff, who had been hired as a subcontractor to perform

work in a concrete parking garage, hired defendant as a sub-subcontractor to drill nine holes in the west end of the parking garage. During the course of defendant's work, defendant drilled four holes through structural support cables. As a result, the general contractor of the project withheld over $76,000 from the compensation it owed plaintiff in order to repair the damage. Plaintiff filed suit against defendant for breach of contract and gross negligence, and defendant filed a motion for summary judgment. The trial court denied defendant's motion for summary judgment, but interpreted the contract to impose limits on the amount of damages that plaintiff could recover. Plaintiff appeals the trial court's decision concerning the limitation of damages provision of the contract. Defendant cross-appeals, arguing that the trial court erred in denying its motion for summary judgment. For the following reasons, we dismiss the appeals for lack of jurisdiction.

¶ 3 BACKGROUND

¶ 4 On June 17, 2010, plaintiff filed a three-count complaint against defendant. The complaint alleges that in January 2009, plaintiff, a commercial irrigation contractor, was hired as a subcontractor by Bulley & Andrews, LLC (Bulley), the general contractor for work to be preformed at a parking garage in Chicago. The work to be performed by plaintiff included upgrades to the irrigation system for the landscaping at and near the parking garage. The work required holes to be cut into the concrete floors and ceilings of the parking garage so that plaintiff could place its irrigation pipes through the holes. Plaintiff hired defendant, a commercial concrete sawing and drilling contractor, as a sub-subcontractor to perform the required drilling. Plaintiff and defendant executed a written contract on April 7, 2009, which provided that

defendant would drill 18 holes, 9 in the east elevation of the parking garage and 9 in the west elevation. The instant case only involves the work performed in the west elevation.

¶ 5 The complaint alleges that as part of defendant's work, defendant was required to perform electronic scanning of the concrete prior to drilling so that defendant could locate any structural supports, post tension cables, utility lines, or other items embedded in the concrete. On May 6, 2009, defendant visited the parking garage to scan and drill the holes in the west elevation of the parking garage. The next day, plaintiff received a telephone call from a representative of Bulley informing plaintiff that four of the holes drilled by defendant cut through or damaged the concrete reinforcement bars and the post tension cables embedded in the concrete, which were integral to the structural stability of the parking garage; defendant did not inform plaintiff of the damage caused by the holes. As a result of the damage, the parking garage was required to be repaired.

¶ 6 The first count of the complaint alleges that defendant breached its contract with plaintiff by damaging the post tension cables. Plaintiff claims that as a result of defendant's actions, it has incurred damages in the amount of $76,495.00, which are directly related to the analysis and repair of the post tension cables damaged by defendant.

¶ 7 The second count of the complaint alleges gross negligence and willful conduct by defendant. The complaint alleges that when defendant drilled the first hole that damaged a post tension cable, defendant knew or should have known that the location of the hole drilled was incorrect and knew or should have known that it should re-scan the areas to be drilled prior to drilling further. However, defendant failed to re-scan the area or cease drilling. Defendant then

drilled a second successive hole that also damaged a post tension cable. At that time, defendant had actual knowledge that the location drilled was again incorrect and knew or should have known that defendant should re-scan the area prior to further drilling. Defendant failed to re-scan the area or cease drilling.

¶ 8 The complaint alleges that defendant then drilled a third successive hole that damaged a post tension cable. Based on its previous results, defendant had actual knowledge that the location drilled was incorrect and knew or should have known that the area needed to be re-scanned prior to any future drilling. However, defendant again failed to re-scan the area and failed to cease drilling. Finally, defendant then drilled a fourth successive hole damaging a post tension cable.

¶ 9 The complaint alleges that defendant committed gross negligence[1] by continuing to drill after damaging the post tension cables and by failing to re-scan the area to be drilled after previous holes had damaged post tension cables. The complaint alleges that the drilling of the holes was "willful, reckless and in conscious disregard for the apparent and obvious facts and conditions of the Premises of which [defendant] was wholly aware." The complaint further alleges that at no time during the drilling did defendant inform plaintiff that it had damaged at least four post tension cables. As a result of the gross negligence and willful conduct of defendant, plaintiff alleges that it incurred damages in the amount of $76,495.00 and requested judgment for that amount.

¶ 10 The third count of the complaint, not at issue in the instant appeal, alleges in the

[1] The contract limited negligence by defendant to gross negligence or willful misconduct.

alternative that defendant committed fraud by stating that it would properly electronically scan the areas of the parking garage prior to drilling.

¶ 11 Attached to the complaint was the four-page contract executed by the parties. The contract contemplates work to be performed at three locations for a total of $14,355.00; the amount to be paid for the work at the parking garage at issue in the instant case was $2,970.00 for drilling 18 holes, 9 in the east elevation and 9 in the west elevation of the parking garage. Under the description of the work, the contract includes the statement "ALL HOLES ARE TO BE APPROVED BY OTHERS BEFORE WE DRILL." (Emphasis in original.) After the price, in the "Notes" section, the contract includes the following:

> "ROUGHNECK CONCRETE DRILLING AND SAWING CO. HAS BEEN HIRED TO PERFORM SCANNING. IF THE CLIENT DOES NOT HIRE ROUGHNECK TO PERFORM THE CUTTING PROCEDURES, ROUGHNECK WILL NOT BE HELD LIABLE IN ANY WAY FOR DAMAGE CAUSED BY ANY AND ALL CONCRETE CUTTING OR CORING EXECUTED BY ANY AND ALL OTHER CONTRACTORS IN THE SCANNED AREA. THE AREA TO BE SCANNED MUST BE A MINIMUM OF 4" FROM ANY INTERSECTING POINT, WALL OR COLUMN TO THE SURFACE BEING SCANNED." (Emphasis in original.)

¶ 12 On the second page of the contract, directly before the "Terms and Conditions of Sale"

section, the following language appears:

> "Disclaimer: Roughneck makes no, and hereby expressly disclaims all warranties, express or implied, with respect to the nature, quantity or quality of the services to be performed hereunder. Except to the extent of its gross negligence or willful misconduct, Roughneck shall not be liable to the customer for any damages as a result of its performance or failure to perform the services."

Under the "Terms and Conditions of Sale" section, paragraphs 2 and 3 provide:

> "2. Contract Claims Only. Customer's claims with respect to the services furnished hereunder shall be limited to the contractual warranties and remedies provided in this agreement and may be brought only in an action for breach of contract. Customer shall not make any claim against Roughneck based on any theory of tort, including but not limited to strict liability or negligence theories, except to the extent of the gross negligence or willful misconduct of Roughneck.
>
> 3. Liability of Roughneck. The total liability of Roughneck under this agreement for breach of warranty, or for any other breach of the Agreement or for any claim related to services furnished by Roughneck under this Agreement shall in no event

> exceed the amount paid to Roughneck by Customer hereunder. In no event shall [R]oughneck of its agents be liable for special, incidental or consequential damages of any kind whatsoever, or for the loss of profits or revenue, or for loss of use, or for actual losses or for loss of production or progress of construction, whether resulting in any manner from services furnished under this agreement or from [R]oughneck's breach of any warranty or any other obligation of [R]oughneck under this agreement. [T]he foregoing limitation of damages and disclaimer of special, incidental and consequential damages shall apply to all causes of action whatsoever asserted against [R]oughneck pertaining to the performance or nonperformance of the services or of [R]oughneck's other obligations under this agreement."

¶ 13 On August 9, 2010, defendant filed its answer and affirmative defenses. Defendant raised two affirmative defenses. The first claimed that, pursuant to the terms of the contract, plaintiff's potential damages were limited to the amount of the contract, which was $3,230.00.[2] The second claimed that, pursuant to the contract, all areas to be scanned were to be a minimum of four inches from any intersecting point, wall, or column; however, plaintiff instructed defendant to scan areas within four inches of an intersecting point, wall, or column, so plaintiff knew that

[2] It is not clear how the amount was calculated, since the portion listed for the work at the parking garage was $2,970.00.

accuracy of the scanning was not guaranteed and accepted that risk by instructing defendant to scan those areas.

¶ 14 In the same pleading, defendant included a counterclaim for contribution against plaintiff. The counterclaim stated that the contract, as well as a second contract entered into concerning the same work, contained a requirement that plaintiff approve all holes before defendant drilled. The counterclaim alleged that the holes were approved by plaintiff, so to the extent that they caused any damage, plaintiff's approval proximately caused the damage.

¶ 15 On August 1, 2011, defendant filed a motion for summary judgment and to strike the *ad damnum* clause of each count of the complaint. Defendant argued: (1) since plaintiff did not possess an ownership interest in the parking garage, it had no standing to sue defendant for property damage; (2) plaintiff's negligence claim was barred by the *Moorman* doctrine; (3) plaintiff waived its right to bring the instant lawsuit when it executed the contract with defendant, which contained "clear and unambiguous limitations on liability and damages"; and (4) plaintiff's fraud claim was based on promissory fraud, which is not actionable in Illinois. Defendant also requested that the prayers for relief in all three counts be stricken because the contract contained language limiting the possible damages to the amount paid to defendant under the contract.

¶ 16 Attached to the motion for summary judgment was a copy of plaintiff's subcontract with Bulley, the general contractor on the project. The subcontract listed the owner of the property as InterPark, Inc. Section 7.4 of the subcontract provided:

"Waiver of Subrogation. Subcontractor, on behalf of itself

> and all of its Sub-subcontractors, hereby waives all rights of action and subrogation against General Contractor, Owner and any lender for the Project, and their officers, agents, and employees to the extent of any insurance recoveries that may be obtained by such waiving party including, but not limited to personal injury and property damages including damages to tools and equipment caused by fire and other perils covered by insurance, except such rights as it may have to proceeds of insurance held by any other person as trustee or otherwise on behalf of Subcontractor."

The subcontract also provided that violation of any condition of the contract would constitute default and that, in the case of default, Bulley had the option of terminating the subcontract and ceasing to make further payment to plaintiff.

¶ 17 Also attached to the motion for summary judgment were plaintiff's answers to interrogatories, in which plaintiff stated that $76,495.00 was withheld by Bulley from sums that were due to plaintiff for the work performed on the parking garage.

¶ 18 In its response to the motion for summary judgment, plaintiff argued: (1) it had standing to file suit against defendant because they had a contractual relationship and plaintiff suffered actual damages; (2) if plaintiff did not have standing for its own claim, it had standing to file suit against defendant to recoup its damages through the theory of subrogation; (3) an exception to the *Moorman* doctrine exists because if plaintiff does not have standing for the contract action, then it is left without a remedy if it cannot bring a tort action; and (4) the limitation of damages

and limitation of liability provisions in the contract are ambiguous and unconscionable. Plaintiff's response also noted that, as a result of the problems with the drilling, plaintiff did not pay defendant for its work.

¶ 19 Attached to plaintiff's response was an affidavit from Thomas Halloran, a vice president with plaintiff and the person who had signed the contract with defendant. The affidavit stated that he had served as the vice president of plaintiff for over 20 years. The affidavit further stated that on April 7, 2009, Halloran signed the contract with defendant; plaintiff did not draft the contract. Halloran was not aware of the terms concerning the limitation of damages when he signed the contract and was never made aware of the terms by defendant's representative. If he had been made aware of the limitations of damages provision, he would not have signed the contract. Finally, the affidavit stated that plaintiff had retained defendant a number of times previously and the April 7, 2009, contract was the first time their agreement was reduced to writing; generally, the agreement to perform work was verbal.

¶ 20 On December 9, 2011, the trial court issued a written order concerning defendant's motion for summary judgment. The trial court found that plaintiff did not have standing to file a cause of action in tort against defendant because plaintiff did not have an ownership interest in the damaged property. The trial court further found that the tort claim was for strictly economic loss and was barred by the *Moorman* doctrine. However, the court noted that

> "the tort issue is not wholly resolved by the standing and *Moorman* issues because in the parties' contract, Defendant agreed to be liable for damages arising from its gross negligence or willful

> misconduct. The contract provides that Defendant shall not be liable to Plaintiff for any damages as a result of its performance 'except to the extent of its gross negligence or willful misconduct.' Therefore, even though the *Moorman* doctrine and lack of standing leave Plaintiff with only contractual remedies, the contract allows for recovery for gross negligence or willful misconduct."

Consequently, the trial court denied defendant's motion for summary judgment on count II of the complaint, which concerned the negligence claim.

¶ 21 The trial court then found that the terms of the contract were not ambiguous and that the only reasonable interpretation of the contract was that the only theory under which defendant could be liable was gross negligence or willful misconduct. The court further found that the contract clearly provided that the amount paid to defendant was the maximum amount for which defendant could be liable. The trial court disagreed with plaintiff's argument that the contract led plaintiff to believe that defendant would accept responsibility for damages if it was hired to perform the drilling on the project. However, the court found that summary judgment was not justified "because Defendant agreed to be liable up to the amount it was paid on the contract for grossly negligent or willful conduct."

¶ 22 The trial court found that the limitation of damages provisions were not unconscionable, either procedurally or substantively. Accordingly, the trial court found that they should be enforced as written. Finally, the trial court found that plaintiff's promissory fraud claim was not actionable and granted defendant's motion for summary judgment on that count.

¶ 23 In sum, the trial court denied defendant's motion for summary judgment on counts I and II of the complaint, concerning the breach of contract and negligence claims, and granted the motion for summary judgment on count III of the complaint, concerning the fraud claim. The court further granted defendant's motion to strike the *ad damnum* clauses of the complaint, holding that "[a]ny recovery that Plaintiff might secure is limited to the amount Plaintiff paid Defendant under the contract."

¶ 24 Both plaintiff and defendant filed motions to reconsider, which the trial court denied on February 6, 2012. On March 15, 2012, the trial court entered an order finding that, pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010), the trial court's order of December 9, 2011, was a final order and there was no just reason for delaying the enforcement or appeal thereof. On April 10, 2012, plaintiff filed a notice of appeal and on April 12, 2012, defendant filed a notice of cross-appeal.

¶ 25 ANALYSIS

¶ 26 On appeal, plaintiff claims that the trial court erred in finding that plaintiff's available damages were limited to the amount paid to defendant pursuant to the contract and defendant claims that the trial court erred in denying its motion for summary judgment. However, we find that we cannot consider either party's argument because we lack jurisdiction over the instant appeals.

¶ 27 "Jurisdiction of appellate courts is limited to reviewing appeals from final judgments, subject to statutory or supreme court rule exceptions." *In re Marriage of Verdung*, 126 Ill. 2d 542, 553 (1989) (citing *People ex rel. Scott v. Silverstein*, 87 Ill. 2d 167, 171 (1981), and *Village*

of Niles v. Szczesny, 13 Ill. 2d 45, 47 (1958)). "A judgment is considered final 'if it terminates the litigation between the parties on the merits or disposes of the rights of the parties, either on the entire controversy or a separate part thereof.' " *In re Curtis B.*, 203 Ill. 2d 53, 59 (2002) (quoting *R.W. Dunteman Co. v. C/G Enterprises, Inc.*, 181 Ill. 2d 153, 159 (1998)).

¶ 28 In the case at bar, the order the parties are challenging is an order denying defendant's motion for summary judgment and limiting plaintiff's potential damages. The trial court's order in the case at bar did not dispose of the rights of either party on any issue,[3] so it is not a final order. "Ordinarily, the denial of summary judgment is not appealable, because such an order is interlocutory in nature." *Clark v. Children's Memorial Hospital*, 2011 IL 108656, ¶ 119. Additionally, an order limiting damages available is not a final order, because it does not dispose of the issue of liability or damages to the extent that damages could be assessed. See *Vijuk Bindery Equipment, Inc. v. Transconex, Inc.*, 171 Ill. App. 3d 408, 410 (1988) ("In granting partial summary judgment on this issue, the trial court ruled, as a matter of law, that plaintiff could potentially recover a maximum of only $50 in this case. The order did not, however, dispose of the issue of liability or the issue of damages to the extent that damages could be assessed anywhere between $0 and $50."). Accordingly, we lack jurisdiction to review the trial court's order.

¶ 29 Plaintiff claims that the trial court has jurisdiction pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010). Rule 304(a) provides that "[i]f multiple parties or multiple

[3] The trial court granted summary judgment on plaintiff's fraud claim, but that issue is not the subject of the instant appeal.

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." Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010). In the case at bar, the trial court included a written finding pursuant to Rule 304(a) in its order denying the parties' motions to reconsider. However, "the mere presence of Rule 304(a) language cannot make a nonfinal order final and appealable." *People ex rel. Block v. Darm*, 267 Ill. App. 3d 354, 356 (1994); *Cinch Manufacturing Co. v. Rosewell*, 255 Ill. App. 3d 37, 42-43 (1993). Here, the trial court's denial of defendant's motion for summary judgment is not a final order and the presence of Rule 304(a) language in the trial court's denial of the motions to reconsider does not make it so.

¶ 30 We note that, in certain situations, otherwise nonappealable orders may be appealed. For instance, a denial of a motion for summary judgment may be reviewed where a cross-motion for summary judgment on the same issue has been granted, because the resulting order entirely disposes of the litigation. See, *e.g.*, *Colvin v. Hobart Brothers*, 156 Ill. 2d 166, 170 (1993). However, our supreme court has declined to expand that rule to situations such as in the case at bar, where an order contains a denial of a motion for summary judgment on one claim, but contains a final judgment on a separate claim. *Arangold Corp. v. Zehnder*, 187 Ill. 2d 341, 358-59 (1999). Thus, the grant of defendant's motion for summary judgment on count III of the complaint does not permit us to review the denial of the motion for summary judgment on counts I and II of the complaint.

¶ 31 Additionally, since an appeal from a final judgment draws into issue all prior

interlocutory orders that produced the final judgment, "we have jurisdiction to review interlocutory orders of a trial court if those orders constitute a procedural step in the progression leading to the entry of the final judgment from which an appeal has been taken." *Valdovinos v. Luna-Manalac Medical Center, Ltd.*, 307 Ill. App. 3d 528, 538 (1999). In the case at bar, the only final judgment entered was the grant of summary judgment on count III of the complaint, which was not appealed. Consequently, the denial of the motion for summary judgment on counts I and II and the limitation of damages cannot be a procedural step in the progression leading to the entry of a final judgment from which an appeal has been taken and the order remains unappealable.

¶ 32 Finally, otherwise nonappealable orders may be appealed pursuant to supreme court rules. The only supreme court rule that would permit an appeal in the instant case is a petition for leave to appeal pursuant to Illinois Supreme Court Rule 308 (eff. Feb. 1, 1994), which permits an application for leave to appeal in situations where the trial court 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." As there is no such finding in the case at bar, nor was there a petition for leave to appeal filed, we cannot consider the merits of the parties' claims and must dismiss the appeal for lack of jurisdiction.

¶ 33 CONCLUSION

¶ 34 We find that we lack appellate jurisdiction to consider the parties' appeals since the order denying defendant's motion for summary judgment and limiting the amount of damages

available to plaintiff was not a final order and no petition for leave to appeal pursuant to Rule 308 was filed.

¶ 35 Appeals dismissed for lack of jurisdiction.