FOURTH DIVISION
September 30, 2014

No. 1-13-1454

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SHAHIDA FOZIA KHAN,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
	)	
v.	)	No. 10 L 1210
	)	
BRENDA CARSON,	)	Honorable
	)	John P. Callahan,
	)	Kathy M. Flanagan
Defendant-Appellee.	)	Judges Presiding.

JUSTICE EPSTEIN delivered the judgment of the court.
Justices Howse and Taylor concurred in the judgment.

ORDER

¶ 1 ***Held***: Appeal dismissed for lack of jurisdiction where orders appealed from were not final and appealable.

¶ 2 Plaintiff Shahida Fozia Khan *pro se* appeals from: (1) the February 21, 2013 order of the circuit court of Cook County finding that her former counsel had not waived its attorney fees, and further ordering plaintiff to reimburse her former counsel's costs of $1,093.45 "at the conclusion of this litigation (or before) out of any settlement or judgment proceeds" and (2) the April 5, 2013 order denying her motion to set aside the February 21, 2013 order. We conclude that neither order is a final appealable order. We dismiss this appeal for lack of jurisdiction.

¶ 3 BACKGROUND

¶ 4 On January 27, 2010, plaintiff *pro se* filed a complaint against defendant Brenda Carson for injuries plaintiff allegedly sustained in an automobile accident on January 28, 2008. The complaint was dismissed for want of prosecution (DWP). Thereafter, plaintiff retained counsel, Lipkin & Higgins, on May 27, 2010. Lipkin & Higgins had the DWP vacated and filed an amended complaint on June 17, 2010. In October 2010, the case was again DWP'd and the DWP was later vacated. On January 6, 2012, Lipkin & Higgins filed a motion to withdraw. On January 30, 2012, while Lipkin & Higgins's motion was pending, plaintiff *pro se* filed several motions including a motion to order her counsel "to provide a complete file of records." On February 6, 2012, the trial court granted Lipkin & Higgins's motion to withdraw as plaintiff's counsel and ordered plaintiff to file a supplemental appearance or retain an attorney to do so.

¶ 5 According to plaintiff, in the spring of 2012, she went to the offices of Lipkin and Higgins to get her case file but her counsel demanded that she first sign a statement that she would pay the counsel $1093.45 in costs and expenses incurred by the firm. She refused and left without a copy of the file.

¶ 6 When the matter subsequently appeared before the court on the status of whether plaintiff had retained another attorney, it was continued until April 6, 2012, and on that date, the case was DWP'd, which plaintiff successfully had vacated. The case was then DWP'd several more times all of which plaintiff successfully had vacated while acting *pro se*. In her *pro se* motions to vacate the DWPs, plaintiff requested copies of the court file from her former counsel. The trial court did not address these requests when vacating the DWPs. On January 9, 2013, the case was DWP'd for the sixth time (the court noted the dates of the prior DWPs as "5-4-10, 10-19-10, 4-6-12, 7-25-12 and 10-11-12").

¶ 7 On January 15, 2013, plaintiff *pro se* filed a "motion to allow continuation with conditions" in which she requested the court to vacate the sixth DWP. She also requested an order allowing a copy of the case file without cost, six weeks to review the file, a status meeting and additional time if more witnesses need to be introduced before the trial.

¶ 8 On January 23, 2013, the matter, including plaintiff's motion, was continued to February 14, 2013, to allow plaintiff to seek legal representation. On February 11, 2013, plaintiff *pro se* filed a motion to set aside the orders entered on January 9, 2013 (sixth DWP), and January 23, 2013 (case management order). Plaintiff maintained that she has the right to represent herself. She also requested the court to order her former counsel to provide her with a copy of her case file "without immediate payment."

¶ 9 On February 14, 2013, the court held a hearing on plaintiff's motion to vacate the DWP entered on January 9, 2013. After plaintiff advised the court that she could not obtain her file from her former counsel, the court ordered that an attorney from Lipkins & Higgins appear in court on February 21, 2013, with a complete copy of plaintiff's file.

¶ 10 On February 21, 2013, the court entered an order, part of which plaintiff is now appealing. The court order stated that "[p]laintiff received her entire litigation file in open court from former counsel." The order further found that plaintiff's former counsel had not waived its attorney fees, and further ordered plaintiff to reimburse her former counsel's costs of $1,093.45 "at the conclusion of this litigation (or before) out of any settlement or judgment proceeds." The matter was set for status on May 21, 2013.

¶ 11 On March 22, 2013, plaintiff *pro se* filed a motion to set aside part of the order entered on February 21, 2013, alleging that Lipkin & Higgins "withdrew on its own free will" and that there had been no recovery between the time the firm had started work on the case and the time it had

withdrawn. Plaintiff maintained that her former counsel had agreed on an 18% contingency fee, but later demanded a 28% contingency fee. She also argued that her former counsel were not entitled to any payment under their contract despite any contingency fee. Plaintiff claimed that her former counsel negligently withdrew without taking appropriate steps including handing over the case file, and were not entitled to any refunds, payment or lien.

¶ 12 On March 28, 2013, plaintiff *pro se* filed a motion to grant refunds, alleging that she lost her job in 2009, and was qualified to sue as an indigent person and had received an order in September 2012, allowing her to do so. She requested the court to reimburse her for the costs incurred by her former counsel in the lawsuit against defendant.

¶ 13 On April 5, 2013, the trial court denied plaintiff's pending *pro se* motions. The court also excused plaintiff's former counsel from having to appear at future hearings, motions, or case management conferences in this matter. The court set the matter for case management on May 21, 2013.

¶ 14 On May 3, 2013, plaintiff *pro se* filed a notice of appeal from the orders entered on February 21, 2013, and April 5, 2013. She listed defendant as the appellee in the notice of appeal. Although no brief was filed in response to this appeal, we may consider it pursuant to the principles set forth in *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 131-33 (1976).

¶ 15 ANALYSIS

¶ 16 As an initial matter, we must address whether we have jurisdiction to consider this appeal. See, *e.g.*, *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 251-52 (2010) (noting that a reviewing court has a duty to consider its jurisdiction and dismiss an appeal if the court determines that jurisdiction is wanting). Our jurisdiction 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); accord *Board of Trustees of Community College District No. 508 v. Rosewell*, 262 Ill. App. 3d 938, 950 (1992) ("Appellate jurisdiction is confined to reviewing final judgments unless the order to be reviewed comes within one of the exceptions for interlocutory orders specified by the supreme court.").

¶ 17 Plaintiff asserts that jurisdiction is proper under Supreme Court Rule 301 (eff. Feb. 1, 1994), which governs appeals from final orders. Under Rule 301, an order is final and thus appealable if it either 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 branch thereof. *Hull v. City of Chicago*, 165 Ill. App. 3d 732, 733 (1987); see also *Big Sky Excavating, Inc. v. Illinois Bell Telephone Co.*, 217 Ill. 2d 221, 232-33 (2005) ("A final judgment is a determination by the court on the issues presented by the pleadings which ascertains and fixes absolutely and finally the rights of the parties in the lawsuit."). In general, an order is final and appealable if it determines the merits of the parties' claims, such that the only remaining action is to proceed with the execution of the judgment. *In re Estate of French*, 166 Ill. 2d 95, 101 (1995). We conclude that neither the February 21, 2013 court order, nor the April 5, 2013 order denying plaintiff's motion to set aside the February 21, 2013 was a final and appealable order.

¶ 18 We first address that part of the order finding that plaintiff's former counsel had not waived its attorney fees. "An attorney who withdraws from a case for a justifiable cause or is terminated without cause may recover compensation for services rendered." *Twin Sewer & Water, Inc. v. Midwest Bank & Trust*, 308 Ill. App. 3d 662 (1999). Generally, to enforce a lien, "the attorney must file a petition in a court of competent jurisdiction to adjudicate the rights of the parties. [Citation.]" (Internal quotation marks omitted.) *Moenning v. Union Pacific R.R. Co.*,

2012 IL App (1st) 101866, ¶ 17 (quoting 770 ILCS 5/1 (West 2006)). "Since the attorney's lien is a creature of statute, the [Attorneys Lien] Act must be strictly construed, both as to establishing the lien and as to the right of action for its enforcement." (Internal quotation marks omitted.) *Pedersen & Houpt, P.C. v. Main Street Village West Part 1, LLC*, 2012 IL App (1st) 112971¶ 24 (quoting *People v. Philip Morris, Inc.*, 198 Ill. 2d 87, 95 (2001)). "Attorneys who do not strictly comply with the [Attorneys Lien] Act have no lien rights." *Id*. Nothing in the record indicates that plaintiff's former counsel has made any attempt to enforce its *lien* to date. The judgment is not ready to be executed because the court order merely concluded that counsel had not waived its lien. Thus, to the extent the court order referenced the statutory lien, we conclude that this part of the order was not a final and appealable order.

¶ 19 However, we have noted that "[t]wo types of liens may be asserted to obtain payment of outstanding attorney fees." *Twin Sewer & Water, Inc. v. Midwest Bank & Trust Co*., 308 Ill. App. 3d 662, 667 (1999). In addition to the special lien that attaches only to the proceeds recovered in the underlying litigation, a "retaining or general lien attaches to property belonging to the client, which the attorney received during representation." *Id*. "Notwithstanding the creation of a statutory lien for attorney's fees in Illinois, the common law retaining lien remains a right in favor of the attorney." *Upgrade Corp. v. Michigan Carton Co*., 87 Ill. App. 3d 662, 664 (1980). "A common law retaining lien is a possessory lien in favor of an attorney for unpaid fees, and exists on all papers or documents of the client placed in the attorney's hands in his professional character or in the course of his employment." (Internal quotation marks omitted.) *In re Coronet Insurance Co.*, 298 Ill. App. 3d 411, 415 (1998). Such a lien allows an attorney to retain possession of a client's files until such time as his fees are paid or adequate security posted. *Id*.

¶ 20 Assuming the court order referenced former counsel's retaining lien, we note that the court order further noted that plaintiff had received "her entire litigation file." Although a general or retaining lien cannot be enforced by judicial proceedings *brought for that purpose*, "where the attorney is brought into court, upon application of his client, to compel the attorney to turn over *** papers upon which he claims a lien ***, the court may ascertain the extent of the lien and enforce it. [Citation.]" (Internal quotation marks omitted.) *Twin Sewer & Water, Inc. v. Midwest Bank & Trust Co.*, 308 Ill. App. 3d 662, 668-69 (1999). "The attorney who claims compensation for services rendered by him to the client is entitled to a summary determination fixing the value of his services so that such amount can be paid or otherwise adequately secured before the production order may be enforced." *Upgrade Corp. v. Michigan Carton Co.*, 87 Ill. App. 3d 662, 666 (1980). To the extent the portion of the order concluding that plaintiff's attorneys had "not waived their lien" referred to the retaining lien, we conclude that the order was not appealable. The finding constituted a part of the proceedings in the case between plaintiff and defendant, that case is still pending, and the order contains no Rule 304(a) language.

¶ 21 We also conclude that the portion of the court order requiring plaintiff to pay her former counsel's "costs" was not final and appealable.[1] Our supreme court has stated that "[a] judgment for costs is a money judgment enforceable by execution [citation], and is clearly appealable." *Galowich v. Beech Aircraft Corp.*, 92 Ill. 2d 157, 161 (1982). The order here, however, additionally stated that plaintiff was to pay her former counsel's costs "*out of any settlement or judgment proceeds.*" (Emphasis added.) Although the amount of reimbursable "costs" has been

[1] Generally, "costs" taxed to a losing party are commonly understood to be “court costs,” such as filing fees, subpoena fees, and statutory witness fees. *Burmac Metal Finishing Co. v. West Bend Mutual Insurance Co.*, 356 Ill. App. 3d 471 (2005). Here, the order does not concern costs of a losing party but, instead, reimbursable costs to a party's former counsel. Also, it is unclear from the record whether the costs awarded by the trial court consisted of "court costs" only, or all of counsel's costs.

determined, no settlement or judgment proceeds exist, and there is a possibility that there may not be any proceeds. The action between plaintiff and defendant remains pending. It cannot be said that the only remaining action is to proceed with the execution of the judgment. The order, as written, does not permit plaintiff's former counsel to enforce the judgment. Thus the order does not constitute "a determination by the court on the issues presented by the pleadings *which ascertains and fixes absolutely and finally* the rights of the *parties* in the lawsuit." (Emphases added.) *Big Sky Excavating, Inc*., 217 Ill. 2d at 232-33.

¶ 22 Even assuming *arguendo* that we had jurisdiction to consider this appeal, to the extent plaintiff seeks our review of the substance of the trial court's orders, we would be required to affirm the trial court's order pursuant to *Foutch v. O'Bryant*, 99 Ill. 2d 389 (1984). As the *Foutch* court explained:

> "[A]n appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis. Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Id*. at 391-92.

In *Foutch*, the appellant failed to provide a transcript of the hearing on a motion to vacate. *Id*. at 392. Therefore, the court concluded that there was no basis for holding that the trial court abused discretion in denying the motion. *Id*.; see also *In re Marriage of Frazier*, 205 Ill. App. 3d 621, 625 (1990) (affirming an award of attorney fees where the appellant had failed to include a transcript of the hearing).

¶ 23 Supreme Court Rule 321 requires an appellant to provide a complete record on appeal, including any report of proceedings. Ill. S. Ct. R. 321 (eff. Feb. 1, 1994). If a verbatim transcript is unavailable, Illinois Supreme Court Rule 323 authorizes, and it is generally incumbent upon the appellant to file, either a bystander's report of the proceedings or an agreed statement of facts. Ill. S. Ct. R. 323(c),(d) (eff. Dec. 13, 2005); see also *Midstate Siding & Window Co., Inc. v. Rogers*, 204 Ill. 2d 314, 319 (2003); *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984).

¶ 24 Here, the February 21, 2013 court order states that the cause was "coming to be heard for status/[case management conference]." However, the order also states that the court made its ruling "after being fully advised of the premises." "Once the trial court makes a determination as to the reasonableness of attorney fees and related costs, that determination will not be disturbed absent an abuse of discretion. [Citation.]" *Shoreline Towers Condominium Ass'n v. Gassman*, 404 Ill. App. 3d 1013, 1024 (2010); accord *Taghert v. Wesley*, 343 Ill. App. 3d 1140, 1148 (2003) (an award of attorney fees and costs is a matter within the trial court's discretion and that award will be upheld, absent an abuse of discretion). Plaintiff, however, has failed to provide a transcript or a bystander's report and this court, if it had jurisdiction, could not determine if the court abused its discretion. Plaintiff did not meet her burden of presenting this court with a record of the trial court proceedings to support her contentions on appeal.

¶ 25 CONCLUSION

¶ 26 For the foregoing reasons, we dismiss this appeal for lack of jurisdiction. The court found that plaintiff's former counsel had not waived its attorney fees and ordered plaintiff to reimburse her former counsel's costs of $1,093.45. However, that order additionally stated that plaintiff was to do so "at the conclusion of this litigation (or before) *out of any settlement or*

judgment proceeds." (Emphasis added.) There has been no settlement or judgment in this case. Neither the February 21, 2013 court order, nor the order denying her motion to set aside the February 21, 2013 order was a final and appealable order.

¶ 27 Appeal dismissed.