

ARKANSAS COURT OF APPEALS

DIVISION I
No. CA11-129

LAMCO LIMITED PARTNERSHIP II
APPELLANT

V.

PASTA CONCEPTS, INC.; PASTA
CONCEPTS, LLC; PASTA CONCEPTS
OF CONWAY, LLC; FAZOLI'S
FRANCHISING SYSTEMS, LLC;
GEORGE OSBORN; JANICE
OSBORN; MARK OSBORN; BRENDA
OSBORN; MARK LEVINSON;
ELIZABETH LEVINSON; ROGER
HILL; and CONNIE HILL
APPELLEES

Opinion Delivered February 15, 2012

APPEAL FROM THE FAULKNER
COUNTY CIRCUIT COURT,
[NO. CV-07-665]

HONORABLE MICHAEL A. MAGGIO,
JUDGE

DISMISSED

ROBIN F. WYNNE, Judge

Appellant Lamco Limited Partnership II (Lamco) appeals from summary judgments granted to appellees George, Janice, Mark, and Brenda Osborn; Mark and Elizabeth Levinson; and Roger and Connie Hill. We dismiss the appeal due to lack of a final order.

The Osborns, Levinsons, and Hills formed Pasta Concepts, Inc., to operate a Fazoli's restaurant in Conway. The corporation rented space from Frank and Nickie Macon under a fifteen-year lease executed in 1995. The Osborns, Levinsons, and Hills signed the lease as guarantors.

In 1997, the Levinsons and the Hills divested their interests in Pasta Concepts, Inc. The corporation was eventually dissolved and apparently transferred its right to operate the



Fazoli's to a new entity, Pasta Concepts, LLC. The LLC and certain individual members, including George and Mark Osborn, signed agreements indemnifying Connie Hill and Mark Levinson from all claims related to the lease.

Thereafter, Pasta Concepts, LLC, operated the Fazoli's while occupying the space that was the subject of the 1995 lease. The record does not indicate that the LLC signed a new lease or that Pasta Concepts, Inc., expressly assigned the 1995 lease to the LLC. Rather, the LLC simply paid rent to the Macons, the lessors under the 1995 lease. In 1999, the Macons sold the property. Through several conveyances, appellant Lamco became the property owner and the purported assignee of the 1995 lease. From September 1999 through early 2007, the LLC paid rent to Lamco.

In March 2007, the LLC ceased making payments, and Lamco filed an unlawful detainer action seeking \$47,271.30 in overdue rent, plus late charges. The complaint named Pasta Concepts, Inc.; Pasta Concepts, LLC; Pasta Concepts of Conway, LLC (a successor of Pasta Concepts, LLC, according to the complaint); Fazoli's Franchising Systems, Inc.; and the Osborns, Levinsons, and Hills as defendants. Lamco actively pursued its claim against the Osborns, Levinsons, and Hills as guarantors of the 1995 lease and nonsuited its claims against the three "Pasta" entities and Fazoli's. The guarantors filed motions for summary judgment, which the circuit court granted, leading to this appeal.¹

¹The court ruled that the suit against the guarantors was barred by the statute of limitations and that the suit against the Levinsons and Hills in particular was barred by material alteration of the lease terms.



The finality issue is addressed by appellees in their briefs. They claim that the orders appealed from are not final because 1) Fazoli's and the Pasta entities were dismissed without prejudice, and 2) the Levinsons and Hills filed claims that have not yet been adjudicated. Appellees' first point is not well taken. A plaintiff may take a nonsuit with respect to some of the parties in a case without affecting finality. *Advanced Env'tl. Recycling Techs. v. Advanced Control Solutions, Inc.*, 372 Ark. 286, 275 S.W.3d 162 (2008). But on their second point, appellees are correct. The Levinsons and Hills cross-claimed against the Osborns for indemnity and contribution in the event they were held liable to Lamco. Additionally, Mark Levinson and Connie Hill filed a third-party complaint seeking similar relief against the members of the LLC who signed the indemnity agreements. Neither the cross-claim nor the third-party complaint has been adjudicated or dismissed.

The presence of an unresolved cross-claim or third-party complaint deprives the appellate court of jurisdiction to hear the appeal. Ark. R. Civ. P. 54(b)(1) (2011); *Office of Child Support Enforcement v. Willis*, 341 Ark. 378, 17 S.W.3d 85 (2000); *Davidson v. Dunn*, 2011 Ark. App. 1. Lamco argues, however, that the indemnity claims asserted by the Levinsons and Hills in their cross-claim and third-party complaint became moot once the Levinsons and Hills were exonerated from liability. See generally *Martin Farm Enters. v. Hayes*, 320 Ark. 205, 895 S.W.2d 535 (1995). Even if we were to concede this point, our rules require the entry of an order dismissing or otherwise adjudicating a claim before it is considered resolved for finality purposes. In *Bulsara v. Watkins*, 2010 Ark. 453, for example, the plaintiff appealed a jury verdict in favor of the defendant. Our supreme court dismissed



the appeal for lack of finality because the prevailing defendant's cross-claim for indemnity had not yet being adjudicated. In light of the holding in *Bulsara*, we conclude that the present appeal is likewise lacking in finality and that we must dismiss the appeal without prejudice to refile upon the entry of a final order or a proper certificate under Ark. R. Civ. P. 54(b).²

We further note that the clerk's docket sheet in this abbreviated record indicates that other claims may remain pending, in addition to those mentioned herein. If Lamco refiles its appeal, we urge it to include in its record and addendum all claims filed in the case, whether by complaint, counterclaim, cross-claim, or third-party complaint; any orders granting leave to file such claims; any summonses returned and responses to those claims; any orders ruling on those claims; any letter opinions issued by the court in support of its orders; and any orders or notices of appeal filed after this dismissal. An appellant's record and addendum should contain any document essential for the appellate court to confirm its jurisdiction, understand the case, and decide the issues on appeal. Ark. Sup. Ct. R. 4-2(a)(8)(A)(i) (2011).

Our listing of the above deficiencies, and our stated reasons for dismissal due to lack of finality, should not be construed as exhaustive. We encourage Lamco, before refileing, to review our rules, the entire record, and its brief to ensure that no other such problems exist.

See Harrill & Sutter, PLLC v. Farrar, 2011 Ark. 181.

Dismissed without prejudice.

ROBBINS and ABRAMSON, JJ., agree.

²Lamco asks that we overrule *Bulsara*, but we do not have the authority to overrule supreme court decisions. *Selrahc Ltd. P'ship v. Seeco, Inc.*, 2009 Ark. App. 865, 374 S.W.3d 33.



Cite as 2012 Ark. App. 145

Glenn Lovett, Jr., PLC, by: *Glenn Lovett, Jr.*, for appellant.

Barrett & Deacon, P.A., by: *Ralph W. Waddell* and *Lauren O. Baber*, for appellees.