2014 IL App (1st) 132185-U

FIFTH DIVISION
May 2, 2014

No. 1-13-2185

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JENNIFER NEMETH,	)	Appeal from
	)	the Circuit Court
Plaintiff-Appellee,	)	of Cook County
	)	
v.	)	13 M1 109585
	)	
JEREMEY LEVIN,	)	Honorable
	)	Jessica A. O'Brien,
Defendant-Appellant.	)	Judge Presiding

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Gordon and Justice Taylor concurred in the judgment.

ORDER

¶ 1 *Held*: Interlocutory appeal was dismissed in part for lack of jurisdiction where denial of motion to dismiss was not a final and appealable order and affirmed in part where denial of request for sanctions was consistent with objective facts.

¶ 2 Jeremey Levin, the owner of an apartment building at 1121 North Ashland Avenue, Chicago, Illinois, 60622, appeals from an order denying his motion to dismiss a lawsuit filed by his former tenant, Jennifer Nemeth, alleging Levin's handling of her security deposit violated the Chicago Residential Landlords and Tenants Ordinance, § 5–12–010, *et seq*. (amended Nov. 6, 1991) (hereinafter RLTO). In this interlocutory appeal, ostensibly brought pursuant to Supreme Court Rule 304(a) (Ill. S. Ct. R. 304(a) (eff. Feb.26, 2010)), Levin contends the motion should

have been granted because his building came within an exception to the municipal ordinance. Levin also contends the court should have sanctioned Nemeth for failing to amend her complaint in a timely fashion after Levin told her he considered her damage claim to be excessive.

¶ 3 Levin, who resides in Devon, Pennsylvania, accepted a $1,700 security deposit from Nemeth when they entered into a one-year written lease for tenancy beginning on May 15, 2012. On the front page of the lease agreement, one of Levin's daughters, Jena L. Levin, a Chicago attorney, was listed as "person authorized to act on behalf of owner for purpose of service of process and receipting of notices."

¶ 4 About three months after Nemeth moved into the 3rd Floor Front unit of Levin's Ashland Avenue building, she sent an email to him, his wife, and Jena, informing the Levins that a "family-related issue" was forcing Nemeth to move out early and that she hoped to begin subletting the unit as of October 1, 2012. Nemeth vacated the apartment by October 1, 2012, and returned her set of keys on October, 15, 2012. The apartment was relet at the beginning of November. Levin credited Nemeth with 40 cents interest for the five months he retained her security deposit, and then deducted $400 for unpaid rent, $27.50 for late payment of rent, $150 to clean the bathroom and kitchen and replace six light bulbs, and $823.52 to satisfy bills from Commonwealth Edison for electric utility service, but noted that the Commonwealth Edison balance was subject to adjustment. On or about November 29, 2012, he refunded $476.41 to Nemeth.

¶ 5 In February 2013, Nemeth sued Levin in the circuit court of Cook County, alleging that he violated the RLTO by failing to hold her security deposit in an Illinois financial institution (count I), comingling her security deposit with his own assets (count II), failing to disclose the name and

address of the financial institution (count III), failing to notify her that he transferred the security deposit from one financial institution to another during the rental agreement (count IV), failing to give her a receipt (count V), failing to return the security deposit less allowable deductions within 45 days of her departure (count VI), and failing to attach an interest rate summary to her lease (count VII). Nemeth's damage claim totaled $23,332, because she sought twice her security deposit in each of the first five counts ($3,400 x 6 counts), $1,132.50 in the sixth count, $100 in the final count, and in every count asked for interest, court costs ($337), and attorney fees.

¶ 6 In March 2013, Levin's daughter, Jena, appeared as counsel and filed the motion at issue in this appeal. The motion to dismiss was divided into two parts. Citing section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2010)), Levin argued Nemeth's entire complaint should be dismissed because his apartment building was exempted from the RLTO as an "owner-occupied" building of six units or less due to the fact that his two adult daughters reside rent-free in the building and he stays in one of those apartments during his frequent visits to Chicago. Next, citing section 2-615 of the Code (735 ILCS 5/2-615 (West 2010)), Levin sought dismissal of counts II through V on grounds that those counts improperly duplicated the damages sought in count I. He contended it was wrong to "stack" or sum the damage claims for multiple violations to the RLTO and that for this reason alone, the court should consider only the allegation in count I that Levin failed to hold the security deposit within Illinois. In the concluding paragraph of his section 2-615 argument, Levin stated that as a sanction pursuant to Supreme Court Rule 137, Nemeth should be ordered to pay the attorney fees Levin incurred in preparing the motion to dismiss, because he warned her that he believed the purpose of counts II through V was to needlessly increase the costs of the litigation and that if she did not voluntarily withdraw counts II

through V, he would bring his belief to the court's attention. 137 Ill. S. Ct. R. 137 (eff. Feb.1, 1994).

¶ 7 A few weeks later, in April 2013, when the parties appeared in court for a status call, Nemeth asked for and was granted leave to amend her complaint. The trial court's order also indicates Levin withdrew his section 2-615 argument but chose to maintain his request for sanctions and that the court set a briefing schedule and a hearing date on the remainder of Levin's motion. Nemeth left the court room and immediately filed a first amended verified complaint which was substantively similar to her original pleading, but was styled as a single count and sought damages of only $4,632.50.

¶ 8 Nemeth subsequently filed a response brief in which she challenged Levin's contention that his building was an owner-occupied building of six units or less, in part because the building had been marketed for sale as a seven flat with two retail units and because Levin undisputedly resided in Pennsylvania and only visited rather than resided in one of the apartments. Nemeth attached a real estate listing for 1121 North Ashland Avenue and an affidavit regarding her contacts with Levin. She pointed out that if she showed at trial that the building did in fact contain seven dwelling units, this would disqualify the building from the statute's exception for six or fewer units, and there would be no need to address whether the building was owner-occupied.

¶ 9 In reply, Levin argued that Nemeth focused on his residency, but that his daughters qualified as "beneficial owners" of the property and brought the building within the owner-occupied exception. He also argued Nemeth had not provided "any legitimate basis" to argue that the building had more than six dwelling units.

¶ 10 After hearing oral arguments in May 2013, the trial court took the motion under

advisement. In June 2013, the court entered a two-page handwritten order that, among other things, (1) denied Levin's 2-619 motion to dismiss on the basis of the owner-occupied exception, (2) indicated a question of fact remains as to the number of dwelling units, (3) indicated a question of fact remains as to whether Levin waived application of the RLTO by attaching a summary of the ordinance to his lease with Nemeth, (4) denied Levin's request for sanctions pursuant to Rule 137, and (5) scheduled Nemeth's compliant for trial on September 30, 2013. The court's order also stated there was no just reason to delay either the enforcement or appeal of the order. Levin has appealed to this court, seeking review of the denial of his motion on the basis of the owner-occupied exception and denial of his request for sanctions.

¶ 11 In his opening appellate brief, Levin cites Supreme Court Rule 304 as the basis of our jurisdiction. Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010). Before we address Levin's arguments, we must consider Nemeth's challenge to our jurisdiction over the denial of Levin's motion to dismiss. Except as provided by the Illinois Supreme Court Rules, we have jurisdiction to review only final judgments, orders, or decrees. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); *Flores v. Dugan*, 91 Ill. 2d 108, 112, 435 N.E.2d 480, 482 (1982) (generally, an appellate court lacks jurisdiction to review interlocutory orders); *Almgren v. Rush-Presbyterian-St. Luke's Medical Center*, 162 Ill. 2d 205, 210, 642 N.E.2d 1264, 1266 (1994) (citing Ill. Const. 1970, art. VI, § 6 and stating the Illinois constitution provides for appeals as a matter of right from final judgments, there is no corresponding constitutional right to appeal from interlocutory orders, and the Illinois constitution authorizes the supreme court to provide for interlocutory appeals as it sees fit). "A judgment or order is final for purposes of appeal if it disposes of the rights of the parties, either on the entire case or on some definite and separate part of the controversy, and, if affirmed, the only task

remaining for the trial court is to proceed with execution of the judgment." *Brentine v. DaimlerChrysler Corp*., 356 Ill. App. 3d 760, 765, 826 N.E.2d 1057, 1062 (2005); *Valdovinos v. Luna–Manalac Medical Center, Ltd.*, 307 Ill. App. 3d 528, 538, 718 N.E.2d 612, 619 (1999). Nemeth contends that the trial court's denial of Levin's motion to dismiss is not the type of ruling that is appealable pursuant to Rule 304. Ill. S. Ct. R. 304 (eff. Feb. 26, 2010). We agree with her.

¶ 12 Rule 304 provides, in pertinent part:

> "Rule 304. Appeals from Final Judgments That Do Not Dispose of an Entire Proceeding
>
> (a) Judgments As To Fewer Than All Parties or Claims-Necessity for Special Finding. 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. 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. *** In the absence of such a finding, any judgment that adjudicates fewer than all the parties is not enforceable or appealable and is subject to revision at any time before the entry of a judgment adjudicating all the claims, rights, and liabilities of all the parties." (Emphasis added.) Ill. S. Ct. R. 304 (eff. Feb. 26, 2010).

¶ 13 The rule exists to discourage piecemeal appeals in the absence of a good reason to proceed in such a fashion and also to remove any uncertainty about the proper course when a judgment is entered regarding fewer than all matters in controversy. *Mares v. Metzler*, 87 Ill. App. 3d 881, 884,

409 N.E.2d 447, 450 (1980).

¶ 14 It is well-settled that the denial of a motion to dismiss is not a final judgment. *Walker v. Carnival Cruise Lines, Inc.*, 383 Ill. App. 3d 129, 132, 889 N.E.2d 687, 693 (2008) (a trial court's denial of a motion to dismiss is an interlocutory order that is not final and appealable); *Saddle Signs, Inc. v. Adrian*, 272 Ill. App. 3d 132, 135, 650 N.E.2d 245, 247 (1995) (the denial of a motion to dismiss does not fall within the scope of any of the Supreme Court Rules regarding interlocutory appeals); *Chicago Housing Authority v. Abrams*, 409 Ill. 226, 228-29, 99 N.E.2d 129, 131 (1951) (it is well settled that the denial of a motion to dismiss is an interlocutory order). The denial of a motion to dismiss is not a final order, as it does not finally "dispose[] of the rights of the parties, either on the entire case or on some definite and separate part of the controversy." *Brentine*, 356 Ill. App. 3d at 765, 826 N.E.2d at 1062. The order here is not a finding regarding liability with respect to Nemeth's claim and it does not affect Levin's ability to defend against the merits of her claim. Instead, the trial court retains jurisdiction to consider the issues arising out of the parties' landlord-tenant relationship and scheduled a trial date on Nemeth's first amended pleading. The ruling does not end the controversy between the parties, and thus, this appellate court has no jurisdiction to review the ruling. See *Chicago Housing Authority*, 409 Ill. at 230, 99 N.E. at 131 (order denying motion to dismiss petition left pleading viable and subject to further hearing regarding compensation and was not a final and appealable order).

¶ 15 Furthermore, while Rule 304(a) permits appeals from orders which do not dispose of an entire proceeding, the mere inclusion of Rule 304(a) language cannot make a nonfinal order final and appealable. *In re Estate of Rosinksi*, 2012 IL App. (3d) 110942 ¶ 22, 975 N.E.2d 335; *Hicks v. Weaver*, 255 Ill. App. 3d 650, 652, 627 N.E.2d 751, 753 (1994); *Coryell v. Village of La Grange*,

245 Ill. App. 3d 1, 5, 614 N.E.2d 148, 150 (1993) ("case law is replete with instances where this [appellate] court has determined an order to be nonfinal and nonappealable despite the trial court's statement to the contrary"); *Blott v. Hanson*, 283 Ill. App. 3d 656, 660, 670 N.E.2d 345, 348, (1996) (a Rule 304(a) finding does not make a nonfinal order appealable, rather it makes a final order appealable despite pending other claims or parties); *Viirre v. Zayre Stores, Inc.*, 212 Ill. App. 3d 505, 511, 571 N.E.2d 209, 213 (1991) (entering 304(a) language does not make an order final and appealable if the order was not in fact final). Thus, the inclusion of the 304(a) language does not make the order denying Levin's motion to dismiss a final and appealable order.

¶ 16 Levin contends, however, that the order entered was the "equivalent to a *partial* summary judgment order [in Nemeth's favor]," and that we may proceed with our review under the standards applicable to the entry of summary judgment. (Emphasis in original.) This contention is not properly presented. One deficiency is the lack of citation to and discussion of legal principles that would permit us to construe the trial court's ruling or some part of the ruling on the motion to dismiss as the entry of summary judgment for the other party. As discussed below, it is true that we are not bound by the title of an order and have authority to construe its contents so that we may give effect to the apparent intention of the trial court. Levin, however, makes no attempt to discuss this principle and we expect appellants to fully brief and argue the principles that they are relying upon. Levin states: "Defendant's Motion to Dismiss was pursuant to 735 ILCS 5/2-619. A 2-619 motion states an affirmative matter and essentially converts the motion to a motion for summary judgment. Summary judgment is proper when ***." This is plainly not sufficient reasoned argument to construe one type of motion as an entirely different type of motion. If motions for dismissal and motions for summary judgment were essentially the same motion, they would share

a single section in the Code of Civil Procedure and a single body of case law, which they do not. Levin then cites one case regarding the standard of review for summary judgment rulings (*City of Oakbrook Terrace v. Suburban Bank & Trust Co*., 364 Ill. App. 3d 506, 845 N.E.2d 1000 (2006)) and he cites one case for the proposition that a court should not *sua sponte* grant summary judgment (*Peterson v. Randhava*, 313 Ill. App. 3d 1, 729 N.E.2d 75 (2000), and neither of these cases indicate that a section 2-619 ruling is generally reviewable as a summary judgment ruling. Thus, Levin's contention fails for lack of adequate legal support. We could stop our discussion here, but there is another reason for rejecting Levin's contention.

¶ 17 Another deficiency is the lack of facts indicating that the trial court's ruling went beyond what either party expected. Levin bases his contention on one sentence or sentence fragment in the body of the order that his daughter handwrote for the court's entry. At the outset of the order, it is plainly stated, "[t]his matter is coming to be heard on defendant's 2-619.1 combined motion to dismiss," the words "summary judgment" do not appear in the order, and we point out that the legal briefs submitted to the trial court do not refer to summary judgment concepts. Moreover, Levin has failed to provide either a verbatim transcript or a bystander's report of the hearing from which we might glean that the trial court not only denied Levin's motion to dismiss but also proceeded to enter partial summary judgment for Levin. When Nemeth pointed out this omission, Levin replied that a transcript or bystander's report is not always necessary. See *Venturini v. Affatato*, 84 Ill. App. 3d 547, 552, 405 N.E.2d 1093, 1097 (1980). That principle applies to some cases, but not to this case, where it is not apparent from the written order that the trial court intended to enter summary judgment. Appellant Levin bore the burden of presenting a sufficiently complete record to support his claim of error and his failure to do so leads to presume that the missing information supports

the trial court's ruling. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92, 459 N.E.2d 958, 959 (1984); *Venturini*, 84 Ill. App. 3d at 552, 405 N.E.2d at 1097. This is reason alone to reject Levin's contention.

¶ 18 The incomplete sentence that Levin has culled from the order indicates that the statutory exception at issue cannot be applied to the statutory definition of the term owner. He quotes from the handwritten order, "the owner-occupied exception does not apply under [the portion of the code that defines the term "owner", which is section] 5–12–030(c)." Chicago Municipal Code 5–12–030(c) (amended Nov. 6, 1991). According to Levin, this was a ruling that the owner-occupied exception was not applicable to Levin's apartment building. He contends the trial court *sua sponte* reached this conclusion in Nemeth's favor despite (1) there being no motion requesting the ruling, (2) Levin not being given an opportunity to respond, (3) a clear indication in the order that the relevance of the owner-occupied exception to Levin's building remains in dispute (the order states in part, "[a] question of fact remains as to the number of units in the building") and (4) the fact that the order schedules Nemeth's claim for trial. Levin argues that for no apparent reason and with no warning, the trial court has "prejudicially precluded" Levin from subsequently addressing a key issue at trial. Nemeth responds that Levin is trying to skirt the fact that we lack jurisdiction to review the denial of his motion to dismiss. She states:

> "This [argument] is nonsense. After denying the motion to dismiss, the trial court set a discovery schedule and trial date in this case. *** Plaintiff still has to prove her case, and defendant is free to put on additional evidence that the building is only six-units and owner-occupied. This is a classic piecemeal appeal. Levin should not be allowed to pursue this issue until the trial is held and judgment is entered."

¶ 19 As mentioned above, we have authority to construe orders after taking into account the pleadings, issues, and motions that were before the court when the order was entered, and based on this record, we conclude that this trial court's intent was simply to deny Levin's motion to dismiss and set the issues for trial. *Twardowski v. Holiday Hospitality Franchising, Inc.*, 321 Ill.App.3d 509, 512, 748 N.E.2d 222, 226 (2001) (orders should be interpreted in the context of the record and circumstances that existed at the time of their rendition); *Garcia v. Gutierrez*, 331 Ill.App.3d 127, 129, 770 N.E.2d 1227, 1230 (2002) ("[a] court order is to be interpreted in its entirety with reference to other parts of the record, including pleadings, motions, and issues before the court" and should be "construed in a reasonable manner that gives effect to the apparent intention of the trial court"); *Granville Beach Condominium Association v. Granville Beach Condominiums, Inc.*, 227 Ill.App.3d 715, 720, 592 N.E.2d 160, 163 (1992) (same). We find that the trial court did not *sua sponte* enter a summary judgment ruling that was neither briefed nor requested. We find that the ruling Levin challenges was the denial of a motion to dismiss and that we have no jurisdiction to review the denial of a motion to dismiss.

¶ 20 For these reasons, we dismiss for lack of jurisdiction the portion of the appeal in which Levin addresses the relevance of the RLTO's owner-occupied exception.

¶ 21 Levin also seeks review of the denial of his request for sanctions, which was the final resolution of a claim that was distinct from Nemeth's claim regarding her security deposit (see *John G. Phillips & Associates v. Brown*, 197 Ill. 2d 337, 339-40, 757 N.E.2d 875, 877 (2001); *Yunker v. Farmers Automobile Management Corp.*, 404 Ill. App. 3d 816, 821, 935 N.E.2d 630, 634-35 (2010)), and that resolution, coupled with the Rule 304(a) language, is a final and appealable ruling. See generally *Viirre*, 212 Ill. App. 3d at 512, 571 N.E.2d at 213 (where the basis

for a resolved claim differs from other pending claims, and the trial court has entered 304(a) language, the resolution of the distinct cause of action is appealable). Moreover, the structure of the trial court's order suggests that the Rule 304(a) language was intended to be specific to the sanction ruling. The first page of the two-page order concerns matters that are not relevant here: the court set a discovery deadline and September trial date, the court denied Levin's motion for substitution of judge as a matter of right, and the court indicated that because Jena may be called as witness, she was being given leave to withdraw as counsel and that Levin could seek new counsel or proceed *pro se*. The second page was specific to the topics raised in Levin's motion, in that the court: denied the motion for dismissal on grounds of owner-occupancy, stated a question of fact remains about the number of dwelling units, stated a question of fact remains about whether Levin waived application of the RLTO by attaching a copy of the ordinance it to the written lease, and, then, finally, denied the request for sanctions and stated, "There is no just reason to delay either the enforcement or appeal of this order."

¶ 22 Rule 137 requires the attorney of record to sign every pleading, certifying that she has read the pleading and that, to the best of her knowledge, the pleading was grounded in fact and warranted by existing law or a good-faith argument for the extension of existing law. Ill. S. Ct. R. 137 (eff. Jan. 4, 2013). Rule 137 is designed to prevent abuse of the judicial process by imposing sanctions on attorneys who file vexatious and harassing actions based on allegations that are unsupported by fact or law. *Burrows v. Pick*, 306 Ill. App. 3d 1048, 1050, 715 N.E.2d 792, 794 (1999); *Krawczyk v. Livaditis*, 366 Ill. App. 3d 375, 851 N.E.2d 862 (2006) (Rule 137 is intended to penalize the filing of frivolous and false lawsuits). The party seeking sanctions under Rule 137 bears the burden of proving that the opposing party made false allegations, without reasonable

cause, for the mere purpose of harassment or undue delay. *Mina v. Board of Education for Homewood–Flossmoor*, 348 Ill. App. 3d 264, 279, 809 N.E.2d 168, 180 (2004). Courts use an objective standard when considering a pleading party's actions. *Yunker*, 404 Ill. App. 3d 824, 935 N.E.2d at 629. A reviewing court uses the abuse of discretion standard to determine whether a trial court erred in denying a motion for sanctions. *Yunker*, 404 Ill. App. 3d 824, 935 N.E.2d at 629. This is a highly deferential standard. *Mina*, 348 Ill. App. 3d at 279, 809 N.E.2d at 179. An abuse of discretion occurs when no reasonable person could take the view adopted by the trial court. *Krawczyk*, 366 Ill. App. 3d at 379, 851 N.E.2d at 865.

¶ 23 The record does not disclose the trial court's specific reasons for denying the request for sanctions, but based on our consideration of the facts at the time that Nemeth filed her original and amended complaints, we conclude that the trial court's ruling was not an abuse of discretion. Levin was critical of the amount of Nemeth's total damage claim, but not of her substantive allegations or her reliance on the RLTO. After Levin sent his letter criticizing Nemeth's damage claim, she took less than four weeks to prepare, seek leave to file, and file her first amended complaint in which she adhered to her original factual allegations and legal grounds yet revised the mathematical calculation of her damages under the RLTO. Nemeth followed protocol. A plaintiff does not have an absolute right to amend and must first seek and obtain the court's permission to file a proposed amendment. *First Robinson Savings & Loan v. Ledo Construction Co.*, 210 Ill. App. 3d 889, 892, 569 N.E.2d 304, 306 (1991); *In re Purported Election of Durkin*, 299 Ill. App. 3d 192, 700 N.E.2d 1089 (1998). Four weeks to accomplish this task was a short amount of time, particularly when the lawsuit was a minor one involving a small amount of money only. The timing of Nemeth's amendment was objectively reasonable rather than vexing. Moreover, we fail to see the need for

Nemeth to amend her pleading simply to revise the specific amount of claimed damages. A court will not blindly grant damages requested by a prevailing movant or plaintiff. A plaintiff seeking damages under the RLTO must prove her factual and legal entitlement to statutory damages before a court will consider the amount of damages to be awarded. If Nemeth does succeed in meeting this burden of proof, then it will be a straightforward task for the parties to calculate and argue the appropriate damage award. In light of this practicality, it was unnecessary for Levin to send the threatening letter to Nemeth, to argue for the dismissal of Nemeth's original complaint pursuant to section 2-615, and to ask the court to sanction Nemeth pursuant to Rule 137. Levin argues that if Nemeth had "timely" withdrawn the complaint and filed her amended version, then Levin "would have been saved the time and expense of [his section 2-615 motion] entirely and [he] could have presented any defenses and arguments [to the amended complaint] (*i.e.*, application of the owner-occupied exception) himself at an informal hearing without the expensive assistance of any attorney." According to Levin, if he did not have to present his 2-615 argument, then he would have proceeded *pro se* "at a single informal hearing where the entire case would have been decided and over in one day." It was, however, Levin's strategic choice to pursue the section 2-615 argument, its corresponding briefing schedule and extra hearing date, and ultimately this appeal from the unfavorable ruling. The facts do not support a finding that Nemeth's complaint was or that her conduct regarding its presentation and amendment were not well-grounded in fact or existing law, lacked a good-faith basis, or was or were interposed for an improper purpose. We conclude that the trial court's denial of Levin's request for sanctions was not an abuse of discretion and we affirm the court's ruling.

¶ 24 Appeal dismissed in part; affirmed in part.