DENY; and Opinion Filed May 9, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-18-00110-CV

IN RE BEHNAM BAGHERI, Relator

On Appeal from the 254th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DF-16-09231

MEMORANDUM OPINION

Before Justices Lang, Myers, and Whitehill
Opinion by Justice Whitehill

The underlying proceeding is a divorce action between relator and his wife, Nadereh. Relator seeks a writ of mandamus directing the trial court to dismiss the underlying divorce in accord with a joint notice of non-suit. The wife's former counsel maintains that the trial court did not abuse its discretion by not non-suiting the case because that counsel is seeking to enforce pre-existing attorney's fees orders. After reviewing relator's petition, the response of Nadereh's counsel, Orsinger, Nelson, Downing & Anderson, L.L.P. (ONDA) , and the mandamus record, we conclude relator is not entitled to the relief requested because he has not shown that the trial court abused its discretion by delaying signing the dismissal order.

I. Background

Two weeks before trial, relator and Nadereh purportedly reconciled and decided not to continue with the divorce proceedings. Relator's counsel prepared a notice of nonsuit for relator's and Nadereh's signatures.

ONDA advised Nadereh of the effect of the nonsuit, counseled her against signing the nonsuit, and told her that they would move to withdraw as counsel if her decision remained to nonsuit her claims. ONDA told Nadereh that she could proceed with the nonsuit as a pro se party after the withdrawal was granted.

But before ONDA could file the withdrawal motion, relator's counsel filed the nonsuit on behalf of relator and Nadereh. The nonsuit was signed by relator and Nadereh in their individual capacities.

Two hours after the nonsuit was filed, ONDA filed a motion to withdraw and a petition in intervention seeking, in part, enforcement of prior attorney's fees orders requiring relator to pay certain fee awards directly to ONDA. ONDA later filed an amended petition that included a motion for sanctions against relator and his counsel.

Relator filed this original proceeding after the trial court retained the trial setting for the divorce proceeding and refused to sign an order of dismissal granting the nonsuit. Relator seeks a writ of mandamus directing the trial court to sign a dismissal order without ruling on ONDA's pending motions and intervention.

II. Applicable Standards and Law

To be entitled to mandamus relief, a relator must show both that the trial court has clearly abused its discretion and that relator has no adequate appellate remedy. *In re Prudential Ins. Co.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding).

Rule 162 permits a plaintiff to dismiss a case or take a nonsuit at any time before the plaintiff has introduced all of his evidence other than rebuttal evidence and provides that:

> Any dismissal pursuant to this rule shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief or excuse the payment of all costs taxed by the clerk. A dismissal under this rule shall have no effect on any motion for sanctions, attorney's fees or other costs, pending at the time of dismissal, as determined by the court. Any dismissal pursuant to this rule which terminates

> the case shall authorize the clerk to tax court costs against dismissing party unless otherwise ordered by the court.

TEX. R. CIV. P. 162. A nonsuit renders the merits of the nonsuited case moot. *Villafani v. Trejo*, 251 S.W.3d 466, 469 (Tex. 2008) ("One unique effect of a nonsuit is that it can vitiate certain interlocutory orders, rendering them moot and unappealable."); *Univ. of Tex. Med. Branch at Galveston v. Estate of Blackmon ex rel. Shultz*, 195 S.W.3d 98, 101 (Tex. 2006) ("Although [Rule 162] permits motions for costs, attorney's fees, and sanctions to remain viable in the trial court, it does not forestall the nonsuit's effect of rendering the merits of the case moot.").

Although plaintiffs have a right to nonsuit their claims and the trial court has "no choice but to grant their nonsuit," plaintiffs do not have the absolute right to nonsuit "*someone else's* claims they are trying to avoid." *Tex. Mut. Ins. Co. v. Ledbetter*, 251 S.W.3d 31, 37–38 (Tex. 2008) (emphasis in original) (any dismissal pursuant to a nonsuit under Rule 162 "shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief"); *see also Villafani*, 251 S.W.3d at 469 ("Once a judge announces a decision that adjudicates a claim, that claim is no longer subject to the plaintiff's right to nonsuit") (quoting *Hyundai Motor Co. v. Alvarado*, 892 S.W.2d 853, 855 (Tex. 1995).

To that end, a trial court retains jurisdiction after a nonsuit and may delay signing an order of dismissal to address collateral matters, such as motions for sanctions, even when such motions are filed after the nonsuit. *See In re Bennett*, 960 S.W.2d 35, 38 (Tex. 1997) (per curiam) ("A trial court has the discretion to allow a reasonable amount of time for holding a hearing on sanctions and, once the question of sanctions has been resolved, to then sign an order of dismissal."); *Scott & White Mem'l Hosp. v. Schexnider*, 940 S.W.2d 594, 596–97 (Tex. 1996) (per curiam) (trial court has authority to decide a motion for sanctions while it retains plenary power, even after a nonsuit is taken and even if the motion is filed after the nonsuit).

Similarly, although one cannot generally intervene after final judgment, "when a subrogee's interest has been adequately represented and then suddenly abandoned by someone else, it can intervene even after judgment or on appeal so long as there is neither unnecessary delay nor prejudice to the existing parties." *Ledbetter*, 251 S.W.3d at 36.

In *Ledbetter*, a workers' compensation carrier filed a petition in intervention seeking subrogation for past and future benefit payments after the deceased employee's widow settled the case but before the prove-up hearing began. Before the trial court was able to call the case, the plaintiffs' attorney nonsuited all claims except those of Ledbetter's estate. The trial court granted the nonsuit over the carrier's objection, approved the settlement, and struck the carrier's intervention, and the carrier appealed.

The Texas Supreme Court reversed, holding that the dismissal prejudiced the carrier's pending claim for affirmative relief, which included a statutory claim of right to first money and a declaratory judgment action regarding its duty to make future payments to the widow and son. *Id.* at 38. Although "the plaintiffs were entitled to nonsuit their own affirmative claims, they were not entitled to dismissal from the case." *Id.* The carrier "had no reason to intervene earlier, as its claim and the plaintiffs' were identical insofar as recovering from any tortfeasors" and the carrier did not have "any reason to intervene to protect its claim" until the plaintiffs nonsuited. *Id.* at 36. Applying Rule 162, the *Ledbetter* court held that the carrier's subrogation claims constituted a claim for affirmative relief over which the trial court retained jurisdiction to address following the nonsuit. *Id.* at 38 (a claim for affirmative relief is one "on which the claimant could recover compensation or relief even if the plaintiff abandons his cause of action").

III. Application of Law to Facts

The trial court lacks jurisdiction to proceed to trial on the divorce if the nonsuit is valid. That does not mean, however, that the trial court must immediately dismiss the entire case. As

noted above, a trial court may rule on a motion for sanctions filed by a party to the action after a nonsuit is filed. *See Schexnider*, 940 S.W.2d at 596–97. Moreover, a trial court has discretion to delay entry of dismissal after a nonsuit is filed in order to address collateral matters, including interventions in which the intervening party asserts a claim for affirmative relief. *See Bennett*, 960 S.W.2d at 38; *see also Ledbetter*, 251 S.W.3d at 38.

To support his premise that no such delay is proper here, relator relies on cases holding that a court is without jurisdiction to retain the cause to determine attorney's fees where, as here, the parties to a divorce suit reconcile and nonsuit their claims. *See Jones v. Jones*, 97 S.W.2d 949, 950–51 (Tex. 1936); *Kelly v. Gross*, 4 S.W.2d 296, 297 (Tex. Civ. App.—El Paso 1928, writ ref'd); *Lamaster v. Loomis*, 230 S.W.2d 368, 370 (Tex. Civ. App.—Waco 1950, writ dism'd); *Henderson v. McCarter*, 200 S.W.2d 889, 890 (Tex. Civ. App. —Galveston 1947, writ dism'd). Those courts held post-reconciliation fee awards erroneous because allowing such awards in a divorce case "would violate the public policy of encouraging a continuation of the marriage relation." *Roberts v. Roberts*, 192 S.W.2d 774, 777 (Tex. 1946); *Lamaster*, 230 S.W.2d at 370 (citing *Roberts*); *see also Henderson*, 200 S.W.2d at 889–90 (public policy "cannot contemplate any rule which would permit outsiders to speculate upon the contingency of a disrupted marital union.").

However, those cases are distinguishable from this case. Although ONDA seeks fees pursuant to its client agreement with Nadereh, ONDA also seeks to enforce court orders to recover fees previously awarded to ONDA against relator, seeks sanctions against relator and his counsel directly related to conduct regarding the nonsuit, and argues that the nonsuit is invalid. Although ONDA was not a named party at the time of the nonsuit, ONDA, like the carrier in *Ledbetter*, has claims for affirmative relief that will be prejudiced by a dismissal order.

Moreover, ONDA's intervention is not an attempt to assert itself into the personal matters of a reconciled couple. On the contrary, ONDA seeks to recover fees awarded to ONDA before

the nonsuit and seeks sanctions related directly to the nonsuit and relator's effort to avoid the prior fees orders and to deprive ONDA of its rights to collect those fees from relator. *See, e.g., Roberts,* 192 S.W.2d at 777 (awarding fees to wife following involuntary dismissal of husband's divorce action following jury finding of lack of standing "was not 'promotive of divorce'" because, although dismissal left the marriage intact, wife and her attorneys successfully thwarted husband's efforts to seek the divorce in an improper manner).

We thus conclude that ONDA's intervention, motion for sanctions, and motion to enforce prior fees orders are collateral matters that may be determined before entry of a dismissal order. We express no opinion on whether the trial court may also consider ONDA's request for contractual attorney's fees pursuant to its engagement agreement with Nadereh. Based on the record before us, we conclude the trial court's delay in signing a dismissal order is not an abuse of discretion. Accordingly, we deny relator's petition for writ of mandamus. *See* TEX. R. APP. P. 52.8(a) (the court must deny the petition if the court determines relator is not entitled to the relief sought).

/Bill Whitehill/
BILL WHITEHILL
JUSTICE

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