

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
ROBERT J. GLADWIN, JUDGE

DIVISION III

CA06-1350

September 5, 2007

ROBERT MEYER, d/b/a MEYER
EXCAVATORS CONTRACTORS
APPELLANT

AN APPEAL FROM PULASKI
COUNTY CIRCUIT COURT
[No. CV02-6804]

v.

CDI CONTRACTORS, LLC
APPELLEE

HONORABLE JAMES MAXWELL MOODY,
CIRCUIT JUDGE

DISMISSED

Robert Meyer, d/b/a Meyer Excavators Contractors, appeals for the second time from the entry of summary judgment to appellee CDI Contractors, LLC. As in our previous decision, we must dismiss this appeal for lack of a final order.

Because we explained the factual history of this proceeding in detail in our first opinion, our recitation of the facts here will be brief. Appellant filed a complaint against appellee for fraud and breach of contract. Appellee filed a breach-of-contract counterclaim against appellant. Appellee later moved for a non-suit on its counterclaim. It also moved for summary judgment. Without ruling on appellee's motion to take a non-suit, the circuit court

granted summary judgment to appellee on all of appellant's claims. Appellant then took an appeal to this court.

We dismissed that appeal because the record contained no order dismissing appellee's counterclaim and no certification pursuant to Ark. R. Civ. P. 54(b), and therefore, the case was not final for purposes of appeal. *Meyer v. CDI Contractors, LLC*, CA06-31 (Sept. 27, 2006). The circuit court granted appellee's motion for non-suit of its counterclaim on October 10, 2006. Appellant filed a timely notice of appeal.

The question of whether an order is final and subject to appeal is a jurisdictional question, which we will raise on our own even if the parties do not. *Epting v. Precision Paint & Glass, Inc.*, 353 Ark. 84, 110 S.W.3d 747 (2003). When more than one claim for relief is presented, the trial court may direct the entry of a final judgment as to one or more but fewer than all of the claims by following the procedure set forth in Ark. R. Civ. P. 54(b). The supreme court has held that a party that has several claims against another party may not take a voluntary non-suit of one claim and appeal an adverse judgment as to the other claims when it is clear that the intent is to re-file the non-suited claim and thus give rise to the possibility of piecemeal appeals. *See Haile v. Ark. Power & Light Co.*, 322 Ark. 29, 907 S.W.2d 122 (1995); *Ratzlaff v. Franz Foods of Ark.*, 255 Ark. 373, 500 S.W.2d 379 (1973). This is so because a voluntary non-suit or dismissal leaves the plaintiff free to re-file the claim, assuming there has been no previous dismissal. *Haile, supra*; Ark. R. Civ. P. 41(a).

Following the supreme court's decisions cited above, we concluded that we had no choice but to dismiss an appeal because the appellant had taken a non-suit on some of its

claims, which could be re-filed, in *Pro Transportation, Inc. v. Volvo Trucks North America, Inc.*, 96 Ark. App. 166, ___ S.W.3d ___ (2006). The concurrence to the majority's opinion pointed out that, in light of the supreme court's interpretation of Rule 54(b), such claims should be dismissed with prejudice if an appeal is to be taken from the disposition of the remaining claims; otherwise, there is no final judgment upon which an appeal may be taken.

We are faced with a similar situation here, where appellee's counterclaim was dismissed without prejudice. According to these supreme court opinions, even though there is no indication that appellee intends to re-file its counterclaim, this case still lacks a final judgment, and we are required to dismiss this appeal.

Dismissed.

GRIFFEN and VAUGHT, JJ., agree.