Affirmed and Majority and Dissenting Opinions filed August 25, 2011.

In The

Fourteenth Court of Appeals

NO. 14-09-00892-CV

ELIZABETH THOMAS, Appellant

V.

DOROTHY ELIZABETH COOK & ARDYSS INTERNATIONAL, INC., Appellees

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On Appeal from the 333rd District Court
Harris County, Texas
Trial Court Cause No. 2008-50750

DISSENTING OPINION

In this appeal from the trial court's entry of an arbitration award as a final judgment, appellant Elizabeth Thomas challenges the trial court's jurisdiction to enter a judgment in favor of Ardyss International, Inc. ("Ardyss") and Dorothy Cook. Prior to arbitration, Thomas nonsuited her claims against Ardyss and Cook. At the time of her nonsuit, neither Ardyss nor Cook had filed any claims for affirmative relief in the trial court. I would thus conclude that the trial court lost jurisdiction to enter the arbitration award in this case because at the time it entered the award, there was no longer a case or controversy before it. Accordingly, I respectfully dissent.

The majority opinion adequately sets out the facts of this case. Further, I do not disagree with the majority's determination that a Texas court has subject matter jurisdiction to enforce arbitration awards under the Federal Arbitration Act. *See ante* at 6–7. Certainly, had Ardyss and Cook filed a petition seeking to compel arbitration or to enter the arbitration award, the trial court would have jurisdiction over such a claim. *Cf.* Tex. Civ. Prac. & Rem. Code Ann. § 171.081 (Vernon 2011) (conferring jurisdiction on trial courts to enforce arbitration agreements and render judgment on arbitration awards). However, I disagree with the majority's conclusion that, in the specific procedural posture of this case, which was filed by Thomas and in which she, as the "driver of the vehicle," chose to abandon her claims, the trial court retained jurisdiction to enter judgment. Simply put, I disagree with the majority's conclusion that the mere fact that a trial court theoretically has jurisdiction over a particular matter, means that it may necessarily exercise that jurisdiction in all circumstances. My disagreement with the majority centers on the following long-standing principal of law: "Subject matter jurisdiction requires that the party bringing the suit have standing, *that there be a live controversy between the parties*, and that the case be *justiciable*."[1] *State Bar of Texas v. Gomez*, 891 S.W.2d 243, 245 (Tex. 1994) (emphasis added).

Although I disapprove of the tortuous procedural maneuvering undertaken by Thomas in this case, the trial court lost jurisdiction to enter the arbitration award as its judgment because Thomas nonsuited her claims against both defendants; thus, there was no longer any case or controversy before it. *See, e.g.*, *Univ. of Tex. Med. Branch at Galveston v. Blackmon*, 195 S.W.3d 98, 101 (Tex. 2006) (per curiam) (filing of nonsuit has the effect of "rendering the merits of the case moot"); *see also Gomez*, 891 S.W.2d at 245. A trial court may have jurisdiction over a particular matter, but if there is no case or controversy before it, it has nothing over which to *exercise* such jurisdiction.

[1] As noted by the majority, justiciability requires "'a real controversy between the parties, which . . . will be actually determined by the judicial declaration sought.'" *See ante* at 8 (citing *United Servs. Life Ins. Co. v. Delaney*, 396 S.W.2d 855, 860 (Tex. 1965)).

Under the Texas Rules of Civil Procedure, a party has an absolute, unqualified right to take a nonsuit or dismiss a case before she introduces all of her evidence, as long as the defendant has not made a claim for affirmative relief. Tex. R. Civ. P. 162; *BHP Petroleum v. Millard*, 800 S.W.2d 838, 840 (Tex. 1990). A claim for affirmative relief must allege a cause of action, independent of the plaintiff's claim, on which the claimant could recover compensation or relief, even if the plaintiff abandons or is unable to establish her cause of action. *Univ. of Tex. Med. Branch at Galveston*, 195 S.W.3d at 100. A nonsuit is effective when it is filed; the only requirement is the mere filing of the motion with the clerk of court. *Id.*

Both Ardyss and Cook contend that their motion to compel arbitration constitutes a request for affirmative relief. Thus, they assert that, notwithstanding Thomas's nonsuit, the trial court retained jurisdiction over their claim for affirmative relief, *i.e.*, their motion to compel arbitration. But a request for arbitration of claims—like that made by Ardyss and Cook here—is not a cause of action independent of the plaintiff's claim, nor one in which the defendants could recover benefits if the plaintiff abandons her cause of action; thus, it is not a claim for affirmative relief.[2] *In re Riggs*, 315 S.W.3d 613, 615 (Tex. App.—Fort Worth 2010, orig. proceeding) (citing *Gen. Land Office of State of Tex. v. OXY, U.S.A.*, 789 S.W.2d 569, 570 (Tex. 1990)). "Arbitration is not a basis for recovery;

[2] As noted by the majority, two of our sister courts have held that an arbitration claim survives the filing of a nonsuit because it is a claim for relief independent of the plaintiff's causes of action. *See Joe Williamson Constr. Co. v. Raymondville Indep. Sch. Dist.*, 251 S.W.3d 800, 805–06 (Tex. App.—Corpus Christi 2008, no pet.); *Quanto Int'l Co. v. Lloyd*, 897 S.W.2d 482, 487 (Tex. App.—Houston [1st Dist.] 1995, orig. proceeding). I respectfully disagree with the reasoning expressed by our sister courts. *See Gen. Land Office*, 789 S.W.2d at 570 (stating that to qualify as claim for affirmative relief, defensive pleading must allege an independent cause of action on which he could recover even if plaintiff abandoned claim); *Gillman v. Davidson*, 934 S.W.2d 803, 804–05 (Tex. App.—Houston [1st Dist.] 1996, orig. proceeding) (en banc) (per curiam) (Hedges, J., dissenting) (concluding that arbitration is not a basis for recovery but a means by which recovery is obtained); *Quanto*, 897 S.W.2d at 488 (Hutson-Dunn, J., dissenting) ("Once Quanto abandoned its claims by filing a nonsuit, no other claims were on file to be resolved by arbitration."). Because neither *Quanto* nor *Joe Williamson* was reviewed by our high court, they are persuasive, but not binding, on the other intermediate appellate courts of this state. *See Riggs*, 315 S.W.3d at 615 n.2; *cf. In re Swift Transp. Co.*, 311 S.W.3d 484, 490 n.2 (Tex. App.—El Paso 2009, orig. proceeding).

it is, rather, the means by which recovery is obtained." *Gillman v. Davidson*, 934 S.W.2d 803, 805 (Tex. App.—Houston [1st Dist.] 1996, orig. proceeding) (en banc) (per curiam) (Hedges, J., dissenting).

Further, both Ardyss and Cook filed general denials pursuant to Texas Rule of Civil Procedure 92. They also asserted numerous affirmative defenses. But neither party requested any affirmative relief in their original answers or in pleadings filed prior to Thomas's nonsuits.[3] If a defendant does nothing more than resist a plaintiff's right to recover, the plaintiff has an absolute right to nonsuit. *Riggs*, 315 S.W.3d at 615. Thomas nonsuited her claims against Ardyss on July 7, 2009;[4] she dismissed Cook on July 10, 2009. As noted above, a nonsuit is effective on the date it is filed. *Univ. of Tex. Med. Branch at Galveston*, 195 S.W.3d at 100. Accordingly, at the time that trial court signed its final judgment in favor of Ardyss and Cook on October 2, 2009, nearly three months after both defendants had been nonsuited, there was no case left in which to enter judgment.

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[3] Both parties included in their conclusions and prayers a request for attorney's fees and costs. However, "[a] general prayer for relief will not support an award of attorney's fees because it is a request for affirmative relief that must be supported by the pleadings." *Alan Reuber Chevrolet, Inc. v. Grady Chevrolet, Ltd.*, 287 S.W.3d 877, 884 (Tex. App.—Dallas 2009, no pet.). Further, a request for attorney's fees in the defendant's answer, not made in connection with an affirmative claim alleging that the opposing party has independently committed a breach of the party's contract, does not constitute a claim for affirmative relief. *See Leon Springs Gas Co. v. Rest. Equip. Leasing Co.*, 961 S.W.2d 574, 578 (Tex. App.—San Antonio 1997, no pet.). Neither Ardyss nor Cook alleged an independent claim for attorney's fees based on any breach of contract by Thomas. Thus there is no basis for the award of attorney's fees to them, and they had no other claim for affirmative relief pending that would preclude dismissal based on Thomas's nonsuit and dismissal motions. *See id.*

[4] Thomas arguably nonsuited her claims against Ardyss months earlier when she filed an amended petition omitting Ardyss as a defendant on April 27, 2009. *See FKM P'ship, Ltd. v. Board of Regents of Univ. of Houston Sys.*, 255 S.W.3d 619, 634 (Tex. 2008) (citing *Webb v. Jones*, 488 S.W.2d 407, 409 (Tex. 1972) and stating that an amended petition omitting claims acts as a voluntary dismissal of those claims).

I would conclude that the trial court lost jurisdiction to sign the judgment when Thomas nonsuited her claims. Accordingly, I would vacate the trial court's judgment and dismiss this case.

/s/ Adele Hedges
Chief Justice

Panel consists of Chief Justice Hedges and Justices Seymore and Boyce (Boyce, J., majority).