

No. 1-12-3765

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
FIRST JUDICIAL DISTRICT

PRESTON ROBERSON,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 12 M1 131116
)	
MIDWAY DODGE INC., II,)	Honorable
)	James E. Snyder,
Defendant-Appellee.)	Judge Presiding.

PRESIDING JUSTICE HOWSE delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* Appeal dismissed for lack of jurisdiction.

¶ 2 Plaintiff Preston Roberson filed a complaint against defendant Midway Dodge Inc., II, regarding the warranty on a vehicle plaintiff purchased from defendant. Defendant filed a motion to dismiss the complaint under section 2-619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2010)), which was granted by the circuit court of Cook County.

Plaintiff now appeals that order, as well as the trial court's denial of his subsequently filed motion to reconsider that dismissal.

¶ 3 The pleadings in the common law record show that on October 7, 2010, plaintiff purchased a vehicle (the vehicle) from defendant, and, in the process, entered into an arbitration agreement (the agreement) in relation to that purchase. Therein, the parties agreed to submit to arbitration any dispute "arising out of or relating to" the purchase, lease, servicing or repair of the vehicle.

¶ 4 On May 24, 2012, plaintiff filed a complaint against defendant, raising claims of breach of express warranty, breach of implied warranty of merchantability, common law fraud, and violation of the Consumer Fraud Act in relation to the warranty covering the vehicle after incurring repair costs for the engine in the sale. On July 23, 2012, defendant filed a section 2-619 motion to dismiss plaintiff's complaint, alleging that at the time of purchase, the parties entered into a written arbitration agreement whereby any dispute arising out of the purchase was subject to arbitration pursuant to the Rules of the Better Business Bureau of Chicago. Defendant attached a copy of the signed agreement in support of the motion and asserted that under its terms the parties were required to proceed with arbitration.

¶ 5 On July 23, 2012, this case was ordered to mandatory arbitration. Neither party attended the hearing scheduled for November 14, 2012, and as a result, a finding in favor of defendant was entered. However, this arbitration award was vacated on November 29, 2012.

¶ 6 The record reflects that the parties failed to attend the arbitration hearing because the case had been dismissed on August 22, 2012, after a hearing was held on defendant's section 2-619 motion to dismiss plaintiff's complaint. In its written order, the trial court stated that the motion to dismiss was granted "without prejudice to the parties proceeding to arbitration, now pending before the Better Business Bureau in Chicago."

¶ 7 On September 13, 2012, plaintiff filed a motion to reconsider the August 22, 2012 dismissal of his complaint, which the trial court denied on December 12, 2012, in an order stating "this is a final and appealable order."

¶ 8 On appeal, plaintiff challenges the trial court's August 22, 2012, order dismissing his complaint, and its December 12, 2012, order denying his motion to reconsider that dismissal. He contends that the trial court erred because, pursuant to both the Federal Arbitration Act (FAA) and Illinois Uniform Arbitration Act (IUAA), the case should have been stayed rather than dismissed outright. He thus requests that we reverse the trial court's dismissal order and remand this case to the trial court with directions that it be stayed pending arbitration. Although defendant has not filed a brief in response, we will consider the appeal pursuant to the principles set forth in *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 131-33 (1976).

¶ 9 That said, we must first address the question of our jurisdiction in this matter. Although plaintiff has not questioned this court's jurisdiction over his appeal, we have a duty to raise it *sua sponte*, and to dismiss this appeal if jurisdiction is lacking. *Ferguson v. Riverside Medical Center*, 111 Ill. 2d 436, 440 (1985).

¶ 10 Our jurisdiction is limited to review of appeals from final orders. *Renzulli v. Zoning Board of Appeals of City of Wood Dale*, 176 Ill. App. 3d 661, 662 (1988). The original order appealed from in this case dismissed plaintiff's complaint without prejudice. Our supreme court has held that inclusion of the phrase "without prejudice" in a dismissal order "clearly manifests the intent of the court that the order not be considered final and appealable." *Flores v. Dugan*, 91 Ill. 2d 108, 114 (1982). Accordingly, we find that the order dismissing plaintiff's complaint without prejudice is not a final and appealable order.

¶ 11 Further, our conclusion is not altered by the fact that in its order dismissing plaintiff's motion to reconsider the dismissal of his complaint, the circuit court stated that the order was final and appealable. The finality of an order is determined by its substance, rather than its form. *Cole v. Hoogendoorn, Talbot, Davids, Godfrey and Milligan*, 325 Ill. App. 3d 1152, 1153 (2001). It has been held that where a complaint is dismissed without prejudice, and a motion to reconsider that dismissal is denied in an order including language stating that the order is appealable, such language does not render the order final because no order has been entered dismissing the complaint with prejudice. *Cole*, 325 Ill. App. 3d at 1155. Such is the case here, where no order dismissing plaintiff's complaint with prejudice was ever entered, and, accordingly, he would not be barred from filing another complaint. Plaintiff himself acknowledges that he has the ability to file an "identical" case. Under these circumstances, we find that we lack jurisdiction over this appeal.

¶ 12 For the reasons we have stated, we dismiss the appeal for want of jurisdiction.

¶ 13 Appeal dismissed.