2019 IL App (1st) 172346-U
Order filed: February 15, 2019

FIRST DISTRICT
Fifth Division

No. 1-17-2346

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ELITE STORAGE SOLUTIONS, LLC,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 15 L 011291
	)	
JACIEJ RATAJCZAK, Individually and as Agent of MR INSURANCE AGENCY, INC.; MR INSURANCE AGENCY, INC.; and PRECISION BUILDERS & CONTRACTORS, LLC,	)	Honorable
	)	Brigid M. McGrath,
Defendants-Appellees.	)	Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: We dismissed plaintiff's appeal for lack of appellate jurisdiction where plaintiff did not timely file its notice of appeal within 30 days of the final judgment.

¶ 2 Plaintiff-appellant, Elite Storage Solutions, LLC, appeals the order of the trial court dismissing its second-amended complaint against defendants-appellees, Maciel Ratajczak, Mr. Insurance Agency, Inc., and Precision Builders & Contractors, LLC, for negligence and breach of contract. We dismiss plaintiff's appeal for lack of appellate jurisdiction[1].

[1]In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order stating with specificity why no

¶ 3 I. BACKGROUND

¶ 4 Plaintiff filed its two-count, second-amended complaint[2] on February 2, 2017. The caption named as defendants: (1) Maciel Ratajczak and Mr. Insurance Agency, Inc. (hereinafter the Ratajczak defendants); and (2) Precision Builders & Contractors, LLC (hereinafter Precision). Count I alleged negligence against the Ratajczak defendants regarding their procurement of a commercial general liability policy (CGL policy) for Precision that named plaintiff as an additional insured. Count II alleged breach of contract against the Ratajczak defendants arising out of the procurement of the CGL policy. Although Precision was named in the caption of the second-amended complaint, neither count made any claims against Precision, and no relief was sought from Precision. The record on appeal is also devoid of any indication that Precision was served with a summons or with a copy of the complaint.

¶ 5 A. Count I

¶ 6 Plaintiff alleged that on or about November 27, 2012, Precision entered into a contract with plaintiff, whereby Precision agreed to provide equipment and services for a materials handling system at the Iron Mountain project in Elgin, Illinois. The contract required Precision to include plaintiff as an additional insured on Precision's insurance policy.

¶ 7 Precision contacted an insurance producer, the Ratajczak defendants, who procured a Scottsdale Insurance Company (Scottsdale) CGL policy for Precision and named plaintiff as an additional insured, for the policy period starting November 11, 2012, through November 11, 2013. On September 9, 2013, and on November 6, 2013, Scottsdale's agent, Risk Placement Services, Inc., notified the Ratajczak defendants regarding the need to renew the CGL policy in

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substantial question is presented.

[2]The record on appeal contains the original complaint and the second-amended complaint; it does not contain the first-amended complaint. The caption of the original complaint did not name Precision as a defendant.

order to prevent a lapse in coverage. The Ratajczak defendants were also notified of the need to procure continuous and unbroken coverage of plaintiff as an additional insured.

¶ 8 Subsequently, on November 15, 2013, the Ratajczak defendants renewed Precision's insurance policy with the same coverages (and which again included plaintiff as an additional insured). However, by waiting until November 15, 2013, to renew the insurance policy, the Ratajczak defendants caused a four-day lapse in coverage (for November 11, 12, 13, and 14).

¶ 9 On or about November 13, 2013, Antonio Venegas was injured while erecting storage racks for Precision on the Iron Mountain project and he later filed suit against Iron Mountain, Inc., and against plaintiff. Plaintiff made a claim for coverage under the Scottsdale insurance policy that had been procured by the Ratajczak defendants. On August 4, 2015, Scottsdale informed plaintiff that it was not covered for Mr. Venegas's accident because the accident occurred during the four-day lapse in coverage.

¶ 10 Plaintiff alleged that the Ratajczak defendants owed it a duty to procure unbroken, continuous coverage of plaintiff as an additional insured on Precision's insurance policy, and that their carelessness and negligence caused the four-day lapse in coverage during which Mr. Venegas was injured. Plaintiff sought the recovery from the Ratajczak defendants of all defense costs in Mr. Venegas's suit, including the recovery of the cost of any judgment or settlement in Mr. Venegas's case.

¶ 11 B. Count II

¶ 12 Plaintiff alleged that Precision and the Ratajczak defendants entered into a contract whereby the Ratajczak defendants agreed to renew a CGL policy for Precision for the period of November 11, 2013, through November 11, 2014. Plaintiff was an intended third-party beneficiary of the contract, in that Precision and the Ratajczak defendants agreed that plaintiff

would have unbroken, continuous coverage as an additional insured under the CGL policy. Precision performed all of its obligations under the contract, including paying all premiums. However, the Ratajczak defendants breached the contract by waiting until November 15, 2013, to renew the insurance policy, thereby causing a four-day lapse in coverage during which Mr. Venegas's accident occurred. Plaintiff sought recovery from the Ratajczak defendants of a judgment in excess of $50,000.

¶ 13 C. The Motion to Dismiss and Plaintiff's Response Thereto

¶ 14 On March 22, 2017, the Ratajczak defendants filed a motion to dismiss plaintiff's second-amended complaint pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2018)). Precision did not join in the motion. In the introductory section of the dismissal motion, the Ratajczak defendants explained Precision's absence from the motion, by noting that plaintiff had brought no claims against Precision in its second-amended complaint and had instead only brought its negligence and breach of contract claims against the Ratajczak defendants. As plaintiff's second-amended complaint asserted no claims and sought no relief against Precision, there was no need for Precision to join in the Ratajczak defendants' motion to dismiss.

¶ 15 The Ratajczak defendants argued for dismissal of the negligence count against them on the basis that they only had an "insurer producer relationship" with Precision, *not* with plaintiff and, thus, their duty of care in procuring the insurance policy flowed only to Precision and not towards plaintiff. The Ratajczak defendants contended that absent the allegation of facts showing that they owed plaintiff a duty of care, plaintiff failed to state a cause of action in negligence. See *Cole v. Paper Street Group, LLC*, 2018 IL App (1st) 180474, ¶ 42 (to state a

cause of action for negligence, plaintiff must establish the existence of a duty owed by defendant, a breach of that duty, and an injury proximately resulting from that breach).

¶ 16 The Ratajczak defendants argued that the breach of contract count should be dismissed because plaintiff did not comply with section 2-606 of the Code, as it failed to attach the contract to its second-amended complaint or an affidavit stating that the contract was not accessible. See 735 ILCS 5/2-606 (West 2018) ("If a claim or defense is founded upon a written instrument, a copy thereof *** must be attached to the pleading as an exhibit or recited therein, unless the pleader attaches to his or her pleading an affidavit stating facts showing that the instrument is not accessible to him or her.").

¶ 17 The Ratajczak defendants further argued that the breach of contract count should be dismissed because plaintiff did not plead the terms of the contract (see *Razor Capital v. Antaal*, 2012 IL App (2d) 110904, ¶ 31 (holding that plaintiff did not properly plead a breach of contract action where it did not allege the terms of the contract)). Finally, the Ratajczak defendants argued that even if plaintiff had sufficiently pleaded the terms of the contract, plaintiff did not adequately allege that it was a direct third party beneficiary of any such contract. See *155 Harbor Drive Condominium Ass'n v. Harbor Point Inc.*, 209 Ill. App. 3d 631, 646 (2007) ("Only third parties who are direct beneficiaries have rights under a contract.").

¶ 18 Plaintiff filed a response to the motion to dismiss on April 24, 2017. In its response, plaintiff first explained why it had not brought any claims against Precision in its second-amended complaint. Specifically, plaintiff explained that it "has already brought an action for breach of contract against Precision in [Mr. Venegas's underlying personal injury lawsuit] and cannot bring a claim against [Precision] for the same issues in this matter."

¶ 19 Plaintiff then proceeded to argue that its second-amended complaint adequately stated causes of action for negligence and breach of contract against the Ratajczak defendants. Specifically, with respect to the negligence count, plaintiff argued that it adequately alleged that the Ratajczak defendants agreed to provide uninterrupted coverage to plaintiff as an additional insured on the CGL policy issued to Precision and, as such, that they owed plaintiff a duty of care in the procurement of such coverage. Plaintiff argued that it adequately alleged that the Ratajczak defendants negligently breached the duty, when they failed to timely renew the CGL policy, causing a four-day lapse in coverage, during which Mr. Venegas was injured.

¶ 20 With respect to the breach of contract count, plaintiff argued that it adequately alleged that it was a third party beneficiary of the contract between Precision and the Ratajczak defendants, because one of the purposes of the contract was to provide plaintiff with uninterrupted coverage as an additional insured on the CGL policy issued to Precision. Plaintiff argued that it adequately alleged that the Ratajczak defendants breached the contract by failing to timely renew the CGL policy, causing the four-day lapse in coverage, during which Mr. Venegas was injured. Plaintiff made no response to the Ratajczak defendants' argument that plaintiff violated section 2-606 of the Code by failing to attach a copy of the contract to its second-amended complaint.

¶ 21 D. The Trial Court's Orders

¶ 22 On July 12, 2017, the trial court entered a written order, after a hearing, that granted the Ratajczak defendants' motion to dismiss the second-amended complaint "in its entirety and with prejudice." The order did not set any future court dates. The transcript of the hearing is not contained in the record on appeal.

¶ 23 On August 14, 2017, plaintiff and the Ratajczak defendants filed a "joint and routine motion for entry of a final judgment," which stated:

> "The Court's July 12, 2017 Order did not address [Precision's] status as a named defendant but against whom Plaintiff alleged no wrong doing and sought no relief.
>
> To ensure that this matter has been finally resolved and is final for purposes of appeal, *i.e.*, that all claims against all parties are dismissed in their entirety, the Parties respectfully request that this Court enter the Agreed Order attached hereto as Exhibit B."

¶ 24 On August 22, 2017, the trial court entered the "agreed final judgment," which stated:

> "1. The Court's July 12, 2017 Order dismissed Plaintiff's Second Amended Complaint in its entirety.
>
> 2. This Order resolves all claims against all parties, and therefore, is a final and appealable final judgment."

¶ 25 On September 21, 2017, plaintiff filed a notice of appeal from the August 22, 2017, order.

¶ 26 II. PLAINTIFF'S APPEAL

¶ 27 As an initial matter, we address the Ratajczak defendants' contention that this court lacks jurisdiction to consider plaintiff's appeal. Ordinarily, jurisdiction is conferred on this court by the filing of a notice of appeal within 30 days of the entry of the final judgment from which the appeal is taken. *D'Agostino v. Lynch*, 382 Ill. App. 3d 639, 642-43 (2008). A final and appealable judgment is one that fixes the rights of the parties absolutely and finally in the litigation and terminates the litigation on the merits so that if the judgment is affirmed, the only thing left to do is to proceed with the execution of the judgment. *In re Application of County Collector*, 395 Ill. App. 3d 155, 159 (2009).

¶ 28 However, Supreme Court Rule 303(a)(1) provides that if a timely posttrial motion directed against the judgment is filed, then the time in which to file a notice of appeal is tolled, and the appealing party must file the notice of appeal "within 30 days after the entry of the order disposing of the last pending postjudgment motion directed against that judgment or order." Ill. S. Ct. R. 303(a)(1) (eff. July 1, 2017). To qualify as a timely-filed postjudgment motion, the motion must be filed within the original 30-day filing period and must request a rehearing, a retrial, modification of the judgment, or to vacate the judgment or for other relief. 735 ILCS 5/2-1203 (West 2018). The "other relief" referenced in section 2-1203 must be similar in nature to the other forms of relief specified in that section. *Shutkas Electric, Inc. v. Ford Motor Co*., 366 Ill. App. 3d 76, 81 (2006).

¶ 29 The Ratajczak defendants argue that the July 12, 2017, order dismissing plaintiff's second-amended complaint "in its entirety and with prejudice" was the final order in this case, triggering the 30-day period in which plaintiff was required to file either its postjudgment motion or its notice of appeal. We agree. See *Chicago Title & Trust Co. v. Weiss*, 238 Ill. App. 3d 921 (1992) (an order dismissing a cause "in its entirety," and that did not set any future court dates, was final and appealable); *Slavick v. Michael Reese Hospital and Medical Center*, 92 Ill. App. 3d 161 (1980) ("an order dismissing a plaintiff's entire complaint with prejudice is considered to be a final judgment"). Plaintiff did not file a notice of appeal within 30 days of the July 12, 2017, final order, nor did it timely file a postjudgment motion within the 30-day period that would have tolled the time in which to file the notice of appeal. Instead, the parties filed their "joint and routine motion for entry of a final judgment" (joint motion) on August 14, 2017. However, the joint motion was not a timely postjudgment motion, as it was filed more than 30 days after the July 12, 2017, order and it did not seek a rehearing, retrial, modification of the judgment, or to

vacate the judgment or similar relief. In the absence of a timely filed postjudgment motion tolling the 30-day period for filing the notice of appeal, plaintiff's notice of appeal that was filed on September 21, 2017, more than 30 days after the July 12, 2017, final order, was untimely. Accordingly, we are without jurisdiction to consider plaintiff's appeal.

¶ 30 Plaintiff argues, though, that the July 12, 2017, dismissal order was not a final judgment as to Precision, as the motion to dismiss was only brought by the Ratajczak defendants and was not joined in by Precision. Plaintiff contends that as the July 12, 2017, order was a final judgment as to less than all the parties, no appeal could be taken unless the court entered a Rule 304(a) finding. Supreme Court Rule 304(a) provides:

> "If multiple parties or multiple claims for relief are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all of the parties or claims only 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. March 8, 2016).

¶ 31 The trial court did not make a Rule 304(a) finding, and therefore plaintiff contends that the notice of appeal could not have been taken until after the August 22, 2017, agreed final judgment that expressly resolved "all claims against all parties" (including Precision). Plaintiff argues that the notice of appeal filed on September 21, 2017, within 30 days of the August 22, 2017, order, was timely.

¶ 32 *Zak v. Allson*, 252 Ill. App. 3d 963 (1993), is informative. In *Zak*, the plaintiff sought relief against two defendants, Allson and Tinghino. *Id*. at 965. Tinghino was served, he appeared, and he moved to dismiss the action. *Id*. The trial court entered an order granting Tinghino's motion to dismiss. *Id*. Allson was never served, never appeared, and he did not join

in Tinghino's motion. *Id*. The appellate court held that Allson was still a defendant and a party within the context of Rule 304(a) and that, since the order appealed from did not contain the requisite Rule 304(a) language, appellate jurisdiction was lacking. *Id*.

¶ 33 There are important distinctions between the present case and *Zak*. In *Zak*, after the dismissal order as to Tinghino was entered, a claim against Allson still remained pending, and Allson could still have been served with a summons and a judgment entered against him. Allowing Zak to appeal in the absence of a Rule 304(a) finding would have conflicted with the purpose of Rule 304(a), which is " 'to discourage piecemeal appeals in the absence of just reason, and to remove the uncertainty which exists when a final judgment is entered on less than all matters in the controversy.' " *Mares v. Metzler*, 87 Ill. App. 3d 881, 884 (1980) (quoting *Petersen Brothers Plastics, Inc. v. Ullo*, 57 Ill. App. 3d 625, 630 (1978)).

¶ 34 In the present case, by contrast, plaintiff not only failed to serve Precision, but it also made no claims and sought no relief of any kind against Precision in its second-amended complaint; plaintiff only served the Ratajczak defendants with the second-amended complaint and it only made claims, and sought corresponding damages, against the Ratajczak defendants for negligence and breach of contract. In their motion to dismiss, the Ratajczak defendants referenced plaintiff's failure to serve Precision or to bring any claims against Precision in its second-amended complaint. Plaintiff explained in its response to the Ratajczak defendants' motion to dismiss that it would not be making any claims or pursuing any relief against Precision in this case because it had filed suit against Precision in a separate proceeding. Unlike in *Zak*, then, the parties bringing the motion to dismiss (the Ratajczak defendants) were the only parties against whom any relief had been sought in the second-amended complaint; there were no outstanding claims against Precision or against any other parties who had not joined in the

motion. Thus, when the trial court subsequently dismissed plaintiff's second-amended complaint "in its entirety and with prejudice" on July 12, 2017, it resolved the entire matter on the merits; no claims or requests for relief against Precision remained pending. Further, having dismissed the second-amended complaint "with prejudice," the trial court indicated that plaintiff would not be allowed to amend its complaint to bring any future claims against the Ratajczak defendants, Precision or any other parties and, thus, that the dismissal was a final judgment. *Fabian v. BGC Holdings, LP*, 2014 IL App (1st) 141576, ¶ 12. Therefore, the 30-day time period for either filing a postjudgment motion or a notice of appeal began running when the final order was entered on July 12, 2017, and no Rule 304(a) finding was necessary in order for plaintiff to file its appeal. Accordingly, plaintiff's notice of appeal, filed more than 30 days after the July 12, 2017, final order, was untimely.

¶ 35 Plaintiff argues that the trial court was revested with jurisdiction on August 14, 2017, when plaintiff and the Ratajczak defendants filed the joint routine motion for entry of the final judgment. Plaintiff contends that pursuant to its revestment of jurisdiction, the trial court entered the final dismissal order on August 22, 2017, and that the 30-day period for filing the notice of appeal began running from that date. Therefore, according to plaintiff, the September 21, 2017, notice of appeal was timely filed.

¶ 36 Our supreme court has held:

> "[F]or the revestment doctrine to apply, *both* parties must: (1) actively participate in the proceedings; (2) fail to object to the untimeliness of the late filing; *and* (3) assert positions that make the proceedings inconsistent with the merits of the prior judgment and support the setting aside of at least part of that judgment. If any one of those

requirements remains unmet, the doctrine does not revest the court with jurisdiction." (Emphases in original.) *People v. Bailey*, 2014 IL 115459, ¶ 25.

¶ 37 The first two elements of the revestment doctrine have been met here, as plaintiff and the Ratajczak defendants filed the joint motion and no objection was made as to its untimeliness. However, the third element has not been met, as the Ratajczak defendants did not assert a position inconsistent with the merits of the prior July 12, 2017, dismissal order and did not seek to set aside any part of the July 12 judgment. To the contrary, the Ratajczak defendants asserted a position in the joint motion *consistent* with the July 12 judgment, in that they sought reaffirmation that the July 12 dismissal order constituted a dismissal of plaintiff's second-amended complaint in its entirety. Since the Ratajczak defendants did not assert a position supporting the setting aside of any part of the July 12 judgment, the trial court was not revested with jurisdiction. In the absence of jurisdiction, the order entered by the trial court on August 22, 2017, more than 30 days after the July 12, 2017, final judgment, was void. See *Manning v. City of Chicago*, 407 Ill. App. 3d 849 (2011). A void order entered outside the 30-day deadline for filing a posttrial motion or notice of appeal cannot extend the time within which the appellant must appeal from the final judgment. *Id*.

¶ 38 Plaintiff also contends that the Ratajczak defendants should be equitably estopped from contesting appellate jurisdiction or, in the alternative, that they waived any jurisdictional argument. Plaintiff's arguments fail, as "appellate jurisdiction may not be conferred by laches, consent, waiver, or estoppels." *Nwaokocha v. Illinois Department of Financial and Professional Regulation*, 2018 IL App (1st) 162614, ¶ 43.

¶ 39 In sum, to confer jurisdiction on this court, plaintiff was required to file its appeal within 30 days of the final judgment entered on July 12, 2017. Plaintiff failed to do so, and accordingly we must dismiss its appeal.

¶ 40 For all the foregoing reasons, we dismiss plaintiff's appeal for lack of appellate jurisdiction.

¶ 41 Dismissed.