TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00736-CV

Elizabeth Hubbell, Appellant

v.

Mystic Shores Property Owners Association, Appellee

FROM THE DISTRICT COURT OF COMAL COUNTY, 433RD JUDICIAL DISTRICT
NO. C2010-1667D, HONORABLE R. BRUCE BOYER, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

Appellant Elizabeth Hubbell appeals from the trial court's August 16, 2016 default judgment, asserting that the trial court abused its discretion by failing to grant her motion for new trial and allowing it to be overruled by operation of law. In a related petition for writ of mandamus that Hubbell filed the same day as she filed her notice of appeal, she argues that the default judgment is not a final judgment and that we should direct the trial court to vacate it. *See In re Elizabeth Hubbell*, No. 03-16-00739-CV, slip op. (Tex. App.—Austin Aug. 25, 2017, orig. proceeding) (mem. op.). We agree with Hubbell that the default judgment is not a final and appealable judgment, and accordingly, we will dismiss this appeal for want of jurisdiction.

In the underlying case, appellee Mystic Shores Property Owners Association sued Hubbell for breaching restrictive covenants, and it sought injunctive relief, statutory damages, and attorneys' fees. The "Final Default Judgment" signed by the trial court found that Hubbell caused

Mystic Shores "to sustain damages as alleged in Plaintiff's latest Petition" and that she was in violation of the restrictive covenants. The court granted a permanent injunction against Hubbell. The permanent injunction issued against Hubbell required her "to complete the construction of the residence and restore the garage according to the garage plan specifications approved on November 25, 2013, on [Hubbell's] Property located at 172 Gull Lane, Spring Branch, TX 78070 within 60 days after the date this judgment becomes final." Although the judgment stated that "[a]ll other relief requested which has not been expressly granted is hereby denied," it did not expressly dispose of Mystic Shores's claims for statutory damages and attorneys' fees.

As a general rule, a party may only appeal from a final judgment. *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001). "[W]hether a judicial decree is a final judgment must be determined from its language and the record in the case." *Id.* "[W]hen 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." *Id.* at 205. Although courts presume that a judgment following a trial on the merits is final, "there is no such presumption of finality following a summary judgment or default judgment." *In re Burlington Coat Factory Warehouse of McAllen, Inc.*, 167 S.W.3d 827, 829 (Tex. 2005) (orig. proceeding) (citing *Lehmann*, 39 S.W.3d at 199-200). Thus, while a "Mother Hubbard" clause—like the one in this judgment stating that "all other relief requested which has not been expressly granted is hereby denied"—indicates that a post-trial judgment is final, it does not establish finality for a default judgment. *Id.* (applying *Lehmann* in default-judgment case involving one plaintiff, one defendant, and no counterclaims).

"A judgment that actually disposes of all parties and all claims is final, regardless of its language; however, a default judgment that fails to dispose of all claims can be final only if 'intent to finally dispose of the case' is 'unequivocally expressed in the words of the order itself.'" *Id.* at 830 (quoting *Lehmann*, 39 S.W.3d at 200). The default judgment in this case, like the one in *Burlington Coat Factory*, failed to dispose of all claims. While it awarded a permanent injunction to Mystic Shores, it failed to dispose of Mystic Shores's claims for statutory damages and attorneys' fees. *See, e.g.*, *id.* (holding that default judgment that did not dispose of claim for exemplary damages based on gross negligence was not final). When a judgment does not dispose of all claims, it cannot be final unless its words "unequivocally express" an "intent to finally dispose of the case." *See Lehmann*, 39 S.W.3d at 200.

In *Lehmann*, the Texas Supreme Court provided an example of unequivocal language that would suffice to indicate finality, noting that "[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. This default judgment lacks the required unequivocal expression. Although it is titled "Final Default Judgment," the body of the judgment does not state that it is a final judgment. *See id.* at 200 (stating that "[i]t is not enough, of course, that the order or judgment merely use the word 'final'"). It does not purport to dispose of all parties and all claims, and it does not actually dispose of Mystic Shores's claims for statutory damages and attorneys' fees. The permanent injunction awarded in the judgment requires Hubbell to complete construction of the residence and restore the

garage according to plan specifications "*within 60 days after the date this judgment becomes final*."[1] (Emphasis added.) Because the judgment's language does not unequivocally express that it was intended to be final, and based on the record before us, the judgment does not dispose of all claims, we conclude that the judgment is interlocutory and not appealable.[2] *See In re Burlington Coat Factory*, 167 S.W.3d at 831; *Lehmann*, 39 S.W.3d at 205-06 ("[I]f the record reveals the existence of parties or claims not mentioned in the order, the order is not final."). Therefore, this Court is without power to review it, and we have jurisdiction only to dismiss the appeal. *See Bison Bldg. Materials, Ltd. v. Aldridge*, 422 S.W.3d 582, 585 (Tex. 2012) ("Unless specifically authorized by statute, Texas appellate courts only have jurisdiction to review final judgments." (citing Tex. Civ. Prac. & Rem. Code § 51.014; *Stary v. DeBord*, 967 S.W.2d 352, 352-53 (Tex. 1998))). Accordingly, we dismiss the appeal for want of jurisdiction.

Cindy Olson Bourland, Justice

Before Chief Justice Rose, Justices Field and Bourland

Dismissed for Want of Jurisdiction

Filed: August 25, 2017

[1] Although Hubbell points out in her petition for writ of mandamus that there is no adequate remedy by appeal when enforcement of a judgment commences before the judgment is final, citing *Burlington Coat Factory*, nothing in either the appellate record or the mandamus record indicates that Mystic Shores has attempted to enforce the judgment.

[2] Although Mystic Shores does not seek dismissal of this appeal on the ground that the default judgment is not final, we nevertheless feel constrained by Supreme Court precedent to conclude that the judgment is not final based on the record before us.