

No. 1-14-2639

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 JUDICIAL DISTRICT

THOMAS J. MCCABE,)	Appeal from the
)	Circuit Court of
)	Cook County
Plaintiff-Appellant,)	
)	
v.)	No. 07 L 10440
)	
PHILIP M. BARONE, M. BARONE REALTY)	
COMPANY, and BARIRVING LLC,)	Honorable
)	Raymond W. Mitchell,
Defendants-Appellees.)	Judge Presiding.

PRESIDING JUSTICE REYES delivered the judgment of the court.
Justices Gordon and Burke concurred in the judgment.

ORDER

¶ 1 *Held:* Plaintiff's appeal is dismissed for lack of jurisdiction.

¶ 2 Plaintiff Thomas McCabe, *pro se*, appeals after the circuit court of Cook County granted his motion pursuant to section 2-1009 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-1009 (West 2014)) to voluntarily dismiss the remaining counts of his second amended complaint. On appeal, plaintiff contends the trial court erred when it: (1) granted one of

defendants' motions *in limine*; (2) dismissed in part his first amended complaint; and (3) limited evidence during a prove-up hearing for counts one, two, and seven of his second amended complaint. For the reasons that follow, we lack jurisdiction to consider plaintiff's contentions of error.

¶ 3

BACKGROUND

¶ 4 Plaintiff initially filed a five-count complaint against defendants Philip Barone (Barone), M. Barone Realty Co. (Barone Realty), a real estate company, and BarIrving LLC (BarIrving), a condominium developer, (collectively defendants). Plaintiff sought damages for (1) fraudulent misrepresentation, (2) fraudulent concealment, (3) a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, (4) breach of warranty, and (5) breach of the punch list agreement. These causes of action stemmed from the July 31, 2005, sale of a condominium unit located at 2510 West Irving Park Road in Chicago by defendants to plaintiff, the buyer. Plaintiff alleged that pursuant to the verbal representations of Barone, the condominium building had passed all inspections and an occupancy permit had been obtained for the condominium. Based on these representations, plaintiff entered into a contract for the sale of the condominium. Pursuant to the sales contract, the sale of the property was scheduled to close on August 31, 2005. The sale of the property, however, did not close on August 31, 2005, as defendants had failed to obtain a certificate of occupancy. Instead, the closing occurred on December 21, 2006. In addition, plaintiff alleged that after he had moved into the condominium, he discovered numerous latent defects in the workmanship of the unit. Plaintiff further alleged that defendants would not remediate despite the fact those defects were covered under the limited warranty and the punch list agreement.

¶ 5 After this initial complaint was dismissed pursuant to section 2-615 of the Code, plaintiff,

with leave of court, filed a seven-count first amended complaint. Count one alleged fraudulent misrepresentation against defendants. Count two alleged fraudulent concealment against defendants. Count three alleged negligent misrepresentation by Barone and Barone Realty. Count four alleged a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act against defendants. Count five alleged violations of the Illinois Real Estate License Act against Barone and Barone Realty. Count six alleged breach of warranty against BarIrving. Count seven alleged breach of the punch list agreement against BarIrving.

¶ 6 On August 1, 2008, defendants filed a motion to dismiss pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2008)). On January 21, 2009, after the matter was fully briefed and argued, the trial court granted defendants' motion in part and denied it in part. The trial court dismissed counts one and two as to Barone Realty and BarIrving, and count three as to Barone Realty; however, counts one through three remained as to Barone individually. The trial court also denied the motion as to counts four and five; however, counts six and seven were dismissed with leave to replead.

¶ 7 On February 18, 2009, plaintiff filed a second amended complaint containing seven counts, which is the operative pleading in this matter. Counts one through three alleged fraudulent misrepresentation, fraudulent concealment, and negligent misrepresentation by Barone. Count four alleged a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act against defendants. Count five alleged violations of the Illinois Real Estate License Act against Barone and Barone Realty. Counts six and seven alleged a breach of warranty and a breach of the punch list agreement.

¶ 8 Defendants filed an answer to the complaint and discovery proceeded. However, after the defendants failed to appear at many case management conferences, the trial court, on July 30,

2010, ordered defendants to appear or else it would enter a default judgment in favor of plaintiff. On September 2, 2010, defendants failed to appear, their prior answers were stricken, and the trial court found them in default on all counts. The matter was continued for prove-up of damages.

¶ 9 On November 15, 2011, judgment was entered in favor of plaintiff against defendants jointly and severally in the amount of \$530,318.73 plus \$790 in court costs for a total judgment of \$531,108.73. This order, however, was subsequently vacated, but only with regard to counts four, five, and six. The default judgment previously entered by the trial court remained as to counts one, two, and seven. Plaintiff subsequently voluntarily dismissed count three.

¶ 10 On August 20, 2012, a prove-up hearing commenced pertaining to the issue of damages for counts one, two, and seven. After hearing testimony and considering the evidence, the trial court entered judgment for plaintiff and against Barone on counts one and two in the amount of \$12,298 and against BarIrving on count seven in the amount of \$28,081.

¶ 11 Thereafter, the parties engaged in discovery with trial scheduled to commence on July 28, 2014. Defendants submitted a motion *in limine* to the trial court on July 21, 2014. Defendants requested evidence regarding the following be excluded: (1) any oral agreements or representations made by defendants; (2) incidental or consequential damages relating to the contract for sale; (3) damages for the common areas of the building; (4) defects in the building, common areas, or residence that are not covered by the limited warranty; and (5) incidental and consequential damages in reference to the breach of warranty claims. Plaintiff filed a response to the motion.

¶ 12 On July 24, 2014, the trial court entered the following order:

"This matter coming to be heard on Defendants' motion *in limine* it is ordered that

Defendants' motion *in limine* is taken under advisement in all respects except that Defendants' motion is granted as respects its motion to bar evidence of damages to the common areas of the building is granted and Plaintiff is precluded from seeking damages related to the common areas of the building.

Plaintiff's motion under 2-1009 to voluntarily dismiss counts IV[,] V[,] and VI of his Second Amended Complaint is granted over Defendants' objection with the Court expressly allowing Plaintiff to refile his claims against Defendants within one year of this dismissal order. All other counts of Plaintiff's complaint including count III having been previously disposed[,] this matter is dismissed. Trial set for July 28, 2014 is stricken."

We note that Plaintiff's motion to voluntarily dismiss counts four, five, and six of the second amended complaint is not contained in the record on appeal. In addition, plaintiff, as the appellant, has failed to provide this court with a record of proceedings or a bystander's report indicating how this motion came before the court.

¶ 13 On August 25, 2014, plaintiff filed a notice of appeal from the July 24, 2014, order requesting this court "reverse those parts of the Judgment Order that grants Defendant's [*sic*] Motion in Limine barring [*sic*] evidence of damages to the common elements of the building based upon the lack of standing of Plaintiff to pursue said damages."

¶ 14 ANALYSIS

¶ 15 On appeal, plaintiff, *pro se*, contends the trial court abused its discretion in granting defendants' motion *in limine* when it found that plaintiff had no standing to seek damages for the common elements of the building. In addition, plaintiff maintains the trial court erred in dismissing defendants Barone Realty and BarIrving on counts one and two of the first amended complaint as well as Barone Realty on count three of the first amended complaint. Lastly,

plaintiff asserts the trial court abused its discretion when it limited the scope of the evidence relating to damages for the defaulted counts (one, two, and seven) of plaintiff's second amended complaint. Based on these arguments, plaintiff seeks to appeal from: (1) the July 24, 2014, order granting a motion *in limine*; (2) the January 21, 2009, order denying in part defendants' motion to dismiss the first amended complaint; and (3) the August 20, 2012, order entering damages on counts one, two, and seven of the second amended complaint.

¶ 16 Jurisdiction

¶ 17 We first address our jurisdiction over this matter. Plaintiff asserts we have jurisdiction to consider this appeal under Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994). Defendants, however, assert we lack jurisdiction where the July 24, 2014, order granting the motion *in limine* was not a final and appealable order.

¶ 18 In this cause, plaintiff appeals after the entry of a voluntary dismissal order. "It is well settled that final orders entered in a case become appealable following a voluntary dismissal." *Dubina v. Mesirow Realty Development, Inc.*, 178 Ill. 2d 496, 503 (1997). An appeal from a final order also draws into issue all prior interlocutory orders which constituted a procedural step in the progression leading to the entry of the final judgment from which an appeal has been taken. *JPMorgan Chase Bank, N.A. v. East-West Logistics, L.L.C.*, 2014 IL App (1st) 121111, ¶ 25.

¶ 19 Although the order of voluntary dismissal rendered all orders which were final in nature, but which were not previously appealable, immediately final and appealable, however, this does not mean we have jurisdiction to review all of plaintiff's claims. With a few statutory and supreme court rule exceptions that are not applicable here, our jurisdiction is limited to reviewing appeals from final judgments. *In re Marriage of Verdung*, 126 Ill. 2d 542, 553 (1989).

"A judgment is final if it determines the litigation on the merits so that, if affirmed, nothing remains for the trial court to do but to proceed with its execution. [Citation.] When an order leaves a cause still pending and undecided, it is not a final order. [Citation.]" (Internal quotation marks omitted.) *Resurgence Financial, LLC v. Kelly*, 376 Ill. App. 3d 60, 62 (2007).

Accordingly, the grant or denial of a motion *in limine* is not a final order, but is an interlocutory order. *Valdovinos v. Luna-Manalac Medical Center, Ltd.*, 307 Ill. App. 3d 528, 538 (1999).

¶ 20 As previously discussed, we have jurisdiction to review interlocutory orders of a trial court only if those orders constitute a procedural step in the progression leading to the entry of the final judgment from which an appeal has been taken. *Id.* When the interlocutory order of a trial court does not constitute such a procedural step, we have no jurisdiction to review it absent some specific statute or rule granting us the power. *Id.* Here, the trial court granted one of defendants' motions *in limine* and took the rest under advisement. This interlocutory order does not constitute a procedural step in granting a motion for voluntary dismissal. See *id.* (concluding the reviewing court lacked jurisdiction to consider an order granting and denying certain of the parties' motions *in limine* as it was not a "procedural step in granting a motion for voluntary dismissal"). Thus, we lack the requisite jurisdiction to review this order.

¶ 21 We further find we lack jurisdiction to review the orders of January 21, 2009, denying in part defendants' motion to dismiss the first amended complaint and the August 20, 2012, order entering damages on counts one, two, and seven of the second amended complaint because plaintiff failed to specify in his notice of appeal that he was seeking review of these orders in violation of Illinois Supreme Court Rule 303(b)(2) (eff. June 4, 2008).

¶ 22 "A notice of appeal confers jurisdiction on a court of review to consider only the judgments or parts of judgments specified in the notice of appeal." *General Motors Corp. v.*

Pappas, 242 Ill. 2d 163, 176 (2011). The purpose of the notice of appeal is to apprise the parties of the nature of the appeal. *Burtell v. First Charter Service Corp.*, 76 Ill. 2d 427, 433-434 (1979). To this end, Illinois Supreme Court Rule 303(b)(2) (eff. June 4, 2008) requires a notice of appeal to "specify the judgment or part thereof or other orders appealed from and the relief sought from the reviewing court." Our courts have consistently held that, although a notice of appeal is to be liberally construed, if the appellant fails to designate an order he is appealing from in his notice of appeal, the appellate court cannot consider that order upon review. *McGath v. Price*, 342 Ill. App. 3d 19, 31 (2003) (and cases cited therein). A notice of appeal, however, need not specify a particular order to confer jurisdiction so long as the order specified in the notice directly relates back to the order sought to be reviewed. *Burtell*, 76 Ill. 2d at 434-35.

¶ 23 Plaintiff's notice of appeal reads in full:

"Plaintiff Thomas J. McCabe, by his attorney, Aron D. Robinson, hereby appeals from the final Judgment Order of this Court dated July 24, 2014, and such other orders and rulings of the Court leading to such Judgment Order, or upon which such Judgment Order was based, insofar as they were adverse to Plaintiff, in this matter.

By this appeal, Plaintiff requests that the Appellate Court (a) reverse those parts of the Judgment Order that grants Defendant's [*sic*] Motion in Limine barring [*sic*] evidence of damages to the common elements of the building based upon the lack of standing of Plaintiff to pursue said damages (Exhibit 1 [the July 24, 2014, order]), (b) allow such other further relief as Plaintiff may be entitled to on this appeal."

¶ 24 We observe that the July 24, 2014, order was expressly listed as the order being appealed from in the notice of appeal. This order is unique in that it granted one of defendants' motions *in limine*, took the remaining motions *in limine* under advisement, and voluntarily dismissed the

remaining counts of plaintiff's complaint. As previously discussed, the purpose of the notice of appeal is to apprise the parties of the nature of the appeal. See *Burtell*, 76 Ill. 2d at 433-434. To defendants, this order was only adverse to plaintiff in that it granted one of their motions *in limine*, it did not reference the prior judgment on counts one, two, and seven nor did it implicate any orders regarding the first amended complaint. In fact, the July 24, 2014, order expressly allowed plaintiff leave to refile his complaint.

¶ 25 We further note that on appeal plaintiff contests the propriety of the January 21, 2009, order regarding the dismissal in part of his first amended complaint. Plaintiff, however, subsequently filed and proceeded to judgment on a second amended complaint, thus abandoning the first amended complaint. See *Funes v. B & B Equipment, Inc.*, 282 Ill. App. 3d 272, 274 (1996) (quoting *Pfaff v. Chrysler Corp.*, 155 Ill. 2d 35, 61 (1992) ("Generally, once an amended pleading is filed, allegations contained in the prior pleading and objections to the trial court's ruling on that pleading are deemed waived, as it 'ceases to be a part of the record for most purposes, being in effect abandoned and withdrawn. [Citation.]' "). Moreover, the denial of a motion to dismiss is not a final order and could not have been appealed after the entry of a voluntary dismissal. See *Saddle Signs, Inc. v. Adrian*, 272 Ill. App. 3d 132, 135-137 (1995) (plaintiff's voluntary dismissal of the cause of action did not make appealable the nonfinal order denying defendant's motion to dismiss). Accordingly, we do not have jurisdiction to consider the January 21, 2009, order, as it was not referenced in the notice of appeal and was not a "step in the procedural progression" leading to the entry of the order on appeal. See *Edward E. Gillen Co. v. City of Lake Forest*, 221 Ill. App. 3d 5, 11 (1991) (holding the reviewing court lacked jurisdiction where "an order dismissing earlier counts of a complaint is not a step in the 'procedural progression' leading to the summary judgment order as to the remaining counts").

¶ 26 Similarly, the August 20, 2012, order entering judgment on counts one, two, and seven of the second amended complaint was not referenced in the notice of appeal. Instead, the notice of appeal sought review of an order that contained no judgment on the pleadings. In fact, as previously discussed, the July 24, 2014, order contained an interlocutory order and an order which dismissed the case in its entirety with leave to refile. Moreover, plaintiff did not seek to amend the notice of appeal to include the August 20, 2012, order. Accordingly, this notice of appeal did not inform defendants that an appeal was being taken from the August 20, 2012, order. Thus, we lack jurisdiction to consider plaintiff's contentions relating to this order as it does not consist of a procedural step leading to the voluntary dismissal of plaintiff's complaint. See *General Motors Corp.*, 242 Ill. 2d at 177 (holding the notices of appeal filed did not confer jurisdiction on the appellate court as the matter the appellant sought to review "constituted an entirely different matter" than the order stated in the notice of appeal); *McGath*, 342 Ill. App. 3d at 32-33 (holding plaintiff's failure to include an order in his notice of appeal was "fatal to the reviewability of that order on appeal.").

¶ 27 **Insufficient Record on Appeal**

¶ 28 Manifestly, we have no jurisdiction in this case, but even if we had jurisdiction plaintiff did not provide a complete record to support his claim of error regarding the August 20, 2012, order. Plaintiff has failed to provide this court with a record of proceedings or to reconstruct the record with either a bystander's report or an agreed statement of facts. See Ill. S. Ct. R. 323 (eff. Dec. 13, 2005). Plaintiff, as the appellant, bears the burden of providing a sufficiently complete record to support his claim or claims of error, and in the absence of such a record on appeal, "it will be presumed that the order entered by the trial court was in conformity with the law and had a sufficient factual basis." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Moreover, any

doubt arising from the incompleteness of the record will be resolved against the appellant. *Id.* at 392.

¶ 29 Plaintiff contends on appeal that the trial court erred in entering the August 20, 2012, order because the court "stated that it would only hear damage evidence as to the delay in closing on the condominium and damages in relation to the interior of the condominium." The record contains no transcript of the hearing where the trial court allegedly made these statements. Further, the August 20, 2012, order, which was authored by plaintiff's counsel, states broadly that the matter was "coming to be heard on prove-up on damages on counts I, II, and VII of Plaintiff's Second Amended Complaint." The order does not state the hearing was limited to damages regarding the delay in closing on the sale of the property and appears to have fully adjudicated the question of damages with respect to those counts. Consequently, even if we had jurisdiction to consider this order, we would presume that the August 20, 2012, order was in conformity with the law and had a sufficient factual basis. See *Foutch*, 99 Ill. 2d at 391-92.

¶ 30 In sum, we lack jurisdiction to review the trial court's decision on a motion *in limine* as it was an interlocutory order that did not constitute a procedural step in granting plaintiff's motion for voluntary dismissal. See *Valdovinos*, 307 Ill. App. 3d at 538. We further lack jurisdiction to consider the orders of January 21, 2009, and August 20, 2012, because they were not specified in plaintiff's notice of appeal in violation of Illinois Supreme Court Rule 303(b)(2) and cannot be deemed to have been a step in the procedural progression leading to the July 24, 2014, order. See *General Motors Corp.*, 242 Ill. 2d at 177; *McGath*, 342 Ill. App. 3d at 32-33.

¶ 31 CONCLUSION

¶ 32 For the aforementioned reasons, we dismiss this appeal for lack of jurisdiction.

¶ 33 Dismissed.