2019 IL App (1st) 160782-U

No. 1-16-0782

March 20, 2019

Third Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

ALEJANDRO VAZQUEZ,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	
	)	No. 12 L 7436
ANTHONY WALKER and CHICAGO	)	
TRANSIT AUTHORITY,	)	Honorable
	)	James P. McCarthy,
Defendants-Appellees.	)	Judge Presiding.
	)	

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: Plaintiff's appeal is dismissed when the notice of appeal was not timely filed because plaintiff's certificate of service fails to substantially comply with Supreme Court Rule 12(b)(3), and is thus unable to prove that the notice of appeal was filed within 30 days of the denial of the pending postjudgment motions.

¶ 2 Following a jury trial, judgment and damages were entered in favor of plaintiff Alejandro Vazquez and against defendants, Anthony Walker and the Chicago Transit Authority (CTA), in

this personal injury case. On appeal, plaintiff contends that this cause must be remanded for a new trial as to the disability element of his damages because the jury did not award any disability damages "despite uncontroverted evidence" showing that treatment had "failed to mend the physical limitations" to plaintiff caused by the accident. For the following reasons, we dismiss.

¶ 3 On July 2, 2012, plaintiff filed a personal injury complaint against defendants Walker and the CTA (defendants), alleging that he was injured on August 15, 2007 when the vehicle he was driving was involved in a collision with a CTA bus operated by Walker. The complaint noted that a prior action involving the same parties was dismissed on September 28, 2011, and cited section 13-217 of the Code of Civil Procedure (735 ILCS 5/13-217 (West 2012)), to indicate that the cause had been refiled within one year. The parties engaged in discovery and the matter proceeded to a jury trial.

¶ 4 The evidence at trial established that on August 15, 2007, a collision occurred between plaintiff's vehicle and a CTA bus operated by defendant Walker. Plaintiff suffered a back injury and subsequently underwent two operations in order to address the injury. Dr. Jeffrey Coe, a specialist in occupational medicine, testified that he examined plaintiff in May 2014, that plaintiff had suffered from "continuous back pain" since the accident, and that although plaintiff was "somewhat better" following the second surgery, "the pain has not gone away." Coe opined, to a reasonable degree of medical certainly, that the injury to plaintiff's back was "causally related" to the accident, caused pain and suffering to plaintiff, and that the pain was "permanent" and would "certainly limit [plaintiff's] ability" to do "things." Plaintiff testified that following two operations, he was unable to return to work as a carpenter and had continuing pain and chronic migraines. On cross-examination, plaintiff acknowledged that after the second surgery,

he experienced some relief in his back and that at some point he stopped using a cane. He did not have any intention to find a job.

¶ 5 On November 5, 2015, the jury found that plaintiff sustained an injury as a result of the accident. The jury awarded plaintiff $323,901.07 in medical expenses and $30,000 in pain and suffering. The jury did not award any damages for future pain and suffering, "the disfigurement resulting from the injury" or "the disability experienced and reasonably certain to be experienced in the future." The court entered the judgment on the same day.

¶ 6 Plaintiff and defendants both filed postjudgment motions. Plaintiff's motion for a new trial alleged, *inter alia,* that the jury's award of damages for pain and suffering was legally inconsistent with the jury's failure to award plaintiff disability damages. The trial court denied all postjudgment motions on February 16, 2016. Plaintiff then filed a notice of appeal.

¶ 7 Plaintiff's notice of appeal states: "PLEASE TAKE NOTICE that on March 17th, 2016, Plaintiff/Appellant *** filed his notice of appeal from the final judgment entered on February 16th, 2016." The document was stamped "Filed" by the circuit court of Cook County on March 24, 2016. The notice of filing and proof of service to the CTA, also stamped "Filed" March 24, 2016, states:

> "Please be advised that I shall file with the Clerk of Cook County Clerk of Court on March 17, 2016, the attached Notice of Appeal and Appearance in the above-entitled cause.
>
> This certifies that I have served the above named parties a copy of said motion, by enclosing same in envelopes, properly addressed, postage prepaid, and by depositing said envelopes in a U.S. Mail Box in Chicago Illinois on March 17, 2016."

The notice of filing and proof of service is addressed to the CTA's general counsel at 567 West Lake Street, Chicago, Illinois, 60661.

¶ 8 On appeal, plaintiff contends that this court should remand the cause for a new trial as to the disability element of plaintiff's damages because the jury did not award any disability damages "despite uncontroverted evidence" showing that treatment had "failed to mend the physical limitations precluding him from his return to carpentry" and that he was "unable to independently perform the basic daily activities of life."

¶ 9 Before we consider plaintiff's contention on appeal, we must first determine whether we have jurisdiction to decide the instant case. "A reviewing court must ascertain its jurisdiction before proceeding in a cause of action, regardless of whether either party has raised the issue." *Secura Insurance Co. v. Illinois Farmers Insurance Co.*, 232 Ill. 2d 209, 213 (2009).

¶ 10 Here, defendants contend that this court lacks jurisdiction to consider plaintiff's appeal because his notice of appeal was untimely in that it was filed more than 30 days after the trial court denied the parties' postjudgment motions.[1] Plaintiff responds that this court should apply the mailbox rule, that is, equate time of mailing with time of filing. See *Harrisburg-Raleigh Airport Authority v. Department of Revenue*, 126 Ill. 2d 326, 340 (1989) (holding that "in light of modern policies and practices," when documents are filed with the clerk of the circuit court should "take into account the widespread practice of filing documents by mail"). However, plaintiff must first demonstrate proper proof of mailing because if sufficient proof of mailing is

[1] Defendants previously filed a motion to dismiss plaintiff's appeal alleging that plaintiff's notice of appeal was untimely. On August 31, 2016, this court denied defendants' motion as moot and *sua sponte* dismissed the appeal for want of prosecution. On September 13, 2016, this court granted plaintiff's motion for reconsideration of dismissal for want to prosecution, reinstatement of appeal and extension of time to file the record on appeal.

not on file, "there is nothing in the record to establish the date the document was timely mailed" for application of the mailbox rule. *Secura Insurance Co.*, 232 Ill. 2d at 216.

¶ 11 The timeliness of a party's notice of appeal is governed by our supreme court's rules. *Huber v. American Accounting Ass'n*, 2014 IL 117293, ¶ 9. Whether or not a party timely filed a notice of appeal is a legal question this court reviews *de novo. Id.*

¶ 12 Supreme Court Rule 303(a)(1) states that "[t]he notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the final judgment appealed from," or "within 30 days after the entry of the order disposing of the last pending post judgment motion." Ill. S. Ct. R. 303(a)(1) (eff. Jan. 1, 2015). "The timely filing of a notice of appeal is both jurisdictional and mandatory." *Secura Insurance Co.*, 232 Ill. 2d at 213.

¶ 13 Here, the trial court denied all postjudgment motions on February 16, 2016. Thus, plaintiff would be required to file his notice of appeal within 30 days, that is, no later than March 17, 2016. Plaintiff does not dispute that his notice of appeal was due on March 17, 2016, nor does he dispute the notice of appeal was not file-stamped by the clerk of the circuit court of Cook County until March 24, 2016. Plaintiff argues, however, that his notice of appeal was timely pursuant to the mailbox rule because it was mailed on March 17, 2016.

¶ 14 Supreme Court Rule 373 provides that, when filing by mail, "[i]f received after the due date, the time of mailing * * * shall be deemed the time of filing." Ill. S. Ct. R. 373 (eff. Sept. 19, 2014). Although "Rule 373 relaxes the requirement of timely filing where a party takes advantage of the convenience of mailing a document, a party can only take advantage of Rule 373 if it files proper proof of mailing as required by Rule 12(b)(3)." *Secura Insurance Co.*, 232 Ill. 2d at 216. See also Ill. S. Ct. R. 373 (eff. Sept. 19, 2014) ("[p]roof of mailing or delivery to a

third-party commercial carrier shall be as provided in Rule 12(b)(3)"). Rule 12(b)(3) states, *inter alia*, that proof of service is provided:

> "(3) in case of service by mail or by delivery to a third-party commercial carrier, by certificate of the attorney, or affidavit of a person, other than the attorney, who deposited the document in the mail or delivered the document to a third-party commercial carrier, stating the time and place of mailing or delivery, the complete address which appeared on the envelope or package, and the fact that proper postage or the delivery charge was prepaid [.]" Ill. S. Ct. R. 12(b)(3) (eff. Jan. 1, 2016).

"Although minor defects will be excused, proof of proper service by mail must be made in substantial compliance with the requirements of Supreme Court Rule 12." *Ingrassia v. Ingrassia*, 156 Ill. App. 3d 483, 502 (1987). Therefore, plaintiff's notice of appeal can be deemed timely only if it was mailed by March 17, 2016, and the accompanying certificate of service substantially complies with Supreme Court Rule 12(b)(3).

¶ 15 Before this court, defendants argue that plaintiff's certificate of service filed with the notice of appeal fails to conform to the requirements of Supreme Court Rule 12(b)(3). Defendants specifically note the facts that plaintiff failed to indicate on the certificate that it was also being mailed to the clerk the circuit court of Cook County and left off the mailing address for the clerk and the specific time and location of the mailing.

¶ 16 We note that plaintiff argues in his reply brief that defendants fail to acknowledge plaintiff's explanation, contained in his response to defendants' motion to dismiss, as to why the notice of appeal had a "late postmark" and what "steps" plaintiff "took to remedy that fact." However, such a motion, that is, a response to defendants' motion to dismiss which addresses the

timeliness of the notice of appeal does not appear in the records of this court.[2] Accordingly, on July 3, 2018, this court granted plaintiff's request, made in his reply brief, for leave to supplement the record on appeal with his response to defendants' motion to dismiss and the accompanying exhibits in order to determine whether plaintiff's notice of appeal was, in fact, timely filed. This court subsequently entered an order giving plaintiff until November 21, 2018, to supplement the record. Plaintiff has not, however, supplemented the record with these documents, and, accordingly, the resolution of his appeal rests upon the record on appeal before this court.

¶ 17 In the case at bar, plaintiff's notice of appeal was accompanied by a notice of filing and proof of service to the CTA which stated that "I have served the above named parties a copy of said motion, by enclosing same in envelopes, properly addressed, postage prepaid, and by depositing said envelopes in a U.S. Mail Box in Chicago Illinois on March 17, 2016." However, the certificate does not state that plaintiff provided service to the circuit court by mail or the specific time and place of the mailing. Moreover, the envelope addressed to the circuit court that is contained in the record does not bear a postmark and is file-stamped March 24, 2016. Based on the above, plaintiff's certificate of service fails to substantially comply with the requirements of Rule 12(b)(3). See Ill. S. Ct. R. 12(b)(3) (eff. Jan. 1, 2016).

¶ 18 Thus, even if the mailbox rule could be applied to plaintiff's notice of appeal, there is no evidentiary support in the record for plaintiff's assertion that the notice of appeal was filed by mail on March 17, 2016. Without a proper certificate of service, plaintiff cannot show that his

[2] Although plaintiff sought leave to file a response to defendants' motion to dismiss, this court denied plaintiff leave to file such a motion on September 13, 2016, finding the issue to be, at that time, moot.

notice of appeal complies with the jurisdictional requirement of Rule 303(a). See *Secura Ins. Co.*, 232 Ill. 2d at 217. Since plaintiff's notice of appeal was file-stamped by circuit court on March 24, 2016, more than 30 days after the trial court denied the pending postjudgment motions on February 16, 2016, it was untimely and this court must dismiss plaintiff's appeal. See Ill. S. Ct. R. 303(a)(1) (eff. Jan. 1, 2015) ([t]he notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the final judgment appealed from," or "within 30 days after the entry of the order disposing of the last pending post judgment motion").

¶ 19 For the foregoing reasons, plaintiff's appeal is dismissed for lack of jurisdiction.

¶ 20 Appeal dismissed.