

2018 IL App (1st) 180839-U

No. 1-18-0839

Order filed October 26, 2018

Fifth 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

---

NATIONSTAR MORTGAGE, LLC,	)	Appeal from the
	)	Circuit Court of
Plaintiff and Counterdefendant-Appellee,	)	Cook County.
	)	
v.	)	
	)	
HALIMI GONZALEZ, AGUSTIN GONZALEZ,	)	No. 16 CH 10326
USVELIA GONZALEZ, UNKNOWN OWNERS and	)	
NON-RECORD CLAIMANTS,	)	
	)	
Defendants,	)	Honorable
	)	John Curry,
and	)	Judge, Presiding.
	)	
(Halimi Gonzalez and Agustin Gonzalez, Defendants and	)	
Counterplaintiffs-Appellants).	)	

---

JUSTICE HALL delivered the judgment of the court.  
Justices Hoffman and Lampkin concurred in the judgment.

**ORDER**

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

¶ 2 Defendants Halimi and Agustin Gonzalez appeal an order of the circuit court of Cook County which granted plaintiff Nationstar Mortgage, LLC's (Nationstar) motion to dismiss count 2 of defendants' amended counterclaim in a mortgage foreclosure action. On appeal, defendants contend that the circuit court erred when it dismissed count 2 of the amended counterclaim under 2-619.1 and 2-615 (735 ILCS 5/2-619.1, 5/2-615 (West 2016)) because it alleged "plenty of facts by which a reasonable jury could conclude deceptive practices occurred and that the [sic] Gonzalez was [sic] damaged by those practices." For the following reasons, we dismiss the appeal for lack of jurisdiction.

¶ 3 Nationstar filed a mortgage foreclosure action against defendants on August 5, 2016, alleging that they defaulted on their mortgage and accelerated the full principal amount of the loan as due and payable. Defendants filed their appearance and answer including an affirmative defense and counterclaims on January 1, 2017. They alleged that on September 22 and 25, 2015, Nationstar sent letters to them which offered a trial loan reduction modification of their mortgage, and attached the two letters as exhibits. The letters stated that Nationstar must receive three trial loan payments at a predetermined reduced amount from defendants on November 1, 2015, December 1, 2015, and January 1, 2016, and also required them to return a signed copy of the modification agreement and other documentation. After defendants completed the trial period, Nationstar would review the mortgage loan to determine if it would be permanently modified. If they determined the loan was eligible for a permanent modification, Nationstar would provide defendants with a signed agreement for the modification. The letters also contained language that if the loan was not permanently modified, the prior existing loan terms would apply to future payments. Both parties acknowledged in their pleadings that defendants

completed the three trial loan payments, but there is no record of whether defendants returned the required documentation or if Nationstar approved a permanent loan modification.

¶ 4 On November 4, 2017, defendants filed separate verified counterclaims against Nationstar for its failure to offer them a permanent loan modification. Count 1 alleged breach of contract; Count 2 alleged violation of the Federal Debt Collection Practices Act (15 U.S.C. §1692, *et seq.* (2012)); Count 3 alleged breach of implied covenant of good faith and fair dealing; Count 4, pled in the alternative, alleged unjust enrichment and Count 5 alleged violation of section 2 of the Illinois Consumer Fraud and Deceptive Practices Act (Consumer Fraud Act) (815 ILCS 505/2 (West 2016)). Attached as exhibits were Nationstar's September 2015 letters, proof of payment for the three required trial loan payments and proof of reduced payments made on the mortgage from February 2016 to July 2016.

¶ 5 Nationstar moved to dismiss the verified counterclaims, contending that after defendants' trial period ended, they continued to make reduced payments to Nationstar, but it did not accept any of defendants' reduced payments and refunded the trial period payments. The continuation of the improperly reduced payments led to Nationstar filing its foreclosure action against defendants.

¶ 6 After a hearing on June 14, 2017, the circuit court dismissed counts 2, 3 and 4 of the counterclaims with prejudice and counts 1 and 5 of the counterclaims without prejudice.

¶ 7 Defendants subsequently filed a two-count amended counterclaim against Nationstar on August 28, 2017. Count 1 was for breach of contract and count 2 was for violations of section 2 of the Consumer Fraud Act (815 ILCS 505/2 (West 2016)) for Nationstar's failure to convert the 2015 trial modification into a permanent one. Nationstar moved to dismiss the amended verified

counterclaim and the circuit court granted Nationstar's motion to dismiss count 1 of defendants' counterclaim without prejudice on January 12, 2018. The court subsequently granted Nationstar's motion to dismiss count 2 without prejudice after a hearing on March 20, 2018, finding that the counterclaim did not sufficiently allege facts to show a deceptive act occurred under the Consumer Fraud Act. Defendants appeal that order.

¶ 8 On appeal, defendants contend that the circuit court erred as a matter of law when it granted Nationstar's motion to dismiss count 2 of their amended counterclaim. Nationstar, however, contends that this court lacks jurisdiction to review the circuit court's March 20, 2018, order because it is not a final and appealable order.

¶ 9 We first address whether this court has jurisdiction to hear the appeal. "A reviewing court must be certain of its jurisdiction prior to proceeding in a cause of action." *R.W. Duntelman Co. v. C/G Enterprises, Inc.*, 181 Ill. 2d 153, 159 (1998).

¶ 10 Defendants claim that this court has jurisdiction to review the circuit court's order under Rule 304(b), which makes certain specific types of final orders that do not dispose of an entire proceeding immediately appealable without a special finding. See Ill. S. Ct. R. 304(b) (eff. Mar. 8, 2016). Defendants, however, do not specify which subsection of Rule 304(b) applies to their appeal and cite to *Schal Bovis, Inc. v. Casualty Insurance Co.*, 314 Ill. App. 3d 562 (1999) in support of their contention that we have jurisdiction. Defendants' reliance on *Schal Bovis* is misplaced.

¶ 11 In *Schal Bovis*, the circuit court dismissed several counts "without prejudice" based on its determination that plaintiffs could not allege that they suffered any damages because their third party excess carrier had previously paid the entire judgment against them. *Schal Bovis*, 314 Ill.

App. 3d at 568. Although the circuit court used the words "without prejudice" in its order, it made a final determination of the rights of the parties with its holding, thus making that order a final one which gave this court jurisdiction to review it. *Schal Bovis*, 314 Ill. App. 3d at 568.

¶ 12 The Illinois Constitution gives the appellate court jurisdiction to hear appeals from all final judgments entered in the circuit court. Ill. Const. 1970, art. VI, § 6. The constitution also allows this court to review certain non-final appeals if an Illinois supreme court rule allows it. *Blumenthal v. Brewer*, 2016 IL 118781, ¶ 23. Without authority from a supreme court rule, the appellate court does not have the jurisdiction to review orders that are not final. *EMC Mortgage Corporation v. Kemp*, 2012 IL 113419, ¶ 9.

¶ 13 Illinois Supreme Court Rule 304(a) allows for 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." Ill. S. Ct. R. 304(a) (eff. Mar. 8, 2016). "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." *Blumenthal*, 2016 IL 118781, ¶ 23. If an order does not resolve every right, liability or matter raised, it must contain an express finding that there is no just reason for delaying an appeal; otherwise the order is not appealable. *Marsh v. Evangelical Covenant Church of Hinsdale*, 138 Ill. 2d 458, 465 (1990).

¶ 14 In the case at bar with regard to the March 20 order, because it dismissed defendants' counterclaim without prejudice, it was non-final. *Ally Financial Inc. v. Pina*, 2017 IL App (2d) 170213, ¶ 28. The finality of an order is determined by its substance and not its form (*Sherman*

*West Court v. Arnold*, 407 Ill. App. 3d 748, 752 (2011)), and the substance of the March 20 order reveals that it is non-final. As such, we lack jurisdiction to consider defendants' appeal.

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

¶ 16 Appeal dismissed.