2019 IL App (1st) 181404-U

FOURTH DIVISION
June 27, 2019

No. 1-18-1404

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LAURA HERRERA, INDIVIDUALLY AND AS SUPERVISED ADMINISTRATOR OF THE ESTATE OF FILIBERTO HERRERA, Plaintiff-Appellant, v. SUMMIT DESIGN & BUILD, LLC, and DAMIAN CONCRETE, INC., Defendants, and STEEL SOLUTIONS FIRM, INC., JW PRO BUILDERS, INC., and J&M HAULING CO., INC., Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County 2015-L-001809 Honorable John H. Ehrlich, Judge Presiding

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PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Gordon and Reyes concurred in the judgment.

O R D E R

Held: Appeal dismissed because untimely filed notice of appeal did not confer jurisdiction.

¶ 1 Laura Herrera, individually and as administrator of the estate of her deceased husband, Filiberto Herrera, has sued for the damages arising from Filiberto's death in a construction accident in 2014. In 2017, Herrera filed her fourth amended complaint, asserting allegations for

the first time against Steel Solutions Firm, Inc., JW Pro Builders, Inc., and J&M Hauling, Inc. The circuit court granted the new defendants' motions to dismiss Herrera's wrongful death claims as being untimely filed more than two years after the accident. With Herrera's survival claims now stayed in the circuit court, she contends on interlocutory appeal that the dismissed claims are subject to the four-year statute of limitations for personal injury actions related to construction (see 735 ILCS 5/13-213 (West 2014)),[1] rather than the two-year statute of limitations set out in the Wrongful Death Act (see 740 ILCS 180/2(d) (West 2014)).[2] She asks us to reverse the trial court's dismissal and remand for further proceedings on her claims. The appellees counter that there is no conflict between the two statutes and that precedent involving similar facts and arguments, *Beetle*, indicates that only section 2 of the Wrongful Death Act governs the timeliness of the claims on appeal. *Beetle v. Wal-Mart Associates*, 326 Ill. App. 3d 528, 761 N.E.2d 364 (2001); 740 ILCS 180/2(d) (West 2014). JW Pro Builders also responds that we lack jurisdiction to consider Herrera's arguments about the timeliness of her claims because her appeal itself was untimely filed.

¶ 2 Before we may consider Herrera's arguments about the two statutes of limitations, we need to resolve JW Pro Builder's contention that a premature notice of appeal has deprived us of jurisdiction. *Dus v. Provena St. Mary's Hospital*, 2012 IL App (3d) 091064, ¶ 9, 968 N.E.2d 1178 (a court of review must ascertain its jurisdiction before proceeding in a cause of action). We briefly summarize the essential facts and procedural history.

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[1] Tort suits regarding an act or omission in the design, planning, supervision, observation or management of construction "shall be commenced within 4 years from the time the person bringing the action *** knew or should reasonably have known of such act or omission." 735 ILCS 5/13-202 (West 2016).

[2] Tort suits for wrongfully causing the death of a person that are brought for the benefit of the surviving spouse and next of kin "shall be commenced within 2 years after the death of such person." 740 ILCS 180/2(d) (West 2016). The surviving spouse and next of kin may be compensated for "grief, sorrow, and mental suffering." 740 ILCS 180/2(a) (West 2016).

¶ 3 Filiberto was employed by a roofing subcontractor to work at the Morgan Manufacturing building at 401 North Morgan Street in Chicago. He fell to his death on June 7, 2014, while performing roofing work.

¶ 4 Eight months later, Herrera filed suit on February 20, 2015. Initially, Herrera sued only the building's owner. In a series of amendments to her complaint, Herrera added and deleted various defendants and changed her theories of liability. Her fourth amended complaint, which brought the three appellees into the lawsuit, was filed on September 6, 2017, which was 39 months after her husband's accident.

¶ 5 Steel Solutions moved under section 2-619 of the Code of Civil Procedure to dismiss Herrera's wrongful death claims, but not her survival claims,[3] as untimely. 735 ILCS 5/2-619(a)(5) (West 2014) (involuntary dismissal of a complaint for not being commenced within the statutory time limit). Thus, Steel Solutions was disputing Herrera's claims as Filiberto's surviving spouse, including her request to be compensated for her emotional distress, loss of society, and funeral and burial expenses. Steel Solutions was not disputing the claims that Filiberto was entitled to bring, *e.g.*, for his conscious pain and suffering prior to his death. *See* 755 ILCS 5/27-6 (West 2016) (the "Survival Act," which provides that actions to recover damages for injury to a person shall survive that person's death). Herrera responded that Steel Solutions was relying on the wrong statute of limitations. The circuit court agreed with Steel Solutions and on January 31, 2018, granted its motion to dismiss. The written order entered on that day stated in part, "The court's rulings as to Counts VII, VIII, and IX are final and appealable under Rule 304(a)." Instead of filing an interlocutory appeal, Herrera filed a motion

[3] "The Survival Act does not create a statutory cause of action. It merely allows a representative of the decedent to maintain those statutory or common law actions which had already accrued to the decedent before he died." *Nat'l Bank of Bloomington v. Norfolk & Western Railway Co.*, 73 Ill. 2d 160, 172, 383 N.E.2d 919, 923 (1978).

asking the trial court to reconsider the dismissal.

¶ 6 While Herrera's reconsideration motion was pending, J&M Hauling and JW Pro Builders each filed motions to dismiss the wrongful death claims and presented the dismissal argument that had been successful for Steel Solutions. The trial court considered the three motions at once, and on June 1, 2018, resolved all of them against Herrera and in favor of the defendants. None of the written motions asked the court to include language permitting Herrera to take an interlocutory appeal pursuant to Rule 304(a). During the June hearing, one of the lawyers asked whether the judge would enter Rule 304(a) language, but the judge never answered the question and instead asked about the parties' progress with the discovery they needed to complete before a previously set trial date. The court's written order disposed of the parties' motions, set various deadlines to prepare for trial, and scheduled a case management conference in July 2018. The June ruling had no effect on Herrera's other claims against the same defendants based on the Survival Act. 755 ILCS 5/27-6 (West 2016). Nor did the ruling affect Herrera's separate claims against Summit Design & Build, LLC and Damian Concrete, Inc.

¶ 7 Herrera filed a notice of appeal on June 28, 2018 indicating she was appealing from the orders entered on January 31 and June 1, 2018. She acknowledged that each of the orders was "a final judgment as to fewer than all of the claims." Herrera, however, cited the reference to Rule 304(a) in the January order, said the June order was "based on substantially the same law and facts" as the January order, and said, in a footnote, that she intended to "move the trial court to expressly enter [a Rule 304(a)] finding *** on July 9, 2018 [as to the June order]." The record includes an order dated July 9, 2018, which states: "The rulings on 6/1/18 as to plaintiff's motion for reconsideration; and defendants J&M Hauling, JW Pro Builders, [and] Summit Design & Build's *[(sic)*] motions to dismiss, pursuant to SCR 304a, are entered with an express finding

that there is no just reason for delaying appeal, *nunc pro tunc* to 6/1/18."

¶ 8 The parties have spent nearly a year in the appellate court briefing the issues. As we stated at the outset of this order, JW Pro Builders, which was the last of the three appellees to file an appellate response brief, disputes our jurisdiction. JW Pro Builders contends that the dismissal order entered on June 1, 2018 was not appealable, thus, the notice of appeal Herrera filed on June 28, 2018 was taken from a nonappealable order and was ineffective to confer jurisdiction. JW Pro Builders also contends the *nunc pro tunc* order entered on July 9, 2018 did not cure the jurisdictional defect.

¶ 9 Herrera replies by emphasizing that the January and June dismissals were based on the same reasoning and she argues that the two orders and the corresponding transcripts must be read together. She acknowledges that neither order sufficiently invokes Rule 304(a), but she contends the January transcript shows that the judge intended to authorize an interlocutory appeal and that the June transcript indicates the January arguments were rehashed and that the judge then granted the June dismissal "on the same bases" as the January dismissal. Herrera concludes that the January and June orders were properly corrected *nunc pro tunc* in July to include a Rule 304(a) finding.

¶ 10 "Subject to certain exceptions, an appeal may be taken only after the trial court has resolved all claims against all parties." *Harreld v. Butler*, 2014 IL App (2d) 131065, ¶ 11, 24 N.E.3d 786, 788. Stated another way, our subject matter jurisdiction is limited to reviewing final orders at the conclusion of a plaintiff's entire action, unless we are granted jurisdiction by a statute or a rule such as Rule 304(a). *Inland Commercial Property Management, Inc. v. HOB I Holding Corp.*, 2015 IL App (1st) 141051, ¶ 17, 31 N.E.2d 795; Ill. S. Ct. R. 304(a) (eff. Mar. 8, 2016). A final order is one which either terminates the litigation between the parties on the

merits or disposes of the rights of the parties as to the entire controversy or some definite part of the controversy. *Cohen v. Sterling Nursing Home, Inc.*, 57 Ill. App. 3d 162, 163, 372 N.E.2d 934, 935 (1978).

¶ 11 There is no dispute that the dismissal orders Herrera tendered to this court dispose of only some of her claims and that other claims she included in her fourth amended complaint remain pending in the trial court. The claims that have been stayed in the trial court include survival claims against the three defendants-appellees and various claims against defendants Summit Design & Build, LLC and Damian Concrete, Inc. The pending claims deprive us of jurisdiction, unless the trial court made findings pursuant to Rule 304(a) before Herrera filed her notice of appeal.

¶ 12 Rule 304(a) provides that, in matters involving multiple parties or claims, an interlocutory appeal may be taken when the trial court has entered a final order as to one or more parties or claims, but fewer than all, if the trial court makes an express written finding that there is no just reason to delay enforcement or appeal or both. Ill. S. Ct. R. 304(a) (eff. Mar. 8, 2016); *Harreld*, 2014 IL App (2d) 131065, ¶ 11, 24 N.E.3d 786; *AT&T v. Lyons & Pinner Electric Co., Inc.*, 2014 IL App (2d) 130577, ¶ 19, 8 N.E.3d 462 (Rule 304(a) is invoked only by "an explicit written finding that no just reason exists for delaying either enforcement or appeal"); *Stasko v. City of Chicago*, 2013 IL App (1st) 120265, ¶ 28, 999 N.E.2d 975 (same). Rule 304(a) was intended to dispel uncertainty about the time and right to appeal when a final judgment has been entered as to only some of the controverted matters and yet "discourage piecemeal appeals in the absence of just reason." *Mares v. Metzler*, 87 Ill. App. 3d 881, 884, 409 N.E.2d 447, 450 (1980); *Petersen Brothers Plastics, Inc. v. Ullo*, 57 Ill. App. 3d 625, 630, 73 N.E.2d 416, 420 (1978). Without a Rule 304(a) finding, a final judgment order as to one or more parties or claims remains

subject to the trial court's revision "at any time before the entry of a judgment adjudicating all the claims, rights, and liabilities of the parties." Ill. S. Ct. R. 304(a) (eff. Mar. 8, 2016).

¶ 13 Neither of the two orders contains the necessary express finding that would authorize an interlocutory appeal pursuant to Rule 304(a). Herrera's contention that she may cobble together various phrases from the orders and transcripts in order to create the order she wants is illogical and unsupported by authority. The rule itself specifies that the trial court must make "an express written finding that there is no just reason to delay enforcement or appeal or both." Ill. S. Ct. R. 304(a) (eff. Mar. 8, 2016). See *In Re Estate of Jackson*, 354 Ill. App. 3d 616, 618, 821 N.E.2d 1199, 1201 (2004) (indicating Rule 304(a) applies only when the order appealed from includes a finding there is no just reason for delaying either enforcement or appeal or both). "Such a finding may be made at the time of the entry of the judgment or thereafter on the court's own motion or on motion of any party." Ill. S. Ct. R. 304(a) (eff. Mar. 8, 2016). Without that language, we have no authority to review the interlocutory orders.

¶ 14 Although there was some discussion in January 2018 of Rule 304(a), the January 2018 order lacks the essential language. So at the time the written order was entered on January 31, 2018, it was not appealable. Furthermore, the June 2018 transcript and order refute Herrera's contention that the trial court was anticipating an interlocutory appeal. After the trial court granted the dismissal in June, an attorney asked about 304(a) language. The judge, however, did not respond to the question. Instead, the judge began questioning the attorneys about discovery, and then the judge set dates for scheduling depositions, completing written discovery, filing any third party claims, and returning for a case management conference on July 9, 2018. The judge's written order contains no Rule 304(a) finding and specifies that in July, the attorneys are to report on their "completion of written [discovery] and [the] dates [they have scheduled] for

[taking] eye witness and party depositions." Thus, the June transcript and order indicate the trial court was moving the case toward a trial, rather than sidelining it while Hererra took an interlocutory appeal. So at the time the written order was entered on June 1, 2018, it was not appealable. Nevertheless, Herrera filed her notice of appeal on June 28, 2019. Her notice of appeal was premature and did not confer jurisdiction here. *Stasko*, 2013 IL App (1st) 120265, ¶ 28, 997 N.E.2d 975.

¶ 15 Herrera's argument that the jurisdictional defect was cured by the subsequent addition of a Rule 304(a) finding "*nunc pro tunc*" is incorrect. Paraphrasing *Harreld*, a *nunc pro tunc* order is an order entered now for something previously done, so that the record speaks now of what was actually done then. *Harreld*, 2014 IL App (2d) 131065, ¶ 13, 24 N.E.3d 786. A *nunc pro tunc* order is used to "correct the record of judgment, not to alter the actual judgment of the court." *In re Marriage of Takata*, 304 Ill. App. 3d 85, 92, 709 N.E.2d 715, 720 (1999). Because a *nunc pro tunc* amendment may reflect only what was actually done by the court but was omitted due to clerical error, a *nunc pro tunc* amendment must be based on some note, memorandum, or other memorial in the court record. *Harreld*, 2014 IL App (2d) 131065, ¶ 13, 24 N.E.3d 786; *Marriage of Takata*, 304 Ill. App. 3d at 92, 709 N.E.2d at 720. For instance, the correction cannot be based on merely the personal recollection of a trial judge or other person. *Johnson v. First National Bank of Park Ridge U/T #205*, 123 Ill. App. 3d 823, 827, 463 N.E.2d 859, 862 (1984); *Fox v. Department of Revenue*, 34 Ill. 2d 358, 360, 215 N.E.2d 271, 272 (1966) (*nunc pro tunc* finding cannot rest on a person's recollection, or on new testimony or affidavit).

¶ 16 "A *nunc pro tunc* order may not be used to cure a jurisdictional defect, supply omitted judicial actions, or correct a judicial error under the pretense of correcting a clerical error." *Harreld*, 2014 IL App (2d) 131065, ¶ 13, 24 N.E.3d 786; *Marriage of Takata*, 304 Ill. App. 3d at

92, 709 N.E.2d at 720.

¶ 17 A party may ask the trial court at any time to enter a Rule 304(a) finding as to a final order. *Harreld*, 2014 IL App (2d) 131065, 24 N.E.3d 786; *John G. Phillips & Associates v. Brown*, 197 Ill. 2d 337, 344, 757 N.E.2d 875, 880 (2001) (a Rule 304(a) finding may be made when a judgment is entered or subsequently on the court's own motion or on the motion of any party). Here, instead of asking for a Rule 304(a) finding as of the July 2018 case management conference, Herrera asked for a Rule 304(a) finding *nunc pro tunc* to June 2018.

¶ 18 In this case, there was no 304(a) finding in the court record at the time the *nunc pro tunc* order was entered. As in *Harreld*, the record "indicates that the failure to include a Rule 304(a) finding in the [June] order was not a clerical error but instead was an omitted judicial action." *Harreld*, 2014 IL App (2d) 131065, 24 N.E.3d 786. "Therefore, adding a Rule 304(a) finding [to the June order was] outside the power of [the] *nunc pro tunc* order [entered in July]." *Harreld*, 2014 IL App (2d) 131065, 24 N.E.3d 786. We find that the *nunc pro tunc* order did not correct the jurisdictional defect.

¶ 19 We further find that we lack jurisdiction to address the merits of Herrera's appeal. See *Shanklin v. Hutzler*, 277 Ill. App. 3d 94, 101, 660 N.E.2d 103 (1995) (a notice of appeal from an order requiring but lacking Rule 304(a) finding is a nullity); *Hynes v. Dep't of Revenue*, 269 Ill. App. 3d 697, 707, 646 N.E.2d 1228, 1234 (1995) (a notice of appeal citing orders which did not contain Rule 304(a) language was premature and thus a nullity); J. Eaton, W. Quinlan & R. Stern, *The Notice of Appeal*, in Illinois Civil Appellate Practice § 8.7 (Ill. Inst. for Cont. Legal Educ.1997) ("A notice of appeal that is filed before the entry of a final judgment, or Rule 304(a) certification if necessary, is a nullity").

¶ 20 Appeal dismissed.