Dismissed and Memorandum Opinion filed October 5, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00563-CV

ROBERT ZAFFT, Appellant

V.

GC SERVICES, L.P., Appellee

On Appeal from the 165th District Court
Harris County, Texas
Trial Court Cause No. 2006-28798

MEMORANDUM OPINION

Appellant Robert Zafft challenges the summary judgment order entered in favor of his former employer, appellee GC Services, L.P., in a breach of contract case. By motion to dismiss and by a cross-issue presented in its reply brief, GC Services has challenged this court's appellate jurisdiction, asserting that Zafft did not timely perfect his appeal after the trial court's entry of a final judgment. Because we determine that Zafft's notice of appeal was not timely, we dismiss the case for want of jurisdiction.

FACTUAL AND PROCEDURAL BACKGROUND

Zafft and GC Services entered into a written letter agreement by which Zafft would serve as General Counsel and Vice President, Global Strategy for a period of one year beginning February 1, 2004 through February 1, 2005. The relevant terms of the agreement are set forth below:

- GC Services will guarantee Zafft's employment until February 1, 2005, "excepting termination for material intentional wrongdoing or fraud."
- Zafft's annual base compensation "shall not be less than $275,000."
- Zafft "will be eligible for an annual performance bonus, subject to statutory deductions and payable as follows. The annual performance bonus for [Zafft's] services in 2004 shall not be less than $90,000. The performance bonus shall accrue ratably over the course of [Zafft's] employment in 2004. For 2004 and each subsequent year, the bonus shall be payable on or before March 31 of the following year unless [Zafft has] voluntarily quit employment before that date."
- Zafft "will be entitled to such benefits and equipment as the Company generally provides to its other executive officers, including, without limitation: (i) an annual automobile allowance of at least $7,000, payable ratably with [Zafft's] annual base compensation; (ii) employer matching of 401(k) contributions in accordance with the plan (currently not less than four percent of annual base compensation); (iii) participation in the executive deferred compensation plan as it may exist from time to time; (iv) participation in the group medical, dental, life, and disability insurance plans; (v) exclusive use of a laptop computer; (vi) exclusive use of a mobile telephone with international roaming." (Zafft refers to this section of the agreement as "Paragraph 5.")

By letter to Zafft dated February 27, 2004, GC Services indicated that it was "in its best interest to terminate" Zafft's employment. In this letter, GC Services notified Zafft that his benefits with GC Services would cease immediately and that Zafft would continue to receive a salary for the duration of the agreement. GC Services indicated, "Your bonus will be paid when due in 2005." The parties do not dispute that GC Services continued to pay Zafft his base salary as specified in the Agreement until

February 1, 2005, the expiration of Zafft's employment under the agreement. It is also undisputed that GC Services paid Zafft $7,500 as a bonus for 2004.

Zafft alleged a single cause of action for breach of contract and a conditional claim for attorney's fees in the event he prevailed in his breach of contract claim. In his live petition, Zafft claimed that GC Services breached the agreement by terminating him before February 1, 2005, and in failing to pay him all sums entitled to him under the agreement. Zafft sought damages under the agreement, including the full amount of the 2004 bonus, the pro-rated portion of the 2005 bonus for the duration of the agreement, and all compensation due under the agreement such as the benefits promised to him in Paragraph 5.[1]

After several denied motions for summary judgment filed by both parties, on October 27, 2008, the trial court entered an order (hereinafter the "October Order") granting GC Services's renewed motion for summary judgment in its entirety and denying Zafft's renewed motion for summary judgment in its entirety. Although the record reflects that a hearing on the motions was scheduled, there is no transcript of any hearing in our record. The face of the order reflects that the words "Final Judgment" were crossed through, and the words "Order on Summary Judgments" were handwritten at the top of the order. After considering the motions,[2] supplements, and any opposition to the motions, the trial court found that "Plaintiff is not entitled to any bonus for 2004 beyond that for the time Plaintiff worked for Defendant in 2004, which Plaintiff confesses Defendant has already paid and that Plaintiff is not entitled to any other benefits, including payment for his health care insurance, after the date of Plaintiff's last day of work with Defendant." Additionally, the face of the order reflects that the following sentences were crossed through:

[1] It is undisputed that Zafft continued to draw his salary under the agreement after his termination.

[2] The parties' motions each incorporated by reference prior summary judgment motions, responses, and replies. GC Services's prior summary judgment motion was a traditional and no-evidence motion.

- "It is further ORDERED that Plaintiff take nothing by his claims and causes of action against Defendant."
- "This is a final judgment and is appealable."
- "All costs of Court are taxed against Plaintiff."

On May 21, 2009, Zafft filed a notice of nonsuit without prejudice for "any claims raised by the current petition that were not addressed" in the trial court's order dated October 27, 2008, noting "[i]t remains unclear whether, following the Order on Summary Judgments, any claim remains pending in this case." In response, GC Services moved to strike Zafft's notice of nonsuit, alleging that the trial court's October Order, disposed of all claims and causes of action and that the trial court lost plenary power over the suit once thirty days had passed after entry of the trial court's October 27, 2008 order.

On May 22, 2009, the trial court entered an order of nonsuit without prejudice, for "any claims remaining in [Zafft's] pleading as of the entry of the Order on Summary Judgments." In reference to the claims covered by the October Order, the trial court entered a final, take-nothing judgment in favor of GC Services and against Zafft, taxing costs against the party incurring the same. This appeal ensued.

ANALYSIS

Is GC Services's motion to dismiss dispositive of the issues on appeal?

By cross-issue and by motion to dismiss, GC Services challenges this court's appellate jurisdiction by asserting that Zafft did not timely perfect his appeal within thirty days of the trial court's October Order. In response, Zafft claims that the trial court's order on summary judgment was not a final order. If the present case is an appeal over which this court has no jurisdiction, then the appeal must be dismissed. *See Nguyen v. Woodley*, 273 S.W.3d 891, 896 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

1. *Is the trial court's October 27, 2008 order a final, appealable judgment?*

As a general rule, an appeal may be taken only from a final judgment. *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195, 205 (Tex. 2001). A judgment that issues without a

conventional trial is final only if it either actually disposes of all claims and parties before the trial court or it states with unmistakable clarity that it is a final judgment. *See id.* at 200. In this case, the face of the trial court's October Order shows that the words "Final Judgment" were crossed through, and the words "Order on Summary Judgments" were handwritten at the top of the order. All other references to the finality of the order, including "take nothing" language, reference to an appealable judgment, and assessment of costs, are crossed through. Therefore, the trial court's order does not state with unmistakable clarity that it is a final, appealable judgment. *See In re K.M.B.*, 148 S.W.3d 618, 620 n.1 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

We next determine whether the order is final as disposing of all claims and parties. *See Lehmann*, 39 S.W.3d at 191. Although a final judgment is not required to be in any particular form, whether a judicial decree is a final judgment for purposes of appeal must be determined from the language of the decree and the record in the case. *See id.* at 195. A judgment that actually disposes of all remaining parties and claims pending in a case, based on the record in the case, is final regardless of its language. *See id.* at 200, 204.

At the time the trial court granted GC Services's renewed motion for summary judgment, Zafft's live petition alleged a single cause of action for breach of contract and a conditional claim for attorney's fees in the event he was successful in his breach of contract claim. According to Zafft, GC Services breached the agreement by terminating his employment before February 1, 2005, and by failing to pay all sums to which Zafft was entitled. However, the only damages Zafft sought in his live petition were the full bonus for 2004, a pro-rated bonus for 2005, and "all compensation due under the terms of his contract," specifically referring to the benefits under Paragraph 5. GC Services alleged no counterclaims against Zafft.

The trial court granted GC Services's motion and denied Zafft's motion, disposing of Zafft's sole cause of action. The trial court found that Zafft is not entitled to any bonus beyond the time Zafft worked for GC Services in 2004. The trial court's order also

recited that Zafft "is not entitled to *any other benefits*," including payment for his health care insurance, after the date of Zafft's last day of work with GC Services. The bonus and the benefits under Paragraph 5 were the only damages Zafft sought in his live petition and alleged in his motion.

On appeal, as support for his argument that the October Order is not final, Zafft claims that the trial court's order did not address or resolve his claim that GC Services breached the agreement by terminating him before the expiration of the agreement's one-year term and did not resolve his claim for equipment, such as a computer or cellular phone reimbursement, under Paragraph 5. However, the October Order granted GC Services's motion in its entirety and denied Zafft's motion in its entirety on his sole breach of contract claim and found that Zafft was not entitled to any of the damages Zafft pleaded in his live petition. Zafft's live petition only alleged damages pertaining to the bonus and benefits under the agreement, which the trial court resolved; Zafft did not claim any other damages.[3] Furthermore, Zafft's live petition did not distinguish his claim for "all compensation, including the benefits promised under ¶ 5 of the contract" as a separate claim for equipment under Paragraph 5.

Zafft points to a docket notation indicating the trial court's intent to make the October Order an interlocutory order. The finality of an order or judgment is determined from the language of the decree and the record in the case. *Id.* at 195. A docket notation does not constitute a signed, written order by which to determine finality. *See In re K.M.B.*, 148 S.W.3d at 622 (providing that a notation in a docket does not affect a determination as to whether a decree is final); *Grant v. Am. Nat'l Ins. Co.*, 808 S.W.2d

[3] To prevail on a summary judgment motion for a breach of contract claim, the following elements must be proven as a matter of law: a valid contract existed, plaintiff performed under the contract, breach of the contract by the defendant, and plaintiff incurred damages resulting from the breach. *See Haden v. David J. Sacks, P.C.*, — S.W.3d —,—, No. 01-01-00200-CV, 2009 WL 1270372, at *13 (Tex. App.—Houston [1st Dist.] May 7, 2009, pet. denied) (op. on remand) (holding that summary judgment was proper when a party offered no summary judgment evidence of damages in support of its counterclaims).

181, 181–84 (Tex. App.—Houston [14th Dist.] 1991, no writ) (holding docket entry with judge's initials did not constitute a final, appealable judgment).

Similarly, Zafft points to the language on the face of the order that has been crossed through as supporting his argument that the order is not a final order. Whether any language purporting to deny all relief not granted is included in an order or judgment is not indicative of finality. *See Lehmann*, 39 S.W.3d at 204 (referring to such language as Mother Hubbard language that is used frequently in interlocutory orders). Rather, an order that grants a motion for partial summary judgment is final if it actually disposes of the only remaining issues and parties in a case even if the order does not contain language referring to its finality and even if the language indicates the order is not final. *Id.* As in this case, based on Zafft's single alleged cause of action for breach of contract and the language in the trial court's October Order, the October Order disposed of all claims for which Zafft sought damages.[4] *See id.* Therefore, the trial court's order was a final, appealable judgment because it disposed of all parties and all pending claims before the trial court.

2. *Did Zafft timely perfect the appeal from the trial court's final judgment?*

A party's ability to timely perfect an appeal or file certain post-judgment motions and requests depends on whether a judgment is final. *See id.* at 195. Because we have determined that the trial court's order on October 27, 2008, was a final, appealable order, we next consider whether Zafft timely perfected his appeal. "A party who is uncertain whether a judgment is final must err on the side of appealing or risk losing the right to appeal." *Id.* at 196. Zafft's notice of nonsuit, filed seven months after the October Order, indicated that he was unsure whether any further claims remained after entry of the trial court's October Order.

[4] On this basis, Zafft's conditional claim for attorney's fees became moot. *See Haden*, 2009 WL 1270372, at *13 (providing that to recover attorney's fees on a breach of contract claim, the party must prevail on the breach of contract claim and recover damages); *see, e.g., Jones v. Rabson & Broocks, L.L.C.*, No. 01-01-01210-CV, 2003 WL 302439, at *5 (Tex. App.—Houston [1st Dist.] Feb. 13, 2003, no pet.) (mem. op.) (concluding claim for attorney's fees was moot once the other issues were resolved).

A trial court retains jurisdiction over a case for a minimum of thirty days after it signs a final judgment or order, during which time the trial court has plenary power to change its judgment. *See* TEX. R. CIV. P. 329b(d); *Lane Bank Equip. Co. v. Smith S. Equip., Inc.*, 10 S.W.3d 308, 310 (Tex. 2000). Certain post-judgment motions may be filed within this thirty-day period to extend the trial court's plenary jurisdiction. *See* TEX. R. CIV. P. 329b(c), (e), (g); *Lane Bank Equip. Co.*, 10 S.W.3d at 310. The trial court signed the October Order on October 27, 2008, which this court has determined is a final judgment. It is undisputed that Zafft filed no motions that would extend a deadline by which to appeal. Therefore, the trial court's plenary power expired thirty days after the October Order was entered. *See* TEX. R. CIV. P. 329b(d); *Nguyen*, 273 S.W.3d at 896. Consequently, the trial court lacked jurisdiction on May 22, 2009, when it granted Zafft's notice of nonsuit.

We conclude that the trial court's October Order was the final, appealable order from which Zafft did not timely appeal. *See* TEX. R. CIV. P. 25.1 (providing that a notice of appeal generally must be filed within thirty days after a judgment is signed). Accordingly, this court lacks appellate jurisdiction to review the merits of Zafft's appellate claims. We sustain GC Services's cross-issue and motion and dismiss for want of jurisdiction.

/s/ Leslie B. Yates
Justice

Panel consists of Justices Yates, Anderson, and Seymore.