2019 IL App (1st) 180957-U
No. 1-18-0957
June 28, 2019

FIRST DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

CARL ALLEN, individually, and ILLINOIS FAMERS INSURANCE COMPANY as Subrogee of CARL ALLEN, Plaintiffs-Appellants, v. BRUCE LECKIE and JONATHAN LECKIE, Defendants-Appellees.	)	Appeal from the Circuit Court Of Cook County. No. 15 L 013027 The Honorable Christopher Lawler, Judge Presiding.

JUSTICE WALKER delivered the judgment of the court.
Presiding Justice Mikva and Justice Pierce concurred in the judgment.

ORDER

¶ 1 *Held:* Where the trial court's order dismisses fewer than all of the parties or claims, a reference to supreme court rule 304(a) is insufficient to make an order appealable, and no appeal may be taken unless the trial court makes an express written finding that there is no just reason for delaying either enforcement or appeal or both.

¶ 2 Plaintiff Carl Allen filed a negligence complaint against defendants Bruce Leckie and Robin Leckie (the Leckies) for damages to Allen's condominium unit and vehicle caused by

fire that originated from a vehicle Allen believed was owned by the Leckies. Allen also alleged Mr. Leckie negligently performed repair and maintenance work on the vehicle which led to the fire. After learning that the vehicle was not owned by the Leckies, but by their son who resided with the couple, Allen filed an amended complaint adding the son as defendant. The Leckies filed a motion to dismiss arguing that because they did not own the vehicle, they did not owe Allen a duty. In a written order, the trial court granted the motion to dismiss, holding that the Leckies "did not have a duty to maintain, inspect, service or repair a vehicle that they did not own." The written order did not include language referencing Supreme Court Rule 304(a)(rule 304(a)) but on the same day, a separate case management order prepared by the Leckie's counsel was entered, which stated ". . . Defendants 2-619 Motion to Dismiss is GRANTED, with prejudice and subject to IL Supreme Court Rule 304(a)." The case management order did not include language referencing the immediate appealability of the order or the justness of delaying the appeal. There were several motions filed including a section 2-1401 petition seeking vacatur of the dismissal order, which the trial court denied. Allen filed this appeal.

¶ 3 We find that the order granting the motion to dismiss only addressed ownership and not Allen's allegations that Mr. Leckie performed work on the vehicle. We also find that there was no sufficient rule 304(a) finding when the motion to dismiss was granted because (i) the case management order did not include language indicating that it is "final and appealable," made no reference to the immediate appealability of the order or the justness of delaying the appeal and (ii) there is no indication in the record that the court intended to invoke rule 304(a) because the trial court's written order that ruled on the motion to dismiss did not

include the language necessary to invoke rule 304(a). Accordingly, a section 2-1401 petition was not required. Because Allen has alleged facts that if true would entitle him to relief, we vacate the dismissal of Mr. Leckie, and remand this case to the trial court for further proceedings.

¶ 4 I. BACKGROUND

¶ 5 On December 29, 2015, Allen, individually, and ILLINOIS FARMERS INSURANCE COMPANY (Illinois Farmers) as subrogee of CARL ALLEN, filed a two count negligence complaint against the Leckies.

¶ 6 Count I of the complaint, entitled "Negligence," alleges Allen and the Leckies were neighbors at a condominium property located in Roselle, Illinois. On March 26, 2015, a fire started within a 2004 Cadillac vehicle owned by the Leckies, spread and caused damages to Allen's condominium unit and 2008 Nissan Maxima vehicle. Prior to the fire, Mr. Leckie "personally attempted to perform certain service, maintenance, repair and/or replacement work on the [Cadillac] including but not limited to, specific work to the front grill and/or its electrical components and/or its wiring" even though he "was not qualified to perform the inspections, service, maintenance, repair and/or replacement work on the [Cadillac]."

¶ 7 Allen contended the Leckies had a duty to hire a "qualified and/or licensed mechanics and/or service technicians to perform the inspections, maintenance, service, repairs and/or replacement work on the [Cadillac], including but not limited to, the front grill and/or its electrical components and wiring." Allen alleged the Leckies had "a duty to ensure that the [Cadillac] was properly inspected, maintained, serviced and/or repaired in order to prevent any malfunctions and/or failures of the [Cadillac] which might cause a fire and/or significant

damage to the property of others." Allen also alleged the Leckie's breached their duty by not only failing to hire a qualified or licensed mechanic, but by Mr. Leckie attempting to perform the repairs himself.

¶ 8 In Count II, entitled "*Res Ipsa Loquitor*," Allen alleged that a vehicle such as the Cadillac does not and should not catch fire as the result of a routine inspection, maintenance, service and/or repair work. Because the Leckies were in exclusive and primary control of the maintenance, inspection, service and/or repair tools used to remedy the Cadillac's malfunction, and were in exclusive and primary control of the Cadillac when it caught fire, they should be liable for the damages incurred.

¶ 9 Allen incurred $49,296.83 in damages to his condominium and $4,754.78 in damages to his vehicle which were paid by Illinois Farmers. However, Allen alleges that he incurred uninsured losses in excess of $153,793.58.

¶ 10 On April 26, 2016, Allen filed a first amended complaint which added Jonathon Leckie, the Leckie's adult son who resided with the Leckies in the condominium unit, and was the owner of the Cadillac. Counts I and II, still named the Leckies as defendants, and Counts III and IV related to Jonathon. The first amended complaint contained many of the same facts as the December 29, 2015 complaint, but did not allege the Leckies owned the Cadillac. It did allege Mr. Leckie and Jonathon performed maintenance work on the Cadillac together.

¶ 11 On May 26, 2016, the Leckies filed a section 2-619 motion to dismiss Counts I and II of the first amended complaint. The Leckies supported their motion with affidavits averring they did not own the Cadillac and have never personally inspected or repaired it, and therefore, they did not owe Allen a duty.

¶ 12 On June 23, 2016, Allen filed his response in opposition of the Leckie's section 2-619 motion to dismiss Counts I and II arguing the Leckies affidavits failed to address the duties the Leckies owed Allen as owners of the property where the Cadillac was permitted to park. Allen also argued the first amended complaint alleged a duty independent of the Leckies ownership of the Cadillac, and ownership of the vehicle was immaterial.

¶ 13 On July 15, 2016, the Leckies filed their reply contending they did not owe Allen any duties because they did not own, and never performed repairs on the Cadillac.

¶ 14 On September 22, 2016, Judge Larry Axelrood entered the following order:

> "Here, Defendants argue that Plaintiffs' claims against them are barred because Defendants did not own the vehicle and therefore did not have a duty to maintain, inspect, service or repair it. In support of their argument, both Defendants submitted affidavits which provide that they are not and have never been the owner of the subject 2004 Cadillac CTS mentioned in the complaint and that their son, an adult over the age of 18, is the owner of the vehicle. Defendants further provided that they have never caused the subject vehicle to be inspected, maintained, services, or repaired.
>
> After reviewing the briefs and attachments, the Court finds that the claims asserted against Defendants are barred by an affirmative matter. Specifically, that Defendants did not have a duty to maintain, inspect, service or repair a vehicle that they did not own. Therefore, Plaintiffs' *res ipsa loquitor* count against Defendants also fails."

Accordingly, the trial court granted the Leckies section 2-619 motion to dismiss.

¶ 15 On October 7, 2016, Allen filed a motion to reconsider the September 22, 2016 order. Allen argued that the trial court erred because the order dismissed the Leckies solely because they were not the owners of the Cadillac. Allen contended the trial court failed to consider the Leckie's common law negligence as the owners of the property where the fire occurred and their actions and involvement in the repairs of the Cadillac. Allen also stated that his Cause and Origin expert who investigated the fire would testify that Mr. Leckie admitted to the expert that Mr. Lackie performed electrical repairs on the Cadillac. Allen requested leave to file a second amended complaint to clarify the duties the Leckies owed as the property owners and in performing the repairs and maintenance on the Cadillac.

¶ 16 On November 23, 2016, the Leckies filed their response to Allen's motion to reconsider the September 22, 2016 order. The Leckies argued the court did not err because it did not dismiss Counts I and II solely based on the Leckies ownership of the Cadillac, but on all evidence including evidence beyond the mere ownership of the vehicle.

¶ 17 On December 7, 2016, Allen filed his reply in support of his motion to reconsider. Allen argued that he filed the motion to reconsider to alert the court of its error in dismissing Counts I and II because the first amended complaint indicated the fire was caused by Mr. Leckie's negligent maintenance and repairs. Allen also agreed Mrs. Leckie did not perform any repairs on the Cadillac, and she should be dismissed. Additionally, Allen attached and sought leave to file a proposed second amended complaint.

¶ 18 On February 3, 2017, Judge Axelrood denied Allen's motion to reconsider.

¶ 19 On March 15, 2017, Allen filed a motion for leave to file his second amended complaint. Allen first argued that on February 3, 2017, during oral arguments on the motion to

reconsider, Judge Axelrood indicated that if a written expert report is provided, then the report might lay a proper basis to bring a cause of action against Mr. Leckie. Allen attached a copy of the expert report showing the origin and cause of the fire. The report stated Jonathon told an investigator that "among the work performed before the fire, [Mr. Leckie] had removed the grille and replaced it." The report additionally stated that "electrical short circuiting and overheating was found at a connection point to the fuse disconnect" and that "this wiring would be manipulated during work at the front of the vehicle such as removing and replacing the grille. The wiring was either damaged or the connector damaged during the work [Mr. Leckie] performed."

¶ 20 On July 10, 2017, Judge Jerry A. Esrig entered an order stating that "the motion for leave to file is denied for the reasons stated on the record. Plaintiff to file its 2-1401 petition."

¶ 21 On July 12, 2017, Allen filed a section 2-1401 petition noting that at the July 10, 2017 hearing, Judge Esrig indicated that Judge Axelrood's prior dismissal order did not consider anything other than the ownership of the Cadillac, but that the proper procedural relief at the time of the July 10, 2017 hearing was a 2-1401 petition.

¶ 22 On November 30, 2017, Judge Christopher E. Lawler, found that for a party to be entitled to relief under section 2-1401, the underlying judgment or order must be both final and appealable. However, in this case, the judgment was final as to the Leckies but not appealable because it did not dispose of the entire proceeding. Judge Lawler stated that final orders that do not dispose of an entire proceeding are not appealable unless the trial court makes an express finding that "there is no just reason for delaying either enforcement or appeal or both pursuant to Illinois Supreme Court Rule 304(a)," which was not indicated in

Judge Alexrod's September 22, 2016 order. Accordingly, Judge Lawler ruled that relief under section 2-1401 was unavailable to Allen. However, he noted that in a case such as this where "multiple judges and rulings are involved, a court may review, modify, or vacate interlocutory orders as long as the court retains jurisdiction over the entire controversy." Judge Lawler, *sua sponte*, found that the September 22, 2016 order needed to be modified. Judge Lawler stated that taking Allen's allegations that prior to the fire, Mr. Leckie performed repairs on the Cadillac, "[Mr. Leckie] owed a duty to perform the repairs reasonably regardless of whether he owned the vehicle" and "neither the September 22, 2016 order nor the February 3, 2017 order that denied [Allen's] motion to reconsider addressed these allegations." Therefore, on November 30, 2017, Judge Lawler vacated the September 22, 2016 order and reinstated Counts I and II as to Mr. Leckie.

¶ 23 On January 2, 2018, Mr. Leckie filed a motion to reconsider Judge Lawler's November 30, 2017 order. Mr. Leckie contended there was an oversight in Judge Lawler's ruling which found that the September 22, 2016 order did not contain Rule 304(a) language. He stated that a separate September 22, 2016 case management order contained the Rule 304(a) language. The case management order stated "status on service of Defendant Johnathon Leckie. Defendants 2-619 Motion to Dismiss is GRANTED, with prejudice and subject to IL Supreme Court Rule 304(a)." The case management order did not include language referencing the immediate appealability of the order or the justness of delaying the appeal. Nonetheless, Mr. Leckie argued the court no longer had jurisdiction over the case.

¶ 24 On March 1, 2018, Judge Lawler issued a written order finding that the September 22, 2016 case management order contained the 304(a) language and thus was final and

appealable. Judge Lawler then addressed the 2-1401 petition on the merits, focusing on the expert report. He found the allegation that Mr. Leckie performed work on the vehicle, and the work performed may have been the cause of the fire, "substantially mirrored" allegations already contained in Allen's first amended complaint. Because a section 2-1401petition's purpose is to bring before the court facts not appearing in the record, Judge Lawler granted the Leckie's motion to reconsider the court's November 30, 2017 order and vacated the reinstatement of Counts I and II as to Mr. Leckie.

¶ 25 On March 29, 2018, Allen filed a motion to reconsider the March 1, 2018 order arguing that the case management order was handwritten by Leckie's counsel and was not part of the court's ruling on the 2-619 motion to dismiss because the Rule 304(a) language was not included in Judge Axelrood's written order that dismissed the Leckies. Allen contended that Judge Axelrood's order was not intended to make the case final and appealable because Judge Axelrood requested Allen produce the expert's report. Thus, Allen argues the court had jurisdiction to rule on the September 22, 2016 order. Allen also argued that if the September 22, 2016 order was final and appealable, then his 2-1401 petition was proper, and the petition did not substantially mirror the allegations in the first amended complaint.

¶ 26 On April 12, 2018, the trial court denied Allen's motion to reconsider the March 1, 2018 order. On April 17, 2018, Allen filed a motion for a rule 304(a) finding which the court granted on May 1, 2018. Allen filed his notice of appeal on May 8, 2018 and appealed the September 22, 2016, March 1, 2018 and April 12, 2018 orders.

¶ 27 II. JURISDICTION

¶ 28 Supreme Court Rule 304(a) (Ill. S. Ct. R. 304(a) (eff. March 8, 2016)) gives this court jurisdiction to consider the appeal from the September 22, 2016, March 1, 2018 and April 12, 2018 orders.

¶ 29 III. ANALYSIS

¶ 30 On appeal, Allen argues that the trial court erred when it granted Mr. Leckie's section 2-619 motion to dismiss on September 22, 2016, denied the motion to reconsider on February 3, 2017, and granted Mr. Leckie's motion to reconsider on March 1, 2018. Allen contends the trial court abused its discretion when it denied his section 2-1401 petition on March 1, 2018 and denied the motion reconsider on April 12, 2018. We review an order granting a section 2–619 motion to dismiss *de novo*. *Kean v. Wal-Mart Stores, Inc.,* 235 Ill. 2d 351, 361 (2009).

¶ 31 Section 5/2-619(a)(9) of the Code of Civil Procedure provides that defendant may file a motion for dismissal, supported by affidavit, if the claim asserted against defendant is barred by other affirmative matters avoiding the legal effect of or defeating the claim. (735 ILCS 5/2–619(a)(9) (West 2018). Our supreme court has held that when ruling on a motion to dismiss because the claims are barred by other affirmative matters that avoid the legal effect of or defeats the claim, the trial court must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party. *In re Chicago Flood Litig.*, 176 Ill. 2d 179, 188 (1997). The motion should only be granted if the plaintiff can prove no set of facts that would support a cause of action. *Id.*

¶ 32 Allen contends the court erred in its September 22, 2016 order because the court dismissed the Leckies based solely on the ownership of the Cadillac and did not address Allen's allegations against Mr. Leckie regarding the repair and maintenance work Mr. Leckie performed on the Cadillac. Allen maintains that the first amended complaint stated sufficient facts to establish a cause of action against Mr. Leckie independent of ownership of the Cadillac. We agree.

¶ 33 Allen's first amended complaint alleged that Mr. Leckie "personally attempted to perform certain service, maintenance, repair and/or replacement work on the [Cadillac] including but not limited to, specific work to the front grill and/or its electrical components and/or its wiring" even though he "was not qualified to perform the inspections, service, maintenance, repair and/or replacement work on the [Cadillac]."

¶ 34 Judge Axelrood's September 22, 2016 order granting the motion to dismiss, stated that ". . . [a]fter reviewing the briefs and attachments, the Court finds that the claims asserted against Defendants are barred by an affirmative matter. Specifically, *that Defendants did not have a duty to maintain, inspect, service or repair a vehicle that they did not own*." (Emphasis added). Based on the aforementioned language of the September 22, 2016 order, we find, the affirmative matter on which Judge Axelrood relied was solely the ownership of the Cadillac. The September 22, 2016 order did not address Allen's allegations that prior to the fire, Mr. Leckie performed repairs on the Cadillac. Both Judge Esrig and Judge Lawler found that the September 22, 2016 order did not address Allen's allegations regarding Mr. Leckie's maintenance work on the Cadillac. Mr. Leckie's motion to dismiss should not have been granted because the first amended complaint alleged sufficient facts to establish a cause of

action against Mr. Leckie for his negligent repairs of the Cadillac regardless of whether he owned the Cadillac. Because the parties agree that Mrs. Leckie did not perform any repairs or maintenance on the Cadillac, Mrs. Leckie was properly dismissed.

¶ 35 The case management order stated ". . . Defendants 2-619 Motion to Dismiss is GRANTED, with prejudice and subject to IL Supreme Court Rule 304(a)." The order did not include language referencing the immediate appealability of the order or the justness of delaying the appeal.

¶ 36 Rule 304(a) provides that

> "if multiple parties or multiple 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. Mar. 8, 2016).

¶ 37 This court held in *Palmolive Tower Condominiums, LLC v. Simon*, 409 Ill. App. 3d 539, (2011) that "a circuit court order accompanied by language indicating that it is “final and appealable,” but not referencing immediate appeal, the justness of delay, or Rule 304(a), does not trigger the rule." *Id.* at 544. We also held in *Rohr Burg Motors, Inc. v. Kulbarsh,* 2014 IL App (1st) 131664 that "absent some other indication from the record that the court intended to invoke Rule 304(a) [citation], a circuit court's declaration that an order is ‘final and appealable’ amounts to nothing more than a nonbinding interpretation." *Id*. at ¶ 36. In this case, the case management order, handwritten by Leckie's counsel, did not include language indicating that it is "final and appealable," and made no reference to the immediate

appealability of the order or the justness of delaying the appeal. There is also no indication in the record that the court intended to invoke rule 304(a) because Judge Axelrood's September 22, 2016 written order on the motion to dismiss did not reference rule 304(a). Therefore, we hold that the reference to rule 304(a) in the case management order was insufficient to make the September 22, 2016 case management order or the 2-619 dismissal order appealable.

¶ 38 In light of our finding that the trial court erred when it entered the September 22, 2016 dismissal order and our holding that the reference to Rule 304(a) was insufficient to invoke Rule 304(a), we need not address Allen's contentions that the trial court erred or abused its discretion when it entered the orders on February 3, 2017, July 10, 2017, March 1, 2018, and April 12, 2018.

¶ 39 IV. CONCLUSION

¶ 40 Because the order granting the motion to dismiss only addressed ownership of the vehicle and not Allen's allegations that Mr. Leckie performed work on the vehicle, we find that the trial court erred when it entered the September 22, 2016 dismissal order. Accordingly, we reverse the trial court's September 22, 2016 order and we remand this case to the trial court for further proceedings.

¶ 41 Reversed and remanded.