

Affirmed and Memorandum Opinion filed June 2, 2016.



In The

Fourteenth Court of Appeals

NO. 14-14-01001-CV

TONY D. CASTON, Appellant

V.

**EVA M. WILEY, FERNANDO V. MARTINEZ AND MARIA C.
MARTINEZ, Appellees**

**On Appeal from the 268th District Court
Fort Bend County, Texas
Trial Court Cause No. 12-DCV-200446**

M E M O R A N D U M O P I N I O N

This case arises from a property title dispute between appellant Tony Caston and appellee Eva Wiley. Appellees Fernando and Maria Martinez intervened in the lawsuit after purchasing the property from Wiley. The trial court granted Caston's motion for summary judgment on his fraud cause of action against Wiley. The parties' remaining claims were tried to a jury, which found in favor of Wiley and the Martinezes. The trial court signed a final judgment and Caston appealed.

All three issues on appeal are premised on Caston's assertion that the trial court's summary judgment was a final judgment that disposed of all parties and claims. Caston argues in his first issue that the trial court erred by rendering a final judgment following the jury trial because the court's plenary power had expired. Caston also argues that Wiley's counterclaim, filed after the trial court granted Caston's motion for summary judgment, was an independent suit and thus time-barred. In his third issue, Caston contends that Wiley's counterclaim is also barred by the compulsory counterclaim rule, res judicata, and collateral estoppel.

We hold that the trial court's summary judgment was not final because it did not dispose of all parties and claims. The trial court's plenary power therefore had not expired when it rendered final judgment following the jury trial. Further, Wiley's counterclaim was not barred by the compulsory counterclaim rule, res judicata, or collateral estoppel. Even if Wiley's counterclaim was untimely filed, Caston waived his affirmative defense of limitations by not raising this defense in his pleadings. We overrule each of Caston's issues and affirm the final judgment of the trial court.

BACKGROUND

Wiley owned a residential property in Fort Bend County. In 2010, she obtained a \$25,000 loan from Caston. To provide Caston collateral for the loan, Wiley transferred to him an undivided one-half interest in the property through a warranty deed.

Caston later sued Wiley for fraud, fraudulent inducement, and statutory fraud. Caston alleged that Wiley fraudulently deeded Caston's interest in the property back to herself through a quitclaim deed and advertised the property for sale. Caston sought to void the quitclaim deed and enjoin Wiley from selling the property. Caston also requested actual damages, exemplary damages, and court

costs. The trial court issued a temporary injunction and restraining order against Wiley to prevent the sale of the property, but the property had already been sold to the Martinezes by warranty deed that conveyed a 100% interest in the property.

After taking possession of the property, the Martinezes learned of Caston's one-half interest and the ongoing litigation between Caston and Wiley. On September 24, 2012, the Martinezes intervened to protect their interest in the property and sought to recover damages from Wiley for breach of contract and fraudulent inducement. The Martinezes also sought to partition the property by sale, reserving a set-off credit in their favor for any taxes, insurance, repairs, and improvements that they had paid for or performed with regard to Caston's one-half interest in the property.

In November 2012, Caston filed a motion for summary judgment on the fraud claims set out in his petition and requested that the trial court set aside the sale of the property to the Martinezes. The trial court granted the motion on December 7, 2012. The summary judgment voided the quitclaim deed but did not set aside the sale or adjudicate the claims brought by the Martinezes. The order further stated: "This Judgment is not a final and appealable Judgment, and does not dispose of all issues, claims, and parties."

Following the summary judgment, the parties continued to file numerous answers, counterclaims, and motions under the original cause number. On January 31, 2013, Wiley filed her amended answer and counterclaim to Caston's petition. Alleging fraud and unjust enrichment, Wiley's counterclaim sought to set aside the warranty deed she conveyed to Caston to secure the loan. Caston filed multiple pleadings seeking to clear title, including a motion to set aside the sale to the Martinezes.

The case proceeded to a jury trial in July 2014. The jury found for Wiley

and the Martinezes, concluding that Caston engaged in fraud when he acquired his deeded interest from Wiley and that the deed represented security for a loan rather than a conveyance of title.¹ On November 20, 2014, the trial court signed the final judgment. The judgment voided the one-half interest Wiley conveyed to Caston and enforced the warranty deed Wiley conveyed to the Martinezes. Caston appealed.

ANALYSIS

Each of Caston’s three issues on appeal turns on the initial question whether the December 7, 2012 summary judgment was a final judgment that disposed of all parties and claims. If it were final, then (1) the trial court’s plenary power would have expired thirty days after the summary judgment, long before it rendered the November 20, 2014 final judgment;² (2) Wiley’s counterclaim for fraud, which was filed after the summary judgment, would constitute a second, independent suit and be time-barred;³ and (3) Wiley’s counterclaim would also be barred by the compulsory counterclaim rule, res judicata, and collateral estoppel because the counterclaim arose from the same transaction or occurrence that formed the basis of the initial proceeding.⁴

For the reasons below, we hold that the December 7, 2012 summary judgment was not a final judgment. We therefore overrule each of Caston’s issues.

¹ Wiley’s transfer of a one-half interest in the property to Caston is considered a deed of trust because it conveyed “title to real property to a trustee as security until the grantor [repaid] the loan.” *Riner v. Neumann*, 353 S.W.3d 312, 318 (Tex. App.—Dallas, no pet.). This type of deed resembles a mortgage and is not a transfer of title. See *Fin. Freedom Senior Funding Corp. v. Horrocks*, 294 S.W.3d 749, 755–56 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (“[A] deed of trust creates only a lien on property and does not constitute a conveyance of the property.”).

² See Tex. R. Civ. P. 329b(d).

³ See Tex. Civ. Prac. & Rem. Code Ann. § 16.069 (West 2015).

⁴ See Tex. R. Civ. P. 97(a).

I. The trial court had jurisdiction to sign the November 20, 2014 judgment because the December 7, 2012 summary judgment was interlocutory.

A. Standard of review and applicable law

Whether a trial court has jurisdiction is a question of law we review de novo. *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004); *Smalley v. Smalley*, 436 S.W.3d 801, 805 (Tex. App.—Houston [14th Dist.] 2014, no pet.). 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). When 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 v. Har-Con Corp.*, 39 S.W.3d 191, 205 (Tex. 2001). An order that adjudicates only the plaintiff's claims against the defendant does not adjudicate a counterclaim, crossclaim, or third-party claim. *Id.* To become a final judgment, a summary judgment must dispose of all the non-movant's claims. *Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 625 (Tex. 1996).

After signing a final judgment, a trial court retains jurisdiction over a case for 30 days unless certain motions are filed. Tex. R. Civ. P. 329b(d). A judgment is void when “the court rendering judgment ha[s] no jurisdiction of the parties or property, no jurisdiction of the subject matter, no jurisdiction to enter the particular judgment, or no capacity to act.” *PNS Stores, Inc. v. Rivera*, 379 S.W.3d 267, 272 (Tex. 2012) (quoting *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 863 (Tex. 2010)).

B. Caston's arguments

Caston argues that the summary judgment was a final judgment because it disposed of all of his claims. In Caston's view, the subject of the lawsuit was his undivided one-half interest in the property, and when the trial court signed the summary judgment on December 7, 2012, there were no longer any live claims before the court. Caston points to statements made by the trial court at a motion for discovery hearing on August 2, 2013, arguing that they show the trial court intended the summary judgment to dispose of all issues in the case.

THE COURT: I have ruled as a matter of law. That case is over with.

[Martinezes' Counsel]: What case?

THE COURT: The case between Ms. Wiley and Mr. Caston, and you're bound by that ruling.

[Martinezes' Counsel]: Okay. That's fine.

There's another claim alleged by Ms. Wiley against Mr. Caston trying to --

THE COURT: That's over with.

[Martinezes' Counsel]: -- invalidate the prior deed.

THE COURT: That's over with. It's finished. I made a ruling on that. There's no dispute between Ms. Wiley and Mr. Caston at this time. You're stuck there.

Because Wiley did not file a motion for new trial or any other post-judgment motion following the summary judgment, Caston argues that the trial court's plenary power expired on January 6, 2013—thirty days after signing the summary judgment. In Caston's view, all orders or judgments signed by the court thereafter are void.

Regarding the Martinezes' petition in intervention, Caston argues that the trial court could not hear the Martinezes' causes of action without vacating or

setting aside the December 7, 2012 summary judgment. Caston acknowledges that the Martinezes timely intervened in the lawsuit prior to the summary judgment, but because the Martinezes purchased the property from Wiley, Caston argues the Martinezes are in privity with Wiley and are therefore bound by the December 7, 2012 judgment. After the judgment became final, it was not subject to collateral attack. As the Martinezes failed to vacate or set aside the judgment, Caston concludes that the trial court could no longer hear their petition and abused its discretion in allowing the Martinezes to proceed with their causes of action.

C. Analysis

The December 7, 2012 summary judgment was not a final judgment because it did not dispose of all claims and all parties. Caston's motion for summary judgment, which was filed after the Martinezes' original petition in intervention, did not address the causes of action that the Martinezes brought against him or Wiley. As Caston admits, the Martinezes brought their causes of action before the summary judgment was signed. The Martinezes sued Wiley for (1) breach of warranty based on her failure to convey clear title to the property and defend title upon demand, and (2) fraudulent inducement for providing false or inaccurate information in the warranty deed. The Martinezes also sued Caston for partition of the property in the event Caston proved his entitlement to his one-half interest, and for a set-off credit in their favor for any taxes, insurance, repairs, and improvements they paid for or had performed.

Caston's motion for summary judgment was limited to his fraud claims against Wiley, which sought an order voiding the quit-claim deed. Accordingly, the December 7, 2012 summary judgment did not address the Martinezes' existing causes of action. The trial court granted Caston summary judgment on his fraud claim against Wiley, voided the quit-claim deed from Caston to Wiley, and

awarded Caston costs against Wiley. Even if the summary judgment disposed of all claims brought by Caston against Wiley, the judgment was not final because the Martinezes' third-party claims remained. *See Lehmann*, 39 S.W.3d at 205. The Martinezes' causes of action, which were timely brought, injected an additional party as well as multiple claims into the litigation that were not addressed in or foreclosed by the summary judgment.⁵ The voiding of the quitclaim deed merely resolved one issue regarding Caston's interest in the property; it did not address the Martinezes' claims seeking damages from Wiley or their claims for partition and set-off against Caston.

The trial court's statement quoted above does not conflict with this conclusion, and in any event it could not change the court's written order on summary judgment. *Richardson v. Johnson & Higgins of Tex., Inc.*, 905 S.W.2d 9, 11 (Tex. App.—Houston [1st Dist.] 1995, writ denied); *see also Clay Expl., Inc. v. Santa Rosa Operating, LLC*, 442 S.W.3d 795, 799 n.6 (Tex. App.—Houston [14th Dist.] 2014, no pet.). In a subsequent pre-trial hearing, the trial court explained the summary judgment's effect on the rest of the case:

THE COURT: . . . The judgment I entered certainly solved the issue between Mr. Caston and . . . Ms. Wiley as to the transfer between themselves. That's settled. That's not a question. At the very least, [Caston and Wiley] both have an equal interest in the hold of the property, which vaults us to a decision about what interest does [the Martinezes] have, which can't be resolved until we resolve the issue that [the Martinezes' counsel] now raised as to the original transfer of the property between Mr. Caston and Ms. Wiley.

In other words, voiding the quitclaim deed did not fully resolve a question central to the Martinezes' claims against Wiley: whether Wiley's warranty deed had

⁵ Nor did the trial court sign an order of severance that would render the otherwise interlocutory summary judgment final. *See Espalin v. Children's Medical Center of Dallas*, 27 S.W.3d 675, 680 (Tex. App.—Dallas 2000, no pet.).

conveyed clear title to the Martinezes. The answer to that question hinged on whether the trial court found the original warranty deed conveyed from Wiley to Caston void. Because the summary judgment did not dispose of the third-party causes of action the Martinezes brought against Caston and Wiley, we hold the summary judgment was not a final judgment. Therefore, the trial court had jurisdiction to render final judgment on November 20, 2014. We overrule Caston's first issue.

II. Wiley's counterclaim was not an independent suit, and even if the counterclaim was untimely filed, Caston waived this argument by not pleading limitations as a defense.

The parties submitted numerous amended pleadings and motions after the summary judgment was signed. On January 31, 2013, Wiley filed a counterclaim against Caston to set aside the warranty deed she had given Caston as security for the loan.

Caston argues in his second issue that Wiley's counterclaim is a second, independent suit not covered by section 16.069 of the Texas Civil Practice and Remedies Code, and therefore it is barred by the statute of limitations. Section 16.069 provides that a counterclaim arising from the same transaction or occurrence that is the basis of an action may be filed not later than the 30th day after the party's answer is due even though it would be barred by limitations if filed as a separate action. Tex. Civ. Prac. & Rem. Code Ann. § 16.069 (West 2015).

Caston begins this issue with the same argument discussed above: Wiley filed her counterclaim after the summary judgment disposed of all claims and parties, and the trial court lacked plenary power to hear that claim because Wiley did not file any post-judgment motions to extend the trial court's plenary power.

Consequently, Caston asserts, Wiley's counterclaim initiated a second, independent suit. As the counterclaim arose out of the same transaction and occurrence as the first suit, Caston concludes the counterclaim should have been asserted before entry of the final judgment.

We held above, however, that the summary judgment did not dispose of all parties and claims. Therefore, Wiley's counterclaim was not a second, independent suit. Caston brought suit against Wiley, and if Wiley had a claim against Caston arising "out of the transaction or occurrence that is the subject matter of the opposing party's claim," she was compelled by Rule 97(a) to state it as a counterclaim in Caston's suit. Tex. R. Civ. P. 97(a); *see Ball v. Cooper-Stanley Co.*, 413 S.W.2d 467, 470 (Tex. Civ. App.—Dallas 1967, no pet.). Wiley's counterclaim, which sought to void the warranty deed she provided to Caston, arose out of the same transaction or occurrence that was the subject matter of Caston's claim because each claim sought to clear title in one party's name by voiding the other party's interest. Wiley's counterclaim was brought prior to the November 20, 2014 final judgment and was therefore not a second, independent suit.

Caston also argues that Wiley's counterclaim was time-barred because she did not file it within 30th day after her answer was due as required by section 16.069. Assuming without deciding that Wiley's counterclaim was filed untimely, we conclude Caston waived his limitations defense. Limitations is an affirmative defense that is waived if not pleaded. *See* Tex. R. Civ. P. 94 (listing statute of limitations as affirmative defense that shall be set forth in party's pleadings); *see also Frazier v. Havens*, 102 S.W.3d 406, 411 (Tex. App.—Houston [14th Dist.] 2003, no pet.). Here, Caston did not assert the affirmative defense of limitations in his pleadings. Instead, Caston argued only that Wiley's post-judgment pleadings

were untimely because they were filed after the trial court’s plenary power expired. Caston maintained this jurisdictional argument throughout the litigation and raised the limitations defense for the first time on appeal. Because limitations cannot be raised for the first time on appeal, we do not consider Caston’s limitations argument. *Naficy v. Braker*, 642 S.W.2d 282, 284 (Tex. App.—Houston [14th Dist.] 1982, writ ref’d n.r.e.). Caston’s second issue is overruled.

In his third issue, Caston argues that Wiley’s counterclaim is barred by the compulsory counterclaim rule, *res judicata*, and collateral estoppel because the summary judgment was final, and the counterclaim arose from the same transaction or occurrence that formed the basis of the original suit. These doctrines only affect a claim filed after a final judgment, however. *See Daniels v. Empty Eye, Inc.*, 368 S.W.3d 743, 754 (Tex. App.—Houston [14th Dist.] 2012, pet. denied); *see also Calabrian Corp. v. All. Specialty Chemicals, Inc.*, 418 S.W.3d 154, 160–61 (Tex. App.—Houston [14th Dist.] 2013, no pet.); *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 652 (Tex. 1996). Given our holding that the summary judgment was not final, we overrule Caston’s third issue.

CONCLUSION

Having overruled each of appellant’s issues, we affirm the trial court’s final judgment.

/s/ J. Brett Busby
Justice

Panel consists of Justices Christopher, McCally, and Busby.