In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-09-00527-CV

QUWANDA GRANT AND CELESTE BROWN, Appellants

V.

HOPE VILLAGE APARTMENTS, Appellee

On Appeal from the County Court
Jasper County, Texas
Trial Cause No. 2836

MEMORANDUM OPINION

The appellants, Quwanda Grant and Celeste Brown (the tenants) seek attorney's fees and taxable costs following Hope Village's non-suit of its forcible entry and detainer case.[1] In three appellate issues, the tenants contend (1) the trial court's order of September 11, 2009, is not a final and appealable judgment; (2) the trial court's August 21, 2009, order releasing funds from the court's registry should be vacated; and (3) the

[1]Similar issues regarding the finality of the trial court's orders are raised in another appeal involving a different tenant but the same landlord, which is styled *Johnson v. Hope Village Apartments*, No. 09-09-00526-CV, __ WL __ (Tex. App.—Beaumont, October 28, 2010, no pet. h.).

trial court's August 6, 2009, order of dismissal allowed the trial court to avoid ruling on their pending motions and claims.

While the tenants filed a notice of appeal from the trial court's September 11 order, the tenants' issues attack the trial court's August 6 order of dismissal and the trial court's order of August 21 releasing funds from the court's registry. We conclude that the tenants failed to timely perfect an appeal from the trial court's final and appealable August 6 order. As the tenants did not timely file their notice of appeal, and their notice was filed more than fifteen days after the date it was due, we are without jurisdiction to reach the complaints the tenants raise about the August 6 order of dismissal.

We further conclude that the trial court's order of August 21, 2009, is separately appealable. While the tenants failed to timely perfect an appeal from the trial court's August 21 order, their notice of appeal was filed within fifteen days of their filing deadline to perfect an appeal from that order. Under Rule 26.3 of the Texas Rules of Appellate Procedure, we are authorized to grant the tenants an extension, which allows our exercise of appellate jurisdiction over the trial court's August 21 order. Therefore, we consider the tenants' complaints only as they relate to the trial court's August 21 order.

Background

In September 2006, the tenants leased an apartment from Hope Village. In March 2009, claiming that the tenants had not paid the rental amounts that were due, Hope Village filed a forcible entry and detainer action in the justice of the peace court. After Hope Village obtained a judgment giving it the right to possess the apartment the tenants

had leased, the tenants exercised their right to appeal to the county court for a trial de novo. *See* Tex. R. Civ. P. 749. To stay the order giving Hope Village the right to possession during the appeal, the tenants paid rent as it became due into the county court's registry. *See* Tex. R. Civ. P. 749b.

After both parties filed motions for summary judgment in the trial court, and for reasons that are not apparent from the record, Hope Village decided to dismiss the proceedings. In July 2009, Hope Village filed a notice with the county clerk non-suiting its forcible entry and detainer case. On August 6, 2009, the trial court entered an "Order Confirming Nonsuit." When the trial court signed the order non-suiting all claims, the tenants' answer was their live pleading. The tenants' answer asserts a general denial and several affirmative defenses. The record does not reflect that the tenants ever filed a counterclaim. However, the tenants' live pleading requests awards of attorney's fees and costs of court.

Before the trial court entered the order of dismissal, the tenants filed a traditional motion for summary judgment. *See* Tex. R. Civ. P. 166a(c). The tenants' motion for summary judgment asserts that the tenants' lease was not properly terminated. The tenants' motion for summary judgment asks the trial court to enter a take-nothing judgment, requests the trial court to dismiss Hope Village's case with prejudice, and requests that Hope Village be taxed with costs.

Two weeks after the trial court entered the order of dismissal, Hope Village filed a motion requesting the trial court to release to it funds that Johnson had paid into the

court's registry. Although the record before us is not complete, we assume that the tenants had deposited funds in the court's registry based on the provisions of Rule 749b(2) of the Texas Rules of Civil Procedure.[2] On the same day that Hope Village filed its motion asking the court to release funds, the tenants filed their motion opposing the release of the funds, claiming that the August 6 order of dismissal had not dismissed all claims. On August 21, 2009, the trial court signed an order releasing "all such funds" to Hope Village.

Finality of August 6 Order

In issue one, the tenants assert the trial court's order of September 11, 2009 is not a final order because the order did not "dispose of every pending claim" and because the order does not recite that it was intended to be a final order. In response, Hope Village asserts that the trial court's order of August 6 disposed of all claims and parties because the tenants had no pending claims for affirmative relief when Hope Village non-suited its claims.

Under the Texas Rules of Civil Procedure, a plaintiff may dismiss a case or take a non-suit at any time prior to introducing all of his evidence, other than rebuttal evidence. Tex. R. Civ. P. 162. "The trial court generally has no discretion to refuse to dismiss the suit, and its order doing so is ministerial." *Univ. of Tex. Med. Branch at Galveston v.*

[2]The partial record before us does not reveal the amount that the tenants paid into the court's registry, but we assume that they followed the provisions of Rule 749b by depositing the amount of rent "due under the rental agreement." Tex. R. Civ. P. 749b(2). The tenants do not assert in their appeal that Hope Village received more than the amount of rent due to it under the rental agreement.

Estate of Blackmon, 195 S.W.3d 98, 100 (Tex. 2006). While a non-suit is effective when filed, the date the trial court signs its dismissal order is "the 'starting point for determining when a trial court's plenary power expires[.]'" *Id*. (quoting *In re Bennett*, 960 S.W.2d 35, 38 (Tex. 1997)).

As *Blackmon* explained, Rule 162 provides that a plaintiff's right to non-suit neither prejudices an adverse party's right to be heard on pending claims for affirmative relief nor excuses payment of costs taxed by the clerk. *Id.*; *see* Tex. R. Civ. P. 162. Further, a dismissal does not affect "any motion for sanctions, attorney's fees or other costs, pending at the time of dismissal[.]" Tex. R. Civ. P. 162. Claims for affirmative relief "must allege a cause of action, independent of the plaintiff's claim, on which the claimant could recover compensation or relief, even if the plaintiff abandons or is unable to establish his cause of action." *Blackmon*, 195 S.W.3d at 101.

The tenants argue that the trial court's September 11 order denying all pending motions did not dispose of all pending claims and does not contain any language of finality. The tenants point to their request for attorney's fees and costs as the claims they made that were still "pending" when the trial court entered the order of dismissal. However, after reviewing the pleadings on file when the trial court entered its order of dismissal, we conclude that neither the tenants' motion for summary judgment nor their live answer contain independent claims for affirmative relief.

To allege a claim seeking affirmative relief, a defendant must allege that he "has a cause of action, independent of the plaintiff's claim, on which he could recover benefits,

compensation or relief[.]" *Gen. Land Office v. OXY U.S.A., Inc.*, 789 S.W.2d 569, 570 (Tex. 1990) (quoting *Weaver v. Jock*, 717 S.W.2d 654, 657 (Tex. App.—Waco 1986, writ ref'd n.r.e.)). "If a defendant does nothing more than resist plaintiff's right to recover, the plaintiff has an absolute right to the nonsuit." *Id*. Generally, matters of avoidance, not affirmative claims, are found in a defendant's answer. Affirmative defenses are theories by which a defendant seeks to avoid liability for the claims advanced by the plaintiff. *See* Tex. R. Civ. P. 94 (requiring the defendant to plead matters "constituting an avoidance or affirmative defense"). On the other hand, and while a claim for affirmative relief can theoretically be found in an answer, a claim for affirmative relief is still required to contain "a short statement of the cause of action sufficient to give fair notice of the claim involved[.]" Tex. R. Civ. P. 47.

A request for attorney's fees in the defendant's answer, not made in connection with an affirmative claim alleging that the opposing party has independently committed a breach of the party's contract, does not constitute a claim for affirmative relief. *See Leon Springs Gas Co. v. Rest. Equip. Leasing Co*., 961 S.W.2d 574, 578 (Tex. App.—San Antonio 1997, no pet.).[3] The tenants' answer does not allege an independent claim for attorney's fees based on Hope Village's alleged breach of the lease. Moreover, the tenants' answer contains no reference to a statutory basis for the tenants' request for

[3]In *Villafani*, the Texas Supreme Court cites to the *Leon Springs* opinion for the proposition that "[a] claim for attorney's fees is not an affirmative claim where it is based solely on the defense against the other party's claims but is an affirmative claim where it is based on an independent ground or as a sanction." *Villafani v. Trejo*, 251 S.W.3d 466, 470 (Tex. 2008).

attorney's fees, nor does their answer contain a short statement of their attorney's fee claim that explains the basis upon which the tenants claim to be entitled to a recovery of attorney's fees. Because the tenants' answer fails to contain a statement of an affirmative claim for relief as contemplated by Rule 47 of the Texas Rules of Civil Procedure, we conclude the tenants had no pending independent claim for attorney's fees when the trial court dismissed Hope Village's case.

Next, we address whether the tenants had a pending claim for costs when the trial court dismissed the case on August 6. In their brief, the tenants acknowledge that the trial court has plenary power to rule on a motion for costs. While the tenants requested a recovery of costs in their answer and in their motion for summary judgment, the record does not reflect that the tenants ever filed a motion to tax costs to Hope Village, or that they provided the trial court with any evidence that they had incurred costs taxable to Hope Village. Moreover, the tenants fail to provide any record reference in their brief to indicate where the record reflects that they paid any taxable costs. Moreover, a prayer to recover taxable costs is not considered to be a claim for affirmative relief. *Anglo Exploration Corp. v. Grayshon*, 562 S.W.2d 567, 568 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ ref'd n.r.e.).

We hold that the tenants' answer and motion for summary judgment that merely ask for a recovery of costs do not raise affirmative claims for relief within the meaning of Rule 47 of the Texas Rules of Civil Procedure. Therefore, the tenants' requests to recover

costs were not pending independent claims for affirmative relief when the trial court entered its August 6 order of dismissal.

In arguing that their pleadings raised independent claims, the tenants' brief refers to the Texas Supreme Court's denial of Hope Village's motion to dismiss a mandamus that arose from a discovery dispute involving another tenant whose case is mentioned in footnote one. The discovery dispute in that matter, involving a tenant named Benjie Johnson, resulted in a mandamus filed in our court. *In Re Benjie F. Johnson*, No. 09-09-00194-CV, 2009 WL 1650343, *2 (Tex. App.—Beaumont, June 11, 2009, orig. proceeding [mand. denied]). We refused Johnson's writ, which, had it been granted, would have allowed him to avoid the trial court's order requiring that he submit to a deposition. Johnson then filed a petition for mandamus in the Texas Supreme Court concerning the same matter, which was also denied. *Id*. Here, the tenants argue that the Texas Supreme Court's denial of Hope Village's motion to dismiss on the basis the matter was moot constitutes an implicit ruling that Johnson still had pending claims. Without citing any legal authority, the tenants argue that the law of the case doctrine[4] establishes that "this matter is not mooted and there remains a live controversy that requires resolution."

Although "[a]ppellate briefs are to be construed reasonably, yet liberally, so that the right to appellate review is not lost by waiver[,]" we conclude that the tenants have

[4]"The 'law of the case' doctrine is defined as that principle under which questions of law decided on appeal to a court of last resort will govern the case throughout its subsequent stages." *Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986).

not sufficiently briefed their "law of the case" argument to require that it be addressed on its merits. *Perry v. Cohen*, 272 S.W.3d 585, 587 (Tex. 2008). We are not required to make the tenants' argument for them, nor are we required to brief the argument on their behalf. *See George v. Houston Eye Assocs.*, No. 14-02-00629-CV, 2003 WL 22232651, at *3 (Tex. App.—Houston [14th Dist.] Sept. 30, 2003, pet. denied) ("It is not the appellate court's responsibility to create the appellant's argument."). To the extent that the tenants argue that the "law of the case" doctrine dictates a result in their favor, we hold that the tenants' brief is inadequate to present a challenge to the finality of the trial court's ruling on that basis. *See* Tex. R. App. P. 38.1(i); *Kupchynsky v. Nardiello*, 230 S.W.3d 685, 692 (Tex. App.—Dallas 2007, pet. denied) (issue inadequately briefed when party gave general cite to one case stating elements of cause of action); *Sterling v. Alexander*, 99 S.W.3d 793, 798-99 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (issue inadequately briefed when party failed to make proper citations to authority or the record and in failing to make a cogent argument); *Wheeler v. Methodist Hosp.*, 95 S.W.3d 628, 646 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (issue inadequately briefed when party did little more than summarily state his point of error, without citations to legal authority or substantive analysis); *Velasquez v. Waste Connections, Inc.*, 169 S.W.3d 432, 436 (Tex. App.—El Paso 2005, no pet.) (issue inadequately briefed when argument did not contain any references to relevant cases or legal principles).

Having determined that the tenants had no independent pending claims for affirmative relief when the trial court dismissed the case, we now address whether the

absence of an express statement to the effect that the trial court intended the order of dismissal to function as a final judgment undermines the finality of the trial court's order. An order dismissing all claims in a case is a final judgment. *See Ritzell v. Espeche*, 87 S.W.3d 536, 538 (Tex. 2002) ("'[A]n order that expressly disposes of the entire case is not interlocutory merely because the record fails to show an adequate motion or other legal basis for the disposition.'") (quoting *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 206 (Tex. 2001)). Although the trial court's order of non-suit does not recite that the trial court intended the dismissal to function as a final judgment, an order of dismissal that disposes of all claims for affirmative relief functions as a final judgment and is appealable. *See Lehmann*, 39 S.W.3d at 192-93 (explaining that "a judgment issued without a conventional trial is final for purposes of appeal if and only if either it actually disposes of all claims and parties then before the court, regardless of its language, or it states with unmistakable clarity that it is a final judgment as to all claims and all parties."). Here, the trial court's August 6 order of dismissal was final and appealable because it dismissed all of Hope Village's pending claims, and the tenants had pled no independent affirmative claims for relief. *Cf. Crites v. Collins*, 284 S.W.3d 839, 840-41 (Tex. 2009) (explaining that an order of non-suit did not function as a final judgment where it did not dispose of a cross-action requesting sanctions).

Because the order was final, we must now determine whether we have jurisdiction over that part of an appeal that complains of the trial court's August 6 order. Where a party files a motion for new trial, a notice of appeal must be filed within ninety days after

the judgment is signed. *See* Tex. R. App. P. 26.1(a)(1) (providing that notice of appeal must be filed within 90 days after judgment is signed where any party files a timely motion for new trial). The tenants filed their notice of appeal on November 20, 2009, more than ninety days after the trial court entered its August 6 order.

The deadline to file a notice of appeal runs from the date of the judgment.[5] *Id*. The trial court's rulings on the tenants' motions can be appealed as part of their appeal from the trial court's final judgment. *Id.* We conclude that the tenants' deadline to appeal from the trial court's rulings of August 6 and September 11 began to run from August 6, the date the trial court ordered a dismissal of all claims that were at that point in time pending. By failing to timely file a notice of appeal, the tenants allowed the August 6 order of dismissal to become final.

In summary, the tenants' complaints in issue one attacking the September 11 order are controlled by the trial court's August 6 order of dismissal. The tenants failed to timely perfect an appeal from the trial court's August 6 order, depriving us of jurisdiction to consider the complaints they make with respect to the trial court's ruling on their motion for new trial and motion for summary judgment. Issue one is dismissed for want of jurisdiction.

In issue three, the tenants complaints all concern the trial court's August 6 order. For the same reasons, we further conclude that we do not have jurisdiction over the

[5]The tenants' appeal with respect to the August 6 order does not fall within the fifteen day grace period during which an appellate court may grant an extension for filing the notice. Tex. R. App. P. 26.3.

tenants' issue three complaints. We dismiss the tenants' complaints in issue one and three for want of jurisdiction.

August 21 Order Releasing Funds

In issue two, the tenants complain about Hope Village's failure to file a sworn motion to procure a release of the funds they had deposited into the court's registry. Generally, a trial court has authority to enter post-judgment orders to enforce its judgment. *See* Tex. R. Civ. P. 308. Post-judgment orders "enforcing the court's judgment itself are appealable orders; they function like judgments." *Cook v. Stallcup*, 170 S.W.3d 916, 920 (Tex. App.—Dallas 2005, no pet.)

With respect to forcible entry and detainer cases, Rule 749b(4) provides a trial court with three alternative circumstances allowing a trial court to permit the landlord to withdraw funds deposited by a pauper into the court's registry. *See* Tex. R. Civ. P. 749b(4). One of these authorizes trial courts to release funds in the court's registry when the appeal of a forcible entry and detainer case is dismissed. Tex. R. Civ. P. 749b(4)(b).

On August 21, 2009, the trial court entered an order that required "all such funds be paid to [Hope Village]." The trial court's order was entered after the trial court dismissed the case. Because the August 21 order was intended to enforce the trial court's order of dismissal, it is separately appealable. *See Cook*, 170 S.W.3d at 920.

We now address whether we have jurisdiction to hear an appeal complaining in part about the trial court's order of August 21. The deadline to file a notice of appeal from the August 21 order was November 19, 2009, and the tenants filed their notice of

appeal on November 20, 2009. Thus, the tenants failed to perfect a timely appeal by filing their notice of appeal within ninety days of the trial court's August 21 order. See Tex. R. App. P. 26.1(a)(1). Nevertheless, the tenants' notice of appeal was filed within the fifteen day grace period allowed, extending the time to perfect appeals. *See* Tex. R. App. P. 26.3. Because their notice was filed in the grace period allowed under Rule 26.3, we imply that the tenants intended to request an extension. *See Verburgt v. Dorner*, 959 S.W.2d 615, 617 (Tex. 1997) (holding that in civil cases, "a motion for extension of time is necessarily implied" when the appellant, acting in good faith, files notice of appeal beyond time permitted by Rule 26.1, but within fifteen-day period in which the appellant would be entitled to move to extend filing deadline under Rule 26.3).

The tenants' explanation for filing their notice of appeal beyond the ninety day period is apparent from the argument that they make in their brief. Although the tenants are mistaken with respect to whether their pleadings assert independent claims for affirmative relief for the reasons we have already explained, the tenants' confusion may be considered to constitute a reasonable explanation for their delay in filing a timely notice of appeal. *See Hone v. Hanafin*, 104 S.W.3d 884, 886-87 (Tex. 2003) (explaining that ordinarily, the appeals court should accept the appellant's explanation for his delay as reasonable). Accepting the tenants' confusion about their deadline to file a timely notice of appeal, we extend the tenants' deadline for filing the notice of appeal from the

August 21 order by one day to avoid a dismissal of the tenants' complaints about the trial court's August 21 order.[6]

Having extended the tenants' deadline to appeal from the August 21 order, we turn to the tenants' issue two complaints. In issue two, the tenants assert the trial court's order of August 21 should be vacated "because the requirements under Texas Rule of Civil Procedure 749b(4) were not met." The tenants' argument presumes, incorrectly, that when the trial court dismissed the case on August 6 the tenants still had pending independent claims for attorney's fees and costs. Based on the tenants' belief that they had pending independent claims, the tenants argue that Hope Village "needed to comply with the proper subsections of Rule 749(b); which is subsection [749b(4)](a) and not (b)." However, the tenants' brief states that they "do not oppose [Hope Village] obtaining the funds from the registry[.]" Nevertheless, the tenants contend the trial court should have required Hope Village to file a sworn motion complying with the provisions of Rule749b(4)(a)[7] before releasing the funds on deposit to Hope Village.

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[6]We are unable to use Rule 26.3 of the Texas Rules of Appellate Procedure to save the tenants' appeal of the August 6 order, as their notice was filed beyond fifteen days of the deadline. *See Verburgt*, 959 S.W.2d at 617 (stating "once the period for granting a motion for extension of time under Rule [26.3] has passed, a party can no longer invoke the appellate court's jurisdiction.").

[7]The tenants' brief asserts that the trial court failed to hold a hearing on Hope Village's motion to withdraw funds, but the trial court's August 21 order recites that the order was entered "after reviewing the pleadings and the evidence, and hearing any arguments of counsel[.]" We have no transcript of a hearing conducted by the trial court resulting in the August 21 order, but we expressly note that the tenants have not raised an issue complaining of the lack of an evidentiary hearing, nor have they shown that they

Rule 749b provides:

> In a nonpayment of rent forcible detainer case a tenant/appellant who has appealed by filing a pauper's affidavit under these rules shall be entitled to stay in possession of the premises during the pendency of the appeal, by complying with the following procedure:
>
> (1) Within five days of the date that the tenant/appellant files his pauper's affidavit, he must pay into the justice court registry one rental period's rent under the terms of the rental agreement.
>
> (2) During the appeal process as rent becomes due under the rental agreement, the tenant/appellant shall pay the rent into the county court registry within five days of the due date under the terms of the rental agreement.
>
> (3) If the tenant/appellant fails to pay the rent into the court registry within the time limits prescribed by these rules, the appellee may file a notice of default in county court. Upon sworn motion by the appellee and a showing of default to the judge, the court shall issue a writ of restitution.
>
> (4) Landlord/appellee may withdraw any or all rent in the county court registry upon a) sworn motion and hearing, prior to final determination of the case, showing just cause, b) dismissal of the appeal, or c) order of the court upon final hearing.
>
> (5) All hearings and motions under this rule shall be entitled to precedence in the county court.

Tex. R. Civ. P. 749(b).

We have previously explained that the trial court's August 6 order of dismissal effectively dismissed all of Hope Village's claims, and that the tenants' pleadings assert no independent claims for affirmative relief. Rule 749b reinforces the general authority trial courts posses over funds in their registries. "Funds on deposit in the registry of a trial

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were harmed because they were unable to present evidence at a hearing on Hope Village's motion. Based on the tenants' brief, we assume that Hope Village credited the tenants' accounts in an amount equal to the funds the trial court released. *See* Tex. R. Civ. P. 749b(1)-(2).

court are always subject to the control and order of the trial court, and the court enjoys great latitude in dealing with them." *Burns v. Bishop*, 48 S.W.3d 459, 467 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

Because Rule 749b(4)(b) expressly authorizes trial courts to release funds in their registries upon the dismissal of the appeal, we conclude the trial court was authorized to enter the order that is now in dispute. *See* Tex. R. Civ. P. 749b(4)(b). The tenants do not claim they are entitled to receive any of the funds that the trial court released based on its order dated August 21. In light of the trial court's dismissal of their appeal, and because there appears to be no dispute that Hope Village is entitled to the funds in the registry based on the tenants' obligation to pay rent that accrued during their appeal, we conclude the trial court did not err by entering an order releasing the funds to Hope Village. We overrule issue two.

Conclusion

We have no jurisdiction over the complaints that the tenants raise concerning the trial court's August 6 order. Issues one and three of the tenants' appeal are dismissed for want of jurisdiction. With respect to the tenants' second issue, which concerns the trial court's release of funds from its registry, we hold the trial court did not err in releasing the funds the tenants had deposited in the court's registry. The funds in the court's registry were due Hope Village for past due rent and were subject to being released upon a dismissal of the appeal of the forcible entry and detainer case that had originated in the

justice of the peace court. Finding no reversible error with respect to the trial court's entry of the August 21 order, we affirm the trial court's August 21 order.

Affirmed in Part, Dismissed in Part – Want of Jurisdiction.

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HOLLIS HORTON
Justice

Submitted on September 15, 2010
Opinion Delivered October 28, 2010
Before McKeithen, C.J., Kreger and Horton, JJ.