2016 IL App (1st) 141269-U

FIRST DIVISION
August 1, 2016

No. 1-14-1269

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

COUNTRY MUTUAL INSURANCE COMPANY, Plaintiff-Appellant-Cross-Appellee, v. BEST PALLET COMPANY, LLC and DAN LYONS, Defendants-Appellees-Cross-Appellants and Kevin Loudermilk, Defendant.	)	Appeal from the Circuit Court of Cook County, No. 09 CH 47205 Honorable Sophia H. Hall, Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Cunningham and Justice Harris concurred in the judgment of the court.

O R D E R

¶ 1 *Held:* Appeal and cross-appeal dismissed for lack of jurisdiction where the notices of appeal were not filed within 30 days of the trial court's order that disposed of all of the parties' claims, no timely posttrial motions were filed, and no extension of time was granted before the trial court lost jurisdiction; dismissed.

¶ 2 At issue in this insurance coverage dispute is whether plaintiff Country Mutual Insurance

Company owed duties to defend or indemnify defendants Best Pallet Company, LLC, and Dan Lyons in a racial discrimination lawsuit filed against them by a former employee of Best Pallet. The parties appeal from various summary judgment rulings of the circuit court. Because no notice of appeal was filed within 30 days of either the final judgment resolving the last of the parties' claims on the merits or a timely posttrial motion filed against that judgment, we must dismiss the appeal for lack of jurisdiction.

¶ 3 BACKGROUND

¶ 4 In 2008, Kevin Loudermilk filed a racial discrimination lawsuit against Best Pallet and Lyons, his former employer and supervisor, in the United States District Court for the Northern District of Illinois, seeking damages and injunctive relief for violations of federal law. See Loudermilk v. Best Pallet Company, LLC, No. 08 CV 8689 (N.D. Ill.). The lawsuit ultimately resulted in a settlement requiring defendants to pay Loudermilk $125,000.

¶ 5 Defendants tendered the lawsuit to plaintiff for coverage under Best Pallet's general liability insurance policy. Citing various limitations and exclusions in the policy, plaintiff denied coverage and filed a complaint for declaratory judgment on June 10, 2009 in the Circuit Court of Cook County, asking the circuit court to declare that it owed no duty to defend or indemnify either defendant. Defendants filed counterclaims seeking declarations that plaintiff did owe such duties, in addition to damages for breach of contract and statutory damages pursuant to section 155 of the Illinois Insurance Code (215 ILCS 5/155 (West 2008)).

¶ 6 On February 10, 2011, the circuit court entered an order granting plaintiff's motion for summary judgment and denying defendants' cross-motion, finding plaintiff had no duty to defend (and consequently no duty to indemnify) Best Pallet or Lyons in the discrimination lawsuit. The order stated: "This is a final judgment and there is no just reason to delay enforcement or

appeal."

¶ 7 Best Pallet never challenged the circuit court's February 10, 2011, ruling. Lyons, however, moved for reconsideration, arguing that the applicable coverage exclusion did not pertain to claims made against him by an employee of Best Pallet. The circuit court agreed and, on May 5, 2011, vacated its prior order in part, ruling that plaintiff had a duty to defend Lyons. The new order did not contain an express written finding that there was no just reason to delay enforcement or appeal. On August 11, 2011, plaintiff filed a motion to reconsider the May 5, 2011, order and that motion was denied.

¶ 8 The case proceeded to discovery and briefing on the remaining issues, *i.e.*, what if any damages were owed to Lyons for plaintiff's failure to defend him in the Loudermilk lawsuit and whether plaintiff was additionally required to indemnify Lyons for the settlement reached in that case. On June 28, 2013, the circuit court entered judgment against plaintiff in the amount of $549,268.88 for legal fees incurred in Lyons's defense. Then, in a written order dated December 6, 2013, the court denied defendants' motion for partial summary judgment, concluding that plaintiff had no duty to indemnify Lyons and was not liable for section 155 damages. The circuit court issued a separate order that same day stating "[t]his case is set for status on January 9, 2014 ***."

¶ 9 At the status hearing, the circuit court entered the following order purporting to make its prior orders final and appealable as of January 9, 2014:

> "The previous orders of June 28, 2013 and December 6, 2013 having disposed of motions for summary judgment through entry of judgment, those orders are now final and appealable, and remain in full force and effect for enforcement or appeal, date even with this order."

¶ 10 On February 10, 2014, plaintiff moved for reconsideration of the orders issued on June 28, 2013, and January 9, 2014. The motion was denied on April 18, 2014, and plaintiff and defendants filed their notices of appeal on April 29 and May 19, 2014, respectively.

¶ 11 ANALYSIS

¶ 12 In a motion to dismiss taken with this appeal, defendants first raised the issue of this court's jurisdiction with respect to only one of the appealed-from orders. They argued that plaintiff failed to file a notice of appeal within 30 days of the circuit court's May 5, 2011, order concluding that plaintiff had a duty to defend Lyons. Defendants asserted that this order was final and appealable, both as a declaratory judgment made pursuant to section 2-701(a) of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-701 (West 2010)) and because it incorporated by reference language included in the circuit court's February 10, 2011, order making that order final and appealable pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010)). In response to the motion, plaintiff contended that none of the circuit court's rulings were final and appealable prior to the order issued on January 9, 2014, from which plaintiff timely moved for reconsideration and filed its notice of appeal. Before addressing this court's jurisdiction more generally, we first address the specific issue raised in defendants' motion.

¶ 13 Illinois Supreme Court Rule 303 provides that a "notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the final judgment appealed from, or, if a timely posttrial motion directed against the judgment is filed, *** within 30 days after the entry of the order disposing of the last pending postjudgment motion directed against that judgment or order ***." Ill. S. Ct. R. 303(a)(1) (eff. May 30, 2008). The requirement is both mandatory and jurisdictional. *Secura Insurance Co. v. Illinois Farmers Insurance Co.*, 232 Ill. 2d 209, 213 (2009). "If the appellant fails to comply with the deadline ***, this court lacks authority to

consider the appeal." *McCorry v. Gooneratne*, 332 Ill. App. 3d 935, 939 (2002).

¶ 14 "An order [or judgment] is said to be final if it disposes of the rights of the parties, either upon the entire controversy or upon some definite and separate part thereof, such as a claim in a civil case." (Internal quotation marks omitted.) *D'Agostino v. Lynch*, 382 Ill. App. 3d 639, 641 (2008). The deadline for filing an appeal is triggered by "the final decision of the court resolving the dispute and determining the rights and obligations of the parties." (Internal quotation marks omitted.) *McDonald v. Health Care Service Corp.*, 2012 IL App (2d) 110779, ¶ 21. Orders that dispose of "one or more but fewer than all of the parties or claims" in a case are governed by Illinois Supreme Court Rule 304(a) and may be appealed only where "the trial court has made an express written finding that there is no just reason for delaying either enforcement or appeal or both." (eff. Feb. 26, 2010).

¶ 15 Here, the parties raised four issues by complaint and counterclaim: (1) whether plaintiff owed a duty to defend; (2) whether plaintiff owed a duty to indemnify; (3) whether plaintiff was liable for damages for breaching its duty to defend; and (4) whether defendants were entitled to section 155 damages. Because, as a matter of law, there can be no duty to indemnify where there is no duty to defend (see *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 398 (1993)), the circuit court's February 10, 2011, order finding plaintiff had no duty to defend either Best Pallet or Lyons disposed of the entire case. The Rule 304(a) language in that order was superfluous.[1]

¶ 16 Order of May 5, 2011

¶ 17 The circuit court reconsidered its February 10, 2011, order and, in its May 5, 2011, order,

[1] Plaintiff mistakenly insists that a written finding making an order final and appealable pursuant to Rule 304(a) is appropriate when the circuit court has decided all of the issues in the case. To the contrary, inclusion of such a finding is intended to permit appeals from orders disposing of some but not all of the claims or parties in a case, from which an appeal could not otherwise be taken. Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010).

found plaintiff did have a duty to defend Lyons but let stand the ruling as it applied to Best Pallet. Other issues in the case were thus reopened, including whether plaintiff also had a duty to indemnify Lyons.

¶ 18 Defendants are correct that, at least with respect to the duty to defend Lyons, the May 5, 2011, order was a declaratory judgment. See 735 ILCS 5/2-701 (West 2010) (empowering courts to "make binding declarations of rights, having the force of final judgments"). That order nevertheless did not dispose of the entire proceeding like the orders at issue in the cases defendants cite. See, *e.g.*, *Universal Underwriters Insurance Co. v. Judge & James, Ltd.*, 372 Ill. App. 3d 372, 380-81 (2007) (order was final and appealable where it "granted [the plaintiff] all of the relief she sought in her declaratory judgment action," "fixed absolutely the rights of the parties on the issues raised in [the] complaint concerning the issue of coverage and left no issues remaining").

¶ 19 Nor did the May 5, 2011, order contain the language required by Rule 304(a) to make it immediately appealable. Defendants contend that an order disposing of a motion for reconsideration need not contain such language where it was included in the original order being reconsidered, but the case they rely on for this proposition involved the *denial* of a motion for reconsideration, not the granting of one. See *McCorry*, 332 Ill. App. 3d at 941 ("The rules do not require a second finding of appealability *in the order denying any posttrial motion*." (Emphasis added.)). The facts of this case bear closer resemblance to those in *AAA Disposal Systems, Inc. v. Aetna Casualty & Surety Co.*, 355 Ill. App. 3d 275, 281 (2005), in which the circuit court granted summary judgment in favor of all defendants, but then, in an order that did not reiterate the language required by Rule 304(a), vacated that order as to some but not all of the defendants. On review, the appellate court reasoned that "[b]ecause the order vacating the original judgment

altered rather than left the prior order intact, it was a new and different order that was not final as to all parties and all claims." *Id.*

¶ 20 Accordingly, plaintiff was not required to file a notice of appeal within 30 days of the circuit court's May 5, 2011, order.

¶ 21 Order of December 6, 2013

¶ 22 Because we "have an independent duty to ensure that jurisdiction is proper" (*People v. Aldama*, 366 Ill. App. 3d 724, 725 (2006)), however, our analysis must extend beyond the specific arguments advanced by the parties. The record demonstrates that the circuit court's full disposition of the claims raised in this case was as follows: the court's February 10, 2011, order resolved all claims by or against defendant Best Pallet; the May 5, 2011, order resolved the issue of plaintiff's duty to defend Lyons; the court's June 28, 2013, order resolved Lyons's counterclaim for damages resulting from plaintiff's breach of contract; and the court's December 6, 2013, order resolved the remaining two issues in the case—plaintiff's duty to indemnify Lyons and Lyons's counterclaim for section 155 damages. Nevertheless, the parties treated the court's January 9, 2014, order, issued 33 days later, as the final judgment triggering the 30-day deadline in which to file a posttrial motion or notice of appeal.

¶ 23 On this record, we requested and received supplemental briefing from the parties addressing whether the circuit court's December 6, 2013, written order "fully and finally resolved the last of the parties' then-pending claims" and if so, whether either the court's separate December 6, 2013, order scheduling a status conference to be held on January 9, 2014, or its January 9, 2014, order purporting to make its prior orders final and appealable as of that date had the effect of extending the circuit court's jurisdiction. Defendants' position now is that the circuit court's December 6, 2013, order did indeed constitute the final judgment in the case and this

court lacks jurisdiction over both the appeal and cross-appeal. Plaintiff, however, advances several arguments for why the December 6, 2013, order was not a final and appealable order. We consider each in turn.

¶ 24 Plaintiff's primary argument in support of this court's jurisdiction is that the circuit court's December 6, 2013, order was not a final judgment because a motion to compel discovery was still pending. Plaintiff cites no authority, however, for the proposition that a court retains jurisdiction to decide discovery disputes where the substantive claims in the case have already been decided on the merits. It is true that, in the context of Rule 304(a), our supreme court has defined the word "claim" broadly as "any right, liability or matter raised in an action." *Marsh v. Evangelical Covenant Church of Hinsdale*, 138 Ill. 2d 458, 465 (1990). The rights, liabilities, and matters referred to, however, are those substantive disputes raised in the parties' pleadings. See *Djikas v. Grafft*, 344 Ill. App. 3d 1, 8-9 (2003) (concluding that an order "invoked finality" where it "fixed absolutely the rights of the parties brought into question in each of the claims raised in [the] plaintiff's two-count complaint and in [the] defendant's counterclaim" and where "[n]o issues *raised in the pleadings* were left open or held over by the court") (Emphasis added.); *F.H. Prince & Co., Inc. v. Towers Financial Corp.*, 266 Ill. App. 3d 977, 982 (1994) ("an order or judgment is final if it terminates the litigation between the parties *on the merits of the cause*") (Emphasis added.). Here, plaintiff's motion to compel merely sought a discovery ruling, not an adjudication on the merits of any claim asserted in the parties' pleadings.

¶ 25 For this reason, the motion to compel did not survive the circuit court's December 6, 2013, order, but was effectively mooted by it. The discovery requests at issue were served by plaintiff on July 16, 2013, and sought documentation that Lyons personally paid for legal services rendered in connection with his defense in the Loudermilk lawsuit—discovery that was

only relevant to an issue already decided by the circuit court in its June 28, 2013, order granting defendants' fee petition. Because the June 28, 2013, order did not resolve all of the claims in the case, it remained "subject to revision at any time before the entry of a judgment adjudicating all the claims, rights, and liabilities of the parties." Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010). Plaintiff moved to compel responses to its discovery requests on September 25, 2013. Although the motion was noticed for early October, it was never argued and the circuit court's December 6, 2013, order did not address it, at which point plaintiff re-noticed it for hearing on January 9, 2014. When a circuit court issues a final judgment adjudicating the merits of the parties' claims, however, ancillary issues not yet ruled upon become moot. See, *e.g.*, *Mo v. Hergan*, 2012 IL App (1st) 113179, ¶ 31 (dispute regarding adequacy of service became moot when the circuit court rejected all of plaintiff's claims on other grounds and its order disposing of the entire case constituted a final order); *City of Oakbrook Terrace v. Suburban Bank and Trust Co.*, 364 Ill. App. 3d 506, 512 (2006) (affirmative defenses which were never ruled on were "effectively mooted" by circuit court's order on cross-motions for summary judgment that disposed of the litigation). Thus, when the circuit court in this case ruled on the last of defendants' counterclaims on December 6, 2013, its partial judgment of June 28, 2013, became final, appealable, and no longer subject to revision. Because the discovery sought was only relevant to an issue already decided on the merits, the motion to compel became moot.

¶ 26 Citing no supporting authority, plaintiff additionally contends that by setting a future status date, the circuit court "certainly expressed its intentions" to retain jurisdiction over the case beyond December 6, 2013. It is true that a judgment is not considered final and appealable "where the court reserves an issue for further consideration or otherwise manifests an intention to retain jurisdiction for the entry of a further order." *Djikas*, 344 Ill. App. 3d at 8. The circuit court,

however, must "clearly reserve[] issues for further consideration." *In re Guzik*, 249 Ill. App. 3d 94, 98 (1993)). In its prior order of June 28, 2013, the circuit court did just this, noting that its "[j]udgment [wa]s without prejudice to Defendant's claims for duty to indemnify, costs, and claims relating to 215 ILCS 5/155." However, there is no indication in the record that the status hearing set for January 9, 2014, was not scheduled to ensure compliance with the court's orders, rather than to decide some additional issue on the merits. Plaintiff cites no authority holding that merely setting a future status date has the same effect as the language of the June 28, 2013, order. Although a circuit court retains jurisdiction to enforce its judgments, this does not toll the running of the 30-day deadline to file a post-trial motion or notice of appeal. *Djikas*, 344 Ill. App. 3d at 11; *In re Marriage of Hubbard*, 215 Ill. App. 3d 113, 116 (1991). Nor does anything in the record—which contains no hearing transcripts or bystanders reports for the December 6, 2013, or January 9, 2104, hearings—indicate that the circuit court intended to retain jurisdiction for the issuance of a further order. See *F.H. Prince*, 266 Ill. App. 3d at 990 (holding that, although the circuit court's written order included no express reservation of jurisdiction to rule on the issue of attorneys' fees and costs, "such a reservation [wa]s implied from the court's oral pronouncements").

¶ 27 Plaintiff further argues that the parties' actions demonstrate that they did not believe that all matters had been resolved on December 6, 2013. We are aware of no authority, however, standing for the proposition that what the parties subjectively believe or intend can affect a circuit court's jurisdiction. Indeed, given that a "[l]ack of subject matter jurisdiction *** cannot be cured through consent of the parties" (*People v. Flowers*, 208 Ill. 2d 291, 303 (2003), *as modified on denial of reh'g* (Jan. 26, 2004)), it hardly stands to reason that it could be cured through their mutual mistake. Nor did the parties' actions revest the circuit court with jurisdiction

following expiration of the 30-day period following the final judgment. The revestment doctrine "applies when (1) the parties actively participate in proceedings, without objection, and (2) the proceedings are inconsistent with the merits of the prior judgment." *Lowenthal v. McDonald*, 367 Ill. App. 3d 919, 924 (2006) (citing *People v. Kaeding*, 98 Ill. 2d 237, 241 (1983)). The parties must "ignore the judgment and start to retry the case," thereby implying their shared willingness to have the judgment set aside. *Archer Daniels Midland Co. v. Barth*, 103 Ill. 2d 536, 539-40 (1984) (quoting *Sears v. Sears*, 85 Ill. 2d 253, 260 (1981)). That is not what happened here. Instead, as is typically the case, one party disagreed with the judgment and sought reconsideration, which the other party opposed. As in *Archer Daniels* and *Sears*, the parties "did not waive or ignore the judgment and attempt to retry the case, and *** the fact [that] the court ultimately ruled on the post-judgment motion is inconsequential." *Archer Daniels*, 103 Ill. 2d at 540 (citing *Sears*, 85 Ill. 2d at 260).

¶ 28 Plaintiff nevertheless insists that none of the circuit court's prior orders were final and appealable, as evidenced by the purported "Rule 304(a) order" that it issued on January 9, 2014. As we noted above, Rule 304(a) provides that, when an order disposes of some but not all of the claims in a case, it may only be appealed if the circuit court includes an express written finding that "there is no just reason for delaying either enforcement or appeal or both." Ill. S. Ct. Rule 304(a) (eff. Feb. 26, 2010). The circuit court's January 9, 2014, order does not contain this language. Instead, it acknowledges that issues were disposed of in the past through entry of judgment and essentially attempts to restart the clock on the 30-day deadline imposed by Rule 303 (Ill. S. Ct. R. 303(a)(1) (eff. May 30, 2008)):

> "The previous orders of June 28, 2013 and December 6, 2013 *having disposed of* motions for summary judgment through entry of judgment, those

> orders *are now final and appealable*, and remain in full force and effect for enforcement or appeal, date even with this order." (Emphasis added.)

We are aware of no authority empowering a court to avoid the consequences of a prior final judgment in this manner. The circuit court lost jurisdiction over this matter 30 days after it resolved the last of the parties' claims on the merits, or on January 6, 2014. The order it issued three days later on January 9, 2014, was therefore void. See *Flowers*, 208 Ill. 2d at 306-07 ("[a] ruling made by a circuit court in the absence of subject matter jurisdiction is void *** [and] does not cloak the appellate court with jurisdiction to consider the merits of an appeal").

¶ 29 Notably, plaintiff does not argue that the circuit court's December 6, 2013, order setting a status hearing or its January 9, 2014, order were intended as extensions of the 30-day deadline in which to file a post-trial motion (see 735 ILCS 5/2-1203(a) (West 2012) (giving circuit courts the authority to grant such extensions if done within the initial 30-day timeframe). Courts are reluctant to impute such an intent where a court's order "does not unambiguously call for an extended period of trial court jurisdiction." *Rehabilitation Consultants for Industry, Inc. v. Nowak*, 259 Ill. App. 3d 725, 728-29 (1994). We likewise decline to do so here, where nothing in the text of the circuit court's orders or anywhere else in the record unambiguously calls for such an extension.

¶ 30 In sum, plaintiff has advanced no convincing argument in support of this court's jurisdiction over this matter. Plaintiff's notice of appeal was not filed within 30 days of the circuit court's December 6, 2013, order disposing of all of the parties' claims; no timely postjudgment motion was filed; and no extension of time was granted before the circuit court lost jurisdiction. We must therefore dismiss this appeal for lack of jurisdiction. Ill. S. Ct. R. 303(a)(1) (eff. Feb. 26, 2010); 735 ILCS 5/2-1203(a) (West 2012). Because defendants' notice of cross-appeal was

also not filed within 30 days of the December 6, 2013, order or within 10 days after service of a timely notice of appeal made by another party, we likewise lack jurisdiction over their cross-appeal. Ill. S. Ct. R. 303(a)(3) (eff. Feb. 26, 2010).

¶ 31 We understand that it may have caused the parties some confusion when the circuit court issued a written order disposing of the last of their substantive claims and then, by separate order entered the same day, scheduled a future status hearing for an unspecified purpose. The January 9, 2014, order may in fact have been an attempt to rectify the situation that was thus created. Whatever the case, we are bound by the rules that "narrowly circumscribe this court's jurisdiction." *McCorry*, 332 Ill. App. 3d at 939. Where litigation involves multiple claims, the obligation ultimately lies with the parties to track the circuit court's disposition of the substantive issues raised in the pleadings, to act promptly in accordance with the rules to preserve arguments for appeal, and to seek clarification from the court when the effect of its orders is in doubt.

¶ 32 CONCLUSION

¶ 33 For the foregoing reasons, the appeal and cross-appeal in this matter are dismissed for lack of jurisdiction.

¶ 34 Dismissed.