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ARKANSAS COURT OF APPEALS

DIVISION III
No. CA10-1154

JEFFREY D. ALLEN and TONYA R. ALLEN
APPELLANTS

V.

JAMES M. WELDON and BETTY F. WELDON
APPELLEES

Opinion Delivered MAY 4, 2011

APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT, GREENWOOD DISTRICT
[NO. CV2009-282G]

HONORABLE J. MICHAEL FITZHUGH, JUDGE

DISMISSED

RITA W. GRUBER, Judge

Jeffrey D. Allen and Tonya R. Allen appeal the circuit court's decision quieting title to disputed property in appellees James M. Weldon and Betty F. Weldon. The boundary between the parties' adjoining properties is an inverted L, with the Allens' property lying west and north of the Weldons. The Allens contend in their first three points on appeal that the court's order quieting title provided an inadequate legal description, failed to give proper credence to government monuments, and "impressibly weighed distance calls over artificial and natural monuments." In a fourth point, they contend that the survey the court relied upon is inconsistent with the legal description it adopted. We cannot address these points for lack of a final order.

On May 19, 2009, the Weldons filed a complaint alleging that they were the legal owners and were in actual possession of the disputed property; that they had acquired legal

title by a warranty deed dated September 5, 1975, and filed October 10, 1975; that on or before March 24, 2000, the Allens had erected a fence running on and along the Weldons' west boundary; and that the Allens had acquired legal title to adjacent real property by a warranty deed dated March 7, 2008, and filed on March 11, 2008. The complaint prayed that the Allens be enjoined from further trespass or from ejecting the Weldons; it prayed alternatively that title be quieted in the Weldons.

The Allens filed an answer and a counterclaim asserting that they were legal owners of two tracts of land acquired by warranty deeds of 2007 and 2008, and that they had continuously paid taxes on the property from the time they had acquired ownership. The counterclaim raised three causes of action: trespass, quiet title, and issuance of a correction deed correcting the legal description of the Allens' 2007 warranty deed.

The trial court stated in its written order that the surveys of neither party used an established government monument as the point of the beginning, noting that the survey performed for Mr. Weldon by Harold Hardin in 2000 referred to iron pipes and the 2009 survey performed for Mr. Allen by David Brixey used an existing stone. The court awarded the Weldons' claim by adverse possession, finding that they had purchased the disputed property in 1975, had erected a fence on the west boundary and placed t-posts along the rocky northern boundary, and had paid taxes on the property since 1975. The court ruled that the Hardin "re-survey" performed for the Weldons was the appropriate one, finding that it relied on previous surveys while the Brixey survey for the Allens ignored distances and boundaries in applicable deeds. The order confirmed the Weldons' title in accord with the

legal description set forth in a 1975 warranty deed to them. Other than enjoining each party from trespassing on the other's property, the order made no mention of the Allens' counterclaims.

In *Bevans v. Deutsche Bank Nat'l Trust Co.*, 373 Ark. 105, 281 S.W.3d 740 (2008), Bevans appealed the circuit court's foreclosure order. The order addressed the bank's claims but did not address a motion by Bevans for nonsuit of her compulsory counterclaims, which the circuit court judge had orally granted. The supreme court explained that in the absence of a written order dismissing the counterclaims pursuant to Rule 41(a)(1) of the Arkansas Rules of Civil Procedure, the foreclosure order was not a final, appealable order:

> Pursuant to Rule 41(a)(1) . . . , a claim may be dismissed without prejudice to a future action by the plaintiff before final submission of the case to the jury; however, "it is effective only upon entry of a court order dismissing the action." Ark. R. Civ. P. 41(a)(1) (2007). The provisions of Rule 41 also apply to the dismissal of any counterclaim, cross-claim, or third-party claim. Ark. R. Civ. P. 41(c) (2007).

373 Ark. at 107, 281 S.W.3d at 742. The *Bevans* court further concluded that, even if a written order dismissing Bevans's counterclaims had been issued, the circuit court's foreclosure would not have been final under Rule 54(b) of the Arkansas Rules of Civil Procedure.

Pursuant to Arkansas Rule of Appellate Procedure–Civil 2(a)(1), a party may appeal from a final judgment or final decree of the circuit court. Rule 54(b) of the Arkansas Rules of Civil Procedure permits entry of a final judgment in some instances where the court has disposed of fewer than all of the parties' claims. However, the court must execute a certificate that contains both an express determination "supported by specific factual findings" that there is no just reason for delay and "the factual findings upon which the determination to enter the

judgment as final is based." Ark. R. Civ. P. 54(b)(1). Absent the certificate required by the Rule, the order adjudicating fewer than all the claims shall not terminate the action as to the claims. Ark. R. Civ. P. 54(b)(2). Finality of an order appealed from is a jurisdictional issue, and, therefore, is a matter the appellate court will consider even when the parties do not raise it. *Bevans*, 373 Ark. at 106, 281 S.W.3d at 741.

Here, as in *Bevans*, *supra*, the written order does not reflect the court's disposition of the Allens' counterclaims. The order includes no dismissal of counterclaims, as required by Rule 41, nor is there a Rule 54(b) certificate. The order thus lacks finality, and we are without jurisdiction to address the appeal.[1]

Dismissed.

MARTIN, J., agrees.

HART, J., concurs.

JOSEPHINE LINKER HART, Judge, concurring. I concur that this appeal must be returned to the circuit court for lack of a final order. The court's order, filed July 29, 2009,

[1]We also note that the circuit court's order merely confirmed title "in accordance with the legal description set forth in the September 5, 1975, Warranty Deed from Kersey to Weldon." Even were we to address the merits of the present case, our decision would require remand for a specific legal description. *See Greenway Land Co. v. Hinchey*, 2010 Ark. App. 330 (discussing a line of cases where the order itself was deficient of property description, and the appellate court decided the merits and remanded to the trial court for a more specific legal description even where it referenced an existing survey). *See, e.g.*, *Rice v. Whiting*, 248 Ark. 592, 452 S.W.2d 842 (1970); *Boyster v. Shoemake*, 101 Ark. App. 148, 272 S.W.3d 139 (2008); *Adams v. Atkins*, 97 Ark. App. 328, 249 S.W.3d 166 (2007); *Jennings v. Burford*, 60 Ark. App. 27, 958 S.W.2d 12 (1997).

provided that the survey of appellees, in which appellees' "surveyor relied on previous surveys and used an iron pipe as his point of beginning" was the "appropriate one." Thus, in its order, the court acknowledged that the iron pipe should be used as the point of beginning. I note, however, that the survey further provides that "there is apparently something wrong either in the deed calls or the existing stone," the stone being the point alleged as a point of beginning by appellants and then rejected by the circuit court. But despite the survey's acknowledgment that there was a problem with the deed calls, the circuit court nevertheless confirmed title in appellees "in accordance with the legal description set forth in the September 5, 1975, Warranty Deed from" appellees' predecessor-in-interest to appellees. Appellees' survey, however, showed that the deed calls would show the point of beginning as approximately fifty-six feet south of the point of beginning accepted by the court—the iron pipe.[2] Thus, given the court's acceptance of the survey and its use of the iron pipe as the point of beginning, the court cannot at the same time accept the description in the deed showing a different point of beginning.

To be final, an order must describe the boundary line between disputing land owners with sufficient specificity that it may be identified solely by reference to the order. *Petrus v. Nature Conservancy*, 330 Ark. 722, 957 S.W.2d 688 (1997). Given the apparent discrepancy in the court's order, I must conclude that the order is not final.

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[2]The deed description establishes the point of beginning as "beginning at a point 414.90 feet south, and 325 feet east, of the NW court of the NE 1/4, of the NW 1/4 of Section 17." The survey description, though it ultimately rejects this point of beginning, describes the distance calls in nearly identical language as 416.6651 feet south and 324.7215 feet east.