NUMBER 13-17-00096-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

HECTOR MORIN, **Appellant,**

v.

RUBEN RIVERA, **Appellee.**

On appeal from the 92nd District Court of Hidalgo County, Texas.

MEMORANDUM OPINION

Before Chief Justice Valdez and Justices Rodriguez and Hinojosa
Memorandum Opinion by Justice Rodriguez

Appellant Hector Morin has filed a notice of appeal regarding an order which vacated an earlier order granting a new trial in his favor. Appellee Ruben Rivera[1] has

[1] The attorney of record for appellee, Ruben Rivera, has filed a suggestion of death for Rivera pursuant to Texas Rule of Appellate Procedure 7.1(a)(1). *See* TEX. R. APP. P. 7.1(a)(1). We proceed to adjudicate the appeal as though all parties were alive, and we utilize the decedent party's name herein. *See id.*; *see also Kallam v. Boyd*, 232 S.W.3d 774, 776 (Tex. 2007).

filed a motion to dismiss the appeal for lack of jurisdiction. Concluding that the underlying default judgment is interlocutory, we dismiss this appeal for lack of jurisdiction.

I. BACKGROUND

In 2009, Morin sold Rivera an eighteen-acre tract of land in Hidalgo County, maintaining a lien on the property. Morin thereafter was involved in a single vehicle accident while driving Rivera's vehicle with a trailer and boat attached. Morin and Rivera thereafter disputed the amounts that they owed to each other under the purchase agreement for the land and as a result of the vehicular accident. Rivera ultimately brought suit against Morin. According to Rivera's petition, Morin agreed to apply the costs of the damages resulting from the vehicular accident toward Rivera's purchase of the realty, however, Morin instead threatened to foreclose on the property, and Rivera thus requested title to that property. Rivera requested that the property be partitioned, and that he be given credit for the damage caused to the vehicle and boat. Rivera also requested a temporary restraining order (1) preventing Morin from "mortgaging, selling, encumbering, or foreclosing" on the real property and improvements, (2) giving Rivera "exclusive use and possession" of the property, and (3) prohibiting Morin from "contacting, harassing, or threatening" Rivera or "his lessees, relatives, or anyone acting in concert" with him. Rivera sought a temporary injunction "for the preservation of the property and protection of the parties as deemed appropriate and equitable," and further sought both temporary and permanent injunctions prohibiting Morin from "contacting, harassing or threatening" Rivera or his "lessees, relatives, or anyone acting in concert" with Rivera. In addition to the temporary restraining order, temporary injunction, and permanent injunction, Rivera sought judgment for title to and possession of the property, costs of

suit, attorney's fees, postjudgment interest, and a judgment "that the property is susceptible to partition and directing partition."

On October 10, 2014, the trial court rendered a default judgment against Morin and awarded Rivera title and ownership to the real property, $10,000 for attorney's fees, and $750 for court costs:

> On the 22nd day of September 2014, came on to be heard the above-entitled and numbered cause. Ruben Rivera, Plaintiff, appeared in person and by and through his attorney of record, Juan E. Gonzalez and announced ready for trial. Defendant Hector Morin, having been duly cited, failed to appear and wholly made default. No jury having been demanded, all matters of fact and things in controversy were submitted to the Court.
>
> The Court hearing the evidence and arguments of counsel, is of the opinion that the Plaintiff have judgment and that Plaintiff is entitled to title and ownership to the interest of Hector Morin in the real property more particularly described as set forth in Exhibit "A". The Court finds that Defendant Hector Morin, is fully divested of any and all interest in the real property set forth in Exhibit "A". The Court further finds that Plaintiff is entitled to recover of and from Defendant, the sum of Ten Thousand and No/100ths ($10,000.00) Dollars for attorney's fees and the sum of Seven Hundred Fifty and No/100ths ($750.00) Dollars for court costs.
>
> IT IS THEREFORE, ORDERED, ADJUDGED, AND DECREED by the Court that Plaintiff have and recover from Defendant, the sum of Ten Thousand and No/100ths ($10,000.00) Dollars for attorney's fees and the sum of Seven Hundred Fifty and No/100ths ($750.00) Dollars for court costs and that this award of attorney's fees is part of the judgment hereby rendered.
>
> IT IS FURTHER ORDERED that Plaintiff have full title and ownership to the real property more particularly described in Exhibit "A" and that Defendant Hector Morin is fully divested of any and all interest in the real property described in Exhibit "A".
>
> IT IS FURTHER ORDERED that Plaintiff have possession of the real property described above and that all writs and processes for the enforcement and collection of this judgment may issue as necessary.
>
> All and other relief not expressly granted is hereby DENIED.

On October 16, 2014, within thirty days of the date of the default judgment, Morin timely filed a motion for new trial. *See* TEX. R. CIV. P. 329b(a). The trial court held a hearing on Morin's motion, but did not issue an order on the motion for new trial. Accordingly, Morin's motion for new trial was overruled by operation of law seventy-five days after the default judgment was signed. *See id.* R. 392b(c). Nevertheless, by order rendered on July 15, 2016, the trial court purportedly granted Morin's motion for new trial. Rivera thereafter filed a motion to vacate the July 15, 2016 order as void for having been rendered after the expiration of the trial court's plenary power, or alternatively, a plea to the jurisdiction. Morin filed a response to Rivera's motion to vacate contending that the default judgment was interlocutory rather than final because it failed to dispose of all causes of action, and accordingly, the trial court had jurisdiction to set aside the default judgment. By order rendered on January 18, 2017, the trial court granted Rivera's motion to vacate the new trial order as void:

> Plaintiff's Motion to Vacate Void Order, Alternatively, Plea to the Jurisdiction having come before the Court for hearing and the parties having appeared by and through their attorneys of record, having introduced evidence, and having argued the motion, the Court is of the opinion the motion is in order. Accordingly, the Court adjudges the Court acted without jurisdiction in signing the Order of July 15, 2016 granting to Defendant Hector Morin a new trial. The Court now vacates the order of July 15, 2016 granting Defendant a new trial on the grounds the order is void. The Court, having no jurisdiction over this matter, declines to take any further action or to issue any further or other orders concerning this matter.

On February 9, 2017, Morin filed a notice of appeal regarding this order. Rivera filed a motion to dismiss the appeal for want of jurisdiction. Rivera argues that the trial court's October 10, 2014 judgment was final and Morin timely filed a new trial. According to Rivera, the trial court heard Morin's motion and decided to grant the motion for new

trial, but did not issue a written order granting the new trial while it had jurisdiction to do so. Rivera thus contends that the October 10, 2014 judgment is not susceptible to attack by appeal and requests that we dismiss this appeal. Morin has not filed a response to Rivera's motion to dismiss.

II. ANALYSIS

Texas Rule of Appellate Procedure 26.1 provides that an appeal is perfected when notice of appeal is filed within thirty days after the judgment is signed, unless a motion for new trial is timely filed. TEX. R. APP. P. 26.1(a)(1). Where a timely motion for new trial has been filed, the notice of appeal shall be filed within ninety days after the judgment is signed. *See id.* R. 26.1(a). Unless a trial court signs an order granting a motion for new trial within seventy-five days after signing a final judgment, the motion for new trial is overruled by operation of law. *See* TEX. R. CIV. P. 329b(c).

After a motion for new trial is overruled, the court retains plenary power "to grant a new trial or to vacate, modify, correct, or reform the judgment" for an additional 30 days. *See id.* R. 329b(e). An order purporting to grant a new trial, or modify a judgment, after the court's plenary power has expired, is void. *See id.* R. 329b(f); *State ex rel. Latty v. Owens*, 907 S.W.2d 484, 486 (Tex. 1995). Nevertheless, after the expiration of plenary power, the trial court can set aside a judgment by bill of review, correct a clerical error in a judgment by rendering a judgment nunc pro tunc, and "sign an order declaring a previous judgment or order to be void because signed after the court's plenary power had expired." TEX. R. CIV. P. 329b(f); see *Middleton v. Murff*, 689 S.W.2d 212, 213–14 (Tex. 1985) (per curiam); *In re Martinez*, 478 S.W.3d 123, 126 (Tex. App.—Houston [14th Dist.] 2015, orig. proceeding).

In this case, the trial court's January 18, 2017 order declaring its new trial order as void was issued within the parameters of Texas Rule of Civil Procedure 329b(f). *See Middleton*, 689 S.W.2d at 213–14 (stating that, notwithstanding the language of Rule 329b(f), a trial court may declare a prior judgment void and set it aside, after expiration of plenary power and without using the bill-of-review procedure, if the trial court lacked subject-matter jurisdiction to render the prior judgment); *see also Parker v. Dennis*, No. 14-12-00085-CV, 2013 WL 5346417, at *1–3 (Tex. App.—Houston [14th Dist.] Aug. 27, 2013, no pet.) (mem. op.) (affirming order in which trial court declared that its prior judgment in the case was void based on the court's lack of subject-matter jurisdiction, after expiration of the trial court's plenary power and without using the bill-of-review procedure); *F&Z Bus. LLC v. Afisco Interests, LLC*, No. 14-10-00274-CV, 2011 WL 2150563, at *1 (Tex. App.—Houston [14th Dist.] June 2, 2011, no pet.) (mem. op.) ("The trial court was without jurisdiction to grant a new trial on January 15, 2009. The order declaring the grant to be void was therefore proper."); *In re N.E.*, No. 05-09-00891-CV, 2010 WL 1665284, at *2 (Tex. App.—Dallas Apr. 7, 2010, no pet.) (mem. op.) (affirming an order vacating a prior judgment nunc pro tunc on grounds that the error subject to correction was judicial rather than clerical, and thus the trial court's plenary power had expired).

However, 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); *see Kelly v. Stock Bldg. Supply of Tex., L.P.*, 319 S.W.3d 903, 904 (Tex. App.—Austin 2010, no pet.). Thus, while a "Mother Hubbard" clause—like the one in this judgment stating that "all and other relief not 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 title and ownership of the property to Rivera, it failed to dispose of Rivera's requests for relief prohibiting Morin from "contacting, harassing or threatening" Rivera or his "lessees, relatives, or anyone acting in concert" with Rivera, and also fails to dispose of Rivera's claim for postjudgment interest. *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. The default judgment at issue in this case lacks the required unequivocal expression. Neither the title nor the body of the judgment states 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 Rivera's claims for temporary and permanent injunctive relief. Moreover, the fact that the judgment awarded costs and provided that Rivera was entitled to enforce the judgment through "writs and processes" does not definitely indicate finality. *In re Burlington Coat Factory Warehouse of McAllen, Inc*., 167 S.W.3d at 830; *see Castle & Cooke Mortg., LLC v. Diamond T Ranch Dev., Inc.*, 330 S.W.3d 684, 689 (Tex. App.—San Antonio 2010, no pet.)

III. CONCLUSION

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 default judgment was interlocutory. *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 matter remains pending in the trial court. We thus deny

Rivera's motion to dismiss because he asserts, incorrectly, that the default judgment was final.

Because the default judgment is interlocutory, 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)). We dismiss the appeal for want of jurisdiction.

NELDA V. RODRIGUEZ
Justice

Delivered and filed the 7th
day of December, 2017.