

ARKANSAS COURT OF APPEALS

DIVISION III

No. CA12-557

UNIFUND CCR PARTNERS
APPELLANT

V.

KAY THORNTON
APPELLEE

Opinion Delivered February 13, 2013

APPEAL FROM THE GARLAND
COUNTY CIRCUIT COURT
[NO. CV-2007-1028-II]

HONORABLE VICKI SHAW COOK,
JUDGE

DISMISSED WITHOUT PREJUDICE

PHILLIP T. WHITEAKER, Judge

The Garland County Circuit Court awarded appellee Kay Thornton \$13,000 on her counterclaim against appellant Unifund CCR Partners. On appeal, Unifund argues that the circuit court erred in entering a default judgment, in failing to set it aside, and in finding that Unifund acted in bad faith. We dismiss the appeal without prejudice due to lack of a final order.

In 2007, Unifund sued Thornton for money past due on a credit-card account. An affidavit stated that the account was originally issued by First USA Bank and that Unifund acquired the account through assignment. Thornton answered that Unifund's complaint was barred by the statute of limitations and that it lacked documentation of contractual privity. She contemporaneously filed a counterclaim alleging violation of the Arkansas Deceptive Trade Practices Act, the Fair Debt Collection Practices Act, and the Arkansas Rules of Civil



Procedure, noting that Unifund failed to attach a copy of the parties' contract to its complaint.

Unifund did not file a timely answer to Thornton's counterclaim. It did file an amended complaint, however, which set forth additional allegations regarding Thornton's contract with First USA and the acquisition of the account through assignment. Thornton moved for a default judgment on her counterclaim due to the lack of a timely answer. Unifund responded that the counterclaim was moot due to its filing of the amended complaint.

In October 2008, the circuit court entered two orders. The first, dated October 16, 2008, found that Unifund had failed to comply with Ark. R. Civ. P. 10 because Unifund did not attach a contract to its complaint.¹ The court then stated the following:

[S]hould the Plaintiff [Unifund] be unable within ten (10) days from today's September 2, 2008 hearing to produce the parties' alleged contract, and any alleged modifications to said contract, the Plaintiff's Amended Complaint shall be stricken; the Plaintiff's Complaint shall be denied; the Defendant's Motion for Default Judgment shall be granted on Defendant's Counterclaim, and the Defendant's Counterclaim shall be set for hearing on the issue of damages.

The second order, entered on October 31, 2008, gave Unifund an additional ten days to file a copy of the parties' alleged contract. The order included a paragraph similar to the one quoted above.

Unifund did not produce the documents required in the October 2008 orders. However, the circuit court did not enter an order dismissing Unifund's complaints or granting

¹A copy of any written instrument or document upon which a claim or defense is based shall be attached as an exhibit to the pleading in which such claim or defense is averred unless good cause is shown for its absence in such pleading. Ark. R. Civ. P. 10(d) (2012).



Thornton a default judgment. Instead, the parties and the court proceeded on the assumption that the complaints had been dismissed and that a default judgment had been entered. Thornton requested and received a hearing date on her damages. The parties were ordered into mediation. When mediation was unsuccessful, a damages hearing was held on January 9, 2012.

Following the hearing, the court entered an order directing Unifund to pay Thornton \$13,000, of which \$9,000 was earmarked for her attorneys. The court also stated that, due to Unifund's "bad faith," which apparently occurred during or after the mediation process, Thornton's attorneys could recover their fees incurred following mediation. Subsequently, the court entered a separate order, awarding additional fees to Thornton's attorneys. Unifund then brought this appeal. Because we lack a final order, we cannot reach the merits of Unifund's arguments.

An appeal may be taken only from a final judgment or decree entered by the trial court. Ark. R. App. P.–Civ. 2(a)(1) (2012). Our rules of civil procedure provide that, absent a proper certification by the trial court, an order that adjudicates fewer than all of the claims of all of the parties is not a final order. Ark. R. Civ. P. 54(b)(2) (2012). The question of whether an order is final and subject to appeal is a jurisdictional question that we may raise on our own. *Hall v. Bd. of Admin. of Willow Cove Horizontal Prop. Regime*, 2012 Ark. App. 677.

In the present case, the October 2008 orders provided that Unifund's complaint and amended complaint would be dismissed "should Plaintiff be unable" to produce the parties'



contract. The orders were therefore contingent and conditional in nature. A conditional judgment, order, or decree, the finality of which depends upon certain contingencies that may or may not occur, is not final for purposes of appeal. *Coleman v. Regions Bank*, 364 Ark. 85, 216 S.W.3d 579 (2005); *Corbit v. State*, 334 Ark. 592, 976 S.W.2d 927 (1998); *Murphy v. Murphy*, 2011 Ark. App. 205; *Wadley v. Wadley*, 2010 Ark. App. 733; *Dobbs v. Dobbs*, 99 Ark. App. 156, 258 S.W.3d 414 (2007); *Mid-State Homes, Inc. v. Beverly*, 20 Ark. App. 213, 727 S.W.2d 142 (1987). The court's orders did not unequivocally dismiss Unifund's complaints; rather, the orders provided that the complaints might or might not be dismissed, depending upon the actions taken by Unifund. No subsequent order of the court provided for the formal dismissal of Unifund's complaints. The claims in those complaints remain pending. We therefore lack jurisdiction to hear this appeal, and we dismiss the appeal without prejudice. *Hall, supra*.²

We note that our dismissal gives the circuit court the opportunity to remedy a procedural irregularity in the case. The court awarded Thornton judgment on her counterclaim based on Unifund's lack of a timely answer, but the court did not enter a default judgment. The absence of a default judgment renders Unifund's argument that the court erred in entering a default judgment difficult to address—our court would be placed in a position of attempting to review an order that was not in fact entered. Entry of a default judgment is therefore necessary if Unifund decides to pursue another appeal following this dismissal.

²Unifund's notice of appeal did not contain a statement that it abandoned any pending but unresolved claims. See Ark. R. App. P.–Civ. 3(e)(vi) (2012).



Cite as 2013 Ark. App. 92

Finally, Unifund should correct a briefing error if it files a second appeal. In response to a motion at trial, Thornton provided a transcript from another proceeding. The transcript is contained in Unifund's addendum. Our rules provide that, if a transcript of a hearing is an exhibit to a motion or related paper, the material parts of the transcript should be abstracted and not placed in the addendum. Ark. Sup. Ct. R. 4-2(a)(8)(A)(i) (2012). If Unifund deems the testimony relevant to its issues on appeal, it should abstract the testimony rather than place it in the addendum.

Dismissed without prejudice.

GLOVER and VAUGHT, JJ., agree.

Hosto & Buchan, PPLC, by: *Sam P. Strange* and *Matthew Scott Runge*, for appellant.

Crawley, DeLoach & Hargis, PLLC, by: *Joel G. Hargis*; and *The Cruz Law Firm, PLC*, by: *Kathy A. Cruz*, for appellee.