Cite as 2012 Ark. App. 382

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CA11-965

	Opinion Delivered June 13, 2012
ACEVA TECHNOLOGIES, LLC, and SUNGARD AVANTGARD, LLC APPELLANTS	APPEAL FROM THE WASHINGTON COUNTY CIRCUIT COURT, [NO. CV-07-1677-2]
V.	HONORABLE KIM M. SMITH, JUDGE
TYSON FOODS, INC. APPELLEE	DISMISSED WITHOUT PREJUDICE

JOHN B. ROBBINS, Judge

Aceva Technologies, LLC, and Sungard Avantgard, LLC (collectively "Aceva") appeal from a judgment entered on a jury verdict in favor of appellee, Tyson Foods, Inc. Tyson brings a cross-appeal from the trial court's refusal to award prejudgment interest. We must dismiss the appeal for lack of a final order.

In 2004, the parties entered into a Value Assessment Agreement (VAA) in which Aceva agreed to perform an independent study of Tyson's credit department's processes, systems, and software needs for $30,000. Aceva advised Tyson that it would save over $2,000,000 by implementing Aceva's software. Following that recommendation, Tyson purchased Aceva's software and entered into a Software License Agreement (SLA) in 2005, agreeing to pay Aceva a licensing fee of $400,000; a first-year maintenance fee of $80,000; and

approximately $170,000 for Aceva to customize and install the software in accordance with Tyson's needs. Aceva agreed to complete the work in twelve weeks, beginning in March 2005. It did not, however, meet the twelve-week deadline; according to Tyson, the software never met its requirements and could not be used. Tyson notified Aceva of default and demanded cure by May 12, 2006; in the alternative, it demanded reimbursement for its out-of-pocket costs of $887,199.60.

Tyson sued Aceva in 2007 for breach of the VAA; breach of the agreement to provide professional services; breach of the SLA; breach of express warranty; breach of the implied warranties of merchantability and fitness for a particular purpose; breach of the implied covenant of good faith and fair dealing in the VAA and SLA; negligence in performing the VAA and professional services; promissory estoppel; unjust enrichment; negligent misrepresentation; deceptive trade practices; and fraud. Aceva raised several affirmative defenses and brought a counterclaim for breach of contract, promissory estoppel, and unjust enrichment. Aceva moved for partial summary judgment, which the circuit court granted in part and denied in part. The court dismissed Count II (breach of the agreement to provide professional services), Count V (breach of the warranty of merchantability), Count VI (breach of the warranty of fitness for a particular purpose), Count VII (breach of the covenant of good faith and fair dealing in the VAA), and Count VIII (breach of the covenant of good faith and fair dealing in the SLA) with prejudice. The court noted in the order that Tyson's Count XIV

(Delaware Consumer Fraud Act violations) and Count XVI (negligent misrepresentation) had been voluntarily dismissed without prejudice.

The case was tried before a jury in October 2010. The jury found that Aceva had breached the SLA and an express warranty; that it was negligent in performing the VAA; that it had not committed deceit or violated the Arkansas Deceptive Trade Practices Act; and that Tyson had not breached the SLA. It awarded damages of $512,000 to Tyson. Tyson moved for prejudgment interest, attorney's fees, and costs. When the circuit court entered judgment on the jury verdict, it awarded attorney's fees of $300,000, plus $100,000 in costs, to Tyson, but denied its request for prejudgment interest. Aceva filed a timely notice of appeal, abandoning any pending but unresolved claims. Tyson filed a notice of cross-appeal from the order denying its motion for prejudgment interest but did not state in the notice that it abandoned any pending but unresolved claims.

Rule 2(a)(1) of the Arkansas Rules of Appellate Procedure–Civil (2011) provides that an appeal may be taken from a final judgment or decree entered by the circuit court. A final order is one that dismisses the parties, discharges them from the action, or concludes their rights to the subject matter in controversy. *Davis v. Brown*, 2011 Ark. App. 789. The question of whether an order is final and subject to appeal is a jurisdictional question that this court will raise on its own. *Edgin v. Cent. United Life Ins. Co.*, 2012 Ark. App. 216. Absent a certificate from the circuit court directing that the judgment is final, an order that fails to adjudicate all

of the claims as to all of the parties is not final for purposes of appeal. *Id.*; Ark. R. Civ. P. 54(b)(2) (2011). Apparently, the following claims of Tyson have not been resolved: Count I (breach of the VAA) (on which Tyson orally indicated at trial that it intended to take a nonsuit, although we can find no such order in the record); Count X (negligence in performance of professional services); Count XI (promissory estoppel); and Count XII (unjust enrichment). The record contains an order granting Tyson a nonsuit on Counts XIV (Delaware Consumer Fraud Act violations) and XVI (negligent misrepresentation). Tyson's voluntary nonsuit did not, however, operate to make the order appealed from final and appealable. *Deer/Mt. Judea Sch. Dist. v. Beebe*, 2012 Ark. 93; *Midkiff v. Crain Ford Jacksonville, LLC*, 2012 Ark. App. 185; *Lancaster v. Red Robin Int'l, Inc.*, 2011 Ark. App. 292. Here, the record does not reflect a Rule 54(b) certificate; there is not yet a final order and this court has no jurisdiction to hear the appeal.

Arkansas Rule of Appellate Procedure–Civil 3(e) was amended in 2010 and now requires, in subsection (vi), that the appealing party state in his notice of appeal that he is abandoning any pending but unresolved claim. Because Tyson did not abandon these claims in its notice of cross-appeal, this case is not final for purposes of appeal and must be dismissed without prejudice. *See Searcy Cnty. Counsel for Ethical Gov't v. Hinchey*, 2011 Ark. 533; *Davis*, *supra*; Ark. R. App. P.–Civ. 3(e)(vi) (2011). If Aceva refiles its appeal, we urge it to include in its record and addendum all claims filed in the case, whether by complaint or counterclaim;

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).

Dismissed without prejudice.

GLADWIN and GRUBER, JJ., agree.

Wright, Lindsey & Jennings, by: *Gary D. Marts, Jr.* and *Bland Rome LLP*, by: *Daniel E. Rhynhart* and *Inez R. McGowan*, pro hac vice, for appellants.

Williams & Hutchinson, LLP, by: *Timothy C. Hutchinson*, and *Brown & James, P.C.*, by: *Steven H. Schwartz*, pro hac vice, for appellee.