In the
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-23-00038-CV

KEVIN W. MATTHEWS, Appellant

V.

NALCO COMPANY, LLC D/B/A ECOLAB, INC., Appellee

On Appeal from the 13th District Court
Navarro County, Texas
Trial Court No. D22-30319-CV

Before Stevens, C.J., van Cleef and Rambin, JJ.
Memorandum Opinion by Chief Justice Stevens

MEMORANDUM OPINION

Kevin W. Matthews appeals the Navarro County[1] district court's dismissal of his lawsuit against his former employer pursuant to a Rule 91a motion to dismiss[2] and its order awarding attorney fees. Matthews asserts that the trial court erred in dismissing his lawsuit and asserts several issues in support of his contention, including that the motion should have been denied because it was not timely filed. He also asserts that the order awarding attorney fees is void. Because we agree that the trial court erred in granting the Rule 91a motion to dismiss when it was not timely filed and that the order awarding attorney fees is void, we will reverse the trial court's judgment and the order awarding attorney fees.

I. Background

On February 28, 2022, Matthews sued his former employer, which his original petition named as "Nalco Company LLC d/b/a ECOLAB, INC."; asserted claims for employment discrimination and breach of arbitration agreement; and sought damages, declaratory relief, and an injunction. Citation was issued on March 2, 2022, to "Nalco Champion L.L.C." and indicated that the style of the case was "Kevin W. Matthews VS Nalco Champion L.L.C." The return of service showed that "**NALCO CHAMPION L.L.C.**" was served with the original petition and citation by delivering the same "**to its Registered Agent, CT CORPORATION SYSTEM**" on March 3, 2022.

---

[1]Originally appealed to the Tenth Court of Appeals, this case was transferred to this Court by the Texas Supreme Court pursuant to its docket equalization efforts. *See* TEX. GOV'T CODE ANN. § 73.001. We are unaware of any conflict between precedent of the Tenth Court of Appeals and that of this Court on any relevant issue. *See* TEX. R. APP. P. 41.3.

[2]*See* TEX. R. CIV. P. 91a.

On May 18, 2022, ChampionX filed a waiver and acceptance of service under Rule 119 and accepted service of the lawsuit. On June 13, 2022, ChampionX filed a Rule 91a motion to dismiss Matthews's original petition and asserted that it was the proper defendant but had been "improperly named Nalco Company LLC *d/b/a* Ecolab, Inc." Matthews filed his first amended petition, renamed the defendant as "Nalco Company LLC d/b/a ECOLAB, INC. d/b/a Champion X L.L.C.," and reasserted his employment discrimination and breach of arbitration claims as well as his request for damages, declaratory relief, and an injunction. Matthews also filed a response to the motion to dismiss and asserted, *inter alia*, that the defendant had been served on March 3, 2022, that ChampionX lacked standing to file the motion to dismiss, and that the motion to dismiss was untimely because it was not filed within sixty days of service of the original petition.

ChampionX withdrew its first motion to dismiss, filed its second Rule 91a motion to dismiss the amended petition, and sought dismissal of Matthews's breach of arbitration agreement claim, including its request for declaratory relief. In its second motion to dismiss, ChampionX admitted that "Nalco Champion LLC d/b/a Nalco Champion" was Matthews's "employer and the proper defendant in this case." It also stated that its second motion to dismiss was "filed on behalf of Nalco Champion, LLC d/b/a Ecolab, Inc. and all entities named in this lawsuit." ChampionX also asserted that it had standing because

> the Arbitration Agreement define[d] "Company" as: "Ecolab and its subsidiaries, divisions and business units; any entity or person alleged to have joint and several liability concerning any Dispute; all of their directors, officers, employees and agents; every plan of benefits established or maintained by any such entity; the fiduciaries, agents and employees of all such plans; and the successors and assigns of all such entities, plans and persons."

It then concluded that, "[t]hus, ChampionX [was] covered under the Agreement and ha[d] standing to file the . . . Motion to Dismiss."

Matthews filed a response to the second motion to dismiss and again asserted, *inter alia*, that ChampionX lacked standing to file the motion to dismiss and that the motion to dismiss was untimely because it was not filed within sixty days of service of the original petition. In reply, ChampionX repeated its previous assertions and also asserted that "Nalco Champion was acquired by ChampionX before [Matthews] filed the instant lawsuit."[3]

On January 11, 2023, the trial court dismissed all of Matthews's claims with prejudice and "**ORDERED** that Defendant [was] awarded it[s] attorneys' fees and costs associated with its Motion to Dismiss." However, the amount of attorney fees and costs was not stated. The judgment also stated, "This judgment is final, disposes of all parties and all claims in this case, is appealable, and disposes of this case in the entirety." Matthews timely filed a motion for new trial, which was overruled by operation of law. On April 26, 2023, ChampionX filed the affidavit of its attorney, who attested to the attorney fees and costs associated with the Rule 91a motion and attached redacted invoices. On April 28, 2023, the trial court, apparently without a hearing,[4] signed an order that awarded the attorneys for ChampionX $228.00 in costs and $57,795.00 in attorney fees.

[3]In its brief on appeal, ChampionX cites to this statement but asserts that "Nalco Champion was acquired by ChampionX before Matthews *filed his First Amended Petition*." (Emphasis added).

[4]In his supplemental brief, Matthews asserts that the order was signed without any notice of hearing or opportunity to object. He also maintains that there is no docket entry for April 28, 2023. These assertions are not disputed by ChampionX in its supplemental brief.

II. The Trial Court Erred in Granting the Rule 91a Motion to Dismiss

A. Standard of Review

"We review the merits of a Rule 91a motion *de novo* . . . ." *City of Dallas v. Sanchez*, 494 S.W.3d 722, 724 (Tex. 2016) (per curiam) (citing *Wooley v. Schaffer*, 447 S.W.3d 71, 75–76 (Tex. App.—Houston [14th Dist.] 2014, pet. denied)). Also, the "application of the law to undisputed facts is reviewed *de novo*." *Id.* (citing *Marsh USA Inc. v. Cook*, 354 S.W.3d 764, 768 (Tex. 2011)). "Texas Rule of Civil Procedure 91a allows a party, with exceptions not applicable here, to 'move to dismiss a cause of action on the grounds that it has no basis in law or fact.'" *Gardner v. Majors*, No. 10-21-00306-CV, 2023 WL 3097749, at *2 (Tex. App.—Waco Apr. 26, 2023, no pet.) (mem. op.) (quoting TEX. R. CIV. P. 91a.1). However, "[a] motion to dismiss under Rule 91a must be filed 'within 60 days after the first pleading containing the challenged cause of action is served on the movant.'" *Thoele v. Tex. Dep't of Crim. Just.*, No. 10-18-00249-CV, 2020 WL 7687864, at *1 (Tex. App.—Waco Dec. 22, 2020, no pet.) (mem. op.) (quoting TEX. R. CIV. P. 91a.3(a)). A Rule 91a motion that is not filed within the sixty-day period is not timely and is properly denied. *See Serna v. Banks*, No. 13-20-00505-CV, 2022 WL 3724102, at *4 (Tex. App.—Corpus Christi–Edinburg Aug. 30, 2022, no pet.) (mem. op.); *Tunad Enters. Inc. v. Palma*, No. 05-19-00497-CV, 2020 WL 3410633, at *5 (Tex. App.—Dallas June 22, 2020, no pet.) (mem. op.).

B. Analysis

In his third issue, Matthews asserts that the trial court erred in granting ChampionX's Rule 91a motion to dismiss because the motion was untimely.[5] Matthews argues that ChampionX was served on March 3, 2022, when service was perfected on Nalco Champion, LLC. As a result, he argues, under Rule 91a.3(a), any Rule 91a motion was required to be filed, at the latest, sixty days later, on May 1, 2022. He concludes that, since the first Rule 91a motion was not filed until June 13, 2022, the motion was untimely and that the trial court erred in granting the motion.[6] ChampionX maintains that the effective date of service was May 18, 2022, when it signed a waiver of service and that, therefore, its first motion to dismiss was timely. The parties do not dispute that all of Matthews's claims were first asserted in his original petition.

The resolution of whether the first Rule 91a motion was timely depends on whether ChampionX may be deemed to have been served when service of citation was perfected on Nalco Champion, LLC. The record shows that Nalco Champion, LLC, although misnamed in the original petition, was served with the original petition and citation through its registered

[5]ChampionX argues that Matthews did not adequately brief his issues by failing to make a clear and concise argument for his contentions, failing to cite to appropriate authority, and failing to make precise citations to the record. ChampionX attacks the brief as a whole and does not analyze its assertion of briefing waiver as to the particular issues Matthews asserted. Nevertheless, in regard to the issue of timeliness, we have looked to the wording of Matthews's issue, his argument, the evidence he relied on, and his citation to appropriate legal authority to determine whether this issue was waived and have concluded that it has been adequately briefed. *See Lion Copolymer Holdings, LLC v. Lion Polymers, LLC*, 614 S.W.3d 729, 732–33 (Tex. 2020) (per curiam).

[6]Although the trial court granted ChampionX's second Rule 91a motion challenging Matthews's first amended petition, because his claims were first asserted in his original petition, if service on Nalco Champion, LLC, was effective service on ChampionX, then it was required to file a Rule 91a motion within sixty days of Nalco Champion, LLC, being served with the original petition. As a result, when ChampionX filed its first Rule 91a motion is determinative of whether the motion was timely. *See* TEX. R. CIV. P. 91a.5(b) (providing that, if a Rule 91a motion has been filed and "the respondent amends the challenged cause of action . . . the movant may . . . file . . . an amended motion directed to the amended cause of action").

agent on March 3, 2022. ChampionX judicially admitted in its pleadings and on appeal that Nalco Champion, LLC, was the proper defendant in this case and that it acquired Nalco Champion, LLC, at some point before Matthews filed his first amended petition. *See Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 568 (Tex. 2001) ("Assertions of fact, not pleaded in the alternative, in the live pleadings of a party are regarded as formal judicial admissions. A judicial admission that is clear and unequivocal has conclusive effect and bars the admitting party from later disputing the admitted fact." (citation omitted)). In its pleadings, ChampionX has also consistently maintained that it was the proper defendant, although it was misnamed in the petition.

Thus, this case involves a misnomer. "Misnomer arises when a plaintiff sues the correct entity but misnames it." *Chilkewitz v. Hyson*, 22 S.W.3d 825, 828 (Tex. 1999) (citing *Enserch Corp. v. Parker*, 794 S.W.2d 2, 4–5 (Tex. 1990)). In misnomer cases, "[c]ourts are flexible . . . because the party intended to be sued has been served and put on notice that it is the intended defendant." *In re Greater Houston Orthopaedic Specialists, Inc.*, 295 S.W.3d 323, 326 (Tex. 2009) (per curiam) (orig. proceeding) (citing *Pierson v. SMS Fin. II, L.L.C.*, 959 S.W.2d 343, 347 (Tex. App.—Texarkana 1998, no pet.)). As a result, "[i]f the plaintiff merely misnames the correct defendant (misnomer), limitations is tolled and a subsequent amendment of the petition relates back to the date of the original petition." *Enserch Corp. v. Parker*, 794 S.W.2d 2, 4–5 (Tex. 1990). Further, if a defendant is sued under an incorrect name but the petition and citation leave no doubt that the served defendant was who was intended to be sued, it is incumbent on that defendant to appear and answer "or else be bound by the judgment to be entered on its

default." *Abilene Indep. Tel. & Tel. Co. v. Williams*, 229 S.W. 847, 848 (Tex. 1921). Consequently, "when an intended defendant is sued under an incorrect name, the court acquires jurisdiction after service with the misnomer if it is clear that no one was misled or placed at a disadvantage by the error." *In re Greater Houston Orthopaedic Specialists, Inc.*, 295 S.W.3d at 326 (quoting *Sheldon v. Emergency Med. Consultants, I, P.A.*, 43 S.W.3d 701, 702 (Tex. App.—Fort Worth 2001, no pet.)).

In this case, Nalco Champion, LLC, which was served on March 3,[7] was the intended defendant, and no one was misled or placed at a disadvantage because of the misnomer. There is no dispute that ChampionX acquired Nalco Champion, LLC, at some point and that it knew that Nalco Champion, LLC, was the intended and proper defendant in this lawsuit. Under this record and the principles set forth above, we find that the service on Nalco Champion, LLC, was effective service on ChampionX.

As a result, ChampionX was first served with the pleading containing Matthews's causes of action on March 3. Because ChampionX did not file its first Rule 91a motion until 103 days later, the motion was untimely and should have been denied. *See Serna*, 2022 WL 3724102, at *4; *Palma*, 2020 WL 3410633, at *5. Therefore, we find that the trial court erred in granting the Rule 91a motion and in dismissing Matthews's claims. We sustain this point of error.[8]

[7]In one of its pleadings, ChampionX claimed that Nalco Champion, LLC, was not in existence at the time of service but provide no evidence to support that claim.

[8]Because this issue is dispositive of Matthews's challenges to the order dismissing his claims, we need not address Matthews's remaining issues challenging that order.

III. The Order Awarding Attorney Fees is Void

As previously stated, the January 11 judgment dismissed all of Matthews's claims with prejudice and "**ORDERED** that Defendant [was] awarded it[s] attorneys' fees and costs associated with its Motion to Dismiss" but did not state the amount of attorney fees and costs. The judgment also stated, "This judgment is final, disposes of all parties and all claims in this case, is appealable, and disposes of this case in the entirety." Matthews timely filed a motion for new trial, which was overruled by operation of law. On April 28, 2023, the trial court signed the April 28 order that awarded the attorneys for ChampionX $228.00 in costs and $57,795.00 in attorney fees.[9]

Matthews asserts, *inter alia*, that the April 28 order is void because it was entered after the trial court lost its plenary jurisdiction. Matthews argues that the trial court's January 11 judgment contained a finality phrase and was therefore a final order. *See Bella Palma, LLC v. Young*, 601 S.W.3d 799, 801 (Tex. 2020) (per curiam). As a result, he argues, the trial court's plenary jurisdiction ended thirty days after his motion for new trial was overruled by operation of law, i.e., on April 26. *See* TEX. R. CIV. P. 329b(c), (e). In its supplemental brief, ChampionX

[9]The April 28 order was not included in the original clerk's record, which was filed on May 11, 2023. After both parties filed their briefs, a supplemental clerk's record that contained the April 28 order was filed on July 31, 2023. Three days later, Matthews filed his "Opposed Motion for Leave to File Amended Notice of Appeal," in which he made a sworn declaration that the first notice he had of the signed April 28 order was when the supplemental clerk's record was filed. We granted the motion on August 8, 2023. Matthews filed his amended notice of appeal on that same day and added his challenge to the April 28 order to his notice of appeal. ChampionX filed a supplemental brief and asked us to strike Matthews's amended notice of appeal and asserted that it was untimely. In support of its contention, ChampionX asserted that "[n]otice of the [April 28] Order was provided to the parties and all counsel of record electronically on April 28." However, the certificate of service cited by ChampionX shows that counsel for Matthews was served with an electronic copy of the apparently proposed order at 5:47:52 PM on April 26, 2023. Yet, the April 28 order was not signed by the trial court until 10:21:24 am on April 28, 2023. Although Matthews did not meet all the requirements to be entitled to additional time to file his amended notice of appeal under Rule 4.2 of our appellate rules, we will address the April 28 order in the interest of justice and judicial economy. *See* TEX. R. APP. P. 4.2.

does not address the effect of the finality phrase in the January 11 judgment. Rather, it contends that the award of attorney fees was mandatory under Rule 91a.7 and that, for this reason, the judgment was not final until the entry of the April 28 order.[10]

A. When is a Judgment or Order Void?

"A court order is void if it is apparent that the court had no jurisdiction of the parties or property, no jurisdiction of the subject matter, no jurisdiction to enter the particular judgment, or no capacity to act." *Capps v. Known & Unknown Heirs of Foster*, No. 10-18-00329-CV, 2019 WL 3955832, at *2 (Tex. App.—Waco Aug. 21, 2019, pet. denied) (mem. op.) (quoting *Custom Corps., Inc. v. Sec. Storage, Inc.*, 207 S.W.3d 835, 838 (Tex. App.—Houston [14th Dist.] 2006, orig. proceeding)). "Orders issued outside of a trial court's plenary power are typically void, because a court no longer has jurisdiction to act once its plenary power has expired." *Id.* (quoting *Custom Corps., Inc.*, 207 S.W.3d at 838).

After a trial court's plenary power has expired, the activities "it may take with respect to its judgment are limited." *Id.* at *3. "For example, the trial court may correct clerical mistakes

[10]ChampionX does not cite any legal authority holding that a mandatory award of attorney fees prevents a judgment from being final even when it contains a finality phrase that "clearly and unequivocally states that it finally disposes of all claims and parties." *In re Guardianship of Jones*, 629 S.W.3d 921, 924 (Tex. 2021) (per curiam). Nevertheless, in support of its contention that the award of attorney fees was mandatory, ChampionX quotes the former Rule 91a.7 and cites *Guillory v. Seaton, LLC*, 470 S.W.3d 237 (Tex. App.—Houston [1st Dist.] 2015, pet. denied). At the time *Guillory* was decided, Rule 91a.7 provided that "the court *must* award the prevailing party on the motion all costs and reasonable and necessary attorney fees incurred with respect to the challenged cause of action . . . ." TEX. R. CIV. P. 91a.7, 82 Tex. B.J. 631 (Tex. 2019, amended 2019) (emphasis added). However, on July 11, 2019, the Texas Supreme Court adopted amendments to the rule, effective September 1, 2019, "[t]o effectuate the Act of May 21, 2019, 86th Leg., R.S., ch. 885 (HB 3300, codified at **TEX. CIV. PRAC. & REM. CODE §** 30.021)." *Id.* (emphasis added). That amendment replaced "*must* award" with "*may* award." *Id.* (emphasis added). As a result, under the new rule, the award of attorney fees and costs to the prevailing party is not required but, rather, discretionary with the trial court. Because this suit was filed after September 1, 2019, the new rule is applicable to this case. *See id.* Consequently, even if a mandatory award of attorney fees could overcome the finality phrase in the January 11 judgment, any award of attorney fees in this case was discretionary, not mandatory.

in the judgment[, . . . it] may also supervise post-judgment discovery that is conducted to aid in the enforcement of the judgment[, and . . . it] has both a statutory and an inherent power to enforce its judgment." *Id.* (quoting *Custom Corps., Inc.*, 207 S.W.3d at 839). "The trial court may not, however, issue an order that is inconsistent with the original judgment or that otherwise constitutes a material change in the substantive adjudicative portions of the judgment after its plenary power has expired." *Id.* (quoting *Custom Corps., Inc.*, 207 S.W.3d at 839).

The determination of the amount of attorney fees that are reasonable and necessary is a question of fact. *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998). For that reason, the amount of attorney fees awarded in the April 28 order constituted a material change in the substantive adjudicative portion of the January 11 judgment. To determine whether the April 28 order was void, we must determine if the January 11 judgment was a final judgment and, if so, whether the April 28 order was signed after the trial court's plenary power had expired.

B. Finality of a Judgment Without a Trial

"[C]ourts will deem a judgment without a trial to be final '(1) [when the judgment] actually disposes of every pending claim and party or (2) [when] it clearly and unequivocally states that it finally disposes of all claims and parties, even if it does not actually do so.'" *Patel v. Nations Renovations, LLC*, 661 S.W.3d 151, 154 (Tex. 2023) (per curiam) (orig. proceeding) (alterations in original) (quoting *In re Guardianship of Jones*, 629 S.W.3d 921, 924 (Tex. 2021) (per curiam)). "If the judgment clearly and unequivocally states that it finally disposes of all claims and parties, the assessment is resolved in favor of finding finality, and the reviewing court cannot review the record." *Id.* (citing *In re Elizondo*, 544 S.W.3d 824, 827 (Tex. 2018) (per

curiam) (orig. proceeding)). As a result, we must determine whether the January 11 judgment "is clearly and unequivocally final on its face." *Id.*

Although "no magic language is required . . . 'a trial court may express its intent to render a final judgment by describing its action as (1) final, (2) a disposition of all claims and parties, and (3) appealable.'" *Id.* at 155 (quoting *Bella Palma, LLC*, 601 S.W.3d at 801). Although each of those statements, or similar statements, may be "insufficient when standing alone, together [they] form a clear indication of finality." *Id.*

The January 11 judgment provides this combination of statements: it provides that the judgment is "final," that it "disposes of all parties and all claims in this case," and that it "is appealable." In addition, it provides that the judgment "disposes of this case in the entirety." By those four statements, the January 11 judgment "clearly and unequivocally express[ed] that [it] was final." *Id.* As a result, we find that the January 11 judgment was a final judgment.

C. Plenary Jurisdiction

A trial court "has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment within thirty days after the judgment is signed." TEX. R. CIV. P. 329b(d). However, if any party timely files a motion for new trial, the trial court's plenary power is extended "until thirty days after all such timely-filed motions are overruled, either by a written and signed order or by operation of law, whichever comes first." TEX. R. CIV. P. 329b(e). A motion for new trial is overruled by operation of law "seventy-five days after the judgment [is] signed." TEX. R. CIV. P. 329b(c).

In this case, the final judgment was signed on January 11. Because Matthews timely filed a motion for new trial and the trial court did not enter a signed, written order overruling it, the motion for new trial was overruled seventy-five days after January 11, i.e., on March 27. The trial court's plenary power expired thirty days later, on April 26. Because the April 28 order was signed two days later and "after the trial court's plenary power expired, . . . the trial court lacked jurisdiction to enter the [order]." *Capps*, 2019 WL 3955832, at *4; *see State ex rel. Latty v. Owens*, 907 S.W.2d 484, 486 (Tex. 1995) (per curiam) ("Judicial action taken after the court's jurisdiction over a cause has expired is a nullity.").

Even though an appeal from a void order is not necessary, when an appeal is taken, we may "declare the order appealed from void because it was signed after the [trial] court's plenary jurisdiction expired." *Latty*, 907 S.W.2d at 486. For that reason, we declare that the April 28 order is void.

IV. Conclusion

For the reasons stated, we declare the trial court's April 28 order void, reverse the trial court's January 11 judgment, and remand this case for further proceedings consistent with this opinion.

Scott E. Stevens
Chief Justice

Date Submitted: August 18, 2023
Date Decided: October 13, 2023