

ARKANSAS COURT OF APPEALS

DIVISION IV

No. CA10-952

ROMA TRAKRU

APPELLANT

V.

DAVID MATHEWS

APPELLEE

OPINION DELIVERED DECEMBER 7, 2011

APPEAL FROM THE STONE
COUNTY CIRCUIT COURT
[NO. CV-04-2-2]HONORABLE ADAM HARKEY,
JUDGE

APPEAL DISMISSED

ROBERT J. GLADWIN, Judge

A Stone County jury found appellant Roma Trakru liable for fraud, breach of contract, and breach of fiduciary duty on a complaint filed by appellee David Mathews. The jury awarded Mathews \$570,000 in compensatory damages, \$500,000 in punitive damages, and \$53,500 in attorney fees. For reversal, Trakru argues that the fraud verdict is not supported by substantial evidence; that the breach-of-contract and breach-of-fiduciary-duty claims fail as a matter of law; that the circuit court erred in limiting her cross-examination of Mathews; and that the attorney-fee award should be reversed. We dismiss the appeal without reaching the merits of these arguments due to lack of a final order.

Mathews was the owner of Ozark Mountain Enterprises, Inc., which operated the Stone County Ironworks (SCI) in Mountain View. In 2003, SCI encountered financial difficulties, and its lender recommended that its assets be sold. During the process of finding a willing buyer, Mathews and Trakru exchanged memoranda indicating their interest in

becoming partners and creating a company, Metal Arts, Inc., to operate an ironworks and home-decor business. Subsequently, Trakru formed Metal Arts, Inc., and bought SCI's intangible assets.¹ At the time the asset-purchase agreement was signed, Mathews had not yet acquired an interest in Metal Arts and had not yet executed a written partnership agreement with Trakru.

After executing the asset-purchase agreement, Trakru decided that she could not work with Mathews. She sold Metal Arts's assets to a new company, owned by her and a third party, and Mathews did not receive any of the sales proceeds. As a result, he filed suit against Trakru, Metal Arts, Inc., and another company, Rasy, Inc., for fraud, breach of contract, and breach of fiduciary duty. He also asserted a claim for promissory estoppel regarding an alleged oral employment contract with Trakru, and he sought a declaration that a covenant not to compete, which he had signed in July 2003, was void.

The case went to trial on the fraud, breach-of-contract, and breach-of-fiduciary-duty counts, and the jury rendered the above-mentioned verdict. On June 7, 2010, the circuit court filed a judgment incorporating the verdict, and Trakru filed a posttrial motion, which was later deemed denied. On October 1, 2010, the court entered an order awarding attorney fees to Mathews on his contract claim. Trakru now appeals from those rulings.

When more than one claim for relief is presented in an action or when multiple parties are involved, the circuit court may direct the entry of final judgment as to one or more but

¹Other buyers purchased SCI's tangible assets and the assets of another SCI division in Calico Rock.

fewer than all of 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) (2011). In the event the court so finds, it shall execute a certificate in compliance with Rule 54(b). *Id.* Absent such certification, a judgment that adjudicates fewer than all of the claims or the rights and liabilities of fewer than all of the parties shall not terminate the action as to any of the claims or parties. Ark. R. Civ. P. 54(b)(2) (2011).

In this case, the circuit court has not yet adjudicated all of the claims in the action or the rights and liabilities of all of the parties, and no Rule 54(b) certificate has been executed to permit an immediate appeal. With regard to parties, Mathews's complaint named two defendants in addition to Trakru: Metal Arts, Inc., and Rasy, Inc. Mathews did not try his case against those defendants, and the record contains no order dismissing them. The lack of a dismissal order is not critical as to Rasy—it was not served and did not appear in the action. *See* Ark. R. Civ. P. 54(b)(5) (2011) (providing that a claim against a named but unserved defendant is considered dismissed by the circuit court's final judgment). But Metal Arts appeared, answered, and filed a counterclaim (although there is no returned summons for Metal Arts in the record). Where a defendant appears and timely answers a complaint, Rule 54(b)(5) does not apply, and the defendant becomes a party to the case. *Cruse v. 451 Press, LLC*, 2010 Ark. App. 115 (per curiam). Because Metal Arts became a party and was not dismissed from the case, the judgments and orders appealed from are not final. *See generally Carr v. Nance*, 2010 Ark. 25.

The judgments and orders also lack finality because all claims for relief have not been adjudicated. *Yanmar Co., Ltd. v. Slater*, 2011 Ark. App. 167; *Forever Green Athletic Fields, Inc. v. Lasiter Constr., Inc.*, 2010 Ark. App. 483 (per curiam). In addition to the claims decided by the jury, Mathews's complaint asserted causes of action for promissory estoppel with regard to an alleged employment contract and for declaratory relief regarding the validity of a covenant not to compete. The record does not contain an order dismissing or otherwise resolving those claims. Moreover, Trakru and Metal Arts filed a counterclaim against Mathews, which they moved to nonsuit but did not dismiss by a written court order. The counterclaim therefore remains pending. *See Yanmar, supra* (holding that an order of dismissal is required before a nonsuit is effective).²

Given that the rights and claims of all parties have not been adjudicated, we lack jurisdiction to hear this case and must dismiss the appeal.

Dismissed without prejudice.

ROBBINS and HOOFFMAN, JJ., agree.

² Trakru's "third amended notice of appeal" stated that she abandoned any pending but unresolved claims. *See In re Arkansas Rules of the Supreme Court and Court of Appeals; Rules of Appellate Procedure – Civil; and Rules of Civil Procedure*, 2010 Ark. 288; Ark. R. App. P. –Civ. 3(e)(vi) (2011). Trakru's third amended notice, however, was not filed within thirty days of the last order appealed from, and it is therefore unclear if the notice is effective. In any event, dismissal is required for reasons other than the possible pendency of Trakru's counterclaim.