Dismissed and Memorandum Opinion filed July 20, 2021.

In The

Fourteenth Court of Appeals

NO. 14-17-00428-CV

JOE ALFRED IZEN, JR., Appellant

V.

CIG COMP TOWER, LLC, Appellee

On Appeal from the 55th District Court
Harris County, Texas
Trial Court Cause No. 2014-43610B

MEMORANDUM OPINION

Appellant Joe Alfred Izen, Jr. appeals the trial court's disposition of appellee CIG Comp Tower, LLC's claims in interpleader in the underlying suit. Concluding the trial court did not render a final, appealable judgment, we dismiss this appeal for want of subject-matter jurisdiction.

I. BACKGROUND

CIG claimed to lease a cell tower located on property that both Izen and

Kenneth E. Ryals, as trustee of the East Texas Investment Trust, claimed to own. CIG asserted that the lease obligated it to make "annual rental payments," but that CIG did not know whether to pay the rent to Izen or Ryals. CIG interpleaded in litigation between Izen and Ryals regarding ownership of the property, requesting to deposit its rent into the trial court's registry and seeking a declaration that it was released and discharged from liability regarding its rent payments. CIG also sought attorney's fees by its interpleader claims.[1]

The trial court signed an "Interlocutory Judgment" on October 27, 2016 regarding CIG's interpleader claims. As part of the interlocutory judgment, the trial court discharged CIG from liability for its rental payments for 2014, 2015, and 2016. The trial court further determined that CIG would not recover attorney's fees by its interpleader action.

CIG then sought severance of, among other claims,[2] its "interpleader cause of action." The trial court signed an order granting the motion for severance on March 1, 2017.

At CIG's request, the trial court, on April 12, 2017, signed a "Final Order" stating in part:

> It is the opinion of this Court that all issues in the Severed Case are final. It is therefore
>
> ORDERED that the Order for Severance signed on March 1, 2017, rendered the Interlocutory Judgment a final judgment as of March 1, 2017.

[1] CIG was involved in numerous other claims in the underlying lawsuit. Specifically, Ryals filed a counterclaim against CIG. In addition, CIG asserted claims against third-party Towers of Texas Site Development, Inc., which in turn asserted claims against third-party AT&T Corporation. The trial court signed an "Order for Partial Dismissal" addressing these claims on October 14, 2016.

[2] CIG also sought severance of "the causes of action asserted by CIG against Towers of Texas" and "Towers of Texas' causes of action against AT&T," as discussed in footnote 1.

Izen filed a motion for a new trial on May 12, 2017 and a notice of appeal on May 30, 2017. After Izen initiated this appeal, CIG filed a motion to dismiss, arguing that Izen's notice of appeal was untimely because postjudgment and appellate deadlines began running on March 1, 2017, the day the trial court signed its severance order.

II. ANALYSIS

We begin, as we must, by assessing our subject-matter jurisdiction over this appeal, and specifically whether this appeal was taken from a final, appealable judgment. *See Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 443–44 (Tex. 1993) ("Subject matter jurisdiction is never presumed and cannot be waived."). In support of its motion to dismiss, CIG argues the trial court's March 1, 2017 severance order rendered the trial court's October 27, 2016 interlocutory judgment a final, appealable judgment. 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). When an otherwise final judgment fails to dispose of all claims and parties, the court may make the judgment final for purposes of appeal by severing the claims and parties disposed of by the judgment into a different case. *Martinez v. Humble Sand & Gravel, Inc.*, 875 S.W.2d 311, 312 (Tex. 1994).

In March 2017, the trial court granted CIG's motion seeking severance of, among other claims, CIG's "interpleader cause of action." The trial court's severance order does not clearly and unequivocally state that it finally disposes of all claims and all parties, nor does it dispose of any claims. The severance order itself, then, is not a final judgment. *See Lehmann*, 39 S.W.3d at 205. Accordingly,

we look to the record to determine whether all of the severed claims were disposed of before the severance order. We begin with whether the trial court's interlocutory judgment fully disposed of CIG's "interpleader cause of action."

In CIG's live pleading, its second amended petition in interpleader, CIG stated that it "unconditionally offers to and is ready to deposit with the Court all rental payments that may become due during the course of this litigation." Based on this offer, CIG requested that it "be released and discharged from all liability to Izen and [Ryals] on account of the matters relating to the rental payments."

With regard to the relief requested by CIG on interpleader, the trial court's October 27, 2016 interlocutory judgment states:

> CIG, having paid the rental proceeds from the years 2014, 2015, and 2016 in the registry of the Court and having disclaimed any interest in those rental proceeds, is discharged from further liability to the Trustee and Joe Alfred Izen, Jr. for the 2014, 2015, and 2016 rental proceeds owed on the lease arising from the PCS Site Agreement, which agreement is evidenced by that PCS Site Agreement Memorandum of Agreement recorded in the Harris County Real Property Records at File No. S434738[.]
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> . . . .
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> Any relief not specifically granted is denied without prejudice.

CIG argues this language disposes of its interpleader claims. We disagree.[3] CIG's petition requested relief with regard to "all rental payments that may become due *during the course of this litigation*." (emphasis added). The trial court's interlocutory judgment disposed of rental payments for 2014, 2015, and 2016. The trial court's severance order, however, was not signed until 2017; it is not clear from the record whether rental payments for that year were due at the

[3] We do not purport to announce generally-applicable rules regarding the finality of judgments in interpleader actions. Our analysis instead rests on specific language in the pleadings at issue here.

time of severance.[4] Moreover, "this litigation" is an ambiguous term; it arguably encompasses rental payments that may have come due during this appeal. Finally, the trial court's statement that "[a]ny relief not granted is denied without prejudice" does not convert this interlocutory order into a final judgment. For one, this Mother Hubbard language does not comply with *Lehmann* finality requirements. *See Lehmann*, 39 S.W.3d at 192 ("We no longer believe that a Mother Hubbard clause in an order or in a judgment issued without a full trial can be taken to indicate finality."). In addition, because remaining relief is denied "without prejudice," this language does not finally dispose of interpleader claims for years beyond 2016. *Cf. McGowen v. Huang*, 120 S.W.3d 452, 461–62 (Tex. App.—Texarkana 2003, pet. denied) ("Since claims exist which were not dismissed *with prejudice*, the nonsuits were not final judgments on the merits.") (emphasis added).

We further note that CIG does not argue that the trial court's "Final Order" is itself a final, appealable judgment, nor does that document purport to be a final judgment itself using language prescribed by *Lehmann*. Rather, the order expresses the trial court's "opinion" that the severance order was a final judgment. This order, however, cannot convert a previously-rendered interlocutory judgment into a final judgment. Reading the order to do so would give the trial court the power to retroactively commence the running of post-judgment and appellate deadlines, and in so doing nullify the jurisdiction of the appellate courts.

[4] As above, CIG claimed that it its lease obligated it to make "annual rental payments." The lease itself is not in the record before us. However, after CIG filed its interpleader action in 2014 and deposited funds to cover that year's rent in the trial court's registry, it filed a second motion to deposit funds on February 23, 2015 representing that "[t]he 2015 rental payment is now due." If CIG's "annual rental payments" continued into 2017 and were due at the same time each year, the 2017 rent would already have been due by the time the trial court severed CIG's interpleader claims on March 1, 2017.

Ultimately, it is, at best, unclear that the trial court had fully disposed of CIG's interpleader claims at the time of the severance order. Certainty, however, is paramount when determining whether a final judgment has been rendered. As the supreme court explained in *Lehmann*, "[b]ecause the law does not require that a final judgment be in any particular form, whether a judicial decree is a final judgment must be determined from its language and the record in the case. Since timely perfecting appeal (as well as filing certain post-judgment motions and requests) hangs on a party's making this determination correctly, *certainty is crucial*." 39 S.W.3d at 195 (emphasis added). Determining that an ambiguous judgment finally disposes of a claim for purposes of appeal—as CIG would have us do here in order to hold Izen's notice of appeal untimely—would undermine this core principle of the finality of judgments in cases where there has been no conventional trial on the merits.

Moreover, taking it upon ourselves to "fix" the deficiencies in the judgment would only encourage parties to continue to omit *Lehmann* language. Extraordinary amounts of attorney time and client dollars, not to mention judicial resources, would be saved if parties would simply include the straightforward language from *Lehmann* in all judgments, even judgments following a conventional trial on the merits, instead of later litigating whether judgments are final. While we do not accuse any party in this case of malicious intent, we can think of no ethically-sound reason to intentionally omit *Lehmann* language from a judgment a party believes to be final; the only potential motivation would be to try to mislead the other side about the finality of the judgment until the appellate deadlines had run. But the supreme court's decision in *Lehmann* stresses that finality of judgments should not turn into a game of "gotcha." Rather, the goal for all involved is "certainty," such that parties and courts can dispense with

procedural arguments and proceed swiftly and efficiently to the merits of the case.

III. CONCLUSION

Concluding the trial court did not render a final, appealable judgment, we dismiss this appeal for want of subject-matter jurisdiction.[5] Tex. R. App. P. 42.3(a).[6]

/s/ Charles A. Spain
Justice

Panel consists of Chief Justice Christopher and Justices Bourliot and Spain.

[5] The court recognizes the time and expense involved in filing an appeal and briefing it for submission. Once the mandate issues in case number 14-17-00428-CV, the court will consider a motion to file the record and briefs in case number 14-17-00428-CV in a new appeal and to set that appeal for submission if the parties agree that no additional briefing is required.

[6] Because the parties addressed the finality of the judgment in their written submissions on CIG's motion to dismiss, notice of involuntary dismissal is unnecessary. *See* Tex. R. App. P. 42.3(a). Likewise, we conclude it would be improper to abate this appeal. While an appellate court may abate to permit trial-court "clarification" of an ambiguous judgment, *see Lehmann*, 39 S.W.3d at 206 (citing Tex. R. App. P. 27.2), difficult ethical questions arise if the appellate court does so in the absence of agreement of the parties. *See Fair Oaks Hous. Partners, LP v. Hernandez*, No. 14-19-00314-CV, 2021 WL 389338, at *2 (Tex. App.—Houston [14th Dist.] Feb. 4, 2021, no pet.) (Spain, J., concurring in denial of en banc reconsideration) ("Unless all parties to the underlying case agree to an abatement to obtain a final judgment, then how does the appellate court remain impartial if it dictates specific action in the trial court during the abatement?"). Here, the parties clearly disagree about when and if the trial court rendered a final judgment; indeed, had the parties agreed on this issue, they likely would have requested abatement by this court when these issues were first raised in order to clarify proceedings in the trial court.