Cite as 2012 Ark. App. 189

ARKANSAS COURT OF APPEALS

DIVISION I
No. CA11-984

Opinion Delivered February 29, 2012

EDWARD A. LABRY III
APPELLANT

V.

METROPOLITAN NATIONAL BANK
APPELLEE

APPEAL FROM THE WASHINGTON COUNTY CIRCUIT COURT, [NO. CV-09-2582-4]

HONORABLE MARY ANN GUNN, JUDGE

DISMISSED WITHOUT PREJUDICE

RAYMOND R. ABRAMSON, Judge

Edward A. Labry, III, appeals from the June 9, 2011 order and judgment granting appellee Metropolitan National Bank's motion to enforce the parties' settlement agreement. Appellant makes two arguments on appeal: (1) the trial court erred in awarding judgment to Metropolitan in the amount of $1,500,000 because it is contrary to the terms of the parties' settlement agreement; and (2) if this court affirms the judgment, the trial court's award of 10% post judgment interest should be reversed. Because we determine that there is no final order in this case, we dismiss the appeal.

This case arises from a loan that appellee made to Ruskin Heights, LLC, for the development of certain real property in Washington County. A related appeal before the supreme court, *Crafton, Tull, Sparks & Associates v. Ruskin Heights, LLC*, 2012 Ark. 56, was

recently dismissed for lack of a final order. That opinion sets out the facts surrounding this foreclosure action:[1]

> On September 17, 2007, Metropolitan and Ruskin Heights, LLC, executed a promissory note and loan agreement for $8,606,250 to finance construction of a residential subdivision on real property located in Washington County. As security for the note, Ruskin Heights executed a mortgage on the real property in favor of Metropolitan. In addition, William B. Benton, Jr.; J. Kevin Adams; Edward A. Labry, III; John G. Brittingham; Carlen G. Hooker; Edward F. Davis; and Dirk W. Van Veen executed personal guarantees. On August 3, 2009, Metropolitan filed a foreclosure complaint alleging breach of note and breach of guaranties against Ruskin Heights, LLC; William B. Benton, Jr.; J. Kevin Adams; Edward A. Labry, III; John G. Brittingham; Carlen G. Hooker; Edward F. Davis; Dirk W. Van Veen; and David Ruff in his capacity as Tax Collector for Washington County.
>
> On November 2, 2009, CTSA filed a complaint asserting a materialman's lien against Ruskin Heights. Thereafter, on December 7, 2009, the circuit court granted CTSA's motion for consolidation and joinder of the two complaints. Also in December 2009, the circuit court granted Northwest Excavation, a Division of Nabholz Construction Company ("Nabholz"), leave to file a foreclosure complaint in intervention against Ruskin Heights and any and all claims it may have against other parties.
>
> On December 14, 2009, CTSA filed an amended complaint against Ruskin Heights and Metropolitan. CTSA requested monetary judgment against Ruskin Heights and that CTSA's lien be declared superior to any claims of Ruskin Heights or Metropolitan. On December 23, 2009, CTSA filed a second amended complaint against Ruskin Heights and Metropolitan, incorporating the previous amended complaint's allegations and adding a claim for breach of contract against William B. Benton, Jr.; J. Kevin Adams; Edward A. Labry, III; John G. Brittingham; Carlen G. Hooker; Edward F. Davis; and Dirk W. Van Veen. CTSA requested (1) that its lien and that Nabholz's lien be declared superior to any lien or claims by Metropolitan and Ruskin Heights and (2) that CTSA be awarded a monetary judgment against Ruskin Heights, Benton, Adams, Labry, Brittingham, Hooker, Davis, and Van Veen.

[1]In that case, Crafton, Tull, Sparks & Associates ("CTSA") appealed from a November 29, 2010 order of the Washington County Circuit Court finding that its lien was second in priority to appellee Metropolitan National Bank's lien.

On February 3, 2010, CTSA filed a motion to dismiss its complaint for breach of contract against Benton, Adams, Labry, Brittingham, Hooker, Davis, and Van Veen. On September 10, 2010, CTSA filed a motion for summary judgment as to its claims against Ruskin Heights and Metropolitan, which it amended on September 24, 2010. In addition, Metropolitan filed a cross-motion for summary judgment against CTSA on September 10, 2010. Later, on September 17, 2010, Metropolitan filed a motion for partial summary judgment against Ruskin Heights and Nabholz.

On October 8, 2010, the court held a hearing. . . . At the conclusion of the hearing, the court declined to rule on the motions. Another hearing was held on October 19, 2010, where the parties presented more argument. The court denied motions for summary judgment as to Metropolitan and Nabholz. The court reserved its decision on the summary-judgment motions as to Metropolitan and CTSA. The court held a final hearing on October 26, 2010, in which it ruled from the bench that CTSA had an engineering and architectural lien against the property at issue; that CTSA's lien did not have priority over Metropolitan's mortgage lien, regardless of the fact that Metropolitan's lien was not recorded until after CTSA's had been filed; and that CTSA's lien did not relate back.

On November 29, 2010, the circuit court entered a Partial Judgment and Decree, in which it specifically reserved its decision regarding Metropolitan's claims against Benton, Adams, Labry, Brittingham, Davis, and Van Veen. The court found that Nabholz's claims against Metropolitan were dismissed with prejudice, Nabholz's claims against Ruskin Heights were dismissed without prejudice, and Nabholz's lien had been released. With regard to Metropolitan's claims against Ruskin Heights, the court found that Ruskin Heights had defaulted and owed Metropolitan damages; that Metropolitan's mortgage lien was valid and enforceable; that Metropolitan had first priority as to any lien claim by Nabholz or CTSA; and that CTSA had a second lien on the property. CTSA filed a notice of appeal from the order on December 10, 2010.

Thereafter, on December 13, 2010, the circuit court entered an order granting Metropolitan's motion for summary judgment against CTSA and denying CTSA's motion for summary judgment against Metropolitan. On April 4, 2011, the circuit court entered an order dismissing with prejudice any claims between Metropolitan and John G. Brittingham, as those two parties had reached a settlement. On June 9, 2011, the circuit court entered a judgment in favor of Metropolitan against Edward A. Labry for $1,500,000. Also on June 9, 2011, the circuit court entered an order dismissing with prejudice the following parties: William B. Benton, Jr.; Kevin Adams; Edward Davis; and Dirk W. Van Veen.

Crafton, Tull, Sparks & Assocs. v. Ruskin Heights, LLC, 2012 Ark. 56, at 1–4.

In addition, Metropolitan and the guarantors entered into a settlement agreement in November 2010. The settlement agreement provided that "Brittingham and Labry shall each pay or cause to be paid, directly or indirectly through entities, to Metropolitan $1,500,000.00, for a total of $3,000,000.00 (the "Settlement Amount") in immediately available funds."

Appellant failed to pay Metropolitan the $1,500,000 he owed under the settlement agreement. John Brittingham and Metropolitan then entered into a separate settlement agreement, and Brittingham was dismissed from the case with prejudice by order dated April 1, 2011.

On May 3, 2011, Metropolitan filed a motion to enforce the settlement agreement, to reduce the defendants' time to respond, and to hold an expedited hearing. The court held a hearing, and on June 9, 2011, entered a judgment in the amount of $1,500,000 in favor of Metropolitan against appellant. The court also awarded post judgment interest at a rate of 10% per annum.

On June 22, 2011, appellant filed a motion for new trial or, in the alternative, motion to alter judgment, which the court denied. On July 8, appellant filed a notice of appeal, and on July 21 he filed a supplemental notice of appeal and supplemental designation of record, which included a July 19 order denying his motion for new trial.

Whether a final judgment, decree, or order exists is a jurisdictional issue that this court has the duty to raise, even if the parties do not, in order to avoid piecemeal litigation. *Van DeVeer v. George's Flowers, Inc.*, 76 Ark. App. 408, 410, 65 S.W.3d 488, 489–90 (2002).

On February 9, 2012, the supreme court dismissed *Crafton, Tull, Sparks & Associates v. Ruskin Heights, LLC*, *supra*, for lack of a final order. The supreme court identified several outstanding issues that required dismissal for lack of a final order, including that the record contained no final disposition as to Metropolitan's claims against guarantor Carlen G. Hooker and Washington County Tax Collector David Ruff. The court went on to note:

> although the June 9, 2011 judgment finding Edward A. Labry liable to Metropolitan for $1,500,000 stated that "[a]ll other claims are dismissed with prejudice," we have repeatedly held that it is not enough to dismiss some of the parties or to dispose of some of the claims; to be final and appealable, an order must cover all of the parties and all of the claims. *Bayird v. Floyd*, 2009 Ark. 455, 344 S.W.3d 80; *Williamson v. Misemer*, 316 Ark. 192, 871 S.W.2d 396 (1994); *Smith v. Leonard*, 310 Ark. 782, 840 S.W.2d 167 (1992). Although the June 9 judgment refers to "all claims," it does not operate to dismiss all parties.

Id. at 6.

As in *Crafton*, the record before us contains no final disposition as to Metropolitan's claims against Carlen G. Hooker and David Ruff. As there is not a final order or a Rule 54(b) certification, we must dismiss.

Dismissed without prejudice.

ROBBINS and WYNNE, JJ., agree.

Conner & Winters, LLP, by: *Todd P. Lewis* and *Vicki Bronson*, for appellant.

Williams & Anderson PLC, by: *Philip E. Kaplan* and *Daniel J. Beck*, for appellee.