

ARKANSAS COURT OF APPEALS

DIVISION II
No. CV-18-904

A TIME FOR YOU, LLC; AND CHERYL
MUSTICCHI

APPELLANTS

V.

PARK H PROPERTIES, LLC

APPELLEE

Opinion Delivered: May 22, 2019

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT, SIXTH
DIVISION

[NO. 60CV-17-2592]

HONORABLE TIMOTHY DAVIS FOX,
JUDGE

APPEAL DISMISSED WITHOUT
PREJUDICE

BART F. VIRDEN, Judge

The Pulaski County Circuit Court granted the motion of appellee Park H Properties, LLC, for default judgment as to appellant A Time For You, LLC. The trial court also granted Park H's motion for partial summary judgment as to appellant Cheryl Musticchi. Appellants moved to set aside those judgments, but the trial court denied their motions. Appellants now appeal from the orders granting Park H's motions and denying their postjudgment motions. We dismiss the appeal without prejudice for lack of a final, appealable order.

I. *Procedural History*

On September 30, 2015, Park H entered into a one-year commercial lease agreement with Musticchi in which she agreed to rent storefront property in North Little

Rock to run her salon-and-massage business called A Time For You. Appellants vacated the property around June 30, 2016. On May 23, 2017, Park H filed a complaint against appellants alleging that appellants had breached the contract by not paying rent after June 30 and by damaging the property. Appellants were served with the complaint and summons on June 8. Musticchi, pro se, timely filed an answer on July 7; A Time For You did not.

On July 14, 2017, Park H filed a motion for default judgment with respect to A Time For You based on its failure to timely file an answer to Park H's complaint. Park H sought default judgment on both breach-of-contract claims. On July 28, the trial court granted the motion and entered judgment against A Time For You for \$9,370. On November 13, A Time For You moved to set aside the default judgment, but the trial court denied its motion.

Also on July 14, 2017, Park H submitted to Musticchi its first set of requests for admissions to which she responded on August 13 through counsel. On August 28, Park H filed a motion for partial summary judgment against Musticchi on its claim for breach of contract as to the unpaid rent. Musticchi did not respond to Park H's motion for partial summary judgment. No hearing was held. On September 27, the trial court granted Park H's motion. On October 19, the trial court denied Musticchi's "Motion Pursuant to Rule 59." On January 12, 2018, the trial court denied her motion to set aside the partial summary judgment.

On July 18, 2018, the trial court granted Park H's request for a nonsuit of "all pending but unresolved claims" without prejudice. On August 15, appellants, through counsel, filed their joint notice of appeal. The notice of appeal states that the orders subject to appeal have become final, appealable orders as a result of the July 18 order.

II. Jurisdiction

Arkansas Rule of Appellate Procedure–Civil 2(a)(1) provides that an appeal may be taken only from a final judgment or decree entered by the trial court. A final order is one that dismisses the parties, discharges them from the action, or concludes their rights to the subject matter in controversy. *Johnson v. Windstream Commc'ns, Inc.*, 2016 Ark. App. 419. Whether an order is final for appeal purposes is a jurisdictional question that this court will raise sua sponte. *Deer/Mt. Judea Sch. Dist. v. Beebe*, 2012 Ark. 93. When more than one claim for relief is presented in an action or when multiple parties are involved, an order that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not a final, appealable order. Ark. R. Civ. P. 54(b)(1). The purpose of the rule is to avoid piecemeal litigation. *Toland v. Robinson*, 2017 Ark. 41.

The parties to a lawsuit cannot create a final order by taking a voluntary nonsuit dismissing their remaining claims without prejudice. *Bevans v. Deutsche Bank Nat'l Tr. Co.*, 373 Ark. 105, 281 S.W.3d 740 (2008); *Haile v. Ark. Power & Light Co.*, 322 Ark. 29, 907 S.W.2d 122 (1995); *Park Plaza Mall CMBS, LLC v. Powell*, 2018 Ark. App. 48; *Pro Transp., Inc. v. Volvo Trucks N. Am., Inc.*, 96 Ark. App. 166, 239 S.W.3d 537 (2006); *French v. Brooks Sports Ctr., Inc.*, 57 Ark. App. 30, 940 S.W.2d 507 (1997). Voluntary nonsuits are governed

by Arkansas Rule of Civil Procedure 41(a), which provides that an action may be dismissed without prejudice to a future action by the plaintiff, assuming that there has been no previous dismissal. After a voluntary nonsuit, the plaintiff may refile the claim within one year. Ark. Code Ann. § 16-56-126(a) (Supp. 2017).

Generally, the dismissal of a *claim* without prejudice does not create finality. *Park Plaza Mall, supra*; see, e.g., *Ratzlaff v. Frantz Foods of Ark.*, 255 Ark. 373, 500 S.W.2d 379 (1973); *Haile, supra*. By contrast, the dismissal of a *party* to an action, with or without prejudice, is sufficient to obtain finality and invest jurisdiction in an appellate court. See, e.g., *Driggers v. Locke*, 323 Ark. 63, 913 S.W.2d 269 (1996). The facts of this case more closely align with those involving the nonsuit of a claim, rather than those involving the nonsuit of a party.

Indeed, Park H took a voluntary nonsuit as to all pending but unresolved *claims*. The pending but unresolved claim—breach of contract as to property damage—pertained only to Musticchi given that Park H had obtained a default judgment as to all of its claims against A Time For You. Although the order on appeal as it relates to A Time For You appears to be final, the claim against Musticchi for unpaid rent was not disposed of by the granting of the nonsuit. That claim was resolved, at least temporarily, through the interlocutory granting of partial summary judgment but is subject to reconsideration, and even revision, before the final resolution of the case. See Ark. R. Civ. P. 54(b)(2) (providing that an order or judgment is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties); *Shaw v. Destiny*

Indus., Inc., 78 Ark. App. 8, 76 S.W.3d 905 (2002) (noting that a nonsuit cannot give final, binding status to partial summary judgment because entire case had not been finally submitted and decided, and the portion that had been decided could have been reconsidered during the remaining course of the case). In other words, the unpaid-rent claim could not be considered a “pending but unresolved” claim that was dismissed by Park H through the voluntary nonsuit.

To obtain what was, in effect, the dismissal of a party such that we could have reached the merits of the appeal as it relates to A Time For You, both claims against Musticchi had to have been nonsuited. *Bevans, supra* (recognizing that when all claims against one defendant are nonsuited, that defendant has been effectively dismissed from the suit); *Advanced Envtl. Recycling Tech., Inc. v. Advanced Control Sols., Inc.*, 372 Ark. 286, 275 S.W.3d 162 (2008); *Park Plaza Mall, supra*. A nonsuit has the effect of an absolute withdrawal of the claim and carries with it all the pleadings and all issues with respect to a plaintiff’s claim. *Tribco Mfg. Co., Inc. v. People’s Bank of Imboden*, 67 Ark. App. 268, 998 S.W.2d 756 (1999). A partial summary judgment does not have the same effect. Moreover, the nonsuit of the claim for property damage does not leave Musticchi in the same position as she would have been in had she not been sued, or had she been sued separately, because, when the trial court granted the nonsuit of the property-damage claim, Musticchi already had a partial summary judgment against her with respect to the claim for unpaid rent. See *Driggers*, 323 Ark. at 66–67, 913 S.W.3d at 270; see also *Advanced Envtl., supra*; *Park Plaza Mall, supra*.

III. Conclusion

The partial summary judgment against Musticchi on the claim for unpaid rent prevents us from having a final, appealable order as to both parties, notwithstanding the nonsuit of the other claim against Musticchi. *Haile, supra*; *Ratzlaff, supra*; *French, supra*; *Killian v. Gibson*, 2011 Ark. App. 245. Also, because Park H may refile its claim for property damage against Musticchi after a voluntary nonsuit, it leaves an outstanding issue that prevents a final order from being obtained. *See Toland, supra*.

When more than one claim for relief is presented in an action, or when multiple parties are involved, the trial court may direct the entry of a final judgment as to one or more but fewer than all the claims or parties only upon an express determination, supported by specific factual findings, that there is no just reason for delay and upon an express direction for the entry of judgment. Ark. R. Civ. P. 54(b)(1). Absent a final order or a properly executed Rule 54(b) certificate, we do not have jurisdiction over this appeal. Ark. R. App. P.-Civ. 2(a)(1), (11).

Appeal dismissed without prejudice.

MURPHY and BROWN, JJ., agree.

Cullen & Co., PLLC, by: *Tim Cullen*, for appellants.

Prater Law Firm, PLLC, by: *Paul Prater*, for appellee.