DIVISION I

CA06-948

May 23, 2007

SUNBELT BUSINESS BROKERS OF ARKANSAS, INC., and MARVIN WINSTON
APPELLANTS

v.

NANCY JAMES
APPELLEE

AN APPEAL FROM PULASKI COUNTY CIRCUIT COURT
[No. CV2004-10633]

HONORABLE WILLARD PROCTOR, JR.
CIRCUIT JUDGE

REMANDED

Sunbelt Business Brokers of Arkansas, Inc., and Marvin Winston have appealed from a judgment for appellee Nancy James on her fraud claim. Because this abbreviated record does not show that all of the claims by all of the parties have been concluded, it is impossible to determine whether this case is final for purposes of appeal. We therefore remand for supplementation of the record and rebriefing so that we can determine whether the judgment appealed from is final.

In 2003, Thomas Cormier employed Sunbelt to sell his Subway stores in Lonoke and Carlisle. Winston was an agent for Sunbelt. Using information provided by Cormier to Winston on Sunbelt's "cash-flow form," appellee entered into a contract to purchase the stores. The stores' profits proved to be less than appellee expected, and she learned that the cash-flow form contained erroneous information. Appellee ultimately sold the stores at a loss. She and

her company, NARP, Inc., which purchased the stores, brought a suit for fraud and breach of contract against appellants; Cormier; Lycor, Inc., which owned and sold the stores and of which Cormier was a co-owner and officer; and Roy Gorcyca, Sunbelt's sole shareholder. According to the first amended complaint, Sunbelt was dissolved, leaving Gorcyca responsible for its liabilities.

The trial court made the following findings in the judgment:

> There was a misunderstanding as to what the figures relating to the compensation of the owner and/or managers for the years 2000 and 2001 meant. The Sunbelt Business Brokers' form is not clear. It is clear to the Court that Mr. Cormier provided the information that he was directed to provide by Mr. Winston. Ms. James' interpretation of the figures provided was reasonable, and therefore, the Court finds that she was justified in relying on the figures provided by Mr. Cormier. The Court also finds that Mr. Cormier intended Ms. James to rely upon the representations and induced that reliance by verifying its authenticity through his signature on Schedule of Sellers Net Discretionary Cash Flow and other documents. The only question left for the Court is whether Mr. Cormier knew or believed that the representations were false or that he didn't have sufficient information to make them. While Mr. Cormier may have lacked the basis for knowing that the listing would be misleading, Mr. Winston did not. From the testimony, it appeared to the Court that Mr. Cormier relied extensively on the advice of Mr. Winston in preparing documents and forms. Indeed, it is the Sunbelt form that is at the center of plaintiff's claim of fraud. Mr. Cormier took the professional advice of the firm he had hired to advise him of the proper figures to be put into Sunbelt's form. Mr. Winston clearly should have known that . . . representations regarding compensation to the owner were false and therefore should have properly instructed Mr. Cormier on what information to provide.

The trial court found that appellee proved fraud on the part of Sunbelt and Winston and awarded $73,390 to appellee from Sunbelt. The court stated that it would not address the breach-of-contract claim because it might result in a duplicative recovery. This appeal then followed.

Other than the judgment and the notice of appeal, none of the pleadings are in the addendum. The record is abbreviated. In their notice of appeal, appellants designated the record as follows: the trial transcript; all exhibits; the first amended complaint; Cormier's, Winston's, and Gorcyca's answers to the first amended complaint; Gorcyca's cross-complaint against Cormier; Cormier's answer to Gorcyca's cross-complaint; and the judgment. The headings of Cormier's answer to the first amended complaint, the judgment, and the notice of appeal indicate that Cormier filed a counterclaim against appellee. That pleading is not in the record or the addendum.[1] In the judgment, the court stated that Cormier had sought the remaining balance of the purchase price. Gorcyca's and Winston's answer to the first amended complaint lists Cormier as a cross-plaintiff against Sunbelt and Gorcyca, but the record and addendum do not contain a cross-claim by Cormier against Sunbelt and Gorcyca. The judgment disposed of Cormier's counterclaim against appellee, providing that the $73,390 judgment represented the difference between what appellee paid for the stores ($175,000 less the $11,610 that she did not pay Cormier) minus the $90,000 that she received for the sale of the business. However, it did not conclude Gorcyca's cross-claim against Cormier or Cormier's claim against Sunbelt and Gorcyca.

The question of whether an order is final and subject to appeal is a jurisdictional question that the court will raise on its own. *Downing v. Lawrence Hall Nursing Ctr.*, 368 Ark. 51, ___ S.W.3d ___ (2006). Pursuant to Ark. R. Civ. P. 54(b)(2), an order that fails to

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[1]This court may go to the record to determine its jurisdiction. *See Russell v. State*, 85 Ark. App. 468, 157 S.W.3d 561 (2004).

adjudicate all of the claims as to all of the parties is not final for purposes of appeal. *Id*. A trial court may enter a final judgment, even in the absence of a resolution of all claims, by including an appropriate certificate in its order as set forth in Ark. R. Civ. P. 54(b)(1). *Id*. However, where, as here, the record reflects neither an adjudication of all claims nor a proper Rule 54(b) certificate, the court's order is not final, and this court has no jurisdiction to hear the appeal. *Id*.

If a complete record had been filed and it showed that all of the claims had not been adjudicated, this appeal would have to be dismissed. However, the record is abbreviated, and it is not possible to determine whether all of the parties' claims have been adjudicated. Under Ark. R. App. P. – Civ. 6(c), this court shall not affirm or dismiss a case based on an abbreviated record if the record was abbreviated in good faith either by agreement or without objection from the appellee. Here, we see no objection from appellee. We therefore give appellants the opportunity, within fifteen days from this date, to supplement the record to include all orders, should they exist, that dismiss any other party to the proceeding from which this appeal has been brought. *See Thomas v. Avant*, ___ Ark. ___, ___ S.W.3d ___ (March 8, 2007); *Verdier v. Verdier*, 362 Ark. 660, 210 S.W.3d 123 (2005); *West v. West*, 362 Ark. 456, 208 S.W.3d 776 (2005).

We also note that appellants have failed to comply with the requirements of Ark. Sup. Ct. R. 4-2 in the following ways: (1) as discussed above, the orders (if they exist) addressing the other parties' claims are not included in the addendum; and (2) other than the judgment and the notice of appeal, none of the pleadings are in the addendum. Arkansas Supreme Court Rule

4-2(a)(8) requires that the addendum shall include true and legible photocopies of, among other things, the relevant pleadings, documents, and exhibits that are essential to an understanding of the case and the court's jurisdiction on appeal.

To correct these deficiencies, we direct appellants to file a substituted abstract, brief, and addendum within fifteen days after the supplemental record is filed should they choose to supplement the record. Ark. Sup. Ct. R. 4-2(b)(3). Under our rules, mere modifications of the original brief will not be accepted. *Id*. If appellants fail to file a complying abstract, brief, and addendum within the prescribed time, the decision may be affirmed for non-compliance with our rules. *Id*. After service of the substituted brief on appellee, she shall have an opportunity to file a responsive brief in the time prescribed by the supreme court clerk or to rely on her brief already filed in this appeal. *See Kyzar v. City of W. Memphis*, 359 Ark. 366, 197 S.W.3d 502 (2004).

Remanded.

BAKER and MILLER, JJ., agree.