Cite as 2012 Ark. App. 549

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CA11-236

CECIL ELLIS, MIKE MORGAN, J.W. TAYLOR, GREG ENGLE, STEVEN CHAMP, RICHARD & SHIRLEY SIMMONS PARTNERSHIP, STEPHEN SIMMONS, AND WILL SIMMONS APPELLANTS V. AGRILIANCE, LLC APPELLEE	**Opinion Delivered** October 3, 2012 APPEAL FROM THE CLAY COUNTY CIRCUIT COURT, EASTERN DISTRICT [NO. CV2009-51] HONORABLE DAVID N. LASER, JUDGE APPEAL DISMISSED WITHOUT PREJUDICE

DAVID M. GLOVER, Judge

Appellants and approximately seventy other cotton farmers in northeast Arkansas sued twenty-one defendants for strict liability, negligence, breach of implied warranties, and violation of the Arkansas Deceptive Trade Practices Act (ADTPA) in connection with the defendants' manufacture and distribution of the pesticide 2,4-D. Appellants and the other plaintiffs claimed that they suffered damages when neighboring farmers applied the 2,4-D to their rice crop and it drifted onto the cotton. The circuit court divided the suit into separate trials in order to reduce the number of plaintiffs in each proceeding, and appellants' claims were the first to be tried. The jury rendered a defendants' verdict, and appellants now appeal from the resulting judgment. Because the judgment is not a final order, we must dismiss the appeal.

The initial complaint was filed on June 2, 2009. In the months thereafter, the circuit court dismissed several plaintiffs, leaving approximately sixty-three; dismissed several defendants, leaving approximately fifteen; and dismissed the implied-warranty and ADTPA causes of actions, leaving only the negligence and strict-liability claims. As the time for trial drew near, the court determined that proceeding to trial with sixty-three plaintiffs would prove unwieldy and would prejudice the defendants. The court therefore ordered that the plaintiffs' claims would be

> severed for trial under Rule 21 of the Arkansas Rules of Civil Procedure and shall proceed in separate actions. The first trial will be of no more than six plaintiffs. A final judgment shall be rendered in each action after each trial.

The court also stated that the plaintiffs in each action would be identified by a later court order; that severance of the plaintiffs' claims would take effect after a pretrial hearing that preceded each action; and that each side was to select three plaintiffs to participate in the first trial.

Appellants Cecil Ellis, Mike Morgan, J.W. Taylor, Greg Engle, Steven Champ, Richard and Shirley Simmons Partnership, Stephen Simmons, and Will Simmons were chosen as the first trial plaintiffs (with the three Simmons plaintiffs being counted as one). They went to trial against nine defendants, one of whom, Helena Chemical Co., settled during trial, and another of whom, Winfield Solutions, LLC, was dismissed by a directed verdict. The remaining seven defendants—Universal Crop Protection Alliance, LLC; United Agri Products, Inc.; Crop Production Services, Inc.; Albaugh, Inc.; Agriliance, LLC; Nufarm Americas, Inc.; and Universal Cooperatives—won at trial, and the court entered a judgment

dismissing appellants' case against them. Appellants then filed their notice of appeal from that judgment.[1] Thereafter, orders were entered dismissing certain other defendants who had not participated in the trial.[2] Three defendants remained for whom no record of dismissal appears: Corning Farming Supply, Inc., C&C Flying Service, Inc., and Stanford Cooperative Gin, Inc.

The first finality problem arises from the lack of an order dismissing defendants Corning Farming Supply, Inc., C&C Flying Service, Inc., and Stanford Cooperative Gin, Inc. These defendants were named in the original complaint but not in any subsequent complaints. The circuit court's docket sheet shows that summonses were issued for them but does not indicate whether they were served. It does not appear that they answered the complaint.

We are bound by supreme court precedent and our rules of civil procedure, which require dismissal of the appeal under these circumstances. When claims against all of the defendants in a case have not been adjudicated or dismissed, the order appealed from is not final. Ark. R. Civ. P. 54(b)(2) (2012). Applying Rule 54(b)(2) to the case at bar, we lack an appealable order because appellants' claims against defendants Corning, C&C, and Stanford have not been dismissed or otherwise resolved. Further, while these three defendants were not named in the amended complaints filed by appellants and the other plaintiffs, the deletion of a defendant from a caption in subsequent complaints does not operate as a dismissal. *See Shackelford v. Ark. Power & Light Co.*, 334 Ark. 634, 976 S.W.2d 950 (1998). Finally, the

[1]Six of the seven trial defendants settled with appellants after the record was lodged with this court. We dismissed them, leaving Agriliance as the sole appellee.

[2]The order dismissing Helena Chemical was also entered after the notice of appeal was filed.

uncertainty regarding whether these defendants were served prevents the application of Ark. R. Civ. P. 54(b)(5) (2012), which provides that a claim against a named but unserved defendant is automatically dismissed by the court's final judgment. Our supreme court has held that, where the record fails to demonstrate whether a named defendant was served, the issue of finality cannot be resolved and the appeal must be dismissed. *See Hotfoot Logistics, LLC v. Shipping Point Mktg., Inc.*, 2012 Ark. 76.

A second finality problem stems from the fact that cross-claims filed by defendants Craighead Farmers Coop., Jimmy Sanders, Inc., and Farmers Supply Association, have not been dismissed in their entirety. Failure to dismiss a pending cross-claim results in a lack of finality. *Bulsara v. Watkins*, 2010 Ark. 453. This holds true even where, as here, the cross-claimant has been dismissed from the case and his cross-claim sought only indemnity and contribution in the event he was held liable to the plaintiffs. *Bulsara*, *supra*. Again, we are bound to follow supreme court precedent on this point and must dismiss the appeal.

Lastly, we address a third finality problem involving the circuit court's attempt to sever appellants' claims from those of the remaining plaintiffs. A circuit court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim or issue. Ark. R. Civ. P. 42(b) (2012). Additionally, Ark. R. Civ. P. 21 provides that "any claim against a party may be severed and proceeded with separately." Separate trials under Rule 42 should be distinguished from severance of claims. David Newbern, John Watkins, & D.P. Marshall, *Ark. Civ. Prac. & Proc.* § 25:3 (5th ed. 2010). When separate trials are ordered, the case as a whole remains intact and

a single judgment is ultimately entered. Consequently, an appeal from one of the trials does not result in a final judgment. *See Barnhart v. City of Fayetteville*, 316 Ark. 742, 875 S.W.2d 79 (1994). By contrast, severed claims become independent actions, *id.*, each of which would presumably yield a final order upon completion. *See, e.g.*, *Green v. George's Farms, Inc.*, 2011 Ark. 70, at 3, n. 1.

In the present case, the court stated its intention to sever the plaintiffs' claims pursuant to Rule 21, with the separate actions resulting in final judgments. In practice, however, the order was one for separate trials. No separate docket numbers were issued to distinguish the severed actions, and the court continued to issue orders that pertained to *all* plaintiffs. Additionally, the plaintiffs in each succeeding trial remained unidentified until a later order of the court, and the segregation of each set of trial plaintiffs was not scheduled to occur until the conclusion of a pretrial hearing preceding each trial. Thus, the overall action remained intact until each set of trial plaintiffs was chosen and a pretrial hearing held. Consequently, the trial involving the claims of nine plaintiffs, appellants herein, was merely a separate trial in a unified action and did not result in a final judgment in the absence of a Rule 54(b) certificate permitting an appeal at this point.

Despite our dismissal, we are mindful that this case is extraordinary, not only in the number of plaintiffs and the complexity of the claims but in its sheer size. The record before us consists of over 100 volumes and more than 55,000 pages. Waiting in the wings are more than fifty other plaintiffs whose cases have yet to be tried and whose future appeals, if any, may likewise suffer from the same finality problems as the present case. Given these

circumstances, should appellants obtain a proper Rule 54(b) certificate from the circuit court and refile their appeal, they may file a record containing only the judgment with the attached certificate, and a timely notice of appeal therefrom. We will then, in the interest of conserving both space and resources, entertain a motion from appellants to rely on the briefs filed in the present case. *See Forever Green Athletic Fields, Inc. v. Lasiter Constr., Inc.*, 2010 Ark. App. 483. Appellants will, of course, be permitted to rely on the record already filed in the present case.

If appellants do not or cannot obtain a Rule 54(b) certificate, they must obtain an order that disposes of all of the claims of all of the parties in order to achieve finality and refile their appeal. We caution appellants that, in this instance, they must file not only a record of the final order and a notice of appeal but an addendum containing all matters that this court would require to confirm its jurisdiction on appeal, including the complaints, answers, cross-claims, and other claims of all parties and the orders dismissing or adjudicating those claims. *See* Ark. Sup. Ct. R. 4-2(a)(8)(A)(i) (2012).

Based on the foregoing, we dismiss the appeal without prejudice.

Dismissed without prejudice.

VAUGHT, C.J., and MARTIN, J., agree.

Carney Williams Bates Bozeman & Pulliam, PLLC, by: *Hank Bates*; *McMath Woods, P.A.*, by: *James Bruce McMath*; and *Looper, Reed & McGraw*, by: *William J. French*, for appellants.

Bridges, Young, Matthews & Drake, PLC, by: *Joseph A. Strode* and *Tanya B. Spavins*, for appellee.