Opinion issued September 9, 2021

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00716-CV

U. A. LEWIS, PEGGIE STOKES, PEGI JOHNSON, TONIECE WHITE AND MADDISON WHITE, Appellants

V.

STAR REALTY INC., ALAN GIRARD, AND MUZA GARARD, Appellees

On Appeal from the 215th District Court
Harris County, Texas
Trial Court Case No. 2015-37315

MEMORANDUM OPINION

This appeal is the latest action in an ongoing dispute over a $750 discovery sanction. The appellants challenge the trial court's June 4, 2019 order imposing $6,492.00 in additional sanctions related to their alleged failure to pay the previously

ordered $750. They contend that the trial court erred by granting additional sanctions more than two years after its plenary power expired.

We conclude that we lack jurisdiction, and we dismiss the appeal.

Background

In June 2015, Peggie Stokes, Pegi Johnson, Toniece White, and Maddison White (the "plaintiffs") filed suit against Star Realty Inc., Alan Girard, and Muza Garard (the "defendants") alleging that the defendants had refused to remedy the toxic mold in their apartment.[1] They were represented by attorney U.A. Lewis, who continues to represent them, and herself, in this appeal. They alleged violations of the Property Code and the Deceptive Trade Practices Act ("DTPA").

The defendants answered with a general denial and multiple affirmative defenses. In their prayer for relief, they sought attorney's fees. They did not plead the grounds for their request for attorney's fees. The defendants filed a motion for summary judgment in July 2016 and a motion to compel discovery and for sanctions for discovery abuse in August 2016.

On September 14, 2016, the trial court awarded the defendants $750 in sanctions, representing a portion of their legal fees. The next day, September 15, 2016, the plaintiffs filed a nonsuit without prejudice. The next day, September 16,

[1] Peggie Stokes is the mother of Pegi Johnson and Toniece White and the grandmother of Maddison White.

2016, the trial court signed two orders: an order denying the defendants' motion for summary judgment and an order of nonsuit without prejudice.

On October 5, 2016, the defendants filed a motion for new trial arguing that they had a live counterclaim for attorney's fees pending at the time of the nonsuit. On November 11, 2016, the defendants filed another motion for sanctions seeking additional sanctions due to the plaintiffs' failure to comply with the previous order for them to pay $750. On November 23, 2016, the trial court denied the motion for sanctions.

In 2017, the plaintiffs refiled their lawsuit against the defendants. The defendants again sought to impose additional sanctions due to the plaintiffs' failure to pay $750. After a hearing, the trial court concluded that the discovery abuse previously sanctioned in the 2015 lawsuit was due to attorney Lewis's actions, and it ordered Lewis to pay the $750 sanction previously ordered. A judgment was signed in April 2018, the plaintiffs appealed, and the appeal was dismissed for want of prosecution in February 2019.[2]

In May 2019, the defendants filed a motion for additional sanctions in the 2015 case. They sought an additional $6,492.00 in accrued attorney's fees through April 2019, including attorney's fees accrued in defending against the 2017 lawsuit.

---

[2] *See Stokes v. Star Realty Inc.*, No. 14-18-00532-CV, 2019 WL 470424, at *1 (Tex. App.—Houston [14th Dist.] Feb. 7, 2019, no pet.) (mem. op.) (appealing 2017 case).

The trial court granted this motion on June 4, 2019, and Lewis and the plaintiffs appealed on September 17, 2019.

Analysis

On appeal, the plaintiffs argue that the court lacked jurisdiction to order additional sanctions in 2019. Before we reach the merits of the plaintiffs' arguments, we first consider our own jurisdiction. "[C]ourts always have jurisdiction to determine their own jurisdiction." *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 146 n.14 (Tex. 2012) (internal quotations omitted); *see also Royal Indep. Sch. Dist. v. Ragsdale*, 273 S.W.3d 759, 763 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (jurisdiction is fundamental in nature and cannot be ignored). Whether we have jurisdiction is a question of law, which we review de novo. *Tex. A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 840 (Tex. 2007). If this is an appeal over which we have no jurisdiction, it must be dismissed. *Ragsdale*, 273 S.W.3d at 763.

I. An appellant must file a timely notice of appeal from a final judgment or authorized interlocutory order to invoke this court's jurisdiction.

Unless a statute authorizes an interlocutory appeal, a party may appeal only from a final judgment. *See* TEX. CIV. PRAC. & REM. CODE §§ 51.012, 51.014; *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001). When, as here, "there has not been a conventional trial on the merits, an order or judgment is not final for purposes of appeal unless it actually disposes of every pending claim and party or unless it clearly and unequivocally states that it finally disposes of all claims and all

parties." *Lehmann*, 39 S.W.3d at 205. In addition, an order for monetary sanctions based on abuse of post-judgment discovery in aid of enforcement of a judgment is final and appealable when reduced to a judgment upon which execution is authorized. *Arndt v. Farris*, 633 S.W.2d 497, 500 n.5 (Tex. 1982); *Sintim v. Larson*, 489 S.W.3d 551, 557 (Tex. App.—Houston [14th Dist.] 2016, no pet.); *see* TEX. R. CIV. P. 621a (post-judgment discovery and enforcement of judgment).

Without a timely filed notice of appeal from a final judgment or recognized interlocutory order, we do not have jurisdiction over an appeal. *See Lehmann*, 39 S.W.3d at 195. Generally, "a notice of appeal must be filed within 30 days after the judgment is signed." TEX. R. APP. P. 26.1. The time to file a notice of appeal is extended to 90 days after the signing of the judgment if any party files a timely motion for new trial, motion to modify the judgment, motion to reinstate, or a request for findings of fact and conclusions of law that is either required by the Rules of Civil Procedure or may properly be considered by the appellate court.[3] TEX. R. APP. P. 26.1(a)(1)–(4).

---

[3] The filing of a motion for new trial also extends the plenary power of the trial court. *See* TEX. R. CIV. P. 329b. The motion for new trial must be filed within 30 days after the signing of the challenged judgment or order. *Id.* The motion for new trial is overruled by operation of law 75 days after the date the judgment was signed unless the trial court signs a written order ruling on the motion. *Id.* The trial court retains plenary power for 30 days after the date it signs an order ruling on the new-trial motion or 30 days after the new-trial motion is overruled by operation of law. *Id.* In this case, the trial court signed an order of dismissal on September 16, 2016. Within 30 days, on October 5, 2016, the defendants filed a motion for new trial. The trial court did not sign an order disposing of the new-trial motion, and it was overruled

II. The plaintiffs did not file a timely notice of appeal.

A. The notice of appeal was not timely in relation to the 2016 final judgment.

The trial court signed an order of nonsuit without prejudice on September 16, 2016, dismissing the plaintiffs' causes of action against the defendants. Because there was no trial on the merits, we do not presume this judgment was final. *See Lehmann*, 39 S.W.3d at 205. However, because it dismissed all of the plaintiffs' claims against the defendants, it would only be interlocutory if the defendants had pending claims for affirmative relief at the time of the court's dismissal. *See id.* The defendants' motion for sanctions was granted two days before the court dismissed the plaintiffs' claims, and there was no other motion pending at the time of the dismissal. However, on appeal and in the trial court, the defendants have maintained that they had a pending "counterclaim" for attorney's fees. Thus, the finality of the September 16, 2016 judgment of dismissal depends on whether the defendants had a pending counterclaim for attorney's fees.

Texas has long followed the "American Rule" prohibiting fee awards to the prevailing party unless specifically provided by contract or statute.[4] *See MBM Fin.*

---

by operation of law 75 days after September 16, 2016, which was Wednesday, November 30, 2016. The trial court's plenary power extended for an additional 30 days after that, expiring on Friday, December 30, 2016.

[4] "[A] defendant may be a prevailing party when a plaintiff nonsuits without prejudice if the trial court determines, on the defendant's motion, that the nonsuit was taken to avoid an unfavorable ruling on the merits." *Epps v. Fowler*, 351 S.W.3d 862, 870 (Tex. 2011).

Corp. v. Woodlands Operating Co., L.P., 292 S.W.3d 660, 669 (Tex. 2009) (citing *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 310–11 (Tex. 2006)). "To be entitled to an award of attorney's fees, a party must file an affirmative pleading requesting them." *Whallon v. City of Hous.*, 462 S.W.3d 146, 165 (Tex. App.—Houston [1st Dist.] 2015, pet. denied) (quoting *Menix v. Allstate Indem. Co.*, 83 S.W.3d 877, 880 (Tex. App.—Eastland 2002, pet. denied)). "[I]f a party pleads facts which, if true, entitle him to the relief sought, he need not specifically plead the applicable statute in order to recover [attorney's fees] under it." *Whallon*, 462 S.W.3d at 165 (quoting *Gibson v. Cuellar*, 440 S.W.3d 150, 156 (Tex. App.—Houston [14th Dist.] 2013, no pet.)).

The defendants' live pleading at the time of the nonsuit in the 2015 case alleged a general denial and affirmative defenses, and it included a prayer for attorney's fees and costs. Their live pleading did not allege any facts. The defendants did not plead the applicable statute that would allow them to recover attorney's fees. *See Whallon*, 462 S.W.3d at 165. In their motion for new trial, they argued that the court should look to the plaintiffs' pleadings to determine the basis for their claim for defensive attorney's fees.

The plaintiffs brought causes of action under the Property Code and the DTPA. The Property Code provides that a tenant may recover attorney's fees in suit based on a landlord's failure to take reasonable action to repair or remedy a condition

of the premises. *See* TEX. PROP. CODE § 92.0563. It does not authorize recovery of attorney's fees by a landlord prevailing in defense of such a lawsuit. *See id.* The DTPA authorizes the trial court to award to a prevailing defendant reasonable and necessary attorney's fees and court costs when it finds that the plaintiff's claim was groundless in law or fact, brought in bad faith, or brought for purposes of harassment. TEX. BUS. & COM. CODE § 17.50(c).

The defendants did not plead any facts that, if true, would show that the plaintiffs' claims were groundless in law or fact, brought in bad faith, or brought for the purpose of harassment, which would entitle them to a judgment for attorney's fees. *See Whallon*, 462 S.W.3d at 165. Because the defendants neither pleaded the statutory basis for their claim for attorney's fees nor facts that, if true, would entitle them to attorney's fees, we conclude that they did not have a live claim for attorney's fees at the time of the plaintiffs' nonsuit. *See id.*

Having concluded that the defendants did not have a pending claim for attorney's fees at the time of the dismissal, we hold that the September 16, 2016 dismissal was a final judgment. The interlocutory $750 sanctions order merged into the final judgment of dismissal. *See Bonsmara Nat. Beef Co., LLC v. Hart of Tex. Cattle Feeders, LLC*, 603 S.W.3d 385, 390 (Tex. 2020) ("When a trial court renders a final judgment, the court's interlocutory orders merge into the judgment . . . ."). The defendants timely filed a motion for new trial, which extended the time for filing

a notice of appeal to Thursday, December 15, 2016. *See* TEX. R. APP. P. 26.1(a). The notice of appeal in this case was filed on September 17, 2019, nearly three years late.

B. The 2019 sanctions order was not a final judgment.

The plaintiffs and the defendants joined issue on whether the trial court had jurisdiction to enter the 2019 sanctions order. But they did not address whether we have appellate jurisdiction over a direct appeal from that order.

The trial court is authorized to enforce its judgments. *See* TEX. R. CIV. P. 308 ("The court shall cause its judgments and decrees to be carried into execution . . . ."); *Arndt*, 633 S.W.2d at 499; *Cook v. Stallcup*, 170 S.W.3d 916, 920 (Tex. App.—Dallas 2005, no pet.) (trial court has inherent judicial authority to enforce its orders and decrees); *Wall St. Deli, Inc. v. Boston Old Colony Ins. Co.*, 110 S.W.3d 67, 69 (Tex. App.—Eastland 2003, no pet.) ("A trial court has the power to enforce its judgments even after its plenary power has expired."). That power does not, however, permit a trial court to modify its judgment after the expiration of its plenary power. *See Malone v. Hampton*, 182 S.W.3d 465, 470 (Tex. App.—Dallas 2006, no pet.) ("Any document, other than a motion to enforce or clarify, filed after the expiration of the trial court's plenary jurisdiction, would be a nullity as a suit ends when the trial court's plenary power over the proceeding ends.").

The Texas Rules of Civil Procedure permit post-trial discovery to obtain information to enforce a judgment. TEX. R. CIV. P. 621a. Rule 621a permits "any

discovery proceeding authorized by these rules for pre-trial matters." *Id.* A trial court may make orders related to post-judgment discovery, including ordering sanctions for abuse of the discovery process, which could be used to avoid enforcement of a judgment. *E.g.*, *Arndt*, 633 S.W.2d at 500 n.5; *Sintim*, 489 S.W.3d at 557. It is in this context that an order imposing sanctions may be appealable. *See Arndt*, 633 S.W.2d at 500 n.5; *Sintim*, 489 S.W.3d at 557. When an order imposes monetary sanctions for abuse of post-judgment discovery taken in aid of enforcement of a judgment, the resulting order will be final and appealable when it is reduced to a judgment upon which execution is authorized. *See Arndt*, 633 S.W.2d at 500 n.5; *Sintim*, 489 S.W.3d at 557; *see also* TEX. R. CIV. P. 621a (post-judgment discovery and enforcement of judgment).

The 2019 sanctions order did not arise in the context of post-judgment discovery to ascertain what assets may be available to satisfy a judgment. The 2019 order is not a final judgment and is not appealable. *See Arndt*, 633 S.W.2d at 500 n.5; *Sintim*, 489 S.W.3d at 557.

Conclusion

Having concluded that the notice of appeal was untimely as to the 2016 judgment of dismissal and that the 2019 sanctions order was not a final, appealable judgment, we conclude that we lack appellate jurisdiction.[5]

We dismiss this appeal for want of jurisdiction.

Peter Kelly
Justice

Panel consists of Justices Kelly, Landau, and Hightower.

---

[5] Under certain circumstances, an appellate court may treat a direct appeal as a petition for writ of mandamus. *See CMH Homes v. Perez*, 340 S.W.3d 444, 452–53 (Tex. 2011). Specifically, an appellate court may treat a direct appeal as a request for mandamus relief when an appellant makes a specific request to invoke the court's original jurisdiction. *See id.* (holding appeal of unappealable order may be construed as petition for writ of mandamus where appellant specifically requested mandamus relief and filed separate document titled "petition for writ of mandamus"); *see also Jones v. Brelsford*, 390 S.W.3d 486, 497 n.7 (Tex. App.—Houston [1st Dist.] 2012, no pet.) (refusing to construe appeal as petition for writ of mandamus where appellant failed to specifically request mandamus relief). The appellants did not ask this court to construe this appeal as a petition for writ of mandamus, and the appellant's brief does not satisfy the mandatory formal requirements for the extraordinary, equitable remedy of mandamus. *See* TEX. R. APP. P. 52.3.