NUMBER 13-19-00007-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

MARICELA MENDIOLA AND MARIA DEL CARMEN FLORES, **Appellants,**

v.

DANIEL P. RUIZ, INDIVIDUALLY AND AS OWNER OF RRRAPID TOWING; RRRAPID TOWING, A PARTNERSHIP; MARIA SAGRARIO CEDILLO, INDIVIDUALLY AND AS PARTNER OF RRRAPID TOWING; MAGDALENA RODRIGUEZ; AND FAMILY DOLLAR STORES OF TEXAS, LLC **Appellees.**

On appeal from the 206th District Court of Hidalgo County, Texas.

MEMORANDUM OPINION

Before Justices Hinojosa, Perkes, and Tijerina

Memorandum Opinion by Justice Tijerina

Appellants Maricela Mendiola and Maria Del Carmen Flores appeal the trial court's summary judgment in favor of appellees Daniel P. Ruiz, individually and as owner of RRRapid Towing; RRRapid Towing, a partnership; Maria Sagrario Cedillo, individually and as partner of RRRapid Towing (collectively, RRR); Magdalena Rodriguez; and Family Dollar Stores of Texas, LLC (Family Dollar). By two issues, appellants argue: (1) the trial court erred when it signed more than one final judgment, and (2) the trial court erred in "allowing the towing of customers' vehicles." We dismiss the appeal.

I. FACTUAL & PROCEDURAL HISTORY

Family Dollar contracted with RRR to remove cars parked by non-customers at the Family Dollar parking lot in McAllen, Texas. According to appellants, their vehicles were wrongfully towed on two separate occasions.

Mendiola claims that on February 8, 2014, she parked her vehicle in the Family Dollar handicapped parking space "believing that parking was free for its customers," and that her vehicle was improperly towed ten minutes after she finished her purchase transaction in the store.

Flores claims she was inside Family Dollar on February 15, 2018, when her son needed to use the restroom. When Flores asked the cashier for a restroom, the cashier informed them that they did not have public restrooms, but they could use a restroom across the street. Flores claims she obtained the cashier's permission to leave her vehicle parked in Family Dollar's parking lot while she left the premises to use the restroom across the street, yet her vehicle was towed.

The following timeline of events transpired in the trial court:

- On September 13, 2016, appellants filed their second amended petition, asserting: breach of contract, consumer protection, abuse of governmental powers, fraud, breach of duty as owed to an invitee and licensee, respondeat superior, theft, negligence, extortion, unjust enrichment, strict liability, negligence per se, and gross negligence.

- On October 13, 2016, appellants filed a supplement to their second amended petition adding the following causes of action: violation of the Deception Trade Practice Act (DTPA), civil conspiracy, breach of duty in bailment context, and breach of fiduciary duty.

- On February 27, 2017, Family Dollar filed a cross-claim against RRR, asserting that to the extent that the trial court finds that Family Dollar wrongfully towed Mendiola's vehicle, then RRR breached its contract with Family Dollar by towing an unauthorized vehicle.

- On March 20, 2017, the trial court dismissed with prejudice appellants' claims of breach of contract, consumer protection, abuse of governmental powers, fraud, negligence per se and negligence when they failed to replead as previously ordered.

- On May 22, 2017, Family Dollar filed its motion for traditional and no-evidence summary judgment, challenging the following causes of action: negligence, premises liability, gross negligence, strict liability, fiduciary duty in a bailment and special relationship context, unjust enrichment, fraud, fraudulent inducement, theft, extortion, and conspiracy.

- On July 18, 2017, the trial court dismissed with prejudice the claims for theft, extortion, unjust enrichment, strict liability, bailment, breach of fiduciary duty, and the Texas Occupations Code because appellants again failed to replead in accordance with the trial court's order.

- On January 29, 2018, the trial court denied Family Dollar's traditional and no-evidence motion for summary judgment on its cross-claim against RRR.

- In that same order, the trial court also granted Family Dollar's traditional and no-evidence motions for summary judgment on the following claims: "general negligent [sic], premises liability, gross negligence, strict liability, breach of [fi]d[u]iciary duties (in a bailment context and under a special relationship), unjust enrichment, fraud and fraudulent inducement, theft, extortion, and conspiracy."

- On February 5, 2018, Family Dollar filed a motion for final summary judgment as to appellants' DTPA and consumer protection claims.

- On May 4, 2018, appellants filed their third amended petition asserting the following: DTPA, civil conspiracy, breach of duty pursuant to the Texas Business

and Commerce Code (TBCC), *see* TEX. BUS. & COM. CODE ANN. § 7.204(a), breach of duty to invitee, violation of Texas Transportation Code, *see* TEX. TRANSP. CODE ANN. § 681.006, negligence per se, abuse of governmental powers, fraud, and violation of § 17.12 of the TBCC.

- On July 5, 2018, RRR filed a joint motion for traditional and no-evidence summary judgment, challenging every cause of action that appellants alleged.

- On November 1, 2018, Rodriguez filed a motion for final summary judgment, arguing that all of appellants' claims were time-barred as to her because she was not served until four years after the causes of action accrued.

- On November 2, 2018, the trial court: (1) granted RRR's traditional and no-evidence summary judgment motion; (2) dismissed with prejudice appellants' DTPA and consumer protection claims for having failed to replead their claims as previously ordered; and (3) granted Family Dollar's motion for traditional summary judgment as to appellants' DTPA claims.

- On December 4, 2018, the trial court granted Rodriguez's motion for final summary judgment thereby disposing of all appellants' claims against her.

This appeal followed.

II. PARTIAL SUMMARY JUDGMENTS

By their first issue, appellants assert that the trial court erred in "signing more than one judgment as the final judgment." Specifically, appellants claim there is no "final judgment as required by Rule 301 of the Texas Rules of Civil Procedure in order to have [a] proper appeal." *See* TEX. R. CIV. P. 301 ("Only one final judgment shall be rendered in any cause except where it is otherwise specially provided by law."). Instead, they assert there are five judgments "being considered final," and that "is not acceptable as a matter of law." Appellees assert that the trial court disposed of all parties and claims. We address each party's argument in turn.

Family Dollar and Rodriguez assert that "from the totality of the record, it is clear that a final judgment was entered that disposed of the case on December 4, 2018." We

construe their argument as follows:[1] the December 4, 2018 partial summary judgment was a final judgment because Family Dollar and RRR's partial summary judgments merged with the December 4, 2018 summary judgment, and the December 4, 2018 summary judgment disposed of the only remaining claim and party in the case. RRR asserts that "the judgments signed by the Court were stand[-]alone documents as to each of the mov[a]nts," and the order granting their motion for summary judgment was final as to RRR. We disagree with appellees.

A. Applicable Law

An appeal may be taken only from a final judgment, unless a statute expressly authorizes an interlocutory appeal. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 51.012, 51.014(a); *Lehmann v. Har–Con Corp*., 39 S.W.3d 191, 195 (Tex. 2001). A judgment issued without a conventional trial on the merits is final for purposes of appeal if it: (1) actually disposes of all claims and all parties before the court; or (2) states with unmistakable clarity it is a final judgment as to all claims and all parties. *Lehmann*, 39 S.W.3d at 192.

"A summary judgment, unlike a judgment signed after a trial on the merits, is presumed to dispose of only those issues expressly presented, not all issues in the case." *City of Beaumont v. Guillory*, 751 S.W.2d 491, 492 (Tex. 1988) (per curiam). "When a court renders a summary judgment that only disposes of part of a case, it is by definition a partial summary judgment. A partial summary judgment is not final, and does not become final, until it is merged into the final judgment in the case." *Loy v. Harter*, 128 S.W.3d 397, 403 (Tex. App.—Texarkana 2004, pet. denied). However, a partial summary

[1] Family Dollar and Rodriguez do not cite authority for this position.

judgment can become final and appealable if a severance of that phase of the case is ordered by the trial court. *Guillory*, 751 S.W.2d at 491. Also, "an order that grants a motion for partial summary judgment is final if in fact it disposes of the only remaining issue and party in the case, even if the order does not say that it is final." *Lehmann*, 39 S.W.3d at 204.

We look at the record of the case to determine whether an order actually disposes of all pending claims and parties. *See id*. at 205–06. If the record reveals the existence of parties or claims not mentioned in the order, the order is not final. *Id*. at 206. An order does not dispose of all claims and all parties merely because it is entitled "final," uses the word "final" in the order, awards costs, or states that it is appealable. *Id*. at 205. However, if the language expressly disposes of all claims and all parties then the order is final even though it should have been interlocutory. *Id*. at 200. "The intent to finally dispose of the case must be unequivocally expressed in the words of the order itself." *Id*.

To determine whether the partial summary judgments merged into a final judgment disposing of all claims and parties, we must compare the last-filed live pleadings with the motions for summary judgment. *See Tex. Integrated Conveyor Sys., Inc. v. Innovative Conveyor Concepts, Inc*., 300 S.W.3d 348, 361 (Tex. App.—Dallas 2009, pet. denied).

B. Analysis

The record shows that all claims against RRR[2] and Rodriguez[3] were disposed of in their motions for summary judgment. However, appellants argue that the trial court's partial summary judgment of Family Dollar's claims did not dispose of all claims. Whether Family Dollar's partial summary judgment merged into the final judgment is contingent upon whether Family Dollar's partial summary judgment disposed of all of appellants' pending claims against Family Dollar. *See Lehmann,* 39 S.W.3d at 204; *Loy*, 128 S.W.3d at 403.

Appellants sued Family Dollar for breach of contract, consumer protection, abuse of governmental powers, fraud, breach of duty as owed to an invitee and licensee, respondeat superior, theft, negligence, extortion, unjust enrichment, strict liability, negligence per se, gross negligence, violation of the DTPA, civil conspiracy, breach of duty in bailment context, and breach of fiduciary duty. The trial court dismissed with

---

[2] Although RRR did not address several causes of action in its motion for summary judgment, the trial court's order disposed of all pending claims against RRR with prejudice:

> After reviewing the pleadings on file, the Defendants' Motion, the Plaintiff's Reply and evidence submitted in support thereof, it is the determination of this Court that Defendants' motion should in all things be **GRANTED**. It is therefore **ORDERED, ADJUDGED AND DECREED** that [RRR's] Motion for Summary Judgment is hereby **GRANTED**, and this case shall be dismissed with prejudice as to [RRR]. Each party shall bear their own costs. This order resolves all issues pending, and is final and appealable.

"When a trial court grants more relief than requested and, therefore, makes an otherwise partial summary judgment final, that judgment, although erroneous, is final and appealable." *G.H. Towing Co. v. Mcgee*, 347 S.W.3d 293, 298 (Tex. 2011).

[3] In Rodriguez's motion for summary judgment, she argued that all of appellants' claims against her were barred by the statute of limitations. The trial court granted the motion:

> [Rodriguez's] Motion for Final Summary Judgment as to [appellants'] claims based on limitations, and the Court having reviewed the Motion, all responses thereto, the pleadings on file with the Court, and the argument of counsel, is of the opinion that [Rodriguez's] Motion is in all things meritorious and should be granted in its entirety. It is, therefore, **ORDERED, ADJUDGED, AND DECREED**, that [Rodriguez's] Motion is hereby **GRANTED** in its entirety, and that [appellants] take nothing by their claims against her.

prejudice the following: breach of contract, consumer protection, abuse of governmental powers, fraud, negligence per se, negligence, theft, extortion, unjust enrichment, strict liability, bailment, breach of fiduciary duty, and the Texas Occupations Code claims. The trial court denied Family Dollar's motion for summary judgment on its cross-claim against RRR but granted Family Dollar's summary judgment on these claims: general negligence, premises liability, gross negligence, strict liability, breach of fiduciary duties (in a bailment context and under a special relationship), unjust enrichment, fraud and fraudulent inducement, theft, extortion, and conspiracy.

Family Dollar moved for summary judgment on appellants' DTPA claim.[4] Appellants responded to the motion. After Family Dollar filed its motion and after appellants responded, but before the motion was heard and decided, appellants amended their pleadings adding claims for: violation of § 17.12 and § 7.204(a) of the TBCC, and violation of § 681.006 of the transportation code.[5] Family Dollar did not amend its motion for summary judgment to address these later claims, and appellants did not address these claims in their response to Family Dollar's motion for summary judgment.

The trial court granted Family Dollar's motion for summary judgment in what it entitled a "final summary judgment." In its final summary judgment, the trial court stated that Family Dollar's:

[4] Family Dollar did not address appellants' respondeat superior claim in its motion for summary judgment, but we do not address this omission in our analysis because appellants did not assert this cause of action in the live pleading at the time the trial court granted the motion for summary judgment. The trial court set Family Dollar's motion for a hearing on May 17, 2018, and appellants amended their pleading on May 8, 2018. *See Austin v. Countrywide Homes Loans*, 261 S.W.3d 68, 75 (Tex. App.—Houston [1st Dist.] 2008, pet. denied) ("Once the hearing date for a motion for summary judgment has passed, the movant must secure a written order granting leave in order to file an amended pleading.").

[5] We note that appellants repleaded several claims that the trial court had previously dismissed with prejudice or disposed of via summary judgment, so we do not include those claims in our analysis.

> motion for final summary judgment is hereby **GRANTED** in its entirety, and that as a result its Motion for Final Summary Judgment as to [appellants'] remaining claim for violations of the DTPA is granted, and the Court having reviewed the motion, all responses thereto, the pleadings on file with the Court, and the argument of counsel, is of the opinion that Defendant [Family Dollar's] Motion is in all things meritorious and should be granted in its entirety. It is therefore, **ORDERED, ADJUDGED, AND DECREED**, that [Family Dollar's] Motion is hereby **GRANTED** in its entirety, and that as a result its Motion for Final Summary Judgment as to [appellants'] remaining claim for violations of the DTPA is granted, and that [appellants] take nothing by the DTPA claims.

Although the judgment states it is a "final judgment," merely including the word "final" in a judgment is not enough to make the judgment final. *Lehmann*, 39 S.W.3d at 205. As used here, the word "final" is qualified: the summary judgment specifies that it is only a "final judgment" on the issue of appellants' DTPA claim. *See Duke v. Am. W. Steel, LLC*, 526 S.W.3d 814, 817 (Tex. App.—Houston [1st Dist.] 2017, no pet.). The trial court's order did not address appellants' claims regarding § 17.12 and § 7.204(a) of the TBCC, and violation of § 681.006 of the transportation code. More importantly, the judgment did not dispose of Family Dollar's cross-claim. There is no indication that the trial court addressed or considered these remaining causes of action and cross-claim. *See Bobbitt v. Stran*, 52 S.W.3d 734, 735 (Tex. 2001) (holding that an order granting partial summary judgment, which did not dispose of all claims, counterclaims or cross-claim, was not a final, appealable order although it stated, "All relief not expressly granted herein is denied."); *Innovative Conveyor Concepts*, *Inc.*, 300 S.W.3d at 362 (concluding that the trial court's summary judgment order does not actually dispose of all claims where there were numerous claims that were not addressed in the motion for summary judgment). Thus, as the trial court had not disposed of all claims and parties, it is a partial summary judgment, and it is not an appealable judgment. *In re Burlington Coat Factory Warehouse*

of McAllen, *Inc.*, 167 S.W.3d 827, 830 (Tex. 2005) (orig. proceeding) ("A judgment that does not dispose of all parties and claims is interlocutory and will not be considered final for purposes of appeal unless the intent to finally dispose of the case is unequivocally expressed in the words of the order itself."); *Loy*, 128 S.W.3d at 403.

Appellees argue that because "the parties all acknowledged at the November 2, 2018 pretrial conference that after granting Family Dollar's and [RRR's] respective Motions for Summary Judgment as to [appellants'] claims, the only claims left to be decided were [appellants'] claims against Rodriguez." However, appellees cite to no authority and we find none supporting the position that the acknowledgment by the parties that a judgment is final supersedes the express language of a summary judgment. To the contrary, as we previously stated, "the intent to finally dispose of the case must be unequivocally expressed in the words of the order itself," not in some other proceeding, and such intent is not unequivocally expressed here as the judgment makes clear that it disposes of only appellants' DTPA claim. *See Lehmann*, 39 S.W.3d at 200; *Duke*, 526 S.W.3d at 817. Although the trial court and the parties may have presumed all claims and parties were disposed of, an appellate court cannot speculate as to the intended disposition of any remaining claims. *See Sw. Invs. Diversified, Inc. v. Estate of Mieszkuc*, 171 S.W.3d 461, 469 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

Next, appellees argue that Rodriguez was the last remaining party to the suit and only appellants' claims against her remained pending; therefore, the trial court's partial summary judgment in favor of Rodriguez resulted in a final judgment. However, as explained above, when the trial court granted Rodriguez's motion for summary judgment, the claims against Family Dollar and Family Dollar's cross-claim were still pending, and

the trial court did not state in its partial summary judgment that it disposed of every pending claim between those parties or clearly and unequivocally state that it finally disposed of all claims and all parties. *See Davati v. McElya*, 530 S.W.3d 265, 267 (Tex. App.—Houston [1st Dist.] 2017, no pet.). Therefore, we reject appellees' argument.

Next, RRR claims that the trial court's partial summary judgment in favor of RRR disposed of Family Dollar's pending claims. We disagree. The order states:

> After reviewing the pleadings on file, the Defendants' Motion, the Plaintiff's Reply and evidence submitted in support thereof, it is the determination of this Court that Defendants' motion should in all things be **GRANTED**. It is therefore **ORDERD, ADJUDGED AND DECREED** that [Ruiz, RRR, and Cedillo's] Motion for Summary Judgment is hereby **GRANTED**, and this case shall be dismissed with prejudice as to [Ruiz, RRR, and Cedillo]. Each party shall bear their own costs. This order resolves all issues pending, and is final and appealable.

However, Family Dollar's pending claims were not addressed in RRR's motion for summary judgment. Thus, the trial court's summary judgment does not dispose of all pending claims.

Finally, RRR argues that each partial summary judgment was a stand-alone judgment. We reject this argument. "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; but language that 'plaintiff take nothing by his claims against X' when there is more than one defendant or other parties in the case does not indicate finality." *Lehmann*, 39 S.W.3d at 205. As the order recites and record demonstrates, RRR was not the only adverse party in this case, and the order granting RRR's motion for summary judgment makes it clear that the trial court decided only the issues against RRR. Therefore, this is not a final and appealable judgment as RRR asserts. *See Lehmann*, 39

S.W.3d at 205 (providing that language that plaintiff take nothing by his claims, or that case is dismissed, shows finality if there are no other claims by other parties).

Based on the order and record, we are constrained to conclude that the trial court's partial summary judgments did not dispose of all claims because as explained above, none of the partial summary judgments disposed of appellants' claims for violations of the TBCC, transportation code, or Family Dollar's cross-claim. *See Lehmann*, 39 S.W.3d at 204; *Duke*, 526 S.W.3d at 816 (holding that because the trial court's partial-summary-judgment order disposed of only a subset of the plaintiffs' claims, it therefore was not final). Consequently, there is no final appealable judgment, and we sustain appellants' first issue.

"If a party appeals from a partial summary judgment that disposes of some but not all claims between the parties, the appellate court must dismiss the appeal for lack of jurisdiction, even if the trial court severed the disposed claims into a new cause." *Davati*, 530 S.W.3d at 267; *Duke*, 526 S.W.3d at 816. Therefore, we must dismiss the appeal for lack of jurisdiction.[6] *See* TEX. R. APP. P. 42.3(a).

III. CONCLUSION

We dismiss the appeal for lack of jurisdiction.

JAIME TIJERINA,
Justice

Delivered and filed the
30th day of July, 2020.

[6] We need not reach appellants' remaining issue as it is not dispositive. TEX. R. APP. P. 47.1.