

Dismissed, Motion Denied, and Memorandum Opinion filed January 6, 2011.



In The

Fourteenth Court of Appeals

NO. 14-09-00874-CV

HERRING BANK, Appellant

V.

**CENTRO CRISTIANO LA VOZ QUE CLAMA A/K/A MINISTERIO LA VOZ
QUE CLAMA AND ST. AGNES MISSIONARY BAPTIST CHURCH,
Appellees**

**On Appeal from the 61st District Court
Harris County, Texas
Trial Court Cause No. 2009-04024**

MEMORANDUM OPINION

Herring Bank appeals an order dismissing its suit for lack of standing as a third-party beneficiary to a contract between appellees Centro Cristiano La Voz Que Clama a/k/a Ministerio La Voz Que Clama (hereinafter “La Voz”) and St. Agnes Missionary Baptist Church (hereinafter “St. Agnes”). We dismiss for lack of jurisdiction.¹

¹ Herring Bank filed a motion to strike portions of appellees’ brief because those portions referenced materials outside of the appellate record. The motion was taken with the case. Because of our disposition, we deny Herring Bank’s motion as moot.

I. FACTUAL AND PROCEDURAL BACKGROUND

In July 2008, St. Agnes and La Voz entered into an Exclusive Real Estate Purchase Contract for La Voz to purchase certain property from St. Agnes. The contract was subsequently amended to, among other things, acknowledge Herring Bank, as trustee for the bondholders who held a property lien, as a third-party beneficiary to the contract. When La Voz did not tender payment to Herring Bank as required in the amendment to the contract, Herring Bank filed suit.

In its original petition, Herring Bank alleges a breach of contract claim against La Voz for breach of the agreement between St. Agnes and La Voz and a quantum meruit claim against both La Voz and St. Agnes for continued use of the property. In addition, Herring Bank requests attorney's fees under Texas Civil Practice and Remedies Code section 38.001. St. Agnes filed an answer, affirmative defenses, and counterclaim for wrongful foreclosure and attorney's fees; La Voz filed an answer with a general denial.

St. Agnes and La Voz filed a motion to dismiss Herring Bank's suit for lack of standing, arguing that (1) the contract and amendment are unenforceable and (2) even if they are enforceable, Herring Bank lacks standing as a third-party beneficiary because the amendment identifying Herring Bank as a third-party beneficiary confers no right to enforce the contract. The trial court granted appellees' motion to dismiss on the ground that neither the contract nor the amendment vested a "right to sue to enforce the contract" in Herring Bank. The trial court ordered Herring Bank to take nothing by reason of its suit and dismissed Herring Bank's suit without prejudice.

II. ANALYSIS

As a threshold issue, this Court must determine whether it has jurisdiction over the appeal. An appellate court is obligated to review *sua sponte* issues affecting its jurisdiction. *See M.O. Dental Lab v. Rape*, 139 S.W.3d 671, 673 (Tex. 2004) (per curiam). An appeal may be taken only from a final order unless a statute or constitutional source of authority specifically authorizes an interlocutory appeal. *See Tex. Civ. Prac. &*

Rem. Code Ann. §§ 51.012, 51.014(1) (West 2008 & Supp. 2010); *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001). An order issued without a conventional trial on the merits is final for purposes of appeal if it (1) actually disposes of all claims and all parties before the court or (2) clearly and unequivocally states that it finally disposes of all claims and all parties. *Lehmann*, 39 S.W.3d at 205.

Here, the trial court's order granted appellees' motion to dismiss and stated that Herring Bank take nothing by reason of its suit and dismissed its suit without prejudice. The order did not adjudicate St. Agnes's counterclaim against Herring Bank for wrongful foreclosure and attorney's fees.² Nothing in the record indicates that the counterclaim was non-suited or severed. Language stating that the plaintiff take nothing by its claims in the case, or that the case is dismissed, shows finality if there are no other claims by any other parties; but if the record reveals the existence of parties or claims not mentioned in the order, the order is not final. *Id.* at 205-06. An order that adjudicates only the plaintiff's claims against the defendant does not adjudicate a counterclaim, cross-claim, or third-party claim. *Id.* at 205.

In addition, the order does not state "with unmistakable clarity that it is a final judgment as to all claims and all parties." *Id.* at 192-93. The order states: "This is a FINAL order from which appeal may be sought." An order does not dispose of all claims and all parties merely because the word "final" appears in the order nor does an order completely dispose of a case merely because it states that it is appealable. *Id.* at 200, 205. "Rather, there must be some other clear indication that the trial court intended the order to completely dispose of the entire case." *Id.* at 205. The order does not clearly and

² In addition, St. Agnes moved for sanctions in its response to Herring Bank's sur-reply on the motion to dismiss and filed a request for oral hearing on its motion for sanctions prior to the trial court's dismissal order. St. Agnes's motion was not specifically referenced by the dismissal order. *See Unifund CCR Partners v. Villa*, 299 S.W.3d 92, 96 (Tex. 2009) (per curiam). "A judgment dismissing all of a plaintiff's claims against a defendant . . . does not necessarily dispose of any cross-actions, such as a motion for sanctions, unless specifically stated within the order." *Crites v. Collins*, 284 S.W.3d 839, 840-41 (Tex. 2009) (per curiam) (citing *Lehmann*, 39 S.W.3d at 199).

unequivocally state that it finally disposes of all parties and all claims. *Id.* As a result, the trial court's order is not final.³ *See id.* at 192-93.

III. CONCLUSION

Because the record indicates that St. Agnes's counterclaim for wrongful foreclosure and attorney's fees was not disposed of and the order does not clearly and unequivocally state that it finally disposes of all parties and all claims, we dismiss the appeal for lack of jurisdiction.

/s/ Adele Hedges
Chief Justice

Panel consists of Chief Justice Hedges, Justice Jamison, and Senior Justice Hudson.*

³ There is a difference between an order that is interlocutory and one that is final but erroneous. "An express adjudication of all parties and claims in a case is not interlocutory merely because the record does not afford a legal basis for the adjudication." *Lehmann*, 39 S.W.3d at 200, 206; *see also In re Daredia*, 317 S.W.3d 247, 248-49 (Tex. 2010) (per curiam) (orig. proceeding). Here, however, the order's language is not an express adjudication of all parties and claims.

* Senior Justice J. Harvey Hudson sitting by assignment.