In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-16-00057-CV

IN THE ESTATE OF JOE DAN BROWN, DECEASED

On Appeal from the County Court
Rusk County, Texas
Trial Court No. 15-062P

Before Morriss, C.J., Moseley and Burgess, JJ.
Memorandum Opinion by Justice Burgess

MEMORANDUM OPINION

Joe Dan Brown passed away on March 11, 2009. His last will and testament left all of his property to his wife, Gail Larue Brown, and named her as independent executrix of his estate. On March 29, 2009, Gail signed an affidavit of heirship and election not to probate Brown's will, but filed an application to probate Brown's will six years after his death. Pointing to the election and the four-year statute of limitations to probate a will, Brown's only child, Joe Frank Brown, contested Gail's application and filed traditional and no-evidence motions for summary judgment. The trial court granted Joe's summary judgment motions and denied and dismissed Gail's application to probate Brown's will. Gail appeals.

After carefully reviewing the appellate record in this matter, we conclude that we are without jurisdiction to hear Gail's appeal because the trial court had previously entered a final, appealable order in this case, and Gail did not timely appeal from that order.

I. Procedural History

On April 1, 2015, Gail filed "an Application to Probate Will and for Issuance of Letters Testamentary and Motion to Withdraw Election not to Probate" (the original application). Based on the four-year statute of limitations,[1] Joe filed traditional and no-evidence motions for summary

[1]The statute of limitation is found in Section 256.003 of the Texas Estates Code, which reads:

> (a) Except as provided by Section 501.001 with respect to a foreign will, a will may not be admitted to probate after the fourth anniversary of the testator's death unless it is shown by proof that the applicant for the probate of the will was not in default in failing to present the will for probate on or before the fourth anniversary of the testator's death.
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> (b) Except as provided by Section 501.006 with respect to a foreign will, letters testamentary may not be issued if a will is admitted to probate after the fourth anniversary of the testator's death.

TEX. EST. CODE ANN. § 256.003 (West Supp. 2016).

judgment, and a hearing on those motions was set for December 15, 2015. On December 14, 2015, one day prior to the hearing on Joe's motions for summary judgment, Gail filed an amended application to probate the will as a muniment of title (the amended application).[2]

The next day, at the hearing on Joe's motions for summary judgment, the trial court noted that the amended application had been filed and asked Joe if he was prepared to go forward in light of that pleading. Although he objected to the amended application as being untimely filed, Gail responded that she did not object to the trial court granting Joe's motions for summary judgment as to the original application so long as it did not operate to dismiss the case in its entirety. Gail asserted that because the amended application superseded the original application, and because the motions for summary judgment did not address the amended application, the trial court's order granting summary judgment should be limited to the original application only.

With that understanding, the trial court granted Joe's motions for summary judgment as to the original application based on the statute of limitations. The trial court then directed Joe's attorney to prepare a proposed order granting Joe's motions for summary judgment as to the original application based on the expiration of the statute of limitations, to forward a copy to Gail's attorney for review, and then to forward the proposed order to the trial court for signature. Accordingly, by order dated January 26, 2016, the trial court granted Joe's no-evidence and

[2]Probate as a muniment of title is allowed if "the will should be admitted to probate and the court: (1) is satisfied that the testator's estate does not owe an unpaid debt, other than any debt secured by a lien on real estate; or (2) finds for another reason that there is no necessity for administration of the estate." TEX. EST. CODE ANN. § 257.001 (West 2014). Further, "[a]n applicant for the probate of a will as a muniment of title must prove to the court's satisfaction that: . . . (2) four years have not elapsed since the date of the testator's death and before the application." TEX. EST. CODE ANN. § 257.054 (West 2014).

traditional motions for summary judgment based on the four-year statute of limitations as to the original application. The January 2016 order granting summary judgment states:

> IT IS THEREFORE ORDERED ADJUDGED AND DECREED that summary judgment is GRANTED as to the Application to Probate Will and for Issuance of Letters Testamentary and Motion to Withdraw Election not to Probate filed by Gail Brown.
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> IT IS FURTHER ORDERED ADJUDGED AND DECREED that the Application to Probate Will and for Issuance of Letters Testamentary and Motion to Withdraw Election not to Probate filed by Gail Brown be and is hereby dismissed in its' [sic] entirety, with res judicata and prejudice as to refiling of same.

Subsequently, on February 11, 2016, Joe filed traditional and no-evidence motions for summary judgment, again based in part on the statute of limitations, with respect to the amended application. The trial court held a hearing on those summary judgment motions on April 27, 2016, and entered summary judgment in Joe's favor on April 27, 2016, as to the amended application. Gail subsequently filed her notice of appeal within thirty days of the trial court's order granting Joe's summary judgment as to the amended application.

However, Gail's notice of appeal was filed more than thirty days after the trial court granted Joe's motions for summary judgment as to the original application. Because the language of the January 2016 order dismissing Gail's application with prejudice appeared to indicate that it was a final, appealable order, we notified the parties of our concern that we may not have jurisdiction to entertain an appeal from the April order. Specifically, we informed the parties that we believed Gail was required to file either a notice of appeal, a motion for reconsideration, or a motion for new trial within thirty days of January 26, 2016, and that the clerk's record did not show that a

motion for reconsideration, a motion for new trial, or a notice of appeal was filed in connection with the January 26 order. *See* TEX. R. CIV. P. 329b(a); TEX. R. APP. P. 26.1(a).

In response, Gail did not point us to any motion for reconsideration, motion for new trial, notice of appeal, or caselaw supporting her position that this Court has jurisdiction to address her appeal. Instead, Gail argues that the trial court's first summary judgment order was not final because it only dismissed Gail's original filing, not her amended application to probate the will as a muniment of title.[3] In other words, Gail argues that the first summary judgment operated as a partial summary judgment. We disagree.

II. The Legal Effect of Amended Pleadings Filed in Response to Motions for Summary Judgment

Ordinarily, "[a] party who fails to amend or supplement his motion for summary judgment to address claims asserted in a plaintiff's amended pleading is generally not entitled to a summary judgment on the plaintiff's entire case, because the entry of such judgment would grant more relief than requested." *Rust v. Tex. Farmers Ins. Co.*, 341 S.W.3d 541, 5523 (Tex. App. —El Paso 2011, pet. denied) (citing *Lehmann v. Har–Con Corp.*, 39 S.W.3d 191, 200 (Tex. 2001); *Blancett v. Lagniappe Ventures, Inc.*, 177 S.W.3d 584, 592 (Tex. App.—Houston [1st Dist.] 2005, no pet.)). Thus, "[i]f the amended pleading raises a new theory of liability, a summary judgment cannot be granted as to those new theories." *Id.* (citing *Fraud–Tech, Inc. v. Choicepoint, Inc.*, 102 S.W.3d 366, 387 (Tex. App.—Fort Worth 2003, pet. denied)). For this reason, when a trial court grants

[3]Gail bases her argument on the reporter's record from the hearing on Joe's first set of summary judgment motions, in which the trial court indicated that it was dismissing the original filing, not the amended petition to probate the will as a muniment of title, since that petition was filed on the day before the hearing and Joe had not yet had any opportunity to respond to the filing.

summary judgment after an amended pleading asserting new causes of action has been filed, the summary judgment is not a final, appealable order.

However, "when an amended petition essentially reiterates previously pleaded causes of action, an amended or supplemental motion for summary judgment is not always necessary." *Id*. (citing *Rotating Servs. Indus., Inc. v. Harris*, 245 S.W.3d 476, 487 (Tex. App.—Houston [1st Dist.] 2007, pet. denied); *Choicepoint, Inc.*, 102 S.W.3d at 387). For example, "[a]n amended or supplemental motion is not required when the grounds asserted in the motion for summary judgment conclusively [negate] a common element of the previously and newly pleaded claims, or when the motion is broad enough to encompass the newly asserted claims." *Id*. (citing *Harris*, 245 S.W.3d at 487) (cataloguing cases). Accordingly, where an amended petition merely reiterates the causes of action previously pleaded in an original petition, an order granting summary judgment as to the original petition resolves all of the claims pending between the parties notwithstanding the existence of an amended petition. In that instance, the summary judgment as to the original petition is a final, appealable order.

III. Analysis

Both Gail's original application and the amended application sought to probate Brown's 2006 will and stated that the will should be probated even though more than four years had passed since Brown's death because "good cause exist[ed] for the late filing." The only difference between the original application and the amended application is the relief requested, i.e., the original application sought to admit the will for all purposes, whereas the amended application

sought only to probate the will as a muniment of title. The cause of action itself—admitting the will to probate—remained the same.

Joe's first motions for summary judgment asserted that the original application to probate the will was barred by the applicable statute of limitations. Because the amended application merely reiterated the cause of action pled in the original application, the motions for summary judgment as to the original application were "broad enough to encompass the newly asserted claims" raised in the amended application. *Id.* Accordingly, the trial court's January 2016 order granting summary judgment as to the original application effectively resolved the entire dispute between the parties.

Moreover, the trial court's first summary judgment order was based on the statute of limitations. "A statute of limitations is a plea in bar." *In re K.M.T.*, 415 S.W.3d 573, 575 (Tex. App.—Texarkana 2013, no pet.); *see* TEX. R. CIV. P. 94. "[I]t operates to prohibit the assertion of a cause of action and involves the final disposition of a case." *In re A.M.*, 936 S.W.2d 59, 62 (Tex. App.—San Antonio 1996, no writ). "If a plea in bar is sustained, a take-nothing judgment finally disposing of the controversy will be rendered on the merits for the defendant." *Hall v. City of Bryan*, No. 10-12-00248-CV, 2014 WL 3724069, at *5 (Tex. App.—Waco July 24, 2014, no pet.) (mem. op.) (citing *Tex. Hwy. Dep't v. Jarrell*, 418 S.W.2d 486, 488 (Tex. 1967)). The same four-year statute of limitations applies to an application to probate a will for all purposes as well as an application to probate a will as a muniment of title.[4]

[4]*See supra* notes 1–2.

Therefore, notwithstanding Gail's attempts to limit the effect of the trial court's January 2016 order granting summary judgment to the original application, that order effectively disposed of the controversy between the parties when it dismissed Gail's original application in its "entirety, with res judicata and prejudice as to refiling of same."[5] A "dismissal with prejudice constitutes an adjudication on the merits and operates as if the case had been fully tried and decided." *Shugart v. Thompson*, No. 06-15-00101-CV, 2017 WL 117331, at *10 (Tex. App.—Texarkana Jan. 12, 2017, no pet. h.) (quoting *Decker v. Dunbar*, 200 S.W.3d 807, 812 (Tex. App.—Texarkana 2006, pet. denied)). And,"[o]rders dismissing cases with prejudice have full res judicata and collateral estoppel effect, barring subsequent litigation of the same causes of action or issues between the same parties." *Id*. (quoting *Dunbar*, 200 S.W.3d at 812). Accordingly, the trial court's first summary judgment order was a final, appealable judgment as to both Gail's original application and amended application, and Gail's notice of appeal was untimely filed.[6]

[5]"Res judicata precludes relitigation of claims that have been finally adjudicated, or that arise out of the same subject matter and that could have been litigated in the prior action. . . . It requires proof of the following elements: (1) a prior final judgment on the merits by a court of competent jurisdiction; (2) identity of parties or those in privity with them; and (3) a second action based on the same claims as were raised or could have been raised in the first action." *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 652 (Tex. 1996).

[6]As mentioned previously, at the hearing on Joe's original motions for summary judgment, Gail attempted to limit the scope of the trial court's order granting summary judgment and dismissing the original application to that application only. At several points during that hearing, Gail referenced the continuation of the case under the amended application. Nevertheless, because a party is not required to file an amended motion for summary judgment in response to an amended petition that merely reiterates previously pled causes of action, and because there is no difference between an original petition and an amended petition which merely reiterates the causes of action alleged in the original petition, then it follows that a trial court's summary judgment on an original petition disposes of both the original petition and the amended petition. Accordingly, the trial court's order granting summary judgment on the original application resolved all of the claims alleged in both the original application and the amended application. Consequently, the trial court's first order granting summary judgment on Gail's original application was a final, appealable order notwithstanding the trial court's (and Gail's) efforts to preserve the reiterated cause of action raised in the amended application.

IV. Conclusion

Because we find (1) that the trial court's first summary judgment was a final, appealable order and (2) that Gail did not timely appeal from that order, we conclude that we are without jurisdiction to hear Gail's arguments on appeal.

We dismiss this appeal for want of jurisdiction.

Ralph K. Burgess
Justice

Date Submitted: December 8, 2016
Date Decided: March 30, 2017