FIRST DIVISION
September 5, 2017

No. 1-16-1049

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

AFFILIATED HEALTH GROUP, LTD., AMERICAN HEALTH CENTER, LTD., DIMENSIONS MEDICAL CENTER, LTD., ACCESS HEALTH CENTER LTD., ACU HEALTH CENTER, LTD., ADVANTAGE HEALTH CARE, LTD., AANCHOR HEALTH CENTER, LTD., FORESTVIEW MEDICAL CENTER, LTD., MICHIGAN AVENUE CENTER FOR HEALTH, LTD., ACE HEALTH CENTER, LTD., CENTER FOR FAMILY HEALTH CARE, SC, VIJAY L. GOYAL, M.D., and VINOD K. GOYAL, M.D.,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellants,	)	
v.	)	No. 13 L 11485
DEVON BANK, TCF BANK, HEALTHCARE SERVICES CORP. d/b/a BLUE CROSS BLUE SHIELD OF ILLINOIS, UNITED HEALTHCARE SERVICES, INC., AETNA, INC., IRINA NAKHSHIN, INNA KOGANSHATS and BORIS KOGANSHATS,	)	
Defendants.	)	
(Devon Bank,	)	Honorable Raymond W. Mitchell,
Defendant-Appellee).	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Connors and Justice Mikva concurred in the judgment.

ORDER

¶ 1 ***Held*:** The appeal is dismissed for lack of jurisdiction. Plaintiffs-appellants failed to timely file their notice of appeal. Defendant-appellee's motion for sanctions is denied.

¶ 2 Plaintiffs-appellants are two doctors, Vijay L. Goyal M.D. and Vinod K. Goyal, M.D., along with the organizations they control, who provided medical services in Chicago, Illinois and the surrounding area. They allege that beginning in the early 1990s two of their employees from their billing department began to embezzle funds from them. They allege that the two employees created sham entities with similar names to their own organizations and then opened accounts for these sham entities at Devon Bank and TCF Bank.[1] Plaintiffs brought suit against the embezzlers, the insurance companies, and the depositing banks.

¶ 3 Ultimately, the plaintiffs and Devon Bank agreed to settle plaintiffs' claims, with Devon Bank agreeing to pay plaintiffs $730,000. In exchange for Devon Bank's payment, plaintiffs agreed to dismiss all their claims against Devon Bank with prejudice. On September 30, 2015, plaintiffs filed a section 2-1401 petition seeking to vacate the settlement agreement they had entered into with Devon Bank. 735 ILCS 5/2-1401 (West 2016). Plaintiffs based their request for relief on an alleged mutual mistake of fact because plaintiffs had not discovered the true scale of the embezzlement. After briefing by the parties, the trial court rejected plaintiffs' argument and dismissed their 2-1401 petition.

¶ 4 Plaintiffs raise only one issue on appeal: whether the trial court erred in dismissing their section 2-1401 petition. Additionally, during the pendency of this appeal, Devon Bank moved for sanctions, which we ordered taken with the appeal.

¶ 5 After reviewing the record, we dismiss the appeal for lack of jurisdiction. The motion for sanctions is denied.

[1] TCF Bank is not a party to this appeal.

¶ 6 JURISDICTION

¶ 7 For the reasons explained below, we lack jurisdiction to consider the merits of this appeal.

¶ 8 BACKGROUND

¶ 9 A full recitation of the facts leading up to this appeal can be found in *Affiliated Health Group, Ltd., et al., v. Healthcare Services Corp. d/b/a BlueCross BlueShield of Illinois, et al.*, 2016 IL App (1st) 152685. The following contains only those facts necessary for the disposition of this appeal.

¶ 10 Plaintiffs filed their initial complaint against Devon Bank on October 16, 2013. Plaintiffs' complaint alleged that two of their employees, Irina Nakhshin and Inna Koganshats, embezzled company money over a 20-year period. These employees allegedly embezzled the money by establishing Illinois business entities with names similar to that of plaintiffs and then proceeded to open bank accounts, including at Devon Bank, under these similarly named companies. As the insurance companies issued checks for the services plaintiffs provided, the embezzlers would deposit them into the accounts they controlled.

¶ 11 After discovering the embezzlement, plaintiffs brought this action against the embezzlers, the health insurance companies, and the banks used by the embezzlers including Devon Bank. The complaint sought damages from Devon Bank for check conversion under the Illinois Uniform Commercial Code (UCC) and common law negligence. On March 11, 2014 Devon Bank filed a section 2-619.1 motion to dismiss. 735 ILCS 5/2-619.1 (West 2016). The section 2-619 portion of the motion to dismiss contained two related arguments: (1) a three-year statute of limitations applied to check conversion under the UCC and (2) each check deposited created its own three-year statute of limitations, with the continuing violation rule being inapplicable to toll the statute of limitations. The section 2-615 portion contained three arguments directed at the

common law negligence claim: (1) the UCC claims for conversion preempted the common law negligence claims, (2) Devon Bank had no duty to plaintiffs, and (3) the *Moorman* doctrine barred plaintiffs' purely economic loss. After hearing arguments, the trial court agreed that a three-year statute of limitations applied and dismissed all claims occurring on or before October 16, 2010. Plaintiffs filed a motion to reconsider, which the trial court denied on December 11, 2014. Devon Bank answered the remaining claims and raised several affirmative defenses.

¶ 12 On April 28, 2015, plaintiffs and Devon Bank agreed to attend voluntary mediation with retired Judge Morton Denlow. During this mediation, the parties agreed to settle plaintiffs' claims. Devon Bank agreed to pay $730,000 in exchange for plaintiffs dismissing all claims with prejudice. After agreeing to the settlement, Devon Bank moved the trial court for the entry of a good faith finding pursuant to the Joint Tortfeasors Act. 740 ILCS 100/1 *et al.* (West 2016). On May 26, 2015, the trial court granted the good faith finding and in the same order dismissed all counts against Devon Bank with prejudice.

¶ 13 On September 30, 2015, plaintiffs filed a section 2-1401 petition to vacate the settlement agreement with Devon Bank. In the petition, plaintiffs argued there was a mutual mistake of fact because neither party had conducted sufficient discovery to allow plaintiffs to learn the full magnitude of their injury. Plaintiffs argued that this resulted in an unconscionable settlement amount. They also argued that they had failed to consider the legal ramification of the UCC's "ratification doctrine." In response, Devon Bank argued there was no mutual mistake and that plaintiffs were attempting to back out of the settlement agreement. On January 29, 2016, after several extensions of time to allow plaintiffs to file a reply brief, the trial court entered an order stating that the plaintiffs' 2-1401 petition had been taken under advisement and a written order adjudicating the petition would follow.

¶ 14 On February 22, 2016, the trial court issued its order dismissing plaintiffs' 2-1401 petition. The trial court concluded there had been no mutual mistake of fact and discovery of additional damages by plaintiffs did not provide a valid basis to set aside the settlement. On the same day, plaintiffs filed a third motion for extension of time to file a reply brief in support of their petition. On February 24, 2016, the trial court *sua sponte* entered an order which continued plaintiffs' request for an extension of time. It did direct that any reply should be filed by March 8, 2016, but made no mention of the February 22 order dismissing the petition. On March 9, the plaintiffs filed their reply.

¶ 15 On March 22, 2016, Devon Bank moved to strike plaintiffs' reply brief because it allegedly contained statements made during the confidential mediation. The trial court took the motion to strike under advisement. On the same day, the trial court issued an order denying plaintiffs' third extension of time to file a reply and also denied Devon Bank's motion to strike. The trial court let its February 22 order stand.

¶ 16 On April 12, 2016, plaintiffs filed their notice of appeal specifically challenging the order of March 22, 2016. The notice of appeal does not mention the February 22, 2016 order. While this appeal was pending, Devon Bank filed a motion for sanctions regarding plaintiffs' failure to address the merits of the appeal in its opening brief. We took the sanctions motion with this appeal.

¶ 17 ANALYSIS

¶ 18 We do not address the merits of plaintiffs' appeal because a review of the record demonstrates the notice of appeal was not timely filed and we therefore lack jurisdiction to consider it.

¶ 19 This court has an independent obligation to consider its own jurisdiction over an appeal, even after the parties have briefed the case on the merits. *In re Marriage of Carr*, 323 Ill. App.

3d 481, 483 (2001). Even if not raised by the parties, this court cannot obtain jurisdiction over an appeal through consent or waiver of appellate jurisdiction. *Gaynor v. Burlington Northern & Santa Fe Ry.*, 322 Ill. App. 3d 288, 289 (2001). Illinois Supreme Court Rule 303 states:

> "[T]he 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 post-trial motion directed against the judgment is filed, whether in a jury or non-jury case, within 30 days after the entry of the order disposing of the last-pending post-trial motion." Ill. S. Ct. R. 303(a)(1) (eff. Jan. 1, 2015).

The rule makes clear that a notice of appeal must be filed within 30 days of the entry of final judgment if no postjudgment motion is filed. "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." *Big Sky Excavating, Inc. v. Illinois Bell Telephone Co.*, 217 Ill. 2d 221, 232-33 (2005). A judgment will be considered "final if it determines the litigation on the merits, so that, if affirmed, the only thing remaining is to proceed with execution of the judgment." *Lamar Whiteco Outdoor Corp. v. City of West Chicago*, 395 Ill. App. 3d 501, 504-05 (2009).

¶ 20 In this case, the final judgment came on February 22, 2016, when the trial court dismissed plaintiffs' 2-1401 petition, not on March 22, 2016, which is the order plaintiffs appealed. In the February 22 order, the trial court addressed the merits of plaintiffs' petition based on the facts contained therein. Specifically, the trial court rejected the argument that there had been a mutual mistake when the parties entered into the agreement. The court noted that the decision by the plaintiff to settle the case without conducting more extensive discovery does not represent a mutual mistake made by the parties, and is therefore not a sufficient basis to vacate the settlement agreement. By rejecting plaintiffs' petition on the merits, the February 22 order

represented a final judgment. *Lamar Whiteco Outdoor Corp.*, 395 Ill. App. 3d at 504-05. Because the February 22 determined the litigation on the merits, any notice of appeal had to be filed within 30 days or by March 23. Plaintiffs did not file their notice of appeal until April 12.

¶ 21 Neither the February 24 or March 22 order affected the time in which to file under Rule 303. Neither order can be considered a final order because neither order addressed the merits of the litigation. *Big Sky Excavating, Inc.*, 217 Ill. 2d at 232-33; *Lamar Whiteco Outdoor Corp.*, 395 Ill. App. 3d at 504-05. The February 24 order addressed the filing of plaintiffs' reply brief and makes no mention of the February 22 order. The March 22 order similarly does not address the merits of the litigation and itself states, "[t]he February 22, 2016 Order denying Plaintiffs' petition to vacate the parties' settlement agreement stands."

¶ 22 We also do not consider the reply brief filed by plaintiffs on March 9 to be a postjudgment motion which would extend the time to file the notice of appeal. The time in which a party can file a notice of appeal may be extended if a timely postjudgment is filed. Ill. S. Ct. R. 303(a)(1) (eff. Jan 1, 2015). If this occurs then the notice of appeal is filed "within 30 days after the entry of the order disposing of the last pending postjudgment motion directed against that judgment or order." *In re Application of the Cnty. Treasurer*, 214 Ill. 2d 253, 261 (2005) citing Ill. S. Ct. R. 303(a)(1). However, in order to toll the filing time, the postjudgment motion must be "directed against the judgment." *Marsh v. Evangelical Covenant Church*, 138 Ill. 2d 458, 462 (1990). A motion is directed against a judgment if "it attacks the judgment in one of the statutorily authorized ways, which include by requesting rehearing, retrial, modification, or vacation of the judgment." *D'Agostino v. Lynch*, 382 Ill. App. 639, 643 (2008) citing 735 ILCS 5/2-1203 (West 2006); *Marsh*, 138 Ill. 2d at 461. Plaintiffs' reply did not attack the trial court's February 22 judgment and, therefore, cannot be considered a postjudgment motion extending the time in which plaintiffs could file their notice of appeal.

¶ 23 The February 22, 2016 order dismissing plaintiffs' 2-1401 petition represented a final judgment for the purposes of calculating the time plaintiffs had to file their notice of appeal. Plaintiffs had thirty days, until March 23, 2016, to file either a notice of appeal or a postjudgment motion. Plaintiff did not file a postjudgment motion and their notice of appeal was not filed until April 12, 2016. Therefore, plaintiffs' notice of appeal was not timely filed and we lack the jurisdiction to consider its merits.

¶ 24 Plaintiffs' appeal is dismissed and Devon Bank's pending motion for sanctions is denied.

¶ 25 CONCLUSION

¶ 26 The appeal is dismissed for lack of jurisdiction and the pending motion for sanctions is denied.

¶ 27 Dismissed.