

Cite as 2023 Ark. App. 357  
**ARKANSAS COURT OF APPEALS**

DIVISION II  
No. CV-22-624

MARC WEINBERG D/B/A W&W  
ROOFING

APPELLANT

V.

MADÉLIN PAJAS

APPELLEE

Opinion Delivered August 30, 2023

APPEAL FROM THE BENTON  
COUNTY CIRCUIT COURT  
[NO. 04CV-21-2367]

HONORABLE CHRISTINE  
HORWART, JUDGE

DISMISSED WITHOUT PREJUDICE

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**WENDY SCHOLTENS WOOD, Judge**

Marc Weinberg, d/b/a W&W Roofing, appeals the Benton County Circuit Court's order dismissing his complaint to enforce a materialmen's lien and for breach of contract regarding roofing work he performed for appellee Madelin Pajas. The circuit court dismissed the claims after determining that Weinberg failed to comply with the notice provision of Arkansas Code Annotated section 18-44-115(a)(1), (3), and (4) (Supp. 2021). The court also found section 18-44-115(a)(4) to be constitutional. On appeal, Weinberg argues that the circuit court erred in granting Pajas's motion to dismiss on the basis of its finding that section 18-44-115(4) is constitutional. Because Weinberg failed to appeal from a final order, we have no jurisdiction and dismiss his appeal.

On September 29, 2021, Weinberg filed a complaint to enforce a lien on Pajas's home. The complaint alleged that Weinberg and Pajas entered into a contract on May 28, 2021, pursuant to which Weinberg was to provide materials and labor for a roof on Pajas's home. Weinberg alleged in the complaint that he performed the services but that Pajas paid him only a portion of the amount due for the job. He attached a copy of a materialmen's lien that was filed on July 26, 2021, and asked the court to require Pajas to pay him the remainder of the amount owed or, alternatively, to enforce the lien and foreclose on the property.

On October 25, Pajas moved to dismiss the complaint, alleging that the circuit court lacked subject-matter jurisdiction. Specifically, Pajas alleged that Weinberg failed to give her the notice required by section 18-44-115(a)(1) and (3) before commencing the work; therefore, he was "barred from bringing an action either at law or in equity, including without limitation quantum meruit, to enforce any provision of a residential contract" pursuant to section 18-44-115(a)(4) (Supp. 2011).<sup>1</sup> Pajas also filed a counterclaim the same day contending that Weinberg's lien is not in the proper form because it fails to contain the appropriate notices. Accordingly, Pajas asked the court to discharge the lien and award her costs and attorney's fees.

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<sup>1</sup>Section 18-44-115(a)(4) was amended effective July 28, 2021, to provide that a contractor who fails to give the requisite notice only deprives himself or herself of the benefit of the lien. Because the parties' agreement and Weinberg's work occurred before July 28, the circuit court found that the older version of the statute applied.

On November 4, Weinberg filed an amended complaint alleging claims for breach of contract, tortious interference with contractual relationship of business expectancy, and defamation. The breach-of-contract claim concerned the agreement between the parties for labor and material for the roof; the tortious-interference claim alleged that Pajas interfered with Weinberg's business relationship with Shelter Insurance Company; and the defamation claim alleged that Pajas made false and defamatory statements about Weinberg and his work to an agent for Shelter Insurance Company. Pajas filed an answer to the amended complaint that included a motion to dismiss on the same basis alleged in her previous motion to dismiss—all of Weinberg's claims were barred by section 18-44-115(a)(4) for failure to provide timely notice of the lien.

On May 19, 2022, Weinberg filed a second amended complaint alleging the same claims for breach of contract, tortious interference with contractual relationship of business expectancy, and defamation but adding the allegation that the applicable version of section 18-44-115(a)(4) is unconstitutional. Specifically, Weinberg contended that the State's interest in giving notice to residential property owners of their rights and responsibilities regarding potential lien claimants is not sufficiently compelling to justify "locking the courthouse doors" to contractors who perform their obligations under a contract and are refused payment. Weinberg added Leslie Rutledge, the attorney general at the time, as a third-party defendant.

Pajas filed an answer and motion to dismiss the second amended complaint on the same grounds she had alleged in her previous two motions to dismiss. Leslie Rutledge, in

her capacity as attorney general, moved to dismiss the second amended complaint pursuant to Rule 12(b)(6) of the Arkansas Rules of Civil Procedure, alleging that the complaint failed to state any facts entitling Weinberg to relief against her.<sup>2</sup>

The circuit court entered an order on July 6, 2022,<sup>3</sup> granting Pajas's motions to dismiss Weinberg's claim in the complaint to enforce a lien and in both the amended and the second amended complaints for breach of contract. The court also dismissed the attorney general as a third-party defendant. However, the court's order then provided the following:

Count 2, tortious interference with a contractual or business expectancy, and Count 3, defamation of [Weinberg's] Amended Complaint and Second Amended Complaint, are pled with sufficient enough detail and prayer for damages resulting from the tortious conduct such that they survive [Pajas's] Motion to Dismiss.

The court entered an amended order on July 7 identical to the July 6 order but adding the finding that section 18-44-115(a)(4) is constitutional. Weinberg filed a timely notice of appeal from the July 7 amended order.

Before we address Weinberg's arguments, we must address the issue of jurisdiction. We have jurisdiction over an appeal only if the order appealed is a final order or meets one of several exceptions under Rule 2(a)(1) of the Arkansas Rules of Appellate Procedure–Civil (2022). A final order is one that dismisses the parties, discharges them from the action, or concludes their rights to the subject matter in controversy. *Rigsby v. Rigsby*, 340 Ark. 544,

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<sup>2</sup>In her motion, Rutledge “presumed” that she was sued on the basis of Arkansas Code Annotated section 16-111-106, which requires a party challenging the constitutionality of an Arkansas statute or local ordinance to “notify” the attorney general.

<sup>3</sup>We note that the court's order states that there was a hearing on the motions to dismiss, but a transcript of the hearing was not filed with this court.

546, 11 S.W.3d 551, 552 (2000). Because the issue is one of jurisdiction, it is a matter we will consider even though the parties have not raised it. *Haile v. Ark. Power & Light Co.*, 322 Ark. 29, 31, 907 S.W.2d 122, 123 (1995). Absent a final order or a properly executed certificate from the circuit court making an “express determination, supported by specific factual findings, that there is no just reason for delay”—which the record on appeal in this case does not contain—an order that fails to adjudicate all the parties’ claims cannot be appealed. Ark. R. Civ. P. 54(b) (2022).

In the case at bar, the order appealed dismisses the lien-enforcement claim and the claim for breach of contract, and it rules on the constitutionality of the relevant statute, which is the issue on appeal. But the court’s order specifically provides that the additional claims—tortious interference and defamation—“survive” the motion to dismiss. The record contains no order dismissing these claims. In addition, Pajas filed a counterclaim, and the record contains no order disposing of it. *City of Corning v. Cochran*, 350 Ark. 12, 14, 84 S.W.3d 439, 441 (2002) (holding that where the circuit court did not rule on counterclaim, the order is not final). Thus, the order from which Weinberg appeals is not final. Accordingly, we dismiss the appeal.

Dismissed without prejudice.

VIRDEN and KLAPPENBACH, JJ., agree.

*Osborne & Wilmoth Law firm*, by: *Sammi Wilmoth*, for appellant.

One brief only.