

**SUPREME COURT OF ARKANSAS**

No. 12-298

J-MCDANIEL CONSTRUCTION  
COMPANY; JOHN B. MCDANIEL;  
AND BARBARA G. MCDANIEL  
APPELLANTS

V.

DALE E. PETERS PLUMBING  
LIMITED, D/B/A DALE PETERS  
PLUMBING AND IRRIGATION;  
ROBERT BOSTIC HAULING AND  
EXCAVATING, INC., D/B/A BOBBY  
BOSTIC HAULING AND  
EXCAVATING; ROBERT BOSTIC,  
INDIVIDUALLY; AND ESQUIRE  
MARBLE COMPANY

APPELLEES

**Opinion Delivered April 25, 2013**

APPEAL FROM THE PULASKI  
COUNTY CIRCUIT COURT,  
[NO. CV-09-7490]

HONORABLE TIMOTHY DAVIS  
FOX, JUDGE

APPEAL DISMISSED.**CLIFF HOOFFMAN, Associate Justice**

Appellants, J-McDaniel Construction Company Inc., John B. McDaniel, and Barbara G. McDaniel (collectively referred to as McDaniel), appeal from an order of the Pulaski County Circuit Court granting summary judgment in favor of appellees, Dale E. Peters Plumbing Ltd., d/b/a Dale Peters Plumbing and Irrigation (Peters); Robert Bostic Hauling and Excavating, Inc., d/b/a Bobby Bostic Hauling and Excavating, and Robert Bostic individually (collectively referred to as Bostic); and Esquire Marble Company (Esquire). We dismiss the appeal for lack of a final order.

In late 2005, McDaniel began construction on a home in Little Rock and hired Peters,

Bostic, and Esquire as subcontractors. Peters installed plumbing; Bostic performed excavation, fill, compaction, and site-preparation work; and Esquire installed a shower in the master bedroom. Susan and David Conrad purchased the home from McDaniel on June 2, 2006. Shortly thereafter, the Conrads experienced problems with their home. The Conrads notified McDaniel, and although attempts were made to remedy the problems, the Conrads eventually filed a complaint in the Pulaski County Circuit Court against McDaniel on December 2, 2009, alleging negligence and breach of the implied warranties of habitability, sound workmanship, and proper construction.<sup>1</sup>

On December 23, 2009, McDaniel answered and filed a third-party complaint against Peters and Bostic, asserting claims for breach of contract; negligence; and breach of the implied warranties of habitability, workmanlike performance, sound workmanship, and proper construction. McDaniel later amended the third-party complaint, adding Esquire and claims for contribution and indemnity pursuant to common law and Arkansas Code Annotated section 16-61-201. Peters filed cross-claims against Bostic seeking contribution, indemnity, and apportionment of fault pursuant to Arkansas Code Annotated section 16-55-201. Similarly, Bostic then filed counter cross-claims against Peters seeking contribution, indemnity, and the right to apportionment of fault. Thereafter, Bostic filed a motion for summary judgment on McDaniel's third-party complaint and a motion for summary

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<sup>1</sup>The Conrads filed an amended complaint on November 16, 2010, adding claims against McDaniel and asserting that due to an agreement between the Conrads and McDaniel, the statute of limitations was tolled until December 2, 2009.

judgment on Peters' cross-claims. The circuit court denied Bostic's motion for summary judgment as to the cross-claims but did not rule on its motion as to the third-party complaint.

On April 20, 2011, Peters filed a motion for summary judgment, contending that it was entitled to judgment as a matter of law on the third-party complaint because the claim for negligence and the claim for breach of contract were both barred by the statute of limitations, because McDaniel could not prove breach of a specific contractual term where the parties did not have a written contract, and because the implied warranties did not extend from McDaniel to Peters.

On May 17, 2011, Bostic filed a motion for summary judgment on the third-party complaint and a motion for reconsideration of the denial of its motion for summary judgment on Peters' cross-claims. Bostic argued that McDaniel's claims for negligence, breach of contract, and breach of the implied warranties were time barred; that McDaniel could not prove Bostic breached a specific term of the unwritten contract; that there is no implied warranty between a general contractor and a subcontractor; that equitably indemnity does not apply because this was a "handshake agreement" without express terms; that Arkansas has abolished joint liability except in certain circumstances that are not applicable; and that there is no general right to apportionment. Bostic maintained that because McDaniel had no valid claim against Bostic, it was also entitled to summary judgment on Peters' cross-claims. Subsequently, Peters filed a supplemental motion for summary judgment incorporating Bostic's arguments as to the third-party complaint and asking the court to deny Bostic's motion to reconsider on the cross-claims.

On May 18, 2011, Esquire filed a motion for summary judgment on the third-party complaint, arguing that although McDaniel alleged a breach-of-contract claim against Esquire, any claim he had was for negligence; that the statute of limitations had run on any claim for negligence; that implied warranties of habitability, sound workmanship, and proper construction do not apply to the relationship between Esquire and McDaniel; that McDaniel is not entitled to indemnity where there is no express indemnity agreement; and that McDaniel is not entitled to contribution because passage of the Civil Justice Reform Act eliminated the possibility of contribution because a defendant will be required to pay only its apportioned share.

On May 26, 2011, Peters filed cross-claims against both Bostic and Esquire, asserting the right to apportionment of fault, contribution, and indemnity. Both Bostic and Esquire filed answers denying liability.

After a hearing was held, the court took the matters under advisement and requested letter briefs from all parties. On August 22, 2011, the circuit court entered an order granting Peters' April 20 motion for summary judgment and dismissing "such defendant" with prejudice, granting Bostic's motion for reconsideration of the denial of its motion for summary judgment on Peters' cross-claim and dismissing "such defendant," and granting Esquire's May 18 motion for summary judgment and dismissing "such third-party defendant."

On December 19, 2011, the circuit court entered an order "[u]pon the request of [the Conrads] and because the Conrads' claims against [McDaniel] have settled, the matter is hereby dismissed with prejudice." Thereafter, McDaniel filed a timely notice of appeal from

the August 22 order.

Although neither party raises the issue, the question of whether an order is final and subject to appeal is a jurisdictional question, which this court will raise sua sponte. *Moses v. Hanna's Candle Co.*, 353 Ark. 101, 110 S.W.3d 725 (2003). Rule 2(a)(1) of the Arkansas Rules of Appellate Procedure—Civil provides that an appeal may be taken only from a final judgment or decree entered by the trial court. *Searcy Cnty. Counsel for Ethical Gov't v. Hinchey*, 2011 Ark. 533. Under Arkansas Rule of Civil Procedure 54(b), an order that fails to adjudicate all the claims as to all the parties, whether presented as claims, counterclaims, cross-claims, or third-party claims, is not final for purposes of appeal. *Dodge v. Lee*, 350 Ark. 480, 88 S.W.3d 843 (2002) (citing *City of Corning v. Cochran*, 350 Ark. 12, 84 S.W.3d 439 (2002); *Office of Child Support Enforcement v. Willis*, 341 Ark. 378, 17 S.W.3d 85 (2000)). Although Rule 54(b) provides a method by which the circuit court may direct entry of final judgment as to fewer than all the claims or parties, where there is no attempt to comply with Rule 54(b), the order is not final, and we must dismiss the appeal. *Harrill & Sutter, PLLC v. Farrar*, 2011 Ark. 181.

Our review of the record in this case reveals that there are several claims that have not been disposed of by the circuit court. First, the circuit court was specific in its August 22 order that it was granting Bostic's motion to reconsider the denial of summary judgment on Peters' cross-claims. However, the court made no mention of Bostic's motion for summary judgment as to the third-party complaint filed by McDaniel. There is no indication in the record that the claims made against Bostic in McDaniel's third-party complaint have been settled. Second,

Bostic filed counter cross-claims against Peters. There is no indication in the record that a motion was filed with regard to those counter cross-claims, and there is no order in the record disposing of them. Finally, Peters filed cross-claims against Esquire. Again, the record is devoid of any motion filed with regard to those cross-claims, and the record is silent as to their disposal. In sum, the record contains no order dismissing McDaniel's third-party claims against Bostic, Bostic's counter cross-claims against Peters, and Peters' cross-claims against Esquire.

We have repeatedly held that it is not enough to dismiss some of the parties or to dispose of some of the claims; to be final and appealable, an order must cover *all of the parties and all of the claims*. *Williamson v. Misemer*, 316 Ark. 192, 871 S.W.2d 396 (1994) (emphasis added). Thus, this court lacks jurisdiction of this appeal because a final order has not been entered disposing of all the claims.

Appeal dismissed.

*Dover Dixon Home, PLLC*, by: *Wm. Dean Overstreet* and *John D. Pettie*, for appellants.

*Friday, Eldredge & Clark, LLP*, by: *James C. Baker, Jr.*, and *Jamie Huffman Jones*, for appellees.