

No. 1-15-2341

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).

U.S. BANK, NATIONAL ASSOCIATION,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	
)	
TINA M. MCBRIDE, as Independent Administrator of)	
the Estate of Raymond J. McBride, TINA M.)	
MCBRIDE, and RAYMOND H. MCBRIDE,)	
)	
Defendants-Appellants,)	
)	Nos. 11 CH 36940 &
)	12 CH 32706
)	
TINA M. MCBRIDE, as Independent Administrator of)	
the Estate of Raymond J. McBride, TINA M.)	
MCBRIDE, and RAYMOND H. MCBRIDE,)	
)	
Cross-Plaintiffs-Appellants,)	
)	
v.)	
)	The Honorable
FIDELITY NATIONAL TITLE GROUP,)	Pamela McLean
)	Meyerson,
Cross-Defendant-Appellee.)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Justices Neville and Mason concurred in the judgment.

ORDER

¶ 1 *Held:* We dismiss in part because we lack jurisdiction to consider the circuit court’s interlocutory order dismissing count I of plaintiff’s third amended complaint without prejudice. We affirm the circuit court’s order dismissing defendants’ third-party complaint and denying leave to amend.

¶ 2 Raymond H. McBride and Tina McBride, individually and as administrator of the estate of Raymond J. McBride, appeal from the circuit court's order dismissing their third-party complaint against Fidelity National Title Group. They also purport to appeal part of the circuit court's order denying their motion to dismiss U.S. Bank's mortgage foreclosure count. For the following reasons, we dismiss the portion of the McBrides's appeal challenging the circuit court's denial of the motion to dismiss U.S. Bank's mortgage foreclosure count for lack of jurisdiction, and we affirm the circuit court's order dismissing the McBrides's third-party complaint with prejudice and denying leave to file an amended third-party complaint.

¶ 3 **BACKGROUND**

¶ 4 The McBrides's brief does not contain a coherent and concise statement of facts. As a result, we recite the pertinent facts taken from the circuit court's written order to assist in the understanding of our disposition of this appeal.

¶ 5 In 1997, Raymond J. McBride, Raymond H. McBride, and Tina McBride were owners in joint tenancy of the property located at 312 Dewey, Northlake, Illinois (the property). In 1998, the three joint tenants executed a mortgage in favor of Norwest Mortgage, Inc., which was later assigned to Wells Fargo Home Mortgage (the Wells Fargo mortgage). In April 2004, Raymond J. and Tina refinanced the Wells Fargo mortgage by executing a mortgage in favor of Landmark Financial, Inc., which was later assigned to Option One Mortgage, Inc. (the Option One mortgage). Raymond H. did not sign the Option One mortgage. The funds from the Option One mortgage paid off the 1998 Wells Fargo mortgage.

¶ 6 In September 2004, Raymond J. and Tina refinanced the Option One mortgage by executing a mortgage in favor of Landmark, which was later assigned to U.S. Bank, N.A. (the

U.S. Bank mortgage). The funds from the U.S. Bank mortgage paid off the Option One mortgage from April 2004. Raymond H. did not sign the U.S. Bank mortgage.

¶ 7 In October 2011, U.S. Bank filed a complaint to foreclose on the U.S. Bank mortgage, naming the McBrides as defendants. In August 2012, U.S. Bank filed a separate action for declaratory relief, alleging that at the September 2004 closing on the U.S. Bank mortgage, Raymond J. and Tina presented a deed that transferred title from the joint tenancy to Raymond J. and Tina, that this deed was lost and never recorded, and that Raymond H., Raymond J., and Tina were “unwilling to arrange for the execution of a duplicate deed.” U.S. Bank sought an order declaring that Raymond J. and Tina had a fee simple interest in the property, and that Raymond H. had no interest in the property. The McBrides moved to consolidate the foreclosure action and declaratory judgment action, which the circuit court granted.

¶ 8 During the course of the litigation, both U.S. Bank and the McBrides were given multiple opportunities to amend their pleadings, in part due to Raymond J.’s death in July 2013. Tina was named as the Independent Administrator of Raymond J.’s estate, and was added as a defendant in that capacity. Relevant to the issues on appeal are U.S. Bank’s third amended complaint for foreclosure and other relief, and the McBrides’s third-party complaint against Fidelity National Title Group (Fidelity), the entity that insured title to the property.¹

¶ 9 U.S. Bank’s third amended complaint alleged a count for foreclosure of the U.S. Bank mortgage (count I), equitable subrogation (count II), equitable lien (count III), unjust enrichment against Raymond H. (count IV), and “misrepresentation” against Tina in her capacity as administrator (count V). Counts II and III essentially alleged that the Raymond J. and Tina

¹The McBrides originally filed a “cross complaint” against Fidelity, followed by an amended cross complaint, which the circuit court dismissed without prejudice. The amended cross complaint asserted substantially similar claims to those advanced in the third-party complaint.

obtained the Option One mortgage to pay off the Wells Fargo mortgage, and then obtained the U.S. Bank mortgage to pay off the Option One mortgage, and therefore U.S. Bank was either subrogated into the first-lien position originally held by the Wells Fargo mortgage in the amount of \$107,473.71 (which was the amount paid to pay off the Wells Fargo mortgage), or that equitable principles supported imposing a lien on Raymond H. and Tina's interests in the property to prevent Raymond H. and Tina from being unjustly enriched from Raymond J. and Tina having misrepresented who the title owners of the property were at the September 2004 closing. Count IV alleged that Raymond H. would be unjustly enriched in the amount of the payoff of the Wells Fargo mortgage if his interest in the property was not subject to the U.S. Bank mortgage. Count V alleged that Raymond J. made misrepresentations as to the title of the property at the September 2004 closing, that U.S. Bank would suffer losses as a result of those misrepresentations, and that Tina, as administrator of Raymond J.'s estate, was liable for any damages incurred by U.S. Bank.

¶ 10 The McBrides's third-party complaint against Fidelity asserted two counts. Count I alleged that Fidelity had issued a title commitment incorrectly stating that only Tina and Raymond J. were the owners of the property, and that Landmark therefore failed to obtain the consent of all the joint tenants to the U.S. Bank mortgage. The McBrides alleged that Raymond J. was an intended third-party beneficiary of the title insurance policy issued by Fidelity, that Raymond J. had paid the title insurance premiums, and that Fidelity's error in identifying the property's ownership "has invalidated the lien and prevented the perfection of the mortgage lien of *** U.S. Bank." They claimed that the property "is not or will be determined not to collateralize the note and thus the estate of Raymond J. *** will be subject to personal liability." Count II alleged that Fidelity violated the Fair Debt Collection Practices Act (FDCPA) (15

U.S.C. § 1692 *et seq.* (2012)) by sending a letter dated June 25, 2012, containing “the false claim that Raymond H. *** had agreed to execute a deed relinquishing his interest in the property,” that Fidelity “was attempting to protect its position by attempting to collect a deed to overcome its error in insuring the admittedly invalid lien of the mortgage lender,” and threatening legal action that could not be taken.

¶ 11 The McBrides moved to dismiss U.S. Bank’s third amended complaint in its entirety pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2014)), and Fidelity moved pursuant to section 2-619 of the Code to dismiss the McBrides’s third-party complaint. Fidelity argued that count I should be dismissed because Raymond J. was not a third-party beneficiary of the Fidelity title insurance policy, and count II should be dismissed because the June 25, 2012, letter sent to the McBrides was sent by counsel and, regardless, Fidelity was not a debt collector under the FDCPA. After Fidelity moved to dismiss the third-party complaint, but before the circuit court ruled on the motion, the McBrides sought leave to file an amended third-party complaint, which attempted to clarify that Tina, as independent administrator of Raymond J.’s estate, either had authority to pursue a claim under the title policy, or that that the estate was a co-insured under the title policy.

¶ 12 On April 7, 2015, the circuit court entered a written order granting the McBrides’s motion to dismiss count I of U.S. Bank’s third amended complaint without prejudice, finding that U.S. Bank’s lien “is confined to Tina’s undivided one-half interest” in the property. The circuit court allowed U.S. Bank leave to replead count I against Tina’s undivided one-half interest in the property. The circuit court also granted the McBrides’s motion to dismiss counts II through V with prejudice. In the same April 7, 2015, order, the circuit court granted Fidelity’s motion to dismiss the McBrides’s third-party complaint with prejudice, finding that the

McBrides could not recover on count I because they sought recovery for solely economic losses under a negligence theory, and that count II failed because Fidelity did not send the June 25, 2012, letter and Fidelity did not meet the definition of “debt collector” in section 1692a of the FDCPA (15 U.S.C. § 1692a(6) (2012)). The circuit court also denied the McBrides’s motion for leave to amend their third-party complaint, finding that the proposed amendment merely made changes to allege the estate’s status as owner or co-insured of the title policy, and that the amendment did not cure any of the legal deficiencies of the third-party complaint.

¶ 13 On July 17, 2015, the circuit court entered an order finding that “there is no just reason to delay appeal of the April 7, 2015[,] order.” On August 14, 2015, the McBrides filed a notice of appeal, followed by an amended notice of appeal on September 11, 2015, both of which identified the April 7, 2015, dismissal order. The McBrides request that we reverse “the order of April 7, 2015[,] allowing the foreclosure plead in [c]ount I of the [t]hird [a]mended [c]omplaint.” They also request that we reverse the dismissal of the third-party complaint and the denial of leave to amend the third-party complaint.

¶ 14 ANALYSIS

¶ 15 We have an independent duty to consider our jurisdiction. *In re Marriage of Crecos*, 2015 IL App (1st) 132756, ¶ 16. Here, the circuit court entered an order pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010). 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 circuit 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. Feb. 26, 2010).

¶ 16 It is well-settled that Rule 304(a) applies only to final judgments or orders. *Blumenthal v. Brewer*, 2016 IL 118781, ¶ 24. “An order or judgment is considered to be final and appealable for purposes of this rule if it terminates the litigation between the parties on the merits or disposes of the rights of the parties, either on the entire controversy or a separate part thereof.” *Id.* (citing *In re Marriage of Gutman*, 232 Ill. 2d 145, 151 (2008)). Generally, an order that strikes a complaint but grants leave to amend is not an appealable final order. *Richter v. Prairie Farms Dairy, Inc.*, 2016 IL 119518, ¶ 25. The inclusion of the language “without prejudice” means that the circuit court “had not made a final determination of rights or liabilities or an adjudication on the merits and the order was not final or appealable.” *Renzullo v. Zoning Board of Appeals of City of Wood Dale*, 176 Ill. App. 3d 661, 663-64 (1988) (citing *O’Hara v. State Farm Mutual Automobile Insurance Co.*, 137 Ill. App. 3d 131, 134-35 (1985)). “If the order is in fact not final, inclusion of [a Rule 304(a)] special finding in the circuit court’s order cannot confer appellate jurisdiction.” *Blumenthal*, 2016 IL 118781, ¶ 24 (citing *EMC Mortgage Corp. v. Kemp*, 2012 IL 113419, ¶ 14).

¶ 17 Here, the circuit court dismissed count I of U.S. Bank’s third amended complaint without prejudice, and granted U.S. Bank leave to replead count I against Tina’s undivided one-half interest in the property. This does not constitute a final judgment. The inclusion of a Rule 304(a) finding does not confer appellate jurisdiction to consider the circuit court’s non-final order with respect to count I of U.S. Bank’s third amended complaint. Because this was not a final order, we lack jurisdiction, and we must dismiss that portion of the McBrides’s appeal seeking review of the dismissal of count I of U.S. Bank’s third amended complaint.²

²In their appellant’s brief, the McBrides identify six issues for review. We lack jurisdiction to consider any argument advanced in issues one through four.

¶ 18 The circuit court’s dismissal of the McBrides’s third-party complaint with prejudice, as well as the order denying the McBrides leave to file an amended third-party complaint, do constitute final judgments, and the circuit court’s Rule 304(a) finding does confer appellate jurisdiction over those rulings contained in the April 7, 2015, order. We address those arguments in turn.

¶ 19 First, however, we observe that the McBrides’s appellant’s brief is in severe violation of Illinois Supreme Court Rule 341 (eff. Jan. 1, 2016). The McBrides’s brief lacks a Rule 341(c) certificate of compliance certifying that “the brief complies with the form and length requirements of paragraphs (a) and (b) of this rule.” Ill. S. Ct. R. 341(c). Additionally, Rule 341(h)(3) requires “a concise statement of the applicable standard of review for each issue, with citation to authority, either in the discussion of the issue in the argument or under a separate heading placed before the discussion in the argument.” Ill. S. Ct. R. 341(h)(3). Nowhere in the McBrides’s appellant’s brief do they set forth the standard of review for a section 2-619 motion to dismiss or for the denial of a motion for leave to file an amended pleading.

¶ 20 Next, the McBrides’s statement of facts violates Rule 341(h)(6), as it does not “contain the facts necessary to an understanding of the case,” (Ill. S. Ct. R. 341(h)(6)), but instead contains only a terse explanation of the dispute with hardly any information regarding the substance of the relevant pleadings or facts. Finally, Rule 341(h)(7) requires that an appellant’s argument section “contain the contentions of the appellant and the reasons therefore, with citation of the authorities and the pages of the record relied on.” Ill. S. Ct. R. 341(h)(7). The McBrides’s appellant’s brief contains virtually no coherent legal argument in support of their contention that the circuit court erred with respect to the dismissal of their third-party complaint or in the denial of leave to file an amended third-party complaint.

¶ 21 Furthermore, the appendix to the McBrides's appellant's brief only contains the circuit court's April 7, 2015, order, and omits a table of contents to the record on appeal, copies of the notice of appeal and amended notice of appeal, and the relevant pleadings, in violation of Illinois Supreme Court Rule 342(a) (eff. Jan. 1, 2005).

¶ 22 These violations, especially when considered together, are sufficient grounds for us to invoke our discretion to either strike the McBrides's brief or to dismiss their appeal in its entirety. We decline to do so, but we advise the McBrides's counsel that these errors do nothing to assist in the consideration of the appellant's argument and should not be repeated.

¶ 23 Notwithstanding the foregoing, the McBrides argue that the circuit court erred in dismissing their third-party complaint. We review a circuit court's ruling on a section 2-619 motion to dismiss *de novo*. *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31. The McBrides argue that Fidelity was liable for its attorney's statements in the June 25, 2012, letter which "sought payment, not in dollars, but in a deed that would immunize [Fidelity] from liability." The McBrides, however, make no argument that Fidelity meets the FDCPA's statutory definition of a "debt collector," which is defined as "any person who uses any instrumentality of interstate commerce or the mails in any business the *principal purpose* of which is the collection of any debts, or who *regularly* collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." (Emphases added.) 15 U.S.C. § 1692a(6) (2012). And in the circuit court, the McBrides offered no evidence to contradict an affidavit from Sydney Sefick, a vice president of Fidelity, that stated Fidelity's "principal purpose is title services, and is not, and never has been, debt collection." Even if the statements contained in the June 25, 2012, letter could be imputed to Fidelity, the McBrides advance no argument, and point to no evidence in the record, that Fidelity's principal purpose is debt collection, or that it regularly

collects or attempts to collect debts. The McBrides failure to develop a legal argument results in forfeiture. Forfeiture aside, the circuit court properly dismissed count II of the McBrides's third-party complaint because the McBrides could not establish that Fidelity was subject to liability as a debt collector under the FDCPA.

¶ 24 The McBrides next advance an incoherent argument that they could “seek economic damages for a breach of contract,” and that they should have been permitted to replead their third-party complaint. The McBrides point to nothing in the record to suggest that they ever raised this argument in the circuit court, they fail to explain what “contract” they could potentially sue upon, and they point to nothing in the record suggesting that they ever sought leave to amend their third-party complaint to assert such a claim. To the extent that the McBrides are attempting to challenge the circuit court's ruling with respect to count I of the third-party complaint, they have forfeited such claim by failing to advance any coherent legal argument supported by authority. Ill. S. Ct. R. 341(h)(7).

¶ 25 Next, the McBrides argue that the circuit court erred in denying them leave to file an amended third-party complaint. We review a circuit court's order denying leave to amend a pleading for an abuse of discretion. *Loyola Academy v. S&S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992). The McBrides's appellate argument consists of two sentences that advance no legal argument, which falls well short of demonstrating that the circuit court abused its discretion in denying them leave to amend. This is especially true considering that the proposed amended third-party complaint, filed prior to the circuit court's ruling on Fidelity's motion to dismiss the original third-party complaint, advanced no new legal theory, other than that Tina, as administrator, could pursue a claim under the title policy. The McBrides's failure to advance any legal argument in support of their claim results in forfeiture. Forfeiture aside, we find that the

circuit court did not abuse its discretion in denying the McBrides leave to file their proposed amended third-party complaint because, as the circuit court observed, the proposed pleading merely made changes to allege the estate's status as owner or co-insured of the title policy, and failed to cure any of the legal deficiencies of the third-party complaint.

¶ 26

CONCLUSION

¶ 27 We lack jurisdiction to consider the McBrides's challenge to the circuit court's interlocutory order allowing U.S. Bank to replead count I of its third amended complaint against Tina McBride's interest in the property. The McBrides forfeited their remaining arguments dealing with the dismissal of their third-party complaint on appeal. Forfeiture aside, the circuit court properly dismissed the McBrides's third-party complaint, since the McBrides could not establish that Fidelity was a debt collector under the FDCPA, and the circuit court did not abuse its discretion in denying leave to replead where the proposed amended pleading did not cure any of the legal deficiencies in the third-party complaint. For the forgoing reasons, the judgment of the circuit court is affirmed.

¶ 28 Appeal dismissed in part, affirmed in part.