

NOTICE
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2017 IL App (5th) 160371-U

NO. 5-16-0371

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

<i>In re</i> MARRIAGE OF)	Appeal from the
)	Circuit Court of
RICKI L. JONES,)	Madison County.
)	
Petitioner-Appellant,)	
)	
and)	No. 07-D-69
)	
DOROTHY L. BOOS, formerly known as)	
Dorothy L. Jones,)	Honorable
)	Martin J. Mengarelli,
Respondent-Appellee.)	Judge, presiding.

JUSTICE OVERSTREET delivered the judgment of the court.
Justices Welch and Barberis concurred in the judgment.

ORDER

- ¶ 1 *Held:* Appeal from circuit court’s order dismissed for lack of jurisdiction.
- ¶ 2 On cross-motions for summary judgment, the circuit court of Madison County construed an order entered by the United States Tax Court and held the petitioner, Ricki L. Jones, solely liable for federal income tax fraud penalties and held both Ricki and the respondent, Dorothy L. Boos, liable for underpaid taxes and interest. Although the order left undecided the tax liability calculations, including the amount, if any, to be recouped by Dorothy for funding part of the tax fraud penalty, the circuit court entered an order

pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010), allowing this appeal. For the following reasons, we dismiss the appeal.

¶ 3 BACKGROUND

¶ 4 During the parties' marriage, Ricki and Dorothy substantially understated their taxable income in joint federal income tax returns submitted to the Internal Revenue Service for 2003, 2004, and 2005. In early 2009, Ricki was charged and later pleaded guilty to felony evasion of taxes (26 U.S.C. § 7201), for which he was sentenced to 15 months imprisonment. *United States of America v. Ricki Lee Jones*, No. 08-30256 (Jan. 22, 2009). Some of the tax liability related to understatement and nonpayment of taxes on monies Ricki embezzled from British Petroleum Amoco North America, Incorporated, for which restitution was also ordered.

¶ 5 On April 16, 2009, the circuit court entered a judgment of dissolution of marriage pursuant to the parties' marital settlement agreement. According to the marital settlement agreement, the parties agreed that the then-determined tax liabilities and the restitution to British Petroleum would be paid from marital assets. The parties received notice, however, that the IRS was reviewing their tax payments and had commenced audit proceedings, including potential assessment of penalties for fraud. On June 26, 2009, the circuit court ordered that the marital settlement agreement gave each party "an out to claim innocence in the possibility of fraud" and the "ability to pin liability on one another or to use the innocent spouse defense *** for the purpose of offsetting penalties, interest fees and fraud allegations." The order identified the situation as one where the potential liability of 1.3 million to 6 million dollars had not been set aside for the IRS. The order

provided that “any additional penalty whether it [was] caused by fraud or any other inducement [was] to be paid by the individual and not from the collective pool of money.”

¶ 6 On September 4, 2009, the circuit court entered an order stating that the total amount due for the unpaid taxes, interest, and penalties for 2003, 2004, and 2005 was approximately \$784,721.29. The court noted that the negotiated amounts due pursuant to the negotiated income tax examination charges for tax years 2003, 2004, and 2005 amounted to \$4,719,813.29, that Ricki paid about \$1.5 million towards the liability, and that the parties jointly paid approximately \$2,435,721.29 pursuant to the terms of the marital settlement agreement. The court ordered that the balance of \$784,721.29 shall be paid from the parties’ Linsco/Private Ledger (LPL) 7548 account. The court noted that Dorothy had a pending tax protest alleging innocent spouse status and other defenses which had yet to be resolved. The court ordered that the remaining balance of funds in the LPL account shall be held in escrow pending the determination of the wife’s appeal, and the balance shall be used to reimburse Dorothy for overpayment of tax liability, above the \$2,435,721.29 paid pursuant to the marital settlement agreement, should she be successful in her appeal. The court ordered that in the event that Dorothy failed in her claims, then the remaining portion of the LPL account shall be used to reimburse Ricki for any overpayment of the tax liability. The court held that in the event that the LPL account was insufficient to compensate either party for overpayment, then the spouse who had underpaid the tax liability shall indemnify the other for any overpayment not satisfied by the LPL account. In this order, the circuit court stated:

“It is the intent of the parties that each pay one-half of the joint tax liability, unless otherwise determined, based upon a final resolution of the tax protest. Final resolution shall include the appeal process. This shall not be deemed a waiver by [Dorothy] of her claim that the tax liability is not her responsibility for the reasons stated in the tax protest.”

¶ 7 On August 1, 2013, the IRS issued notices of deficiency to Ricki and Dorothy. See 26 U.S.C. § 6212(a) (notice of deficiency follows audit that reveals taxpayer has underpaid). On November 1, 2013, within 90 days of receiving notice, Dorothy petitioned the United States Tax Court for relief from liability for the underpaid taxes and the fraud penalty. Ricki filed a notice of intervention. On September 19, 2014, the tax court protest was resolved in the United States Tax Court by way of an agreed-upon decision stipulated to by the IRS, Ricki, and Dorothy. The decision identified deficiencies in income tax for 2003, 2004, and 2005 in the amounts of \$1,228,312, \$649,225, and \$86,510, respectively. The tax court order further provided:

“That there are no penalties for 2003, 2004, and 2005 under the provisions of I.R.C. § 6663(a)[, which provides for an added tax penalty for fraud]; and

That [Dorothy] is not entitled to relief under [the Innocent Spouse provisions of] I.R.C. § 6015(b), (c) or (f) with respect to her income tax liabilities for 2003, 2004, and 2005.”

¶ 8 On March 6, 2015, Ricki filed in the circuit court a petition for adjudication of indirect civil contempt. In paragraph 1(a) of his petition, Ricki alleged that Dorothy willfully failed to reimburse him for her one-half share of federal and state income tax

payments made from his nonmarital accounts. In paragraph 5, Ricki alleged that Dorothy owed him federal income tax payments of \$1,538,741, Illinois income tax payments of \$256,798, and additional amounts to be determined by discovery and from the outcome of other claims. Ricki further alleged that Dorothy failed to reimburse him for federal and state taxes paid on rental income she received, failed to disclose and account for marital assets and funds, and failed to account for and turn over funds that the IRS had refunded with respect to the 2003 through 2005 joint federal income tax returns.

¶ 9 On November 2, 2015, Dorothy filed a motion for partial summary judgment, requesting an order requiring Ricki to account for funds applied to his tax liability, requiring Ricki to reimburse Dorothy for \$270,641.04, which represented 50% of the refund, and allowing Dorothy to withdraw these funds from the LPL 7548 account, in addition to her 50% of the LPL 7548 account. Dorothy also sought judgment against Ricki in the amount not covered by Ricki's 50% of the LPL account. In her memorandum of law in support of her motion for partial summary judgment, Dorothy asserted that it was undisputed that the joint marital funds she paid the IRS from the LPL 7548 account amounted to \$3,219,813.29 for the three years in question and that she and Ricki were each credited with paying \$1,609,906.65. Dorothy also asserted that it was undisputed that the total underpayment of taxes plus interest for the three years in question was \$2,678,531.22. Thus, Dorothy argued, there was an overpayment from joint funds of \$541,282.07, of which each party should share equally. Dorothy contended that the entire excess payment was credited towards the fraud penalty of which she was absolved by the tax court. Dorothy argued that because the tax court determined that she

was not liable for the fraud penalty, Ricki must reimburse her for her share of the joint funds that exceeded her liability for underpaid taxes and interest, *i.e.*, 50% of \$541,282.07 or \$270,641.04.

¶ 10 On December 23, 2015, Ricki filed a response to Dorothy's motion for partial summary judgment and a "cross[-]motion for partial summary judgment." Ricki argued that the language within the four corners of the tax court's order imposed no civil fraud penalty against Dorothy or him. Ricki argued that he was entitled to summary judgment on the issues that he raised in paragraphs 1(a) and 5 of his petition for adjudication of indirect civil contempt. Accordingly, Ricki sought reimbursement for tax payments from his nonmarital accounts, in addition to federal income tax payments of \$1,538,741.25, Illinois income tax payments of \$256,798.24, and additional amounts to be determined by discovery and from the outcome of other claims.

¶ 11 On July 28, 2016, the circuit court entered an order on the motions for partial summary judgment. The court held that Ricki was liable for the fraud penalty, determined that both parties were liable for the tax liability as reflected in the tax court's order, and set the cause for case management conference on October 12, 2016.

¶ 12 On August 29, 2016, Ricki filed a notice of appeal. On September 12, 2016, Dorothy filed a motion to strike Ricki's notice of appeal, arguing that the circuit court's order was not final in that it adjudicated fewer than all the claims or rights and liabilities of the parties. Dorothy asserted that significant issues that were intricately intertwined with the July 28, 2016, order remained to be adjudicated and should be adjudicated before any appeal. On November 2, 2016, the circuit court entered an order pursuant to

Illinois Supreme Court Rule 304(a), finding no just reason to delay enforcement or appeal of its July 28, 2016, order.

¶ 13

ANALYSIS

¶ 14 Although neither party raises the issue of our jurisdiction, we have a *sua sponte* duty to consider it and dismiss the appeal if jurisdiction is lacking. See *In re Marriage of Susman*, 2012 IL App (1st) 112068, ¶ 11.

¶ 15 The Illinois Constitution confers on the appellate court jurisdiction to hear appeals from all final judgments entered in the circuit court. See Ill. Const. 1970, art. VI, § 6 (providing that appeals from final judgments of a circuit court are a matter of right to the appellate court). The constitution also grants the supreme court the right to “provide by rule for appeals to the [a]ppellate [c]ourt from other than final judgments.” *Id.* “Accordingly, absent a supreme court rule, the appellate court is without jurisdiction to review judgments, orders, or decrees that are not final.” *Blumenthal v. Brewer*, 2016 IL 118781, ¶ 22.

¶ 16 The ruling at issue here was appealed to this court pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010), which authorizes appeals from final judgments that do not dispose of an entire proceeding “if the trial court has made an express written finding that there is no just reason for delaying either enforcement or appeal or both.” See *Blumenthal*, 2016 IL 118781, ¶ 23. “[T]o be considered final and appealable for purposes of Rule 304(a), a judgment or order must terminate the litigation between the parties on the merits of the cause, so that, if affirmed, the trial court only has to proceed with execution of the judgment.” *Id.* ¶ 25. “While the order need not dispose of all the

issues presented by the pleadings, it must be final in the sense that it disposes of the rights of the parties, either upon the entire controversy or upon some definite and separate part thereof.” *Id.*

¶ 17 “In construing and applying Rule 304(a), [the supreme] court has drawn a clear distinction between judgments that dispose of ‘separate, unrelated claims,’ which are immediately appealable under Rule 304(a), and orders that dispose only of ‘separate issues relating to the *same* claim,’ which are not immediately appealable under Rule 304(a). (Emphasis in original.)” *Carle Foundation v. Cunningham Township*, 2017 IL 120427, ¶ 15 (quoting *In re Marriage of Leopando*, 96 Ill. 2d 114, 119 (1983)). “The reason for this distinction is found in the policy considerations that inform Rule 304(a), which include ‘discouraging piecemeal appeals in the absence of some compelling reason and *** removing the uncertainty as to the appealability of a judgment which was entered on less than all of the matters in controversy.’ ” *Id.* (quoting *In re Marriage of Lentz*, 79 Ill. 2d 400, 407 (1980)).

¶ 18 Although the circuit court in this case made the written finding required by Rule 304(a), its finding is not dispositive. See *Blumenthal*, 2016 IL 118781, ¶ 24. “By its terms, Rule 304(a) applies only to final judgments or orders.” *Id.* “[I]t can have no effect on a nonfinal order.” *Id.* If the order is not final, inclusion of the special finding in the circuit court’s order cannot confer appellate jurisdiction. *Id.*

¶ 19 Here, the issue resolved by the circuit court involved the construction of the United States Tax Court’s order and arose from the same set of operative facts and sought precisely the same relief as the underlying contempt action sought: the division of tax

liability between the parties. Rather than being distinct and separate from the contempt action, the issues resolved in the circuit court's order on appeal merely advanced different approaches for determining how the tax liability should be allocated between the parties. The circuit court's order, finding that Ricki was liable for the fraud penalty and that both parties were liable for the tax liability as reflected in the tax court's decision, resolved an issue that was part of or ancillary to the tax division claim and essentially determined how the tax court's order governed the parties' liability. However, "[w]hat law governs a claim is not itself a 'claim,' as it resolves nothing other than the standard by which the underlying claim will be adjudicated." *Carle Foundation*, 2017 IL 120427, ¶ 18.

¶ 20 Moreover, in Dorothy's motion to strike Ricki's notice of appeal, she recognized that significant issues that were intricately intertwined with the July 28, 2016, order remained to be adjudicated and should be adjudicated before any appeal. Indeed, the circuit court's order granting the cross-motions for summary judgment with regard to the construction of the tax order disposed not of a claim that was separate from the remaining claims, but merely of an issue that was ancillary to or part of the remaining claim. See *Carle Foundation*, 2017 IL 120427, ¶¶ 21-23. When the circuit court entered its order, the ultimate question—how the tax liability and the payments previously made shall be divided—remained unsolved. The circuit court's order did not allocate the tax amounts and penalties due or calculate credit to the parties for amounts paid. The circuit court's order served only to narrow the criteria applicable to that decision. See *Blumenthal*, 2016 IL 118781, ¶ 26. "[W]here an order disposes only of certain issues relating to the same basic claim, such a ruling is not subject to review under Rule 304(a)." *Id.* ¶ 27.

¶ 21 Inclusion of the 304(a) language in the circuit court's order did not confer appellate jurisdiction because the order was not final. See *EMC Mortgage Corp. v. Kemp*, 2012 IL 113419, ¶ 14 (inclusion of Rule 304(a) language cannot confer appellate jurisdiction if the order is in fact not final). Accordingly, the circuit court's order was not appealable under Rule 304(a), and we lack jurisdiction to review it. See *Carle Foundation*, 2017 IL 120427, ¶¶ 21-23 (in action by property owner seeking declaration that properties were exempt from taxation, court's order granting summary judgment regarding law applicable to owner's claims was not final in accordance with the Rule 304(a) finding); *In re Marriage of Leopando*, 96 Ill. 2d at 119 (petition for dissolution advances single claim, *i.e.*, a request for an order dissolving the parties' marriage, and custody, property, disposition, and support are merely separate issues relating to the same claim).

¶ 22

CONCLUSION

¶ 23 For the foregoing reasons, we dismiss this appeal.

¶ 24 Appeal dismissed.