2016 IL App (1st) 152385-U

FIFTH DIVISION
September 9, 2016

No. 1-15-2385

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

ACTION GAMING, LLC; ILLINOIS GAMING INVESTMENTS, LLC; and J&J VENTURES GAMING, LLC,	)	Appeal from the Circuit Court of Cook County
Plaintiff-Appellees,	)	
v.	)	
ACTION AMUSEMENT CO., LLC; JASON ROWELL; NICK LENNOX, GEORGE ROWELL, and ACCEL ENTERTAINMENT GAMING, LLC,	)	No. 12 CH 33360
Defendants,	)	Honorable Rodolfo Garcia,
(Accel Entertainment Gaming, LLC,	)	Judge Presiding.
Defendant-Appellant).	)	

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Gordon and Justice Lampkin concur in the judgment.

ORDER

¶ 1 *Held*: Defendant's application for leave to appeal pursuant to Illinois Supreme Court Rule 308 was improvidently granted. We vacate our order granting the application for leave to appeal, deny the application, and dismiss the appeal.

¶ 2 This matter commenced as a civil action filed by plaintiffs Action Gaming, LLC (Action Gaming), Illinois Gaming Investments, LLC (Illinois Gaming), and J&J Ventures Gaming, LLC (J&J) (collectively plaintiffs) against defendants Action Amusement Co., LLC (Action Amusement), Jason Rowell (Rowell), Nick Lennox, George Rowell, and Accel Entertainment Gaming, LLC (Accel) (collectively defendants) in the circuit court of Cook County. Plaintiffs brought numerous counts against defendants based on Rowell's conduct, which plaintiffs alleged tortuously interfered with prelicensure terminal operator contracts that had been assigned to them by a company in which Rowell was a member. A discovery dispute arose: plaintiffs requested Accel produce its application for a terminal operator's license and answers to a questionnaire provided to the Illinois Gaming Board (Board) and Accel refused to produce those documents. After the matter was fully briefed and argued, the circuit court granted plaintiffs' motion to compel the production of those documents. Accel then requested the issue be certified to this court. The circuit court granted the request and certified the following question:

> "Does 230 ILCS 10/6(d) affect discovery in a civil lawsuit between private parties so as to safeguard from disclosure in response to discovery requests the documents one party has submitted to the [Illinois Gaming Board]?"

We initially granted Accel's application for leave to appeal pursuant to Illinois Supreme Court Rule 308 (eff. Oct. 15, 2015); however, after the matter was fully briefed by the parties, we have determined that Accel's application for leave to appeal was improvidently granted. For the reasons that follow, we vacate our order of September 30, 2015, and dismiss the appeal.

¶ 3 BACKGROUND

¶ 4 The dispute in the present matter stems from an agreement initially entered into between Action Gaming and Action Amusement. Plaintiffs alleged that, in 2010, Action Gaming was an

applicant for a license to become a terminal operator, which would allow it to place and operate video gaming terminals in licensed establishments in Illinois. In October 2010, Action Gaming entered into a contract with Action Amusement, a company controlled by Rowell. The contract provided for the assignment of 96 contracts it had entered into with licensed establishments allowing it to place video gaming terminals at these locations to Action Gaming (exclusive location agreements). In exchange, Action Amusement received $100,000 monthly installments and Action Gaming agreed to pay up to $2.4 million over the course of 10 years based on the number of locations that operated video gaming terminals. In addition, Rowell became the general manager of Action Gaming earning an annual salary of $120,000 and was provided with a 25% membership interest in the company. The parties also entered into a "Non-Solicitation and Non Compete Agreement" prohibiting Action Amusement from soliciting business relating to video gaming terminals from any establishment related to a contract held by Action Gaming and included similar provisions in Rowell's employment contract. Thereafter, Action Gaming continued to seek licensure as a terminal operator from the Board.

¶ 5 In June 2012, Rowell informed Action Gaming that he had not fully disclosed his criminal history to the Board as part of the terminal operator application process. Thereafter, Rowell was replaced as the manager of Action Gaming, but retained his 25% membership in the company. Illinois Gaming, a 75% member of Action Gaming, then decided to pursue a sale of the 96 exclusive location agreements to a third party.

¶ 6 In July 2012, Action Gaming received notice that its application for a terminal operator's license would be denied. The Board's notice explained that the basis for the denial was in part due to Rowell's failure to fully disclose his criminal history. Action Gaming requested a hearing to contest the Board's denial. While its application was still pending, Action Gaming accepted

an offer from J&J, a licensed terminal operator, to purchase the 96 exclusive location agreements on August 24, 2012. The Board subsequently denied Action Gaming's request for a hearing and, as a result, Action Gaming did not obtain a terminal operator's license.

¶ 7 In the summer of 2012, Accel was also interested in purchasing the exclusive location agreements from Action Gaming. Accel, however, did not present an offer to Action Gaming, but instead had discussions with Rowell, while he was employed by Action Gaming, regarding obtaining the exclusive location agreements. Rowell's discussions and agreements with Accel were memorialized on August 21, 2012, in a "Brokerage Agreement" and an employment contract. These contracts collectively provided that that Accel would pay Rowell $15,000 for each licensed establishment he persuaded to become an "Accel Establishment" with a maximum of 60 establishments. The licensed establishments listed in an exhibit to the agreement included the same licensed establishments that were assigned by Action Amusement to Action Gaming and were later assigned to J&J. Thereafter, Rowell proceeded to obtain contracts from these establishments on behalf of Accel by informing the licensed establishments that their contracts with J&J were not valid.

¶ 8 On August 31, 2012, plaintiffs filed the present lawsuit against defendants alleging that Rowell breached his fiduciary duties and employment-related contracts when he entered into a brokerage relationship with Accel following his termination by Action Gaming. In addition, plaintiffs claimed that Accel aided and abetted those breaches and tortiously interfered with Action Gaming's contracts with Rowell and the exclusive location agreements which were assigned to J&J. Plaintiffs further alleged J&J had the exclusive right to operate video gaming terminals in the licensed establishments pursuant to its assignment from Action Gaming.

¶ 9 Plaintiffs were allowed leave to amend their complaint on numerous occasions.

Accordingly, on October 3, 2013, plaintiffs filed the operative complaint in this matter, a 21-count third amended complaint. The record indicates, however, that in February 2015, only six counts remained: (1) J&J's claim for a preliminary and permanent injunction; (2) Action Gaming's claim for tortious interference with noncompetition, nondisclosure, and nonsolicitation contracts; (3) Action Gaming's claim for breach of fiduciary and other duties; (4) J&J's claim for violations of the Illinois Unfair Deceptive Trade Practices Act; (5) J&J's claim for tortious interference with location agreements; and (6) J&J's claim for tortious interference with prospective business advantage.

¶ 10 In its answer and affirmative defenses, defendants claimed that the exclusive location agreements were prelicensure agreements that did not comply with the minimum regulatory requirements for valid use agreements and were, therefore, unenforceable.

¶ 11 At issue in this case is plaintiffs' third set of document requests propounded on Accel on September 8, 2014.[1] Plaintiffs requested, in pertinent part: (1) documents related to Accel's response to section 8 of the terminal operator application (the application); and (2) documents related to Accel's response to the Board's 2014 "Use Agreement Questionnaire" (the questionnaire). Section 8 of the application required the applicant to submit: (1) a list of all individuals and business entities with which the applicant has entered into an agreement for the placement of video gaming terminals; (2) the applicant's form agreements for the placement of video gaming terminals; and (3) copies of executed agreements for the placement of video gaming terminals. The questionnaire required an explanation regarding how each "use agreement" was initiated, including whether it was obtained from another terminal operator who was not yet licensed, and disclose and provide an electronic copy of any "purchase agreement"

[1] The record does not contain the first set of discovery requests, but does contain the second set; however, neither set of requests are at issue here.

related to its "use agreements." According to plaintiffs, the answers to this questionnaire would provide the identity and timing of Accel's assignments from third parties and the dates of all of its prelicensure or postlicensure agreements.

¶ 12 Accel declined to produce the communications on the grounds that they were irrelevant to the claims asserted in the litigation, contained sensitive, confidential, and proprietary information about Accel's business practices and partner relationships, and that the evidentiary value of these documents did not outweigh the potential harm such a disclosure would have.

¶ 13 On January 22, 2015, plaintiffs filed a motion to compel the production of the application and the questionnaire. According to plaintiffs, Accel refused to provide discovery that was probative on the subject of Accel's officers' knowledge of the falsity of their representations based upon its interactions with the Board. Plaintiffs' acknowledged that Accel had admitted to entering into prelicensure agreements with the establishments and that it had taken assignment of such agreements from entities that were not licensed. Plaintiffs, however, argued that Accel "refuses to allow discovery as to the 'when'—facts which will allow Plaintiffs to demonstrate that Accel knew that the [Board] allowed pre-licensure agreements and their assignment at the precise time Accel made representations to Plaintiffs' locations to the contrary, and also, that Accel knows that its arguments about the [Board]'s 'intent' concerning these agreements are bogus, as alleged."

¶ 14 At the hearing on June 23, 2015, Accel argued for the first time that section 6 of the Riverboat Gambling Act (Act) (230 ILCS 10/6 (West 2014)) explicitly prohibited such confidential information from being subject to discovery. Section 6(d) provides, in pertinent part:

> "All information, records, interviews, reports, statements, memoranda or other data

> supplied to or used by the Board in the course of its review or investigation of an application for a license or a renewal under this Act shall be privileged, strictly confidential and shall be used only for the purpose of evaluating an applicant for a license or a renewal. Such information, records, interviews, reports, statements, memoranda or other data shall not be admissible as evidence, nor discoverable in any action of any kind in any court or before any tribunal, board, agency or person, except for any action deemed necessary by the Board." 230 ILCS 10/6(d) (West 2014).

After hearing arguments from both sides, the trial court found that the information plaintiffs sought was reasonably related to the claims asserted and granted the motion to compel. The court, however, stated it was "ruling short of preclusion by an express provision in the statute" and ordered supplemental briefing on the issue of whether section 6(d) of the Act prohibited discovery of the documents sought by plaintiffs.

¶ 15 In its supplemental brief, Accel argued section 6(d) of the Act insulates private companies from producing their own communications with the Board in response to a discovery request. In support of their position, Accel emphasized that section 6(d) provided that information "supplied to" the Board was not discoverable in any court. Moreover, Accel argued that the statute contained no language limiting the rule to actions in which the Board was a party. Thus, Accel's submissions to the Board, including its original application for licensure and its response to the questionnaire, were not subject to discovery in this case.

¶ 16 Conversely, in their supplemental brief plaintiffs argued that section 6(d) of the Act refers only to the materials the Board is expected to obtain as a result of its own background investigation. Plaintiffs maintained they were not seeking the production of the Board's investigative file, but of the business records supplied by Accel to the Board and thus were

entitled to discovery of the application and the questionnaire.

¶ 17 After supplemental briefing, the trial court agreed with plaintiffs' construction and found that section 6(d) of the Act did not apply to a civil case between private parties. The trial court, however, certified this question for immediate appeal on August 14, 2015.

¶ 18 ANALYSIS

¶ 19 On August 28, 2015, defendants filed their application for leave to appeal pursuant to Rule 308 which this court granted on September 30, 2015. After having considered the parties' briefs, however, we find that leave to appeal was improvidently granted as our answer to the certified question will not materially advance the ultimate termination of this litigation. Consequently, we vacate our order of September 30, 2015, and dismiss this appeal.

¶ 20 Rule 308(a) provides, in relevant part, as follows:

> "When the trial court, in making an interlocutory order not otherwise appealable, 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, the court shall so state in writing, identifying the question of law involved." Ill. S. Ct. R. 308(a) (eff. Oct. 15, 2015).

Rule 308 should be strictly construed and sparingly exercised, and appeals thereunder should be limited to exceptional circumstances. *Morrissey v. City of Chicago*, 334 Ill. App. 3d 251, 257-58 (2002). The scope of our review in an interlocutory appeal brought pursuant to Rule 308 is limited to the certified question. *Spears v. Association of Illinois Electric Cooperatives*, 2013 IL App (4th) 120289, ¶ 15. In addition, prior to considering an appeal on its merits, we must determine whether the appeal has been properly taken by this court to invoke our jurisdiction. *Voss v. Lincoln Mall Management Co.*, 166 Ill. App. 3d 442, 451 (1988). We may reconsider the

question of jurisdiction if our earlier ruling seems erroneous. *Id.*

¶ 21 We find that answering the question certified by the trial court does not *materially* advance the ultimate termination of the litigation. See *id.* at 451-52. Plaintiffs maintained in the trial court that discovery of the application and questionnaire would evidence Accel's knowledge that the Board did not disprove of prelicensure agreements and their assignment. Plaintiff further asserted before the trial court that the application and questionnaire "may lead to the discovery of evidence which is impeaching of the witnesses and Accel's legal position." Notably, plaintiffs acknowledged that Accel had admitted it had "entered into prelicensure agreements with establishments and had taken assignment of such agreements from entities that were not licensed by the [Board]." While we take no position regarding whether the application and questionnaire are relevant for discovery purposes, the record demonstrates that the resolution of whether section 6(d) of the Act allows for such discovery would not materially advance the ultimate termination of the litigation as Accel has essentially admitted to entering into agreements similar to those entered into by plaintiffs. Furthermore, whether or not the documents are discoverable, the relevant portions of those documents are discoverable by other means.

¶ 22 Additionally, Accel does not provide us with any authority that the resolution of such a discovery dispute would materially advance the ultimate *termination* of the litigation. Moreover, this is not an exceptional circumstance in which we are inclined to extend our jurisdiction pursuant to Rule 308. See *Doe v. Sanchez*, 2016 IL App (2d) 150554, ¶ 20 (finding the certified question would materially advance the ultimate termination of the litigation where certain counts of the complaint could be dismissed based on the reviewing court's answer to the certified question); *In re Estate of Kleine*, 2015 IL App (2d) 150063, ¶ 13 (finding that the resolution of the certified question could materially advance the litigation because, if answered in the

negative, it would have terminated the litigation). We thus decline to exercise our jurisdiction and Rule 308 cannot serve as a predicate for this appeal. See *Mirly v. Basola,* 221 Ill. App. 3d 182, 186 (1991).

¶ 23 CONCLUSION

¶ 24 Based upon the foregoing analysis, we now vacate our order of September 30, 2015, granting Accel's application for leave to appeal pursuant to Rule 308; deny the application for leave to appeal; and dismiss the appeal.

¶ 25 Appeal dismissed.