

Opinion issued April 19, 2010



**In The
Court of Appeals
For The
First District of Texas**

NO. 01-10-00182-CV

**IN RE ESTHER ANDERSON AND BENSON & ANDERSON, L.L.P.,
Relators**

Original Proceeding on Petition for Writ of Mandamus

MEMORANDUM OPINION¹

This appeal concerns whether a trial court has the plenary power to rule on a pending motion for sanctions after the opposing party has nonsuited all of its pending

¹ The underlying case is *Delmar Douglas, Christina Blackwell and Susan Douglas v. Violet Adovnik, Esther Anderson and Benson & Anderson, L.L.P.*, No. 2009-14652, in the 133rd Judicial District Court of Harris County, Texas, the Hon. Jaclanel McFarland, presiding.

claims. By a petition for writ of mandamus, relators, Esther Anderson and Benson & Anderson, L.L.P. (collectively “the Anderson defendants”), challenge the trial court’s refusal to rule on the motion because it concluded that it lacked plenary power to rule 30 days after it signed an order granting the opposing parties’ nonsuit. The Anderson defendants contend that the trial court continues to possess plenary power and therefore must hear and rule on the motion. Following the Texas Supreme Court in *Unifund CCR Partners v. Villa* to conclude that plenary power exists here, we conditionally grant mandamus relief.²

Background

An elderly woman, Violet Adovnik, sued her three adult children, real parties in interest Delmar Douglas, Christina Blackwell, and Susan Douglas (collectively “the Douglas plaintiffs”), for theft. Adovnik appeared with her attorney, Esther Anderson, for a televised local news interview in which she described the allegations. Anderson made general statements about how parents should put “checks and balances” in place if a child assumes control of their finances. Thereafter, the Douglas plaintiffs sued Adovnik, Anderson, and Anderson’s law firm for defamation. The Anderson defendants filed an answer and included a motion for sanctions under Texas Civil Practice and Remedies Code section 10.002(c). The Douglas plaintiffs

² *Unifund CCR Partners v. Villa*, 299 S.W.3d 92, 96 (Tex. 2009).

moved to nonsuit their claims, and the trial court signed an order of nonsuit on September 3, 2009 without referring to the pending sanctions motion. The order provides:

Order of Nonsuit

After considering Plaintiffs' Nonsuit of the Defendants and the pleadings, the court grants Plaintiffs' Nonsuit and hereby orders that Cause No. 2009-14652 be Non-Suited.

On November 9, 2009, the trial court conducted a hearing on the motion for sanctions but addressed only whether it possessed jurisdiction. Concluding that it did not because the hearing occurred more than 30 days after it had signed the order of nonsuit, the trial court determined that it was without the power to rule on the motion for sanctions. Specifically, it stated: "I'm going to rule that I don't have jurisdiction, so I can't hear the motion for sanctions." The Anderson defendants moved for a new trial on December 9, 2009, explaining in their motion that the trial court possessed jurisdiction to resolve the sanctions issue. At a hearing on the motion for new trial, the trial court maintained its position that it lacked plenary power.

Standard of Review

Mandamus relief is available to correct certain trial court errors that lack an adequate remedy by appeal. *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding). In particular, mandamus relief is proper when a trial court refuses

to hear and rule on motions due to lack of plenary power. *See In re Granite Shop*, No. 02-08-00410-CV, 2009 WL 485696, at *1 (Tex. App.—Fort Worth Feb. 24, 2009, orig. proceeding) (granting mandamus relief when trial court refused to rule on motion because it mistakenly believed it lacked plenary power); *Safety-Kleen Corp. v. Garcia*, 945 S.W.2d 268, 269 (Tex. App.—San Antonio 1997, orig. proceeding) (granting mandamus relief when trial court refused to rule on motion).

Trial Court Jurisdiction

The Anderson defendants contend that the trial court possesses plenary power because the trial court’s order of nonsuit is interlocutory, as it did not dispose of their request for sanctions. The Douglas plaintiffs respond that the trial court lacks plenary power because the order of nonsuit is a final order that disposed of all affirmative claims for relief.

Texas Rule of Civil Procedure 162 addresses nonsuits, and states: “At any time before the plaintiff has introduced all of his evidence other than rebuttal evidence, the plaintiff may dismiss a case, or take a non-suit. . . . A dismissal under this rule shall have no effect on any motion for sanctions. . . .” TEX. R. CIV. P. 162. A court cannot issue an order of sanctions after its plenary power has expired. *Scott & White Mem’l Hosp. v. Schexnider*, 940 S.W.2d 594, 596 (Tex. 1996). But “[a] judgment dismissing all of a plaintiff’s claims against a defendant, such as an order of nonsuit, does not

necessarily dispose of any cross-actions, such as a motion for sanctions, unless specifically stated within the order.” *Crites v. Collins*, 284 S.W.3d 839, 840 (Tex. 2009); *see also Unifund CCR Partners v. Villa*, 299 S.W.3d 92, 96 (Tex. 2009).

Villa and *Crites* are relevant to the instant matter. 299 S.W.3d at 95; 284 S.W.3d at 840. Each case involved a pending motion for sanctions, the entry of an order of nonsuit, and the determination of whether the order of nonsuit was a final judgment. *See Villa*, 299 S.W.3d at 94; *Crites*, 284 S.W.3d at 840. Notably, the orders of nonsuit in *Villa* and *Crites* had language similar to that the trial court used here, and did not specifically address the pending motion for sanctions. *See Villa*, 299 S.W.3d at 96–97; *Crites*, 284 S.W.3d at 841. In the absence of specific language addressing the motions for sanctions in the orders of nonsuit, in both *Villa* and *Crites*, the Texas Supreme Court held that the orders of nonsuit were not final judgments. *Villa*, 299 S.W.3d at 96; *Crites*, 284 S.W.3d at 841.

The Douglas plaintiffs respond that they “clearly intended to nonsuit the entire case, not just Plaintiffs’ claims. . . .” But with respect to the motion for sanctions, the Douglas plaintiffs did not assert the claim—it was not theirs to nonsuit. Under *Villa*, the order of nonsuit was an interlocutory order and thus did not trigger the clock on the trial court’s plenary power. *Villa*, 299 S.W.3d at 96. Because of the absence of specific language addressing the motion for sanctions, the trial court’s order of

nonsuit did not dispose of it. *Id.*; *Crites*, 284 S.W.3d at 841; *see also* TEX. R. CIV. P. 162 (expressly noting no effect on pending motion for sanctions). Accordingly, we hold that the September 3, 2009 order of dismissal did not dispose of the sanctions motion and thus was not a final order. The trial court thus possesses jurisdiction to hear and rule on the Anderson defendants' motion for sanctions.

Conclusion

We conditionally grant mandamus relief to resolve the issue of the trial court's plenary power, and direct the trial court to hear and rule on the Anderson defendants' motion for sanctions. The writ will issue only if the trial court fails to comply.

Jane Bland
Justice

Panel consists of Justices Jennings, Hanks, and Bland.