

IN THE UTAH COURT OF APPEALS

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<u>McNeil Engineering and Land</u>	)	MEMORANDUM DECISION
<u>Surveying, LLC; McNeil</u>	)	(Not For Official Publication)
Engineering, Inc.; and Scott	)	
McNeil,	)	Case No. 20080319-CA
	)	
Plaintiff, Counterclaim	)	F I L E D
Defendant, and Appellant,	)	(May 21, 2009)
	)	
v.	)	2009 UT App 138
	)	
<u>Dale K. Bennett; Benchmark</u>	)	
Engineering and Land	)	
Surveying, LLC; et al.,	)	
	)	
Defendant, Counterclaim	)	
Plaintiff, and Appellee.	)	

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Third District, Salt Lake Department, 050917315  
The Honorable Pat B. Brian

Attorneys: Matthew C. Barneck and Paul P. Burghardt, Salt Lake  
City, for Appellant  
Reed L. Martineau, Keith A. Call, and Derek J.  
Williams, Salt Lake City, for Appellee

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Before Judges Thorne, Bench, and Davis.

DAVIS, Judge:

Appellant McNeil Engineering and Land Surveying, LLC (ME&LS) filed suit against Appellee Dale K. Bennett for various claims, and Bennett asserted several counterclaims. The parties eventually filed cross-motions for summary judgment on the issue of whether Bennett's employment resignation from McNeil Engineering, Inc. triggered his withdrawal as a member of ME&LS. The district court determined that Bennett did not withdraw as a member of ME&LS and was therefore due his share of disbursements. ME&LS filed a motion for reconsideration, which the district court denied. The district court then, on Bennett's motion, determined there was "no just reason for delaying entry of judgment as requested by Bennett" for his share of cash distributions. ME&LS now appeals.

The threshold issue before us is whether we have subject matter jurisdiction to address the other issues that the parties

raise on appeal, that is, we must first determine whether the order being appealed from was properly certified for appeal under rule 54(b) of the Utah Rules of Civil Procedure. Although the parties assert that this case is properly before us via a rule 54(b) certification, this consensus is not dispositive. "Acquiescence of the parties is insufficient to confer jurisdiction and . . . a lack of jurisdiction can be raised at any time by either party or by the court." Kennecott Corp. v. Utah State Tax Comm'n, 814 P.2d 1099, 1100 (Utah 1991) (omission in original) (quoting Olson v. Salt Lake City Sch. Dist., 724 P.2d 960, 964 (Utah 1986)).

Rule 54(b) of the Utah Rules of Civil Procedure provides as follows:

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, or third-party claim, and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment.

Utah R. Civ. P. 54(b). The Utah Supreme Court has further elaborated on the requirements of certification under rule 54(b):

First, there must be multiple claims for relief or multiple parties to the action. Second, the judgment appealed from must have been entered on an order that would be appealable but for the fact that other claims or parties remain in the action. Third, the trial court, in its discretion, must make a determination that there is no just reason for delay of the appeal.

Pate v. Marathon Steel Co., 692 P.2d 765, 767 (Utah 1984) (emphasis added) (internal quotation marks omitted). Thus, proper certification under rule 54(b) does not occur when the district court simply directs that judgment be entered and makes the order final. See id. at 768. The district court must additionally determine "whether there was any just reason for delaying the appeal. If it found none, it would then be free to enter such a certification, permitting the appeal to proceed." Id. Neither of these two determinations alone is sufficient for certification under rule 54(b):

We must emphasize that all of these requirements must be met. An order that is "final" as to a claim or a party in a multi-claim or multi-party suit is appealable under Rule 54(b) only if it is accompanied by a district court certification that no just reason exists for delaying the appeal; an order that does not wholly dispose of a claim or a party is not "final" under Rule 54(b) and will not be appealable, even with such a certification.

Id. (emphasis added).<sup>1</sup>

The parties argue that the district court properly certified this case under rule 54(b) because the court's Order and Judgment stated, "The Court finds that there is no just reason for delaying entry of judgment as requested by Bennett." Although this reflects the district court's determination that the Order was a final order, it is unclear whether the court meant the Order was a final order for purposes of 54(b).<sup>2</sup> Moreover, the

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<sup>1</sup>District courts have been directed to provide findings supporting both the determination that a judgment is final under rule 54(b) and the determination that there is no just reason for delay of the appeal. See Bennion v. Pennzoil Co., 826 P.2d 137, 139 (Utah 1992) ("In order to facilitate this court's review of judgments certified as final under rule 54(b), trial courts should henceforth enter findings supporting the conclusion that such orders are final."); id. ("[T]his court has yet to see a single instance where a trial court has advanced a rationale as to why there was no just reason for delay. Because this determination by the trial court is subject to judicial review under an abuse of discretion standard, a brief explanation should accompany all future certifications so that this court may render an informed decision on that question.").

<sup>2</sup>Under the facts of this case, that determination would be inappropriate in any event. The approach adopted by the Utah Supreme Court "requires that before a claim can be considered separate, the facts underlying it must be different than those underlying other claims in the action." Kennecott Corp. v. Utah State Tax Comm'n, 814 P.2d 1099, 1103 (Utah 1991). Thus, to determine whether an issue certified for appeal is separate from the issues remaining in district court, we "focus[] on the degree of factual overlap between [the issues]. When this factual overlap is such that separate claims appear to be based on the same operative facts or on the same operative facts with minor variations, they are held not to constitute separate claims for

(continued...)

Order lacks an accompanying determination that there is no just reason for delay in bringing an appeal. This conclusion is underscored by the following exchange at the hearing on Bennett's motion to enforce the prior summary judgment ruling:

[ME&LS's counsel]: And I presume that order is going to make the--state the language under Rule 54(b) that it's--there's an express determination of final judgment. I think that's what they were asking for.

[Bennett's counsel]: Your Honor, we simply requested a judgment. We didn't request that it be certifiable so it could be appealed on an interlocutory basis.

THE COURT: The Court simply granted the relief prayed for in the motion, and orders counsel for [Bennett] to so reflect in the order.

All right, next matter.

[ME&LS's counsel]: I'm sorry, Your Honor. I have to ask for some clarification, because I'm at a loss here. [Their] moving papers did ask for a final judgment, and the Court is entering a ruling that is, in fact, a final judgment. You['re] ordering my client to make payment by a date certain.

THE COURT: Is counsel not correct? That was the specific relief that defense counsel sought, and the specific relief the Court granted.

[Bennett's counsel]: We sought a judgment--an order of judgment in that amount, Your Honor. We did not specifically request that it be certified as [a] final order for--as a final judgment for purposes of appeal. So I don't know what--exactly

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<sup>2</sup>(...continued)  
rule 54(b) purposes." Id. (citations and internal quotation marks omitted). Here, where the majority, if not all, of the issues in this case are related to Bennett's resignation and the events surrounding it, and where there remains pending an ME&LS claim that Bennett breached the operating agreement, there is factual overlap between the claim before us and claims pending in the district court.

what we're asking for here. We wanted a judgment that we could collect upon. Your Honor, has ruled that the payment is to be made, and--

THE COURT: Cite the specific language in your motion regarding the relief sought, and that is the order of the Court--whatever the specific language of your motion reads.

The district court therefore clearly made no determination as to whether there was any just reason for delaying an appeal but simply granted Bennett's motion, which requested only "an order of judgment for Bennett's share of member distributions."<sup>3</sup> Thus, there was no proper certification under rule 54(b), and we do not have subject matter jurisdiction to consider the issues raised in this appeal.

"When a matter is outside the court's jurisdiction it retains only the authority to dismiss the action." Varian-Eimac, Inc. v. Lamoreaux, 767 P.2d 569, 570 (Utah Ct. App. 1989). We therefore dismiss the appeal.

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James Z. Davis, Judge

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WE CONCUR:

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William A. Thorne Jr.,  
Associate Presiding Judge

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Russell W. Bench, Judge

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<sup>3</sup>Bennett's motion was devoid of the "no just reason for delay" language but instead stated, "There is no reason the Court cannot enter a judgment against ME&LS for this amount and order that Plaintiffs pay Bennett this amount." Bennett's supporting memorandum used language closer to that of rule 54(b), stating, "Bennett is entitled to this judgment based upon the Court's prior ruling and there is no just cause for delaying the entry of this judgment." Neither filing, however, requested the court to make a determination that there was no just reason for delaying an appeal.