NUMBER 13-15-00210-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

DRED W. MARTIN III D/B/A ALL SEASONS AIR CONDITIONING, HEATING AND PLUMBING AND DRED W. HONDO MARTIN, INDIVIDUALLY, **Appellant,**

v.

SERVICE SUPPLY OF VICTORIA, INC., **Appellee.**

On appeal from the 267th District Court of Victoria County, Texas.

MEMORANDUM OPINION

Before Justices Rodriguez, Contreras, and Longoria
Memorandum Opinion by Justice Rodriguez

In 2014, appellee Service Supply of Victoria, Inc., filed suit against appellant Dred W. Martin III d/b/a All Seasons Air Conditioning, Heating and Plumbing and Dred W.

Hondo Martin individually ("Martin").[1] By seven issues, Martin challenges the summary judgment which was granted in favor of Service Supply. Because we find that the trial court did not render a final, appealable judgment, we dismiss for want of jurisdiction.

Service Supply's cause of action was a suit on sworn account; the petition alleged, among other things, that Martin's account had an outstanding principal balance of over $22,000 for goods and services provided. Attached to the verified petition were various invoices, contracts, and affidavits intended to substantiate the account. *See* TEX. R. CIV. P. 185. Service Supply also served discovery on Martin, including multiple requests for admissions. The requests asked Martin to admit or deny the fundamental elements of the suit on sworn account. Martin timely filed a verified denial, but he did not respond to the requests for admission at that time or in the intervening months.

In September 2014, Service Supply filed a motion for summary judgment, arguing that because no timely response to the requests for admission had been filed, the requests were now deemed admitted and could form the basis for summary judgment. The motion was set for hearing on October 31, 2014. On October 24, Martin filed counterclaims for breach of contract, usury, and unfair debt collection practices. Service Supply did not amend its motion for summary judgment to address the newly raised counterclaims.

The trial court granted summary judgment in favor of Service Supply on January 30, 2015. The summary judgment recited that Service Supply's motion was, "in all

[1] On appeal, Martin challenges whether he was sued in the proper capacity, arguing that the question of capacity creates a fact issue which renders summary judgment improper. We do not reach that issue in this opinion. *See* TEX. R. APP. P. 47.1.

things, GRANTED" on the basis of the deemed admissions. The trial court awarded Service Supply $21,887.88 as principal for the account, court costs, attorney's fees, and both pre-judgment and post-judgment interest. The summary judgment further provided, "It is ORDERED that Plaintiff [Service Supply] shall have all writs of execution and other process necessary to enforce this judgment. All relief not expressly granted herein is denied." The summary judgment did not otherwise address Martin's counterclaims. This appeal followed.

As a threshold issue which determines our jurisdiction, we address the finality of the trial court's judgment. Where, as here, there is no authority which allows for an interlocutory appeal, a judgment must be final before it can be appealed. *See Lehmann v. Har-Con Corp.,* 39 S.W.3d 191, 195 (Tex. 2001). A judicial decree that actually disposes of all parties and all claims is a final judgment, regardless of the language used; however, a decree that fails to dispose of all claims can be final only if the intent to finally dispose of the case is unequivocally expressed in the decree itself. *See In re Burlington Coat Factory Warehouse of McAllen, Inc.*, 167 S.W.3d 827, 830 (Tex. 2005) (orig. proceeding); *Lehmann,* 39 S.W.3d at 205. Whether a decree is a final judgment must be determined from its language and the record in the case. *Lehmann,* 39 S.W.3d at 195; *Cartwright v. Cologne Prod. Co.*, 182 S.W.3d 438, 443 (Tex. App.—Corpus Christi 2006, pet. denied). We conduct a de novo review to determine the finality of the decree. *Parks v. DeWitt Cnty. Elec. Co-op., Inc.*, 112 S.W.3d 157, 160 (Tex. App.—Corpus Christi 2003, no pet.); *In re Guardianship of Miller*, 299 S.W.3d 179, 184 (Tex. App.—Dallas 2009, no pet.) (en banc).

Texas Rule of Civil Procedure 63 states that any pleadings, responses, or pleas offered for filing within seven days of the date of trial or thereafter, or after such time as may be ordered by the judge under rule 166, shall be filed only after leave of the judge is obtained. TEX. R. CIV. P. 63; *Sosa v. Cent. Power & Light*, 909 S.W.2d 893, 895 (Tex. 1995) (per curiam). A summary judgment proceeding is a trial within the meaning of rule 63. *Goswami v. Metro. Sav. & Loan Ass'n*, 751 S.W.2d 487, 490 (Tex. 1988); *Hill v. Tx-An Anesthesia Mgmt., LLP*, 443 S.W.3d 416, 422 (Tex. App.—Dallas 2014, no pet.). The last day counted from the date of the filing may be the date of the hearing. *Sosa*, 909 S.W.2d at 895; *see* TEX. R. CIV. P. 4. When amended petitions are filed timely, trial courts must base their decision on the amended pleading, not a prior, superseded petition. *Krainz v. Kodiak Res., Inc.*, 436 S.W.3d 325, 328 (Tex. App.—Austin 2013, pet. denied); *see Sosa*, 909 S.W.2d at 894–95 (reversing summary judgment where plaintiffs amended their pleading on November 10 and hearing was set for November 17, holding that amended pleading controlled and was not subject to same summary disposition as the prior petition).

Here, Martin amended his pleadings to add various counterclaims exactly one week before a scheduled summary judgment hearing. These counterclaims were timely filed under rule 4. *See* TEX. R. CIV. P. 4; *Sosa*, 909 S.W.2d at 895.

However, neither Service Supply's motion nor the resulting summary judgment addressed the timely counterclaims. While the trial court's order contained a Mother Hubbard clause—that is, a recitation that "[a]ll relief not expressly granted herein is denied"—such clauses are not an effectual way to dispose of outstanding claims, and

including a Mother Hubbard clause does not indicate that a summary judgment is final for purposes of appeal. *See In re Daredia*, 317 S.W.3d 247, 248 (Tex. 2010) (per curiam) (orig. proceeding) (citing *Lehmann*, 39 S.W.3d at 203–04). Here, the summary judgment order does not include any other terms which would address Martin's counterclaims.

"Because the judgment does not dispose of all the claims, it cannot be final unless its words unequivocally express an intent to finally dispose of the case." *Burlington Coat*, 167 S.W.3d at 830 (internal quotations omitted). We look for statements such as "[t]his judgment finally disposes of all parties and all claims and is appealable." *Daredia*, 317 S.W.3d at 248. We find no such statement in the trial court's order, nor any other unmistakable language which leaves "no doubt about the court's intention." *See Lehmann*, 39 S.W.3d at 206.[2]

Because the summary judgment order does not render a complete disposition or include an unequivocal expression of finality, we conclude that the order remains interlocutory. *See Burlington Coat*, 167 S.W.3d at 830. This leaves only the question of our disposition. Abatement would be an option if the obstacle to our jurisdiction could be cleared by a ministerial act on the part of the trial court, such as correction of a formal defect. *See Lehmann*, 39 S.W.3d at 206; *Parks*, 112 S.W.3d at 163. However, the adjudication of Martin's counterclaims may "require evidentiary proceeding and further

[2] It is true that certain facets of the order imply finality. For instance, the order refers to itself as a "judgment," provides for the issuance of writs of execution, awards costs, awards pre-judgment and post-judgment interest, and includes a Mother Hubbard clause. However, our high court has rejected the use of "indicia of finality" as a means of assessing the finality of a decree. *Compare In re Burlington Coat Factory Warehouse of McAllen, Inc.*, 832, 830 (Tex. 2005) (orig. proceeding) (reaffirming the rule of *Lehmann*) *with id.* at 832 (O'Neill, J., dissenting) (advocating the use of "indicia of finality" as an alternate test for finality); *see also Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 205 (Tex. 2001) ("An order does not dispose of all claims and all parties merely because . . . it awards costs.").

rulings," rather than a ministerial act. *See Parks*, 112 S.W.3d at 163. In such situations, we have found that we lack the authority to order abatement. *Id.* at 163–64 (citing TEX. R. APP. P. 27.2, 44.3, 44.4(a)). Rather, the appeal must be dismissed for want of jurisdiction. *See id.* at 164.[3]

Accordingly, we dismiss the appeal for want of jurisdiction.

NELDA V. RODRIGUEZ
Justice

Delivered and filed the
16th day of March, 2017.

[3] On a related front, Service Supply directs our attention to the holding of the Dallas Court of Appeals that although "summary judgment generally may not be granted on a claim not addressed in the summary judgment proceeding, it may be granted on later pleaded causes of action if the grounds asserted in the motion show that the plaintiff could not recover from the defendant on the later pleaded causes of action." *Burt v. Harwell*, 369 S.W.3d 623, 625 (Tex. App.—Dallas 2012, no pet.). We find this citation inapposite. The order here did not grant summary judgment concerning the counterclaims, and it is not clear that the order could have done so. The usury claim would have been entirely separate from the grounds asserted in the motion. As to the breach of contract and unfair collection claims, Service Supply itself contended that the basis of these claims was a transaction that "could easily be part of another of [Martin's] accounts with [Service Supply], or pre-[date] or post-date the account sued on." Thus, even assuming that summary judgment was properly granted in favor of Service Supply's claims—which we do not decide—this assumption would not, by necessity, make summary judgment against the counterclaims proper.