

No. 1-17-0098

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

| | | |
|---|---|------------------------|
| COLLEEN SIMON, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellee, |) | Cook County |
| |) | |
| v. |) | |
| |) | |
| NICHOLAS BARRACO d/b/a VITO AND NICK'S |) | |
| II, INC., a dissolved Illinois Corporation and VITO |) | |
| AND NICK'S II, INC., an Illinois Corporation, |) | |
| |) | |
| Defendants-Appellants |) | |
| |) | No. 14 M6 2015 |
| |) | |
| VITO AND NICK'S II, INC., |) | |
| |) | |
| Third-Party Plaintiff-Appellant |) | |
| |) | |
| v. |) | |
| |) | |
| COLLEEN SIMON, |) | Honorable |
| |) | Christopher E. Lawler, |
| Third-Party Defendant-Appellee |) | Judge, Presiding. |

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Rochford and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held:* In the absence of the required language under Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016), we dismissed this appeal for want of jurisdiction.

¶ 2 Nicholas Barraco and Vito and Nick's II, Inc., an Illinois Corporation, appeal from orders of the circuit court: (1) granting summary judgment in favor of the plaintiff, Colleen Simon; (2) denying their motion for summary judgment on Simon's amended complaint; and (3) entering a \$53,155 judgment against them. Vito and Nick's II, Inc., as "third-party plaintiff," also appeals from the denial of its motion for summary judgment on its amended "third-party complaint" against Simon. For the reasons which follow, we dismiss this appeal for want of jurisdiction.

¶ 3 On May 29, 2014, Simon filed the instant action against Barraco and Barraco, d/b/a Vito and Nick's II, Inc., a dissolved Illinois Corporation, seeking rescission of a franchise agreement pursuant to section 26 of the Illinois Franchise Disclosure Act of 1987 (Act) (815 ILCS 705/26 (West 2012)), plus damages. Even though Vito and Nick's II, Inc. was not a party to this action when this action was originally filed, for some inexplicable reason, it was granted leave of court to file both a "third-party complaint" and an amended "third-party complaint" against Simon for breach of contract or, in the alternative, unjust enrichment. Shortly thereafter, Simon amended her complaint to include Vito and Nick's II, Inc. as a defendant.

¶ 4 The defendants, Barraco and Vito and Nick's II, Inc., and Vito and Nick's II, Inc., as "third-party plaintiff," filed a joint motion for summary judgment. Barraco and Vito and Nick's II, Inc. sought summary judgment against Simon on her amended complaint against them. As "third-party plaintiff," Vito and Nick's II, Inc. sought summary judgment against Simon on its "third-party complaint." Thereafter, Simon filed a pleading entitled "Plaintiff's Response to Defendant's [*sic*] Motion for Summary Judgment and Cross Motion for Summary Judgment." In that pleading, Simon responded to the defendants' motion for summary judgment on her

amended complaint and also moved for summary judgment in her favor. That pleading addressed only the defendants' motion for summary judgment on her amended complaint; no response was made to the summary judgment sought against Simon by Vito and Nick's II, Inc. on its "third-party complaint." As for her motion for summary judgment, Simon sought only a summary judgment in her favor and against the defendants on her amended complaint. The pleading is devoid of any request for a summary judgment in her favor on Vito and Nick's II, Inc.'s "third-party complaint."

¶ 5 On June 28, 2016, the circuit court entered an order which states: "(1) Defendants' motion for summary judgment is denied & (2) Plaintiff's cross motion for summary judgment is granted (3) Defendant's third party motion for summary judgment is denied." In addition, the order continued the matter for status on the "defendant's [*sic*] motion to reconsider and/or setting a hearing on plaintiff's damages." The motion to reconsider was denied on October 12, 2016, and on December 2, 2016, after an evidentiary hearing, the circuit court entered a judgment against "Vito and Nick's II" and "Barraco" in the amount of \$53,515. This appeal followed.

¶ 6 Before addressing the question of this court's jurisdiction to entertain this appeal, we feel compelled to comment on the peculiar pleadings filed in this case. Vito and Nick's II, Inc. was granted leave to file both an original and amended third-party complaint against Simon seeking recovery for breach of contract or, in the alternative, unjust enrichment. Section 2-406 of the Illinois Code of Civil Procedure governs third-party proceedings and provides that "a defendant may by third-party complaint bring in as a defendant a person not a party to the action who is or may be liable to him or her for all or part of the plaintiff's claim against him or her." 735 ILCS 5/2-406(b) (West 2012). "A proper third party action requires derivative liability where the liability of the third party defendant is dependent on the liability of the third party plaintiff to the

original plaintiff.” *Board of Trustees of Community College No. 508 v. Coopers & Lybrand LLP*, 296 Ill. App. 3d 538, 549 (1998). At the time that Vito and Nick’s II, Inc. was granted leave to file its third-party complaints against Simon, it was not yet a defendant, and Simon was the plaintiff in the action. Consequently, Vito and Nick’s II, Inc. should not have been allowed to file third-party complaints as it was not yet a defendant, and no third-party complaint should have been filed against Simon as she was a party to the litigation. The proper procedure should have been to grant Vito and Nick’s II, Inc. leave to file a counterclaim against Simon once it was joined as a defendant. See 735 ILCS 5/2-608(a) (West 2012).

¶ 7 We turn now to the question of our jurisdiction in this matter. Although neither party has raised the issue, this court is obligated to examine its jurisdiction and dismiss an appeal if that jurisdiction is lacking. *St. Elizabeth’s Hospital v. Illinois Workers’ Compensation Comm’n*, 371 Ill. App. 3d 882, 883 (2007).

¶ 8 Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016) provides that an appeal may be taken from a final order which disposes of fewer than all of the claims or fewer than all of the parties if the trial court makes an express written finding that there is no just reason for delaying enforcement or appeal or both. In this case, the circuit court made no such finding. Although the circuit court granted summary judgment in favor of Simon and against Barraco and Vito and Nick’s II, Inc. on Simon’s amended complaint charging a violation of the Act and subsequently entered a \$53,515 judgment against those defendants, the circuit court never entered an order disposing of Vito and Nick’s II, Inc.’s claims against Simon for breach of contract or, in the alternative, unjust enrichment. Simon never sought summary judgment in her favor on those claims. The circuit court denied Vito and Nick’s II, Inc.’s motion for summary judgment against Simon on its claims against her, but denying that motion for summary judgment did not result in

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a judgment in favor of Simon. Vito and Nick's II, Inc.'s claims against Simon for breach of contract or, in the alternative, unjust enrichment remain pending and undetermined. Consequently, in the absence of a Rule 304(a) finding, we have no jurisdiction to entertain the instant appeal.

¶ 9 Dismissed.