



**In The
Court of Appeals
Seventh District of Texas at Amarillo**

No. 07-15-00037-CV

AMARILLO-PANHANDLE HUMANE SOCIETY, INC., APPELLANT

V.

STEPHANIE R. MOORE, APPELLEE

On Appeal from the 242nd District Court
Swisher County, Texas
Trial Court No. B-12015-13-05; Honorable Ed Self, Presiding

February 19, 2016

MEMORANDUM OPINION

Before QUINN, C.J., and HANCOCK and PIRTLE, JJ.

Appellant, Amarillo-Panhandle Humane Society, Inc. (APHS), appeals an *Order Granting Nonsuit*, nonsuiting claims against Ted M. White III and Johnny D. Phillips, signed December 22, 2014. By a single issue, APHS contends the trial court improperly determined that it lacked subject matter jurisdiction to hear its claim for attorney's fees against Appellee, Stephanie R. Moore, based on the December 22, 2014 order. We dismiss this appeal for want of jurisdiction.

BACKGROUND

Moore filed a lawsuit on May 6, 2013, in Swisher County, Texas, alleging that APHS, White, and Phillips trespassed on her property and wrongfully took possession of forty-two head of livestock. White and Phillips filed a general denial and raised the affirmative defenses of contributory negligence and ratification. APHS filed a general denial on May 30, 2013. On September 24, 2014, APHS amended its original answer and raised the affirmative defenses of consent, contributing cause, and “qualified good-faith refusal to return the livestock.” Although APHS asserted no claims or causes of action against Moore, its prayer included a request for “attorneys’ fees and court costs.”

By a second amended answer filed October 6, 2014, APHS amended its prayer to include “reasonable and necessary fees and court costs, including but not limited to those available to a prevailing party under Tex. Civ. Prac. & Rem. Code 134.005(b) (West 2011).” Although still without the benefit of any pleadings for affirmative relief, on the same date, APHS filed its traditional and no-evidence motion for summary judgment asserting a claim for recovery of attorney’s fees pursuant to section 134.005(b) of the Civil Practice and Remedies Code. Before a hearing could be held on APHS’s motion for summary judgment, Moore nonsuited her claims against APHS on November 25, 2014. On December 2, 2014, Moore nonsuited her claims against the remaining parties, White and Phillips. Thereafter, on December 22, 2014, the trial court entered an *Order Granting Nonsuit*, reflecting that the nonsuit as to White and Phillips was “effective December 2, 2014.” On January 16, 2015, APHS filed its *Notice of Appeal*, contesting the trial court’s December 22, 2014 order of nonsuit.

ANALYSIS

APHS contends the trial court “improperly refused to hear APHS’s Motion for Attorneys’ Fees, because its subject matter jurisdiction had not expired.” APHS contends that Moore’s nonsuit did not extinguish the jurisdiction of the trial court to hear its claim for attorney’s fees. Alternatively, APHS contends the trial court retained plenary power to adjudicate its claims because a trial court’s plenary power extends from the signing of the order of nonsuit, not the date of its filing. Although APHS fails to say as much, it effectively contends that this court lacks jurisdiction because the trial court has yet to dispose of its claim or cause of action for the recovery of attorney’s fees still pending before that court.¹

As a general rule, in order for this court to have jurisdiction, the judgment or order being appealed must be final. *Lehmann v. Har-Con Corp.* 39 S.W.3d 191, 195 (Tex 2001). A judgment is not final for purposes of appeal unless it disposes of all parties and issues. *North E. Indep. School Dist. v. Aldridge*, 400 S.W.2d 893, 895 (Tex. 1966).

Rule 162 of the Texas Rules of Civil Procedure states that “[a]ny dismissal pursuant to this rule [pertaining to voluntary non-suits] shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief A dismissal under this rule shall have no effect on any motion for sanctions, attorney’s fees or other costs, pending at the time of the dismissal” TEX. R. CIV. P. 162. We have previously held that a voluntary non-suit does not deprive the trial court of subject

¹ We deem the relief being requested by APHS as a motion to dismiss for want of jurisdiction. See TEX. R. APP. P. 42.1(a)(1) (providing an appeal may be dismissed on the motion of an appellant “unless disposition would prevent a party from seeking relief to which it would otherwise be entitled”). To the extent that our disposition in this case could be construed as an involuntary dismissal, to expedite that decision, we invoke Rule 2 to suspend the ten-day notice requirement of Rule 42.3(a). TEX. R. APP. P. 2, 42.3(a).

matter jurisdiction of an opposing party's request for attorney's fees. *Dean Foods Co. v. Anderson*, 178 S.W.3d 449, 456 (Tex. App.—Amarillo 2005, pet. denied) (finding that plaintiff's non-suit did not deprive the trial court of jurisdiction to hear a request for attorney's fees included in the defendant's answer).

In *Dean Foods*, in the course of filing her answer to a pending lawsuit, the defendant, asked for an award of attorney's fees. The plaintiff, Dean Foods, then filed a motion for non-suit. When the trial court then assessed attorney's fees, Dean Foods contended that the non-suit had terminated the trial court's jurisdiction. This court held that "[a]lthough Anderson's answer only requested attorney's fees in a general manner, it can reasonably be construed as requesting attorney's fees associated with her defense" *Id.* at 453. Because Rule 162 provides that a non-suit "shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief," we concluded that Dean Foods's non-suit did not deprive the trial court of subject matter jurisdiction over Anderson's request for attorney's fees. *Id.*

Similar to the defendant in *Dean Foods*, APHS sought the recovery of attorney's fees in its amended answer. APHS further requested an award of attorney's fees as a part of its traditional motion for summary judgment filed on October 6, 2014. Because both of these claims were claims for affirmative relief pending at the time Moore filed her non-suit, we find the non-suit did not deprive the trial court of subject matter jurisdiction to hear those claims. Because the order from which APHS seeks to appeal does not dispose of all claims pending before the trial court, it is not a final order. Accordingly, this court does not have jurisdiction over this dispute. Because we are without jurisdiction to address the merits of this appeal, we have the authority to dismiss the

appeal pursuant to Rule 42.3(a) of the Texas Rules of Appellate Procedure. *See supra* note 1.

CONCLUSION

We dismiss this purported appeal for want of jurisdiction.

Per Curiam