NUMBER 13-17-00185-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

**IN RE EDSON OMAR AMARO, A MINOR,
BY AND THROUGH HIS NEXT FRIEND PEDRO AMARO,
AND PEDRO AMARO, INDIVIDUALLY**

On Petition for Writ of Mandamus.

MEMORANDUM OPINION

**Before Justices Rodriguez, Benavides, and Hinojosa
Memorandum Opinion by Justice Rodriguez[1]**

Relators Edson Omar Amaro, a minor, by and through his next friend Pedro Amaro and Pedro Amaro, individually, filed a petition for writ of mandamus in this cause seeking to compel the trial court to (1) dismiss the underlying lawsuit in accordance with their

[1] *See* TEX. R. APP. P. 52.8(d) ("When granting relief, the court must hand down an opinion as in any other case," but when "denying relief, the court may hand down an opinion but is not required to do so."); *id.* R. 47.4 (distinguishing opinions and memorandum opinions).

motion to nonsuit the case, and (2) vacate an order consolidating the underlying lawsuit with a separate suit pending in a different court.[2] We conditionally grant mandamus relief.

I. BACKGROUND

Edson Omar Amaro, a minor, suffered personal injuries when he was shot during basketball tryouts at Harwell Middle School in Edinburg, Texas. The shot originated from adjoining land. In 2013, Edson and his father brought suit against the real parties in interest: Dustin W. Cook; Matias Pena Jr.; Matias Pena Jr. d/b/a Pena Farms;[3] Stag Holdings, Ltd.; Stag, GP, L.L.C.; EIA Properties, Ltd.; and EIA Management, L.L.C. The suit was filed in trial court cause number C-7289-13-H in the 389th District Court of Hidalgo County, Texas. The Amaros alleged that Cook shot Edson while engaged in target practice on an adjacent property. According to the pleadings, Pena was the lessee of the adjacent property and the remaining defendants allegedly owned or controlled the adjacent property. The Amaros alleged causes of action against all of the defendants for negligence and gross negligence.

On February 17, 2017, Edson filed a separate lawsuit against Cook and Pena for the same incident and resulting personal injuries in cause number CL-17-0721-A in the County Court at Law No. One of Hidalgo County, Texas. This lawsuit was filed after Edson attained his majority, and his father is not a party to that cause.

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[2] This original proceeding rises from trial court cause number C-7289-13-H in the 389th District Court of Hidalgo County, Texas. The respondent in this matter is the Honorable Letty Lopez. *See* TEX. R. APP. P. 52.2.

[3] Matias Pena Jr. and Matias Pena Jr. d/b/a Pena Farms are referred to collectively here as "Pena." The lawsuit was originally filed on December 9, 2013 against Cook and Pena and the remaining defendants were added in the Amaros' second amended petition.

On February 27, 2017, Pena filed a counterclaim against the plaintiffs in the original district court case. His counterclaim asserts that "he seeks relief under Rule 47(c)(2)." *See* TEX. R. CIV. P. 47(c)(2) (requiring "an original pleading which sets forth a claim for relief" to contain a statement regarding monetary and non-monetary relief). Pena asserted that by filing the county court case, the Amaros were attempting to relitigate gross negligence, which is "a matter that this Court has already resolved through summary judgment." Pena sought declaratory relief as follows:

> Pena asks the Court for a declaratory judgment declaring that Pena owed no legal duty to Plaintiffs, in connection with the subject incident, since Cook was a trespasser on Pena's property who discharged a firearm thereon without Pena's knowledge, permission, or authority. There is a justiciable controversy about what if any duty Pena had to Plaintiffs in connection with the subject incident and the requested declaration would resolve the controversy. Declaratory relief is appropriate because it will have greater ramifications than the present suit, such as on the parallel litigation.

In addition to the foregoing declaratory relief, Pena also sought an award of attorney's fees.

On March 3, 2017, the Amaros filed a notice of nonsuit without prejudice in the district court case.

On March 20, 2017, Pena filed, in the district court case, a motion to consolidate the county court case into the district court case. Pena asserted that the Amaros' notice of nonsuit had no effect on Pena's counterclaim and Amaro's notice of nonsuit "evidences obvious forum shopping." He further contended that the district court continued to have "dominant jurisdiction" over the Amaros' claims "by virtue of Pena's pending counterclaim, which is inextricably interwoven with [the] negligence claim now pending in the County Suit." That same day, Pena filed a "Motion to Transfer, Alternatively Motion to Abate, and

Original Answer" in the county court case. Pena again asserted that Amaro was engaging in "impermissible forum shopping." Pena asked the county court to transfer the case to the 389th District Court or abate the suit until the case in district court was fully resolved. Cook also filed a separate motion requesting consolidation of the two cases.

On April 5, 2017, after a non-evidentiary hearing, the district court granted Pena and Cook's motions to consolidate and ordered cause no. CL-17-0721-A in the Hidalgo County Court at Law No. One to be consolidated into cause no. C-7289-13-H in the Hidalgo County 389th District Court. On April 11, 2017, the county court denied Pena's motion to transfer or abate.

This original proceeding ensued. By one issue, the Amaros assert that the trial court lacked jurisdiction to grant the motions to consolidate after they had nonsuited all their claims. This Court requested that the real parties in interest file a response to the petition for writ of mandamus, and Pena filed a response. *See* TEX. R. APP. P. 52.2, 52.4, 52.8. Pena asserts that none of the legal authorities cited in the petition for writ of mandamus supports the contention that a plaintiff's notice of nonsuit automatically triggers the dismissal of a defendant's counterclaim for declaratory relief. According to Pena, "[l]itigation remains pending in the 389th Court until the Amaros at least expressly invite the 389th Court to evaluate the merits of Pena's counterclaim. Because the Amaros have not done this, their petition for writ of mandamus is premature." Pena also asserts that the Amaros have not shown that the district court abused its discretion in issuing the order granting consolidation.

II. STANDARD OF REVIEW

Mandamus relief is proper to correct a clear abuse of discretion when there is no adequate remedy by appeal. *In re Christus Santa Rosa Health Sys.*, 492 S.W.3d 276, 279 (Tex. 2016) (orig. proceeding). The relator bears the burden of proving both of these requirements. *In re H.E.B. Grocery Co.*, 492 S.W.3d 300, 302 (Tex. 2016) (orig. proceeding) (per curiam); *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding). An abuse of discretion occurs when a trial court's ruling is arbitrary and unreasonable or is made without regard for guiding legal principles or supporting evidence. *In re Nationwide Ins. Co. of Am.*, 494 S.W.3d 708, 712 (Tex. 2016) (orig. proceeding); *Ford Motor Co. v. Garcia*, 363 S.W.3d 573, 578 (Tex. 2012). Similarly, a trial court abuses its discretion when it fails to analyze or apply the law correctly. *In re Nationwide Ins. Co. of Am*., 494 S.W.3d at 712. We determine the adequacy of an appellate remedy by balancing the benefits of mandamus review against the detriments. *In re Essex Ins. Co*., 450 S.W.3d 524, 528 (Tex. 2014) (orig. proceeding); *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding).

The granting of a non-suit is "merely a ministerial act." *Greenberg v. Brookshire*, 640 S.W.2d 870, 872 (Tex. 1982) (orig. proceeding). Accordingly, mandamus relief is available when a trial judge refuses to grant a nonsuit when there is no pending claim for affirmative relief. *In re Greater Houston Orthopaedic Specialists, Inc.*, 295 S.W.3d 323, 325 (Tex. 2009) (orig. proceeding); *Hooks v. Fourth Ct. of Apps.*, 808 S.W.2d 56, 59 (Tex. 1991) (orig. proceeding); *see also Klein v. Hernandez*, 315 S.W.3d 1, 4 (Tex. 2010); *In re Midland Funding, L.L.C.*, No. 08-16-00275-CV, __ S.W.3d __, __, 2016 WL 7369196, at *1 (Tex. App.—El Paso Dec. 20, 2016, orig. proceeding).

II. RIGHT TO A NONSUIT

Rule 162 provides that "[a]t any time before the plaintiff has introduced all of his evidence other than rebuttal evidence, the plaintiff may dismiss a case, or take a non-suit, which shall be entered in the minutes." TEX. R. CIV. P. 162; *see Epps v. Fowler*, 351 S.W.3d 862, 868 (Tex. 2011). "A party has an absolute right to file a nonsuit, and a trial court is without discretion to refuse an order dismissing a case because of a nonsuit unless collateral matters remain." *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010); *see Villafani v. Trejo*, 251 S.W.3d 466, 468–69 (Tex. 2008); *Univ. of Tex. Med. Branch at Galveston v. Estate of Blackmon ex rel. Shultz*, 195 S.W.3d 98, 100 (Tex. 2006) (per curiam); *In re Bennett*, 960 S.W.2d 35, 38 (Tex. 1997) (orig. proceeding) (per curiam). A nonsuit "extinguishes a case or controversy from 'the moment the motion is filed' or an oral motion is made in open court; the only requirement is 'the mere filing of the motion with the clerk of the court.'" *Univ. of Tex. Med. Branch at Galveston*, 195 S.W.3d at 100 (quoting *Shadowbrook Apts. v. Abu–Ahmad*, 783 S.W.2d 210, 211 (Tex. 1990) (per curiam)). It renders the merits of the nonsuited case moot. *Travelers Ins. Co*., 315 S.W.3d at 862–63; *Villafani*, 251 S.W.3d at 469.

While the right to a nonsuit is generally unqualified and absolute, Rule 162 provides that a nonsuit or dismissal "shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief." TEX. R. CIV. P. 162, *see CTL/Thompson Tex., L.L.C. v. Starwood Homeowner's Ass'n, Inc*., 390 S.W.3d 299, 300 (Tex. 2013); *In re Greater Houston Orthopaedic Specialists, Inc.*, 295 S.W.3d at 324–25; *BHP Petroleum Co. v. Millard*, 800 S.W.2d 838, 840 (Tex. 1990) (orig. proceeding). In order to constitute a claim for affirmative relief, "a defensive pleading must allege that the

defendant has a cause of action, independent of the plaintiff's claim, on which the defendant could recover benefits, compensation, or relief, even where the plaintiff may abandon its cause of action or otherwise fail to establish it." *Gen. Land Office v. Oxy U.S.A., Inc.*, 789 S.W.2d 569, 570 (Tex. 1990); *see BHP Petroleum Co.*, 800 S.W.2d at 841. Thus, under Rule 162, "[i]f a defendant does nothing more than resist plaintiff's right to recover, the plaintiff has an absolute right to the nonsuit." *Gen. Land Office*, 789 S.W.2d at 570; *see BHP Petroleum Co.*, 800 S.W.2d at 841; *Polansky v. Berenji*, 393 S.W.3d 362, 371 (Tex. App.—Austin 2012, no pet.). Pending claims for affirmative relief may include, for instance, counterclaims, cross-claims, or motions for sanctions. *CTL/Thompson Tex., LLC*, 390 S.W.3d at 300. Rule 162 prohibits the granting of a nonsuit where there are affirmative claims against the party seeking nonsuit and where "the effect would be to prejudice any pending claim for affirmative relief, period." *Tex. Mut. Ins. Co. v. Ledbetter*, 251 S.W.3d 31, 38 (Tex. 2008). "In addition, a party's right to nonsuit cannot be used to disturb a court's judgment on the merits of a claim, such as a partial summary judgment against the nonsuiting party." *Villafani*, 251 S.W.3d at 469. Thus, "[o]nce a judge announces a decision that adjudicates a claim, that claim is no longer subject to the plaintiff's right to nonsuit." *Hyundai Motor Co. v. Alvarado*, 892 S.W.2d 853, 855 (Tex. 1995). A nonsuit sought after such a judicial pronouncement results in a dismissal with prejudice as to the issues pronounced in favor of the defendant. *See id.*

However, "[t]he use of a creative pleading that merely restates defenses in the form of a declaratory judgment action cannot deprive the plaintiff of this right." *BHP Petroleum Co.*, 800 S.W.2d at 841; *see Digital Imaging Assoc., Inc. v. State*, 176 S.W.3d

851, 854 (Tex. App.—Houston [1st Dist.] 2005, no pet.) ("A claim that simply mirrors the controlling issues of the plaintiff's suit is not a claim for affirmative relief."). Thus, where a request for declaratory relief is "framed as a counterclaim," but does not include any "averments of fact upon which affirmative relief could be granted" and instead consists of "mere denial[s]" of the plaintiff's cause of action, the plaintiff has an absolute right to a nonsuit. *BHP Petroleum Co.*, 800 S.W.2d at 841 (quoting and discussing *Newman Oil Co. v. Alkek*, 614 S.W.2d 653, 655 (Tex. App.—Corpus Christi 1981, writ ref'd n.r.e.)); *see also In re Hanby*, No. 14-09-00896-CV, 2010 WL 1492863, at *3 (Tex. App.—Houston [14th Dist.] Apr. 15, 2010, no pet.) (mem. op.). Nevertheless, when a defensive declaratory judgment presents issues beyond those raised by the plaintiff, or has greater ramifications than the original suit, it may present an affirmative claim for relief that would preclude a nonsuit. *BHP Petroleum Co.*, 800 S.W.2d at 841–42; *see Drexel Corp. v. Edgewood Dev., Ltd.*, 417 S.W.3d 672, 677–78 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (stating that a "defensive" declaratory judgment will survive a nonsuit when there are continuing obligations between the parties, and the requested declaratory relief encompassed greater issues than those raised by the plaintiff's suit); *Howell v. Mauzy*, 899 S.W.2d 690, 707 (Tex. App.—Austin 1994, writ denied) (concluding that a declaratory relief action did not constitute an affirmative claim for relief because the parties "have no ongoing relationship; the events that are the subject of this suit were a one-time occurrence that are fully covered by the original suit"); *see also Hytken v. Schaefer Family Trust*, No. 14-07-00246-CV, 2009 WL 442119, at *3 (Tex. App.—Houston [14th Dist.] Feb. 24, 2009, no pet.) (mem. op.) ("Thus, the Schaefer defendants sought a declaratory judgment that, although responsive to Hytken's claims, did not depend on them. Like the

counterclaim of the defendant in BHP, the Schaefer defendants' counterclaim had 'greater ramifications' than Hytken's original suit.").

To determine the propriety of the trial court's action in this case, we must determine whether Pena's counterclaim stated a claim for affirmative relief so as to impact the Amaros' "absolute right" to a nonsuit. *See Travelers Ins. Co.*, 315 S.W.3d at 862. Pena's counterclaim sought a declaration "that Pena owed no legal duty to Plaintiffs."[4] Pena has not stated a cause of action on which he could recover benefits, compensation, or relief if the Amaros abandoned their causes of action or failed to establish them. *See BHP Petroleum Co.*, 800 S.W.2d at 841; *Digital Imaging Assoc., Inc.*, 176 S.W.3d at 854. In short, Pena's counterclaim is nothing more than the mere denial of the Amaros' causes of action. *See BHP Petroleum Co.*, 800 S.W.2d at 841.

Pena asserts, however, that declaratory relief is appropriate because such relief "will have greater ramifications than the present suit, such as on the parallel litigation." Pena also asserts that the declaratory relief is appropriate because the Amaros have a pending claim against Cook, "who may bring a claim for contribution against Pena—a claim that would be addressed through Pena's pending counterclaim for declaratory relief." We disagree with Pena's arguments. Pena's request for a declaratory judgment

[4] *See Abor v. Black*, 695 S.W.2d 564, 566–67 (Tex. 1985) (orig. proceeding) (stating that the trial court should decline to exercise jurisdiction over a declaratory judgment suit that seeks to determine potential tort liability because exercising jurisdiction will deprive the "real plaintiff of the traditional right to choose the time and place of suit"), *abrogated on other grounds by In re Prudential Ins. Co. of Am*., 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding); *Averitt v. PriceWaterhouseCoopers, L.L.P*., 89 S.W.3d 330, 333–34 (Tex. App.—Fort Worth 2002, no pet.) (reversing a declaratory judgment and dismissing the claim because "PWC's use of the Act to determine potential tort liability was improper"); *Hous. Auth. v. Valdez*, 841 S.W.2d 860, 865 (Tex. App—Corpus Christi 1992, writ denied) (stating that it is an error to bring a declaratory judgment counterclaim to adjudicate tort liability); *see also Stern v. Marshall*, 471 S.W.3d 498, 520–21 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

on the issue of duty does not present issues beyond those raised by the Amaros. Specifically, the Amaros have pleaded that the defendants in the suit breached their legal duties to Edson, and Pena's counterclaim specifically attacks the issue of duty. *See, e.g., BHP Petroleum Co.*, 800 S.W.2d at 841–42. There are no ongoing or continuing obligations between the parties, *see Drexel Corp.*, 417 S.W.3d at 677–78, and the events that are the subject of this suit arose from a one-time occurrence that is fully covered by the original suit. *See Howell*, 899 S.W.2d at 707. Each of Pena's assertions are responsive to and dependent on the claims made by the Amaros. We conclude that Pena's counterclaim for declaratory relief does not have greater ramifications than the instant suit such that it constitutes a claim for affirmative relief. Moreover, to the extent that Pena raises claims pertaining to indemnity or contribution, such claims do not constitute claims for affirmative relief. *Le v. Kilpatrick*, 112 S.W.3d 631, 634 (Tex. App.—Tyler 2003, no pet.) (stating that claims for offset or credit, or indemnity or contribution are not affirmative claims which defeat a nonsuit).

Finally, Pena asserts that the mere filing of a notice of nonsuit does not result in the automatic dismissal of a defendant's counterclaim for declaratory relief. Thus, Pena argues that the Amaros were required to "affirmatively extend an invitation to the trial court to (1) assess the merits of the counterclaim and (2) issue an order conveying the result of that assessment." We disagree with Pena's assessment of the effect and procedure applicable to a notice of nonsuit. As stated previously, the nonsuit is effective as soon as the plaintiff files a motion for nonsuit or asks for one in open court. *See Univ. of Tex. Med. Branch at Galveston*, 195 S.W.3d at 100. However, the trial court has discretion to defer signing an order of dismissal so that it can "allow a reasonable amount

of time" for holding hearings on matters which are "collateral to the merits of the underlying case." *Id.* at 101. Rule 162 permits the trial court to hold hearings and enter orders affecting costs, attorney's fees, and sanctions, even after a notice of nonsuit is filed, while the court retains plenary power. *In re Bennett*, 960 S.W.2d at 38–39. In this regard, Pena, as the party allegedly seeking affirmative relief, would have the burden to request the trial court to consider and rule on any collateral matters. *See, e.g., Estate of Smith v. Ector Cnty. Appraisal Dist.*, 480 S.W.3d 796, 801 (Tex. App.—Eastland 2015, pet. denied) ("In a civil case, the burden of proof generally rests upon the party against whom judgment must be entered under the pleadings if neither side introduced any evidence."); *see Vance v. My Apartment Steak House of San Antonio, Inc.*, 677 S.W.2d 480, 482 (Tex. 1984) ("It is a well-accepted postulate of the common law that a civil litigant who asserts an affirmative claim for relief has the burden to persuade the finder of fact of the existence of each element of his cause of action."). Generally, "the movant has the burden to set a hearing on the motion or make a direct request to a trial judge for a hearing." *Enriquez v. Livingston*, 400 S.W.3d 610, 619–20 (Tex. App.—Austin 2013, pet. denied). Moreover, we would note that the Amaros expressly requested the trial court to grant their nonsuit and deny Pena and Cooks' counterclaims.

III. CONCLUSION

The Court, having examined and fully considered the petition for writ of mandamus, the response, and the applicable law, is of the opinion that relators have established their right to mandamus relief. Since Pena's counterclaim did not state a claim for affirmative relief, the Amaros' right to take a nonsuit and dismiss the entire proceeding is absolute. Therefore, we hold that the trial court abused its discretion in refusing to grant the Amaros'

motion for nonsuit and dismiss the proceeding. Accordingly, we lift the stay previously imposed in this cause. *See* TEX. R. APP. P. 52.10(b) ("Unless vacated or modified, an order granting temporary relief is effective until the case is finally decided."). We conditionally grant the writ of mandamus and direct the trial court to grant the nonsuit and vacate its order of consolidation. We note that our ruling herein may not be construed so as to disturb the trial court's adjudication of a claim, if any, rendered before the nonsuit, *see Hyundai Motor Co*., 892 S.W.2d at 855, or the trial court's ability to allow a reasonable period of time to hold any hearings necessary on matters collateral to the merits of the case. *See Univ. of Tex. Med. Branch at Galveston*, 195 S.W.3d at 100.

NELDA V. RODRIGUEZ
Justice

Delivered and filed the
11th day of July, 2017.