Opinion issued August 2, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-21-00065-CV

RODAN TRANSPORT USA, LTD., D/B/A AVEDA TRANSPORTATION AND ENERGY SERVICES, Appellant

V.

NABORS DRILLING TECHNOLOGIES USA, INC., Appellee

On Appeal from the 190th District Court
Harris County, Texas
Trial Court Case No. 2020-01988

MEMORANDUM OPINION

In this breach-of-contract case, appellant Rodan Transport USA, Ltd., doing business as Aveda Transportation and Energy Services (Rodan), appeals the trial court's order granting summary judgment in favor of appellee Nabors Drilling Technologies USA, Inc. (Nabors). Because it does not dispose of all issues between

the parties—specifically, the issue of damages—or contain language of finality, the order is not a final and appealable judgment. Accordingly, we dismiss the appeal for lack of jurisdiction.

Background

Nabors—a company whose business included drilling oil and gas wells—entered into Master Service Agreement (MSA) with Rodan—a registered motor carrier. The MSA governed the terms of their business relationship whereby Rodan would provide services to Nabors. The MSA contained a provision in which Rodan agreed, among other things, to defend and indemnify Nabors against claims for bodily injury brought by Rodan's employees. The MSA also required that Rodan name Nabors as an additional insured on Rodan's insurance policies.

While Rodan was providing services to Nabors, one of Rodan's employees, Daniel Ramirez, was injured. Ramirez filed a personal-injury suit in Brazoria County against only Nabors. A dispute arose between Nabors and Rodan regarding whether Rodan was required to defend and indemnify Nabors with respect to the suit and whether Rodan had named Nabors as an additional insured in Rodan's commercial general liability (CGL) policy. Nabors sued Rodan, bringing it into the Ramirez suit as a third party-defendant. Specifically, Nabors asserted a breach-of-contract claim against Rodan, alleging that Rodan had breached the MSA by failing to defend and

indemnify Nabors and by failing to name Nabors as an additional insured in the CGL policy.

Ramirez and Nabors settled Ramirez's personal-injury suit for a confidential amount.[1] Nabors then non-suited its third-party breach-of-contract claim against Rodan.

A few days later, Nabors filed the underlying suit against Rodan in Harris County. Nabors again claimed that Rodan had breached the MSA "by failing to indemnify [Nabors], and [Nabors] ha[d] suffered, and continues to suffer, damages as a result of [Rodan's] breach." Nabors alleged that, "due to [Rodan's] wrongful refusal to indemnify [Nabors], [Nabors] was forced to settle this claim in excess of $100,000 in favor [Ramirez]." Nabors also asserted that Rodan had breached the MSA "by failing to provide additional insured coverage to [Nabors], and [Nabors] ha[d] suffered, and continue[d] to suffer, damages as a result of [Rodan's] breach. Besides damages, Nabors sought to recover its attorney's fees for prosecuting its breach-of-contract claim against Rodan. Nabors claimed that it was entitled to its attorney's fees "pursuant to Chapter 38 of the Texas Civil Practices & Remedies Code."

After answering the suit, Rodan filed a combined no-evidence and traditional motion for summary judgment on Nabors's breach-of-contract claim. Nabors

[1] It is not disputed that Rodan knows the amount of the settlement.

responded to the motion, and it filed its own traditional motion for summary judgment.

In its motion for summary judgment, Nabors contended that Rodan had breached the MSA, echoing what it had asserted in its pleading. Nabors claimed that Rodan was "contractually obligated to defend and indemnify Nabors for the Ramirez suit." Nabors alleged that, even though it had made "repeated requests," Rodan had "refused and failed to defend and indemnify Nabors and had forced Nabors to file this lawsuit." It also alleged that Rodan had "failed to provide additional insured coverage to Nabors for the Ramirez lawsuit."

Nabors asserted that, "[a]s a result, [it] ha[d] suffered monetary damages arising from costs of defense, including attorneys' fees, court costs, and expert costs, and settlement of the Ramirez lawsuit." And it claimed that it was "entitled to recovery of its attorneys' fees and costs incurred in prosecuting this cause of action for breach of contract as reflected in Exhibit M"—an exhibit attached to Nabors's motion for summary judgment.

Exhibit M was the affidavit of Kelly Hartmann, one of the attorneys representing Nabors. Hartmann testified about the total amount of attorney's fees that Nabors had incurred in defending against Ramirez's suit and in prosecuting the instant suit for breach of contract against Rodan. Hartmann testified, "Reasonable attorneys' fees and expenses incurred in prosecuting [Nabors'] claims against

[Rodan] for defense and indemnification and in defending the suit brought by Daniel Ramirez total approximately $83,439.06." Hartman did not separate the amount of attorney's fees incurred by Nabors in defending against the Ramirez suit from the amount of attorney's fees it had incurred in prosecuting the instant breach-of-contract case against Rodan.

In the prayer of its motion for summary judgment, Nabors asked the trial court to grant the motion because the MSA provided that Rodan was "contractually obligated to (1) defend and indemnify Nabors in the Ramirez lawsuit and (2) provide additional insured coverage to Nabors for the Ramirez lawsuit." Nabors further requested the trial court "[to] declare that [Nabors was] entitled to defense and indemnity and additional insured coverage from [Rodan], award [Nabors] its attorneys' fees and costs in prosecuting this action as evidenced by Exhibit M, and award [Nabors] such other general relief and special relief as it may show itself entitled."

The trial court signed an "Order Granting [Nabors's] Motion for Summary Judgment" in which the court ordered that:

- Nabors's motion for summary judgment was granted;
- Nabors was "entitled to defense and indemnity by [Rodan] for the Ramirez lawsuit";
- "[Rodan] shall provide additional insured coverage to [Nabors] for the Ramirez lawsuit"; and

- "[Nabors] shall recover its attorneys' fees and costs as evidenced by Exhibit M from [Rodan]."

Rodan appealed the trial court's order. In its first issue, Rodan contends that the trial court erred "in granting summary judgment in favor of Nabors and in holding that Rodan owed defense and indemnity for the Ramirez lawsuit." In its second issue, Rodan contends that the trial court erred "in granting summary judgment based on the claim Rodan failed to provide additional insured coverage."

In its third issue, Rodan contends that even if this Court determines that the trial court properly concluded that Rodan breached the MSA, "the judgment as entered cannot be enforced and must be modified." Rodan points out that Nabors's petition alleged only a cause of action for breach of contract, and "[t]he petition sought only money damages and made no mention of declaratory relief." But, "in its motion for summary judgment, the relief Nabors sought [in its prayer] included a request for a declaration that Nabors was 'entitled to defense and indemnity and additional insured coverage.' . . . [R]ather than enter a judgment for money damages and attorney's fees, the trial court's order consisted only of the above declaratory relief and attorney's fees 'as evidenced by Exhibit M.'" Rodan then asserts,

> While all parties are aware of the settlement amount below which was confidential, if this Court finds Nabors is entitled to recover for defense and indemnity of the Ramirez lawsuit, the judgment of the trial court should be modified to reflect that Nabors is entitled to recover the actual amount expended in defense and indemnity of the Ramirez lawsuit[.]

Rodan also asks that we modify the judgment to reflect that the amount of damages Nabors may recover is limited to $500,000 under the Texas Oilfield Anti-Indemnity Act. *See* TEX. CIV. PRAC. & REM. CODE § 127.005.

Among the arguments raised in its response brief, Nabors asserts that "the Order [granting its motion for summary judgment] is not yet final or appealable because the trial court did not award Nabors monetary damages (for the settlement of the Ramirez suit) as requested in its Petition." Nabors further asserts that the trial court "must make a determination on the amount of damages to which Nabors is entitled before an appeal before this Court is ripe."

Appellate Jurisdiction

Because it effects our jurisdiction, we begin by determining whether there is a final, appealable judgment in this case. *See City of Hous. v. Rhule*, 417 S.W.3d 440, 442 (Tex. 2013). Texas appellate courts have jurisdiction to review a trial court's order by appeal if the order constitutes a final judgment or if a statute authorizes an interlocutory appeal. *Lehmann v. Har–Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001); *Stary v. DeBord*, 967 S.W.2d 352, 352–53 (Tex. 1998). Because no statute authorizes an interlocutory appeal in this case, this Court has jurisdiction over this appeal only if the trial court's judgment is final for appellate purposes. *See Stary*, 967 S.W.2d at 352–53; *Silver Gryphon, LLC v. Bank of New York Mellon*, 529 S.W.3d 595, 597 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

An order will be final for appellate purposes if it states with "unmistakable clarity" that it is intended as a final judgment as to all claims and all parties. *Lehmann*, 39 S.W.3d at 192–93; *see Farm Bureau Cnty. Mut. Ins. Co. v. Rogers*, 455 S.W.3d 161, 163 (Tex. 2015). Here, the trial court's order contains no express language of finality.

An order granting a motion for summary judgment will also be final for appellate purposes if it disposes of all issues and parties in a lawsuit. *See Lehmann*, 39 S.W.3d at 192 (providing that judgment is final if it actually disposes of all claims and parties); *Chase Manhattan Bank, N.A. v. Lindsay*, 787 S.W.2d 51, 53 (Tex. 1990) ("To be final, a summary judgment must dispose of all parties and issues in a lawsuit."). Here, the trial court's order granting Nabors's motion for summary judgment did not dispose of all issues because it did not dispose of the issue of damages. *See In re Blankenhagen*, 513 S.W.3d 97, 101 (Tex. App.—Houston [14th Dist.] 2016, orig. proceeding, [mand. granted]) (holding that default judgment was "not a final judgment because the amount of relators' damages has not yet been determined"); *see also In re Burlington Coat Factory Warehouse of McAllen, Inc*., 167 S.W.3d 827, 830–31 (Tex. 2005) (orig. proceeding, [mand. granted]) (holding default judgment was not final because plaintiff's request for exemplary damages was not resolved).

Nabors sued Rodan for breach of contract on theories that, as required by the MSA, Rodan had failed to add Nabors as an additional insured and had failed to defend and indemnify Nabors in the Ramirez suit. In its live pleading, Nabors asked the trial court to award it the monetary damages it had suffered because of Rodan's breach of contract. In other words, Nabors sought damages to compensate it for the attorney's fees and expenses it had incurred in defending against the Ramirez suit and in settling with Ramirez, which Nabors alleged was "in excess of $100,000." Nabors also sought its attorney's fees incurred in prosecuting its breach-of-contract cause of action. The trial court's order disposed of Nabors's attorney's fees claim, but it did not dispose of Nabors claim for damages.[2]

In its brief, Rodan stated that, although the trial court's order provided that Nabors was "entitled to defense and indemnity by [Rodan] for the Ramirez suit," the

[2] The order awarded Nabors its attorney's fees "as evidenced" in Exhibit M, which is Hartmann's affidavit. The amount of the attorney's fees described in the affidavit was the total amount of attorney's fees Nabors incurred in defending against the Ramirez lawsuit and in prosecuting its breach-of-contract claim in the instant suit. The affidavit does not separate the amount of the fees attributable to each suit. Even though the amount of attorney's fees Nabors incurred in the Ramirez suit may more properly be considered as damages in this suit, the trial court's order does not award them as damages. Instead, the order appears to award those fees as attorney's fees in this suit. In its opening brief, Rodan points out that, after Nabors filed its motion for summary judgment, the parties stipulated to the amount of reasonable and necessary attorney's fees that Nabors incurred in prosecuting its breach-of-contract claim. Rodan requests that we modify the order—if we conclude it breached the MSA—to order it to pay only the stipulated amount; that is, the amount of attorney's fees incurred by Nabors in this suit. However, regardless of the propriety of Rodan's request to modify the attorney's fee award, we cannot modify the order because, as we conclude *infra,* the order is not a final and appealable judgment.

order was not enforceable as written. To remedy this, Rodan requests this Court to modify the trial court's order "to reflect that Nabors is entitled to recover the actual amount expended in defense and indemnity of the Ramirez suit in an amount not to exceed to $500,000," if we determine that Rodan breached the MSA. Thus, Rodan acknowledged in its opening brief that the trial court did not dispose of the issue of damages. However, even if it already contained the language requested by Rodan, the order would still not be final.

"[A] judgment is not final unless it is definite and certain, such that the clerk can ascertain the amount to place in the writ of execution." *In re Educap, Inc.*, No. 01-12-00546-CV, 2012 WL 3224110, at *3 (Tex. App.—Houston [1st Dist.] Aug. 7, 2012, orig. proceeding [mand. granted]) (mem. op.) (citing *Int'l Sec. Life Ins. Co. v. Spray*, 468 S.W.2d 347, 350 (Tex. 1971)). In other words, "[i]f the amount awarded by the judgment cannot be determined, the judgment is interlocutory." *Harris Cnty. Toll Road Auth. v. Sw. Bell Tel., L.P.*, 263 S.W.3d 48, 54 (Tex. App.—Houston [1st Dist.] 2006), *aff'd*, 282 S.W.3d 59 (Tex. 2009) (quoting *Olympia Marble & Granite v. Mayes*, 17 S.W.3d 437, 440 (Tex. App.—Houston [1st Dist.] 2000, no pet.)). Thus, even if the order contained the language proposed by Rodan regarding damages, the order would nonetheless be interlocutory because the amount of the damages would not be "definite and certain," such that it would be ascertainable by the clerk. *See In re Educap*, 2012 WL 3224110, at *3; *see also*

Chado v. PNL Blackacre, L.P., No. 05-04-00312-CV, 2005 WL 428824, at *1 (Tex. App.—Dallas Feb. 24, 2005, no pet.) (mem. op.) (dismissing appeal as interlocutory because order granting summary judgment and awarding attorney's fees on appeal failed to specify amount of attorney's fees awarded).

In its reply brief, Rodan contends that the order granting Nabors's motion for summary judgment is a final and appealable judgment. It notes that Nabors's original and amended petitions "asserted a cause of action for breach of contract on two theories: (1) for indemnity owed and (2) for additional insured coverage." The pleadings also sought attorney's fees "pursuant to Chapter 38 of the Texas Civil Practices & Remedies Code." Rodan acknowledges that Nabors sought damages in its pleadings, pointing out that the pleadings' prayers asked that Nabors be awarded "damages as provided for under Texas law." Rodan points out that, in the prayer of Nabors's motion for summary judgment, Nabors asked the trial court to declare "that [it] was entitled to defense and indemnity and additional insured coverage, and that it be awarded attorney's fees," but the motion's prayer did not request damages. Rodan also points out that the trial court's order granted summary judgment "in [Nabors's] favor on both its claims for breach of contract," declared that Nabors "was entitled to defense and indemnity in the underlying case," and awarded Nabors its attorney's fees. Rodan then claims in its reply brief that Nabors "was awarded everything it asked for in [its] petition and in its motion for summary judgment."

Rodan asserts that the order "disposed of all issues and all parties and is thus ripe for appeal." We disagree.

"A summary judgment, unlike a judgment signed after a trial on the merits, is presumed to dispose of only those issues expressly presented, not all issues in the case." *City of Beaumont v. Guillory*, 751 S.W.2d 491, 492 (Tex. 1988). Here, as discussed, the order granting Nabors's motion did not address the issue of damages. Thus, Nabors's claim for damages remains pending in the trial court.[3] *See Hubbard v. Jackson Heights Volunteer Fire Dep't*, No. 12-12-00147-CV, 2012 WL 5878239, at *2 (Tex. App.—Tyler Nov. 21, 2012, no pet.) (mem. op.) (holding that plaintiff's claim for punitive damages remained pending in trial court because order granting defendant's motion for summary judgment "[did] not specifically address [plaintiff's] claim for punitive damages"); *see also* TEX. R. CIV. P. 166a(a) ("A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to amount of damages.").

Conclusion

We conclude that the trial court's order granting Nabors's motion for summary judgment is not final for purposes of appeal because it does not dispose of Nabors's claim for damages, and it does not contain language of finality. Thus, we

[3] We note that Nabors pleaded damages not only in its original petition but also sought damages in its amended petition, which was filed after its motion for summary judgment.

hold that we lack subject-matter jurisdiction over this appeal. Accordingly, we dismiss the appeal for lack of jurisdiction. *See* TEX. R. APP. P. 42.3(a).

Richard Hightower
Justice

Panel consists of Chief Justice Radack and Justices Goodman and Hightower.