

2017 IL App (1st) 162724-U
No. 1-16-2724
September 29, 2017

SECOND DIVISION

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 DISTRICT

MICHAEL STAINE,)	Appeal from the Circuit Court
)	Of Cook County.
Plaintiff-Appellee,)	
)	
v.)	No. 15 L 10285
)	
T. STEELE CONSTRUCTION, INC., STC)	The Honorable
TWO LLC, and CROWN CASTLE USA,)	John H. Ehrlich,
INC.,)	Judge Presiding.
)	
Defendants-Appellants.)	

PRESIDING JUSTICE NEVILLE delivered the judgment of the court.
Justices Hyman and Mason concurred in the judgment.

ORDER

¶ 1 *Held:* Where the circuit court certified for interlocutory review questions about whether the plaintiff's actions qualified as construction-related for purposes of determining the applicable statute of limitations, and the longer statute of limitations period applied if the defendant's activities, not the plaintiff's activities, count as construction-related, answers to the circuit court's questions would not materially advance the ultimate termination of the litigation, so the appellate court lacked jurisdiction to answer the certified questions. Due to the lack of jurisdiction over the certified questions, the appellate court also lacked jurisdiction to consider other issues concerning the circuit court's interlocutory orders.

¶ 2 In this appeal under Supreme Court Rule 308 (Ill. S. Ct. R. 308 (eff. July 1, 2017)), the circuit court has asked us to answer three specific questions. The defendants contend that answers to the questions would resolve the issue of whether the statute of limitations for construction supervision applies, and that the answers could require the circuit court to dismiss the complaint as untimely. We hold that the questions bear little relevance to the issue of which statute of limitations governs this case. Because we find that answers to the questions would not materially advance the termination of the litigation, we dismiss the appeal.

¶ 3 **BACKGROUND**

¶ 4 In 2012, T-Mobile embarked on a modernization project to improve the functioning of its equipment for relaying cellular telephone signals. T-Mobile hired Nokia Siemens Networks (NSN) to serve as general contractor for the project. NSN entered into a frame agreement with T. Steele Construction, Inc., for Steele to work at a number of different locations, not specified in the frame agreement. The frame agreement made Steele responsible for site preparation, including steel work and cabinet installation, and equipment installation, which included engineering and programming needed to make the equipment operational.

¶ 5 NSN put in an order under the frame agreement for Steele to work on a tower located on a lot owned by STC Two LLC and managed by Crown Castle USA, Inc. Steele hired subcontractors to perform some of the work. Steele entered into an agreement with BRIUS Telecom Solutions, whereby BRIUS agreed to send qualified engineers to work at Steele's worksites. In May 2013, BRIUS sent Michael Staine to work on the upgrade at the STC site.

¶ 6 In October 2015, Staine filed a complaint naming as defendants Steele, STC, and Crown Castle. Staine alleged that in May 2013, in the course of his work at the STC site, he tripped on exposed conduit and suffered extensive injuries. He sought compensation from Steele for its negligence in (1) leaving the conduit in a walkway, (2) failing to light the area adequately, and (3) failing to warn Staine of the danger. He sought recovery from STC and Crown Castle as owners and possessors of the property, arguing that both STC and Crown Castle violated their duties to keep the property reasonably safe.

¶ 7 Steele filed a motion to dismiss based on both the statute of limitations and workers' compensation. STC and Crown Castle filed a separate motion to dismiss based solely on the statute of limitations.

¶ 8 In response to the motions, Staine said in an affidavit that the activities at the site as part of the modernization project included "excavation, laying gravel, laying substantial amounts of conduit – through which electrical and fiber optic cables were to be r[u]n -- *** installation of a large metal cabinet *** to house *** equipment necessary for the *** upgrade, and a platform on which to rest that hardware, as well as hardware and software which facilitated the transmission of a cellular signal." Staine claimed that he "installed critical electronic equipment, electronic software, and physical components" of the modernized structure.

¶ 9 Steele's project manager, David Browning, filed an affidavit in which he disputed several of Staine's assertions. According to Browning, subcontractors working for Steele on the project at the site "replace[d] old antennas on the tower and an old computer cabinet on the

ground with an upgraded *** model of the same equipment. *** [N]othing was installed that did not replace an old piece of equipment. Plaintiff's portion of the work was simply installing a software upgrade on a computer." Browning also admitted that "[t]hree new conduits were added for the new equipment."

¶ 10 The three defendants all argued that a two-year statute of limitations barred all of Staine's causes of action. See 735 ILCS 5/13-202 (West 2012). Staine argued that the four-year limitations period for construction-related accidents applied. See 735 ILCS 5/13-214 (West 2012). Section 13-214 provides:

"As used in this Section 'person' means any individual, any business or legal entity, or any body politic.

(a) Actions based upon tort, contract or otherwise against any person for an act or omission of such person in the design, planning, supervision, observation or management of construction, or construction of an improvement to real property shall be commenced within 4 years from the time the person bringing an action, or his or her privity, knew or should reasonably have known of such act or omission." 735 ILCS 5/13-214 (West 2012).

¶ 11 The circuit court found that Staine did not count as Steele's employee for purposes of the Workers' Compensation Act (820 ILCS 305/1 *et seq.* (West 2012)). The circuit court also held that the four-year statute of limitations applied to Staine's causes of action, so the court denied both of the motions to dismiss. But the circuit court certified for interlocutory appeal the following three questions:

"(1) Whether a subcontractor that executes an agreement with a staffing agency for the installation of computer software is a 'person' within the meaning of 735 ILCS 5/13-214(a);

(2) Whether computer software is an 'improvement to real property' within the meaning of 735 ILCS 5/13-214(a); and

(3) Whether the installation of computer software is a 'construction of an improvement to real property' within the meaning of 735 ILCS 5/13-214(a)."

¶ 12 The defendants filed petitions for leave to appeal under Supreme Court Rule 308 (Ill. S. Ct. R. 308 (eff. July 1, 2017)), and this court allowed the petitions.

¶ 13 ANALYSIS

¶ 14 As a preliminary matter, Staine argues that this court should not have granted the petitions for leave to appeal, because the answers to two of the questions will not materially advance termination of the litigation, and the other question does not involve a substantial ground for difference of opinion. The defendants argue that Staine waived the argument by failing to raise it before the appellate court allowed the petitions for leave to appeal.

¶ 15 Supreme Court Rule 308 creates an exception to the general rule that this court lacks jurisdiction to consider interlocutory appeals. *Doe v. Catholic Bishop of Chicago*, 2017 IL App (1st) 162388, ¶ 4. Under Rule 308, this court has limited jurisdiction to consider an appeal when the trial court enters an interlocutory order and states in writing "(1) that the order involves a question of law as to which there is substantial ground for difference of opinion and (2) that an immediate appeal may materially advance the ultimate termination of

the litigation." *Voss v. Lincoln Mall Management Co.*, 166 Ill. App. 3d 442, 444 (1988). If the appellate court finds either that the order does not present a question subject to substantial grounds for a difference of opinion, or that an answer to the question will not materially advance the termination of the litigation, the appellate court should not accept the case for interlocutory appeal. *Voss*, 166 Ill. App. 3d at 450-52.

¶ 16 We find that the parties cannot give this court jurisdiction to address an interlocutory appeal by waiving an objection that the question does not qualify for review under Rule 308. See *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 251-52 (2010). If, at any time, either the parties or the court recognize any basis for finding that the court lacks jurisdiction over the interlocutory appeal, the parties or the court should address the jurisdictional question. See *In re Marriage of Dougherty*, 2017 IL App (1st) 161893, ¶ 4. Insofar as the court in *Razavi v. Walkuski*, 2016 IL App (1st) 15143,5 ¶ 9 found that a party had waived its objection that a question did not qualify for review under Rule 308, and therefore the court had no need to address the objection, we must disagree with that decision.

¶ 17 Moreover, even if the *Razavi* court correctly found the issue waived, the waiver rule limits only the parties and not the courts. *Committee for Educational Rights v. Edgar*, 174 Ill. 2d 1 (1996). We choose to address the jurisdictional argument that this court should not have allowed the petitions for leave to appeal.

¶ 18 **Whether Steele Is a Person**

¶ 19 The circuit court asked first "Whether a subcontractor that executes an agreement with a staffing agency for the installation of computer software is a 'person' within the meaning of

735 ILCS 5/13-214(a)." The question relates to the case only insofar as Steele executed such an agreement. Section 13-214 defines a 'person,' for purposes of the statute, as "any individual, any business or legal entity, or any body politic." 735 ILCS 5/13-214 (West 2012). In its contract with NSN, Steele described itself as "an Illinois S Corporation *** with a principal place of business [in Illinois]." Thus, Steele admitted that it is a business entity, which makes it a person within the meaning of section 13-214. We note that none of the cases the circuit court cited involve the question of whether a party qualified as a "person" within the meaning of section 13-214. Instead, those cases concerned whether a party, admittedly a person, engaged in "the design, planning, supervision, observation or management of construction." See *Lombard Co. v. Chicago Housing Authority*, 221 Ill. App. 3d 730, 734 (1991); *Prate Installations, Inc. v. Thomas*, 363 Ill. App. 3d 216, 218 (2006). Cases interpreting the term "person" in section 13-214 make no reference to whether the entity engaged in design, planning, or supervision of construction. See *Paszkowski v. Metropolitan Water Reclamation District*, 213 Ill. 2d 1, 7-8 (2004); *County of Du Page v. Graham, Anderson, Probst & White, Inc.*, 109 Ill. 2d 143, 152 (1985). We find no grounds for any dispute over whether Steele, a business entity incorporated in Illinois, qualifies as a 'person' under a statute that expressly defines the term "person" to include "any business *** entity."

¶ 20 The circuit court's question did not directly name Steele; instead, it asked about a subcontractor that executes an agreement with a staffing agency. The parties have not suggested any hypothetical entity which might have the power to effectively execute an

agreement, if the entity does not qualify as either an individual, or a business or legal entity, or a body politic. Even if the parties could concoct such an entity, it would bear no relevance to the case concerning Staine and Steele. In the context of this case, we find no grounds for difference of opinion as to whether an entity that executes a staffing agreement qualifies as a "person" within the meaning of section 13-214. Question 1 cannot justify this court's decision to allow the petition for leave to appeal.

¶ 21 Computer Software

¶ 22 Next, the circuit court asked us to decide whether computer software counts as an "improvement to real property" and whether the installation of computer software counts as "construction of an improvement to real property" within the meaning of section 13-214 (a). 735 ILCS 5/13-214(a). All three defendants argue that if the answer to either question is "no," then the statute of limitations bars the suit, thereby materially advancing termination of the litigation.

¶ 23 Section 13-214(a) establishes a four-year statute of limitations for tort claims based on acts or omissions in the supervision or management of "construction, or construction of an improvement to real property." 735 ILCS 5/13-214(a) (West 2012).

¶ 24 Staine filed his complaint more than two years, but less than four years, after the accident. Thus, the statute of limitations does not bar Staine's complaint if he has alleged facts from which a trier of fact could conclude that any of the defendants committed a negligent act or omission in the construction of an improvement to real property. Staine did not allege that Steele limited its acts to installation of computer software. Steele's contract

with NSN imposed on Steele responsibility for installation of steel work, cabinets, and other equipment, and Steele also had responsibility for the engineering needed to make the new equipment operational. Staine alleged that the work at the STC site included "excavation, laying gravel, laying substantial amounts of conduit *** installation of a large metal cabinet ***, and a platform on which to rest that hardware, as well as hardware and software which facilitated the transmission of a cellular signal." If we answer that computer software, by itself, does not constitute an improvement to real property, or if we say that installation of computer software alone does not qualify as construction of an improvement to real property, we will not have significantly helped the circuit court determine whether Steele, at the STC site, supervised or managed construction of an improvement to real property. Steele's own witness, Browning, admitted that Steele's acts at the site went far beyond installation of computer software. Browning added that "[n]o one from T. Steele had any training, requisite knowledge, or experience necessary in order to perform the software programming for the upgrade." Thus, answers to the circuit court's last two questions have little or no bearing on whether the four-year statute of limitations applies to the alleged acts or omissions of the defendants.

¶ 25 In its application for leave to appeal, Steele asserted: "The court must determine whether the Plaintiff's work in this case was an improvement to real property to determine whether the longer construction statute [of limitations] applies." Section 13-214 establishes a four-year statute of limitations when the plaintiff alleges that the defendant acted negligently in the defendant's construction-related activities. See 735 ILCS 5/13-214(a) (West 2012);

Hernon v. E.W. Corrigan Construction Co., 149 Ill. 2d 190, 199-200 (1992); *Krueger v. A.P. Green Refractories Co.*, 283 Ill. App. 3d 300, 303-04 (1996). The question of whether the plaintiff also engaged in construction-related activities has no bearing on the limitations period. The questions the circuit court posed pertain only to the plaintiff's activities, not the defendants' activities. Because an answer to the second and third questions will not materially advance the termination of the litigation, Questions 2 and 3 cannot justify this court's decision to allow the petition for leave to appeal.

¶ 26 Workers' Compensation Act

¶ 27 Finally, Steele asks us to direct the circuit court to enter a judgment in favor of Steele under the exclusivity provision of the Workers' Compensation Act. "Generally, *** the scope of review in an interlocutory appeal brought under Rule 308 is strictly limited to the certified question." *Balma v. Henry*, 404 Ill. App. 3d 233, 243 (2010). "Appeals under this rule should be available only in the exceptional case where there are compelling reasons for rendering an early determination of a critical question of law and where a determination of the issue would materially advance the litigation. [Citations.] The rule should be strictly construed and sparingly exercised." *Kincaid v. Smith*, 252 Ill. App. 3d 618, 622-23 (1993).

¶ 28 Steele cites cases in which courts held that despite the general rule limiting appeals under Rule 308 to consideration of the questions posed, "[i]n the interests of judicial economy and reaching an equitable result, *** a reviewing court may go beyond the certified question and consider the appropriateness of the order giving rise to the appeal." *P.J.'s Concrete Pumping Service, Inc. v. Nextel West Corp.*, 345 Ill. App. 3d 992, 998-99 (2004). However, in the

cited cases the appellate court had jurisdiction to consider the appeal because the circuit court certified for review at least one question for which there was substantial ground for difference of opinion, and an immediate appeal from the order could materially advance the ultimate termination of the litigation. See *DeBouse v. Bayer*, 235 Ill. 2d 544, 550 (2009); *Bright v. Dicke*, 166 Ill. 2d 204, 208 (1995); *Spears v. Association of Illinois Electric Cooperatives*, 2013 IL App (4th) 120289, ¶ 15.

¶ 29 Here, the questions the circuit court certified do not qualify for interlocutory review, because answers to the questions will not materially advance the litigation, and one of the questions involves no substantial ground for difference of opinion. Because we lack jurisdiction to consider the interlocutory appeal, we must not address the issue concerning the Workers' Compensation Act.

¶ 30 CONCLUSION

¶ 31 Because answers to the questions the circuit court certified for review will not materially advance termination of the litigation, this court lacks jurisdiction to consider the interlocutory appeal. Accordingly, we must dismiss the appeal.

¶ 32 Appeal dismissed.