Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00519-CV

Loren **BREWER**,
Appellant

v.

SCHLUMBERGER TECHNOLOGY CORPORATION,
Schlumberger, N.V. a/k/a Schlumberger Limited and Jose Salazar Jr.,
Appellees

From the 79th Judicial District Court, Jim Wells County, Texas
Trial Court No. 14-09-53692-CV
Honorable Richard C. Terrell, Judge Presiding

PER CURIAM

Sitting: Marialyn Barnard, Justice
Rebeca C. Martinez, Justice
Patricia O. Alvarez, Justice

Delivered and Filed: September 6, 2017

DISMISSED FOR WANT OF JURISDICTION

This is an appeal from a trial court's summary judgment orders in favor of appellees Schlumberger Technology Corporation, Schlumberger N.V. a/k/a Schlumberger Limited, and Jose Salazar Jr. ("Schlumberger"). The clerk's record was filed October 7, 2016. Our review of the clerk's record shows appellant Loren Brewer filed a notice of appeal in which he contends he is seeking to appeal the "FINAL SUMMARY JUDGMENT" signed May 12, 2016. After our initial review of the clerk's record, it appeared Brewer brought suit against and served: (1) Schlumberger Technology Corporation; (2) Schlumberger, N.V. a/k/a Schlumberger Limited; (3) Rig Relocators,

LLC; (4) Rig Relocators; and (5) Jose Salazar Jr. The record shows the trial court granted summary judgment in favor of the Schlumberger entities by order signed May 12, 2016. On that same date, by separate order, the trial court granted summary judgment in favor of Salazar. However, the record does not include an order, judgment, or other document disposing of the claims against Rig Relocators, LLC and Rig Relocators.

Accordingly, because it did not appear the trial court signed an order or judgment disposing of Brewer's claims against Rig Relocators, LLC or Rig Relocators, we issued a show cause order on November 21, 2016, requiring Brewer to file a written response in this court on or before December 21, 2016, showing cause why this appeal should not be dismissed for want of jurisdiction. Neither Brewer nor appellees filed a response and no supplemental clerk's record was filed showing this court has jurisdiction.

Based on the foregoing — and recognizing that generally an appeal may be taken only from a final judgment and a judgment is final for appellate purposes when it disposes of all pending parties and claims in the record — we dismissed the appeal for want of jurisdiction. *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 196 (Tex. 2001). After our opinion issued, Schlumberger filed a document entitled "Motion for Rehearing or Clarification." After reviewing the document, we issued an order requiring Brewer to file a response. *See* TEX. R. APP. P. 49.2 (stating no response to motion for rehearing need be filed unless court requests; rehearing will not be granted unless response has been filed or requested). After we granted an extension of time, Brewer filed a response on February 17, 2017.

In Schlumberger's motion, it argued there are documents in the record showing Rig Relocators, LLC and Rig Relocators were never served. Thus, Schlumberger asked, among other things, that we grant its request for rehearing and dismiss Brewer's appeal for want of jurisdiction based on the untimeliness of his notice of appeal. Schlumberger contends that because Rig

Relocators, LLC and Rig Relocators were never served, the trial court's May 12, 2016 summary judgment orders were final, and Brewer's notice of appeal, which was filed August 12, 2016, was untimely because his motion for new trial, which was filed July 18, 2016, was untimely. Thus, Schlumberger argued the appeal should be dismissed for want of jurisdiction because Brewer's notice of appeal is untimely.

After reviewing the record, this court determined there is a fact question as to whether service upon Rig Relocators, LLC and Rig Relocators was effective and proper. Because it is not within our purview to determine questions of fact, we granted Schlumberger's motion for rehearing, withdrew our opinion and judgment of January 11, 2017, and ordered the appeal reinstated. We further ordered the appeal abated and remanded to the trial court for that court to hold a hearing to determine whether Rig Relocators, LLC and Rig Relocators were properly served and therefore, were defendants in the matter below. We ordered the trial court, after the hearing, to prepare findings of fact and conclusions of law on the service issue, and ordered the district clerk to prepare a supplemental clerk's record including the trial court's findings of fact and conclusions of law and file it in this court.

Pursuant to our order, the trial court held a hearing and prepared the required findings and conclusions, which were filed in this court on March 13, 2017. In its findings of fact and conclusions of law, the trial court determined Rig Relocators, LLC and Rig Locators were never served and were never parties to the lawsuit.

Based on the trial court's findings and conclusions, it appeared the trial court's summary judgments signed May 12, 2016, disposed of all parties and causes of action. Accordingly, any motion for new trial or other motion extending the appellate deadlines was due on or before June 13, 2016. *See* TEX. R. CIV. P. 329b(a). However, Brewer did not file a motion for new trial until

July 18, 2016.[1] In the absence of a timely-filed motion for new trial, Brewer's notice of appeal was due June 13, 2016. *See* TEX. R. APP. P. 26.1. The clerk's record shows Brewer did not file the notice of appeal until August 12, 2016, more than ninety days after the date of the final judgment, and sixty days after the date the notice of appeal was due. *See id.* Brewer did not file a motion for extension of time to file the notice of appeal. *See id.* R. 26.3.

Although a motion for extension of time to file a notice of appeal is necessarily implied when an appellant, acting in good faith, files a notice of appeal beyond the time allowed by Rule 26.1, the notice of appeal must be filed within the fifteen-day grace period provided for in Rule 26.3. *See Verburgt v. Dorner*, 959 S.W.2d 615, 615 (Tex. 1997); *see also* TEX. R. APP. P. 26.1, 26.3. "[O]nce the period for granting a motion for extension of time under Rule [26.3] has passed, a party can no longer invoke the appellate court's jurisdiction." *Verburgt*, 959 S.W.2d at 615.

Accordingly, we ordered Brewer to file a written response in this court showing cause why this court should not dismiss the appeal for want of jurisdiction based on the untimeliness of the notice of appeal. We advised that if Brewer failed to satisfactorily respond, we would dismiss the appeal for want of jurisdiction. *See id.* R. 42.3(a), (c).

Brewer filed a response to our show cause order in which he contends the trial court's May 12, 2016 orders did not constitute a final judgment; rather, he contends it was only when the trial court issued its findings of fact and conclusions of law on March 13, 2017, that a final judgment was rendered with certainty. *See Lehmann*, 39 S.W.3d at 195. In support of this position, Brewer relies on *Lehmann*, *Farmer v. Ben E. Keith Co.*, 907 S.W.2d 495 (Tex. 1995), and *Hegwood v. Am. Habilitation Serv., Inc.*, 294 S.W.3d 603 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

[1] The title of the post-trial motion filed by Brewer was "Plaintiff's Motion to Extend Post-Judgment Deadlines, Motion for Reconsideration of the Orders Granting Summary Judgment and for New Trial or, in the Alternative, Request for Findings of Fact and Conclusions of Law, Motion for Permission to Appeal and Request for Stay of All Trial Court Proceedings." For convenience, we refer to the motion as a motion for new trial.

However, these cases do not support Brewer's argument that the judgment was not final until the trial court entered its findings that Rig Relocators, LLC and Rig Relocators were never served. In *Farmer*, the supreme court merely held the deadline for calculating the period within which an appeal must be perfected runs from the time a judgment disposing of all parties and claims is signed. 907 S.W.2d at 496. We do not disagree with this statement of law, but it does not answer the issue in this matter. In *Hegwood*, the trial court rendered an order dismissing certain claims and severing others. 294 S.W.3d at 604–05. However, the trial court stated its order would not become effective until "the completion of" two certain events. *Id.* The court of appeals held the order was not a final, appealable judgment because there was "no further signed order from the district court establishing that the judgment has in fact become effective." *Id.* at 605. In reaching its conclusion, the appellate court reiterated the holding in *Farmer* that the date of a final judgment for purposes of appeal must be based on the signing of a judgment — not the filing of some other pleading. *Id.*

Unlike *Hegwood*, there was nothing in the trial court's May 12, 2016 order conditioning its effectiveness upon some future event. *See id.* As for *Lehmann*, it merely recognizes a judgment is final for purposes of appeal if it disposes of all pending parties and claims and that finality, which is crucial, is based on an examination of the language in the order and entire record. 39 S.W.3d at 195–96. Thus, none of these cases address the issue before us, which is whether a summary judgment order that does not dispose of claims against unserved parties is final for purposes of appeal on the date the order is signed, or when the trial court subsequently determined, at the behest of the appellate court, that certain parties were not in fact properly served. Rather, we find the supreme court's opinion in *Youngstown Sheet & Tube Co. v. Penn*, 363 S.W.2d 230 (Tex. 1962) instructive.

In *Youngstown*, the supreme court held that a summary judgment order that disposes of all parties except those that are unserved is final and appealable. 363 S.W.3d at 232. Moreover, the supreme court has subsequently held *Youngstown* has not been overruled or altered by *Lehmann*. *M.O. Dental Lab v. Rape*, 139 S.W.3d 671, 675 (Tex. 2004) (per curiam).

Here, whether Rig Relocators, LLC and Rig Relocators were properly served was true or not at the time of the final judgment. However, that fact was unclear from the appellate record, requiring that we abate and remand for the trial court to make that finding of fact based on the evidence. After a hearing, the trial court found Rig Relocators, LLC and Rig Relocators were never served. This action by the trial court was not in the nature of some future action or event that had to occur before its May 12, 2016 order was final, unlike the situation in *Hegwood*. Rather, the trial court merely had to clarify for this court whether Rig Relocators, LLC and Rig Relocators were in fact served. Because Rig Relocators, LLC and Rig Relocators were not served, the trial court's May 12, 2016 orders were final pursuant to *Youngstown*. *See* 363 S.W.3d at 232. Because May 12, 2016 was the date of the trial court's final, appealable judgment, Brewer's notice of appeal — based on the dates set out above — was untimely. Accordingly, we dismiss the appeal for want of jurisdiction.

PER CURIAM