Dismissed for Lack of Jurisdiction and Memorandum Opinion filed April 27, 2017.

In The

Fourteenth Court of Appeals

NO. 14-15-01000-CV

EQUIPMENT PERFORMANCE MANAGEMENT, INC., Appellant

V.

BAKER HUGHES, INC. AND BAKER HUGHES OILFIELD OPERATIONS, INC., Appellees

On Appeal from the 190th District Court
Harris County, Texas
Trial Court Cause No. 2014-40269

M E M O R A N D U M O P I N I O N

A plaintiff seeks to appeal an order in which the trial court granted the defendants' summary-judgment motion and dismissed the plaintiff's claims with prejudice. In the order, the trial court did not actually dispose of the defendants' requests for attorney's fees nor state with unmistakable clarity that the order was final. Concluding that the order is interlocutory and that no statute authorizes an interlocutory appeal from the order, we dismiss this case for lack of appellate

jurisdiction.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellees/defendants Baker Hughes, Inc. and Baker Hughes Oilfield Operations, Inc. (collectively, the "Baker-Hughes Parties") hired appellant/plaintiff Equipment Performance Management, Inc. to provide preventative-maintenance services to their pressure-pumping equipment and to perform safety inspections required by the Texas Department of Transportation. According to Equipment Management, the Baker-Hughes Parties hired away the chief of Equipment Management's preventative-maintenance crew in violation of the crew chief's contract with Equipment Management and induced one of Equipment Management's inspectors to start his own company, which the Baker-Hughes Parties then used for their inspections.

Equipment Management sued the Baker-Hughes Parties alleging tortious interference with contract, participation in breach of fiduciary duty, misappropriation of trade secrets, and violations of the Texas Theft Liability Act arising out of the Baker-Hughes Parties' alleged actions. The Baker-Hughes Parties denied liability and sought to recover attorney's fees under Civil Practice and Remedies Code section 134.005(b), which entitles a defendant to recover its reasonable and necessary attorney's fees for successfully defending a claim based on an alleged violation of the Texas Theft Liability Act. *See* Tex. Civ. Prac. & Rem. Code Ann. § 134.005(b).

The Baker-Hughes Parties then moved for traditional and no-evidence summary judgment on all of Equipment Management's claims. The trial court granted summary judgment. In moving for summary judgment, the Baker-Hughes Parties had not sought or proved any amount of attorney's fees. And, in granting summary judgment, the trial court did not award any amount of attorney's fees. In

its summary-judgment order, the trial court dismissed Equipment Management's claims with prejudice.

Equipment Management appealed. The day after Equipment Management filed its notice of appeal, the Baker-Hughes Parties moved to modify the summary judgment. In their motion to modify, the Baker-Hughes Parties undertook to prove their attorney's fees and asked the trial court to modify the judgment to include the amount of attorney's fees and costs to which the Baker-Hughes Parties were entitled. The trial court has taken no action on the motion to modify the judgment.

On appeal, the Baker-Hughes Parties assert that this court lacks jurisdiction over this appeal because the trial court's judgment is interlocutory. Obliged to determine our own jurisdiction, *see City of Houston v. Rhule*, 417 S.W.3d 440, 442 (Tex. 2013), we consider as a threshold question whether the trial court's judgment is final for purposes of appeal. If it is not, we lack appellate jurisdiction to proceed.

II. JURISDICTIONAL ANALYSIS

No statute authorizes an interlocutory appeal in this case, so this court has jurisdiction over this appeal only if the trial court's summary-judgment order is final. *See Stary v. DeBord*, 967 S.W.2d 352, 352–53 (Tex. 1998) (per curiam). An order issued without a conventional trial on the merits is final for purposes of appeal if it (1) actually disposes of all claims and all parties before the court or (2) states with unmistakable clarity that it is a final judgment. *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 192, 200 (Tex. 2001).

A. The judgment does not actually dispose of all parties and claims or state with unmistakable clarity an intent to do so.

The trial court did not include any language indicating that its summary-judgment order was final or that the order resolved all claims between and among

all parties. Nor did the trial court state with unmistakable clarity that the trial court rendered a final judgment. *See Lehmann*, 39 S.W.3d at 200 (192).

In the summary-judgment order, the trial court actually disposed of Equipment Management's claims, but the trial court did not dispose of the Baker-Hughes Parties' requests for attorney's fees. The trial court ordered that the Baker-Hughes Parties "are entitled to such other relief, whether at law or in equity, including attorney['s] fees, to which they may be entitled." Under the unambiguous wording of the trial court's order, the trial court did not determine whether the Baker-Hughes Parties are entitled to any attorney's fees. The trial court did not award the Baker-Hughes Parties any attorney's fees. Nor did the trial court conclude that the Baker-Hughes Parties should not recover any attorney's fees. A summary-judgment order that does not dispose of a party's request for attorney's fees does not dispose of all claims and parties. *See McNally v. Guevara*, 52 S.W.3d 195, 196 (Tex. 2001) (concluding judgment in which court did not dispose of defendant's request for attorney's fees was interlocutory); *Fleming & Assocs., L.L.P. v. Kirklin*, 479 S.W.3d 458, 461 (Tex. App.—Houston [14th Dist.] 2015, pet. denied). Although the Baker-Hughes Parties incorrectly stated in their motion to modify that the summary-judgment order is final, on appeal, the Baker-Hughes Parties consistently assert that the order is interlocutory and they seek dismissal of the appeal for lack of appellate jurisdiction. Because the trial court did not dispose of the Baker-Hughes Parties' requests for attorney's fees under Civil Practice and Remedies Code section 134.005(b), the trial court did not dispose of all claims and parties.[1] *See McNally*, 52 S.W.3d at 195; *Fleming*, 479

[1] The record contains no severance order or nonsuit by the Baker-Hughes Parties of their attorney's-fees requests. No party asserts that the trial court ordered a severance or that the Baker-Hughes Parties nonsuited these requests.

S.W.3d at 461.

B. Treating the summary-judgment order as final does not make the summary-judgment order final.

On appeal, Equipment Management argues that the summary-judgment order is final for two reasons. First, Equipment Management urges that the Baker-Hughes Parties and the trial court intended the summary-judgment order to be final. Second, Equipment Management argues that even if the summary-judgment order was not final when the trial court signed it, the order became final when the Baker-Hughes Parties' motion to modify the judgment was overruled by operation of law under Texas Rule of Civil Procedure 329b. We reject both arguments.

In support of its first argument (the summary-judgment movants and the trial court intended the summary-judgment order to be final), Equipment Management notes that the Baker-Hughes Parties called the order a final judgment in their motion to modify and the trial court's docket sheet reads, "Final Judgment Signed."[2] But, calling or labeling an order a "final judgment" does not make it one. *See Lehmann*, 39 S.W.3d at 200.

Litigants cannot confer jurisdiction on an appellate court by stating in the trial court their belief that a judgment is final. *See In re Crawford & Co.*, 458 S.W.3d 920, 928 n. 7 (Tex. 2015); *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 76 (Tex. 2000). Nor can they confer jurisdiction on the court of appeals by consent, waiver, or estoppel. *See Dubai*, 12 S.W.3d at 76; *Taub v. Aquila Southwest Pipeline Corp.*, 93 S.W.3d 451, 461 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

[2] Although the Baker-Hughes Parties incorrectly stated in their motion to modify that the order is final, on appeal, they assert that the order is interlocutory and they urge this court to dismiss the appeal for lack of appellate jurisdiction.

We must determine whether the summary-judgment order is final based on a review of the order itself. *See Youngblood & Assocs., P.L.L.C. v. Duhon*, 57 S.W.3d 63, 65 (Tex. App.—Houston [14th Dist.] 2001, no pet.). An order is final only if it actually disposes of every pending claim and party or it states with unmistakable clarity that it is final. *See Lehmann*, 39 S.W.3d192, 200. A statement in the trial court's docket sheet that an order is final does not make the order final. *See In re Le*, 14-14-00446-CR, 2014 WL 3907991, at *3 (Tex. App.—Houston [14th Dist.] Aug. 12, 2014, orig. proceeding); *Youngblood*, 57 S.W.3d at 65 (holding that labeling a judgment "final judgment" does not make the judgment final). The content of the judgment, not its label, governs the finality determination.

C. The motion to modify judgment was not overruled by operation of law.

In support of its second argument (the summary-judgment order became final when the motion to modify was overruled by operation of law), Equipment Management points to Rule 329b and relies on its overruling-by-operation-of-law provision. But, an interlocutory order does not trigger Rule 329b. *In re Fischer*, No. 14-11-0482-CV, 2011 WL 2899128, at *2 (Tex. App.—Houston [14th Dist.] Jul. 21, 2011, orig. proceeding [mand. denied]).

The trial court's summary-judgment order did not become final when the trial court failed to rule on the Baker-Hughes Parties' motion to modify and award attorney's fees and costs. Because the summary-judgment order was interlocutory, Rule 329b was never triggered, and the timetable for expiration of plenary power never began. *See* Tex. R. Civ. P. 329b; *In re Fischer*, No. 14-11-0482-CV, 2011 WL 2899128, at *2 (Tex. App.—Houston [14th Dist.] Jul. 21, 2011, orig. proceeding [mand. denied]). Therefore, the Baker-Hughes Parties' motion to modify and requests for attorney's fees have not been overruled by operation of

law. *See* Tex. R. Civ. P. 329b; *In re Fischer*, 2011 WL 2899128, at *2. The trial court has not ruled on the motion to modify or the requests for attorney's fees, and they remain pending in the trial court. *See* Tex. R. Civ. P. 329b; *In re Fischer*, 2011 WL 2899138, at *2.

III. CONCLUSION

In the summary-judgment order, the trial court did not actually dispose of all claims and all parties, nor did the trial court state with unmistakable clarity that the order was final. The trial court has not severed the Baker-Hughes Parties' requests for attorney's fees into another case, nor have the Baker-Hughes Parties nonsuited these requests. So, the summary-judgment order is interlocutory. *Clark v. Pimienta,* 47 S.W.3d 485, 486 (Tex. 2001). Because no statute provides for an interlocutory appeal from the summary-judgment order, this court lacks appellate jurisdiction to review it. *See In the Interest of E.S.*, No. 14–14–00328–CV, 2015 WL 1456979, at *3 (Tex. App.—Houston [14th Dist.] Mar. 26, 2015, no pet. h.) (mem. op.).

Because we have no appellate jurisdiction, we cannot and do not reach the merits of Equipment Management's appeal, and we dismiss the appeal for lack of jurisdiction. *See Lehmann*, 39 S.W.3d at 200; *Youngblood*, 57 S.W.3d at 65–66.

/s/ Kem Thompson Frost
Chief Justice

Panel consists of Chief Justice Frost and Justices Jamison and Brown.