TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-17-00313-CV

Lori Fain, Appellant

v.

Darlene Marie Georgen and Mark Robin Georgen, Appellees

FROM THE DISTRICT COURT OF COMAL COUNTY, 207TH JUDICIAL DISTRICT
NO. C2014-0290B, HONORABLE DIB WALDRIP, JUDGE PRESIDING

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

On May 3, 2017, appellant Lori Fain filed a notice of appeal from an order signed April 5, 2017. However, as we explain below, that order, which denied Fain's "Motion to Clarify Order Granting Severance Accompanied by Motion to Reconsider the Trial Court's Ruling on Motion for Summary Judgment," is not independently appealable. We therefore dismiss this appeal.

Procedural Background

This appeal arises out of a divorce proceeding between appellees Darlene and Mark Georgen. Mark filed an original petition for divorce, and Darlene filed a counterpetition for divorce, naming Fain as a third-party defendant, alleging that Mark had given Fain, who was by that time Mark's ex-girlfriend, "grossly excessive gifts of community assets." Darlene sought to recover those assets and asked that Fain be required to account for any funds and other gifts given to her by Mark. Mark then filed an amended petition also naming Fain as a third-party defendant, seeking to

have Fain enjoined from contacting Mark, his employer, or his business associates. Fain filed a cross-action as Mark's "putative spouse" seeking at least $50,000 in monies "due her as putative spouse," including "her right to seek reimbursement for her TIME, TOIL AND EFFORT in promoting and enhancing the value of his business." All parties sought attorney's fees from each other.

Darlene filed two motions for partial summary judgment—one addressing Fain's claim that she was Mark's putative spouse and the other asserting that a house and two automobiles owned by Fain were part of the Georgens' community estate.[1] In January 2016, the trial court signed two separate orders granting the motions, finding as a matter of law that Fain "was not at any time the putative spouse" of Mark and determining that the house and cars were part of the community estate. On February 11, Fain filed a motion to reconsider the second order, which determined that the house and cars were part of the community estate. The court signed an order denying the motion to reconsider on April 6. Darlene filed a motion to sever the divorce into a separate cause number in August, and the trial court granted that motion, severing the divorce petitions into a separate cause number on September 20. On October 10, Fain filed a request for findings of fact and conclusions of law related to the court's imposing a constructive trust on the house and cars, stating that the "interlocutory judgment became final" when the severance order was signed. Darlene responded to Fain's request for findings of fact, stating in part that "there is no final judgment in either case because of undetermined issues in both cases."

[1] Darlene asserted that Mark had provided the funds that Fain used to buy the house, as well as money that Fain used as down-payments for the cars. Fain's daughter and mother were named as additional third-party defendants because Fain gave one of the cars to her daughter, who assumed making the payments on the car, and Fain's mother cosigned the note transferring title to Fain's daughter. Those individuals are not part of this appeal.

Darlene filed a motion for partial summary judgment related to Fain's request for attorney's fees, which the trial court granted on January 11, 2017. Also on January 11, the trial court signed an amended order granting Darlene's motion for summary judgment as to the house and cars. In addition to determining that the house and cars were part of the Georgens' community estate, the trial court also found in that order that Mark's transfer of assets to Fain was constructive fraud on the estate and that Fain was an active participant in the fraud. Fain filed a notice of appeal from that order on January 25, which was docketed under cause number 03-17-00069-CV. On March 15, based in large part on Darlene's statement in her trial court filings that there were issues still pending, this Court sent the parties a letter asking whether there had been a final and appealable order entered, requesting a response by March 24. Darlene responded, asserting that she did not believe a final order had yet been signed. Fain did not respond. On April 27, this Court issued a memorandum opinion dismissing the appeal.[2] *See* Tex. R. App. P. 42.3 (court of appeals may dismiss for want of jurisdiction or prosecution or for failure to comply with the rules, a court order, "or a notice from the clerk requiring a response of other action within a specified time").

Meanwhile, on February 10, Fain filed in the trial court a "Motion to Clarify Order Granting Severance Accompanied by Motion to Reconsider the Trial Court's Ruling on Motion for Summary Judgment," asking that the court sever Darlene's claims against Fain into a separate cause and that it vacate its amended order granting summary judgment "relating to constructive fraud." On February 21, Mark filed an amended answer to Fain's cross-action as putative spouse and

[2] Darlene filed a motion for rehearing, explaining that the issue of attorney's fees had been resolved by amendments to the pleadings, but then withdrew her motion. Fain did not file a motion for rehearing or for reinstatement, and mandate issued in that cause on August 1.

Darlene filed a "Second Amended Petition in Third-Party Action" against Fain—those petitions dropped Mark and Darlene's remaining claims for attorney's fees from Fain and thus disposed of all claims between the parties. On March 22, the trial court held a hearing to consider Fain's Motion to Clarify and Reconsider, and it signed an order denying that motion on April 5.[3]

On May 3, Fain filed the subject notice of appeal, stating that she was appealing from the April 5 order. We sent the parties a letter questioning whether we had jurisdiction over the appeal because it appeared that the April 5 order was not an appealable order. This time Fain responded, stating that Darlene had "represented in prior summary judgment proceedings that she was claiming additional relief from [Fain]. Based upon that representation, [Fain] abandoned her notice of appeal from the underlying summary judgment which was properly and timely filed." Fain explained that Darlene had abandoned further requests for relief and had "represented in open court that the April 5th, 2017 order would be considered the final order." While assuring the Court that she does not believe Darlene had engaged in deception or intentional misconduct, Fain stated that Darlene's "actions deprived [Fain] of the right, however, to maintain the notice of appeal properly and timely filed based upon a representation that the orders were not final." Fain asked that, if the April 5 order is not independently appealable, we allow her to proceed with her original notice of appeal. Fain has also filed a motion to amend her notice of appeal, but as explained below, we must deny that motion.

[3] On April 20, the court also signed an order denying Fain's motion for new trial. The order states that the trial court was denying a motion for new trial filed by Fain on October 19, 2016, but that motion does not appear in the clerk's record.

Discussion

Although we are sympathetic to Fain's situation, whether we may exercise jurisdiction is not a question left to our discretion. "Timely filing a notice of appeal is necessary to invoke this Court's appellate jurisdiction." *Texas Entm't Ass'n, Inc. v. Combs*, 431 S.W.3d 790, 796 (Tex. App.—Austin 2014, pet. denied); *see In re A.L.B.*, 56 S.W.3d 651, 652 (Tex. App.—Waco 2001, no pet.) (per curiam). Fain filed her notice of appeal challenging the trial court's April 5 order denying her "Motion to Clarify Order Granting Severance Accompanied by Motion to Reconsider the Trial Court's Ruling on Motion for Summary Judgment." Such an order, similar to a denial of a motion for new trial or a motion for reconsideration, is not independently appealable. *See Miller v. Garcia*, No. 03-16-00551-CV, 2016 WL 5770696, at *1 (Tex. App.—Austin Sept. 28, 2016, no pet.) (mem. op.) (order denying motion for new trial is not independently appealable); *State Office of Risk Mgmt. v. Berdan*, 335 S.W.3d 421, 428 (Tex. App.—Corpus Christi 2011, pet. denied) (order denying motion to reconsider and motion for new trial "was not independently appealable so as to start a new timetable for perfecting the appeal"); *Denton Cty. v. Huther*, 43 S.W.3d 665, 667 (Tex. App.—Fort Worth 2001, no pet.) (order denying motion to reconsider and "renewed" plea to the jurisdiction was not "distinct appealable interlocutory order with a separate timetable for appeal").

As for whether we can allow Fain to amend her notice of appeal, Fain is not seeking to correct typographical errors, *see City of San Antonio v. Rodriguez*, 828 S.W.2d 417, 418 (Tex. 1992), to include omitted information, *Sweed v. Nye*, 323 S.W.3d 873, 874-75 (Tex. 2010) (per curiam), or to correct a date to refer to an amended version of the originally identified order, *see Taylor v. Margo*, 511 S.W.3d 117, 120 (Tex. App.—El Paso 2014, order). Instead, Fain seeks to

amend her notice of appeal to challenge an entirely different order than the one named in the notice. This Court and others have held that such amendments are not permitted. *See, e.g.*, *Oak Creek Homes, LP v. Moore*, No. 11-15-00291-CV, 2016 WL 6998949, at *2 (Tex. App.—Eastland Nov. 30, 2016, no pet.) (mem. op.); *Wright v. Estate of Wright*, No. 03-07-00618-CV, 2008 WL 1753616, at *2 (Tex. App.—Austin Apr. 18, 2008, no pet.) (mem. op.); *Rainbow Grp., Ltd. v. Wagoner*, 219 S.W.3d 485, 492-93 (Tex. App.—Austin 2007, no pet.); *Thomas v. Thomas*, No. 14-02-01286-CV, 2003 WL 1088220, *1-2 (Tex. App.—Houston [14th Dist.] Mar. 13, 2003, no pet.) (mem. op.) (per curiam). Importantly, Fain does not seek to include a subsequent final judgment after filing a notice of appeal from an interlocutory order, *see Thomas*, 2003 WL 1088220, *2 ("If the two orders were not separately appealable, appellant could amend a notice of appeal to include a subsequent final judgment."); *Texas Sting, Ltd. v. R.B. Foods, Inc.*, 82 S.W.3d 644, 647-48 (Tex. App.—San Antonio 2002, pet. denied) (notice of appeal only referred to final default judgment but court of appeals allowed appeal to encompass earlier dismissal order, explaining "a final judgment may consist of several orders that cumulatively dispose of all the parties and issues"), but instead seeks to amend a notice of appeal from an unappealable order to include an earlier final judgment—it is almost an inverse of the kind of situation noted in *Thomas*.

Nor can we allow Fain to proceed with her original, timely appeal, as that proceeding was dismissed and mandate has issued. We recognize that we must adhere to "the principle that appellate courts should not dismiss an appeal for a procedural defect whenever any arguable interpretation of the Rules of Appellate Procedure would preserve the appeal" and that we should construe the rules "reasonably, yet liberally, so that the right to appeal is not lost by imposing

requirements not absolutely necessary to effect the purpose of a rule." *Verburgt v. Dorner*, 959 S.W.2d 615, 616-17 (Tex. 1997). However, "once the period for granting a motion for extension of time [to file a notice of appeal] has passed, a party can no longer invoke the appellate court's jurisdiction." *Id*. We therefore have no choice but to dismiss the appeal for want of jurisdiction. *See* Tex. R. App. P. 42.3(a).

David Puryear, Justice

Before Justices Puryear, Field, and Bourland

Dismissed for Want of Jurisdiction

Filed: October 19, 2017