

Opinion issued February 10, 2011



In The
Court of Appeals
For The
First District of Texas

NO. 01-09-00396-CV

**ARDMORE, INC. F/K/A GHX INCORPORATED AND STAR
PROPERTIES, LLC, Appellants**

V.

THE REX GROUP, INC. D/B/A T-3 SUPPORT SERVICES, INC., Appellee

**On Appeal from the 125th District Court
Harris County, Texas
Trial Court Case No. 2007-65381**

MEMORANDUM OPINION

This case involves a dispute of the ownership of certain commercial property located along Ardmore Street in Houston, Texas. The parties to the suit are Ardmore, Inc. f/k/a GHX Incorporated; Star Properties, LLC; and The Rex Group,

Inc. d/b/a T-3 Support Services, Inc. Over a number of months, the trial court signed a series of orders rendering summary judgment on the parties' various claims. In that period of time, Star Properties filed an amended petition that added claims that have not been disposed of in any of the trial court's orders. After the last order was signed, each of the parties filed a notice of appeal.

We dismiss for want of jurisdiction.

Background

The Rex Group, a tenant of the property owned by Star Properties, filed suit against Star Properties and Ardmore, a subtenant of part of the property. In turn, Ardmore and Star Properties each filed counter-claims against The Rex Group. Eventually, each of the parties filed motions for summary judgment, and each party filed responses to the motions that applied to them. The trial court subsequently issued a series of orders disposing of various claims and arguments.

On May 9, 2008, the trial court signed an order determining the legal effect of certain language in the relevant contracts.

On July 11, 2008, the trial court signed an order granting summary judgment in favor of The Rex Group and against Star Properties. The July 11 order declared that the only remaining issue between the parties was The Rex Group's claim for attorneys' fees from Star Properties. The trial court signed two orders—one on

August 28, 2008 and the other on September 5, 2008—clarifying aspects of the July 11 order.

On January 13, 2009, the trial court entered two orders. The first denied Ardmore's motion for summary judgment against The Rex Group. The second granted The Rex Group's motion for summary judgment against Ardmore. Although not explicitly stated in either order, the orders resolved all issues between The Rex Group and Ardmore except for The Rex Group's claim for attorneys' fees from Ardmore.

On March 18, 2009, the trial court signed an order granting The Rex Group's request for attorneys' fees from Ardmore. On April 3, 2009, the trial court signed an order granting The Rex Group's request for attorneys' fees from Star Properties.

Cumulatively, these orders disposed of all of the grounds presented in the parties' motions for summary judgment, in which the parties sought summary judgment on all of the claims brought by the parties at that time.

On October 13, 2008, however, Star Properties filed its second amended counter-petition. The amended petition was filed after the trial court had disposed of all claims then existing between The Rex Group and Star Properties except for The Rex Group's claim for attorneys' fees but before the trial court disposed of The Rex Group's claim for attorneys' fees against Star Properties and all claims

between The Rex Group and Ardmore. That petition included a new cause of action entitled “Non-Payment of Rent” and sought payment for rent, taxes, and other amounts allegedly due, as well as attorneys’ fees, from The Rex Group. Those claims were also maintained in Star Properties’ Third Amended Counterclaim. No order disposes of these claims.

Even though these new claims had not been disposed of, Ardmore and Star Properties filed their notices of appeal on May 1, 2009. The Rex Group filed its notice of appeal on May 12, 2009. On December 21, 2010, this Court issued an order asking the parties for briefing on whether the orders from which the parties are appealing are final and appealable.

The Rex Group filed a brief arguing that the claims added by Star Properties on October 13, 2008 deprived this Court of jurisdiction over this appeal and that dismissal was required. Star Properties filed two letter-briefs arguing that a Rule 11 agreement entered into in January 2009 between Star Properties and The Rex Group resolved the outstanding claims and that, accordingly, this Court has jurisdiction over the appeal. Ardmore filed a letter-brief adopting Star Properties’ arguments.

Analysis

In their briefs on jurisdiction, the parties dispute whether this Court lacks jurisdiction to consider this appeal based on Star’s filing of an amended petition

containing new claims after the trial court had disposed of all claims then existing between The Rex Group and Star Properties except for The Rex Group’s claim for attorneys’ fees but before the trial court disposed of The Rex Group’s claim for attorneys’ fees against Star Properties and all claims between The Rex Group and Ardmore.

The general rule, with a few mostly statutory exceptions not present here, is that an appeal may be taken only from a final judgment. *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001). “A judgment is final for purposes of appeal if it disposes of all pending parties and claims in the record” *Id.* If the order being appealed is not a final judgment and there is no applicable statutory exception, the appellate court lacks jurisdiction to consider the appeal. *See New York Underwriters Ins. v. Sanchez*, 799 S.W.2d 677, 678–79 (Tex. 1990). When an appellate court concludes it does not have jurisdiction, it can only dismiss the appeal. *Kilroy v. Kilroy*, 137 S.W.3d 780, 783 (Tex. App.—Houston [1st Dist.] 2004, no pet.).

Star Properties attached to one of its letter briefs a Rule 11 agreement entered into in January 2009 between itself and The Rex Group.¹ Star Properties argues that the Rule 11 agreement “expressly addressed Star’s reimbursement

¹ For civil cases, a court of appeals may consider matters of fact outside of the appellate record for the purpose of determining its jurisdiction. TEX. GOV’T CODE ANN. § 22.220(c) (Vernon Supp. 2010); *see also Harlow Land Co., Ltd. v. City of Melissa*, 314 S.W.3d 713, 716 n.4 (Tex. App.—Dallas 2010, no pet.).

claim and the other remaining unresolved claims between Star and Rex in the lawsuit, except Rex’s claim for attorney’s fees, which” was resolved by the April 3 order.

The agreement resolves the issues between the parties “relating to property taxes, property association fees, tax protest consulting fees, and other assessments, insurance premiums, and similar property-related payments for” the property in dispute for 2008 and all prior years. It expressly reserves any rights Star Properties has—if The Rex Group does not prevail on appeal—“to seek the recovery of holdover rent from Rex, from July 15, 2008, through the date of relinquishment of the property to Star, and Rex likewise retains any and all rights it may have in defense thereof.” The Rule 11 agreement further provides, “The parties agree that this Rule 11 agreement addresses all unresolved claims between Rex and Star in the referenced litigation, save and except for Rex’s and *Star’s claims for attorney’s fees* against one another, which will be decided by the [trial] Court.” (Emphasis added.)

In support of its argument, Star Properties relies *Jones v. Grieger*, 803 S.W.2d 486 (Tex. App.—Dallas 1991, no writ), in which a claim of appellee, Grieger, for punitive damages remained unresolved when the notice of appeal was filed. *Id.* at 487. In response to the Dallas Court of Appeals’s inquiry, Grieger represented to the appellate court that he had decided to “forego his right to

attempt to collect punitive damages.” *Id.* Although this decision was never communicated to the trial court or commemorated in any order, the appellate court held that the decision to waive the claim for punitive damages established the finality of the judgment. *Id.* at 488.

Star Properties explains that it “does not rely on *Jones* for the application of law to its specific facts.” That is, Star Properties is not attempting to retain jurisdiction in this Court by waiving its remaining claims. Instead, Star Properties argues that *Jones* stands for a larger principle: that where evidence relating to an appellate court’s jurisdiction “clearly establishes that the judgment disposes of all parties and claims (and, thus, nothing remains for the trial court to actually adjudicate), no useful purpose is served by remanding the case for entry of a purely formalistic order.”

Even if we were to adopt this principle, the Rule 11 agreement still would not dispose of all of the claims before the trial court. In *Howell*, the judgment signed by the trial court provided that the trial court:

might, “if appropriate,” take further action in its adjudication of Mauzy’s claim for attorney’s fees under § 37.009 of the Uniform Declaratory Judgments Act; so much is indicated by the statement granting Mauzy leave to apply to the trial court for additional attorney’s fees, after remand, in the event an appeal is taken.

Howell v. Mauzy, 774 S.W.2d 274, 276 (Tex. App.—Austin 1989, writ denied).

The Austin Court of Appeals held that this conditional language meant that the

issue of attorneys' fees remained unresolved. *Id.* Accordingly, the judgment was not final and appealable. *Id.*

The Rule 11 agreement signed by Star Properties and The Rex Group reserves Star Properties' claim for recovery of holdover rent as well as attorneys' fees if The Rex Group does not prevail on appeal. These claims were included in Star Properties' live petition. Even if this Rule 11 agreement had the same legal effect as an order of the trial court, the conditional language precludes a determination that all parties and claims have been disposed of by the trial court. *Id.*

In reply, Star Properties argues that rule 27.2 of the Texas Rules of Appellate Procedure allows this court to abate the appeal so that the parties can obtain an order from the trial court stating that all claims have been disposed of. *See* TEX. R. APP. P. 27.2. Rule 27.2 provides, in part, "The appellate court may allow an appealed order that is not final to be modified so as to be made final and may allow the modified order and all proceedings relating to it to be included in a supplemental record." *Id.* This rule, however, applies when there is uncertainty about the intent of the trial court in an existing order. *Lehmann*, 39 S.W.3d at 206 & n.92; *Coastal Terminal Operators v. Essex Crane Rental Corp.*, 133 S.W.3d 335, 338–39 (Tex. App.—Houston [14th Dist.] 2004, no pet.). It has also been used when all that is left is a ministerial act of the trial court to make the judgment

final. *See Iacono v. Lyons*, 6 S.W.3d 715, 717 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (abating appeal when trial court only needed to enter order granting previously filed notice of nonsuit); *Parks v. DeWitt Cnty. Elec. Coop., Inc.*, 112 S.W.3d 157, 163 (Tex. App.—Corpus Christi 2003, no pet.) (recognizing *Iacono* based on only act remaining for trial court was ministerial).

Here, there is no uncertainty about the intent of the trial court; Star Properties had not filed a motion to nonsuit its additional claims; and there is no suggestion that Star Properties intends to nonsuit its additional claims. Accordingly, rule 27.2 does not provide this Court with any authority to abate this appeal.

We hold that claims brought by Star Properties remain undisposed of and that, accordingly, we lack jurisdiction to consider the parties' appeals.

Conclusion

We dismiss the appeal for want of jurisdiction.

Per Curiam

Panel consists of Justices Jennings, Higley, and Brown.