Cite as 2009 Ark. App. 737

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CA 09-200

CECIL MARTIN and ANITA MARTIN, APPELLANTS V. KAT'S BAR & GRILL, LLC, APPELLEE	**Opinion Delivered** NOVEMBER 4, 2009 APPEAL FROM THE GARLAND COUNTY CIRCUIT COURT, [NO. CV2008-1027] HONORABLE DAVID B. SWITZER, JUDGE, DISMISSED WITHOUT PREJUDICE

KAREN R. BAKER, Judge

Appellants Cecil and Anita Martin challenge the trial court's entry of judgment in favor of appellee Kat's Bar & Grill, LLC, regarding the purchase of real property in Hot Springs, Arkansas, known as Kat's Bar & Grill, asserting two points of error: (1) The trial court erred in granting foreclosure because the appellee set out a course of conduct that constituted a waiver; (2) The trial court erred in granting foreclosure because enforcing the contract between the parties would be inequitable. The decree granting the foreclosure also contains the order memorializing the nonsuit of appellants' counterclaim arising from the parties' actions and interactions relating to the foreclosure. The order was filed on December 1, 2008. Appellants filed their notice of appeal on December 3, 2008. However, the record

contains no Rule 54(b) certification. Following our supreme court's precedent in *Bevans v. Deutsche Bank National Trust Co.*, 373 Ark. 105, 281 S.W.3d 740 (2008), we must dismiss the appeal without prejudice for lack of a final order.

Cecil and Anita Martin are husband and wife. Cecil and Anita, along with an individual named John Martin who is not a party on appeal, entered into an agreement and executed a promissory note with Kat's Bar & Grill, LLC, to purchase real property in conjunction with the purchase of inventory from the business. The promissory note and a mortgage were executed on June 28, 2007. The Martins tendered a down payment of twenty-five thousand dollars ($25,000) for the real property. They also paid an additional amount of money to purchase the inventory from the bar outright. The promissory note was secured by a lien on the real property.

On August 22, 2008, appellee filed a complaint to foreclose the mortgage alleging a breach of the payment terms pursuant to the promissory note. The complaint claimed that there was no defense to the liability on the note. Appellants timely filed an answer to the complaint denying that appellee was entitled to relief and subsequently filed a counterclaim against appellee on October 8, 2008. Appellants' counterclaim asserted that appellee had intentionally induced and caused a disruption of appellants' business expectancy in that appellee knew that appellants intended to sell the business, along with the real estate, to Roger Womack and Jack Wilhite. Appellants stated that the intentional disruption of their business expectancy resulted in damages to them for which appellee was liable. Appellee timely

answered the counterclaim denying liability and filed an amended complaint asking the court to find its interest superior to any others who may claim an interest in the property. Appellants timely answered the amended complaint denying appellee was entitled to relief.

A hearing was held on November 8, 2008. John Martin did not appear. At the hearing, appellants moved to nonsuit their counterclaim, and the court granted the nonsuit. The order memorializing the grant of the nonsuit is contained in the same decree granting the foreclosure. The order was filed on December 1, 2008, with a notice of appeal filed on December 3, 2008. However, the record contains neither a motion for, nor order granting, a Rule 54(b) certification. The parties' failure to obtain a Rule 54(b) certification requires us to dismiss the appeal without prejudice.

An order or judgment is not considered final and appealable unless it disposes of all the parties and all the claims. *See* Ark. R. Civ. P. 54 (2008). Pursuant to Rule 41(a)(1) of the Arkansas Rules of Civil Procedure, a claim may be dismissed without prejudice to a future action by the plaintiff before final submission of the case; however, "it is effective only upon entry of a court order dismissing the action." Ark. R. Civ. P. 41(a)(1) (2008). Pursuant to Administrative Order Number 2(b)(2), a judgment, decree, or order is "entered" when stamped or otherwise marked by the clerk with the date, time, and the word "filed." The provisions of Rule 41 also apply to the dismissal of any counterclaim, cross-claim, or third-party claim. Ark. R. Civ. P. 41(c) (2008).

Our supreme court in *Bevans*, *supra*, dismissed without prejudice an appeal of a

foreclosure action when the appellant appealed the foreclosure decree after nonsuiting her compulsory counterclaims arising from the financing arrangement. Our supreme court explained its reasoning through a series of cases acknowledging that the possibility for piecemeal appeals exists when a party is free to refile his or her compulsory counterclaims that arise out of the same transaction or occurrence as claims that are decided by the circuit court.

In *Haile v. Arkansas Power & Light Co.*, 322 Ark. 29, 907 S.W.2d 122 (1995), the court held that a plaintiff may not take a voluntary nonsuit as to some of its claims and then appeal from the circuit court's order disposing of the plaintiff's other claims because a voluntary nonsuit without prejudice leaves the plaintiff free to refile the claim; therefore, the order is not considered final. *Id; see also Ratzlaff v. Franz Foods of Ark.*, 255 Ark. 373, 500 S.W.2d 379 (1973) (decided prior to the adoption of our rules of civil procedure). In *Lemon v. Laws*, 305 Ark. 143, 806 S.W.2d 1 (1991), the court was asked to decide whether a plaintiff was barred by the doctrine of res judicata from refiling the plaintiff's previously nonsuited claims. They held that a plaintiff has an absolute right to take a voluntary nonsuit under Rule 41(a) before the final submission of the case for trial. The court emphasized that the first nonsuit and dismissal is without prejudice, thereby leaving the plaintiff free to refile his or her claim. In *Lemon*, the plaintiff nonsuited his claim and the court proceeded to enter an order in favor of the defendant on his counterclaim, but when the plaintiff attempted to refile his claim, the defendant asserted that the claim was barred by res judicata. The court determined that to apply the doctrine of res judicata to the plaintiff's nonsuited claim would be changing the

absolute right under Rule 41(a) to a qualified right. Accordingly, the court held that res judicata did not apply. *Id.*

In *Linn v. NationsBank*, 341 Ark. 57, 14 S.W.3d 500 (2000), the court directly addressed the issue of res judicata as to compulsory counterclaims that have been nonsuited. In that case, NationsBank filed a complaint for foreclosure against the Linns' bed-and-breakfast because the Linns had defaulted on their construction loans. The Linns then filed counterclaims for breach of contract, fraudulent misrepresentation, and negligence arising from NationsBank's refusal to honor an alleged oral agreement to provide permanent financing after construction of the bed-and-breakfast was completed. The Linns nonsuited their counterclaims, which were dismissed without prejudice, and the court proceeded to enter a foreclosure decree in favor of NationsBank. The Linns then attempted to file their original counterclaims and some additional claims in circuit court. NationsBank argued that the Linns' claims were compulsory counterclaims, pursuant to Ark. R. Civ. P. 13, and were barred by the doctrine of res judicata and collateral estoppel. The circuit court agreed and entered summary judgment in favor of NationsBank. On appeal, the Linns argued that the circuit court erred in dismissing their claims. *Id.*

In deciding the issue on appeal, our supreme court analyzed the doctrine of res judicata, a common law principle, in the context of compulsory counterclaims under Rule 13 and voluntary nonsuits under Rule 41. *Id.* They explained that the purpose behind Rule 13 is to require parties to present all existing claims simultaneously or be forever barred,

thereby preventing a multiplicity of suits arising from the same set of circumstances. Yet, while Rule 13 requires compulsory counterclaims to be brought, or else waived, it does not state whether a compulsory claim must be litigated in order to prevent a bar. The supreme court then reiterated a party's absolute right to voluntarily dismiss his or her claims without prejudice and to refile those claims within a year, pursuant to Rule 41. *Id.* (citing *Lemon v. Laws*, *supra*). In light of the fact that the Linns filed their counterclaims in compliance with Rule 13 and were also allowed to voluntarily dismiss those claims without prejudice, under Rule 41, the court concluded that the doctrine of res judicata did not bar the Linns from refiling their previous counterclaims. *Id.*

Our supreme court concluded that since a defendant who nonsuits all of his or her compulsory counterclaims is not barred from bringing those claims against the plaintiff again, it follows that an order or judgment providing for the nonsuit of those counterclaims while entering a judgment on the plaintiff's claims is not a final, appealable order under Rule 54(b) of the Arkansas Rules of Civil Procedure.

The interplay of the finality rule for appellate review and the principle of res judicata on a particular issue, along with the necessity of properly applying the two doctrines, is required to preclude a bar to claims asserted by the litigants to a matter. Our supreme court explained that the reason they were asked by the parties in *Linn* to address the res judicata issue, and not the finality issue, was that the defendants did not attempt to appeal the original foreclosure decree; instead, they refiled their previous counterclaims in circuit court.

The facts in *Linn* were strikingly similar to the facts in *Bevans*. Deutsche Bank filed a foreclosure action against the defendant Bevans. Bevans then filed compulsory counterclaims that all arose out of the financing arrangement, and after she voluntarily nonsuited all of her counterclaims against Deutsche Bank, the bank's claims were decided at trial. Instead of refiling her counterclaims in circuit court, Bevans appealed from the judgment against her. Because her nonsuited claims were compulsory counterclaims, Bevans would have been able to refile her claims. *See Linn v. NationsBank*, *supra; Lemon v. Laws*, *supra*. Therefore, the order she appealed from was not a final, appealable order.

Rule 13(a) of the Arkansas Rules of Civil Procedure requires that a pleading shall state as a counterclaim any claim, which at the time of the pleading, the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. *Morsy v. Deloney*, 92 Ark. App. 383, 214 S.W.3d 285 (2005). Appellants' counterclaim asserted that appellee intentionally induced and caused a disruption of the business expectancy between appellants and the potential buyers of the business which included the purchase of the real estate. One paragraph of the mortgage provides that the appellants "will neither sell, convey, bargain or grant the aforesaid property or any interest therein without the prior written consent of the Grantee [appellee], the aforesaid lien being non-assumable." While the facts arising out of the anticipated transfer of the business and real estate were understandably not developed at trial given the grant of the nonsuit, the inescapable conclusion is that a cause of action arising out of the thwarted sale of the real

estate arose from the transactions related to rights of possession to the real estate as decided by the circuit court in the foreclosure action.

For these reasons, we dismiss appellants' appeal without prejudice.

Dismissed.

GRUBER and BROWN, JJ., agree.