TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00262-CV
NO. 03-16-00264-CV

Stacey Hammer, Appellant

v.

University Federal Credit Union; Wayne Morgan a/k/a El Campo Real Estate, LP a/k/a The Morgan Children, Inc. a/k/a Preferred Properties; Venessa Zapata Peters; and Kerry L. Haliburton, Appellees

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 419TH JUDICIAL DISTRICT
NO. D-1-GN-15-000557, HONORABLE J. DAVID PHILLIPS, JUDGE PRESIDING

MEMORANDUM OPINION

Appellant Stacey Hammer filed suit against University Federal Credit Union, Venessa Zapata Peters (an employee of UFCU), and Kerry Haliburton (an attorney for UFCU) (collectively, "the UFCU Defendants") along with El Campo Real Estate, L.P., "whose general partner or owner is Wayne Morgan a/k/a The Morgan Children Incorporated and Preferred Properties." In her suit, Hammer brought various claims arising out of the foreclosure of real property.

On June 11, 2015, El Campo Real Estate, L.P., obtained a summary judgment in its favor, dismissing Hammer's claims against the limited partnership. In its order granting summary judgment, the trial court severed Hammer's claims against El Campo Real Estate from her remaining

claims and assigned the severed claims to a new cause number, D-1-GN-15-002232.[1] The remaining claims proceeded under the original cause number, D-1-GN-15-000557, and comprise the case before us.

In the original cause number, the UFCU Defendants subsequently filed a motion for summary judgment on Hammer's claims against them. On August 18, 2015, the trial court signed a "final order," granting the UFCU Defendants' motion for summary judgment and awarding them $10,000 in attorney's fees plus costs of court. Almost four months later, Wayne Morgan a/k/a Preferred Properties a/k/a The Morgan Children, Inc. (Morgan) filed a motion for sanctions in the case. *See* Tex. Civ. Prac. & Rem. Code § 10.001. On January 12, 2016, following a hearing at which Hammer failed to appear, the trial court signed a "final judgment" granting Morgan's motion, dismissing Hammer's claims against Morgan, and awarding sanctions in the amount of $37,599.80.

On April 20, 2016, Hammer filed two notices of appeal in this Court, one seeking to appeal the "final order" signed on August 18 and another seeking to appeal the "final judgment" signed on January 12. In each notice of appeal, Hammer asserts that she is entitled to challenge the judgment by restricted appeal because she did not participate in the hearing that resulted in the challenged judgment. *See* Tex. R. App. P. 26.1(c) (in restricted appeal, notice of appeal must be filed within six months after judgment or order is signed); *Clopton v. Pak*, 66 S.W.3d 513, 516

[1] Hammer separately filed a notice of appeal from the summary judgment granted in favor of El Campo Real Estate, and the case was assigned cause number 03-16-00263-CV on appeal by the Clerk of the Court. Because the record in that case revealed that Hammer failed to timely file her notice of appeal from that summary judgment, we dismissed the appeal for want of jurisdiction. *See Hammer v. El Campo Real Estate, L.P.*, No. 03-16-00263-CV, 2016 WL 4628075, at *1 (Tex. App.—Austin Sept. 2, 2016, no pet.) (mem. op.).

(Tex. App.—Fort Worth 2001, pet. denied) (restricted appeal is available for limited purpose of providing non-participating party opportunity to correct erroneous judgment). The UFCU Defendants have now filed a motion to dismiss, asserting that the summary judgment granted in their favor on August 18, 2015, operated as a final summary judgment in the case and that Hammer's notice of appeal was untimely. *See* Tex. R. App. P. 26.1 (time to perfect appeal).

"[W]ith a few mostly statutory exceptions [not applicable here], an appeal may be taken only from a final judgment."[2] *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001). There can be only one final judgment in a case.[3] Tex. R. Civ. P. 301; *see Webb v. Jorns*, 488 S.W.2d 407, 409 (Tex. 1972) (recognizing that interlocutory order becomes final for appeal when it merges into final judgment disposing of whole case). The deadline for filing a notice of appeal from a final judgment begins to run on the date the trial court signs the final judgment. *See* Tex. R. App. P. 26.1. Unless a notice of appeal is timely filed, the appellate court does not have jurisdiction over the appeal. *See id*. R. 25.1. In this case, Hammer seeks to appeal two judgments that were signed by the trial court in the same cause and that, on their face, purport to be "final." Therefore, to determine

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[2] Appeals of interlocutory orders are authorized only when explicitly permitted by statute. *See* Tex. Civ. Prac. & Rem. Code § 51.014(a)(1)-(12). There is no dispute that neither the August 18 "final order" nor the January 12 "final judgment" is appealable as an interlocutory order. *See, e.g.*, *Gulf Coast Asphalt Co. v. Lloyd*, 457 S.W.3d 539, 542-43 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (noting that courts of appeals generally do not have jurisdiction over appeals from partial summary judgments); *First Nat'l Bank of Giddings, Tex. v. Birnbaum*, 826 S.W.2d 189, 190 (Tex. App.—Austin 1992, no writ) (sanctions order that does not dispose of all parties and issues is not appealable as final judgment or as interlocutory appeal).

[3] Although each notice of appeal was assigned a separate cause number by the Clerk of this Court, the appeals arise from the same underlying trial court proceeding and should have been brought as one appeal.

whether Hammer timely perfected an appeal, we first examine whether the earlier judgment (the August 18 "final order") operates as the final judgment.

When, as in this case, there has been no traditional trial on the merits, there is no presumption of finality of a judgment. *Crites v. Collins*, 284 S.W.3d 839, 840 (Tex. 2009) (per curiam). Rather, "when there has not been a conventional trial on the merits, an order or judgment is not final for purposes of appeal [(1)] unless it actually disposes of every pending claim and party or [(2)] unless it clearly and unequivocally states that it finally disposes of all claims and all parties." *Lehmann*, 39 S.W.3d at 205. "[T]he language of an order of judgment can make it final, even though it should have been interlocutory, if that language expressly disposes of all claims and all parties." *Id*. at 200. "A statement like, 'This judgment finally disposes of all parties and all claims and is appealable,' would leave no doubt about the court's intention." *Id.* at 206.

An order that disposes of claims by only one of multiple plaintiffs or against one of multiple defendants does not adjudicate claims by or against other parties. *Id*. at 205. Likewise, an order or judgment does not dispose of all claims and all parties merely because the word "final" appears in the order or judgment or because it states that it is "appealable." *Id*. Instead, the language of the order or judgment must clearly indicate that the court intended to completely dispose of the entire case. *Id*. But if that intent is clear, the order is final and appealable, even if the record does not provide an adequate motion or other legal basis for this disposition. *Id.* at 200. In that case, the judgment is erroneous and subject to reversal, "but it is not, for that reason alone, interlocutory." *Id*. "Language that the plaintiff take nothing by his claims in the case, or that the case is dismissed, shows finality if there are no other claims by other parties." *Id*. at 205.

The language in the August 18 "final order" on the UFCU Defendants' motion for summary judgment indicates that the trial court "clearly and unequivocally" intended to dispose of the entire case. *See id*. The record in this case reveals that, at the time the trial court signed the August 18 summary judgment, no counterclaims, cross-claims, or third-party claims had been asserted in the case. *See id*. at 206 (explaining that "[t]he record may help illumine whether an order is made final by its own language"). Thus, the only claims in the case were those claims asserted by Hammer against the defendants. Although the "final order" does not expressly mention any defendants other than the UFCU Defendants, it concludes by stating that "because all claims for relief by Plaintiff have been denied, this order shall be entered as a final judgment in this action." *See In re Daredia*, 317 S.W.3d 247, 249 (Tex. 2010) (concluding that language in judgment clearly indicated it was intended to be final even though it did not state that it was "appealable"). Because the order purports to finally dispose of all claims made by Hammer in the suit—effectively providing that Hammer take nothing on her claims—and because there were no other claims by any other parties pending at that time, the order operates as a final judgment for purposes of appeal. *See Lehmann*, 39 S.W.3d at 205.

Moreover, the August 18 summary judgment "actually disposes of every pending claim and party." *See id.* Hammer sued and served only one defendant other than the UFCU Defendants—El Campo Real Estate, L.P. Hammer's original petition identifies the parties as UFCU, Venessa Zapata-Peters, Kerry L. Haliburton, and "Defendant, El Campo Real Estate L.P.," "whose general partner or owner is Wayne Morgan a/k/a The Morgan Children Incorporated a/k/a Preferred Properties." *See* Tex. R. Civ. P. 79 (petition "shall state the names of the parties and their

residences, if known"); *Yilmaz v. McGregor*, 265 S.W.3d 631, 637 (Tex. App.—Houston [1st Dist.] 2008, pet. denied) ("To be a 'party' to a lawsuit, one generally must be named in the pleadings and either be served, accept or waive service, or make an appearance."). Service of citation on El Campo Real Estate was executed by "serving its general partner/owner, Wayne Morgan a/k/a The Morgan Children, Incorporated, a/k/a Preferred Properties." No attempt was ever made to separately serve citation on Wayne Morgan, The Morgan Children, or Preferred Properties as individual defendants. To the extent Hammer sought a judgment against Morgan as a consequence of his status as the general partner of El Campo Real Estate, *see* Tex. Bus. Orgs. Code § 152.306(a) ("A judgment against a partnership is not by itself a judgment against a partner. A judgment may be entered against a partner who has been served with process in a suit against the partnership."), any vicarious claim against Morgan was necessarily disposed of when El Campo Real Estate obtained a summary judgment in its favor, *see id*. § 152.306(b) (providing that creditor may proceed against property of partner to satisfy judgment based on claims against partnership when judgment is obtained against both). Because Hammer's claims against El Campo Real Estate were severed from the instant action and Morgan was not named as a defendant independent from his status as the general partner of El Campo Real Estate, the August 18 "final order" dismissing Hammer's claims against the UFCU Defendants actually dismissed the only claims pending at the time. As a result, the August 18 summary judgment actually serves as a final judgment in the case.

Because the summary judgment in favor of the UFCU Defendants operates as a final judgment, Hammer's deadline to appeal began to run from August 18, 2015, the date the judgment was signed. *See* Tex. R. App. P. 26.1 (generally, notice of appeal must be filed within 30 days after

judgment is signed). On September 17, 2015, Hammer timely filed a "motion for reconsideration and new trial," which was overruled by operation of law. *See* Tex. R. Civ. P. 329b(a) (any motion for new trial or motion to modify, correct or reform judgment must be filed within 30 days after judgment is signed), (e) (timely motion considered overruled by operation of law 75 days from date judgment is signed, if not determined by that date). Consequently, Hammer's deadline for filing an ordinary notice of appeal was extended to November 16, 2015, and her deadline to file a notice of a restricted appeal was February 18, 2016.[4] *See* Tex. R. App. P. 26.1(a) (when motion for new trial or other post-judgment motion is filed, notice of appeal must be filed within 90 days after judgment or order is signed), (c) (in restricted appeal, notice of appeal must be filed within six months after judgment or order is signed). Hammer did not file any notice of appeal until April 20, 2016, long after her appellate deadlines had expired. As a result, this Court lacks jurisdiction to consider the merits of any decision in the underlying case. *See id*. R. 25.1(b) (filing of notice of appeal invokes appellate court's jurisdiction). We grant the UFCU Defendants' motion and dismiss Hammer's

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[4] Hammer's post-judgment motion also extended the trial court's plenary jurisdiction. *See* Tex. R. Civ. P. 329b(a), (c), (e). The trial court's plenary jurisdiction expired on December 2, 2015 before the trial court signed the judgment awarding sanctions against Hammer on January 12, 2016. *See Scott & White Mem'l Hosp. v. Schexnider*, 940 S.W.2d 594, 596 (Tex. 1996) (stating that trial court could not issue order for sanctions after plenary power expired); *In re Velte*, 140 S.W.3d 709, 711-712 (Tex. App.—Austin 2004, orig. proceeding) (granting mandamus relief from order on motion for sanctions granted after trial court's plenary jurisdiction expired). Consequently, the January 12 "final judgment" is void, *see In re Southwestern Bell Tel. Co.*, 35 S.W.3d 602, 605 (Tex. 2000) (orig. proceeding) (order issued after plenary power expired is void), and thus to the extent it would otherwise constitute a modified judgment restarting Hammer's appellate deadlines, it fails to do so here. *See* Tex. R. Civ. P. 329b(h) ("If a judgment is modified, corrected or reformed in any respect, the time for appeal shall run from the time the modified, corrected, or reformed judgment is signed"); *Lane Bank Equip. Co. v. Smith S. Equip., Inc.*, 10 S.W.3d 308, 312 (Tex. 2000) (holding that timely filed post-judgment motion for sanctions qualifies as "a motion to modify, correct or reform the existing judgment within the meaning of Rule 329b(g)").

appeal of the August 18 “final order” and her appeal of the January 12 “judgment” for want of jurisdiction. *See id*. R. 42.3(a).

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Scott K. Field, Justice

Before Chief Justice Rose, Justices Field and Bourland

Dismissed for Want of Jurisdiction

Filed: March 30, 2017