Opinion issued July 2, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-18-00621-CV

V.I.P. ROYAL PALACE, LLC D/B/A ROYAL PALACE AND ANNA EAGLIN, Appellants

V.

HOBBY EVENT CENTER LLC, Appellee

On Appeal from the 133rd District Court
Harris County, Texas
Trial Court Case No. 2017-08762

MEMORANDUM OPINION

Appellants, V.I.P. Royal Palace, LLC, doing business as Royal Palace ("Royal Palace"), and Anna Eaglin (collectively, "appellants"), challenge the trial court's rendition of summary judgment for appellee, Hobby Event Center LLC ("Hobby Event Center"), in their suit for breach of contract, fraud, fraud by

nondisclosure, and negligent misrepresentation. In two issues, appellants contend that the trial court erred in entering a purported final judgment and in granting a no-evidence summary judgment in favor of Hobby Event Center.

We dismiss the appeal for lack of jurisdiction.[1]

Background

In their original petition, appellants alleged that on March 17, 2016, Royal Palace signed a catering agreement with Hobby Event Center under which Royal Palace was to be "the exclusive provider of the bar services at all events that took place at . . . Hobby Event Center for a three-year period beginning March 17, 201[6]." On April 30, 2016, Royal Palace signed another contract with Hobby Event Center to rent its facility for a car show on June 26, 2016. And on May 4, 2016, Royal Palace signed a facility use agreement with Hobby Event Center under which Royal Palace agreed to rent Hobby Event Center's facility for concerts, plays, and comedy events and to provide catering. Appellants brought a breach-of-contract claim against Hobby Event Center, alleging that it breached those agreements, and they sought damages.

Hobby Event Center answered, generally denying the allegations in appellants' original petition and asserting various affirmative defenses. It then

[1] In accordance with Texas Rule of Appellate Procedure 42.3, we provided appellants notice of our intention to dismiss their appeal for lack of jurisdiction. *See* TEX. R. APP. P. 42.3(a). Appellants did not respond.

moved for summary judgment on appellants' breach-of-contract claim, arguing that it was entitled to judgment as a matter of law and that no evidence supported any element of appellants' claim. Hobby Event Center attached to its summary-judgment motion the affidavit of Jacob Wang, its corporate representative.

After responding to Hobby Event Center's summary-judgment motion, appellants filed their first amended petition. In their first amended petition, appellants brought claims for breach of contract, fraud, fraud by nondisclosure, and negligent misrepresentation against Hobby Event Center and Jack Wang, "the sole proprietor of [Hobby] Event Center." As for their breach-of-contract claim, appellants alleged on March 17, 2016, Royal Palace executed a catering agreement with Wang, which provided that Royal Palace would "be the exclusive provider of the bar services at all events that took place at . . . Hobby Event Center for [a] three-year period beginning [on] March 17, 2016." On April 30, 2016, Royal Palace signed another contract with Hobby Event Center to rent its facility for a car show on June 26, 2016. And on May 4, 2016, Royal Palace signed a facility use agreement with Hobby Event Center under which Royal Palace agreed to rent Hobby Event Center's facility for concerts, plays, and comedy events and to provide catering. Appellants alleged that Hobby Event Center and Wang breached these agreements.

As for their fraud claim, appellants alleged that Wang represented that he was "operating a sole proprietorship and/or a D/B/A," when he signed the March 17,

2016 catering agreement. Wang represented that his business was properly organized and that representation to appellants was material "because it caused [appellants] to enter into the agreements complained of." According to appellants, Wang's representation constituted a false statement of fact because "[t]he sole proprietorship did not contain the name of Jack Wang in its name and if Jack Wang was representing that the business was a D/B/A it was not properly registered . . . at the time the contracts were entered into." Appellants relied on Wang's false representation, and it directly and proximately caused them injury.

As for their fraud-by-nondisclosure claim, appellants alleged that Wang "concealed and/or failed to disclose material facts related to the status of his business entity," Wang "had a duty to disclose the information that Vera M. Wright did not have the authority to enter into an agreement with . . . Royal Palace," Hobby Event Center was not a properly formed business, and such information was material because it formed the basis of the agreements at issue. Also, Wang knew that appellants were "ignorant of the information and did not have an equal opportunity to discover the truth," and by deliberately remaining silent, Wang directly and proximately caused injury to appellants.

As for their negligent-misrepresentation claim, appellants alleged that Wang represented to appellants that Hobby Event Center was properly registered, Wang "made th[at] representation in the course of a transaction in which [appellants] had

an interest" and "for the guidance of others," Wang's representation was a "misstatement of fact and/or opinion," appellants relied on the representation when they entered into the agreements, and Wang's misrepresentation proximately caused injury to appellants.

On February 13, 2018, the trial court, without specifying grounds, granted Hobby Event Center summary judgment on appellants' breach-of-contract claim against it (the "February 13, 2018 order").

Hobby Event Center then moved for summary judgment on appellants' claims against it for fraud, fraud by non-disclosure, and negligent misrepresentation, asserting that an adequate time for discovery had passed and appellants could not "demonstrate competent summary judgment evidence for each of the[] elements" of their claims. Appellants did not respond to Hobby Event Center's no-evidence summary-judgment motion.

Appellants filed a motion for new trial or motion for reconsideration of the trial court's February 13, 2018 order granting Hobby Event Center summary judgment on appellants' breach-of-contract claim against it.[2] In their motion, appellants asserted that they had "abandoned" their breach-of-contract claim against Hobby Event Center by filing their first amended petition. And that appellants had

[2] Appellants filed a motion for new trial and a first amended motion for new trial or in the alternative motion for reconsideration. Although the motions have different titles, their substance is the same.

alleged "new claims" against a new defendant, Wang, in their first amended petition. The trial court denied appellants' motion.

On June 5, 2018, the trial court granted Hobby Event Center summary judgment on appellants' remaining claims against it and dismissed appellants' claims against Hobby Event Center with prejudice (the "June 5, 2018 order").

Finality of Judgment

In their first issue, appellants argue that the trial court erred in entering a purported final judgment because Wang was "an additional party to the case" and appellants had asserted "separate causes of action[]" against him.

"[C]ourts always have jurisdiction to determine their own jurisdiction." *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 146 n.14 (Tex. 2012) (internal quotations omitted); *see also Royal Indep. Sch. Dist. v. Ragsdale*, 273 S.W.3d 759, 763 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (jurisdiction fundamental in nature and cannot be ignored). Whether we have jurisdiction is a question of law, which we review de novo. *See Tex. A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 840 (Tex. 2007). If this case is an appeal over which we have no jurisdiction, the appeal must be dismissed. *Ragsdale*, 273 S.W.3d at 763.

Generally, appeals may be taken only from final judgments. *Lehmann v. Har–Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001). Interlocutory orders may be appealed only if permitted by statute. *See Koseoglu*, 233 S.W.3d at 840; *Bally Total Fitness*

Corp. v. Jackson, 53 S.W.3d 352, 352 (Tex. 2001). A judgment issued without a conventional trial is final for appeal only if it: (1) actually disposes of all claims and parties then before the court, regardless of its language, or (2) states with "unmistakable clarity" that it is a final judgment as to all claims and all parties. *Lehmann*, 39 S.W.3d at 192–93, 200, 204.

One way in which the judgment may actually dispose of all claims and all parties before the court is if the record reflects each of these propositions: (1) the trial court granted summary judgment expressly disposing of the plaintiffs' claims against all parties named in the petition except one, (2) so far as can be determined from the record, the remaining defendant was never served with citation and did not file an answer, and (3) nothing in the record indicates that the plaintiffs ever expected to obtain service upon the remaining defendant. *See M.O. Dental Lab v. Rape*, 139 S.W.3d 671, 673–75 (Tex. 2004); *Youngstown Sheet & Tube Co. v. Penn*, 363 S.W.2d 230, 232 (Tex. 1962); *In re Sheppard*, 193 S.W.3d 181, 187 (Tex. App.—Houston [1st Dist.] 2006, orig. proceeding [mand. denied]). If the record satisfies these three prerequisites, then "the case stands as if there had been a discontinuance as to [the unserved defendant], and the judgment is . . . regarded as final for the purposes of appeal." *M.O. Dental*, 139 S.W.3d at 673 (internal quotations omitted); *see also Nabelek v. City of Houston*, No. 01-06-01097-CV, 2008 WL 5003737, at *3 (Tex. App.—Houston [1st Dist.] Nov. 26, 2008, no pet.) (mem. op.) (explaining

discontinuance as to unserved defendant "acts as a nonsuit without prejudice as to [that] defendant[]"). Even so, if the record reflects that the plaintiffs expect to obtain service on the unserved defendant, a judgment solely disposing of the claims against the served defendant is interlocutory. *See Nabelek*, 2008 WL 5003737, at *3.

Appellants assert that their first amended petition, filed before the trial court's June 5, 2018 order, added Wang as a new defendant, "listed a place for service" for Wang, and "plead[ed] causes of actions specific to [him]." According to appellants, Wang was "an additional party to the case, with separate causes of action[]" alleged against him and the trial court's June 5, 2018 order cannot be final.

Appellants, in their original petition, brought a breach-of-contract claim only against Hobby Event Center. But, in their first amended petition, appellants added claims for breach of contract, fraud, fraud by nondisclosure, and negligent misrepresentation against Hobby Event Center and Wang, "the sole proprietor of [Hobby] Event Center." The record does not reveal that, when the trial court signed the June 5, 2018 order, Wang had been served with citation or waived service of citation, had made a general appearance, or had otherwise answered. The record also does not have any orders of severance or nonsuit addressing appellants' claims against Wang. The trial court's June 5, 2018 order contains no ruling on appellants' claims against Wang.

That said, the trial court's June 5, 2018 order may still be final if the record reflects that (1) the trial court granted summary judgment expressly disposing of appellants' claims against all parties named in the petition except Wang, (2) so far as can be determined from the record, Wang was never served with citation and did not file an answer, and (3) nothing in the record indicates that appellants ever expected to obtain service upon Wang. *See M.O. Dental Lab*, 139 S.W.3d at 673–75; *Penn*, 363 S.W.2d at 232; *In re Sheppard*, 193 S.W.3d at 187.

Here, we cannot say that "nothing in the record" indicates that appellants did not expect to obtain service upon Wang. *Cf. M.O. Dental Lab*, 139 S.W.3d at 673–75 (plaintiff did not indicate she expected to serve defendant); *see also Md. Cas. Co. v. Am. Home Assurance Co.*, No. 01-06-00237-CV, 2007 WL 926514, at *3 (Tex. App.—Houston [1st Dist.] Mar. 29, 2007, no pet.) (mem. op.) (noting record indicated plaintiff "d[id] expect to obtain service upon the remaining parties"). Appellants, in their first amended petition, provided the address where Wang could be served and added claims specifically against Wang in that pleading.[3] *See Old*

[3] In its brief, Hobby Event Center asserts that appellants' first amended petition "naming a new . . . defendant," Wang, "came too late" because it was filed after the deadline set in the trial court's docket control order for adding additional parties and appellants "never sought nor received a signed order from the [trial] court granting leave to add . . . Wang as an additional party." Although the trial court's docket control order set the date for adding additional parties as November 28, 2017, no one challenged, objected to, or moved to strike appellants' addition of Wang as a defendant in the trial court. *See* TEX. R. APP. P. 33.1(a).

Am. Cty. Mut. Fire Ins. Co. v. Villegas, No. 01-17-00750-CV, 2019 WL 3121853, at *3 (Tex. App.—Houston [1st Dist.] July 16, 2019, no pet.) (mem. op.) (petition identified defendant, provided address, and stated defendant could be served with citation at address); *cf. M.O. Dental*, 139 S.W.3d at 674 (petition stated location for service of defendant unknown and no citation was being requested). Then, before the trial court's June 5, 2018 order, appellants, in their motion for new trial or motion for reconsideration of the trial court's February 13, 2018 order, reiterated that they, in their amended petition, had added new claims against the new defendant, Wang, and requested that the trial court retain the case on its docket. *See Bradley v. Authur*, No. 01-15-00065-CV, 2016 WL 7011412, at *2 (Tex. App.—Houston [1st Dist.] Dec. 1, 2016, pet. denied) (mem. op.) (plaintiff informed trial court of his continuing interest in prosecuting claim against unserved defendant); *Md. Cas. Co.*, 2007 WL 926514, at *3 (plaintiff requested trial court retain case on its docket). Still yet, in their briefing in this Court, appellants have stated that they have "abandoned [their] claims" against Hobby Event Center and only want to proceed on their claims against Wang.

Although at the time the trial court signed the June 5, 2018 order, appellants had not yet served Wang, "the failure to effect service of process against an unserved defendant, does not, by itself, demonstrate a lack of intent to serve that defendant." *Bundy v. Houston*, No. 01-17-00863-CV, 2018 WL 6053602, at *3 n.2 (Tex. App.—

Houston [1st Dist.] Nov. 20, 2018, no pet.) (mem. op.); *see also Taylor v. Jones*, No. 01-16-00999-CV, 2017 WL 6327375, at *1 (Tex. App.—Houston [1st Dist.] Dec. 12, 2017, no pet.) (mem. op.). Because the record reflects that appellants expect to obtain service on Wang, we cannot conclude that the trial court's June 5, 2018 order constitutes a judgment that actually disposes of all claims and all parties. *See Lehmann*, 39 S.W.3d at 192–93, 200, 204; *Nabelek*, 2008 WL 5003737, at *3 (where record reflects plaintiffs expect to obtain service on unserved defendant, judgment disposing of solely served defendant is interlocutory).

Because the trial court's June 5, 2018 order does not actually dispose of all claims and all parties, it is interlocutory and not final for purposes of appeal unless the intent to finally dispose of the case is unequivocally expressed in the words of the order itself. *See In re Burlington Coat Factory Warehouse of McAllen, Inc.*, 167 S.W.3d 827, 830 (Tex. 2005); *Lehmann*, 39 S.W.3d at 200. Such an order would be erroneous if it granted more relief than requested, but it would be considered final for purposes of appeal. *See Lehmann*, 39 S.W.3d at 200 (judgment granting more relief than requested by party would not be interlocutory but would be subject to reversal). Appellate courts must review the record in the case and the language of the trial court's order to determine whether the order is intended to be final. *Lehmann*, 39 S.W.3d at 205–06; *Tex–Fin, Inc. v. Ducharne*, 492 S.W.3d 430, 436 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

Here, the trial court's June 5, 2018 order is titled "Final Judgment" and includes the words "final" and "appealable judgment." Even so, an order is not final just because it is entitled "final" or because the word "final" appears in the order. *See Lehmann*, 39 S.W.3d at 205 (internal quotations omitted). Nor does an order constitute a final judgment just because it states that it is "appealable." *Lehmann*, 39 S.W.3d at 205; *see also Breitling Oil & Gas Corp. v. Petroleum Newspapers of Alaska, LLC*, No. 05-14-00299-CV, 2015 WL 1519667, at *4 (Tex. App.—Dallas Apr. 1, 2015, pet. denied) (mem. op.) ("[T]he order's recitation that it is 'final and appealable' does not necessarily make it so."); *Forest N./Springwoods Co-Op. Recreation Ass'n v. City of Austin*, No. 03-12-00529-CV, 2013 WL 3336863, at *2 (Tex. App.—Austin June 27, 2013, no pet.) (mem. op.). And although the order states that appellants "take nothing by way of any of their claims," language that the plaintiffs take nothing on their claims or that a case is dismissed, only shows finality "if there are no other claims" involving other parties at issue in the case. *See Lehmann*, 39 S.W.3d at 205. Including a "Mother Hubbard clause[]" does not on its face "implicitly dispose of claims not expressly mentioned in [an] order" or signify finality. *Farm Bureau Cty. Mut. Ins. Co. v. Rogers*, 455 S.W.3d 161, 164 (Tex. 2015); *see also Forest N./Springwoods Co-Op.*, 2013 WL 3336863, at *2. Instead, "there must be evidence in the record to prove [that] the trial court[] inten[ded] to dispose of any remaining issues [by] . . . includ[ing] a Mother Hubbard clause in

[its] order." *Rogers*, 455 S.W.3d at 164. If there is any doubt over a judgment's finality, the question must be resolved by determining the trial court's intention as gathered from the language of the entire order and the record as a whole, "aided on occasion by the conduct of the parties." *Vaughn v. Drennon*, 324 S.W.3d 560, 563 (Tex. 2010) (internal quotations omitted).

A review of the entirety of the trial court's June 5, 2018 order shows that it is an order intended solely to grant Hobby Event Center's no-evidence summary-judgment motion and dismiss appellants' claims against Hobby Event Center with prejudice.[4] *See Forest N./Springwoods Co-Op.*, 2013 WL 3336863, at *2 (although order recited "all [p]laintiff's claims against the [d]efendants are dismissed with prejudice," concluding it necessary to read order in full which indicated only plaintiff's claims against defendants who had moved for summary judgment were dismissed (internal quotations omitted)). This is confirmed by the trial court's continued reference throughout the order to its decision to grant Hobby Event Center summary judgment. Notably, when Hobby Event Center moved for a

[4] As previously noted, Hobby Event Center initially moved for summary judgment on appellants' breach-of-contract claim, which the trial court granted in the February 13, 2018 order. After appellants filed their first amended petition asserting additional claims against Hobby Event Center, Hobby Event Center filed a no-evidence summary-judgment motion on appellants' claims against it for fraud, fraud by non-disclosure, and negligent misrepresentation. The trial court granted Hobby Event Center summary judgment on appellants' remaining claims against it in the June 5, 2018 order.

no-evidence summary judgment after appellants filed their amended first petition, Hobby Event Center sought summary judgment on appellants' fraud, fraud-by-non-disclosure, and negligent-misrepresentation claims against it. Hobby Event Center's summary-judgment motion did not concern or mention any of appellants' claims against Wang, and the trial court's June 5, 2018 order never mentions Wang or the claims brought against him. *See Cordova v. Hawkins*, No. 01-05-00495-CV, 2006 WL 1428857, at *1–2 (Tex. App.—Houston [1st Dist.] May 25, 2006, no pet.) (mem. op.) (order not final where it did not mention other party or outstanding claims). We cannot conclude that the trial court's June 5, 2018 order states "with unmistakable clarity that it is a final judgment as to all claims and all parties." *See Lehmann*, 39 S.W.3d at 192–93, 205 ("[T]here must be some . . . clear indication that the trial court intended the order to completely dispose of the entire case."); *see also Breitling Oil*, 2015 WL 1519667, at *1–4 (although order stated it "dispose[d] of all claims and causes of action and [was] final and appealable," concluding it did not state with "unmistakable clarity that it [was] a final judgment as to *all claims and all parties*" (internal quotations omitted)).

An order that does not actually dispose of all claims and all parties before the trial court and does not state with unmistakable clarity that it is a final judgment as to all claims and all parties must be classified, for purposes of appeal, as an unappealable interlocutory order. *See Lehmann*, 39 S.W.3d at 192–93. Without

affirmative statutory authority to hear an interlocutory appeal, this Court lacks jurisdiction. *See CMH Homes v. Perez*, 340 S.W.3d 444, 447 (Tex. 2011); *Ruiz v. Ruiz*, 946 S.W.2d 123, 124 (Tex. App.—El Paso 1997, no writ); *see also Cordova*, 2006 WL 1428857, at *1 ("Excluding those statutory exceptions, . . . this Court's jurisdiction is . . . limited to review of final judgments that dispose of all parties and claims."). Because we hold that the trial court's June 5, 2018 order was not a final judgment and appealable, we dismiss this appeal for lack of jurisdiction.[5] *See* TEX. R. APP. P. 42.3(a), 43.2(f).

Conclusion

We dismiss the appeal for lack of jurisdiction.

Julie Countiss
Justice

Panel consists of Justices Lloyd, Landau, and Countiss.

[5] We need not address appellants' second issue. *See* TEX. R. APP. P. 47.1.