2019 IL App (1st) 180041-U

SIXTH DIVISION
April 12, 2019

No. 1-18-0041

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ASPEN FINANCIAL FUND, INC.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Counter-Defendant-Appellant,	)	Cook County.
	)	
v.	)	No. 13 CH 19468
	)	
O'HARE MIDWAY LIMOUSINE	)	
SERVICE, INC.,	)	Honorable
	)	Brigid Mary McGrath,
Defendant-Counter-Plaintiff-Appellee.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Delort and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 ***Held*:** We dismiss this appeal for lack of appellate jurisdiction. The grant of partial summary judgment did not contain Rule 304(a) language and its inclusion in the order denying the motion to reconsider was ineffective to confer appellate jurisdiction on this court.

¶ 2 In October 2010, plaintiff-counter-defendant-appellant, Aspen Financial Fund, Inc. (hereinafter Aspen), and defendant-counter-plaintiff-appellee, O'Hare Midway Limousine Service, Inc. (hereinafter O'Hare Midway), entered into a contractual relationship. The agreement allowed O'Hare Midway to provide marketing, dispatch, billing, and reservation

services for livery vehicles under Aspen's control. The business relationship soured and Aspen commenced this action in the circuit court of Cook County on August 22, 2013. Aspen filed a verified complaint alleging breach of contract. At the same time, it filed an emergency petition for an *ex parte* temporary restraining order. The circuit court denied the TRO and Aspen filed an amended verified complaint again alleging breach of contract. Eventually, Aspen filed a verified second amended complaint containing three counts for breach of contract and one count of conversion. O'Hare Midway counterclaimed with its own breach of contract claims. After engaging in discovery, O'Hare Midway moved for summary judgment on both the second amended complaint and its own counterclaims.

¶ 3 On June 23, 2017, the circuit court ruled on O'Hare Midway's motion for summary judgment. As to the portion of the motion related to Aspen's claims, the court determined that there was no dispute that Aspen had breached its contract with O'Hare Midway and could not demonstrate its own full compliance. Based on this, the circuit court determined O'Hare Midway was entitled to judgment on Aspen's second amended complaint. The court also found that O'Hare Midway was entitled to summary judgment on its own counterclaims but only as to liability. The court found a genuine issue of material fact remained as to O'Hare Midway's damages. Aspen moved for reconsideration of the summary judgment order, but this was denied by the circuit court. Aspen then appealed.

¶ 4 Before this court, Aspen argues that a genuine issue of material fact exists as to its alleged breach of the various agreements between the parties and that O'Hare Midway waived any material breach by continuing to conduct business with Aspen after the alleged breach occurred.

¶ 5 For the reasons stated more fully below, we dismiss this appeal for lack of appellate jurisdiction.

¶ 6 JURISDICTION

¶ 7 As discussed in greater detail in the Analysis section of this Rule 23 order, we lack appellate jurisdiction to consider the merits of Aspen's appeal.

¶ 8 BACKGROUND

¶ 9 This is a breach of contract case and there are four written contracts at issue. The first contract was dated October 14, 2008, and was between O'Hare Midway and non-party American-Mazeen Limousine, Inc. (referred to as the Master Vehicle Leasing Agreement 2). Pursuant to this agreement, O'Hare Midway leased a 2009 Lincoln Town Car to American-Mazeen for a cost of $2362.54 per month. The second contract was dated August 14, 2009, and was between American-Mazeen and Aspen (referred to as the Assignment Agreement). In this agreement, American-Mazeen assigned its rights and obligations under the Master Vehicle Leasing Agreement 2 to Aspen. Upon assuming this agreement, O'Hare Midway agreed to lease the 2009 Lincoln Town Car to Aspen for 33 months at a rate of $2362.54 to use in performance of Aspen's obligations under a third contract, the Contractor Agreement.

¶ 10 Entered into on October 8, 2010, the Contractor Agreement between O'Hare Midway and Aspen provided that O'Hare Midway would furnish transportation orders to Aspen for the pickup of passengers and packages, under the name O'Hare Midway Limousine Service. Paragraph 12 of the Contractor Agreement stated that Aspen would be responsible for "any and all taxes relating to the business of the Contractor" and Aspen "shall treat its drivers as employees" for tax purposes. It required that Aspen pay all applicable employment taxes for its drivers.

¶ 11 Aspen and O'Hare Midway entered into a fourth contract on October 26, 2011. This contract, known as Master Vehicle Leasing Agreement 1, provided that O'Hare Midway would

lease to Aspen a 2012 Cadillac Escalade for 30 months at a rate of $2344.99 per month. Aspen could use the vehicle in connection with its obligations under the Contractor Agreement.

¶ 12 On July 10, 2013, O'Hare Midway sent Aspen a letter indicating that it would terminate its contractual relationship with Aspen due to: (1) Aspen's failure to make its vehicles available for dispatch and (2) the failure to pay drivers in accordance with applicable tax and labor laws. On August 22, 2013, Aspen filed its initial breach of contract action alleging O'Hare Midway refused to honor the purchase provision related the Cadillac Escalade. At the same time, Aspen sought a temporary restraining order seeking to prevent O'Hare Midway from leasing the Escalade to another party. The circuit court denied the temporary restraining order and eventually Aspen filed a four count second amended complaint which is the subject of this appeal.

¶ 13 The four-count second amended complaint contained three counts for breach of contract and one count of conversion. Count I alleged that O'Hare Midway refused to honor the buyout provision for the Cadillac Escalade. Count II alleged O'Hare Midway unjustly terminated the Contractor Agreement between the parties. Count III alleged O'Hare Midway unjustly terminated the Master Vehicle Leasing Agreement 2. Count IV alleged that after terminating the Contractor Agreement, O'Hare Midway was wrongfully retaining at least $69,170.50 that rightfully belonged to Aspen or its drivers.

¶ 14 O'Hare Midway counterclaimed with its own breach of contract claims. Count I alleged Aspen breached the Contractor Agreement when it failed to abide by the tax provision requiring Aspen to pay all applicable employment taxes for its drivers. Count II alleged Aspen was in default of the Master Vehicle Leasing Agreement 1 based on its noncompliance with the Contractor Agreement. Count III contained similar allegations to Count II but was based on the Master Vehicle Leasing Agreement 2.

¶ 15 After engaging in discovery, O'Hare Midway moved for summary judgment on Aspen's second amended complaint and on its own counterclaims. The motion alleged that Aspen could not succeed on its own breach of contract claims because it could not establish that it fully complied with its own obligations in the various agreements. It also argued that Aspen had admitted it had not complied with the applicable tax provision and O'Hare Midway was entitled to summary judgment on its counterclaims.

¶ 16 On June 23, 2017, the circuit court issued its ruling on O'Hare Midway's summary judgment motion. As it related to Aspen's claims in its second amended complaint, the court found Aspen had breached paragraph 12 (the tax provision) and the breach was material. The court further found that O'Hare Midway had not waived enforcement of the provision. Based on these findings, the court concluded O'Hare Midway was entitled to judgment as a matter of law on Aspen's second amended complaint. The noncompliance with the tax provision also meant that O'Hare Midway was entitled to summary judgment on its counterclaims. However, the court found that there was a genuine issue of material fact related to the damages suffered by O'Hare Midway. Accordingly, the court entered judgment on the liability portion of the counterclaims, but denied summary judgment as to the damages portion. The circuit court's summary judgment order did not contain Supreme Court Rule 304(a) language.

¶ 17 On July 25, 2017, Aspen filed a motion to reconsider the circuit court's summary judgment order. The motion raised several arguments in support of reversing the grant of summary judgment. Aspen argued that the Master Lease Agreement 2 did not allow O'Hare Midway to terminate it even if Aspen was in breach of the Contractor Agreement. It further argued that the tax provision of the Contractor Agreement was invalid and against public policy because the drivers were actually employees of O'Hare Midway. Finally, Aspen argued the grant of summary judgment resulted in an impermissible windfall to O'Hare Midway.

¶ 18 On December 5, 2017, the circuit court denied Aspen's motion to reconsider. The order denying the motion to reconsider also stated, "[t]he Court finds this order final and appealable pursuant to Sup. Ct. R. 304."

¶ 19 On January 3, 2018, Aspen filed a notice of appeal seeking reversal of the summary judgment order and denial of its motion to reconsider.

¶ 20 ANALYSIS

¶ 21 Before turning to the merits of the appeal, this court must address whether it has jurisdiction to consider this matter. Aspen's brief before this court states that this court has jurisdiction pursuant to Supreme Court Rules 301 and 303. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. May 30, 2008). O'Hare Midway disputes that we have jurisdiction under Rule 301 and additionally argues that the reference to Rule 304 in the order denying the motion to reconsider was insufficient to confer appellate jurisdiction on this court. Aspen did not file a reply brief. Questions regarding appellate jurisdiction are reviewed *de novo*. *In re Marriage of Demaret*, 2012 IL App (1st) 111916, ¶ 25.

¶ 22 The Illinois Constitution provides for appellate 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 grants our supreme court the authority to "provide by rule for appeals to the Appellate Court from other than final judgments." *Id.* Absent an applicable supreme court rule this court may not exercise appellate jurisdiction over a judgment, order or decree which is not final. *Flores v. Dugan*, 91 Ill. 2d 108, 112 (1982). "Rule 301 and 304 provide the jurisdictional basis for appealing final judgments, while Rule 303 provides the guidelines for effectuating such appeals." *Lewis v. Family Planning Management, Inc.*, 306 Ill. App. 3d 918, 921 (1999).

¶ 23 Supreme Court Rule 301 provides that "[e]very final judgment of a circuit court in a civil case is appealable as of right." Ill. S. Ct. R. 301 (eff. Feb. 1, 1994). "A judgment is final if it determines the litigation on the merits so that, if affirmed, the only thing remaining is to proceed with the execution of the judgment." *People ex rel. Scott v. Silverstein*, 87 Ill. 2d 167, 171 (1981). An order which determines liability but does not determine damages or reserves such a ruling for a later date is not a final judgment under Rule 301. *Lindsey v. Chicago Park District*, 134 Ill. App. 3d 744, 747 (1985). In this case, the summary judgment order determined the rights and liabilities of the parties *vis-à-vis* the four contracts, but it did not determine any damages. The court's ruling that O'Hare Midway's damages represented a question of fact meant the summary judgment order was not final and not immediately appealable under Supreme Court Rule 301.

¶ 24 Since the summary judgment order was not a final judgment as to all claims, the only avenue for this court to have jurisdiction over this proceeding is by way of Supreme Court Rule 304(a). Rule 304(a) provides in relevant part:

> "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. Mar. 8, 2016).

In interpreting and applying this rule, our 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. O'Hare Midway argues that the summary judgment order determined separate issues related to the same claim and was therefore not immediately appealable under Rule 304(a). We need not decide this contention because even if

the order disposed of "separate, unrelated claims" it is apparent from the record that we would still not have jurisdiction under Rule 304(a).

¶ 25 As O'Hare Midway correctly points out, the summary judgment order contains no reference to Rule 304(a). "Absent a Rule 304(a) finding, a final order disposing of fewer than all of the claims is not an appealable order and does not become appealable until all of the claims have been resolved." *In re Marriage of Gutman*, 232 Ill. 2d 145, 151 (2008) (citing *R.W. Dunteman Co. v. C/G. Enterprises, Inc.*, 181 Ill. 2d 153, 159 (1998)). Accordingly, even if the summary judgment order adjudicated "separate, unrelated claims," the failure to include Rule 304(a) language means we are without jurisdiction to consider it.

¶ 26 The reference to Rule 304 in the order denying the motion to reconsider is also ineffective. The last sentence of that order states, "[t]he Court finds this order final and appealable pursuant to Sup. Ct. R. 304." The reference to "this order" refers to the order denying the motion to reconsider, not the order granting partial summary judgment. Rule 304(a) is applicable to final judgments that do not dispose of an entire proceeding and an order denying a motion to reconsider is not appealable, and is not a judgment. *McCorry v. Gooneratne*, 332 Ill. App. 3d 935, 941 (2002) (citing *Sears v. Sears*, 85 Ill. 2d 253, 258 (1981)). Moreover, this court has held that language in an order stating that it is "final and appealable" without referencing "immediate appeal, the justness of delay, or Rule 304(a)" is insufficient to trigger the rule. *Palmolive Tower Condominiums, LLC v. Simon*, 409 Ill. App. 3d 539, 544 (2011). Therefore, even if the partial summary judgment order decided separate unrelated claims, without a reference to "immediate appeal, the justness of delay, or Rule 304(a)" in the summary judgment order, this court does not have jurisdiction to consider its merits.

¶ 27 CONCLUSION

¶ 28 For the reasons stated above, we lack jurisdiction to consider the merits of this appeal and it is dismissed.

¶ 29 Dismissed.