2014 IL App (2d) 131064-U
Nos. 2-13-1064 & 2-13-1327, cons.
Order filed December 26, 2014

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

DIANE SCHREINER Plaintiff-Appellee, v. CHALLENGER MANUFACTURING, INC., and JAMES COXWORTH, Defendants-Appellants.	))))))))))	Appeal from the Circuit Court of Kane County. No. 09-L-2699 Honorable Robert B. Spence, Keith F. Brown, Judges, Presiding.

PRESIDING JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court improperly granted the plaintiff's motion for partial summary judgment as to count I of her complaint; (2) this court was without jurisdiction to consider the propriety of the trial court sanctioning the plaintiff's attorneys for a discovery violation because that order was not a final order.

¶ 2 The defendants, Challenger Manufacturing, Inc., and James Coxworth, terminated Challenger's employment contract with the plaintiff, Diane Schreiner. The plaintiff filed a three-count complaint, seeking an unpaid bonus and severance pay. The trial court granted the plaintiff's motion for partial summary judgment as to her claim that she was entitled to her bonus. The trial court entered a separate order sanctioning the plaintiff's attorneys $600 for a

discovery violation. The defendants appeal from both of those interlocutory orders. We reverse the trial court's order granting partial summary to the plaintiff and remand for additional proceedings. We lack jurisdiction to entertain the appeal pertaining to the sanction imposed on the plaintiff's attorneys, and therefore dismiss it.

¶ 3 Appeal No. 2-13-1064

¶ 4 On March 27, 2009, the plaintiff filed a three-count complaint against Challenger Manufacturing (the company or the defendant) and its president, James Coxworth. The complaint alleged that, on January 2, 2008, the plaintiff accepted the defendants' offer to work as vice-president of operations. Her annual salary would be $185,000. Her contract also included a bonus provision. That provision provided:

> "You may also be eligible to receive a discretionary annual bonus of up to 75% of your base salary provided you achieve EBIT [earnings before income taxes] percent of sales set forth below. Your annual bonus, if any, will be calculated on a calendar year [basis] beginning January 2008. The bonus schedule is as follows:

EBIT Earnings (as a percent of sales determined solely by the Company)	% of Base Salary*	Bonus
9-10%	10%	$18,500
10-11%	20%	$37,500
11-12%	30%	$55,500
12-13%	50%	$92,500
13-14%	$60%	$111,000
14% and up	$75%	$138,750

*Based on a salary of $185,000."

¶ 5 The plaintiff further alleged that, in the event that she was terminated after working for the company for a year, she would be entitled to 12 months' separation pay equal to her monthly base salary (one-twelfth of her annual salary). Thus, the plaintiff argued that she would be entitled to severance pay of $185,000.

¶ 6 The complaint further alleged that the plaintiff worked for the company until January 23, 2009, when her position was terminated. On that day, Coxworth allegedly acknowledged her entitlement to a 30% bonus of $55,500 by delivering a document (the bonus document) to her containing a calculation of that amount. Specifically, the bonus document stated:

"Diane Schreiner

-Bonus for 2008

2008 B/W EARNINGS [$1],825,983 11.6% of sales

Bonus % 30% of Salary $55,500"

¶ 7 On February 2, 2009, the plaintiff received the company's separation agreement and release. That agreement contained the following pertinent provisions:

"Payments to Schreiner. In consideration of Schreiner's execution of this Agreement, the promises contained herein and for other good and valuable consideration, the *** adequacy and sufficiency of which are hereby acknowledged, Challenger Manufacturing agrees as to:

A. pay Schreiner a discretionary bonus in the amount of Fifty Five Thousand Five Hundred Dollars ($55,500.00) ***

* * *

> Schreiner acknowledges and agrees that in the absence of this Agreement, Schreiner has no claim for the Discretionary Bonus *** pursuant to contract, policy, statute or otherwise and that Schreiner has otherwise received all compensation of whatever kind or nature from Challenger Manufacturing (including salary and vacation benefits) that she was entitled to receive by reason of her employment with Challenger Manufacturing and that she is entitled to no more."

The plaintiff did not sign the release, and the defendants did not pay her the bonus.

¶ 8 On May 8, 2009, the defendants filed an answer to the plaintiff's complaint. The defendants denied that the plaintiff (1) performed her duties under the contract; (2) was terminated without cause; and (3) was entitled to any relief. The defendants further denied that Coxworth had acknowledged that the plaintiff was entitled to any bonus.

¶ 9 On June 17, 2010, the plaintiff filed a motion for partial summary judgment as to count I of the complaint pertaining to her claimed bonus. In support of her motion, the plaintiff included the bonus document and a report from accountant Robert Kleeman. In his report, Kleeman indicated that he had reviewed the company's financial records as they pertained to the plaintiff's complaint. He stated that these records revealed that (1) the company made an accounting adjustment for a bonus payable to the plaintiff; (2) the company showed a bonus due to the plaintiff in the amount of $55,500 on its 2008 corporate tax return filed with the IRS, thus reducing the net income the company earned; and (3) Coxworth's personal tax liability for 2008 was at least $20,000 less due to the reduction of the company's income by booking the bonus expense of $55,500 due to the plaintiff.

¶ 10 On August 19, 2010, the defendants filed a response to the plaintiff's motion for partial summary judgment. The defendants argued that the parties' agreement clearly provided that the

payment of bonuses was discretionary. In support of its response, the defendants relied on Coxworth's deposition testimony. Coxworth testified that due to the difficult financial situation in the country in 2008 and early 2009, the company did not pay any bonuses to any employee in 2008. He explained that the bonus document that he presented to the plaintiff was not an award of any bonus but rather reflected the amount that the company would be willing to pay her as separation pay. He also testified that he showed the bonus document to the plaintiff to give her a rough idea of what the bonus would be if one was awarded to her.

¶ 11 The defendants also supported their response with the affidavit of the company's controller, Christine Motschull. Motschull testified that the company's EBIT could not be calculated before March 2009 because the company's auditors were not done analyzing the books until that time. The audited figures establish that company's EBIT was 10.9%. [The defendants argued that this showed that the plaintiff would not have been entitled to a $55,500 bonus.] Motschull testified that she made accounting entries in 2009 to reflect that the company made no discretionary payments for 2008.

¶ 12 The defendants also attached the affidavit of John Coffey, an accountant. He testified that he had reviewed the company's accrued bonuses from 2007 to 2009. No bonuses were paid in 2008. As such, the amounts set aside in the bonus accounts were reversed in 2009 to reflect that the expenses (*i.e.* tax deductions) were equal to the amount actually paid.

¶ 13 On September 29, 2010, the trial court granted the plaintiff's motion for partial summary judgment. The trial court found that there was no issue of fact because the defendants had recognized the plaintiff had earned a bonus of $55,500. This was evident because the defendants had included the bonus on its financial statement and had taken the bonus as an expense on its

federal income tax return. The trial court also noted that Coxworth had received a tax benefit from the company's handling of the bonus awarded to the plaintiff.

¶ 14 On May 9, 2011, the defendants filed a motion to re-open and reconsider entry of partial summary judgment in favor of the plaintiff. The defendants supported their motion with 14 affidavits. On November 8, 2011, the trial court denied the defense motion to re-open partial summary judgment.

¶ 15 On August 30, 2012, the defendants filed their second motion to re-open and reconsider the entry of the partial summary judgment. On September 24, 2013, the trial court denied that motion. In so ruling, the trial court included language with its order pursuant to Supreme Court Rule 304(a) (eff. Feb. 26, 2010) that there was no reason to delay enforcement or appeal of the trial court's September 29, 2010, order. The defendants thereafter filed a timely notice of appeal. In their notice of appeal, the defendants indicated that they were seeking review of the trial court's orders of: (1) September 29, 2010; (2) November 8, 2011; and (3) September 24, 2013. The appeal was docketed in this court as appeal No. 2-13-1064.

¶ 16 At the outset, we note that the plaintiff argues we lack jurisdiction to consider the trial court's orders of November 8, 2011, and September 24, 2013, because the trial court did not include Rule 304(a) language as to those two orders. We find this argument to be without merit. On appeal, the appellant may bring up all related orders entered before the notice of appeal and not previously appealable, including the denial of a post-judgment motion. *Sears v. Sears*, 85 Ill. 2d 253, 258 (1981). Here, all of the orders at issue are related to each other, and they were all entered before the defendants filed their notice of appeal. Thus, this court has jurisdiction to consider the three orders listed above. See *id.*

¶ 17 We next address the plaintiff's motion to strike portions of the defendants' brief. Relying on *Rayner Covering Systems, Inc. v. Danvers Farmers Elevator Co.*, 226 Ill. App. 3d 507, 509-11 (1992) the plaintiff argues that the "appellant may only refer to the record as it existed at the time the trial court ruled, outline the arguments made at that time, and explain why the trial court erred in granting summary judgment." Based on *Rayner*, the plaintiff argues that this court cannot consider any evidence that the plaintiff submitted after the trial court granted her motion for partial summary judgment. However, for the reasons discussed below, we believe that considering just the evidence that the defendants submitted in opposition to the motion for partial summary judgment is sufficient for us to determine that the order of partial summary judgment was improper. We therefore deny the plaintiff's motion as moot because it asks us to consider issues that are not germane to our disposition. See *In re Lawson's Estate*, 41 Ill. App. 3d 37, 40 (1976) (question is moot when it presents no actual controversy or where the issues have ceased to exist).

¶ 18 Turning to the merits of the defendants' appeal, we note that the purpose of a motion for summary judgment is to determine whether a genuine issue of triable fact exists (*People ex rel. Barsanti v. Scarpelli*, 371 Ill. App. 3d 226, 231 (2007)) and that such a motion should be granted only when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law" (735 ILCS 5/2-1005(c) (West 2010)). An order granting summary judgment should be reversed if the evidence shows that a genuine issue of material fact exists or if the judgment was incorrect as a matter of law. *Clausen v. Carroll*, 291 Ill. App. 3d 530, 536 (1997).

¶ 19 Here, there are material facts that preclude the entry of summary judgment. Despite the plaintiff's insistence to the contrary, the document at the center of the parties' dispute—the bonus document—does not establish in itself that the plaintiff is entitled to any bonus. The bonus document refers to the plaintiff, a bonus for 2008, and it lists a series of numbers. The document does not indicate that any earned bonus would in fact be paid. The parties' 2007 agreement also does not establish that the plaintiff was entitled to a bonus. Rather, the 2007 agreement provides that the payment of any such bonus is "discretionary." When the bonus document is read in conjunction with the 2007 agreement, an inference could be drawn that the defendants intended to exercise their discretion and pay the plaintiff a bonus. However, a different inference is raised when the bonus document is considered in conjunction with Coxworth's deposition testimony and the proposed separation agreement. Coxworth indicated that the bonus document was part of a separation agreement and that the amount listed in the bonus document was intended to be separation pay. He also testified that the company did not pay anyone a bonus in 2008 due to the poor state of the economy. These competing interpretations of the bonus document demonstrate that a question of fact remains as to whether the defendants indeed intended to award the plaintiff a bonus. Thus, the trial court erred in granting summary judgment as to count I of the plaintiff's complaint. *Id*.

¶ 20 In so ruling, we reject the plaintiff's argument that her expert's report established that the defendants did intend that the $55,500 be treated as an earned bonus based on the way the defendants treated that amount in their tax filings. The plaintiff's expert's assessment was contradicted by two accountants who submitted affidavits on behalf of the defendants. The accountants testified that no bonuses were paid in 2008 and that the company's records were amended to reflect that. Based on this conflict in the evidence submitted for and in opposition to

the motion for summary judgment, the plaintiff's expert's testimony was also not a sufficient basis to grant summary judgment in the plaintiff's favor. *Id.*

¶ 21 Appeal No. 2-13-1327

¶ 22 The defendants' second contention on appeal is that the trial court erred in sanctioning the plaintiff's attorneys only $600 for their discovery violations. The defendants argue that they incurred approximately $13,000 in attorney fees due to the plaintiff's noncompliance with Supreme Court Rule 219(c) (eff. July 1, 2002). The defendant therefore ask that we vacate the trial court's order imposing only limited sanctions on the plaintiff's attorneys and remand with directions that the sanctions be increased and that a monetary penalty be imposed for the willful violation of Rule 219.

¶ 23 On May 19, 2011, the defendants filed a motion for summary judgment as to count II of the plaintiff's complaint seeking unpaid separation pay under the Wage Act. The defendants argued that the plaintiff was not entitled to such pay because the evidence established that the plaintiff had not satisfactorily performed her job duties, complied with company policies, and followed the directives of Coxworth.

¶ 24 On September 8, 2011, the plaintiff's counsel submitted the plaintiff's third supplemental answers to the defense expert interrogatory. In those answers, the plaintiff's attorneys indicated that their expert, Kleeman, opined that the plaintiff's efforts were in part responsible for the company's improved financial results in 2008.

¶ 25 Based on the supplemental answers, the defendants deposed Kleeman to determine the basis for his opinion. On July 24, 2012, Kleeman, after being compelled by the court to address the contents of the third supplemental answers, repudiated in a deposition any opinion that the plaintiff had contributed to the improvement of the company's finances.

¶ 26 On August 30, 2012, the defendants filed a motion to bar Kleeman's testimony and for sanctions. On January 31, 2013, the trial court found that sanctions were appropriate pursuant to Rule 219, due to the conflict between the plaintiff's third supplemental answers and Kleeman's July 24, 2012, deposition testimony. The trial court therefore granted defense counsel's prayer for attorney fees. The trial court limited the amount of fees to the time the defendants spent deposing Kleemen at the July 24, 2012, deposition ($600).

¶ 27 The defendants subsequently filed a motion for the trial court to reconsider its imposition of limited sanctions. The defendants argued that their attorneys spent 45 hours discovering the basis (or lack thereof) for the opinions disclosed in the plaintiff's third supplemental expert witness disclosure.

¶ 28 On December 5, 2013, the trial court denied the defendants' motion to reconsider. In so ruling, the trial court stated:

> "What I will do is add into the order that the Court would consider this portion of the case for purposes—if the plaintiff does prevail in awarding of attorney's fees, that this part of the discovery process may be considered by the Court in not awarding the plaintiff attorney's fees for these actions.
>
> I'll add that because I think that is fair. And I don't think you should have to pay for much of this procedure if you—if they prevail to—you know, on those type of motions. And so I'll add that language."

The trial court further indicated that, pursuant to Rule 304(a), its ruling was final and appealable.[1] The defendants then filed a timely notice of appeal. The appeal was docketed in this court as appeal No. 2-13-1327.

[1] We note that, unlike the trial court's oral pronouncements denying the defendants'

¶ 29 We first address the plaintiff's argument that we lack jurisdiction to consider this appeal because the trial court's ruling is not a final order. We note that the plaintiff previously moved to dismiss the appeal for lack of jurisdiction, and this court denied the motion. However, we have an independent duty to determine whether we have jurisdiction, and we may reconsider our ruling on a motion to dismiss an appeal at any time before the disposition of the appeal. *Stoneridge Development Co, Inc. v. Essex Insurance Co.*, 382 Ill. App. 3d 731, 739 (2008).

¶ 30 Rule 304(a) states that a final order that disposes of less than all of the claims in one action is not appealable unless the trial court makes a written finding that there is no just reason to delay enforcement or appeal or both. Ill. S.Ct. R. 304(a) (eff. Feb. 26, 2010). However, a trial court cannot make a nonfinal order appealable simply by including language that complies with Rule 304(a). *In re Estate of Rosinski*, 2012 IL App (3d) 110942, ¶ 23. Instead, we must independently determine whether the order was in fact, final and appealable. *Id.*

¶ 31 In *Rosinski*, a minor was injured in a car accident. The insurance company for the driver who injured the minor hired a law firm to facilitate a settlement with the minor. The trial court appointed a guardian *ad litem* (GAL) to represent the minor. The GAL subsequently filed a petition for fees, and the trial court ordered that the law firm pay those fees. The trial court

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motion to reconsider, in its written order the trial court makes no reference to considering the discovery violation again after trial. However, it is well settled that the oral pronouncement of the judge, rather than the written order, is the judgment of the court, and that where the oral pronouncement and the written judgment conflict, the oral pronouncement controls. *People v. Jones*, 376 Ill. App. 3d 372, 395 (2007). We therefore consider the trial court's oral pronouncement as its actual order.

indicated that its order was "final and appealable." The law firm thereafter filed a notice of appeal pursuant to Rule 304(a). *Id.*, ¶ 21.

¶ 32 On appeal, the reviewing court dismissed the appeal for lack of jurisdiction. The court explained that the record revealed that that the petition to settle the minor's cause of action remained pending and that the GAL's duties had not been terminated. *Id.*, ¶ 23. The court noted that the GAL continued to appear on behalf of the minor even after the law firm had filed its appeal. The reviewing court then explained that it lacked jurisdiction because the trial court's order "did not absolutely and finally determine the rights of the firm because the firm could be ordered to pay additional GAL fees or other costs due to the ongoing nature of the pending petition." *Id.*, ¶ 24.

¶ 33 Here, as in *Rosinski*, the trial court's order did not absolutely and finally determine the rights of the parties because the trial court's order indicated it planned to revisit the issue following trial and that it might potentially not allow the plaintiff to recover attorney fees related to this discovery violation. As the trial court indicated that it would consider again this same discovery violation later in the proceedings, its order was not final. Thus, we do not have jurisdiction to consider the appeal. See *Pruitt v. Pruitt*, 129 Ill. App. 3d 50, 51-52 (1984) (finding order was not final and appealable where trial court's later ruling on attorney fees could result in another appeal on underlying action).

¶ 34 The defendants insist that the trial court erred in relying on an improper consideration in denying its motion to reconsider. Specifically, the defendants argue that "[r]eimbursement for defense legal fees to disclose the discovery violation involves entirely different considerations compared to whether the [p]laintiff incurred reasonable legal fees for prevailing on her claims. Under this reasoning, the defense has no recourse for the Rule 219 violation if it prevails on

Plaintiff's claims." However, at this point we are not addressing whether the trial court's order was proper. We are only addressing whether it was final. As we have determined that it was not, we must dismiss the defendant's appeal.

¶ 35 CONCLUSION

¶ 36 For the foregoing reasons, in appeal No. 2-13-1064, the judgment of the circuit court of Kane County is reversed and remanded for additional proceedings. In appeal No. 2-13-1327, the appeal is dismissed.

¶ 37 Appeal No. 2-13-1064: reversed and remanded.

¶ 38 Appeal No. 2-13-1327: dismissed.